UNITED STATES FEDERAL DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

United States of America, et al.,

Plaintiffs,

v. NO. 6:83-cv-01041-MV-JHR

Tom Abousleman, et al.,

Defendants.

RESPONSE BRIEF ON ISSUES NO. 1 AND NO. 2

This brief is filed for Charlotte Mitchell by the same counsel who represented her leading into the Settlement Agreement. Mrs. Mitchell was a founding member of both the Citizens Equal Rights Alliance (CERA) and Citizens Equal Rights Foundation (CERF) and is still a board member of CERA.

ARGUMENT

As the Tenth Circuit panel in *Abouselman* opined, this case has spent many years deciding "Whether the Pueblo's aboriginal water rights were extinguished by the imposition of Spanish authority without any affirmative act?" The Tenth Circuit decided that no act of Spain or Mexico diminished those rights in its interlocutory appeal order of September 29, 2020, 976 F. 3d 1146 (10th Cir. 2020). This decision opens the second question in the case of whether the

Pueblo of Santa Ana can invoke federal reserved water rights to require water rights that have been "settled" in this case to be reallocated to meet Santa Ana's request for additional rights.

This brief addresses the changes in federal Indian law that now implicate whether there is any federal reserved rights doctrine as articulated in *United States v. Winans*, 198 U.S. 371, 381 (1905) (recognizing aboriginal rights reserved to the tribe and not granted in a treaty) and whether the Tenth Amendment and other laws prohibit it from existing. Counsel will endeavor to condense twenty years of legal changes into this brief brought about by the application of federalism as recognized in *New York v. United States*, 505 U.S. 144 (1992) to curtail federal plenary power over Indians and territorial lands.

I. AMERICAN TERRITORIAL LAND POLICY IS AN EXPERIMENT

To believe how the federal assimilation policy began and how revolutionary it was to include Native Americans as potential citizens of the United States requires the knowledge that the United States Department of Justice (USDOJ) has lied to the federal courts about Native Americans from its beginning in 1870. It is generally good that federal judges want to try to protect the Indians and Indian tribes from the harsh reality of how the federal government has treated them as pawns to greater federal interests. This includes how the USDOJ, since it's creation in 1870, has argued an outright fiction that it was needed to protect the Indian tribes from the States who they say were the primary stealers of all Indian rights.

A. The Framers, punished by Great Britain with the Territorial War powers, created a new land system that attempted to prevent the territorial war powers from ever becoming permanent domestic powers of our republic.

Before the Civil War, this Court determined that Congress had plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories became States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). As inherited from the law of Great Britain, constitutional government was not considered applicable in the wilderness. Until basic forms of government were in place, the King and Parliament exercised unlimited authority with all of the war powers conceivable under British law. The territorial war powers of Great Britain also included the powers designated by the Pope of the Catholic Church to the Sovereign under the Roman law doctrine of conquest. The Framers of our Constitution fought the Revolutionary War to free themselves from the permanent territorial war powers of Great Britain. They intentionally tried to create a new system for domesticating new land areas by applying the principles of the Enlightenment Era. Because constitutional law does not apply in a territory the Framers required that Congress "dispose of the territories." Property or Territory Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States known as the equal footing doctrine was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Lessee of Pollard v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers in domestic law against the States and individuals after statehood. This Court has recently reaffirmed the equal footing doctrine in *Oklahoma v. Castro-Huerta*, 142 S.Ct 2486, -- (2022).

This means there is a difference in the war powers inherited from British law that allow the States, the Commander in Chief and the Congress to respond to a local or national emergency within the constitutional structure and the territorial war powers that were and are sovereign

powers created or recognized by the Catholic Pontiff during the reign of Henry VIII. The Doctrine of Discovery recognized a virtually unlimited sovereign anointed by God who could wield absolute civil and religious authority. This was not a sovereign authority that could be converted into a republic ruled by the people through elected representatives.

The Declaration of Independence set the abstract standards for what our new republic was reaching for in developing a new political system of self-governance. The Declaration does not say to place all States on an equal footing. The Declaration boldly asserts that "all men are created equal and endowed by their Creator with certain inalienable rights…" Our early Founders set the principle of equal protection as the ultimate standard even though they knew that in their time slavery was legal and persons who were not white were considered lesser human beings in general not only in the government laws but also in the religious laws. In analyzing their own situation under the yoke of British rule from a country over two thousand miles away, they realized that they were being discriminated against using the exact same powers being used to enforce the slave trade and that the Spanish King was using to brutally "civilize" all non-Catholics. While England had not enforced this overriding imperial law we now refer to as the territorial war powers as drastically as the Spanish were doing with the Inquisition, there was no doubt that the British King had the same power over conquered territory and the persons residing in that territory.

The British King George III greatly disliked the independent American Colonies. The mad King George III had an army to enforce any crazy order he issued against the American colonists. The King could order every American killed or all their property seized on any pretext

under the doctrine of constructive treason.. This is no different than what can happen to any Indian today residing on an Indian reservation. *See United States v. Bryant*, 511 U.S. 738 (2016).

The Framers, to succeed in creating a new form of government, had to find a way to prevent these same territorial war powers that were necessary to add land to the existing colonies from usurping any form of written constitutional governance. While some of the prohibitions to expressly stop the reserved sovereign powers from becoming powers of the national government were relatively easy to place into the constitution such as the prohibitions against ex post facto laws, suspension of the writ of habeas corpus and bills of attainder, how to keep these same powers out of territorial land areas not yet brought into the United States was more difficult.

The structure of the constitution was designed by the Framers to ensure that the territorial war powers of British law that had prevented the American colonists from ever becoming equal to English citizens would not interfere with the right of self-governance of the people in our new republic. The Framer's limited the territorial war powers by requiring that States be created out of territorial lands pursuant to the Territory Clause, Art. IV, Sec. III, Cl. 2 and other clauses to ensure that these territorial war powers could only be used on a temporary and not a permanent basis. This new and deliberately different land policy from the British policy was incorporated into the Northwest Ordinance and Ordinance of 1787. This policy was also the basis of the decision in *Johnson v. McIntosh*, 21 U.S. 543 (1823) that defined how the United States as the winner of the Revolutionary War against King George III was the only sovereign that could receive the Indian title of the native Indians.

By 1776 the American colonists had been subject to these unlimited British territorial war powers for over one hundred years and different Colonies had tried various ideas for asserting

local self-governance. The most developed opposition to British rule was in Virginia where the House of Burgesses in Williamsburg had gone so far as to issue a Declaration of Rights based on the theory of natural rights of human beings to oppose the total lack of any guarantied human rights by the King under the doctrine of discovery. Some legal basis had to be developed to displace the absolute right of the British King as recognized by the Pope. The concept of natural rights is that God gives every person the same rights simply because they are human beings, cutting out the Pope and the King from the creation of legal rights. Using the principle of natural rights the People designate their own rights and concomitantly, their own form of government to protect and enforce those rights. It is this principle of natural rights that is asserted in the Declaration of Independence and becomes the legal principle inculcated into the Constitution of the United States to overcome the plenary territorial authority.[1]

The principle of natural rights was a radical departure from the top down laws of Rome and from the hierarchical system of rights of the British aristocracy. Obviously, there was a major problem to the application of equal protection applying immediately to the new United States—slavery. But it was more than slavery that stood in the way of actually applying natural rights principles. Regular Americans in all the States had to accept that freed Blacks and Native Americans had to be equal to white persons. White society was a long way from accepting freed Blacks as equals. But there was some hope in Americans accepting Native Americans at least as possible citizens in the future.

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[1] Many documents could be cited for the Framers view of natural rights but a new book by Akhil Reed Amar has made a true study of this founding theory and what it meant. See The Words That Made Us, America's Constitutional Conversation, 1760-1840.

A national policy of Indian assimilation to become full citizens was required to apply the natural rights principles. This was not necessary under the Articles of Confederation that prevented the national government from having any territorial war powers by keeping all major powers away from the national government. When it became apparent that a loose confederation of States was not going to ever create a functional national government, the Framers of our Constitution had to find a way to start making all persons equal before the law and the Native Americans were ready made for the experiment.

Beginning the experiment to assimilate the Native Americans to become full and equal citizens and the structural limitations to keep the territorial war powers temporary was still not considered enough by many of the Framers to prevent the national government from potentially abusing the territorial war powers to alter a person's status as a person or as a citizen. This same issue led to the discussion to require a Bill of Rights to specifically protect the rights of the People from these territorial war powers being abused by the national government. Again, because of slavery there was no way to create a true equal protection requirement in the Bill of Rights. Most of the other rights necessary to eventually create equal protection were included and some specifically against the territorial war power of Britain were also included like the right to bear arms and the prohibition against quartering soldiers in people's homes. A strong Due Process requirement was created but could not be extended into equal protection. It was the 10th Amendment reserving all undesignated powers not specifically granted to the federal government in the Constitution to the States and to the People respectively that was supposed to be the ultimate protection against the domestic use of the territorial war powers by the national government. Any time George III wanted to assert a new territorial war power or constructive

treason against the colonists he claimed it was a reserved power in the British Crown. Since there was no way to predict what all the newly discovered territorial war powers might be, James Madison instead made all potentially reserved powers belong to the States and the People in the 10th and final amendment of the Bill of Rights.

All of the Framers agreed that the sovereign powers of the doctrine of discovery as promoted by the Catholic Pontiff contradicted the natural rights doctrine that was the basis of our assertion of the right of self-governance incorporated into the Constitution of the United States. While direct application of these British territorial war powers was deliberately limited in the structure with checks and balances and the Bill of Rights, there was still some disagreement in how much authority should be in the national government versus the states. The federalists believed the federal government should have more direct powers than the anti-federalists generally believed. This same struggle over how to divide the powers still exists and creates the conflicts of jurisdiction between the national government and states we call federalism.

No problem was bigger in this federalism conflict than how to divide the British public trust doctrine. In *Lessee of Pollard* the Supreme Court split the main parts of the public trust doctrine between the States and federal government and created the Equal Footing Doctrine to require disposal of the territorial lands as stated above. But the British doctrine also includes that the British Crown retains ownership of the beds and banks of all navigable rivers and shores of lands open to the sea. This ownership being vested in the British King placed the obligation on the King to keep the waterways open to commerce for the benefit of all. Under the Constitution the commerce power was clearly placed in the national government under the Commerce Clause. The federalists in the national government asserted that because the commerce power as defined

in *Gibbons v. Ogden*, 22 U.S. 1 (1824) was dominant, the national government should also control and own the bed and banks of the navigable waterways and sea coast areas. The Supreme Court in *Lessee of Pollard* decided that the bed and banks of the navigable waterways would be owned by the future states, creating a trust responsibility in the national government to safeguard the future state interests. While the Equal Footing Doctrine acted to protect federalism interests and the temporary limitation on the territorial war powers, it was not directly connected to protecting the rights of the people to be treated equally in all the different States in conformity with the natural rights doctrine. This made the Equal Footing Doctrine a poor substitute for equal protection. Just a glance at how easily the SCOTUS dismissed it in *United States v. Winans*, proves the point. *Winans* at 382-384.

B. The Federal Indian Policy of 1871 deliberately incorporated the plenary territorial war powers unleashed in *Worcester* and *Dred Scott* that serve as the basis of *Winans*.

The 1871 Indian policy was created by Secretary of War Edwin Stanton to intentionally preserve the territorial war powers unleashed by the Southern desire to indefinitely preserve slavery in the *Dred Scott v. Sandford,* 60 U.S. 393 (1857) decision. President Lincoln pushed through a modernized Indian assimilation policy in 1863 that was compatible to the Civil War Amendments. *See* 12 Stat. 792-794. President Lincoln was aware that Stanton disagreed with him in placing punishing the South for the Civil War ahead of restoring the Union and improving the constitutional structure. President Lincoln won the fight for the freed blacks by getting the 13th Amendment passed and the 14th Amendment into full discussion before his death but effectively lost the fight with Stanton over the Indians with the adoption of the 1871 Indian policy. This split victory is the basis for the schizophrenia in federal Indian policy today.

The pre- Civil War, *Worcester* decision, in recognizing a special trust relationship between the United States and the Indian tribes under international law principles of the doctrine of discovery contradicted the new American land policy.[2] The Chief Justice started his rationale by throwing out the jurisdiction of the State of Georgia over any of the Cherokee treaty lands, 31 U.S. at 539-540. He then contradicted all previous caselaw granting the original colonies concurrent state jurisdiction on Indian reservations. *See Fletcher v. Peck*, 10 U.S. 87, 118-121 (1810). The Marshall opinion then asserts that "the United States succeeded to all of the claims of Great Britain, both territorial and political." 31 U.S. at 544. And, that the United States gained all of the rights of the King George III Proclamation of 1763 which had prevented the colonists from interacting with the Indians and was a main reason for fighting the Revolutionary War. *Id*. at 547-548. This decision potentially unleashed all of the territorial war powers of the British Kings the United States government would later hold. Literally, the decision in *Worcester* does not appear again until the opinion in *Dred Scott*. In *Dred Scott* Chief Justice Taney expanded the territorial power over Indians by allowing the United States to declare permanent rules for the territories that include the right to forever protect slaves as property. This permanent territorial power is the basis of the 1871 federal Indian policy to forever hold Indians in federal dependent ward status and to keep them on reservations.

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[2] One of the biggest surprises in doing my own research was finding out that it was not just President Andrew Jackson that famously refused to enforce the *Worcester* ruling. No presidential administration through the Presidency of Abraham Lincoln treated *Worcester* as a legitimate decision. It was well known how Chief Justice Marshall manipulated the rules of the federal judiciary to divert the *Worcester* case from the Georgia state courts into the federal courts and all the way to the Supreme Court.

The 1871 Indian Policy formally ended the assimilation policy of the Northwest Ordinance of July 13, 1787, and it began a much harsher direct war power policy toward the Indians. *See United States v. Lara*, 541 U.S. 193, 201 (2004). The Indian Policy of 1871 was based on all Indians and Indian tribes as a race being deemed potential belligerents against the authority of the United States, even though only about ten Indian tribes from the South had formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War. *See* (25 U.S.C. §§ 71 and 72; Rev. Stat. § 2079 and § 2080). They were the same powers needed to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) at p. 470-8.

The territorial war power to punish the Indians was needed to create the legal basis for punishing the defeated Southern States. Unlike actual laws stating the elements of treason, the declarations of "constructive treason" were made by the Sovereign without any requirement of prior notice and without any legal limitations. As the Whiting War Powers treatise explains, the 1871 Indian Policy was used to actually justify the power of constructive treason in the Congress to punish not only the Indians as perpetual belligerents against the United States, but to also punish the Southern States in Reconstruction. The Whiting War Powers treatise references parts of the debate of May 26, 1836 regarding the removal of the Indians from Alabama, Georgia, and Florida. War Powers at 76-78. Whiting uses the stated opinion of Representative and former President John Quincy Adams to explain the limitations placed upon the general domestic power over the Indians and the slaves and how those powers become virtually unlimited when there exists a state of war because of Indian hostilities. Mr. Whiting also discussed the express

constitutional limitations that the Founders had placed upon bills of attainder and *ex post facto* laws to prevent the federal government from acquiring and exercising the power to declare and punish "constructive treason." *Id.* at 84-92. But, as Chapter 5 of that treatise, including its Introduction, argued, Congress possesses the right "to declare by statute the punishment of treason and its Constitutional limitations." *Id*. at 93-95. Mr. Whiting devoted an entire chapter to explaining that, while the Constitution requires that the power of treason be defined by an actual statute, once Congress passed such a statute it could declare in other enacted laws what the punishments for treason will be, without limitation, including attainder. *Id*., Chap. 5, at 95-111. Since its enactment, the 1871 Indian Policy has continued all of the punishments for all Indians as an attainder, which, as of this filing, spans a period of approximately 150 years.

The United States asserted its new war power policy against the Indian tribes that fought for the Confederate States by renegotiating the treaties of the five civilized tribes in 1866. Huge land cessions in the territory of Oklahoma were exacted as well as punishments specific to them including the requirement to accept their slaves as members of the tribe. The end of treaty making in 1871 gave the new policy its name. Act of March 3, 1871, 16 Stat. 544. As discussed in *Holden v. Joy,* the new treaties contained very stringent requirements that relegated even the five civilized tribes to being mere dependent wards of the United States instead of potential citizens under the assimilation policy. It did not take very long for Congress to realize that treating the more civilized peaceful tribes under this new war power policy was wrong and creating conflict where none had previously existed. Congress was looking for a means to reestablish the assimilation policy for the peaceful Indian tribes.

This difference in policies is much more than mere semantics. The difference in the federal power over the Indian tribes under each policy is significant. Under the assimilation policy the United States has limited temporary territorial war powers as inherited from the British King and Pope. These powers could assume Indian title as decided in *Johnson v. McIntosh* and remove Indian tribes to new territorial lands outside of the States. Any Indian people that chose to remain in the States and take their lands individually were supposed to be treated as state citizens. See *Seneca Nation of Indians v. Christy*, 162 U.S. 83 (1898). *See also* Trade and Intercourse Act of 1834. 4 Stat. 729 (altering the definition of Indian country to apply only to Indian lands west of the Mississippi River). Stanton and the USDOJ intended for the 1871 Indian policy to permanently preserve the Indians' dependent ward status to allow the United States the sovereign authority of the territorial war powers.

In reality, the territorial war powers are plenary because they contain the right to redefine the original land status and to redefine all of the circumstances of every person residing in that land area. The victorious North following the Civil War had aspirations for an international empire. See generally Sam Erman, "The Constitutional Lion in the Path": The Reconstruction Constitution as a Restraint on Empire, 91 So. Cal. L. Rev. 1197 (2018). by Associate Professor Sam Erman. One of the few points missed by Assoc. Prof. Erman was that the USDOJ was created by Secretary of War Edwin Stanton to continue and enforce this new Indian policy in

1870.[3] These same territorial war powers are also the basis of the Insular Cases that make the interpretations over rights in the territories acquired in the Spanish American War of 1898.

After the Civil War, just as the Indian policies were divided, so too were all the federal policies regarding the federal public lands. While R.S. 2477 and the Public Lands Act of July 26, 1866, 14 Stat. 251 were mostly in favor of the States, the Mining Act of May 10, 1872, R.S. §2319 et seq., was clearly more in favor of the national interests. With the creation of the USDOJ (16 Stat. 162, Ch. 150, June 22, 1870), a new attack on the public trust doctrine and the ownership of the beds and banks of waters began. Like the pre-Civil War attack, some of the assertion of federal power was based on the Commerce Clause. After the Civil War, the USDOJ schemed to intermix the enumerated powers with the Territory or Property Clause and Treaty Clauses to create "plenary" authority based on the preservation of the territorial war powers. See *United States v. Kagama*, 118 U.S. 375 (1883). In Indian law the Congress passed the General Crimes Act, 18 U.S.C. §1152 to assert control over Indian country. The USDOJ then asserted a new federal authority—to control flooding—as a continuing national emergency. This new claim of flood control authority combined the navigation servitude as previously allowed under the Commerce Clause in *Gibbons v. Ogden,* to the necessity to make and control all obstructions and works on a river system. See Mississippi River Commission Act of 1879. Act of June 28, 1879, 21 Stat. 37. This new river commission actually began under the general Reconstruction

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[3] Prof. Erman realizes that the 1871 Indian policy is a major piece of trying to create an American Empire, *Id.* at 1212-1222, but he underestimated the cleverness of Edwin Stanton and his followers in creating a whole new federal department to enforce it.

authorities enacted to force the defeated Southern States to integrate their societies and to punish them. USDOJ was deliberately expanding the authority of the Army Corps of Engineers.

II. THE TERRITORY OF NEW MEXICO WAS A PRIMARY TARGET OF THE USDOJ ASSERTION OF RESERVED TERRITORIAL WAR POWERS

No place was more targeted than the Territory of New Mexico by the USDOJ to prevent the future State from ever acquiring its full rights under the Equal Footing Doctrine. This was likely for two reasons. The first reason was the actual decision in *United States v. Joseph*, 94 U.S. 614 (1876) that threatened the idea that all Indians should be permanently held as wards under the analysis in *Worcester*. The second reason was probably its majority non-White population. Hispanics elected as state officials were arguably not as well versed in the basis of British common law to figure out what was happening at the national political level and counter it in law and in political tactics. The few "white" lawyers like Albert Bacon Fall who initially represented the Rio Grande Dam and Irrigation Co., could be induced to help the USDOJ with future political promises. Whatever the reasons, the USDOJ was playing out its own legal agenda and the territory of New Mexico was a primary target.

A. The decision in *United States v. Joseph* (1876) reinvigorated the federal Indian policy of assimilation.

One of the first cases after the Civil War that deliberately demonstrates that the original assimilation policy also was in use was the interpretation of the land rights of the Pueblo Indians in *United States v. Joseph*. The majority opinion gives a truly glowing opinion of the Pueblo Indians as a civilized group of people that even though Indian by race are not in this case to be treated as mere tribal Indians subject to the 1834 Trade and Intercourse Act. 94 U.S. at 616-618.

This opinion found that the Pueblo Indians owned their land in fee simple without any reserved interest in the United States. *Id*. at 619-619. This holding demonstrates the major difference between the two federal Indian policies. The assimilation policy begun with the Northwest Ordinance at the adoption of our Constitution sets out to make all Native Americans citizens and land owners. The 1871 Indian policy relegates all Indians to being Indian wards incapable of managing their own affairs that must be held on reservations by force to protect all others from them.

The decision in *United States v. Joseph* contradicted the authority underlying the 1871 federal Indian policy. None of the territorial war power jurisdiction would exist in the United States today without the overriding trust authority over the Indians created in *Worcester* and expanded to the territorial war powers in *Dred Scott*. If all Indians could become competent civilized people contributing to their greater communities like the Pueblo Indians there was no justification to keep all other Indians in a perpetual status as wards or as belligerents. The USDOJ made its position against the reasoning in *Joseph* clear in *Elk v. Wilkins,*112 U.S. 94 (1884) in arguing against a very successful Indian individual and preventing him from being treated as a citizen.

Of course, the USDOJ found a means in *United States v. Sandoval*, 231 U.S. 28 (1913) to not only reverse *Joseph* but all of the rationale making the Pueblo Indians civilized. *Sandoval* is a very racist decision that demeans the Pueblo Indians. The Pueblo Indians have been further relegated to a secondary status in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) that actually denies that the Constitution applies in Indian country. Apparently it does not matter to the Santa Ana Pueblo how demeaning these later decisions are as long as they can gain an

advantage against all other people. It is this greed that the USDOJ position relies on, not just in the natural resources area but in application to the federally mandated laws as well. These later decisions do not change the fact that the opinion in *Joseph* threatened the 1871 Indian policy.

B. <u>The decision in United States v. Joseph made the Territory of New Mexico the primary target of the USDOJ</u>.

In 1883, Congress adopted its first general flood control legislation for the Missouri and Mississippi Rivers. In 1890, using the plenary powers recognized in *Kagama*, it enacted a new Rivers and Harbors Act asserting that the Army Corps of Engineers could prohibit obstructions to navigable rivers. Act of Sept. 19, 1890, 26 Stat. 426. It was Sec. 10 of the 1890 act which made the USDOJ the enforcer of preventing "obstruction[s] to the navigable capacity of any (U.S. jurisdictional) waters" 26 Stat. 454-455 that is cited in *United States v. Rio Grande Dam and Irrigation Co*., 174 U.S. 690, 707 (1899). As the Court made clear "[A]nything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition." *Id*. at 708.

This combination of new laws and the assertion of plenary power is the real source of the Embargo Order on the Rio Grande dated December 6, 1896. The Embargo Order of the Secretary of War in 1896 was not made public to the Territory of New Mexico, the Rio Grande Company or the land grantees in the Mesilla Valley whose waters rights were to be expanded by the dams approved by the Secretary of Interior. The Territory of New Mexico was never told what the power of the United States really was over the Rio Grande. The official line given by the USDOJ was that it was because of the potential treaty interests of Mexico to the Rio Grande as demanded by the Department of State.

In 1899, after the Territory of New Mexico failed to respond to the Embargo order, Congress enacted the 1899 Rivers and Harbors Act (Act of March 3, 1899, 30 Stat. 1121). Section 10 of the 1899 act similarly prohibited all obstructions, including dams, from being built without an express act of Congress granting permission. Section 12 of the 1899 act reaffirmed the USDOJ's role established in the 1890 act as the enforcer against all obstructions. Since these acts only applied if the Rio Grande was navigable in fact, the USDOJ asserted in the Rio Grande Dam cases that the Rio Grande was navigable and commerce could travel on its waters along its whole length from Fort Quitman, Texas to above Albuquerque.

To this day, the real power asserted over the Rio Grande by the United States is based on this complete and utter lie that the Rio Grande is "navigable in fact" and subject to section 10 of the Rivers and Harbors Acts of the United States. See spa.usace.army.mil of the Army Corps of Engineers, Albuquerque District Website, Waters of the U.S., Regulatory Guidance Letter (RGL) 16-01, citing the Clean Water Act and Sections 9 and 10 of the Rivers and Harbors Act of 1899. The Rio Grande Dam decision is the actual source of the "waters of the United States" claim of jurisdiction in the Clean Water Act and one of the cited sources of the federal reserved water rights doctrine. *See Winters v. United States*, 207 U.S. 564, 577 (1908) citing *Rio Grande Ditch*, 174 U.S. at 702. Even now, Elephant Butte Dam is primarily classified as a flood control dam, making its irrigation obligations a secondary consideration of the United States at best.

This claim of the USDOJ that it has primary jurisdiction over the Rio Grande is legally no different than how it was using the term "Indian country" to displace state jurisdiction as discussed in *Oklahoma v. Castro-Huerta*. In New Mexico, the USDOJ has been using both forms of extra-constitutional authorities to assert jurisdiction to interfere with state jurisdiction over the

Rio Grande. All of the foregoing discussion leads to the question of whether there should be a federal reserved rights doctrine.

III. THE BASIS OF WINANS AND THE IMPACT OF CASTRO-HUERTA

As the Tenth Circuit said: "Because *Winans* rights are essentially recognized aboriginal rights, the second issue was resolved by the court's finding that the Pueblos' aboriginal rights had been extinguished by Spain." 976 F. 3d at--. By reversing this holding of the trial court, the Tenth Circuit panel has now opened the issue of whether the Santa Ana Pueblo has a federal reserved water rights aboriginal claim. The Tenth Circuit laid out a framework of decisions in the interlocutory appeal order that formed the basis of the federal reserved rights doctrine. The Tenth Circuit opinion was written over a year before the opinion in *Oklahoma v. Castro-Huerta*. Soon to follow are the consolidated cases of *Haaland v. Brackeen*, Nos. 21-376, 21-377, 21-378 and 21-380 fully briefed and awaiting oral argument on November 9, 2022. About the only thing that has not changed is the sovereign power of the United States as first articulated in *McIntosh* that defined the sovereign authority to cancel Indian title. While *McIntosh* is still the law of the land, the post-Civil War cases cited by the Tenth Circuit panel have been brought into question by a series of cases before the United States Supreme Court challenging the territorial war powers of the United States as asserted through the Territory Clause, Treaty Clause and Supremacy Clause to create federal territorial plenary power over Indians as defined in *United States v. Kagama,* The SCOTUS is now openly questioning whether there is any plenary power in the United States over Indians.

A. <u>The legal basis of United States v. Winans</u>.

As said in *United States v. Winans*, 198 U.S. 371 (1905), "At the time the treaty was made, the fishing places were part of the Indian country, subject to the occupancy of the Indians, with all the rights such occupancy gave. The object of the treaty was to limit the occupancy to certain lands, and to define rights outside of them." *Id*. at 379. The opinion continues by quoting the lower court ruling and the basis of the decision as treating the treaty as a concession of tribal rights. But then it turns, ruling that: "In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted." *Id*. at 381. This creates a permanent property right in the United States to the territorial lands just like was enjoyed by King George III as declared in the Proclamation of 1763. *See Worcester v. Georgia*, 31 U.S. 515, 548 (1832). Congress officially asserts its plenary authority to protect its special interest over Indians as was allowed in *Dred Scott* to protect slavery. *See Dred Scott* at 410. By reinterpreting the Indian property interests as federal reserved rights in the United States, Congress gained the same power asserted by George III to mistreat the American Colonies despite all of the constitution's structural safeguards.

Essentially, this assertion of Congressional plenary authority over Indians allows the federal government to treat any State anywhere as Indian country or as if it is still a federal territory. Any assertion of overriding federal authority for Indians cancels all other constitutional rights and liberties by preventing the states from ever assuming the powers that confer private property rights that make people independent individuals. Whether it comes from Congress or the courts the result is always going to be the same if a federal treaty or statute is allowed to displace state jurisdiction. Designating any area within a State as Indian country activates the territorial war powers against that State and all persons within that State. What is even more

frightening is that because the United States is claiming it can alter the aboriginal title of the underlying land or bed and banks of the river it can take away property rights already conferred destroying all rights and liberties under the constitution.

CERF has two physical documents that prove how the Department of Justice has over time created the federal reserved water rights doctrine to impugn the equal footing doctrine. "The Federal Irrigation Water Rights" memorandum written by Ethelbert Ward, dated June 22, 1930 explains how no matter how a state argues the federal government will always be able to assert a federal reserved water right. The second is "The Embargo on the Upper Rio Grande" by Ottamar Hamele. This document was entered into the docket in *Texas v. New Mexico*, Orig. 141, Doc. 266, before the special master in the Eighth Circuit Court of Appeals. Both of these documents are available in their entirety at millelacsequalrightsfoundation.org. The Embargo on the Upper Rio Grande was the document read to the attendees at the Rio Grande Compact Commission by the USDOJ that was supposed to be the "confession" about the Rio Grande Embargo Order of 1896 to clear the misunderstandings to allow a compact. As counsels letter stated to the Special Master, she had already noted several actions of the United States that were not included in the memorandum and this brief adds yet another. Unless and until the Fourteenth Amendment is fully activated against the United States, the USDOJ is not going to stop trying to take away more individual rights.

B. The impact of *Oklahoma v. Castro Huerta*

In *Oklahoma v. Castro-Huerta*, 142 S.Ct 2486 (2022) the majority found that the State of Oklahoma has concurrent criminal jurisdiction over non-Indians who commit crimes against Indians in Indian country. This finding changes several previous assumptions in federal Indian

law promoted by the USDOJ. The confrontation of jurisdiction was begun over the discussion of whether certain reservations in Oklahoma had ever been disestablished by Congress in *McGirt v. Oklahoma*, 140 S.Ct 2452 (2020). Justice Gorsuch writing for the majority in *McGirt* essentially reversed what had been continuing state jurisdiction over what had been considered former reservations until his opinion. As said previously, the decision in *McGirt* created an uproar and real problems for individual Native Americans who could no longer call their local sheriff, trash collector or county fire department for help. What Justice Gorsuch and the liberal Justices forgot was that these Native Americans were used to living where the constitution had applied and there was a real sense of law and order from the state police and other services. By declaring huge areas around Tulsa to be Indian country again, all of the normal local functions disappeared for Indians, forcing the Native Americans to rely on their tribal governments with their limited powers or the federal government that never committed the resources necessary to fully protect anyone in the rural communities before statehood.

Defendant Castro-Huerta started the case to try to overturn his state conviction for seriously abusing his Indian step-daughter after the *McGirt* decision. His very able counsel did a good job of laying out the USDOJ position against state jurisdiction applying in Indian country. This time the majority was no longer accepting the USDOJ positions. "As a matter of state sovereignty, the State has jurisdiction over all of its territory, including Indian country. U.S. Const. Amdt. 10. As the Court has phrased it, a State is generally 'entitled to the jurisdiction and sovereignty over all the territory within her limits.' *Lessee of Pollard v. Hagan*, 3 How. 212, 228 (1845)." *Castro-Huerta* at--. The opinion then turns to directly address the language in *Worcester v. Georgia* that asserted that Georgia law had no force within the Cherokee Nation.

According to the majority "the general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*, has yielded to closer analysis. *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962)." The opinion then cites several cases with explanations for the proposition of state jurisdiction over Indian reservations and Indian country. The opinion states a new rule "that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction committed in Indian country." *Castro-Huerta* at 2494, 2500.

The opinion then addresses the arguments made by Castro-Huerta that the General Crimes Act, 18 U.S.C. §1152 and Public Law 280, 67 Stat. 588, 18 U.S.C. §1162, 25 U.S.C. 1321, preempt state jurisdiction. After many pages of discussing various points, the majority found that none of the language in either act preempted or precluded state jurisdiction from applying. The opinion lastly addresses the balancing test in *White Mountain Apache Tribe v. Bracker,* 448 U.S.136, 142-143 (1980). The majority concludes that the balancing test applies but does not displace state jurisdiction over a non-Indian. It does keep the test intact over Indians. The last pages are spent refuting the very passionate dissent that relies considerably on the *Worcester v. Georgia* decision.

There has been almost no reaction to the decision in *Castro-Huerta*, in contrast to the uproar that happened after *McGirt.* There are some tribal governments yelping that tribal sovereignty has been harmed but not many. This situation has done what *United States v. Joseph* could have done to the 1871 Indian policy. It has shown not only the Supreme Court Justices and Congress but the news media that individual Native Americans are like all Americans and deserve the same rights and opportunities. The big change in *Castro-Huerta* is the rejection of the USDOJ propaganda that the promotion of tribal sovereignty is more important because the

Indians want to live in separate territories apart from the rest of the people of the United States. As Justice Kavanaugh said "Indian country is part of the State, not separate from the State." *Castro-Huerta* at --.

The *Castro-Huerta* majority has just kicked the 1871 Indian Policy to the rear and reasserted the assimilation policy as the primary federal Indian policy. The obvious reason to do this is the pending decision in the consolidated cases of *Haaland v. Brackeen.*. These cases raise the question whether Congress had the authority under the Constitution and its Amendments to adopt the Indian Child Welfare Act (ICWA), 25 U.S.C. §§1901 et seq. to treat Indian children differently than all other children under the Fourteenth Amendment and to commandeer the States to enforce the federal law.

Three main new positions are put forth by the *Castro-Huerta* majority that implicate whether *United States v. Winans* is still legally viable. The decision in *Worcester v. Georgia* has been pushed back as inapplicable, questioning the special federal trust relationship with Indian tribes and the concept of federal ascendancy to assume all the powers of the British Crown under the territorial war powers to create preemptive Indian country. The Tenth Amendment has been reasserted to restore State jurisdiction within its territorial boundaries along with a reinvigoration of the equal footing doctrine as expressly found in *Lessee of Pollard*. With these changes the anti-commandeering doctrine of *Murphy v. NCAA,* 138 S. Ct 1461 (2018) applies to any federal attempts to remove state jurisdiction.

The federal government is without authority to remove the jurisdiction of the State of New Mexico over the waters of the Rio Grande or over the Indian country that makes up the Santa Ana Pueblo as a federal Indian reservation. Therefore, the decision in *United States v.*

Winans is no longer good law. These arguments place the federal reserved rights doctrine in the same position as the Indian Child Welfare Act in the pending cases of *Haaland v. Brackeen*.

CONCLUSION

This court should deny the existence of any federal reserved right in land or water.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th Day of October, 2022 I electronically filed this Notice of Appearance with the Clerk of the Court using the CM/ECF system, which caused all the entity parties and counsels to be served via the Electronic Filing.

/S/Lana E. Marcussen