Indian Water Rights

Overview

Pueblos and other tribes are located within most of the larger stream systems in New Mexico. Each has claims to rights to use the water in its stream. In New Mexico, Indian rights are significant either because of their early priority dates or because of the large amounts of water rights claimed, or both. In some instances, such claims have the potential to displace a significant number of junior water rights.

Pueblos and tribes in New Mexico assert aboriginal, federally reserved, and state law-based water rights claims which are not subject to forfeiture or abandonment. Some pueblos and tribes also assert claims to storage rights and contract water rights. While pueblos and tribes often own state-based or federally-based water rights, “Indian water rights” generally refer to rights that are specifically established, recognized or created by the courts. Common law theories or doctrines pertaining to Indians continue to be judicially refined and to evolve, so that discussing the nature and extent of “Indian water rights” is a complex topic.

Prior Appropriation

For historical reasons, Indian tribes are not required to conform wholly to state systems of water allocation. Largely because of interstate river compacts that did not include Indian tribes, and U.S. government irrigation projects of the Bureau of Reclamation, non-Indians were able to put water to use in greater quantities than were most Indian nations in the early 1900s. It would thus be unfair to force a system of prior appropriation on tribes that have more senior rights to water, but that did not have as much political power as non-Indians during the era of big-dam building in the West.

The Winters Doctrine

The leading reservation treaty rights case is Winters v. U.S., 207 U.S. 564 (1908). A dispute over Montana’s Milk River between non-Indian irrigators and Gros Ventre and Largely because of interstate river compacts that did not include Indian tribes, and U.S. government irrigation projects of the Bureau of Reclamation, non-Indians were able to put water to use in greater quantities than were most Indian nations in the early 1900s.
Assiniboine Indians on the Fort Belknap Reservation led the Supreme Court to decide that, when Congress establishes a reservation, it implicitly reserves water sufficient to provide a permanent agricultural homeland for the Indians. This reserved right of Indians to unappropriated water appurtenant to their land vests on the date of the creation of their reservation, and is a superior claim to the rights of later appropriators. Further, the Court stated that the U.S. reserved these waters “for a use which would be necessarily continued through years,” meaning that the “use it or lose it” notion under the prior appropriation doctrine does not apply to Indian reserved water rights. In a related case, U.S. v. Winans, 198 U.S. 371 (1905), the Supreme Court recognized that Indians also have aboriginal rights from “time immemorial” to use certain natural resources – including those outside their current tribal lands – except when those rights have been extinguished by sovereign act. The Winans case dealt with off-reservation hunting and fishing rights, but the principle of time immemorial has been applied to Indian water rights.

Quantification

A final quantification of senior tribal water rights is vital, so much so that New Mexico declared the resolution of tribal claims as a critical statewide priority (State Water Plan 2003). The unsettled nature of the law in this area makes accomplishing this task very difficult, however. In the McCarran Amendment, 43 U.S.C. § 666, the federal government waived its sovereign immunity to allow adjudication and administration of federal water rights in state courts. This paved the way for an exercise of concurrent state and federal court jurisdiction over adjudications of tribal water rights. Thus, many state courts are involved in comprehensive stream adjudications, but federal standards still provide the substantive law in this area.

PIA Standard

As discussed below, Pueblo Indian land grants currently remain out of the mainstream of federal Indian water law. For the various Indian reservations, though, the Supreme Court case of Arizona v. California, 373 U.S. 546 (1963), announced that water quantification should proceed using the “Practicably Irrigable Acreage” standard (PIA). In accord with Winters, the Court saw enough water being reserved to irrigate all the practicably irrigable acreage on the reservations, and to serve the current as well as future agricultural needs of the Indians.

Replacements for the PIA standard have been proposed. In a draft opinion before her recusal in the Big Horn Adjudication in 1988, Supreme Court Justice O’Connor advocated a doctrine to require courts to apply reserved rights with “sensitivity” to state water users. The Arizona Supreme Court in 2001 proposed the “Homeland Standard,” a balancing test which would weigh all of a tribe’s economic activities, agricultural and non-agricultural, to decide the amount of water needed for their well-being. In the meantime, however, PIA survives as the measure of how to quantify Indian reservation water rights.

Pueblo Water Rights

Pueblo Indians hold aboriginal rights to their land and use of water under Spanish and Mexican laws, and by the U.S. through the Treaty of Guadalupe Hidalgo in 1848. The U.S. District Court has thus far not applied Winters rights to Pueblo land grants, but the priority dates for Pueblo water users are still considered senior to all others. A proposed quantification standard for Pueblo water is the HIA, or Historically Irrigable Acreage. This judge-made doctrine (developed by the federal district court in the Aamodt...
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adjudication) would recognize prior rights of Pueblo Indians to water necessary for domestic uses and for irrigation of all acreage under cultivation between 1846 and the passage of the Pueblo Lands Act of 1924. A more complete description of the rulings in Aamodt is included in Water Matters! in the paper on the Aamodt adjudication.

Government-to-Government Relations

Indian nations claim inherent sovereignty and treaty rights as the basis for many of their positions on water policy. Concerns about compromising sovereignty and senior water rights have kept some tribes away from the negotiating table, but reliance on litigation is inescapably complex, costly, and time-consuming. All sides are beginning to emphasize the importance of government-to-government consultations on water issues. For example, both state and tribal entities support negotiated shortage-sharing agreements as an alternative to priority administration, provided that the tribal or Pueblo’s senior water rights are recognized.

Settlements

The State Water Plan points out the need for the state to commit the necessary funds and resources to settle Indian water rights claims. In 2005-2006, the State entered into three settlement agreements to resolve the water rights claims of six tribes and pueblos: the Navajo Nation in the San Juan River adjudication; Taos Pueblo in the Abeyta adjudication; and Pojoaque, San Ildefonso, Nambe and Tesuque Pueblos in the Aamodt adjudication. In 2006 it was estimated that the cost to the federal government for the various infrastructure projects needed to implement these three settlements over a long period of construction could be approximately one billion dollars and the state’s share could be one hundred million dollars.

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In 2007, the State Legislature appropriated $10 million to the Indian Water Rights Settlement Fund, a fund established for the State to pay its share in Indian water rights settlements. In the 2008 session, however, the Legislature did not appropriate any money to the Settlement Fund. The total needed for the three settlements will require continued annual appropriations for several years.

Then in 2008 and again in 2009’s new Congress, Senator Bingaman incorporated the concept of the Reclamation Water Settlements Fund for the three settlements into an “Omnibus Public Land Management Act.” This omnibus was adopted in both chambers and with the President’s signature became law on March 30, 2009. The Act formally approved the San Juan River Settlement and authorized $870 million for constructing the Navajo-Gallup pipeline project – as well as $23 million for rehabilitation of existing Navajo irrigation systems.

In the Aamodt and Abeyta cases, the settlements were authorized and funds were appropriated in 2010. Also in 2010, additional funds were appropriated for Navajo – $60 M per year for 3 years beginning in 2010. (More detail on the three settlements and updated information on congressional funding appear in this issue.
of *Water Matters!* – see the articles on Navajo-Gallup, Aamodt Adjudication, and Taos Settlement.)

In conclusion, any workable settlement of competing rights to water in New Mexico must involve more than quantification of those rights. Appropriate and predictable rules for the administration of all water rights must also be developed. Unless the State and its tribes work cooperatively, courts will continue to have power to impose rules from the bench. This may be a greater cession of authority than either the United States or the sovereign Pueblos and Indian tribes would like.

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(Updated December 2010 by Susan Kelly)

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**Sources Consulted and Other Contributors**


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DL Sanders, Chief Counsel, New Mexico Office of the State Engineer.

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