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The First Irrigation Lawsuit

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THE FIRST IRRIGATION LAWSUIT

In the valley of the Nile, of the Euphrates and of other ancient streams where irrigation was practiced for thousands of years before the Christian era, there were undoubtedly disputes over the use of the water. Whether the quarrels led to killings as in the Western States of North America, whether codes were enacted for filing on waters and courts were invoked to interpret them, is however, a matter for speculation. At least I am not aware that any record of such cases has come down the ages. And when I speak of the first irrigation case I mean the first case involving ancient waterrights that was brought to the attention of a court in territory of the United States.

When the common law followed the American arms into that vast section of the continent that was ceded to the United States by the treaty of Guadalupe Hidalgo in 1848 it encountered two divisions of the civil law of Mexico which did not yield to its superior force. These two divisions of law were the Community Property Law and the conception of Waterrights by Appropriation, as opposed to the English system of Tenure by the Entirety and Riparian Rights in Water. Because of the nature of the country, its lack of rainfall, the necessity of conducting water from streams considerable distances in order to irrigate farm lands and thus raise the necessities of life in the way of food, the invaders were quick to recognize the necessity of retaining this law of water appropriation, and so it was retained, in its native purity in some states and modified into a hybrid in others. Presently long and learned discourses were gathered into treatises or textbooks explaining its origin, its uses and its genius. Today it has been elaborated by many decisions, even those of the highest tribunal of the land.

A search of the decisions of the Supreme Court of

California discloses the fact that the first cases involving waters had to do with water for mining purposes. The first case involving disputes over waters for irrigation appears to have been Crandall vs Woods 8 Cal. 136 which was decided in 1857. That fact that this case does not quote a single other decision involving irrigation would indicate that there were none. No other Western States were organized prior to 1855, and it was in this year that the great litigation between the Indian Pueblo of Ácoma and the Indian Pueblo of Laguna in the Territory of New Mexico was commenced as cause No. 1 on the civil docket of the District Court of the Territory of New Mexico for the Third Judicial District within the County of Valencia. The musty documents in the office of W. D. Newcomb, the present clerk of the court, disclose that the suit was hard fought, that every trick of the trade was put in use and that not until 1857 was a settlement reached which disposed of the dispute by an agreement between the parties.

It appears from the files that the water-right in dispute was centuries old, and had been a matter of bitter feeling between the two pueblos for two hundred years or more. The few lawyers that were then practicing in the wake of the victorious armies were venturesome barristers and occupied the very outposts of the common law, its practice and procedure. In the rigid formalities of that system they had been trained and it is therefore interesting to note the skill with which they adapted these forms to the enforcement of a right not known to the common law system.

The "solicitor" for the plaintiff was Spruce M. Baird, who was later to be one of the attorney generals of the territory and who defended Major Weightman after his famous duel with Francis Aubrey. At that time the presiding judge of the district was Kirby Benedict, one of the most picturesque judges who ever sat on the bench in the United States and whose opinions, which are to be found in the New Mexico reports, are truly gems of brilliancy. His famous death sentence on José María Martín has been

often published.[1] Mr. Baird's pleading was entitled "Bill to Quiet Title etc.," a remedy used for the purpose of determining title to land but well adapted to the purpose in hand; and since then water rights have been held to be a specie of real estate.

Here are the important features of the bill:
(interlineations, insertions and erasures as in the original)
"The petition of the Pueblo of Ácoma by their governor José Lovato complaining of the Pueblo of Laguna showeth, that upwards of two hundred years past the Pueblo of Siama (alias Sia)[2] was established by the kingdom of Spain on the creek or stream known as the Galla, being the same which runs from the Ojo del Galla by the ruins of the said Pueblo, the Pueblo of Laguna (after passing which taking the name of the Rita) and enters the Rio Puerco in front of the Pueblo of Isleta. The boundaries of the said Pueblo of Sia were designated as set forth in Exhibit "A" known as follows to wit, as in Exhibit "A", and complainant asserts that the Pueblo of Ácoma and its inhabitants are the successors and descendants of the Pueblo of Sia and have succeeded to and inherited all and singular the rights of property which formerly pertained to the Ancient Pueblo of Sia.

The said Pueblo of Sia as your petitioner is advised and believes was located on the said stream with a view to the use and enjoyment of the water of the same as far as they should need it: But afterwards, but at what precise time your petitioner is unable to state, the Pueblo of Laguna was established immediately below and adjoining the more ancient Pueblo of Sia on the same stream with a view to the enjoyment and use of the surplus water of the said stream after the wants and necessities of the Pueblo of Sia should be supplied.

1. *Old Santa Fe*, I, 83.

2. Seama (Tsiama) is today one of the villages of the Laguna Indians. In the record of this suit it appears to be confused with the old pueblo of Cia (Zia, Tsia) lying northeast on the Jemez River—Ed.

But so it is, may it please your Honor, as your petitioner is advised and believes, the said Pueblo of Laguna disregarding the superior claim of your petitioner to said waters and fraudulently intending to cheat and defraud the said Pueblo of Sia of the use of the water which had been granted to her commenced setting up various fictitious and fraudulent claims to the said water and the lands of the Pueblo of Sia. sometimes pretending that they were equally entitled to the water of said stream, and at other times that they were exclusively entitled to the same, and thus continued to harrass and annoy the people of Sia until, the former growing in strength while the latter was stationary by reason of the prejudice and damage done them by the former, they made war upon the Ancient Pueblo of Sia, the ruins of which still remain, and forced the people thereof to remove from the same to a more secure position and establish the present Pueblo of Ácoma, remote from any running water on a barren rock, some three or four hundred feet high, inaccessible but at two points for footmen and at but one for horsemen and at no point for wheeled carriages. And in consequence of the original and continued harrassments—destroying and confounding the ancient landmarks between the two pueblos—appropriating the same to their own use and to break and destroy the tanks and ditches of your petitioners especially in the season of irrigation and to inflict upon them —damages—such as can not be recompensed—Wherefore the premises being considered in as much as your petitioner is without remedy at law and for the purpose of forever settling all questions between themselves and the Pueblo of Laguna touching the boundaries of their lands and the water of said stream as well as to avoid the multiplicity of suits that must necessarily grow out of said questions if not settled in a court of chancery—" here followed the commensurate prayer for an injunction.

In order to impress the court with the fact that the multiplicity of suits was real and not imaginary, the resourceful lawyer at once started thirteen separate suits in trespass against members of the Laguna tribe and against

the Rev. Samuel Gorman who was the Baptist minister of the Laguna mission. Gorman had played a prominent part in the negotiations which preceded this suit both before the Indian Agency at Santa Fé and Governor Meriwether of the Territory. These negoiations led to a temporary truce during the summer of 1854, but with the approach of the irrigating season of 1855 the trouble broke out anew.

I. S. Watts was the solicitor for the defendant and he filed a lengthy answer in which he set up for the Pueblo of Laguna an earlier title to the water from the same source but three days earlier in time, and plead non-user and abandonment of its water-rights, a doctrine since become firmly established in Irrigation Law. He disputed the allegation that Laguna had made war on Sia and asserted that in 1689 the people of Laguna had numbered only eight families and could not have made war on the "strong and powerful" people of Ácoma, who, he suggested had gone to the inaccessible rock not for safety but for the purpose of using it, in the manner of the robber barons, as a stronghold from which to send expeditions for the oppression of other tribes and to levy tribute upon them. The defendant's pleader was a bit inconsistent in his argument, and after asserting an independent and prior right he alleged that by reason of the abandonment by Ácoma and the user by Laguna the latter had secured a right "in common with" the Ácoma people.

The case came to trial the 10th day of June, 1857, after evidence had been taken by a commission appointed for that purpose. This evidence consisted of oral statements by witnesses as to what their grandfathers and great-grandfathers had told them. The case of both Ácoma and Laguna rested mainly on ancient documents dated "At the town of our Lady of Guadalupe of El Paso of the Rio del Norte" which were in the nature of a deposition to perpetuate testimony. In these documents an Indian named Bartolomé de Ojedas, who could read and write, and who had been wounded, and taken prisoner and who was about to die, declared that he had been in charge of the waters

of the Indians at Ácoma, that he was a resident of Sia and knew all about the water rights between the two Pueblos. The first of these documents is dated February 20th, 1689, and the second one February 28th, of the same year. Both were written down and certified to by the Governor and Captain-General of the Province of New Mexico Don Domingo Jironza Petroz de Cruzate in presence of Don Pedro Ladrande de Guimara, Secretary of Government and War, and the signature of the Indian was duly signed thereto. The depositions are in the handwriting of the secretary and leave no doubt that the water belonged to Ácoma and that Laguna was entitled only to the "sobres" or surplus. At the time this old testimony was taken down before Governor Cruzate the latter had just returned from a punitive expedition to Sia Pueblo[3] where he had made an example of the natives for the benefit of the other Pueblos. Evidently while on this expedition the two quarreling pueblos of Laguna and Ácoma had taken their troubles to him and thus it came that he examined this witness to find out "how it stood between the Pueblos of Ácoma and Laguna regarding the water of the Gallo."

The lawsuit came to an end on July 6th, 1857, when the attorneys for both sides entered and filed in the court a memorandum which determined the controversy in favor of Ácoma because it awarded to Ácoma all the irrigable lands down to the Cañada de La Cruz, on the Gallo or Cock Creek, thus preventing the use of its waters by the Lagunas except as to the surplus waters which might run below that point.

But the settlement appears now to have been forgotten and the age-old controversy was again going on in the year 1917 when the undersigned was United States Attorney for the Pueblo Indians and used to sympathise with the more progressive Lagunas, not at that time knowing or being informed of what the old court records in Valencia County might and did contain.

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3. This was the pueblo on the Jemez River.—Ed.