

**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 NORTEÑAS 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**

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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

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