

Aamodt Adjudication

The “Aamodt case” is a complex, long-running adjudication of water rights in the Pojoaque River watershed north of Santa Fe. In 1966, it was filed in federal court as *State of New Mexico ex rel. State Engineer, et al. v. Aamodt, et al.*, 6:66-CV-6639 (D.N.M.). The parties include the state through the State Engineer, it includes about 5,600 non-Indian claimants, four Pueblos, other governmental entities such as the county of Santa Fe, many acequias, the Pojoaque Valley Irrigation District, and several federal and state agencies. The rights being adjudicated include, but are not limited, to state law rights of non-Indians and government agencies for irrigation, domestic, and commercial uses as well as the federal law rights of the Pueblos to historic, present and future uses.

The Claims Resolution Act became law in December 2010. The Act covers several settlements including water rights claims of the Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque. It authorizes the 2006 Settlement Agreement between the Pueblos, the State, Santa Fe County, the City of Santa Fe and local water users, and provides funding to implement the Settlement.

The court and the parties continue to adjudicate claims of non-Indians. They are currently working on the priority of one acequia and on the domestic well rights. The court must enter a final decree by September 15, 2017.

Background for the Adjudication

Aamodt has its roots in the planning for the San Juan-Chama Diversion Project during the 1960s. These plans allocated modest quantities of San Juan-Chama (SJ-C) imported water to several separate watershed areas that feed into the Rio Grande. The Rio Pojoaque Basin was one of the “tributary irrigation units”. These watershed areas received the proposed new water by diversion from the Rio Grande or by substitution and/or exchange.

As a part of the SJ-C Project, infrastructure projects were proposed for the tributary units. All except the project in the Rio Pojoaque Basin were dropped because of local opposition or other factors. The Nambé Falls Dam was built in the upper part of that watershed, and its storage reservoir now provides supplemental irrigation water to the

“The State, local and Pueblo government parties to the Aamodt case, most irrigators and other people residing in the Basin, support settlement as a way to make a better future together.”

Peter C. Chestnut,
Attorney for Pueblo
de San Ildefonso

In November, 2010, the Congress passed the Claims Resolution Act of 2010 and on December 8, President Obama signed it into law.

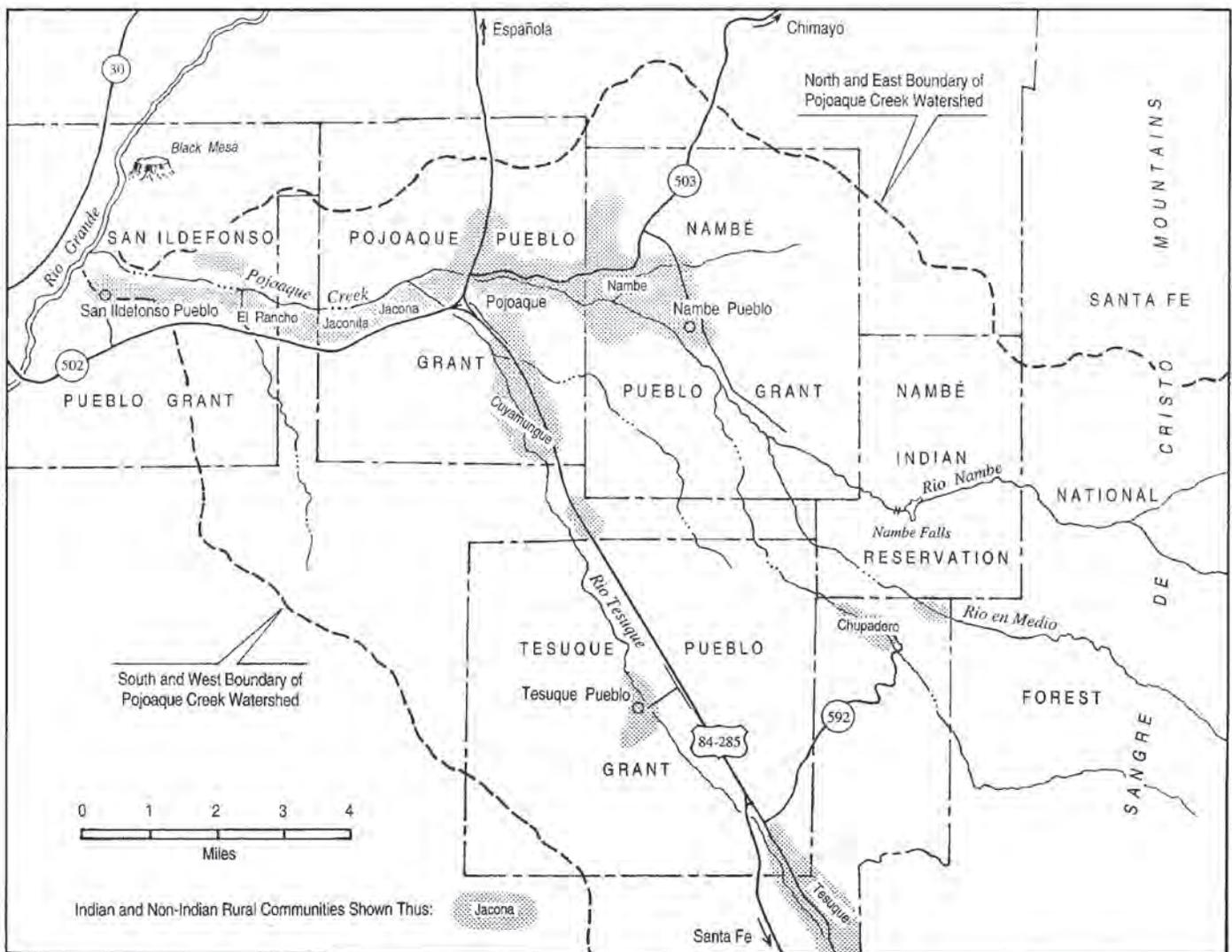
Pojoaque Valley Irrigation District and the pueblos of San Ildefonso, Nambé, and Pojoaque.

In order to properly distribute and account for the imported Project water, the Office of the State Engineer initiated water right adjudications to create water use inventories on each of the major watershed's tributaries to the Rio Grande. In 1952, Congress passed the McCarran Amendment, 43 U.S.C. § 666 which waives federal sovereign immunity so that the federal government's and the Pueblos' water rights could be

determined in state as well as federal court. That concept was not fully understood in the late 1960s, so these tributary cases were filed in federal court.

Adjudication Process

The adjudication of water rights has three basic stages: it begins with 1) a hydrographic survey of all water uses in an area; proceeds to 2) negotiation and resolution between the state and each claimant; and is followed by 3) notice and an opportunity for all claimants, Pueblo and non-Indian alike, to



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By Jerold Widdison
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object to any agreement reached between the state and any other claimant. After all differences are resolved, the court enters a final decree. This system of adjudication is generally applied to both non-Indians and Indian claims.

Aamodt

The *Aamodt* case was the first of the major tributary watershed adjudications to be filed in New Mexico. The Office of the State Engineer [hereinafter OSE] finished the hydrographic survey of non-Indian surface water rights and filed it with the federal court shortly after the case was begun in 1966.

Non-Indian Claims

The elements of non-Indian water rights are determined under state law. These rights have a priority of either the date of first use or, in the case of an OSE permit, the date of application and a measure of actual, historic beneficial use. In the adjudication of *Aamodt* non-Indian claims, the surface water irrigation claims were addressed first. Most of the work on these claims was completed by 1969, except for the priority dates of the acequia and ditch water rights. The court and parties are presently working on adjudicating the priority element for one last acequia in the Chupadero area.

Following the adjudication of surface water rights, the *Aamodt* court decided that domestic well rights should also be adjudicated. Consideration of these claims began in the 1980s and continues today. The court has entered subfile orders for most of the pre-1983 well rights and the focus is now on post-1982 domestic well rights and the remaining pre-1983 domestic well rights.

The court has limited water use in some domestic well rights. In 1983, it required the OSE to restrict new domestic well permits in the Pojoaque Basin to indoor use only. In 1999, a “Post-1982 Domestic Well Stipulation and Settlement Agreement” was developed to modify that ruling and allow

outdoor use in exchange for mandatory metering, reporting and usage limited to no more than 0.7 acre-feet per year per household. Owners of approximately one-third of the post-1982 domestic wells identified at that time joined this settlement.

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Pueblo Claims

The court and parties began working on the water rights of the Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque in about 1969. Among the first issues considered by the District Court were whether Pueblo rights are determined under state or federal law and whether Pueblos have a right to private counsel, separate from that provided by the U.S. Department of Justice. The Tenth Circuit Court of Appeals (*Aamodt I*) held that the Pueblos’ water rights are to be determined under federal law and that the Pueblos are entitled to separate counsel. This decision was not reviewed by the United States Supreme Court.

In its 1985 *Aamodt II* opinion, the adjudication court further developed the foundation for determining the Pueblos’ water rights. Pueblos have primarily grant lands and only secondarily reserved lands. The federal law for water associated with reserved lands is fairly well developed and is expressed in the *Winters* Doctrine. Under the *Winters* Doctrine, Indian water rights have a priority date based on the date the reserved lands were set aside from the public domain. The amount of water is based on what is necessary to satisfy the purpose of the reservation. For reservations created for

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agricultural purposes, that measure is determined by the amount of water necessary to irrigate all practicably irrigable acreage. It is not measured by actually irrigated acreage.

The *Aamodt II* court held that different rules apply to Pueblo grant land water rights because these lands have always been owned by the Pueblos, were never a part of the public domain, and because of how the Treaty of Guadalupe Hidalgo treated citizen owners of land. Therefore, the United States did not set aside their lands but rather recognized existing Pueblo ownership of those lands. Since the Pueblos owned their lands and used water since pre-European time, the court held that the priority of the water rights is the first priority in the basin. This concept is variously expressed as aboriginal priority, first priority, or immemorial priority. The practical effect is that in times of shortage, the Pueblos get all their water for grant lands before anyone else, unless the Pueblo and non-Indian communities make other arrangements.

The court also held that the Pueblos' irrigation rights within the grant lands were to be determined by the amount necessary to irrigate any and all lands under cultivation between 1848 (Treaty of Guadalupe Hidalgo) and 1924 (Pueblo Lands Act). This acreage is known as the 'historically irrigated acreage' (HIA) and the theory behind it is known as the 'Mechem Doctrine'. *Aamodt* is the only case in which HIA has been used in quantifying Pueblo water rights. Although the District Court's opinion was appealed, the U.S. Appeals Court declined to hear it and so the legal merits have never been reviewed by a higher court.

Under *Aamodt* rulings, the Pueblos were also entitled to replacement water rights for lands lost under the 1924 Pueblo Lands Act proceedings. After several years of inconclusive litigation over replacement issues, in 2000, the parties turned to settlement negotiations.

Settlement

The *Aamodt* settling parties, seven governmental entities including the state and representatives from the non-Indian community, began talks in 2000. By 2004, a settlement was drafted and presented to the public. The settlement featured a regional water supply system for both Pueblos and non-Indians. In this first version of the settlement, all non-Indians had to hook up to the water system. After review and public discussion, the settling parties returned to the table to work on the non-Indian communities' concerns and removed the mandatory provision for water system hookup. In 2006, the signed settlement was sent to Congress.

The Settlement Agreement

The State of New Mexico, Santa Fe County, City of Santa Fe, representatives from non-Indian communities, and the four Pueblos signed the 2006 Settlement Agreement. In 2010, Congress passed the Claims Resolution Act, which approved the *Aamodt* and other settlements, and the President signed it into law. The parties have conformed the 2006 Settlement Agreement to the Act and, as of January 2013, it is being circulated for signature.

The key provisions of the *Aamodt* settlement include:

- Constructing Regional Water System
- Providing non-Indians a choice of whether to join the settlement and upon joining, a choice of whether to hook up to the Regional Water System
- Relinquishing existing Pueblo claims against non-Indians who join the Settlement

- Closing the basin to new water right development following the court’s approval of the settlement
- Metering all water uses in the basin
- Limiting Pueblo water use
- Protecting existing uses

The Regional Water System is a pipeline and water-distribution system which will have capacity to deliver water from the Rio Grande to the four Pueblos and to non-Indian residents. The system provides 2,500 acre-feet per year (a/f/y) for Pueblo consumptive use. It also allows Santa Fe county to “piggy back” onto the system for up to 1,500 a/f/y to serve existing non-Indian domestic well owners who choose to connect to the system and all future water users. The county must make its sizing decision by 2017. Water will be diverted from the Rio Grande through infiltration-well structures along the river banks on San Ildefonso Pueblo land, above Otowi gage. (This project is separate from Santa Fe’s Buckman Diversion.) The Bureau of Reclamation will build the system.

The imported water is important to both Pueblos and non-Indians because it will reduce the current stress on the local aquifer by increasing the amount of surface water available and reducing dependency upon groundwater. Reduced stress will strengthen tributary stream flows which supply acequias and support the riparian habitat in the watershed. The system will provide potable water in areas that have natural and manmade water quality issues and will provide water for fire suppression.

The system will also meet some trust obligations of the United States to the Pueblos with regard to their domestic water systems. In many instances, the Pueblo water systems use unsafe asbestos piping, do not include fire suppression works, and are generally inadequate for conditions of the twenty-first century. The parties to the settlement agree that construction of the pipeline is needed to provide a rural water supply to meet increasing water demands

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that cannot continue to be satisfied from the available groundwater resources.

Project Authorization/Funding

Prior to the passage of the *Aamodt* Litigation Settlement Act, the cost estimate for the settlement in 2006 dollars was \$177.3 million (\$106.4 million for the federal contribution, \$49.5 million for the state contribution, and \$21.4 million for the county’s contribution). This cost estimate will be indexed to accommodate economic changes. The majority of the funding is for the construction of the Regional Water System and for the acquisition of water rights for the Pueblos. In the Claims Resolution Act, Congress appropriated \$81.8 million of the federal contribution and authorized an additional \$92.5 million.

In 2009, Congress authorized the “Water Settlements Fund” in the Omnibus Public Land Management Act of 2009. This fund, when originally proposed in 2007, was intended to serve as the major federal funding vehicle for the three Indian water rights settlements in New Mexico and Navajo, *Aamodt*, and *Abeyta* (Taos). The fund offers some potential for *Aamodt* in 2020.

The majority of the State’s share of the funding remains to be appropriated. In 2007, the State made a “down payment” of \$10 million to its Indian Water Rights Settlement Fund, to be used for the State’s contribution for three Indian water rights settlements. In 2010, the Legislature set aside an additional \$15 million. The State’s total contribution

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will be \$130,040 million in un-indexed dollars for the three settlements, and will require appropriations for the next several years.

The *Aamodt* Litigation Settlement Act:

- Expressly authorizes, ratifies and confirms the Settlement Agreement
- Resolves the water right claims of the Pueblos
- Provides for implementation of a “Cost-sharing and System Integration Agreement” and an “Operating Agreement,” between the governmental agencies and the Pueblos
- Provides that construction costs of the Regional Water System pertaining to the Pueblos are federal costs which they will not have to reimburse and that costs pertaining to the County Utility are to be covered by state and local entities
- Allocates 1,079 acre-feet of San Juan-Chama contract water for use by the Regional Water System
- Provides that the Pueblos’ share of San Juan-Chama costs is non-reimbursable
- Provides \$56.4 million in funding now and authorizes an additional \$50 million for construction of the Regional Water System to serve Pueblo and non-Indian residents
- Provides \$25.4 million in funding now for acquisition of water rights and projects to improve existing Pueblo water supply infrastructure
- Authorizes an additional \$42.5 million to assist with operation and maintenance of the Regional Water System
- Allocates over 6,100 acre-feet of water to the Pueblos with various priority dates

With Congressional approval and funding, implementation of the settlement and construction of the Regional Water System have begun. The Bureau of Reclamation has developed implementation plans, schedules and milestones. It meets regularly with the settlement parties and public as they work out the various agreements and processes required to carry out the project. The

settling parties have completed revising the settlement agreement to conform with the Act and the Cost Sharing and System Integration Agreement. Other necessary agreements, partial final decree and interim administration order are in progress. The agreements are now circulating for signature.

Settlement and the Court

Both the settlement agreement and the *Aamodt* Litigation Settlement Act require the court to consider objections and to decide whether to approve the settlement. Early in 2011, the settling parties formally notified the court that Congress had passed the Act. The court subsequently amended its 2007 Order describing the schedule and procedures for *inter se* and entry of the final decree, if approved. During the *inter se*, parties are allowed to challenge the decree before the court decides whether to enter it.

Some non-Indians are opposed to the settlement. They are concerned about the new system’s water delivery costs, property tax implications, regulation and possible increased development in the watershed. Others are concerned about curtailed development. Some residents oppose the settlement because of the way the negotiations were conducted. Many non-Indians who originally opposed the settlement now believe that their issues need to be resolved, not by opposing the settlement, but rather through discussions with Santa Fe County about decisions concerning the size and cost of the non-Indian portion of the system. Those who oppose the settlement may file objections with the court when it considers whether to adopt the settlement.

A number of non-Indians support the settlement. The reasons for support vary. The settlement is designed to protect existing water rights, particularly those of acequia members. It protects the water table by providing a means for reducing existing groundwater uses in the area, limiting the amount of water that can be drawn by existing users and preventing additional new water with-

drawals. This protection is intended to support stream flows upon which acequias depend. The settlement provides an alternative domestic water source for those who are concerned about manmade or naturally occurring pollution in their areas. It provides outdoor water use to those who are limited to indoor use from their domestic wells. It offers enhanced fire protection for non-Indians. It offers protection from Pueblo priority calls and from Pueblo *inter se* challenges. It ends the litigation.

If the court approves the settlement, the four Pueblos' water rights will be resolved. The final decree for all rights, both Pueblo and non-Indian must be entered by September 15, 2017. If the court does not approve the settlement, the case will return to litigation in the U.S. District Court and undergo any subsequent appeals.

Project Construction

The Bureau of Reclamation is building the Regional Water System. In September 2012, Reclamation awarded the contract for

developing the Environmental Impact Statement to EMPSi, an environmental management and planning business with offices in Santa Fe. In early 2013, the Bureau of Reclamation will begin collecting engineering and design information in the Pojoaque Basin. Public scoping meetings will start in April 2013. The Bureau of Reclamation is working closely with the State, the County of Santa Fe, and the Pueblos as it plans, designs and constructs the Regional Water System.

Adapted from a manuscript by Peter C. Chestnut, Esq., who represents the Pueblo de San Ildefonso in the Aamodt case. The views expressed herein do not necessarily reflect the views of Mr. Chestnut or the Pueblo de San Ildefonso.

Updates by Susan Kelly, Esq.
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