American 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."
>
> Albert E. Utton,
> *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 because of their early priority dates, 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 involve all water rights in a stream system and may be conducted in state or federal court. In 1952, Congress passed the McCarran Amendment, 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 governmental entity. Since the water rights are addressed according to the watershed and the state in which they are located, Pueblos and Tribes may have to pursue their water rights in more than one adjudication. Pueblo and Tribal water rights are determined and described under federal law. They may assert aboriginal and federal reserved water rights claims that are not subject to rules of beneficial use, forfeiture or abandonment, and state law claims, which are subject to the same rules as non-Indian 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 junior priorities until the supply

Stream System (Case Name)	Pueblo/Tribe/Nation
Chama (Aragon)	Jicarilla Apache Nation Ohkay Owingeh
Jemez (Abousleman)	Pueblo of Jemez Pueblo of Santa Ana Pueblo of Zia
Nambé-Tesuque-Pojoaque (Aamodt)	Pueblo of Nambé Pueblo of Pojoaque Pueblo de San Ildefonso Pueblo of Tesuque
Pecos (Lewis)	Mescalero Apache Nation
San Juan	Jicarilla Apache Nation Navajo Nation Ute Mountain Ute Nation
San Jose (Kerr McGee)	Navajo Nation Pueblo of Acoma Pueblo of Laguna
Santa Cruz/ Truchas (Abbott)	Ohkay Owingeh Santa Clara Pueblo
Taos (Abeyta)	Taos Pueblo
Zuni (A&R Productions)	Zuni Indian Tribe Navajo Nation

runs out. Shortages may be brought on by variable weather, increased population, early snow melt, over-appropriation, and increased demands *per capita*. This water management system is commonly applied across the West, as well as in New Mexico.

Basis for Water Rights

In New Mexico, as in most of the West, all non-Indian water rights 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 in 1908 by the U.S. Supreme Court in the case, *Winters v. U.S.,* involving non-Indian irrigators and Gros Ventre and Assiniboine Indians on the Fort Belknap Reservation over water in the Milk River of Montana. The U.S. Supreme Court decided 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. Federal Tribal rights are referred to as "federal reserve rights." Pueblos may be entitled to aboriginal rights that were recognized under Spanish and Mexican law and preserved when New Mexico came into the United States under the Treaty of Guadalupe Hidalgo in 1848.

Priority

A Tribal reserved 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. Pueblos and Tribes typically have the earliest dates in a water system.

Quantification

Under state law, water right quantification for non-Indians is relatively straightforward. The method of quantification depends on the purpose to which the water right is applied and the measure is beneficial use. 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. If the purpose is for agriculture, the "Practicably Irrigable Acreage" (PIA) standard is used. In the *Aamodt* case, the standard applied to grant lands is "historically irrigated acreage" (HIA). Tribes may acquire contract and state law rights as well.

PIA Standard: In the case of agricultural reservations, the U.S. Supreme Court case of *Arizona v. California,* announced in 1963 that tribal water quantification would be based on 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, in order to serve the current, as well as the future agricultural needs of the Indians. PIA claims have been litigated in New Mexico for the Mescalero Apache

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Nation in *State ex. rel. Reynolds & Pecos Valley Artesian Conservation District v. L.T. Lewis, et al*. PIA awards tend to be very large.

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, PIA survives as the measure of how to quantify Indian reservation water rights.

HIA Standard: Pueblo Indians held aboriginal rights to their land and use of water under Spanish and Mexican laws. By virtue of the Treaty of Guadalupe Hidalgo, these rights are recognized by the United States. The HIA standard was developed in the *Aamodt* adjudication and has been applied only in that adjudication. The standard recognizes prior rights of Pueblos to water necessary for domestic use 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 in the Rio Pojoaque stream system 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, commonly called "duty," is 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 sets aside public domain land for them, or from acquiring contract or state law rights.

Under either standard, 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. In New Mexico, as across the United States, Indian water rights remain for the most part undefined. These rights are generally believed to have early priority dates for large amounts. Once defined, these rights will be satisfied in priority in times of shortage under the prior appropriation water management system.

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Over the last century, non-Indian development burgeoned as the U.S. 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, management, and the demands on the resource 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 in the State Water Plan of 2003. The emerging nature of the law, the stakes, and the amounts of time, resources, and money required make accomplishing this task very challenging.

Government-to-Government Relations

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.

Litigation

The State and the Pueblos are actively litigating the claims of the Pueblos of Acoma and Laguna in the *State of New Mexico v. Kerr McGee, et.al.* (Rio San Jose) adjudication; the claims of the Navajo Nation in the *State of New Mexico v. A&R* (Zuni River) adjudication; and the claims of the Pueblos of Jemez, Santa Ana, and Zia in the *State of New Mexico v. Abousleman* (Rio Jemez) adjudication.

Settlement

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 *New Mexico v. United States* (San Juan River) adjudication; Taos Pueblo in the *State of New Mexico v. Abeyta* (Rio Hondo and Rio Pueblo de Taos) adjudication; and Pojoaque, San Ildefonso, Nambé and Tesuque Pueblos in the adjudication *New Mexico v. Aamodt* (Rio Nambé, Rio Pojoaque and Rio Tesuque) adjudication. Between 2009 and 2010,

Settlement	Federal Contribution	State Contribution	Local Contribution
Aamodt	$174.3 million	• $50 million ($45.5M for construction of non-Pueblo part of water system; $4M for non-Pueblo connection fund; $500,000 for mitigation of impacts of Pueblo use on non-Pueblo wells)	County of Santa Fe • $7.4 million for construction of County part of water system • $14 million for additional County connections
Navajo	984.1 million	• $50 million, minus previous State contributions or cost share credit toward Navajo Gallup Project (required) • $10 million for non-Indian ditch rehabilitation (not-required)	
Taos	124 million	• $6.9 million to acquire water rights for non-Pueblo parties • $12.1 million for Mutual Benefits Projects, which offset surface water reduction from groundwater pumping	
Total	1,297.4 million	• $129 million (rounded) (plus related indexing)	

Congress approved these settlements and all three are now being implemented.

The Pueblos of Jemez, Santa Ana, and Zia were in settlement talks but have returned to litigation. The parties in *State of New Mexico v. Abbott* for the Santa Cruz/Truchas watersheds are now engaged in settlement talks for Ohkay Owingeh (San Juan Pueblo). In March of 2013, the State and the Jicarilla Apache Nation successfully concluded years of negotiation and collaborative technical work in the *State of New Mexico v. Aragon* (Rio Chama) adjudication with the entry of a Consent Order recognizing the Nation's water rights on lands acquired since the entry of the 1998 Jicarilla Apache Nation decree. Finally, the court in the *A&R Productions* adjudication (Zuni River) granted a stay on December 10, 2013, in the litigation of the Zuni Pueblo sub-proceeding so that the parties can explore entering into settlement talks.

Concerted efforts to obtain funding for implementation of the settlements got started in 2007, both in Congress and in the New Mexico Legislature. The federal contribution will be about $1.3 billion. The state contribution will be about $130 million, to which credits may be applied. The local contributions will total about $93.2 million. The overall cost of the three settlements will be about $1.5 billion. For more information see the link below for 2013 Indian Water Rights Settlement Update to the Interim Indian Affairs Committee below.

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.

If the benchmarks, schedules, and funding obligations are not substantially met, the settlements will fail. Failure means a return to litigation.

The Claims Resolution Act of 2010 approved the Taos Settlement, as well as the Nambé, 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: 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 2011, Legislature appropriated $15 million in Severance Tax Bonds to the fund and in 2013, it appropriated $10 million; the total amount of State funding to date is $35 million. The State's total contribution will be $130 million in un-indexed dollars for the three settlements and will require substantial appropriations for the next several years. The total amount required from the State by the three settlements will require continued annual appropriations of $15 million through 2017.

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, which means a return to litigation.

For more information, please see the "Navajo-Gallup Water Supply Project", the "NPT Pueblos Settlement and the *Aamodt* Adjudication", and the "Taos Pueblo Water Rights Settlement" chapters in this edition of *Water Matters!*.

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 substan-

tially 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 that are being implemented; one Pueblo is in settlement talks; nine others are in litigation; and seven 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.

By Michael Osborn, Esq. (2008)
Latest Update by Darcy Bushnell, Esq. (2013)

Sources and Contributors

Statutes

Claims Resolution Act of 2010, Title VI, Pub. L. No. 111-291, 124 Stat. 3122.

McCarran Amendment of 1952, 43 U.S.C. § 666.

Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991.

Treaty of Guadalupe Hidalgo of 1848, art. III, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922.

Cases

Arizona v. California, 373 U.S. 546 (1963).

State of New Mexico, ex rel. State Engineer v. Aamodt, et al., 66cv6639 (D.N.M.) (Rio Pojoaque; Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque).

State of New Mexico, ex rel. State Engineer v. Abbott, et al., 68cv07488 & 70cv08650, consolidated (Rio Santa Cruz and Rio de Truchas; Ohkay Owingeh aka San Juan Pueblo).

State of New Mexico, ex rel. State Engineer v. Abeyta and Arellano, et al., 69cv07896 & 69cv07939 (Rio Pueblo de Taos and Rio Hondo; Taos Pueblo).

State of New Mexico, ex rel. State Engineer v. Abousleman, et al., 83cv01041 (D.N.M.) (Rio Jemez; Pueblos of Jemez, Santa Ana, and Zia).

State of New Mexico, ex rel. State Engineer v. Aragon, et al., 69cv7941 (D.N.M.) (Rio Chama; Ohkay Owingeh aka San Juan Pueblo and Jicarilla Apache Nation.

State of New Mexico, ex rel. State Engineer v. Kerr McGee Corp., et al., 83-190 CV & 83-220 CV, consolidated, Thirteenth Judicial District of New Mexico (1983) (Rio San Jose; Pueblos of Laguna and Acoma).

State of New Mexico, ex rel. State Engineer v. USA et al., 75cv184, Eleventh Judicial District of New Mexico (1975) (San Juan River; Navajo Nation, Jicarilla Apache Nation, and Ute Mountain Ute Nation).

United States v. A&R Productions, et al., 01cv00072 (D.N.M.) (Zuni River; Pueblo of Zuni and Navajo Nation).

Winters v. U.S., 207 U.S. 564 (1908).

Other

Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 Nat. Resources J. 399. (2006).

John R. D'Antonio Jr., P.E., State Engineer, and Estevan R. López, P.E., Director of Interstate Stream Commission, *Indian Water Rights Settlement Update* (presented to N.M. Legislature Interim Indian Affairs Committee, Jul. 2011), **http://www.nmlegis. gov/lcs/handouts/iacjul21.11stateengineer.pdf**

Pete Domenici, U. S. Sen. (R-NM), Press Release (Jun. 1, 2007).

Stephen H. Greetham, Water, Property, and Authority: Balancing Sovereign Interests in New Mexico (2005) (unpublished manuscript, on file with the author).

Judith V. Royster and Michael C. Blumm, Native American Natural Resources Law (2002).

N.M. Office of the State Engineer,

Native American Water Issues, **http://www.ose.state.nm.us/special_projects_nawrp.html**

Settlements**, http://www.ose.state.nm.us/legal_ose_proposed_settlements.html**

N.M. State Water Plan (2003), **http://www.ose.state.nm.us/publications_state_water_plans.html**

Utton Transboundary Resources Center,

Paul Bossert, Esq., The Rio Jemez: Background Papers on Adjudication Proceeding and Water Rights Issues, (2004), **http://uttoncenter.unm.edu/pdfs/rio_jemez_background_papers.pdf**

Darcy Bushnell, Esq., American Indian Water Rights Settlements (2012), **http://uttoncenter.unm.edu/pdfs/American_Indian_Water_Right_Settlements.pdf**

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