Indian Water Rights

> "Native-American water rights in the region are being slowly determined through negotiation and litigation. This process must be continued and accelerated in order to provide security and certainty to Indian and non-Indian users alike."
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> Albert E. Utton,
> Essay in Natural Resources Journal, Vol. 34, Fall 1994

Overview

Pueblos and tribal reservations 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.

Adjudications involved all water rights in a stream system and may be conducted in state or federal court. 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 many of the cases for tributaries to the Rio Grande were filed in federal court.

Pueblo and tribal water rights belong to the pueblo or tribe, rather than individuals, and are adjudicated to that entity. Since the water rights are addressed according to the watershed in which they are located, pueblos and tribes may have to pursue their water rights in more than one adjudication. Pueblos and tribes in New Mexico assert aboriginal and federal reserved water rights claims, which are not subject to rules of beneficial use, forfeiture or abandonment, and state law-based claims which are subject to the same rules as non-Indians' rights. Some pueblos and tribes also claim storage rights and contract water rights. 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.

Water Distribution

The term "prior appropriation" describes a water management system where, in times of shortage, water is allocated first and in full to the entity or person who has the water right with the oldest priority date and then to rights with successively more junior priorities until the supply runs out. Shortages may be brought on by variable weather, increased populations,

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early snow melt, over-appropriation, and increased demands per capita. This water management system is commonly applied across the West and in New Mexico as well.

Basis for Water Rights

In New Mexico as in most of the West, all water rights, except those held by tribes and pueblos, are determined and described under state law. The priority of a state law water right is based on *when* the water is put to beneficial use and the quantity is based on *how much* is put to beneficial use. To preserve a water right under state law, the beneficial use must be continuous, thus giving rise to the maxim, "use it or lose it."

In contrast, tribes' and pueblos' water rights are determined and described under federal law. This rule was developed by the United States Supreme Court in the case *Winters v. U.S., 207 U.S.* 564 (1908) involving non-Indian irrigators and Gros Ventre and Assiniboine Indians on the Fort Belknap Reservation over water in the Milk River of Montana. The non-Indians argued that since water was not mentioned in the document creating the Reservation, no water rights should be accorded to it and its inhabitants. The United States Supreme Court rejected that position, deciding that, when Congress establishes a reservation, it implicitly reserves water in an amount sufficient to meet the purpose of the reservation, now and into the future and that the right will have a priority as of the date of the reservation.

Priority

The elements for Indian water rights are determined using federal law. Tribal water right priority is as of the date when the lands were set aside by the federal government. Pueblo water rights on grant lands have a "immemorial, aboriginal or first priority" because the lands a) have been occupied and the water used since before Europeans entered the territory, b) were recognized by prior sovereigns, c) came into the United States protected by the treaty of Guadalupe Hidalgo and d) were never relinquished to the federal government.

Quantification

Under state law, water right quantification for non-Indians is relatively straight forward. The method of quantification depends on the purpose to which the water right is applied. The measure is beneficial use for that purpose. Non-Indian irrigation rights are measured by the number of irrigated acres multiplied by the consumptive irrigation requirement assigned to the area or that amount necessary to grow the crops generally grown in the area. The water must be used for that purpose and must be used through time in order to maintain the water right.

Tribal and pueblo water rights are quantified differently. The first step in tribal water right quantification for reserved lands involves looking at the purpose for which the reservation was set aside.

PIA Standard: In the case of agricultural reservations, the Supreme Court case of *Arizona v. California,* 373 U.S. 546 (1963), announced that water quantification would be based on "Practicably Irrigable Acreage" (PIA), not actually irrigated acreage. In accord with *Winters*, the Court adjudicated enough water to irrigate all the practicably irrigable acreage on the affected reservations, to serve the current as well as future agricultural needs of the Indians. PIA claims have been litigated in New Mexico for the Mescalero Apache Nation in *State ex. rel. Reynolds and Pecos Valley Artesian Conservation District v. L.T. Lewis, et al.*

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

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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. Tribes may also acquire contract and state law rights as well.

HIA Standard: 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. One quantification standard for pueblo water is Historically Irrigable Acreage (HIA). This doctrine was developed the *Aamodt* adjudication and has been applied only in that adjudication. The doctrine recognizes prior rights of pueblos 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. The HIA standard affords the pueblos the earliest priority date, but severely restricts the amount of acreage that is used to calculate the amount of water allocated to them. The amount of water per acre is to be the same as for the non-Indians. The HIA standard does not preclude the pueblos from also having federal reserved rights if the federal government set aside public domain land for them or from acquiring contract or state law rights.

In either case, tribes and pueblos are not limited to using their federal law water rights in the manner suggested by the quantification standard; that is PIA or HIA measured water does not need to be used for irrigation. They also do not have to be actively using the water at the time of quantification and are not subject to the "use it or lose it" rule. They do not get permits from the State Engineer for any federal reserved right. They do, however, exercise their priorities in the prior appropriation water management system.

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Over the last century, non-Indian development burgeoned as the Bureau of Reclamation developed dams and other government irrigation projects and states crafted interstate river compacts allocating water between them. Water was captured and rights were allocated and managed without knowledge or consideration of Indian water claims. Consequently, watersheds' supplies were fully or over-appropriated in filling the demands of non-Indians. Now Indians' claims are being defined and the complexion of watershed resources and the demands upon them are changing.

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 emerging nature of the law in this area, the stakes and the amounts of time, resources and money make accomplishing this task very challenging.

Government-to-Government Relations

Indian tribes, pueblos and nations assert 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 alternatives to priority administration, provided that the tribal or Pueblo's senior water rights are recognized. Increasingly non-Indian governments are employing tribal liaisons to increase communication and cooperation between governments.

Settlements

The 2003 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 one nation and five pueblos: the Navajo Nation in the San Juan River adjudication; Taos Pueblo in the *Abeyta* adjudication of the Rio Hondo and Rio Pueblo de Taos stream systems; and Pojoaque, San Ildefonso, Nambé and Tesuque Pueblos in the *Aamodt* adjudication of the Nambé, Pojoaque and Tesuque stream systems. Between 2009 and 2010 these settlements were approved in Congressional Acts. A link to copies of these settlements is found at the end of this document. The Pueblos of Jemez, Santa Ana and Zia are presently engaged in negotiation talks and the court in *NM v. Abbott* for the Santa Cruz/Truchas watersheds is considering whether to allow settlement talks for Ohkay Owingeh (San Juan Pueblo).

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Federal Funding: In June 2007, Senator Pete Domenici introduced a ten-year funding plan (S. 1643) to raise an estimated $1.37 billion to pay the federal share of implementing the pending settlements. His bill was entitled "Reclamation Water Settlements Fund Act," which was eventually approved by the Senate Energy and Natural Resources Committee, but lapsed at the end of 2008. Then in 2008 and again in 2009, Senator Bingaman added the Reclamation Water Settlements Fund for the three settlements to the "Omnibus Public Land Management Act." This omnibus bill became law on March 30, 2009.

The Claims Resolution Act of 2010 approved the Taos Settlement, as well as the Nambe, Pojoaque, San Ildefonso, and Tesuque Settlement. The Act also appropriated and authorized millions to meet the federal obligations for these and the Navajo Nation Settlement.

State Funding: 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 2009, the State Legislature removed that $10 million and replaced it with State Treasury Bond authorization in the same amount. On June 7, 2011, the Interstate Stream Commission certified the sale of the bonds to the Board of Finance. In the 2010 special session, the Legislature appropriated an additional $15 million. The total amount required from the State by the three

settlements will require continued annual appropriations of $15 million through 2017.

For more detail on the three settlements, see this issue of *Water Matters!*, in the articles on the Navajo-Gallup Water Supply Project, *Aamodt* Adjudication, and Taos Settlement.)

Congress built benchmarks and timetables into each of the Acts approving the three settlements. If the benchmarks, schedules, and funding obligations are not substantially met, the settlements will fail. Failure means a return to litigation.

Settlement or Litigation: The *Aamodt* parties litigated the Pueblos' claims from 1966 to 2000 without reaching an end. The parties reached a settlement in six years. It took four years for the settlement to wend through Congress. The settlement must be substantially executed by 2024. Other adjudications have a similar story. Today, two Indian nations have adjudicated water rights; five pueblos and one Indian nation have settlements approved by Congress and which are being implemented; three pueblos are in settlement talks; seven others are in litigation and, four have not yet started down this path. One way or another, the water rights of Indian peoples whose homelands are located in New Mexico will be determined and they will have a significant effect on the State and its operations.

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