

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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

Plaintiff - Appellant,

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

Plaintiffs - Appellees,

and

PUEBLO OF SANTA ANA; PUEBLO OF  
JAMEZ; PUEBLO OF ZIA,

Plaintiff Intervenors,

v.

TOM ABOUSLEMAN; 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;

No. 18-2164  
(D.C. No. 6:83-CV-01041-  
MV-JHR) (D.N.M.)

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 ACEQUIAS DEL RIO VALLECITOS, TUSAS Y OJO CALIENTE; RIO CHAMA ACEQUIA ASSOCIATION; ASOCIACION DE ACEQUIAS 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.*

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 - Appellant,

No. 18-2167  
(D.C. No. 6:83-CV-01041-MV-JHR) (D.N.M.)

TOM ABOUSLEMAN; 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  
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  
ACEQUIAS 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.

---

---

**STATE OF NEW MEXICO'S  
PETITION FOR REHEARING**

---

---

Arianne Singer  
Gregory C. Ridgley  
Special Assistant Attorneys General  
Office of the State Engineer  
P.O. Box 25102  
Santa Fe, NM 87504-5102  
(505) 827-6150

Brett J. Olsen  
Special Assistant Attorney General  
Abramowitz, Franks & Olsen, LLC  
5051 Journal Center Blvd., NE. Suite 320  
Albuquerque, NM 87109  
(505) 247-9011

*Attorneys for the State of New Mexico*

## **INTRODUCTION**

Appellee State of New Mexico respectfully asks the Court on rehearing to clarify that the scope of the September 29, 2020 opinion is limited to the legal question defined by the Court: “whether, as a matter of law, a sovereign can extinguish aboriginal rights by the mere imposition of its authority and without any affirmative adverse act.” Op. p. 21. The Court held that it cannot. *Id.*

In its discussion, however, the majority opinion appears to reach beyond the scope of the certified legal question on review to address a question of fact, stating that “[i]ndeed, there is no evidence that Spanish sovereignty had any impact on the Pueblos’ use of the water from the Jemez River at all,” and that “Spain’s water administration system had no impact, let alone a negative impact, on the Pueblos’ right to use water . . . .” Op. at 26-27. These statements are not supported by the evidentiary record below, conflict with the district court’s findings, and are not necessary to the majority’s holding that an affirmative act is required to extinguish aboriginal rights to water.

Further, these statements could be read to address an issue not raised by the certified order, and the first issue to be addressed by the district court on remand: whether the Pueblos’ aboriginal water rights have been *modified* in any way by any actions of Spain. As the Court explains in the majority opinion, the issue before the district court was Issue 1: “Have the Pueblos ever possessed aboriginal water rights

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.