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Richard W. Hughes

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Richard W. Hughes\*

## **PUEBLO INDIAN WATER RIGHTS: CHARTING THE UNKNOWN**

### **ABSTRACT**

*This article examines the so-far-unsuccessful efforts to judicially define and quantify the water rights appurtenant to the core land holdings of the 19 New Mexico Pueblos, many of whose lands straddle the Rio Grande. It explains that the Tenth Circuit Court of Appeals has squarely held that Pueblo water rights are governed by federal, not state law, and are prior to those of any non-Indian appropriator, but also that the Tenth Circuit acknowledged that it could not say how those rights should be characterized. Part I of the article examines the course of the cases that have sought to achieve this elusive goal. Of the first six cases, filed half a century ago, three ended in negotiated settlements and none of them has yielded a definitive ruling on the nature or measure of Pueblo rights. Of the three cases filed since then, only one is in active litigation on the Pueblo rights issue, but that case may finally lead to a substantive ruling. Part II discusses the few rulings that have been issued in these cases so far relative to Pueblo water rights, and examines the distinctive nature of the issues that are presented by the unique circumstances of the Pueblos' history and landholdings. The article notes that the ultimate determination of the nature and measure of Pueblo rights could have dramatic consequences for any effort to adjudicate rights on the mainstem of the Upper and Middle Rio Grande.*

### **INTRODUCTION**

Despite 50 years of litigation, there is still no clear court ruling on the nature or measure of the water rights appurtenant to the core land holdings of the Pueblo Indians of New Mexico—the Pueblos' "Spanish grant" lands. The only proposition that is generally supported by the few substantive court rulings that do exist is that those lands do not have federally reserved, or "Winters"-type rights appurtenant to them. In the late 1960s, the New Mexico State Engineer instituted

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six suits to adjudicate tributary rights in the northern Rio Grande Basin, including the rights of seven of the eight northern Pueblos. Only one of those cases ever generated a reported decision purporting to characterize the Pueblos' water rights, and as will be explained below, many believe that this decision is deeply flawed.

The lack of a clear ruling as to the nature and measure of the Pueblos' rights plainly disadvantages the Pueblos when water rights settlement talks get underway, as they have in all of the six actions filed in the 1960s (and in two of the three Pueblo water rights cases filed since then). With this uncertainty, the Pueblos have no way of assessing the relative value of a possible settlement as against the quantity of water rights they could reasonably expect to be awarded in litigation. Moreover, the uncertainty of the possible extent of Pueblo water rights claims casts a long shadow over the prospect of an adjudication of the mainstem of the Rio Grande, as there are nine Pueblos whose Spanish grant lands border or straddle the Rio Grande.<sup>1</sup> If, as the Pueblos contend in at least the one pending tributary case where their rights are still being litigated, their lands turn out to have appurtenant water rights that are not limited to what the Pueblos used historically, those rights—which plainly have a priority superior to that of any non-Indian water user—could seriously impact non-Indian appropriations from the Rio Grande.

This article first discusses the history of the original six cases filed by the State Engineer, and of the three subsequently filed cases, that have involved the adjudication of Pueblo rights. It then examines the one reported opinion and the few other unpublished opinions that discuss the nature of Pueblo rights. Finally, it examines the outstanding legal issues governing Pueblo rights and the contentions as to those issues made by the United States and the Pueblos, as well as by the State and the non-Indian water users, in the case in which litigation is ongoing. The article concludes with some thoughts about the implications of this case for the possible adjudication of the mainstem of the Rio Grande.

## I. THE HISTORY

In the mid-1960s, the New Mexico State Engineer, Steve Reynolds, directed his chief counsel, F. Harlan Flint, to initiate general stream adjudications, pursuant to NMSA 1978 Sections 72-4-15 to -20 (1907, as amended through 1965), on six tributary systems of the upper Rio Grande.<sup>2</sup> These adjudications anticipated

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1. Actually, counting Taos, there are ten, but in the settlement of the adjudication of Taos Pueblo's rights in the Rio Lucero and Rio Pueblo de Taos, discussed in the article, Taos agreed to relinquish any claims to water rights in the mainstem. See Claims Resolution Act of 2010, Pub. L. No. 111-291, § 510(a)(2), 124 Stat. 3064, 3131. Considering that Taos's grant lands bordering the mainstem all lie about seven hundred feet above the river, that concession was probably not a particularly substantial one.

2. The cases, in order of their filing, are as follows:

- New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. filed Apr. 20, 1966) (adjudicating the Rio Pojoaque-Rio Tesuque-Rio Nambé);
- New Mexico *ex rel.* State Eng'r v. Abbott, No. 68-CV-7488 (D.N.M. filed Mar. 22, 1968) (adjudicating the Rio Santa Cruz);
- New Mexico *ex rel.* State Eng'r v. Abeyta, No. 69-CV-7896 (D.N.M. filed Feb. 4, 1969) (adjudicating the Rio Pueblo de Taos);

the completion of the San Juan–Chama transbasin diversion project, which was authorized by Congress in 1962 to divert up to 235,000 acre-feet per year (AFY) of Upper Colorado River Basin water from tributaries of the San Juan River in Colorado and northern New Mexico into the Rio Grande Basin.<sup>3</sup> Reynolds wanted to assure cities and counties contracting for San Juan–Chama Project water that this water would not be intercepted by other users between El Vado Dam, on the Rio Chama,<sup>4</sup> and delivery points on the Rio Grande. Moreover, Sen. Dennis Chavez of New Mexico had conditioned his approval of the diversion project on there being some benefits for the New Mexico Pueblos, in the way of tributary projects that would make use of San Juan–Chama water. Determining the water rights on the Rio Chama, Reynolds hoped, would help give the contracting entities the assurance they wanted, that their water would not be hijacked en route. The proper administration of Chavez’s tributary projects also necessitated determinations of the rights on those tributaries. As it happened, moreover, Reynolds was in the process of completing a general stream adjudication in the Gila River Basin in southwestern New Mexico—a proceeding that had taken fewer than five years from hydrographic survey to final decree—and he thought he would be able to accomplish something similar with the upper Rio Grande tributaries.<sup>5</sup>

Reynolds’ hopes that these proceedings would quickly determine tributary rights and possibly set the stage for a mainstem adjudication, however, would turn out to be wildly unrealistic. All of the cases Flint filed outlived Reynolds, Flint’s successor Paul Bloom, and a great many other lawyers, judges, and water users. The problem was that they included the adjudication of the tributary water rights of all but one of the eight northern Pueblo Indian tribes: Taos, San Juan (now known as Ohkay Owingeh), Santa Clara (except for Santa Clara’s rights to Santa Clara Creek), San Ildefonso, Pojoaque, Nambé, and Tesuque.<sup>6</sup> Until that time, there had

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- New Mexico *ex rel.* State Eng’r v. Arellano, No. 69-CV-7939 (D.N.M. 1969) (adjudicating the Rio Hondo) (consolidated with *Abeyta*);
  - New Mexico *ex rel.* State Eng’r v. Aragon, No. 69-CV-7941 (D.N.M. filed Mar. 4, 1969) (adjudicating the Rio Chama);
  - New Mexico *ex rel.* State Eng’r v. Acequia del Alto de la Acequia del Llano Community Ditch Assoc., No. 70-CV-8650 (D.N.M. 1970) (adjudicating the Rio Truchas) (consolidated with *Abbott*).

Additionally, in 1972, when the Bureau of Reclamation was considering whether to construct the proposed Cerro Unit of the San Juan–Chama Project, the State filed New Mexico *ex rel.* State Eng’r v. Molycorp, Inc., No. 72-CV-9280 (D.N.M. 1972), an adjudication of the Red River system, which would have been affected by the Cerro Unit. Ultimately, Reclamation concluded that the Cerro project was not feasible, but the case proceeded to its conclusion, with entry of a final decree on December 1, 2000. Of course, the Red River is not burdened with any Pueblo claims.

3. Act of June 13, 1962, Pub. L. No. 87–483, 76 Stat. 96. That Act also authorized construction of the Navajo Indian Irrigation Project.

4. The San Juan–Chama diversion tunnel delivers the water into Heron Reservoir, on a tributary of the Chama, whence it flows into El Vado Reservoir on the Chama.

5. G. Emlen Hall, *Adjudication Nightmares in New Mexico 2–4* (Oct. 17, 2008) (unpublished manuscript).

6. Because there were no San Juan–Chama-related projects or effects there, no adjudication was filed on the Rio Embudo-Rio Santa Barbara-Rio Pueblo system, in which the Pueblo of Picuris is situated.

been no judicial determination of the measure of Pueblo Indian water rights appurtenant to the Pueblos' "Spanish grant" lands.<sup>7</sup>

Reynolds undoubtedly still had fresh in his mind the Supreme Court's decision in *Arizona v. California*,<sup>8</sup> in which the Court adopted the "practicably irrigable acreage" (PIA) standard as the measure of federally reserved water rights for the five Indian tribes on the mainstem of the lower Colorado River. Based on that standard, the Court awarded those tribes rights totaling nearly one million AFY, more than thirteen percent of the 7.5 million AFY of the surface flow of the Colorado River that had been allocated to the Lower Colorado Basin states—Arizona, California, and Nevada—by the Colorado River Compact.<sup>9</sup> Reynolds earnestly wanted to thwart the possibility that any such ruling might be applied to the Pueblos' lands in the already over-appropriated Rio Grande basin; but the actual task of determining what rights the Pueblos hold has turned out to be an excruciating process, Byzantine in its complexities and hugely frustrating in its glacial pace.<sup>10</sup> Although settlements were recently approved by Congress in three of the original six cases filed by Flint nearly half a century ago, final implementation of those settlements will take many years; there is yet no end in sight in the other three cases. All of this litigation purporting to describe the

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7. Nearly all of the New Mexico Pueblos' core land holdings are what were believed to be Spanish land grants, most of which were confirmed by Congress in 1858. *See* Act of December 22, 1858, ch. 5, 11 Stat. 374. Santa Ana's "grant" was confirmed by the Act of February 9, 1869, ch. 26, 15 Stat. 438. Laguna's "grant" was rejected by the Court of Private Land Claims, in *Pueblo of Laguna v. United States*, No. 133 (Ct. Private Land Claims April 20, 1898), but the court confirmed a Pueblo "League" for Laguna. A purported grant to Zuni Pueblo was confirmed by Congress by the Act of March 3, 1931, ch. 438, 46 Stat. 1509. Most of these "grants" were documents dated 1689, that purported to be land grants made by Spanish Governor Don Domingo Jironza Petriz de Cruzate, but it has since been concluded by all the historians who have considered the question that these documents are not authentic 1689 documents. *See, e.g.* EBRIGHT, HENDRICKS & HUGHES, *FOUR SQUARE LEAGUES: PUEBLO INDIAN LAND IN NEW MEXICO* 205–34 (2014) [hereinafter EBRIGHT ET AL.]. They appear to have been created in the early 1850s, but by whom, and for what reason, remains one of the great mysteries of New Mexico history. A number of the Pueblos had no grant documents, but for those Pueblos Congress nonetheless confirmed standard Pueblo "Leagues," a measure of land that was the acknowledged minimum entitlement of each Pueblo under Spanish law. *Id.* at 11–47. The confirmations were based on testimony procured by the Surveyor General of New Mexico that each such Pueblo had once had a paper grant but had lost it. A Pueblo League is a square, two Spanish leagues, or about 5.2 miles, on each side, centered on the Spanish mission in the Pueblo. Sandia Pueblo, which was abandoned in the years after the Pueblo Revolt, but was reestablished in 1748, is the one Pueblo that holds an unquestionably authentic paper Spanish grant, which was also confirmed by Congress in the 1858 legislation.

Notwithstanding these circumstances, these core land holdings will hereinafter be referred to as the Pueblos' Spanish grant lands. It is the nature and measure of the water rights appurtenant to these lands that is the focus of this article.

8. *Arizona v. California*, 373 U.S. 546, 600–01 (1963).

9. Act of August 19, 1921, ch. 72, 42 Stat. 171. The Compact allocation was based on the assumption that the average natural flow of the river was at least 16.5 million AFY, of which 1.5 million AFY was allocated to Mexico and the rest was divided equally between the Upper and Lower Basins. It is now generally agreed that that estimate was too high by at least fifteen percent.

10. In a brief filed in the *Abeyta* (Taos) litigation in late 1991, the Town of Taos and certain non-Indian defendants called the nature, extent and priority of Pueblo Indian water rights "the most tormented issue in the complex stream adjudication suits involving the New Mexico Pueblos." Memorandum in Support of Motion for Partial Summary Judgment, *New Mexico v. Abeyta*, No. 69-CV-7896 & No. 69-CV-7939, at 39 (D.N.M. Dec. 18, 1991).

Pueblos' water rights has produced only one reported district court decision, and that decision—which was never tested on appeal, as will be explained below—contains much language that appears to be highly favorable to the Pueblos, but ultimately imposes limitations on Pueblo rights that the court appears to have made out of whole cloth, and that not even the State has supported in later briefing.

One of the cases, the adjudication of the Rio Chama, *New Mexico v. Aragon*,<sup>11</sup> had originally been filed in state court but was removed to federal court by the United States. Flint filed all of the other cases in federal court, reportedly the result of a deal struck between State and Pueblo lawyers: if the State filed the suits in federal courts the Pueblos would not contest jurisdiction,<sup>12</sup> as they most certainly would in state court.<sup>13</sup>

#### A. *New Mexico v. Aamodt*

Although proceedings for the mostly noncontroversial determination of non-Indian rights on each Upper Rio Grande tributary stream proceeded fairly methodically in each case, the process of deciding the issues regarding the Pueblos' rights essentially languished in all but one case. The exception was the first of the cases filed, *New Mexico v. Aamodt*.<sup>14</sup> That case sought adjudication of all rights to the admittedly scarce surface waters and groundwater within the Rio Pojoaque-Rio Tesuque-Rio Nambé stream system, the basin located immediately north of Santa Fe, New Mexico. As the Tenth Circuit Court of Appeals observed, “[s]ubstantially all of the drainage area [of the stream system] is within the boundaries of the San Ildefonso, Pojoaque, Nambé, and Tesuque Pueblos.”<sup>15</sup> But also within those boundaries reside nearly 2,000 non-Indians, whose occupancy of Pueblo lands had been confirmed in the proceedings under the Pueblo Lands Act.<sup>16</sup> There are also several non-Indian communities within the basin, outside of the Pueblo grant lands. The non-Indian communities are virtual suburbs of Santa Fe and comprise a complex mixture of traditional northern New Mexican *Hispanos* and relatively recently-arrived Anglos. Regardless of the exact makeup, all community members

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11. *New Mexico ex rel. State Eng'r v. Aragon*, No. 69-CV-7941 (D.N.M. filed Mar. 4, 1969).

12. Hall, *supra* note 5, at 5. At the time, the Pueblos were “represented” by Tom Garrity, an attorney in the Department of the Interior’s Office of the Field Solicitor, in Albuquerque. Few Pueblos then had lawyers, or could afford them. *Id.*

13. In 1976, the Supreme Court held, in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), that the policy evinced by the so-called “McCarran Amendment,” 43 U.S.C. § 666 (2012) (so-named for its sponsor, the famously conservative Senator Pat McCarran of Nevada), by which the United States waived its immunity for purposes of joinder in general stream adjudications, applied equally to claims by the United States on behalf of Indian tribes to federally reserved rights, and warranted federal courts abstaining from hearing such cases, in favor of their proceeding in state courts, at least where state law provided a procedure for comprehensive basin-wide water rights adjudications. The Court later held that that doctrine applied even in states (like New Mexico) whose organic documents expressly waived jurisdiction over Indian lands. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). In the mid-1960s, however, these propositions were matters of pure speculation.

14. *New Mexico ex rel. State Eng'r v. Aamodt*, No. 66-CV-6639 (D.N.M., filed Apr. 20, 1966).

15. *New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976).

16. Act of June 7, 1924, ch. 331, 43 Stat. 636. For a detailed discussion of the proceedings under the Pueblo Lands Act, that allowed so many non-Indians to continue to reside within Pueblo grant boundaries, see EBRIGHT ET AL., *supra* note 7, at 267–91.

treasured their semi-rural farms and gardens, watered by old acequias. The *Aamodt* case became the venue for a long, fierce, hugely expensive battle over the nature and measure of Pueblo water rights. The case outlived several lawyers and special masters and two federal judges assigned to hear it, but it ultimately failed to deliver a clear determination of Pueblo rights.

The four Pueblos and the United States were named as defendants in *Aamodt*, but to eliminate any uncertainty as to its status, the United States moved to intervene, both in its proprietary capacity as owner of the Santa Fe National Forest<sup>17</sup> and as guardian of the four Pueblos, but also as a plaintiff in the case.<sup>18</sup> The court allowed the intervention, and at the same time realigned the four Pueblos as plaintiffs, with the Pueblos continuing to be represented by counsel for the United States.<sup>19</sup> But the Pueblos eventually perceived that the United States had a conflict of interest in claiming to represent them while it was also seeking to establish rights for the Santa Fe National Forest, which lies upstream of the Pueblo lands. With this argument, they persuaded the Commissioner of Indian Affairs that the United States should pay the costs of private counsel to represent each Pueblo in the case. The Pueblos' new counsel then appeared in the case before the special master beginning in April 1974, participated in a trial that occurred in the summer of that year, concerning applicable law, and in November 1974, filed a joint complaint-in-intervention.

When the court learned that the special master had allowed the Pueblos' counsel to appear separately, however, it sent a letter to counsel announcing that the Pueblos would not be permitted to be represented in the case by separate counsel. The Pueblos sought reconsideration of that determination, but at a hearing on December 2, 1974, Judge H. Vearle Payne adhered to his position and entered an Order to that effect, and struck the complaint-in-intervention that the Pueblos had tried to file in November.<sup>20</sup>

Earlier in the case, the State had moved for summary judgment, asking for a ruling that the Pueblos' water rights were governed by the state law of prior appropriation. The special master who had been appointed to hear proceedings in the case, Edward Yudin, denied the motion, and the State sought review by Judge Payne. Judge Payne affirmed the special master's decision in a letter to counsel

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17. The headwaters of the Rio Pojoaque-Rio Tesuque-Rio Nambé stream system are located in the Santa Fe National Forest.

18. See Hall, *supra* note 5. This unusual circumstance arose, again according to Prof. Hall, as a result of an agreement between the lawyers for the State and the United States' and the Pueblos' lawyers, to avoid a potentially serious question of how a federal court could have jurisdiction over a state-initiated general stream adjudication. With the United States as a plaintiff, federal court jurisdiction would be assured. 28 U.S.C. § 1345 (1948).

19. Order, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M., Feb. 13, 1967).

20. Order, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M., Dec. 6, 1974). Earlier in the litigation, the Pueblos of Santo Domingo and San Felipe had sought leave to intervene as parties, not only in Aamodt but also in the Rio Pueblo de Taos, Rio Santa Cruz, Rio Chama and Rio Hondo adjudications, claiming that their rights would be impaired were they not allowed to participate in these cases. Both Pueblos lie athwart the mainstem of the Rio Grande, well to the south of all of the basins as to which adjudications had been filed. Special Master Edward Yudin recommended that the motions be denied, and the court adopted that recommendation. Order, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M., Aug. 16, 1971).



dated July 6, 1973. But in a subsequent letter dated August 10, 1973, he announced his decision that the Pueblos' rights were in fact limited by the prior appropriation doctrine, a view the court reiterated in a letter dated August 28, 1973, though Judge Payne acknowledged in that letter that "these matters are not really before me at this time."<sup>21</sup> The special master, believing that he could proceed to consider other theories of the Pueblos' rights, held an 11-day trial in April and June 1974, receiving expert evidence on the nature of the Pueblos' rights. In a letter dated September 17, 1974, however, Judge Payne indicated that while it was acceptable for the special master to receive tenders of evidence on other theories, he had intended that only evidence of the Pueblos' rights under prior appropriation should be admitted.<sup>22</sup> At a hearing in the case on December 2, 1974, Judge Payne signed an Order ruling specifically to that effect.<sup>23</sup>

The Pueblos appealed to the Tenth Circuit Court of Appeals from the order denying their right to be represented by separate counsel, and the United States obtained leave to take an interlocutory appeal from the ruling that the Pueblos' rights were governed by state law.

The Tenth Circuit opinion, by Judge Breitenstein, readily concluded that the Pueblos had a right to be separately represented in the case.<sup>24</sup> In considering the nature of the Pueblos' water rights, however, the court found the waters fairly muddy. The first argument it considered was the Pueblos' contention that they had federally reserved rights, such as were upheld in *Winters v. United States*<sup>25</sup> and *Arizona v. California*. The court noted that the Pueblos' grant lands had not been "reserved" by the United States, but were held by them in fee, pursuant to patents from the United States, based on congressional confirmations of what were understood to be titles acquired under Spanish colonial authority.<sup>26</sup> Indeed, the court viewed the Pueblos' fee titles to their lands as "logically inconsistent with the concept of a reserved right."<sup>27</sup> This reasoning compelled the conclusion that cases such as *Winters* and *Arizona* were "not technically applicable."<sup>28</sup> On the other hand, the court flatly rejected the arguments of the State and the non-Indian defendants that the effect of the Pueblo Lands Act and the 1933 Pueblo Compensation Act<sup>29</sup> was to place Pueblo rights under state law. Instead, it held that "[t]he United States has not relinquished jurisdiction and control over the Pueblos

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21. Brief for the United States at 3-4, *New Mexico v. Aamodt*, 537 F. 2d 1102 (10th Cir. 1976).

22. *Id.*, at 5-6.

23. Order, *New Mexico ex rel. State Eng'r v. Aamodt*, No. 66-CV-6639 (D.N.M., Dec. 2, 1974).

24. *New Mexico v. Aamodt*, 537 F.2d 1102, 1107 (10th Cir. 1976). The opinion treated the district court's action as one essentially denying the Pueblos leave to intervene.

25. *Winters v. United States*, 207 U.S. 564 (1907). *Winters* is generally cited for the proposition that when the United States sets aside public lands for any purpose, it impliedly reserves sufficient water from the unappropriated waters appurtenant to the land to serve the purposes of the reservation. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 138 (1976).

26. *See EBRIGHT ET AL.*, *supra* note 7, at 205.

27. *Aamodt*, 537 F.2d at 1111.

28. *Id.*

29. Act of May 31, 1933, ch. 45, 48 Stat. 108.

and has not placed their water rights under New Mexico law. . . . The water rights of the Pueblos are not subject to the laws of New Mexico.”<sup>30</sup>

The court paid particular attention to the effect of Section 9 of the 1933 Act on the issue of priority of the Pueblos’ rights. It concluded that Congress had intended to preserve prior rights for the Pueblos, stating: “A recognition of any priority date for the Indians later than, or equal to, a priority date for a non-Indian violates the mandate of Congress that nothing in the 1933 Act shall deprive the Pueblos to [*sic*] a prior right to the use of water.”<sup>31</sup>

But the court had no such clarity on the question of quantification of those rights, admitting, “[w]e do not know.”<sup>32</sup> In turn, the appellate court directed the district court’s attention to the Supreme Court’s decision in *Arizona v. California* (where the Court had adopted the “practicably irrigable acreage” standard for federally reserved rights), but otherwise offered no guidance.<sup>33</sup>

Following its return to the district court, the case was reassigned to District Judge Edwin L. Mechem, a former Governor of New Mexico. Over the next 25 years, trials were held before a special master on Spanish colonial law, Mexican law, and the Pueblos’ historically irrigated lands, among other issues. Judge Mechem issued at least sixteen separate opinions on different issues in the case before he passed away in 2002.<sup>34</sup> One of Judge Mechem’s opinions—issued

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30. *Aamodt*, 537 F.2d at 1111–12.

31. *Id.* at 1113.

32. *Id.*

33. *Id.*

34. The Memorandum Opinions and Orders filed in the case by Judge Mechem include the following: New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. June 10, 1983) (denying United States’ motion for summary judgment seeking determination that no non-Indian whose title derived from the Pueblo Lands Act had a priority date earlier than 1924, and discussing generally the effect of the 10th Circuit opinion); New Mexico *ex rel.* State Eng’r v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985) (determining the nature and measure of Pueblo rights; discussed in the next section of the text); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Jan. 24, 1986) (determining federal water rights appurtenant to Santa Fe National Forest lands); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Dec. 1, 1986) (denying State’s motion for contempt sanctions against Tesuque Pueblo for using more water for its trailer park than was allowed by a state permit, and finding that Tesuque’s rights were governed by federal law and not state law); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Feb. 26, 1987) (determining that water rights appurtenant to lands acquired for the Pueblos by the United States after 1924 to replace lands lost under the Pueblo Lands Act have immemorial priority; that Congress never extinguished Pueblos’ aboriginal rights; and that lands reserved for Pueblos by the United States have immemorial priority if within the Pueblos’ aboriginal areas, and the appurtenant water rights are determined by practicably irrigable acreage, unless the lands were expressly reserved for grazing purposes); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Feb. 26, 1987), Doc. 2977 (determining that non-Indians’ priorities would be determined based on when they or their non-Indian predecessors first applied water to beneficial use on the land, not based on the Pueblos’ immemorial priorities); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Apr. 28, 1987) (Findings of Fact and Conclusions of Law determining the quantities of historically irrigated acres on each Pueblo’s lands, as amended by Amended Findings of Fact and Conclusions of Law, New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Sept. 9, 1987), Doc. 3074; New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. May 1, 1987) (addressing quantification issues regarding rights appurtenant to acquired and reservation lands); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. May 3, 1989), Doc. 3283 (clarifying that water rights appurtenant to acquired lands are entitled to aboriginal priority only if lands were purchased with compensation awards paid to Pueblos under the 1924 and

on September 19, 1985, and reported at 618 F.Supp. 993—set forth the court’s views on the nature and measure of the Pueblos’ rights appurtenant to their grant lands. This decision remains the only reported federal court decision to characterize the Pueblos’ water rights; its novel and controversial conclusion will be discussed in the next section.

By early 2000, however, the parties had entered into facilitated settlement negotiations, and although those negotiations themselves had a long and somewhat tortuous path,<sup>35</sup> the complicated and costly deal was finally approved by Congress in 2010.<sup>36</sup> Subsequently, after the court issued an Order to Show Cause why the Settlement Agreement should not be approved,<sup>37</sup> more than 800 objections to the settlement were filed with the court. On March 21, 2016, the court issued its Order overruling the objections and approving the Settlement Agreement.<sup>38</sup> Two days later, it entered a Partial Final Judgment, formally adjudicating the rights of the Pueblos in accordance with the terms of the Settlement Agreement.<sup>39</sup> But

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1933 Acts); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Oct. 1, 1991) (denying Nambé Pueblo’s motion to call undeposed expert witness and to limit testimony of United States’ expert); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Dec. 29, 1993) (addressing issues regarding priority and quantification of rights appurtenant to reservation lands); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Jan. 17, 1997) (determining San Ildefonso’s reserved water rights for grazing on certain reservation lands); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Nov. 14, 1997) (granting Nambé Pueblo’s motion for partial summary judgment determining that the 1902 Nambé Reservation included reserved water rights for agricultural purposes, for which practicably irrigable acreage was the appropriate measure); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Apr. 14, 2000) (determining that 1924 Act did not extinguish aboriginal water rights, and that upon reacquisition of lands lost under that Act, the Pueblo’s aboriginal water rights as to such tracts are restored, regardless of means by which land was reacquired, and addressing other issues regarding rights appurtenant to reacquired lands); New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Jan. 31, 2001) (addressing issues relative to aboriginal rights and rights protected by Treaty of Guadalupe Hidalgo; restating court’s ruling as to effect of 1924 Act on Pueblos’ aboriginal rights); and New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. July 10, 2001) (rejecting Special Master’s recommended findings and conclusions determining that Nambé had no reserved water rights appurtenant to its lands).

Additionally, in late 2002 the State filed a motion for preliminary injunction against the Pueblo of Pojoaque, claiming that its development of two golf courses and its Buffalo Thunder Resort would cause it to consume about twice as much water as had been adjudicated to it in the court’s finding and conclusions of April 28, 1987, Doc. 3035. On June 30, 2003, Judge Martha Vázquez issued her Memorandum Opinion and Order, Doc. 6065, denying the State’s motion. *See* Memorandum Opinion and Order, New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. June 30, 2003).

35. *See, e.g.*, New Mexico *ex rel.* State Eng’r v. Aamodt, 582 F.Supp.2d 1313 (D.N.M. 2007) (granting motion to approve settlement agreement, after dealing with issues raised by objectors).

36. *See* Claims Resolution Act of 2010, Pub. L. No. 111–291, §§ 601–626, 124 Stat. 3064, 3134.

37. Order to Show Cause, New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-6639 (D.N.M. Mar. 3, 2016).

38. Memorandum Opinion and Order Approving Settlement Agreement, New Mexico *ex rel.* v. State Eng’r v. Aamodt, No. 66-CV-06639 WJ/WPL (D.N.M. Mar. 21, 2016).

39. Partial Final Judgment and Decree of the Water Rights of the Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque, New Mexico *ex rel.* State Eng’r v. Aamodt, No. 66-CV-06639 WJ/WPL (D.N.M. Mar. 23, 2016). Importantly, the terms of the *Aamodt* Litigation Settlement Act, at §§ 621(a) and 623(a)(2)(G) and (H), require that a final decree adjudicating the water rights of *all* of the parties to the case be filed by no later than September 15, 2017, or the Settlement Agreement will become void.

implementing the Settlement Agreement, including its keystone regional water system, will be a complex and lengthy process.

### **B. *New Mexico v. Abeyta***

The suits to adjudicate all rights to the waters of the Rio Pueblo de Taos and the Rio Hondo systems, including those of Taos Pueblo, were originally filed as two separate actions,<sup>40</sup> but they were consolidated under the name, *New Mexico v. Abeyta*.<sup>41</sup> That case actually got into active litigation during the 1980s over the measure of the Pueblo's rights. Still, after extensive briefing and expert reporting, nothing happened. The parties continued actively to address issues regarding rights of non-Indian parties, but neither the special master nor the district judge to whom the case was assigned ever issued an opinion on any of the Pueblo water rights issues, despite frequent nudging by the parties. By 1990, the parties entered into settlement discussions that ultimately yielded a settlement agreement. That agreement was approved by Congress in the same legislation that approved the *Aamodt* settlement.<sup>42</sup> On July 30, 2015, the court issued an opinion overruling objections and approving the settlement agreement.<sup>43</sup> Then, on February 11, 2016, it entered a Partial Final Judgment and Decree on the Water Rights of Taos Pueblo.<sup>44</sup> But that settlement, too, will require substantial further effort before it is fully implemented.

### **C. *New Mexico v. Abbott***

In the adjudication of rights in the Santa Cruz basin, *New Mexico v. Abbott*,<sup>45</sup> the two Pueblos mainly involved, Ohkay Owingeh and Santa Clara, only intervened in the late 1990s. In December 1998, the court entered a scheduling order, dividing the case into subproceedings for separate determinations of each Pueblo's rights.<sup>46</sup> Subproceeding 1 dealt only with the rights of San Ildefonso, Pojoaque and Nambé—each of which had a very small amount of land within the area covered by the adjudication—yet that subproceeding took five years to resolve by stipulation.<sup>47</sup>

40. *See supra* note 2.

41. *New Mexico ex rel. State Eng'r v. Abeyta*, No. 69-CV-7896 (D.N.M. filed Feb. 4, 1969).

42. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, §§ 501-513, 124 Stat. 3064, 3122.

43. Memorandum Opinion and Order, *New Mexico ex rel. State Eng'r v. Abeyta*, No. 69-CV-7896 (D.N.M., July 30, 2015).

44. Partial Final Judgment and Decree on the Water Rights of Taos Pueblo, *New Mexico ex rel. State Eng'r v. Abeyta*, No. 69-CV-7896 (D.N.M. Feb. 11, 2016).

45. *New Mexico ex rel. State Eng'r v. Abbott*, No. 68-CV-7488 & 70-CV-8650 (D.N.M. 1968). The Rio Truchas adjudication, *New Mexico v. Acequia del Alto de la Acequia del Llano Community Ditch Assoc.*, No. 70-CV-8650, was consolidated with *Abbot*, due to the existence of a substantial transbasin diversion in the upper reaches of the two basins, known as La Acequia de la Sierra. This ditch diverts water from the Rio Quemado, a tributary of the Santa Cruz, into the Rio de la Cebolla, a tributary of the Truchas.

46. Scheduling Order on Pueblo Claims, *New Mexico ex rel. State Eng'r v. Abbott*, No. CV-68-7488 & CV-70-8650 (D.N.M. Dec. 17, 1998).

47. The attorney for the United States, a composer of *haiku*, a highly structured form of Japanese verse, wrote the following to commemorate Subproceeding 1:

Subproceeding 2, to address the historic uses of Ohkay Owingeh,<sup>48</sup> got underway in early 2005. Ohkay Owingeh asserted relatively novel claims, supported by numerous expert reports, that it had aboriginal water rights in the amount of several thousand acre-feet per year appurtenant to much of the Santa Cruz and the entirety of the Truchas basins, an area well outside of its grant lands, and most of which encompassed lands that have been in private, non-Indian ownership for hundreds of years. To a large extent, these claimed rights were based on archaeological evidence of prehistoric rain-gathering techniques, such as cobble gardens and gravel mulch fields, features that have never before been accepted as a basis for adjudicated water rights. The Pueblo, the State, the United States, the City of Española, and the non-Indian acequias engaged approximately 30 experts, who were deposed in 2008 and 2009; extensive briefing on pre-trial motions followed. The case was set for trial in early 2011, but in late 2010 Ohkay Owingeh announced that it had entered into preliminary settlement discussions with the City and the non-Indian acequias, and wanted to postpone further proceedings in the case to pursue those discussions. The trial setting was vacated,<sup>49</sup> and all of the pending pre-trial motions were denied without prejudice by Judge Bruce Black.<sup>50</sup>

But on December 2, 2010, Ohkay Owingeh's chief trial counsel, Tim Vollmann, was tragically killed in a freak accident.<sup>51</sup> The Pueblo eventually retained other counsel, who after careful review of the case decided to continue with the settlement discussions. That process was again interrupted in mid-2012 when counsel for the Santa Cruz acequias, Fred Waltz, a long-standing well-regarded figure in northern New Mexico water cases, passed away suddenly.<sup>52</sup> Still, the Pueblo appears to be committed to trying to settle its claims in the case, rather than litigate them. The historic use claims of the Pueblo of Santa Clara are to be decided in Subproceeding 3,<sup>53</sup> but for now there is no way to know when that subproceeding might get underway. Otherwise, there has been no substantive ruling at all in the case relative to Pueblo rights.

#### D. *New Mexico v. Aragon*

Ohkay Owingeh is the only Pueblo involved in the *Aragon* case, the adjudication of rights on the Rio Chama. While the case has chugged along with

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Two stockponds, one well,  
and twenty-three acres make  
five years of *Abbott*.

48. Scheduling Order on Pueblo Claims at 5, ¶ 2.2, *New Mexico ex rel. State Eng'r v. Abbott*, No. CV-68-7488 & CV-70-8650 (D.N.M. Dec. 17, 1998).

49. Order Vacating Trial Date, *New Mexico ex rel. State Eng'r v. Abbott*, Nos. 68-CV-97488 & 70-CV-08650 (D.N.M. Nov. 24, 2010).

50. Order, *New Mexico ex rel. State Eng'r v. Abbott*, No. 68-CV-97488 & 70-CV-08650 (D.N.M. Jan. 5, 2011).

51. See Unopposed Motion to Vacate Pretrial Conference and Exhibit List Deadline, *New Mexico ex rel. State Eng'r v. Abbott*, No. 68-CV-7488 & 70-CV-8650 (D.N.M. Dec. 14, 2010).

52. See Notice, *New Mexico ex rel. State Eng'r v. Abbott*, No. 68-CV-7488 & 70-CV-8650 (D.N.M. May 22, 2012), Doc. 2918.

53. See Supplemental Scheduling Order on Pueblo Claims, *New Mexico ex rel. State Eng'r v. Abbott*, No. 68-CV-07488 & 70-CV-8650, (D.N.M. Oct. 1, 2004).

determinations of the water rights of the many non-Indian parties, there have been no opinions or even briefing of any issue relating to Pueblo water rights. The last scheduling order on the Subproceeding concerning Ohkay Owingeh's past and present water uses had set the trial on those uses to begin in July 2018,<sup>54</sup> but in late 2014, the parties filed a joint motion to vacate the trial setting and all pre-trial deadlines in order to facilitate settlement talks that had recently gotten underway. That motion was granted by Magistrate Judge Lorenzo Garcia on December 11, 2014.<sup>55</sup> As in *Abbott*, Ohkay Owingeh is now engaged in settlement talks with the State and the non-Indians, and seems committed to that path.<sup>56</sup>

#### E. *New Mexico v. Kerr-McGee*

Since the filing of the six Steve Reynolds-initiated actions, three other suits have been filed (and are currently pending) to adjudicate tributary water rights of some of the southern Pueblos.

By far the most interesting of these cases is a general stream adjudication of the Rio San José, a tributary of the Rio Puerco<sup>57</sup> that runs through the lands of Acoma and Laguna Pueblos.<sup>58</sup> The early history of the case was tortuous. In late 1982, the United States filed *United States v. Bluewater-Toltec Irrigation District*<sup>59</sup> in federal court, seeking a declaration of the water rights of the two Pueblos and claiming damages for trespass and injunctive relief. In 1983, in response to an order that the United States file a more definite statement, the government filed an amended complaint that, contrary to the terms of the original pleading, expressly purported to be a general adjudication of all rights in the Rio San José. Within weeks, two groups of defendants in the action separately filed complaints, pursuant to NMSA 1978, Section 72-4-17 (1965), for general stream adjudications in the state district court: *Kerr-McGee Corp. v. United States*<sup>60</sup> and *City of Grants v. United States*.<sup>61</sup> The United States removed both cases to federal court, then moved to dismiss them both for lack of subject-matter jurisdiction,<sup>62</sup> but in each case the plaintiffs filed motions to remand. In February 1984, Judge Bobby Baldock denied

54. Order Extending Pueblo Claims Schedule, New Mexico *ex rel.* State Eng'r v. Aragon, No. 69-CV-7941 (D.N.M. Apr. 11, 2013).

55. Order Granting Joint Motion to Vacate Orders Establishing Pretrial Deadlines, New Mexico *ex rel.* State Eng'r v. Aragon, No. 69-CV-7941 (D.N.M. Dec. 11, 2014).

56. *See, e.g.*, Joint Status Report, New Mexico *ex rel.* State Eng'r v. Aragon, No. 69-CV-7941 (D.N.M. June 8, 2016).

57. The Rio Puerco joins the Rio Grande south of Belen.

58. In the interest of full disclosure, the author notes that since early 2015, he has been one of counsel for the Pueblo of Laguna in this case.

59. *United States v. Bluewater-Toltec Irrigation District*, No. 82-CV-1466 (D.N.M. 1982) (cited in *United States v. Bluewater-Toltec Irrigation Dist.*, 580 F.Supp. 1434 (D.N.M. 1984)).

60. State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190 (N.M. 13th Jud. Dist. Ct., filed Aug. 15, 1983) (cited in *United States v. Bluewater-Toltec Irrigation Dist.*, 580 F.Supp. 1434 (D.N.M. 1984)).

61. *City of Grants v. United States*, No. CB-83-220-CV (N.M. 13th Jud. Dist. Ct. 1983) (consolidated with State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190 (N.M. 13th Jud. Dist. Ct., filed Aug. 15, 1983) (cited in *United States v. Bluewater-Toltec Irrigation Dist.*, 580 F.Supp. 1434 (D.N.M. 1984)).

62. Alternatively, it sought to have the cases consolidated with its *Bluewater-Toltec* suit.

the government's motion to dismiss, granted the motions to remand the two state court suits, and dismissed without prejudice the United States' original federal action<sup>63</sup>—largely relying on the McCarran Amendment<sup>64</sup> and the Supreme Court cases that have construed it.<sup>65</sup>

On their return to the state court, the two cases were consolidated as *State of New Mexico ex rel. State Engineer v. Kerr-McGee Corp.*<sup>66</sup> and the parties were realigned. The State thus became the sole plaintiff in the case. All other parties, including the United States, are defendants. There are now an estimated 1600 total defendants, though no more than about a dozen have actively participated in the litigation. In 1986, both Acoma and Laguna Pueblos intervened as defendants.

Unlike the procedure followed in the federal cases discussed above, in *Kerr-McGee* there has been practically no move to determine the water rights of the many non-Indian claimants, probably because the State has never prepared a hydrographic survey of the basin.<sup>67</sup> But the issues surrounding the water rights of the two Pueblos have been vigorously litigated. The Pueblos, and the United States on their behalf, claimed both federally reserved rights and aboriginal water rights. In late 1992, the special master appointed by the court to oversee the case, Lorenzo Garcia, issued a lengthy report and recommendation on a motion by the State for partial summary judgment. The special master ruled that both Pueblos had held aboriginal water rights,<sup>68</sup> but that those aboriginal rights had been extinguished when the Pueblos settled the claims they had brought against the United States under the Indian Claims Commission Act.<sup>69</sup> He also ruled that the *Winters* doctrine of federally reserved rights was inapplicable to their Spanish grant lands.<sup>70</sup> The

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63. *United States v. Bluewater-Toltec Irrigation Dist.*, 580 F.Supp. 1434 (D.N.M. 1984).

64. 43 U.S.C. § 666.

65. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *see supra* note 13.

66. *State of New Mexico ex rel State Eng'r v. Kerr-McGee Corp.*, D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. filed Aug. 15, 1983). Actually, Kerr-McGee Corporation, which was once a major uranium producer in New Mexico, effectively ceased to exist in 2006, when it was acquired by Anadarko Petroleum Corporation, but the caption of the case has never changed.

67. State statutory law on general stream adjudications requires that the state engineer prepare a hydrographic survey showing the water uses in a basin being adjudicated. *See* N.M. STAT. ANN. §§ 72-4-13, 72-4-17 (1965).

68. Special Master's Report and Recommendations at 43, *State of New Mexico ex rel State Eng'r v. Kerr-McGee Corp.*, D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Nov. 9, 1992). The State's motion had sought a ruling that no aboriginal rights had attached to the Pueblos' grant lands. *See id.* at 42. Special Master Garcia ruled that Laguna and Acoma "from 'time immemorial' had possession, occupancy and beneficial use of the land and water prior to the arrival of the Europeans in the mid-16th century," and that therefore, "[o]n the basis of the record in this proceeding, the Acomas and Lagunas did, indeed, acquire aboriginal title." *Id.* at 43.

69. *Id.* at 45. Act of August 3, 1946, ch. 959, 60 Stat. 1049, formerly codified at 25 U.S.C. §§ 70-70w (since repealed).

70. Special Master's Report and Recommendations, *supra* note 68, at 43. Special Master Garcia resigned his position immediately after he delivered the Report, as he had been appointed a United States Magistrate Judge.

district court adopted the special master's Report, but certified it for interlocutory appeal.<sup>71</sup>

The Pueblos and the United States appealed, and the New Mexico Court of Appeals reversed, in part.<sup>72</sup> It held that neither *res judicata* nor collateral estoppel arising from the Indian Claims Commission (ICC) case settlements barred the Pueblos' aboriginal water rights claims, nor had the State shown that the doctrine of "statutory preclusion" should apply on the ground that the Pueblos had been compensated for their water rights, since the records of the ICC cases gave no indication what the settlement amounts in each case were for.<sup>73</sup> This holding thus left the Pueblos free to claim water rights appurtenant to their retained lands. The Court of Appeals, however, took pains to note that it was expressing no opinion on what rights the Pueblos had.<sup>74</sup> Interestingly, the special master's ruling that the Pueblos held aboriginal rights prior to the filing of their ICC cases, which was adopted by the district court, was not appealed by any party. The appellate body nonetheless affirmed the district court's ruling that the Pueblos could not claim *Winters* rights for their grant lands, relying primarily on the 1985 district court decision in *New Mexico v. Aamodt*,<sup>75</sup> which will be discussed below.

Following remand, the case lay dormant for a few years,<sup>76</sup> until a new special master, former state District Judge George Perez, was appointed. In 2002, the special master issued an order establishing a special subproceeding solely to adjudicate the Pueblos' rights based on past and present uses of water,<sup>77</sup> and discovery commenced in earnest in 2005. At least 41 experts were identified, and they produced more than 70 reports between 2007 and 2012. Expert depositions consumed more than 180 days during 2011 and 2012. Thousands of documents were produced. In 2013, the special master issued an order setting six weeks of trial in the subproceeding, to begin in late 2014 and extending into 2015.<sup>78</sup> But in early 2014, the State, the United States, the two Pueblos, and certain other non-Indian parties asked the court to stay all pre-trial and trial dates for 90 days while they explored the possibility of settlement, and that request was granted.<sup>79</sup> At the end of

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71. Order and Judgment Adopting Special Master's Report and Recommendations and Denying Motion for Reconsideration, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 18, 1993).

72. New Mexico *ex rel*. Martinez v. Kerr-McGee Corp., 1995-NMCA-041, ¶¶ 1, 7, 120 N.M. 118.

73. *Id.* ¶¶ 12, 24, 27.

74. *Id.* ¶ 31.

75. *Id.* ¶ 31 (citing New Mexico *ex rel*. Reynolds v. Aamodt, 618 F.Supp. 993 (D.N.M.1985)).

76. In fact, in 1999 the case was dismissed by the district court for failure to prosecute, but it was reinstated the following year on the State's motion.

77. Order Granting Joint Motion to Establish an Expedited *Inter se* Proceeding to Adjudicate the Water Rights of Acoma Pueblo and Laguna Pueblo Based on Past and Present Uses of Water, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Sept. 23, 2002).

78. Seventh Pre-Hearing Scheduling Order, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Nov. 13, 2013).

79. Order Granting Stay for 90 Days, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Mar. 4, 2014).



that 90-day period, the parties requested a further six-month stay, indicating that the settlement talks were going well, a request that was also granted.<sup>80</sup>

In December 2014, the negotiating parties requested that the stay be extended for another six months, but Tri-State Generation & Transmission Association (Tri-State), an electric power wholesaler, opposed the request.<sup>81</sup> By then, Tri-State—which supplies power to rural electric cooperatives throughout northern New Mexico, eastern Colorado, and western Kansas—had become the most active opponent of the Pueblos' claims in the litigation. The special master denied the extension request and set trial to begin in December 2015.<sup>82</sup> The Pueblos, the United States, and the State appealed that decision to the district court,<sup>83</sup> but the district court affirmed the special master's decision at a hearing in May 2015.<sup>84</sup>

The parties then filed a raft of dispositive motions. Of particular interest was a Tri-State motion claiming that, according to several decisions of the New Mexico Supreme Court,<sup>85</sup> the water law of Spain and Mexico was based on prior appropriation. According to Tri-State's argument, under the terms of the Treaty of Guadalupe Hidalgo, the only water rights the Pueblos held from the period prior to the Treaty were those they could prove based on prior appropriation principles.<sup>86</sup> In all of the litigation over Pueblo water rights in New Mexico over the past half century, no party has ever made such a claim. There is also no historical basis for the proposition that prior appropriation formed any part of the water law of seventeenth or eighteenth century New Spain or nineteenth century Mexico.<sup>87</sup>

80. See Order Granting Stay of Litigation for Six Months, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. June 23, 2014).

81. Order Denying Stay of Litigation and Setting Trial Schedule at 1, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Dec. 17, 2014). Tri-State owns and operates the Escalante Generating Station near Prewitt, New Mexico, within the Rio San José basin, and it has permitted water rights, including both surface and groundwater, totaling more than 4000 AFY.

82. *Id.* at 1–2.

83. Court of Appeals Judge James J. Wechsler has been designated by the New Mexico Supreme Court as the Water Adjudication Judge for general stream adjudications in district courts throughout the state.

84. Order Denying Objections to Special Master's Order Denying Stay of Litigation and Setting Trial Schedule State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 29, 2015).

85. See Tri-State Generation and Transmission Association Inc.'s Motion and Memorandum of Points and Authorities for Judgment on the Pleadings on the United States' and Pueblos' Claims for Priorities and Quantification of Water Uses as of the 1848 Treaty of Guadalupe Hidalgo and Thereafter at 9, State of New Mexico *ex rel*. State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 29, 2015) (citing New Mexico *ex rel*. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 30, 125 N.M. 375.).

86. *Id.* at 7–8. Tri-State also argued in this motion that the only rights the Pueblos had acquired since the Treaty were acquired under the state's law of prior appropriation. *Id.* at 8–12. That argument seems contrary to the Tenth Circuit's ruling in *Aamodt I* that the Pueblos' water rights are governed by federal, not state law. See *New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976).

87. In *City of Las Vegas*, the State Engineer was challenging the City's contention that it held a "pueblo water right," a controversial concept that had been approved by the New Mexico Supreme Court in *Cartwright v. Public Service Co. of New Mexico*, 1958-NMSC-134, 66 N.M. 64, , under which

The United States, joined by Acoma and Laguna, filed a motion for partial summary judgment contending that Special Master Garcia's 1992 ruling that the Pueblos had aboriginal water rights was binding.<sup>88</sup> The State filed a motion arguing that Spanish and Mexican law had effectively limited Pueblo water rights to water actually being used by them.<sup>89</sup> A few other motions were filed by other parties. The motions were argued to the special master in October, 2015,<sup>90</sup> but there have been no rulings on any of them.

In the meantime, the State, the Pueblos, the United States, and certain non-Indian parties (but not Tri-State, which had exited settlement talks in early 2015) continued to engage in mediated settlement negotiations. Just prior to the October 2015 motions hearing, the parties filed for a further, six-month stay of pre-trial deadlines and trial dates.<sup>91</sup> The motion indicated that the settlement talks had been productive and that the negotiating parties believed they could have an agreement on major terms that counsel would recommend to their clients within that period. Though vigorously opposed by Tri-State, the motion was granted by the special master, moving the trial schedule to begin in August 2016 (and extending into

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a town chartered by the King of Spain (not an Indian Pueblo) possessed an infinitely expanding water right to all the water it needed from appurtenant sources. *See* New Mexico *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 24, 135 N.M. 375. The State put on five experts, historians of the Spanish colonial and early Mexican periods, all of whom testified that there was no such thing as a "pueblo water right" in Spanish or Mexican law, and that in fact both sovereigns generally followed the law of equitable apportionment and common use, in which all water users shared the available water generally in accordance with their needs. *See id.* at 55–56. The Supreme Court, however, declined to overrule *Cartwright* on the basis of the unanimous opinions of the expert historians that there was no such thing as a "pueblo water right" doctrine under Mexican law. To do so, it stated, would "undermin[e] the historical basis for New Mexico's adoption of the doctrine of prior appropriation as a legacy of antecedent sovereigns." *Id.* at 57. The problem was not that the historians agreed that the "pueblo water right" doctrine did not exist, but that they insisted that Mexican water law was based on equitable apportionment and common use, not prior appropriation. *Id.* But the court's insistence that prior appropriation is a "legacy of antecedent sovereigns" is only supported by *dicta* in a handful of opinions reaching back to the territorial period, for which no authority is cited. *Id.* The court did overrule *Cartwright*, however, on the ground that the "pueblo water right" doctrine was incompatible with New Mexico's law of prior appropriation. *Id.* at 58.

88. *See* United States' Motion for Partial Summary Judgment on the Aboriginal Water Rights of the Pueblos of Acoma and Laguna on Their Grant Lands at 1 State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 29, 2015). Laguna filed a notice of joinder in that motion on May 29, 2015. Acoma filed a very similar motion. *See* Acoma Pueblo's Motion and Memorandum Brief for Partial Summary Judgment on Time Immemorial Priority for Water Rights of the Pueblos on Retained Lands at 8, State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 29, 2015).

89. *See* State of New Mexico's Motion for Partial Summary Judgment Regarding Legal Basis for Determination of Priority Dates and Quantification of Pueblos' Past and Present Use Water Rights State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 29, 2015).

90. *See* Transcript of Proceedings, Hearing Before Special Master George H. Perez, State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Oct. 6, 2015).

91. *See* Expedited Joint Motion of the United States, the State of New Mexico, and the Pueblos of Laguna and Acoma to Extend Pre-Trial Deadlines and Trial Settings by Six Months, State of New Mexico *ex rel.* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Oct. 5, 2015).

2017).<sup>92</sup> Then, in March 2016, the negotiating parties filed a motion to vacate all pre-trial deadlines and trial settings. The parties noted they had reached agreements on all those issues pending in the subproceeding, agreements they were then willing to recommend to their clients, subject to agreement on ancillary matters still under discussion. Again, Tri-State, alone among the parties, opposed the motion.<sup>93</sup> After a vigorously argued hearing on April 21, 2016, the court granted the motion, but allowed Tri-State to present the testimony of its four expert witnesses, either by trial deposition or in open court.<sup>94</sup> Just what the ramifications of this unusual ruling will be are not yet clear.

Of note, in the federal cases, as soon as the principal parties indicated to the court that they wanted to engage in settlement negotiations, the cases were stayed essentially indefinitely while those negotiations proceeded.<sup>95</sup> The *Kerr-McGee* special master's occasional reluctance to grant stays for settlement talks to proceed without simultaneously requiring counsel to prepare for trial is probably influenced by Tri-State's insistent opposition; it has also made the settlement process bumpier than it otherwise might have been.

But again, apart from Special Master Garcia's decision that Acoma and Laguna did have aboriginal water rights, there has been no ruling on the nature or measure of those rights. Indeed, the Court of Appeals decided that whatever those rights might look like, they were not lost in the Pueblos' ICC proceedings. If the current settlement negotiations continue to progress, however, that may be the last word in the *Kerr-McGee* litigation on the Pueblo water rights issue.

That may be just as well. Indian water rights are matters of federal, not state law.<sup>96</sup> As the Court said in *San Carlos Apache*, "State courts . . . have a solemn obligation to follow federal law."<sup>97</sup> And while a state court is certainly competent to rule on federal law issues, such rulings are not considered precedential in the federal courts.<sup>98</sup> There is one other pending federal court

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92. See Order Granting Expedited Joint Motion of the United States, the State of New Mexico, and the Pueblos of Laguna and Acoma to Extend Pre-Trial Deadlines and Trial Settings by Six Months at 1, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. D.N.M. Jan. 19, 2016).

93. See Tri-State Generation and Transmission Association, Inc.'s Response in Opposition to Expedited Joint Motion of the State of New Mexico, the Pueblos of Laguna and Acoma, and Certain Members of the Association of Community Ditches to Vacate Pre-Trial Deadlines and Trial Settings State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. Apr. 18, 2016).

94. See Order Vacating Pretrial Deadlines and Trial Settings, and Providing for Presentation of Testimony of Certain Tri-State Generation and Transmission Association, Inc., Witnesses at 1, Kerr-McGee, State of New Mexico *ex rel* State Eng'r v. Kerr-McGee Corp., D-1333-CV-198300190, Nos. CB-83-190-CV & CB-83-220-CV (N.M. 13th Jud. Dist. Ct. May 18, 2016).

95. See, e.g., Order Vacating Trial Date, *New Mexico v. Abbott*, Nos. 68-CV-07488 & 70-CV-08650 (D.N.M. Nov. 24, 2010). It is true that in *United States v. Abouseman*, No. 6:83-CV-01041 (D.N.M. 1983), discussed below, Judge Vázquez imposed definite deadlines by which the parties had to arrive at specific benchmarks in their negotiations, although those deadlines were extended several times, and eventually the talks lasted about six years until they foundered, as is explained in the text.

96. See *New Mexico v. Aamodt*, 537 F.2d 1102, 1112 (10th Cir. 1976); see also *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

97. *Id.*

98. E.g., *United States v. Madden*, 682 F.3d 920 (10th Cir. 2012).

proceeding in which the issues of the nature and measure of Pueblo water rights are being actively litigated. As explained below, this remaining case might be the better venue for the explication of these matters.

#### **F. *United States v. A & R Productions***

One of the other two pending cases, *United States v. A & R Productions*,<sup>99</sup> is a general stream adjudication of the Zuni River<sup>100</sup> in western New Mexico. This case—involving the rights of the Zuni Pueblo (along with those of the Ramah Navajo Reservation)—was only filed in 2001, and consideration of the Pueblo's rights really only began in 2007. Moreover, while Zuni does have a confirmed “Cruzate” League grant,<sup>101</sup> the vast majority of its lands were set aside by executive order and congressional legislation, and thus presumably have *Winters*-type reserved rights. Whether the complex issues regarding water rights appurtenant to Pueblo grant lands will play any significant role in this case thus remains to be seen.

#### **G. *United States v. Abousleman***

The other pending case involving the water rights of the Pueblos on their grant lands is *United States v. Abousleman*,<sup>102</sup> originally filed by the United States in 1983 as a trespass action, brought on behalf of the Pueblos of Jemez, Zia, and Santa Ana against non-Indian water users on the Rio Jemez.<sup>103</sup> A few years after the case was filed, the Pueblos intervened as plaintiffs and the State was realigned as a plaintiff, and the case was turned into a general stream adjudication. The course of the case since then has been even more erratic than the flows of the river it seeks to adjudicate.

Early in the litigation, former state District Judge Frank B. Zinn was appointed as special master. In mid-1988, the State and certain non-Indian defendants filed motions for partial summary judgment. These parties sought rulings that the Pueblos had no federally reserved rights appurtenant to their Spanish grant lands, and that such rights they might claim should be limited to the amounts of water they could prove were actually used between 1846 and 1924.<sup>104</sup> On September 14, 1988, Special Master Zinn issued a report<sup>105</sup> recommending that the summary judgment motions be granted in part. Specifically, he proposed that the Pueblos be found not to have reserved rights and to have rights appurtenant to

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99. *United States v. A & R Productions*, No. 01-CV-0072, 2006 U.S. Dist. LEXIS 102099 (D.N.M. filed Jan. 19, 2001).

100. The Zuni River is a tributary of the Little Colorado River.

101. *See supra* note 7.

102. *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. filed June 27, 1983). Again, the author feels obliged to note that he is counsel for the Pueblo of Santa Ana in this case.

103. The Rio Jemez, or Jemez River, is a substantial stream that drains most of the Valles Caldera and the Jemez Mountains of north-central New Mexico, flows through the beautiful San Diego Canyon, then through the lands of the three Pueblos, before joining the Rio Grande just north of Bernalillo.

104. Alternatively, between 1846 and 1933: the Abousleman briefs are not entirely clear.

105. Report of the Special Master at 15, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Sept. 14, 1988), Doc. 1980.

their grant lands solely based on actual use on or after 1846, with priority based on date of first use. The special master held six days of evidentiary hearings on the Pueblos' past and present uses of water, and on October 1, 1991, he issued a further report.<sup>106</sup> There he listed each of the water diversions or developments of each Pueblo (including ditches, wells, springs, stockponds, etc.) and proposed a priority for each based on dates of first use, which he surmised based on the evidence presented at the hearings.

Both of Special Master Zinn's Reports provoked voluminous and caustic objections from the United States and the Pueblos. The United States claimed (with considerable justification) that the special master was proposing to subject the Pueblos to state water law doctrines, and to ignore their federal law rights. Numerous briefs were filed in support of (and in opposition to) the objections to the 1988 Report. The United States and the Pueblos filed objections to the 1991 Report, and the non-Indians filed a motion to accept the Report. While the non-Indian motion was opposed by the Pueblos and the United States, there was no further activity regarding that Report. Then, nothing happened, for about ten years. Although the case proceeded on a variety of matters, mostly related to determination of the rights of the non-Indian parties and the proprietary rights of the United States appurtenant to the portions of the Santa Fe National Forest located in the Jemez Basin, there was no ruling on any of the objections or motions directed at the two special master's reports related to the Pueblo claims.

In July 2003, the case was reassigned to District Judge Martha Vázquez, and the Pueblo claims returned to life. Judge Vázquez and the assigned United States Magistrate Judge, Leslie Smith, soon ordered supplemental briefing on the special master's 1988 Report. While this briefing ostensibly served to address relevant legal developments since 1990, the parties found ways to reargue cases from well before that date. The judges also ordered briefs on the objections to the 1991 Report. After receiving a total of 24 lengthy briefs, Judge Vázquez issued a decision on the motions.<sup>107</sup> Although she did rule that the Pueblos' grant lands were not entitled to *Winters* reserved rights,<sup>108</sup> she otherwise denied the State's and the non-Indians' motions for partial summary judgment. Judge Vázquez specifically declined to rule that the Pueblos' rights were limited to the amount of water they could show they actually used after 1848, or that aboriginal rights could not be a basis for a water right, or that the tribal reserved rights doctrine announced in *United States v. Winans*<sup>109</sup> did not apply to the Pueblos. She further declined to rule on the effect, if any, of the Pueblo Lands Act of 1924 or the Pueblo Compensation Act of 1933 on Pueblo water rights. Because Judge Vázquez considered the character of the Pueblos' water rights to be still undetermined, she also ruled that it

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106. Report of the Special Master, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Oct. 1, 1991), Doc. 2291.

107. Memorandum Opinion and Order, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Oct. 4, 2004), Doc. 4051.

108. *Id.* at 21–22.

109. *United States v. Winans*, 198 U.S. 371 (1905) (holding that by not ceding its fishing rights in its 1855 treaty with the United States, the Yakama Tribe had impliedly reserved its aboriginal right to take fish at all of the tribe's "usual and accustomed" places).

would be premature to rule on Special Master Zinn's 1991 Report.<sup>110</sup> Finally, she rejected "as moot"<sup>111</sup> the special master's 1988 Report, since she was denying, for the most part, the two motions for partial summary judgment.

At that point,<sup>112</sup> the Pueblo of Jemez approached the State, proposing settlement negotiations. The State was unwilling to engage in any settlement talks unless all three tribes participated, however. Finally, in early 2007, after the other two Pueblos had tentatively agreed to engage in talks and a federal negotiating team had been assembled, the State and the United States jointly retained a settlement facilitator from California to determine whether formal settlement negotiations would be productive. The facilitator reported that he believed productive negotiations could proceed and on June 27, 2007, the parties were directed to undertake such negotiations and to produce a "settlement principles" document by December 15, 2007.<sup>113</sup>

Such a document was finally developed by the parties, but not until a year after the date originally ordered, in December 2008. Then, negotiations got underway on a final settlement document, based on the settlement principles. Those talks continued for more than three years, with the parties, their experts, and the mediator meeting once or twice a month, and with regular and frequent prodding by the court. Periodic Joint Status Reports during that period reflected optimism that progress was being made, that the basic terms of the settlement had been resolved, and that all that was needed was to settle various "technical" issues. On March 15, 2012, however, the parties submitted a letter to Judge Vázquez<sup>114</sup> stating that their efforts to reach a settlement in the case "have unexpectedly reached an impasse." The parties indicated that it would be "necessary to resume litigation of the water rights claims of the Pueblos of Jemez, Zia, and Santa Ana" to the waters of the Jemez River basin. They proposed that they be allowed to submit a proposed plan for the litigation, and the court agreed. Thus, nearly eight years of efforts to settle the case—in the course of which the parties undoubtedly spent hundreds of thousands of dollars on attorneys' and expert fees and expenses—foundered, the only such instance in the history of the litigation of Pueblo water rights in New Mexico.

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110. Memorandum Opinion and Order, *supra* note 107, at 34.

111. *Id.*, at 34–36.

112. An interesting sideshow arose when on September 1, 2004, the State Land Commissioner filed Declaration of State of New Mexico Reserved Water Rights, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Sept. 3, 2004), Doc. 4049, in which the Commissioner claimed that all of the state trust lands in the basin had federally reserved water rights that were held in trust for the State. The United States and the Pueblos moved to dismiss the Declaration, and Judge Vázquez granted that motion. *See* Memorandum Opinion and Order, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. July 20, 2005). A few years later, the state court of appeals rejected a similar claim that the Land Commissioner had made in the adjudication of rights in the San Juan River Basin of northwestern New Mexico. *See State ex rel. State Eng'r v. Comm'r Pub. Lands*, 2009-NMCA-004, ¶ 31, 145 N.M. 433. A similar claim by the State Land Commissioner of Arizona in the Gila River adjudication met a similar fate. *See In re General Adjudication of All Rights to Use Water in the Gila River Sys.*, 289 P.3d 936 (Ariz. 2012).

113. Stipulated Order, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. June 27, 2007), Doc. 4147.

114. *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Mar. 15, 2012), Doc. 4234.

Once they were back “in court,” the *Abousleman* parties did agree, at least, that before they could start preparing for a trial on the three Pueblos’ water rights, the court had to resolve several fundamental legal issues regarding the nature and measure of those rights appurtenant to the Pueblos’ grant lands (the issues that all of the cases discussed above were intended to resolve but did not). They even concurred in a statement of the five issues requiring resolution (including several sub-issues); these are identified and discussed in the next section of this article. By Order entered on July 5, 2012, Magistrate Judge William Lynch set a schedule for briefing three of the five issues, those numbered 3, 4 and 5, with proceedings on Issues 1 and 2 to be addressed later.<sup>115</sup> Briefing on Issues 3, 4 and 5 was completed by the end of 2012.

Issues 1 and 2 dealt with what the parties considered to be the most critical and most complex questions facing the court: (1) whether the Pueblos had “aboriginal” water rights,<sup>116</sup> and if so, (2) whether those rights had been limited or otherwise affected by any aspect of Spanish colonial or Mexican law as applied to the Pueblos. The parties agreed that, at least for purposes of dealing with the Spanish and Mexican law questions, expert testimony would be required. The United States retained Dr. Charles Cutter of Purdue University, a historian with extensive experience dealing with questions of Spanish law in the colonial period in New Mexico. For its part, the State retained Prof. G. Emlen Hall, a former attorney for the Office of the State Engineer, a longtime professor at the University of New Mexico School of Law, and the author of several books and articles on the Spanish and Mexican periods in New Mexico. Most of 2013 was spent in the production of expert reports, taking of expert depositions, and exchanges of exhibits in preparation for an evidentiary hearing at which the two experts would testify. That hearing was eventually held before Magistrate Judge Lynch from March 31 through April 2, 2014. The parties then filed briefs on Issues 1 and 2, and briefing was finally completed in November 2014. On October 4, 2016, United States Magistrate Judge Lynch issued Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, in which he recommended that the court find that the three Pueblos had had aboriginal rights to their land and water, but that those rights had been extinguished by the imposition of Spanish and Mexican law. The United States and the Pueblos filed objections to Magistrate Lynch’s proposed disposition, and the matter is now before Judge Vázquez.<sup>117</sup>

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115. Order, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. July 5, 2012).

116. That is, rights having a priority superior to any non-Indian rights, and that would be sufficient, as characterized by the Pueblos and the United States, at least, to supply all of the Pueblos’ present and future needs.

117. Actually, the court has already issued a ruling on Issue 5, the question of whether the Pueblos hold riparian rights. The court’s July 5, 2012 Order setting the briefing schedule called for simultaneous opening, response and reply briefs. While the State and the non-Indians filed briefs on Issue 5 vigorously opposing any claim of riparian rights by the Pueblos, the United States and the Pueblos of Jemez and Santa Ana filed a two-page statement stating that they would not assert any such claim in the case. *United States’ and Pueblos of Jemez and Santa Ana’s Position on Riparian Water Rights*, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Aug. 6, 2010), Doc. 4255. Zia filed a separate statement, saying at greater length that while it would make no claim based solely on riparian rights, it believed that aspects of riparian doctrine were inherent in other theories under which it might make claims, and it did not wish to be barred from making such arguments. *Position of the Pueblo of Zia on*

As will be explained in the next section of this article, the character and measure of Pueblo water rights appurtenant to Pueblo grant lands thus remains entirely unclear, except to the extent that the ruling in *Aamodt II* can be credited, which, as will be explained, seems doubtful. It is somewhat ironic that none of the adjudications undertaken by Steve Reynolds and Harlan Flint in the 1960s appears likely to settle these issues. The two cases in which enormous resources were brought to bear on the issues, *Aamodt* and *Abeyta*, both ended in settlements, and *Abeyta* produced no substantive rulings whatever. The rest of those cases are stalled. *Kerr-McGee* seems headed for settlement. But in *Abousleman*, having apparently exhausted settlement possibilities, the State, the United States, the Pueblos, and the non-Indian parties (represented by two of the most experienced private water lawyers in New Mexico) have followed a path that is likely to lead to substantive rulings on these issues, and they appear to be before a judge willing to issue such rulings. This significant blank spot on the water rights map may, thus, some day in the not-too-distant future, begin to be filled in.

## II. AAMODT II, AND THE UNRESOLVED ISSUES.

A few points should be addressed at the outset of any discussion of the legal issues involved here. First, in some respects that may be relevant to the character of the water rights appurtenant to their grant lands, the Pueblos' core landholdings are unique among those of Indian tribes in the United States. Water rights in this context must be appurtenant to lands, and federal water law as it relates to Indian tribes in the United States has characterized the appurtenant rights in terms of the source of the tribes' respective interests in their lands. Thus, under *Winters*, when the United States sets aside land for a tribe, it impliedly (if not expressly) does so with the intent of establishing a permanent homeland for the tribe. Therefore, the United States impliedly (if not expressly) reserves from unappropriated water appurtenant to the land, the rights to enough water to meet the tribe's present and future needs.<sup>118</sup> Those rights have a priority at least as early as the date on which the lands were set aside. And the quantity of such reserved

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Riparian Rights, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Aug. 6, 2010), Doc. 4254. The State and the non-Indians then urged in their response briefs that the court should enter an order finding that the Pueblos have no riparian rights. *See* State's Response Brief on Issue 5, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Aug. 21, 2012), Doc. 4263, and Coalition's Reply Brief on Legal Issue 5, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Sept. 5, 2012) Doc. 4265, a position the United States and the Pueblos opposed. On December 20, 2012, the court issued an opinion in which it declined to rule on the riparian rights theory, reasoning that since no such claim was asserted by the Pueblos or by the United States on their behalf, any such ruling would be merely advisory. Memorandum Opinion and Order, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Dec. 20, 2012), Doc. 4293.

Each of the remaining issues and the arguments presented on them by the parties will be discussed below, in Part II.C of this article.

118. This is the doctrine generally ascribed to the *Winters* case, although as is apparent from the opinion, the water rights that the Court upheld were actually impliedly reserved by the *tribe*, in the treaty by which it ceded the rest of its lands to the United States. *See Winters v. United States*, 207 U.S. 564, 576-77 (1908). The situation in *Winters* thus seems more like that in *Winans*, in which it was acknowledged that in giving up its lands to the United States, the tribe reserved its aboriginal fishing rights.



water rights is, according to *Arizona v. California*, that amount necessary to irrigate the practicably irrigable lands that were set aside for the tribe, plus—possibly—additional rights for domestic, industrial, grazing and other uses.<sup>119</sup> Under cases such as *Winans* and *United States v. Adair*,<sup>120</sup> when a tribe makes treaty cessions to the United States, those rights not expressly ceded are considered to be reserved *by the tribe*. These rights may include aboriginal rights to hunting, fishing, water, and other resources of the land. There is no clear ruling on the quantification of aboriginal water rights reserved by a tribe in such an instance, but the cases that have discussed the point have held that such rights extend not only to the tribe's present needs, but to its future needs as well.<sup>121</sup>

Although many of the Pueblos have “reservation” lands that were set aside for them by the United States, either by executive order or by act of Congress, and that presumably have federally reserved water rights, Pueblo grant lands are understood either to have been granted by a prior sovereign, or to be lands the Pueblos' prior titles to which were never extinguished or otherwise limited by the prior sovereign.<sup>122</sup> There is no treaty between the Pueblos and the United States that might have defined the United States' relationship to the Pueblos and their lands more clearly.<sup>123</sup> In every case, the Pueblos' grant lands are lands that were exclusively used and occupied by them for a long time preceding the arrival of the Spanish, so they plainly qualify as aboriginal lands. The determination of water rights appurtenant to these lands, however, has been confounded by endless puzzling over what the applicable Spanish colonial and Mexican laws, if any, might have been, and whether they had any impact on the Pueblos' rights. Equally confounding has been the miserable record of the treatment of the Pueblos and their lands by American courts in the first half century after the Treaty of Guadalupe

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119. To be sure, more recently the “practicably irrigable acreage” standard has come under some criticism, and has been rejected in some state court proceedings. *See, e.g., In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 35 P.3d 68 (Ariz. 2001). *See also* Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 NAT. RESOURCES J. 549 (1991). *But see, e.g., In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 100–01 (Wyo. 1988) (adopting practicably irrigable acreage standard in determining water rights of Shoshone and Arapahoe Tribes of the Wind River Reservation).

120. *United States v. Adair*, 723 F.2d 1394, 1413–14 (9th Cir. 1983).

121. *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 326 (9th Cir. 1956); Memorandum Opinion and Order at 3,7–8, *New Mexico ex rel. State Eng'r v. Aamodt*, No. 66-CV-06639 (D.N.M. Jan. 31, 2001); *New Mexico ex rel. State Eng'r v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985).

122. *See supra* note 7.

123. In fact, a treaty was negotiated, in July, 1850, by James S. Calhoun, the first Indian Agent in New Mexico and territorial governor at the time of his death in 1852. This treaty was signed by governors and representatives of ten Pueblos and was transmitted to the Commissioner of Indian Affairs, but the Senate never acted on it. *See* OFFICIAL CORRESPONDENCE OF JAMES S. CALHOUN WHILE INDIAN AGENT OF SANTA FE AND SUPERINTENDENT OF INDIAN AFFAIRS IN NEW MEXICO, 227–28, 237–46 (Annie Heloise Abel ed., Washington Government Printing Office 1915). Calhoun died in April, 1852, near Independence, Missouri, as he was accompanying a delegation from Tesuque Pueblo that was traveling to Washington to lobby for ratification of the treaty. The delegation continued on the trip and caused a sensation in Washington, but got nowhere with the treaty. *See* Peter M. Whitely, *Reconnoitering “Pueblo” Ethnicity: The 1852 Tesuque Delegation to Washington*, 45 J. OF THE SOUTHWEST 437 (2003).

Hidalgo.<sup>124</sup> This period of judicial confusion enabled thousands of non-Indians to occupy Pueblo grant lands without federal (or, in many cases, even Pueblo) approval, a situation that led, finally, to the enactment of the Pueblo Lands Act of 1924. That Act resulted in the permanent transfer to non-Indians title of tens of thousands of acres of some of the Pueblos' most valuable irrigated farmland, for woefully little compensation. The fact that the Pueblo Lands Board deliberately shortchanged the Pueblos in awards of compensation for the lands that they lost then led to the enactment of the Pueblo Compensation Act of 1933.<sup>125</sup> Each of those Acts has been cited as having had some major impact on Pueblo water rights, as will be discussed below, but there is no agreement as yet on what that impact was, in either case.

To be sure, in *Aamodt I* the Tenth Circuit, after acknowledging the Pueblos' unique history, pointed out that the Court in *Sandoval* and *Candelaria* indicated that the Pueblos "are to be treated like other Indian communities. The fact that the Pueblos hold fee simple title makes no difference."<sup>126</sup> That may, in fact, as a practical matter, turn out to be accurate. That is, the Pueblos may ultimately be found to have water rights that look very much like those adjudicated to other tribes. But it nonetheless seems likely that just to arrive at that result, the courts will have to follow a very different logical path than that that led to the outcome in *Winters* or *Arizona v. California*.

Second, as a matter of geography, the United States District Court for the District of New Mexico has essentially exclusive jurisdiction over these issues in the first instance. All Pueblo grant land is in New Mexico.<sup>127</sup> Consequently,

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124. In *United States v. Lucero*, 1869-NMSC-003, 1 N.M. 422, the New Mexico Territorial Supreme Court held that Pueblo Indians were not "Indians" within the meaning of the federal Non-Intercourse Act, and that therefore their lands were not subject to federal protection from trespass by non-Indians. In *United States v. Joseph*, 94 U.S. 614 (1877), the Supreme Court accepted that characterization of the Pueblos. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court reversed course, and held that inasmuch as Congress had consistently treated the Pueblos as Indians subject to federal protection, that was a determination that the Court should not second-guess. In *United States v. Candelaria*, 271 U.S. 432 (1926), the Court expressly held that the Pueblos were intended to be covered by the 1851 legislation that extended the terms of the Non-Intercourse Act to New Mexico. Act of Feb. 27, 1851, §§ 5, 7, 9 Stat. 574, 587. These cases and the circumstances surrounding them are much more fully discussed in *EBRIGHT ET AL.*, *supra* note 7, at 237-62.

125. See generally *EBRIGHT ET AL.*, *supra* note 7, at 267-92.

126. *New Mexico v. Aamodt*, 537 F.2d 1102, 1111 (10th Cir. 1976).

127. In the Arizona adjudication of the Little Colorado River, *in re* the General Adjudication of All Rights to Use Water in The Little Colorado River System and Source, S-0100-CV-6417 (Ariz. Super. Ct. Apache Cty. filed Mar. 24, 1996), the Hopi Tribe produced an expert report by the eminent (now deceased) historian of the southwest, David J. Weber, entitled, "Hopi Land and Water Rights Under Spain and Mexico." Although Weber was appropriately cautious in claiming that the Hopis could claim any land or water rights under Spanish or Mexican law, the implication that they could is clear. But with all due respect to Dr. Weber and to the Hopi's counsel, this contention seems farfetched, at best. Although the Hopi (referred to as "Moqui" by the Spanish) were nominally under Spanish (and later, Mexican) jurisdiction, they always insisted in their dealings with the Spanish that they were an independent nation. Spanish priests established missions at a few of the Hopi villages in the early 1600s, but only that at Awatovi thrived. In the Pueblo Revolt of 1680, the Hopis killed all of the Franciscans in their villages and destroyed the missions. After Vargas reestablished Spanish dominion over the territory in 1693, the people of Awatovi, in 1700, told the Spaniards that they would welcome the return of the priests, but before the Franciscans could reply the village was attacked by a force of Hopis from the

although the parties regularly cite to Indian water law cases arising elsewhere in the West and squabble over their relevance to the Pueblos' rights, only a final decision of the federal district court in New Mexico will determine the character, measure, and priority of the water rights appurtenant to Pueblo grant lands. The point here is that, based on *Winters*, for example, one can assert fairly assuredly that whenever the United States sets land aside for a tribe, anywhere, that act includes at least an implied reservation of water rights from the unappropriated water appurtenant to the lands set aside, sufficient to serve the purposes of the reservation,<sup>128</sup> with a priority no later than the date of the reservation. No such generalization may confidently be asserted in the case of Pueblo grant lands, until there is a clear ruling of the New Mexico federal district court.<sup>129</sup>

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other villages, who massacred the population and reduced the village to burned rubble. It was never rebuilt or reinhabited. See generally JAMES F. BROOKS, MESA OF SORROWS: A HISTORY OF THE AWAT' OVI MASSACRE (2016). Thereafter, there was essentially no official contact between the Spanish territorial government and the Hopis, much less any indices of actual Spanish authority over the Hopi region. In his seminal work, DAVID J. WEBER, THE MEXICAN FRONTIER, 1821–1846; THE AMERICAN SOUTHWEST UNDER MEXICO (1982), Dr. Weber does not even mention the Hopi. Of course, it has never been suggested that any Hopi village was entitled to a "Pueblo League," and the present Hopi reservation was set aside by executive order in 1887 and thus presumably has implied *Winters* reserved rights. Other than to show that neither the Spanish nor the Mexican governments ever did anything to extinguish or limit the Hopi's land or water rights, which is certainly what the historical record shows, it is difficult to see any other point to the invocation of Spanish or Mexican law in support of the Hopi claims in the Little Colorado basin.

In two decisions in the early twentieth century, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919) and *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927), the Supreme Court dealt with issues regarding the land rights of the so-called "Pueblo of Santa Rosa," which was actually a village of the Papago (now, Tohono O'odham) Indians of southern Arizona. The village is now known by its O'odham name of Gu Achi. See 10 HANDBOOK OF NORTH AMERICAN INDIANS 138, 147 (Alfonso Ortiz & William C. Sturtevant eds., 1983). *Lane* held that the Secretary of the Interior was without power to open the tribe's lands to entry under the public land laws, and *Fall* held that a purported conveyance of a huge swath of its lands by a member of the tribe to a non-Indian was void by virtue of the Non-Intercourse Act. Both opinions appear to assume that the village, or the tribe of which it was a part, had land rights that had been respected by Spanish and Mexican authorities, but as the lower court opinion in *Lane* noted, neither the tribe nor the village had ever presented a claimed title to the Surveyor General of Arizona under the Act of July 15, 1870, nor was any claim made by the tribe or the village to the Court of Private Land Claims under the Act of March 3, 1891, ch. 539, 26 Stat. 854. *Pueblo of Santa Rosa v. Lane*, 46 App.D.C. 411, 415, 431 (D.C. Cir. 1917), *rev'd on other grounds*, *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). Oddly, neither opinion noted that an executive order dated January 14, 1916, created the 2.7 million-acre Papago Reservation (now known as the Tohono O'odham Reservation), which included Gu Achi. 10 HANDBOOK OF NORTH AMERICAN INDIANS 144, 146 (Alfonso Ortiz & William C. Sturtevant eds., 1983). Thus, neither the village nor the tribe as a whole have any recognized landholdings derived from the Spanish or Mexican periods, as the New Mexico Pueblos do.

128. It is usually assumed such purposes include the establishment of a permanent homeland for the tribe, unless some more limited purpose, such as grazing, is apparent from the action by which the land was set aside.

129. And, of course, because a district court ruling, even a final one, is considered to be binding precedent on no one other than the parties to the case in which the ruling is issued, *see, e.g.*, *Garcia v. Tyson Foods, Inc.*, 534 F.3d 1320, 1329 (10th Cir. 2008), it will take a ruling from the Tenth Circuit Court of Appeals on these issues to cement them into the doctrines of federal Indian law (at least until the Supreme Court gets a word in, if it does; or, possibly, unless Congress acts, though that seems unlikely).

As has been noted, there is one published opinion on the subject, *Aamodt II*, and there are various subsequent unpublished opinions issued in *Aamodt* that elaborated on the rulings in *Aamodt II* (though not always in helpful or clear ways). Those opinions will be examined, and we will then turn to the legal issues identified by the parties in *Abousleman*, and the arguments made on those issues.

#### A. The Decision in *Aamodt II*

In his first substantive opinion to be issued in *Aamodt* after the remand from the court of appeals, Judge Mechem denied the United States' motion for summary judgment that had sought a ruling that no non-Indian claiming water rights appurtenant to lands within the boundaries of any of the Pueblos could claim a priority date earlier than 1924. He also engaged in a lengthy analysis of the Tenth Circuit opinion in *Aamodt I*.<sup>130</sup> There, Judge Mechem concluded that the appellate court's discussion of the priority of Pueblo water rights<sup>131</sup> and quantification of those rights<sup>132</sup> were dicta, and thus not binding on him as law of the case.<sup>133</sup> That ruling set the stage for Judge Mechem's 1985 decision, *Aamodt II*.

*Aamodt II* was issued on September 18, 1985, after Special Master Edward Yudin had held several lengthy trials on issues of Spanish colonial law and Mexican law relative to the Pueblos; reserved rights and the PIA standard; historical irrigation; among others, and after the special master had submitted to the court extensive recommended findings of fact and conclusions of law on each issue.

Of the nine "general" findings and 41 specific findings of fact recommended by the special master on Spanish and Mexican law issues, the court adopted only two in its opinion. The first adopted finding stated that Spanish law recognized the Pueblos' rights to the lands and water they had been using since prior to the arrival of the Spaniards. The other stated that the Mexican government continued to recognize the Pueblos' rights to their Pueblo Leagues.<sup>134</sup> In contrast, the court adopted most of the Special Master's recommended conclusions of law on Spanish and Mexican law, accepting Conclusions 1 through 4 and 6 through 18. For example, the court specifically concluded that:

- the Pueblos' claims to lands and waters that had been traditionally used by them were "never extinguished by either" Spain or Mexico;<sup>135</sup>
- "[t]he water rights of the Pueblos, which were recognized and protected by Spain and by Mexico, were defined as a prior and paramount right to a sufficient quantity to meet their present and future needs";<sup>136</sup> and

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130. Memorandum Opinion and Order at 3–11, *New Mexico ex rel. State Eng'r v. Aamodt*, No. 66-CV-6639 (D.N.M. June 10, 1983).

131. 1933 Pueblo Compensation Act, § 9, 48 Stat. 108 (1933).

132. Memorandum Opinion and Order at 4, *New Mexico ex rel. State Eng'r v. Aamodt*, No. 66-CV-6639 (D.N.M. June 10, 1983) (focusing on the court's suggestion that Section 9 might have been intended to place the Pueblos' rights under the Winters doctrine).

133. *Id.* at 9–11.

134. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F.Supp. 993, 996–97 (D.N.M. 1985).

135. *Id.* at 998.

136. *Id.*

- the four Pueblos “are entitled to a first right or right of *primacía*, to enough water ‘for their needs,’ or the irrigation of their lands. . . . Availability of excess water should be granted to the Pueblos for their future expansion, based on need.”<sup>137</sup>

Conclusions 8 through 16 addressed the process, known as *repartimiento*, by which the Spanish—and later Mexican—authorities allocated water among users of a common water source in the event of a dispute among them.<sup>138</sup> No *repartimiento* ever occurred within the Rio Tesuque-Rio Nambé-Rio Pojoaque basin, however. Indeed, the only such proceeding<sup>139</sup> to have ever occurred in New Mexico took place on the Rio Lucero and the Rio Pueblo de Taos in 1823.<sup>140</sup>

The opinion essentially disregarded the rest of the special master’s findings and recommendations and instead proceeded with lengthy discussions of its own under headings such as:

- “The Pueblos Under Spanish and Mexican Law;”
- “The Pueblos Under United States Law;”
- “Equitable Apportionment” (which the court found not applicable here),
- “Aboriginal Rights;”
- “Pueblo Water Rights;” and
- “Ground Water.”

In the lengthy section on Aboriginal Rights,<sup>141</sup> the court quoted at length from several Supreme Court decisions on the subject, including the decision in *United States v. Santa Fe Pacific R.R. Co.*<sup>142</sup> In that case, the Supreme Court held that the 1851 Act extending the provisions of the Indian Trade and Intercourse Acts over the lands acquired from Mexico by the Treaty of Guadalupe Hidalgo,<sup>143</sup> “plainly indicates that in 1851 Congress desired to continue in these territories the unquestioned general policy of the Federal Government to recognize [the Indian] right of occupancy.”<sup>144</sup> That case, and the others examined by the court in this section, the court said, “establish that the Pueblos have aboriginal title, Indian rights or original Indian rights to their lands and the use of them including appurtenances.”<sup>145</sup> It added that the “Pueblo aboriginal water right, as modified by

137. *Id.* at 999.

138. *Id.* at 998–99.

139. *Id.* at 999 (considering the surviving archives).

140. *Id.* at 999–1000. The original record is in the Spanish Archives of New Mexico, I SANM 1292.

141. *Id.* at 1005–09.

142. *Id.* at 1009.

143. Act of February 27, 1851, § 8, 9 Stat. 574, 587.

144. *United States v. Santa Fe Pac. R.R.*, 314 U.S. at 348; *see also* *New Mexico ex rel. Reynolds v. Aamodt*, 618 F.Supp. 993, 1006 (D.N.M. 1985).

145. *Aamodt*, 618 F.Supp. at 1009.

Spanish and Mexican law,<sup>146</sup> included the right to irrigate new land in response to need.”<sup>147</sup>

Up until this point, one reading the opinion would conclude that the decision was a sweeping victory for the Pueblos and would surely warrant their having prior rights sufficient for all of their present and future needs, probably encompassing virtually all of the water in the stream system. But then the court stated:

The Pueblos have the prior right to use all of the water of the stream system necessary for their domestic uses and that necessary to irrigate their lands, saving and excepting the land ownership and appurtenant water rights terminated by the operation of the 1924 Pueblo Lands Act, *supra*. *The acreage to which this priority applies is all acreage irrigated by the Pueblos between 1846 and 1924 . . .* The 1924 Act, which gave non-Pueblos within the Pueblo four-square-leagues their first legal water rights, *also fixed the measure of Pueblo water rights to acreage irrigated as of that date.*<sup>148</sup>

The remaining few paragraphs of the opinion noted that the Nambé executive order reservation has *Winters* reserved rights, though “[o]ther Pueblo lands do not have *Winters* rights,” and that Pueblo water rights included the right to “the ground water physically interrelated to the surface water as an integral part of the hydrologic cycle,” citing *Cappaert v. United States*.<sup>149</sup> The court added a certification of its opinion for interlocutory appeal.

The proposition that the Pueblo Lands Act had somehow “fixed the measure of Pueblo water rights to acreage irrigated as of that date” had not been argued by any party to the case. The court had discussed the Act, and the work of the Pueblo Lands Board, fairly briefly,<sup>150</sup> but that discussion gave no hint that the Act had effectuated such a dramatic limitation on the Pueblos’ rights to use water.<sup>151</sup> Strikingly, the court cited to no particular section or language of the Act that it believed had actually imposed such a limitation. There is, indeed, no such language in the Act. Although the Act refers to water rights, in Sections 6 and 7, those references are strictly in the context of directions to the Pueblo Lands Board to include the value of appurtenant water rights in determining the amount of

146. *Id.* at 1010. This phrase is a puzzle. The opinion offers no explanation of any manner in which Spanish or Mexican law “modified” Pueblo aboriginal rights.

147. *Id.* at 1010.

148. *Id.* at 1010 (emphasis added)

149. *Id.* at 1010 (citing *Cappaert v. United States*, 426 U.S. 128 (1976)). This is another puzzle. *Cappaert* is a federal reserved rights case, which, according to the court, should have no applicability to the Pueblos.

150. *Aamodt*, 618 F.Supp. at 1004–05.

151. Indeed, one passage from the Board’s report on Nambé that the court quoted suggested exactly the opposite. The Board had expressed the view that the water rights of the non-Indians whose claims to Nambé land it had upheld were “subsequent to the Indians’ rights for water from that river for such lands as they are now cultivating or may themselves hereafter cultivate within the boundaries of either the Nambé Indian Grant or the Executive Order Additions thereto.” *Id.* at 1005 (quoting Exh. JP-32, at 5) (emphasis added).

compensation due the Pueblo for lands the Pueblo's title to which is extinguished under the Act, or due to a non-Indian whose claim for land is rejected by the Board and the court. But nowhere in the Act is there any language whatever that could fairly be interpreted as imposing any limitation on water rights appurtenant to lands *retained* by a Pueblo. If the court thought that such a limitation arose by implication from some aspect or provision of the Act, it offered no explanation of its reasoning.

Importantly, there *is* language specifically addressing the Pueblos' water rights on their retained lands, in Section 9 of the 1933 Pueblo Compensation Act.<sup>152</sup> That section reads as follows:

Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stock-water, and irrigation purposes for the lands remaining in Indian ownership, and such water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands remain in the Indians.

The *Aamodt II* court quoted and discussed that section earlier in its opinion,<sup>153</sup> noting that “[t]he meaning and intent of Section 9 has caused endless argument and a variety of contention [*sic*] by those engaged in drafting, enacting and lobbying the legislation and by the parties to this action.” That is true, and in fact the motivation for the 1933 Act was to correct the Pueblo Lands Board's persistent undervaluation of lands that the Pueblos lost pursuant to proceedings under the Pueblo Lands Act, based on the Board's utterly misguided theory of the water rights appurtenant to those lands. But the court never discussed those issues, and its only indication of what it thought of that “endless argument” came a few pages later, near the end of the section of the opinion labeled, “Aboriginal Rights,” where the court stated:

While the 1924 Act provided for the termination of the Pueblos' ownership of specific lands within the Pueblos and termination of the right to the use of the water of the stream system thereon, *it did not terminate the prior rights of the Pueblos to the use of the water on their remaining lands*. It did not transfer aboriginal rights to non-Pueblos. *Section 9 of the 1933 Act, supra, affirmed the prior right of the Pueblos to the use of water for the lands remaining in their ownership* and that these priorities were not taken away by either the 1924 or 1933 Acts.<sup>154</sup>

It is extremely difficult to square this passage with the ruling that appears on the next page, quoted above, that the 1924 Act *did in fact* terminate the Pueblos' prior right to water appurtenant to any land newly irrigated after 1924. And the court's complete failure to offer any explanation of how that ruling can be

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152. Act of May 31, 1933, c. 45, § 9, 48 Stat. 108, 111.

153. *Aamodt*, 618 F.Supp. at 1005.

154. *Id.* at 1009 (emphasis added).

reconciled with Congress's inclusion of Section 9 in the 1933 Act fairly thoroughly undermines any possible credibility the ruling might otherwise have. The Pueblos and the United States sought on several occasions to get the Tenth Circuit Court of Appeals to allow an interlocutory appeal of this ruling, but that court declined to hear the matter.

The remarkable impact of *Aamodt II*'s ruling on the Pueblos' water rights became clearer two years later, when the court issued its Findings of Fact and Conclusions of Law on the Pueblo acreage described as being entitled to prior rights under the reasoning of *Aamodt II*. Since no party had anticipated, much less argued for, the measure the court adopted in *Aamodt II*, none of the evidence that had been presented to the special master, and none of the special master's recommended findings, matched up with the court's 1846–1924 time frame.<sup>155</sup> Consequently, the parties' efforts to come up with numbers that met the standard invented by the court diverged widely. The United States and the Pueblos contended that the evidence supported a figure of 3,792 acres. The State contended that the correct number was either 1,687.35 acres, or 1,247.93, or 1,094.02. In its Amended Findings of Fact and Conclusions of Law, filed on September 9, 1987, the court selected the lowest proposed number, 1,094.02 acres, based on an agricultural survey of the four Pueblos' lands that had been conducted in 1932.<sup>156</sup>

As was noted previously, the court issued a number of other unpublished opinions on various other issues in the case,<sup>157</sup> a few of which deserve mention here. In its Memorandum Opinion and Order filed on December 1, 1986,<sup>158</sup> the court denied the State's motion for contempt sanctions against Tesuque Pueblo. The State had complained that Tesuque was using more water for a trailer park on Pueblo land than was allowed by a state permit issued to the previous non-Indian operator of the trailer park. The court ruled that since the Pueblo had taken over the park in 1980, it had been using its own water rights for the park, rights for which it needed no permit and that enjoyed an aboriginal priority. It also ruled that the Pueblo could use these aboriginal water rights for any purpose it chose on its lands. A Memorandum Opinion and Order filed on February 26, 1987<sup>159</sup> determined that the priorities of the rights adjudicated to non-Indians whose land was within Pueblo boundaries (title to which derived from patents issued under Pueblo Lands Act proceedings) would be based on the dates when they or their predecessor non-

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155. The Special Master had found that the four Pueblos had 10,045 acres of practicably irrigable land still in their possession. Special Master Findings of Fact on the Pueblos [*sic*] Water Rights Measured by Irrigable Lands at 3, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. Nov. 23, 1982). The State had argued that the Pueblos were limited to water rights for lands that they had actually irrigated at *any time* in the past, with no deduction for non-use. The special master found that by that measure, the four Pueblos were entitled to rights for a total of 3,821 acres. See Special Master Findings of Fact on the Pueblos' Historically Irrigated Acreage at 4, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. Nov. 23, 1982).

156. Amended Findings of Fact and Conclusions of Law, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. Sept. 9, 1987), Doc. 3074.

157. See opinions cited in *supra* note 34.

158. Memorandum Opinion and Order at 4, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. Dec. 1, 1986).

159. Memorandum Opinion and Order at 7, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. Feb. 26, 1987).



Indian occupants of the land first applied water to beneficial use. The court rejected the State's and the non-Indians' claim that the non-Indian landowners should be able to tack onto the Pueblos' immemorial priority. The court also rejected the Pueblos' and United States' claim that no non-Indian priority date should be earlier than 1924 (an argument the court had already rejected in its Memorandum Opinion and Order of June 10, 1983<sup>160</sup>). And in ruling on a variety of issues, a Memorandum Opinion and Order of January 31, 2001 rejected the argument that Pueblo water rights are limited by certain federal laws enacted by Congress in the 1860s and 1870s (including the Desert Land Act<sup>161</sup>) that applied state water law to the development of water rights on the public domain, federal lands that had not been reserved for specific uses.<sup>162</sup>

## B. The Issues

The *Aamodt* case is now settled, and there will be no final judgment on the measure of Pueblo water rights that could be appealed to the Tenth Circuit. If the Pueblo water rights issues are to be determined judicially, that will have to occur in some other adjudication; as was explained in the previous section, those issues have actually been teed up for decision in the *Abousleman* case. Pursuant to an order entered in that case on July 5, 2012,<sup>163</sup> the parties briefed a set of five legal issues (including some sub-issues) that they had identified as being largely determinative of the question of the Pueblos' rights appurtenant to their grant lands. Those issues are:

Issue No. 1: Have the Pueblos ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, have those aboriginal water rights been modified or extinguished in any way by any actions of Spain, Mexico, or the United States?

Sub-issue: Did the Acts of 1866, 1870 and 1877 have any effect on the Pueblos' water rights and, if so, what effect?

Sub-issue: Did the Pueblo Lands Acts of 1924 and 1933 have any effect on the Pueblos' water rights and, if so, what effect?

Sub-issue: Did the Indian Claims Commission Act have any effect on the Pueblos' water rights and, if so, what effect?

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160. Memorandum Opinion and Order at 1–2, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. June 10, 1983).

161. Desert Land Act, ch. 107, 19 Stat. 377 (1877) (codified as amended 43 U.S.C. §§ 321–23, 325, 327–29).

162. Memorandum Opinion and Order at 8, New Mexico *ex rel.* State Eng'r v. Aamodt, No. 66-CV-6639 (D.N.M. Jan. 31, 2001).

163. Order at 2, New Mexico, *ex rel.* State Eng'r v. Abousleman, No. 83-CV-01041 (D.N.M. July 5, 2012).

Issue No. 2: Does the *Winans* doctrine apply to any of the Pueblos' grant or trust lands?

Issue No. 3: If the Pueblos have aboriginal water rights or *Winans* reserved water rights, what standards apply to quantify such rights?

Issue No. 4: Do the Pueblos have *Winters* reserved rights appurtenant to their trust lands and, if so, how are those rights to be measured?

Issue No. 5: Are the Pueblos entitled to any riparian rights?<sup>164</sup>

Issues 3, 4, and 5 were fully briefed in late 2012 (in reverse order), then expert reports were submitted relative to Issues 1 and 2, depositions were taken, and an evidentiary hearing was held March 31 through April 2, 2014. There, the court heard testimony of the two experts on Spanish and Mexican law. Briefing on Issues 1 and 2 was concluded by the end of 2014. As was noted above, just before publication of this article, on October 4, 2016, Magistrate Judge Lynch issued proposed findings and conclusions regarding Issues 1 and 2, in which he recommended that the court find that the Pueblos had aboriginal rights to their lands and waters, but that those rights were extinguished by the imposition of Spanish and Mexican law over the territory.<sup>165</sup> The United States and the Pueblos are now seeking review of that issue by Judge Martha Vázquez.

For purposes of this discussion, rather than go through the issues as identified above, it will be simpler to discuss each of the key topics, which are: (1) federally reserved rights; (2) Spanish and Mexican law issues; (3) aboriginal rights; (4) impact of the Pueblo Lands Act and the Pueblo Compensation Act; and (5) groundwater.<sup>166</sup>

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164. As has been noted previously, this issue has been resolved, with the Pueblos essentially conceding that they make no claims of riparian rights. *See supra* note 115.

165. Proposed Findings and Recommended Disposition Regarding Issues 1 and 2, *United States v. Abousleman*, No. 83-CV-1041 (D.N.M., filed Oct. 4, 2016), Doc. 4383.

166. Two other issues that are listed as "sub-issues" in the Abousleman list can be quickly disposed of. The first is the effect, if any, of three Acts of Congress enacted in 1866, 1870 and 1877, respectively, including the Desert Land Act, 43 U.S.C. § 321. The non-Indians' counsel have argued relentlessly, and in seeming disregard of precedent, that these statutes effectively subjected the Pueblos' water rights to state law. As was noted above, the *Aamodt* court expressly rejected this argument. *See Memorandum Opinion and Order, supra* note 162, at 8. Like every other court that has considered the argument, that decision noted that those statutes only apply to the development of water rights on public domain lands. Pueblo grant lands have never been part of the public domain, and those statutes can have no applicability to the Pueblos. The second issue is the effect, if any, of the claim brought jointly by the three Pueblos of Jemez, Zia and Santa Ana under the Indian Claims Commission Act. *See Findings of Fact on Compromise Settlement, Pueblo de Zia v. United States*, No. 137 (Ct. Cl. Jan. 10, 1974); *See also United States v. Pueblo de Zia*, 474 F.2d 639 (Ct. Cl. 1973). While it may be debatable whether the settlement of the Pueblos' ICCA claim would impact any claim they might make to aboriginal water rights on lands outside of their grant lands, no claim was made in that case, nor was any compensation paid for, the grant lands or any rights appurtenant thereto, so water rights appurtenant to the grant lands should have been unaffected by that claim.

*I. Federally Reserved Rights.*

Issue 4 in *Abousleman* is whether the Pueblos have *Winters* rights (federally reserved rights) appurtenant to their trust lands. Because the judge hearing the case had already ruled that the *Winters* doctrine does not apply to these Pueblos' grant lands,<sup>167</sup> the parties presumably saw no point in rearguing that issue and therefore restricted their attention, under *Winters*, to the lands set aside by the United States in trust for these Pueblos since 1848. This article's focus, however, is on the water rights appurtenant to Pueblo grant lands, and there is still some value in examining the *Winters* issue here.

As has been explained above, the claim that the Pueblos have *Winters* on their grant lands has been rejected not only by the judge presiding over the *Abousleman* case, but also by the *Aamodt II* decision and by the New Mexico Court of Appeals in *Kerr-McGee*. There is, however, a suggestion in the Tenth Circuit opinion in *Aamodt I* that Section 9 of the Pueblo Compensation Act may have reflected an intention on Congress' part "to recognize the *Winters* decision. Such an intent is consonant with both *Sandoval* and *Candelaria*."<sup>168</sup> Obviously, that passage was not persuasive with the district court on remand, or with any of the other judges who have rejected the claim. There is, however, one other case that offers support for the argument that Pueblo grant lands are entitled to federally reserved rights, though it arose in an unlikely place: deep in the wilds of central Alaska.

In *Alaska v. Native Village of Venetie Tribal Gov't*,<sup>169</sup> the Supreme Court was called upon, for the first time, to interpret the phrase, "dependent Indian community," as it appears in 18 U.S.C. § 1151. That statute, enacted in 1948 as part of an overall revision of the federal criminal code, defines the term "Indian country" for purposes of the Major Crimes Act.<sup>170</sup> "Indian country" is the term of art in Indian law that refers to the geographical area within which special jurisdictional rules (such as, for example, the jurisdiction of the federal courts under the Major Crimes Act) apply. The definition in § 1151 includes all lands within the exterior boundaries of Indian reservations [under subsection (a)], Indian allotments [subsection (c)], and under subsection (b), "all dependent Indian communities within the borders of the United States."<sup>171</sup> The Alaska Native Claims Settlement Act (ANCSA)<sup>172</sup>—enacted in 1968 to resolve the aboriginal title claims

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167. Memorandum Opinion and Order, *supra* note 107, at 21–26.

168. *New Mexico v. Aamodt*, 537 F.2d 1102, 1113 (10th Cir. 1976).

169. *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 526 (1998).

170. Major Crimes Act, § 8, 18 U.S.C. § 1153 (2012). The Act was originally enacted in 1885, in reaction to the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556, 571–572 (1883), in which the Court held that a federal court had no jurisdiction over the prosecution of a tribal member who had committed a crime against another tribal member (in that case, murder) within Indian country, that was punished according to the law of the tribe. The Act sets forth a number of specific crimes that, when committed by an Indian within Indian country, may be prosecuted in federal court. Its constitutionality was upheld in *United States v. Kagama*, 118 U.S. 375 (1886).

171. Though part of the criminal code, the Supreme Court has repeatedly held that that definition should determine whether land is Indian country in civil contexts as well. *See, e.g., DeCoteau v. Dist. Ct.*, 420 U.S. 425, 427 n.2 (1975); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987).

172. Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601–1629(h) (2012).

of native Alaskans to most of the state and thus pave the way for the construction of the Alaska Pipeline—abolished all Indian reservations in the state except one and granted 45 million acres of Alaskan land (and half a billion dollars) to the existing native villages and to the regional native corporations created by ANCSA. In *Venetie*, the village contended that the land conveyed to the villages was Indian country. It was plainly neither reservation land nor allotments and, by a process of elimination, that left “dependent Indian community” as the only possible category that would bring the land within the four corners of § 1151. The village thus contended that it was a “dependent Indian community.”<sup>173</sup>

The caselaw from the lower courts in the 50 years since § 1151 was enacted revealed no clear concept of what constituted a “dependent Indian community” for these purposes. But the origin of the phrase itself was very clear: the drafters of § 1151 lifted it directly from *Sandoval*,<sup>174</sup> the case in which the Supreme Court (correcting the error of *Joseph*<sup>175</sup>) held that the Pueblos were, indeed, “Indians,” and thus under the constitutional authority of Congress.<sup>176</sup> The passages in which the phrase appears demonstrate that the Court in *Sandoval* was not singling the Pueblos out as being distinct from other tribes. Instead, it was describing them as being, for the Court’s purposes, exactly *like* all of the other “dependent Indian communities within [the United States’] borders,” over which the United States has “the power and the duty of exercising a fostering care and protection.”<sup>177</sup>

That notion, in a sense, informed the Court’s decision in *Venetie*. As it had in other Indian country cases, it determined that to constitute a “dependent Indian community,” land had to meet the two-part test of: (1) having been set aside by the government in some manner for Indian use and occupancy, and (2) being under continuing federal superintendence. (The Court concluded that the Alaska village lands failed to meet the second part of this test.) But to justify imposing that test on the “dependent Indian community” category of lands, the Court appears to have felt obliged to review the phrase’s pedigree, to demonstrate that the “federal set-aside/superintendence” test had applied from the very beginning. Acknowledging that the phrase had been derived directly from *Sandoval*,<sup>178</sup> it thus examined the circumstances of the Pueblos in detail. The Court noted that although Pueblo land was owned in fee simple title, it was not “fee simple in the commonly understood sense of the term.”<sup>179</sup> It explained that Congress had legislated with respect to Pueblo lands, “including [imposing] federal restrictions on the lands’ alienation,”<sup>180</sup>

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173. John G. Roberts, Jr., now Chief Justice of the United States, argued the case in the Supreme Court, for the State of Alaska, against the Village of Venetie. See *Alaska v. Native Vill. of Venetie Tribal Gov’t*, 522 U.S. 520 (1998).

174. *United States v. Sandoval*, 231 U.S. 28, 46–47 (1913).

175. See *United States v. Joseph*, 94 U.S. 614 (1877); see also *supra* note 124 and accompanying text.

176. See *Sandoval*, 231 U.S. at 48–49. See also *Native Vill. of Venetie Tribal Gov’t*, 522 U.S. at 530.

177. *Sandoval*, 231 U.S. at 46.

178. *Native Vill. of Venetie Tribal Gov’t*, 522 U.S. at 530.

179. *Id.* at 528.

180. *Id.*

citing the Indian Nonintercourse Act<sup>181</sup> and the passage in *United States v. Candelaria*, where the Court had expressly held that the Nonintercourse Act had been directly imposed on Pueblo lands by the 1851 Act.<sup>182</sup>

*Venetie* thus appears to hold squarely that the extension of the Nonintercourse Act over the Pueblos by the 1851 Act amounted to a federal “set-aside” of the Pueblos’ lands. It would not seem to be too much of a stretch to contend that implicit in that set-aside was a reservation of water rights sufficient for the Pueblos’ present and future needs. It is doubtful whether there will be an opportunity to present that proposition to a federal judge at any time in the foreseeable future, but it is an intriguing proposition all the same.

## 2. Spanish and Mexican Law

The impact on Pueblo water rights, if any, of Spanish and Mexican law during the periods of Spanish and Mexican rule in New Mexico, respectively, has undoubtedly been the most intensively studied and argued-over question in all of the Pueblo water rights cases, especially including *Aamodt*, *Abeyta*, *Abousleman*, and *Kerr-McGee*. Included in this question is the issue of whether either of those sets of laws established (or extinguished) any determinable rights in the Pueblos and what the effect on the Pueblos’ rights, if any, of the change in sovereignty wrought by the Treaty of Guadalupe Hidalgo was. Literally thousands of pages of expert reports and exhibits, deposition transcripts, and trial testimony have been produced in the examination of these questions.

The court in *Aamodt II*, as noted above, held that Spanish and Mexican law recognized and protected the aboriginal rights of the Pueblos to all the water they required for their present and future needs.<sup>183</sup> Subsequently, however, other experts for both the Pueblos and the State have expressed the view that the concept of “aboriginal rights” was unknown in Spanish law. One point that all parties agree on is that when a dispute arose among different users of water from a common source, the Spanish or Mexican government could institute a *repartimiento*.

A *repartimiento* was something like a general stream adjudication, but fairly informal. The local authority would allocate the available water among the various users, based on a variety of factors. In many cases, the result would be that every user ended up with the right to *some* water. But a study of a number of *repartimientos* in Mexico involving Indian communities in the sixteenth through the eighteenth centuries by Prof. William B. Taylor<sup>184</sup> showed that Indians were virtually always given a strong preference in these proceedings based on their priority of use, and in some cases were allotted all of the available water. There is only one record, however, of a *repartimiento* ever having occurred in New

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181. Indian Nonintercourse Act, Rev. Stat. § 2116, 25 U.S.C. § 177 (2012), cited in *Native Vill. of Venetie Tribal Gov’t.*, 522 U.S. at 528 n. 4.

182. *United States v. Candelaria*, 271 U.S. 432, 441–42 (1926), cited in *Native Vill. of Venetie Tribal Gov’t.*, 522 U.S. at 528 n.4.

183. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, at 996, 998, 1000–01 (D.N.M. 1985).

184. See William B. Taylor, *Land and Water Rights in the Viceroyalty of New Spain*, 50.3 N.M. HIST. REV. 189 (1975). Dr. Taylor was an expert witness for the Pueblos in *Aamodt*.

Mexico—on the Rio de Lucero and the Rio de Pueblo de Taos, in 1823.<sup>185</sup> Thus, there seems to be no basis for contending that the *repartimiento* process determined any Pueblo's rights, perhaps other than the rights of the Taos Pueblo.<sup>186</sup>

The Pueblos and the United States argued in *Abousleman* that Spanish and Mexican authorities recognized the Pueblos' rights to use such water as they needed, and that the only relevant question is whether either government ever took any action to limit or extinguish any water rights of any Pueblo, the effects of which action could arguably have survived the transfer of sovereignty over the territory to the United States. The United States' expert in that case, Prof. Cutter, agreed with that position. Apart from the Taos *repartimiento*, and a minor dispute between Tesuque Pueblo and some downstream Spaniards over springflow, no such limiting or extinguishing action has ever been identified. But the State's expert in *Abousleman*, Prof. Hall, has expressed the opinion that the mere possibility that a *repartimiento* could have been imposed to settle a dispute over the use of a water source utilized by a Pueblo and by non-Indians during the Spanish and Mexican periods in New Mexico necessarily meant that the Pueblo's right to use as much of the water from that source as it needed had been extinguished, even though no such proceeding was ever actually instituted. Prof. Hall acknowledges that his opinion is shared by no other expert in this field, and there is no documentary support for it.<sup>187</sup> Magistrate Judge Lynch, however, was seemingly impressed by Prof. Hall's argument<sup>188</sup>, but whether that view will be accepted by Judge Vázquez remains to be seen.

### 3. Aboriginal Water Rights

Indian aboriginal title, sometimes referred to in earlier caselaw as "original Indian title" or the "Indian right of occupancy," is one of the oldest concepts in federal Indian law and was first discussed more than two centuries ago in *Fletcher v. Peck*.<sup>189</sup> Chief Justice John Marshall elaborated on the doctrine in his

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185. The Taos *repartimiento* arose when the Pueblo and the Hispanic citizens of Don Fernando de Taos complained to the *ayuntamiento* (the local town council, a newly established institution under the Mexican government) that a group of settlers in Arroyo Seco, who had settled there with no rights to the land, had constructed a ditch that diverted water from above the Pueblo and the town, thereby infringing on their rights. At the evidentiary hearing in *Abousleman*, Prof. Hall contended that the result of the *repartimiento* was that, although Taos was accorded the senior right, the Arroyo Seco settlers were given the right to a *surco* (the amount of water that could be diverted through a small pipe), and that in times of shortage all of the users' rights were reduced proportionately. See Transcript of Proceedings at 143–44, 446, 451–52, *United States v. Abousleman*, No. 6: 83-CV-01041 (D.N.M. Mar. 31, 2014). Dr. Cutter, however, whose expertise in translating old Spanish documents was acknowledged by Prof. Hall, asserted that Prof. Hall had mistranslated the portion of the document dealing with what happened when water was scarce, and that in fact it required that all users *except* Taos had to reduce their diversions so that Taos could take its full allocation. *Id.* at 445–52.

186. *But see* *New Mexico v. Abeyta*, No. 6:69-CV-07896 (D.N.M. Feb. 11, 2016) (approving settlement of the Pueblo of Taos' rights).

187. Transcript of Proceedings March 31, 2014 at 53, 339, *United States v. Abousleman*, 6:83-CV-01041 (2014)

188. Proposed Findings and Recommended Disposition Regarding Issues 1 and 2 at 12–13, *United States v. Abousleman*, No. 83-CV-1041 (D.N.M., filed Oct. 4, 2016), Doc. 4383

189. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 142–43 (1810).

famous decision in *Johnson v. M'Intosh*.<sup>190</sup> Aboriginal title is an interest in real property that is subject only to the fee title of the sovereign, that may only be extinguished by an affirmative act of Congress, and that embraces not only the soil and its products but also the usufructuary rights appurtenant to the land. These aboriginal rights include hunting, fishing, and the taking of timber and crops, as well the use of water flowing across or adjacent to, or lying beneath, the land. Importantly, the existence of aboriginal title does not depend upon any act of the sovereign recognizing or acknowledging such title. Were there any such act,<sup>191</sup> the tribe's title would be considered "recognized," and therefore would be deemed a full property right, the taking of which would entitle the tribe to just compensation.<sup>192</sup> Rather, aboriginal title arises solely from a tribe's long, continuous, exclusive use and occupancy of lands (or waters), regardless of whether such occupancy has ever previously been acknowledged by the United States.<sup>193</sup>

*Winans* is generally thought of as the case that first gave rise to the notion of aboriginal water rights, but that case in fact held that the Yakama Nation (then known as "Yakima"), in a treaty by which the tribe ceded a large area of land to the United States, in addition to reserving certain lands as a reservation, had also reserved its right to take fish at all of the tribal members' "usual and accustomed places" outside of their reservation, though "in common with the citizens of the territory."<sup>194</sup> The Court made clear that those rights were not granted by the United States, but were rights that the Indians had always enjoyed throughout their aboriginal lands, and were reserved by them in the course of granting vast lands to the United States.<sup>195</sup> Although *Winters* has usually been cited as representing the origin of the federally reserved water rights doctrine,<sup>196</sup> the opinion actually refers to the rights of the tribes, like those in *Winans*, as rights they had possessed prior to the treaty that left the tribes on the Fort Belknap Reservation, and rights they had impliedly reserved. *United States v. Adair*<sup>197</sup> was the first decision to explicitly hold that the tribe retained "an aboriginal right to the water" it used, but similar rulings have since been handed down in cases such as *Joint Bd. of Control v. United States*<sup>198</sup> and *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*.<sup>199</sup>

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190. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

191. Such an act could be, for example, a treaty in which a tribe and the United States agree that the tribe retained certain described lands.

192. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). But see *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (holding that the taking of lands held by aboriginal title is not considered a Fifth-Amendment taking).

193. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.04[2], at 999–1000 (Neil J. Newton et al. eds., 2012).

194. *United States v. Winans*, 198 U.S. 371, 378–79 (1905).

195. *Id.* at 381.

196. *Winters v. United States*, 207 U.S. 564 (1908).

197. *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir.1983).

198. *Joint Bd. of Control v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987).

199. *State ex rel. Greely v. Confederated Salish and Kootenai Tribes*, 712 P.2d 754, 764–67 (Mont. 1985). It should be made clear that the principal feature of "aboriginal water rights" is that they have an

In *Santa Fe Pacific*, the Supreme Court observed that by the 1851 Act, Congress expressly indicated an intention to “continue in these territories [acquired from Mexico by the Treaty of Guadalupe Hidalgo] the unquestioned general policy of the Federal government to recognize [the Indian] right of occupancy.”<sup>200</sup> As noted above, all New Mexico Pueblos continue to occupy lands that they have used and occupied since long before the Spanish arrived in the Southwest, and there has never been any Act of Congress extinguishing their aboriginal title to those lands.<sup>201</sup> The *Aamodt II* court thus found that the Pueblos hold aboriginal rights to use water for their present and future needs (though subject to that court’s questionable conclusion that the Pueblos’ legal right to develop water for future needs was cut off by the Pueblo Lands Act).<sup>202</sup>

The Pueblos and the United States have argued, in the *Abousleman* case, that the measure of aboriginal water rights should be viewed as being similar to that of federally reserved rights, that is, appurtenant to lands set aside as a tribe’s homeland and sufficient to provide for the tribe’s present and future needs. To have the right to sufficient water for those needs, the Pueblos and the United States contend, would have been the tribe’s intention and expectation in its original utilization of its lands and waters. They have further proposed that those rights thus be quantified in the same manner as federally reserved rights are quantified, as enough water to irrigate the practicably irrigable acreage within each Pueblo’s grant lands.<sup>203</sup>

In contrast, the State (joined by the non-Indians in *Abousleman*) asserts that any aboriginal water rights the Pueblos might claim are strictly limited to what they can prove they were using as of 1848. It argues that rights to uses beyond those amounts would have been “inchoate” rights that would not have been protected by the Treaty of Guadalupe Hidalgo. The State vehemently rejects the Pueblos’ and the United States’ claim to a PIA standard for quantification of aboriginal water rights, correctly asserting that no reported decision has ever expressly approved such a standard in addressing aboriginal rights.

In her 2004 Opinion in *Abousleman*, Judge Vázquez specifically held that aboriginal title can form the basis for ownership of a water right.<sup>204</sup> In so ruling, she rejected the claim of the State and the non-Indians to the contrary. And in ruling that *Winters* rights did not apply to the Pueblos’ grant lands, Judge Vázquez took pains to note that her ruling “does not mean that Pueblos do not have aboriginal use rights on grant lands.”<sup>205</sup> But whether the Pueblos do in fact have aboriginal water rights, and if so, what those rights look like, remains to be determined.

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“aboriginal” priority, sometimes referred to as that of “time immemorial,” and thus prior to that of any non-Indian appropriator. *See id.* at 764–67.

200. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 348 (1941).

201. *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975).

202. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1009 (D.N.M. 1985).

203. *See United States’ and Pueblos of Jemez, Santa Ana and Zia’s Opening Brief Regarding Quantification of Pueblos’ Aboriginal Water Rights* (Issue No. 3) at 10–13, *United States v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Nov. 13, 2012).

204. Memorandum Opinion and Order at 21, *New Mexico v. Abousleman*, No. 6:83-CV-01041 (D.N.M. Oct. 4, 2004).

205. *Id.* at 25–26.



#### 4. *The Impact of the Pueblo Lands Act and the Pueblo Compensation Act*

For good reason, lawyers considering the effect of the Pueblo Lands Board period (1924–33) on the water rights of the Pueblos, have primarily focused their attention on the Pueblo Compensation Act of 1933, especially Section 9 of the Act.<sup>206</sup> As will be explained, the very purpose of that Act was to correct what Congress determined to be an incorrect theory advanced by the Board relating to the water rights held by the Pueblos. Indeed, Section 9 was inserted at the urging of a high official of the Department of the Interior to ensure that Congress did not create an implication that the Pueblos had somehow lost the immemorial priority of the water rights that attached to their remaining lands.

After the *Aamodt II* opinion was issued, however, it became necessary to also consider the effect, if any, of the Pueblo Lands Act itself.<sup>207</sup> The court in that opinion held that the Act had terminated the Pueblos' aboriginal rights to develop water for their future needs and had fixed their rights at the amounts of water they had used historically between 1846 and 1924.<sup>208</sup> This passage in that opinion,<sup>209</sup> however, is practically impossible to credit.<sup>210</sup> The court cited no specific language or section of the Act that would effectuate this extinguishment of the Pueblos' rights. And while the Act refers to compensation for water rights appurtenant to lands lost by the Pueblos or by non-Indian claimants, nowhere does it make any reference to rights of the Pueblos on the lands they retained. Moreover, the court makes no effort to explain the significance of Section 9 of the 1933 Act, much less how the court's view of the Pueblo Lands Act comports with that section.

There is no question, however, that the Pueblo Compensation Act of 1933, and especially Section 9 of the Act, bears directly on the Pueblo water rights question. The impetus for the 1933 Act was the revelation to Congress that, in making awards of compensation to the Pueblos for lands that the Pueblo Lands Board (or the federal court) decided met the adverse possession criteria of Section 4 of the Pueblo Lands Act—and that therefore would be patented to the non-Indian claimants—the Board<sup>211</sup> consistently awarded the Pueblos about one-third of the appraised value of the lands they lost, while awarding unsuccessful non-Indian claimants full value of the lands and improvements they lost. Congress held hearings in 1931–32 to investigate this practice. At those proceedings, Herbert Hagerman, a former New Mexico territorial governor and the one person to serve on the Board throughout its existence, claimed that the reduced awards were warranted. Hagerman based this claim on his theory that the Pueblos had only lost “secondary,” as opposed to “primary,” water rights and that the values of those

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206. Act of May 31, 1933, ch. 45, 48 Stat. 108, 111.

207. The tumultuous circumstances that led to the enactment of that Act, and the activities of the Pueblo Lands Board that then prompted Congress to enact the 1933 Act, are set forth in detail in EBRIGHT ET AL. *supra* note 7, at 267–91.

208. New Mexico *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993, 1010 (D.N.M. 1985).

209. To be sure, this is the most critical part of the court's ruling, in that it drastically limits the Pueblos' rights. *See id.* at 1010.

210. *See supra* Part II.A.

211. After the proceedings at Tesuque, to which it awarded full appraised value.

losses were thus much less than the amounts shown by the appraisals.<sup>212</sup> Hagerman was not an attorney, and no attorney familiar with water law ever supported his claim. Moreover, then-Pueblo lands activist (and later Commissioner of Indian Affairs) John Collier made a substantial showing that Hagerman's claim may have been recently invented for purposes of the committee hearings. Collier noted that neither Hagerman nor anyone else on the Board had ever mentioned such a theory at the time they were holding their hearings at the various Pueblos and determining compensation awards. He also showed that even if one accepted Hagerman's claim, the Pueblos had still lost valuable water rights appurtenant to the lands patented to the non-Indians.<sup>213</sup> The committees hearing the bill plainly did not accept Hagerman's claims, and approved the bill to raise the compensation to the Pueblos to figures approaching full appraised value.

Near the end of the lengthy and contentious hearings, in 1932, Northcutt Ely—an attorney who was serving as executive assistant to the Secretary of the Interior, and who clearly did understand Indian water law<sup>214</sup>—proposed a new section of the bill, language that was ultimately adopted verbatim as Section 9. Ely explained that the Department was concerned that a court considering Pueblo water rights at some time in the future might view the bill's clear rejection of Hagerman's claim that the rights the Pueblos lost were only "secondary" rights, and thus not worth much, as implying that Congress had also rejected the view that the Pueblos retained "primary" rights (that is, immemorial priority) on their retained lands. The Department did not want any possibility for such an inference to arise from Congress' enactment of the bill. According to Ely, the Department worried that, by approving the additional compensation, Congress might be seen to have essentially waived or extinguished the Pueblos' prior right to water for the lands they retained.<sup>215</sup> Ely had drafted language to negate any such implication, and it became Section 9 of the bill. Section 9 simply stated that nothing in the Act "shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water . . . for the lands remaining in Indian ownership," and that those rights would not be subject to loss due to non-use or abandonment.

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212. See *Survey of Conditions of the Indians in the United States: Hearing on S. Res. 79, S. Res. 308, and S. Res. 263 Before the S. Subcomm. on S. Res. 79 of the Comm. on Indian Affairs*, 71st Cong. 4588, 4596, 4700 (1931) (statements of Herbert J. Hagerman), <https://babel.hathitrust.org/cgi/pt?id=uc1.b5157897;view=1up;seq=9> [<https://hdl.handle.net/2027/uc1.b5157897>]; *Survey of Conditions of the Indians in the United States: Hearing on S. Res. 79, S. Res. 308, S. Res. 263, and S. Res. 416 Before the S. Subcomm. On S. Res. 79 of the Comm. on Indian Affairs*, 71st Cong. 11211–45 (1931), <https://babel.hathitrust.org/cgi/pt?id=uc1.b5157901;view=1up;seq=891> [<https://hdl.handle.net/2027/uc1.b5157901>].

213. *Id.* at 11245–52.

214. Much later in life, Ely argued in the Supreme Court for the State of California in *Arizona v. California*, 350 U.S. 114 (1955).

215. *Survey of Conditions of the Indians in the United States: Hearing on S. Res. 79, S. Res. 308, S. Res. 263, and S. Res. 416 Before the S. Subcomm. On S. Res. 79 of the Comm. on Indian Affairs*, 71st Cong. 11136–38, 11205–09, 11256–68 (1931), <https://babel.hathitrust.org/cgi/pt?id=uc1.b5157901> [<https://hdl.handle.net/2027/uc1.b5157901>]; *Authorization of Appropriations to Pay in Part the Liability of the United States to Certain Pueblos: Hearings on H.R. 9071 Before the H. Comm. on Indian Affairs*, 72nd Cong. 115–36 (1932) (statements of Northcutt Ely).

It should be noted that Hagerman's theory was dead wrong. By losing valuable irrigable land, the Pueblos were losing the right to claim water rights with a time immemorial priority for that acreage. It is true that the *Aamodt* court held that successful non-Indian claimants did not get the Pueblos' immemorial priority for the water rights appurtenant to the lands they claimed. Rather, the non-Indians' priorities were based on the dates of first application of water to those lands by the claimants or by their non-Indian predecessors in interest.<sup>216</sup> But the additional awards to the Pueblos were warranted, notwithstanding Hagerman's earnest opposition to them, to compensate them for the significant value of the water rights that the Pueblos lost with the land.

The Pueblos and the United States see Section 9 as essentially a refutation of the *Aamodt II* view that water rights for future uses were cut off as of 1924. By confirming a prior right to water for all of the Pueblos' remaining lands, the argument goes, Congress seems plainly to have contemplated the development of lands not then under irrigation, to provide for the Pueblos' future needs. The State and the non-Indians of course reject this claim. They contend that the 1924 Act recognized that Pueblo water rights were governed by state law, and that Section 9's sole purpose was to preserve the issue of priority of those rights for future litigation. Of course, that position is contrary to the Tenth Circuit's rulings on the effect of Section 9 in *Aamodt I*. The State and the non-Indians dismiss those rulings as dicta, but whether Judge Vázquez will therefore simply ignore them remains to be seen. One way or another, her views on the effect of Section 9 of the 1933 Act may turn out to be critical to the outcome of *Abousleman*.

### 5. Groundwater

Not much attention has been paid to groundwater in these cases, but it could be a very consequential topic in *Abousleman*, due to the local hydrologic conditions. As was noted above, in *Aamodt II*, the court ended its opinion with a two-sentence paragraph concerning groundwater, stating that the Pueblos' water rights included "the ground water physically interrelated to the surface water as an integral part of the hydrologic cycle,"<sup>217</sup> citing *Cappaert* (from which that phrase is taken verbatim<sup>218</sup>). There are at least two criticisms that could be leveled at that passage in *Aamodt II*. First, *Cappaert* is a federally reserved rights case, in which the Court held that in setting aside land for the creation of Devil's Hole as a unit of Death Valley National Monument, the United States impliedly reserved sufficient groundwater to assure the survival of the Devil's Hole pupfish, an endangered species whose protection was the principal purpose of the addition of Devil's Hole to the monument. (The government brought the suit to obtain an injunction against groundwater pumping by a neighboring landowner that was lowering the water level in the spring-fed pool to a point that threatened the pupfish's ability to spawn.) But the *Aamodt II* court had held that the Pueblos do not have federally reserved rights appurtenant to their grant lands, so it is unclear how *Cappaert* could provide authority for Pueblo groundwater rights. Second, although the Court

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216. Memorandum Opinion and Order, *supra* note 159.

217. *New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985).

218. *Cappaert v. United States*, 426 U.S. 128, 142 (1976).

described the groundwater that feeds the pool in *Cappaert* as being “hydrologically connected” to the surface water,<sup>219</sup> the Court’s holding in *Cappaert* was that the United States “can protect its water from subsequent diversion, whether the diversion is of surface or groundwater,”<sup>220</sup> a passage that does not appear to require proof of any hydrologic connection to surface water before groundwater can be protected. The wording of the passage in *Aamodt II* thus seems unduly narrow; that is, the Pueblos’ rights to groundwater should not depend on a showing that the groundwater is somehow hydrologically connected to surface water. It should also be noted that while adding that the Pueblos have “the prior right to the use of this water,”<sup>221</sup> the court gave no indication whether that right was also limited by the Pueblo Lands Act, as the court claimed the Pueblos’ surface rights were.

The State’s expert on Spanish and Mexican law in *Abousleman*, Prof. Hall, however, has stated in his expert reports and has testified in depositions in both *Abousleman* and *Kerr-McGee* (and at the evidentiary hearing in *Abousleman*) that in his opinion, under Mexican law, groundwater—or water from springs that does not leave a landowner’s land—was not considered public water, but was rather part of the real property belonging in its entirety to the landowner.<sup>222</sup> The landowner thus had the untrammled right to appropriate groundwater from his own land. Dr. Cutter agreed with that view.<sup>223</sup> If that is so, then that right to all of the available groundwater should be a property right that was protected by the Treaty of Guadalupe Hidalgo.

### III. CONCLUSION

Despite half a century of expensive litigation, key questions relative to the water rights of the Pueblos appurtenant to their grant lands remain undecided, and the issues remain as hotly contested as they were at the outset. There is some irony in the fact that under the *Winters* doctrine, tribes with no substantial agricultural background have been awarded relatively huge water rights,<sup>224</sup> while the Pueblos, who mastered irrigated agriculture a millennium ago, have had their claims of rights based on irrigable acreage so fiercely resisted, and have had to struggle to obtain modest settlement-based water rights.

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219. Although in that case the “surface water” was just the spring-fed pool, which has no outlet, not a flowing stream. See *Cappaert*, 426 U.S. at 136.

220. *Cappaert*, 426 U.S. at 142.

221. *Aamodt*, 618 F. Supp. at 1010.

222. See, e.g., G. EMLÉN HALL, THE WATER RIGHTS OF NEW MEXICO PUEBLOS AND THEIR NEIGHBORS AS OF THE END OF MEXICAN SOVEREIGNTY IN 1848 WITH EMPHASIS ON THE PUEBLOS OF JEMEZ, ZIA AND SANTA ANA IN THE JEMEZ RIVER VALLEY AND WITH A FOCUS ON THE REPORT OF CHARLES R. CUTTER, PH.D. (2013); State of New Mexico Final Exhibit List at 2, *United States v. Abousleman*, 6:83-CV-01041 (D.N.M. September 16, 2013); Transcript of Proceedings March 31, 2014 at 273, 274, 384–85, 389–90, *United States v. Abousleman*, 6:83-CV-01041 (2014).

223. Transcript of Proceedings March 31, 2014 at 60–61, 146–47, 177, *United States v. Abousleman*, No. 6:83-CV-01041 (2014).

224. See, e.g., *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 100–101 (Wyo. 1988) (affirming award of water rights amounting to approximately half a million AFY to Shoshone and Arapahoe Tribes of the Wind River Reservation).

Of course settlements in cases such as *Aamodt* and *Abeyta* have included substantial federal funding for the Pueblos to be able to develop the rights confirmed to them, something that an adjudication would not have afforded them. But the lack of any clear ruling on the nature and measure of their water rights has plainly put the Pueblos at a serious disadvantage in settlement negotiations. Parties in such negotiations routinely assess their positions by comparing what they would obtain in the settlement as opposed to what they could expect to obtain through litigation. Without having some idea of how an adjudication of their rights would come out, however, the Pueblos have had to move cautiously in settlement negotiations, and have had little leverage in the bargaining process.

It is also of consequence that the rights of several Pueblos have not yet been addressed. This is a particularly serious matter when one considers the prospect of an adjudication of the mainstem of the Middle Rio Grande. There are nine Pueblos whose grant lands straddle or border the Rio Grande, and many of them have substantial lands that would very likely be found to be “practically irrigable,” if that standard were found applicable to those lands. The Rio Grande is already famously over-appropriated, and the unadjudicated claims of the Pueblos threaten to seriously unhinge the tenuous existing array of uses of that precious water, not to mention the division of the river’s flows among the basin states.<sup>225</sup>

The need for a clear judicial determination of the nature and measure of Pueblo water rights thus seems incontrovertible. It may be that the pending proceedings in *Abousleman* will produce such a ruling, and change the landscape of Pueblo water rights adjudications, but for now the nature, extent, and priority of Pueblo rights remains uncharted ground.

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225. The 1939 Rio Grande Compact, it should be recalled, states that it is “not to be construed . . . as impairing the rights of the Indian tribes.” N.M. Stat. Ann. § 72-15-23 (1945).

