

Nambé, Pojoaque, San Ildefonso, and Tesuque Pueblos' Settlement

“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

2014 Status Bar

Pueblos' Water Rights - Court

- Aug. 8, 2014 Court enters procedural order re Objections proceedings. Requires parties to sign up for electronic service of court documents.
- Apr. 7, 2014 Objections deadline. Nearly 800 filed.
- Feb.–Apr. 2014 Public meetings, workshops and office hours held to inform claimants about requirements of Order to Show Cause (OTSC).
- Jan. 2014 OTSC, Objection, and Acceptance forms mailed to nearly 7,000 claimants.
- Dec. 2013 Court enters OTSC why it should not adopt the Pueblos' Water Rights Settlement and enter the Final Decree.

Pueblos' Water Rights - USBR

- Significant progress on planning and designing Regional Water System.
- Pilot water treatment plant study begun
- Photos and surveys of topography completed
- Surveys for cultural resources, species, and existing structures completed
- Studies on soil properties completed
- USGS and USBR continue to study long-term storage options.
- Inventory of existing infrastructure begun
- EIS started in 2012 continues

Non-Pueblos Water Rights

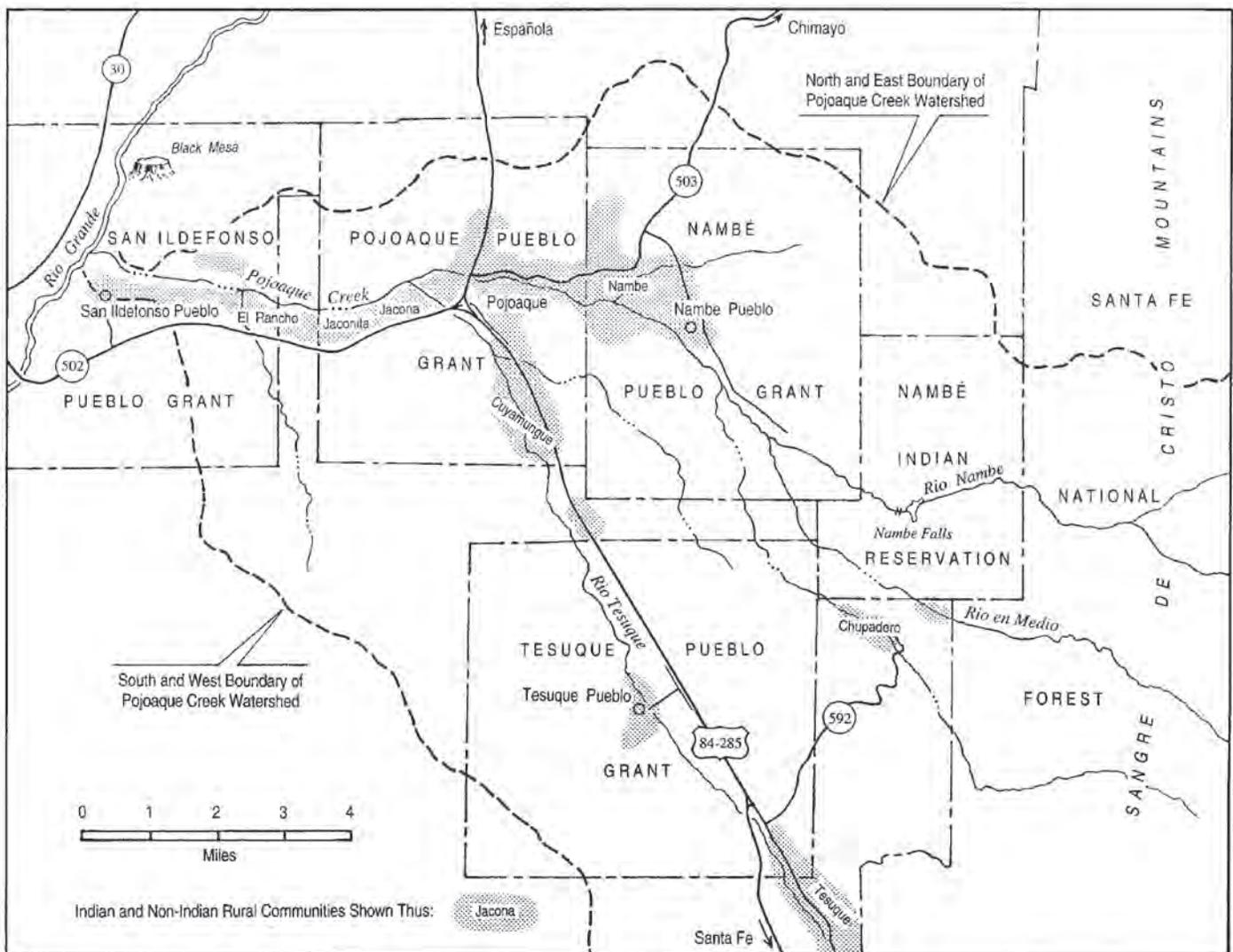
- Well adjudication continues.
- Court orders briefing on shared wells issue.

The “Aamodt case” is a complex, long-running adjudication of water rights in the Pojoaque River watershed northwest 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.* The parties include the State, through the State Engineer, about 5,600 non-Indian claimants, the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque, and 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 water rights of non-Indians and government agencies for irrigation, domestic, and commercial uses as well as the federal water rights of the Pueblos to historic, present, and future uses.

In 2006, after many decades of litigation and six years of negotiations, the settling parties completed and sent the *Aamodt* Litigation Settlement (Settlement) to Congress for approval and funding. The Settlement recognizes the Pueblos' water rights and provides benefits for the non-Pueblo communities. Congress's approval of the settlement was granted in the 2010 Claims Resolution Act. This Act also authorized several other tribal water right settlements. After the parties reconciled the Settlement with the Claims Resolution Act, the Settlement was signed by the Secretary of the

Interior, Pueblo leaders, and state officials on March 14, 2013. Then the implementation phase began.

Implementation of this Settlement involves several steps which include, but are not limited to, completion of the *inter se* phase for the Pueblos' water rights and entry of a final decree; completion of the non-Indian domestic wells, the *inter se* phase for the non-Indian water rights, and entry of their final decree; completion of the Environmental Impact Statement by the Bureau of Reclamation; completion of several key documents; and the construction of a



**Pojoaque Creek Watershed
(Aamodt Adjudication)**

By Jerold Widdison
for the Utton Transboundary Resources Center.

regional water system. Construction of the system depends on the adoption of the settlement by the Court.

Today the Court is conducting the *inter se* phase for the Pueblos' water rights; the state is conducting the adjudication of domestic wells; Reclamation is conducting the environmental compliance studies; and the settlement parties are working on the key documents.

The Court must enter the final decrees by September 15, 2017.

Background for the Adjudication

Aamodt has its roots in the planning of the San Juan-Chama Diversion Project during the 1960s. These plans allocated modest quantities of San Juan-Chama imported water to several northern watersheds that feed the Rio Grande. The Rio Pojoaque Basin was one of these "tributary irrigation units." These watershed areas were to receive the proposed new water by diversion from the Rio Grande or by substitution and/or exchange.

Infrastructure projects were proposed for the tributary units. All except the project in the Rio Pojoaque stream system 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 Pojoaque Valley Irrigation District and the Pueblos of San Ildefonso, Nambé, and Pojoaque.

In order to properly distribute and account for the imported water, the Office of the State Engineer (OSE) initiated water right adjudications to create water use inventories on each of the northern major tributaries to the Rio Grande. 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 courts. That concept was not fully understood in the late 1960s, so these tributary cases were filed in federal court.

The *Aamodt* case was the first of the major tributary watershed adjudications to be filed

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in federal court in New Mexico. The OSE finished the hydrographic survey of non-Indian surface-water rights and filed it with the federal court shortly after the case began in 1966.

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 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. For more information, please see the chapter "Adjudications" in this edition of *Water Matters!*.

Non-Indian Claims

The elements of non-Indian water rights are determined under state law. These rights have a priority of 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 also should be adjudicated. Consideration of these claims began in the 1980s and is nearing an end today. The court has entered subfile orders for most of the domestic well rights, and the

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focus is now on determining the unusual water rights, such as multi-household wells, and any newly discovered domestic well rights which tend to have pre-basin water rights.

The court has limited water use in some non-Pueblo 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 joined this settlement.

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 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 legal foundation for determining the

Pueblos’ water rights. Pueblos primarily own land grants 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 purposes of the reservation. For tribal reservations, that measure has typically been 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 land grant water rights because these lands have always been owned by the Pueblos, were never a part of the public domain, and because the Treaty of Guadalupe Hidalgo of 1848 preserved the property rights of owners of land grants. 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 prior to European colonization, 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 their land grants before anyone else, unless the Pueblo and non-Indian communities together make other arrangements.

The court also held that the Pueblos’ irrigation rights within the land grants 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, so the legal merits of HIA 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. Following several years of inconclusive litigation over replacement water right issues, the parties turned to settlement negotiations in 2000.

Settlement

The *Aamodt* settling parties, seven governmental entities, including the state, and representatives from the non-Indian community, began negotiations 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 address non-Indian communities’ concerns and to remove the mandatory provision for water-system hookup. 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 and sent it to Congress. For more information about the settlement process, please see the chapter “American Indian Water Right Settlements” in this edition of *Water Matters!*.

In the spring of 2010, the Stell Ombudsman Program conducted eleven public meetings for the County of Santa Fe to explain the settlement agreement. In December of 2010, Congress passed the Claims Resolution Act, which approved the *Aamodt* and other settlements, and the President signed it into law. The parties then adjusted the 2006 Settlement Agreement to conform to the Act, and in March of 2013, the agreement was formally signed by the Secretary of the Interior, Pueblo leaders, and state officials. In the early months of 2014, the Stell Ombudsman Program held thirty

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public meetings and office hours for the county of Santa Fe to explain the settlement agreement. Other interests also held public meetings.

The key provisions of the *Aamodt* settlement include:

- constructing a regional water system;
- providing non-Indians with 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 entry of a Pueblo final decree by the court;
- metering all water uses in the basin;
- limiting Pueblo water use; and
- 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 for Pueblo consumptive use. Santa Fe County is allowed to “piggy back” on the system with an extension to serve non-Pueblo domestic well owners who choose to connect and all future water development. The county portion of the system will accommodate up to 1,500 acre-feet per year. The county must make its sizing decision by September of 2017. Water for the regional water system 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 Project. The Bureau of Reclamation will build the system.

Claims Resolution Act, Congress appropriated \$81.8 million of the federal contribution and authorized an additional \$92.5 million.

The imported water is important to both Pueblos and non-Indians because it will reduce the current stress on the local aquifer by alleviating dependency upon local 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 infrastructure, 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 that cannot continue to be satisfied from available groundwater resources.

Project Authorization and 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 is 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. When originally proposed in 2007, this fund was intended to serve as the major federal funding vehicle for the three Indian water rights settlements in New Mexico: Navajo (San Juan River), *Aamodt* (Nambé, Pojoaque, and Tesuque stream systems), and *Abeyta* (Rio de Taos and Rio Hondo stream systems). The fund offers some potential funding 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 2011, the 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. No funding was appropriated in 2014. The State's total contribution will be \$130 million for the three settlements. This amount will be increased through indexing for inflation.

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; and
- allocates over 6,100 acre-feet of water to the Pueblos with various priority dates.

Implementation of the settlement and construction of the regional water system have begun. Reclamation has developed implementation plans, schedules, and milestones. It meets regularly with the settlement parties and the public as they negotiate the various agreements and processes required to carry out the project.

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 proposed decree before the court decides whether to enter it.

Some non-Indians are opposed to the settlement. Just short of 800 objections were filed by the court deadline of April 17, 2014. They are concerned about the new system's water delivery costs, property tax implications, regulation, the adequacy of notice about the *inter se* phase, 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 withdrawals. 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 can end 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 United States District Court and undergo any subsequent appeals.

On December 3, 2013, the court entered an "Order to Show Cause" why it should not enter the decree. This order launches the *inter se* phase of the Pueblos' case. Objections to or acceptances of the settlement of the Pueblos' water right must be filed by April 7, 2014. At the same time, accepting parties who have domestic wells are required to make an

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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. (2009)

election about the future use of their wells and whether they will hook up to the county's part of the regional water system. The Utton Center's Stell Ombudsman Program will conduct up to 16 public meetings, workshops, and will hold office hour sessions to help the public understand the process and the choices that they will need to make.

Project Construction

Reclamation is building the Regional Water System. In September of 2012, Reclamation awarded the contract for completing an environmental impact statement to EMPSi, an environmental management and planning business with offices in Santa Fe. EMPSi has

held several public meetings to inform people about the development of the environmental impact statement. In early 2013, Reclamation began collecting engineering and design information in the Pojoaque Basin. Public scoping meetings started in April of 2013 and continue today. 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.

By Paul Bossert, Esq. (2009)

Latest Update by Sarah Armstrong, University of New Mexico School of Law, Class of 2015 (2013)

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