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# INDIAN PUEBLO WATER RIGHTS NOT SUBJECT TO STATE LAW PRIOR APPROPRIATION

Indian Pueblos' rights to use water of the Nambé-Pojoaque River System are not governed by New Mexico law based on the doctrine of prior appropriation. *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

Under the New Mexico constitution, one acquires a right to the use of water by diverting the water and applying it to a beneficial use.<sup>1</sup> Such a control of the use of water is referred to as the doctrine of prior appropriation meaning that the individual with the greatest priority has the better right to the water.<sup>2</sup> The determination of the water rights in such instances is to be made in a suit brought by the state.<sup>3</sup>

In 1966, New Mexico brought suit to determine the rights to the use of water of the Nambé-Pojoaque River System, a system lying entirely in New Mexico and draining substantially within the San Ildefonso, Pojoaque, Nambé, and Tesuque Pueblo boundaries. This suit was brought in accordance with New Mexico's water adjudication statutes.<sup>4</sup> The United States, the four Pueblos and about 1000 others were named as defendants in the suit. Because of its fiduciary capacity as trustee or guardian of the Pueblos, the United States had intervened. A contract for private legal counsel for the Pueblos was approved. This was because of the determination by the Commissioner of Indian Affairs<sup>5</sup> that the provision of private counsel for the Pueblos was the only way the rights of the Pueblos could be protected since a conflict of interest existed between the proprietary interests of the United States and of the Pueblos.

In its decision, the federal district court held (1) that a private attorney could not represent Indians who were already represented by government counsel; (2) that the Indians did not have the right to intervene; and (3) that the Indians' water uses were controlled by the state law doctrine of prior appropriation.

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1. N.M. CONST. art. 16, § 2.

2. *Id.*

3. N.M. STAT. ANN. §§ 75-4-4 through 75-4-8 (1953 Comp.).

4. *Id.*

5. 25 U.S.C. § 2 provides:

The Commissioner of Indian Affairs shall, . . . have the management of all Indian affairs and of all matters arising out of Indian relations.

As a result of the decision of the federal district court, two appeals were filed by the United States and the Indians. The first appeal was from the denial by the district court of the right of the Pueblos to representation and its rejection of the complaint in intervention filed on behalf of the Pueblos.<sup>6</sup> The Court of Appeals agreed with the actions of the Commissioner of Indian Affairs and held that since a conflict of proprietary interests existed between the Pueblos and the United States, that it would be impossible to adequately serve the interests of both groups by the same counsel. Because of this inadequacy of representation, the Court of Appeals also held that the Pueblos had a right to intervene and subsequently overturned the order of the district court.

The second appeal was based on the ruling of the district court that the rights of the Pueblos to the use of the waters of the Nambepojoaque System was subject to the prior appropriation laws of New Mexico. The United States and the Indians contended that (1) the Indians had a reserved right that was prior to those rights of the non-Indians and (2) that through the laws of Spain and Mexico, the Indians had an aboriginal right which was recognized by the United States in the Treaty of Guadalupe Hidalgo.<sup>7</sup>

Under this second appeal, one of the contentions by the Pueblos was that the State of New Mexico could not attack the rights given to the Pueblos under the Pueblo Lands Act of 1933,<sup>8</sup> since the state was acting in the capacity of *parens patriae*. They further contended that the state was wrongfully asserting rights in favor of the non-Indians because as *parens patriae*, they were asserting claims on behalf of particular persons.

The Court of Appeals held that the state could sue both Indians and non-Indians alike to claim any water rights since the suit was brought under statutory authority.<sup>9</sup>

The Pueblos further contended on the second appeal that they had a reserved right to the use of as much water as was needed to irrigate the land within each pueblo. Their contention was based on several decisions. The first of the decisions recognized the reserved rights of the Indians to water.<sup>10</sup> In that case, the Court had held that there was no denial as to the power of the government to exempt waters from appropriation under the state laws. Still another case on which

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6. *State of New Mexico v. Aamodt*, No. 75-1069 (10th Cir. 1976).

7. 9 Stat. 922 (1848). In the Treaty of Guadalupe Hidalgo, the United States agreed to recognize the rights given by prior sovereigns.

8. Pueblo Lands Act of May 31, 1933, 48 Stat. 108, 73rd Congress, 1st Session, Chap. 45, H.R. 4014, Pub. L. No. 28.

9. N.M. STAT. ANN. § 75-4-4 (1953 Comp.).

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

the Indians relied held that the United States reserved water rights for the Indians effective the date the Indian Reservations were created.<sup>11</sup>

The State of New Mexico and the non-Indians contended in the second appeal that whatever reserved rights the Pueblos may have had were lost by the Pueblo Land Acts of 1924 and 1933.<sup>12</sup>

The 1924 Act was enacted to quiet the title to lands whose titles had become unclear because of an earlier decision, *United States v. Joseph*, which had held that the Acts of 1834 and 1851 were not applicable to the Pueblos.<sup>13</sup> That decision resulted in the acquisition by non-Indians of land within the Pueblos. Two later decisions overruled the *Joseph* decision and in so doing caused uncertainty as to the titles held by the Indians and the non-Indians.<sup>14</sup> The 1924 Act set up a Pueblo Lands Board whose duty was to investigate, determine and report the lands within the exterior boundaries of the Pueblos.

Through an error of the Lands Board to recognize the fact that both lands and the appurtenant waters were lost when the claims of non-Indians were sustained, the 1933 Act approved compensation for the Pueblos to include the value of appurtenant water. The State, therefore, contended that the Pueblos lost the right to claim reserved water rights when they accepted the compensation.

The Court of Appeals stated that under Section 6 of the 1933 Act, the Pueblos could elect to take the authorized compensation or could bring an independent suit to determine land titles within one year from the approval of the Act. The election by the Pueblos to accept the compensation or their failure to sue for determination of titles would not constitute a waiver or an estoppel on the Pueblos' part since estoppel did not run against the United States when the United States acted as trustee for an Indian tribe.<sup>15</sup>

The Court also noted that Section 9 of the 1933 Act recognized a prior right to the use of water for domestic, stockwater, and irrigation purposes when the lands remained in Indian ownership. Thus, the Court held that the rights of the non-Indians were subject to the water laws of New Mexico and the water rights of the Pueblos were not subject to the laws of New Mexico since the United States had never surrendered its jurisdiction and control. Subsequently, the court turned to the remaining issue of the relationship of the priority

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

12. Pueblo Land Acts of 1924 and 1933, *supra* at n. 8.

13. *United States v. Joseph*, 94 U.S. 614 (1876).

14. *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Candelaria*, 271 U.S. 432 (1926).

15. *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956).

rights to the water between the Pueblos and the non-Indians. The Court interpreted the meaning of "prior right" as used in Section 9 of the 1933 Act to be an indication by the Congress to recognize the *Winters* decision which had held that the Indians had a reserved right to water. As such, the Court reasoned that any priority date for the Indians that was later than or equal to the priority date of a non-Indian violated the mandate of Congress that nothing in the 1933 Act could deprive the Pueblos of a prior right to the use of water. Therefore, the Court held that the water rights of the Pueblos were not lost by the Pueblo Lands Act of 1924 and 1933 and that the water rights of the Pueblos were prior to all non-Indians whose land ownership was recognized pursuant to the 1924 and 1933 Act.

The partial concurrence and dissent in the case stated that Congress had specifically and directly attempted to "balance the competing interests"<sup>16</sup> by enacting the Pueblo Land Acts of 1924 and 1933. The dissent also noted that the priority of the respective water rights was to have been left for judicial determination under the savings clause of Section 9 of the 1933 Act and interpreted the priority relationship as being two-fold—that between the Pueblos and the non-Indian land owners (1) as of May 31, 1933, the date of the 1933 Act and (2) from and after May 31, 1933.

#### CONCLUSION

In answering the questions pertaining to the determination of water rights, the court held that the Indian Pueblos' rights to the use of water of the Nambe-Pojoaque River System was not governed by the New Mexico law based on the doctrine of prior appropriation. The court interpreted the Pueblo Land Acts of 1924 and 1933 and reasoned that the language of those acts indicated that the Indians had a reserved right to the use of water in the river system.

The question which remains, however, is whether future courts will follow the line of reasoning as used by this court or, in the alternative, will consider the dissent's need to balance the competing interests of both the Indians and the non-Indians and thus leave priority determinations up to future judicial decisions.

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16. 537 F.2d at 1114.