

**The Rio Grande Compact:  
It's the Law!**

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It's the Law - But  
What About  
Pueblo Water?

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**This presentation represents the speaker's opinions and thoughts and IN NO WAY represents in any form the views of the Pueblos/Tribes.**

*"The failure of the federal government to uphold its trust responsibility to Native Americans is clearly demonstrated in its deep-seated institutional ambivalence as guardian over Native American water resources."*<sup>1</sup>

It is acknowledged that throughout U.S. history, the federal government has failed to

protect and secure Indian land and water interests. The states' continuing commitment to extinguish Indian sovereignty and subsume Tribal governments under state law is a well documented fact.<sup>2</sup> One aspect of such history and fact is our topic of discussion today, the Rio Grande Compact.

In 1938, when the Rio Grande Compact was created, why were the Pueblos not present to participate? Was this a planned oversight to ignore the presence of Pueblos and their water interests? Could this oversight have been planned in order to make it so difficult or even impossible to amend the Compact and the Mexican Water Treaty years later to include Indian water? As we well know and for the most part, Tribal water rights have been determined through the court's interpretation of treaties, Executive Orders, and other agreements made between Indians and the federal government. Such interpretations have not been to the full enjoyment of Tribes. Though Article XVI of the Compact contains disclaimer language, this does nothing more than create more questions than answers.

Article XVI

***Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the rights of the Indian Tribes.***

So what does this exactly mean? Let me point out some basic tenets.

*“The ‘law’ of the Rio Grande is a composite of international treaty provisions, interstate compact commitments, federal reclamation laws, state laws, and undefined Pueblo Indian water rights. The Rio Grande originates in the mountains of southern Colorado and en route to the Gulf of Mexico passes through New Mexico, Texas, and by Mexico... because it cuts through three states, its flow is further apportioned by the Rio Grande Compact. Under this compact, a portion of its water is retained in Colorado, a portion retained in New Mexico, and the balance consumed in Texas and Mexico.”<sup>3</sup>*

First, let's re-frame the geographic setting and the jurisdictional governments inadvertently left out from the above excerpt. Again, I must continue to remind audiences, there are not only three states found within the Rio Grande basin, but also 18 Pueblos<sup>4</sup> and three Tribes, each a recognized individual sovereign government.

Second, let me define the term “Compact” according to Webster's New World Dictionary:

*(n) an agreement between two or more individuals, states, etc.; covenant*

Next, let me define the term “Covenant”:

*(n) Law - a formal sealed, contract*

Finally, let me define the term “Contract”:

*(n) an agreement between two or more people (or in this case states and possible tribes) to do something, especially one formally set forth in writing and enforceable by law*

Applying these definitions to the Rio Grande Compact, this “covenant,” or “contract,” is an agreement entered into clearly by three states. Nowhere do we find a single Pueblo signature

acknowledging this agreement. So how can we expect this Compact to apply to the Pueblos?

*“States and state institutions are bound by the provisions of the Rio Grande Compact. The federal government is likewise bound, as a matter of comity. In its capacity as trustee for the Indians, however, it is arguable that it is not bound. There is no indication in the compact that the Pueblos or Tribes of one state have agreed to the quantities pledged to a sister state.”<sup>5</sup>*

Also, we find,

*“These Indian pueblos hold water rights reserved under federal law and treaties which are not controlled by either interstate compacts or by state law.”<sup>6</sup>*

But yet, Indian water was excluded when the Compact was devised in terms of delivery arrangements to Pueblos, with the exception of the disclaimer. Clearly, Pueblo water did not seem to be that important a factor. There were bigger issues.

*“The Compact reflects the perception during negotiations that a guaranteed annual release of 790,000 af from Elephant Butte would protect existing downstream uses in Texas, New Mexico, and Mexico.”<sup>7</sup>*

So what about the Pueblos and the fact that they have the highest priority water right? Should not the Compact reflect meeting those obligations first? If delivery schedules were created among the states, should not the same apply to Colorado and New Mexico to meet delivery obligations to the Pueblos, which would consequently affect Texas? Despite not containing delivery language, Article XVI of the Compact would be put to the test by six middle Rio Grande Pueblos.

I would like to acknowledge Diego Abeita, Pueblo of Isleta, Porfirio Montoya, Pueblo of Santa Ana, and Domingo Montoya, Pueblo of Sandia for their efforts to insure Pueblo water is not obligated to the Rio Grande Compact. Due to New Mexico's “debt” to Texas in 1951, the Compact Commission ordered that no water be

stored in El Vado Dam. This directive would directly impact the six middle Rio Grande Pueblos' ability to irrigate. The six middle Rio Grande Pueblos met and appointed the Irrigation Committee comprising Diego Abeita, Porfirio Montoya, and Domingo Montoya to protect the Pueblos' water rights.<sup>8</sup>

After meeting with Bureau of Indian Affairs (BIA) attorney William Brophy and others, the Irrigation Committee made a request to the Secretary asking that the Compact Commission review its decision. When the Commission refused to change its decision, the Secretary directed the Middle Rio Grande Conservancy District (MRGCD) to store water for the six middle Rio Grande Pueblos at El Vado, even though no other storage was allowed that year. That action set a precedent allowing water to be stored in El Vado for the six middle Rio Grande Pueblos, which has continued ever since.

The Irrigation Committee continued to function apart from the Texas/New Mexico dispute of the Rio Grande Compact. When Texas sued New Mexico in the Supreme Court in 1951, the Committee urged the U.S. to file a brief asserting the water rights of the six Pueblos. The Special Master appointed to hear the case met with the Committee chairman to hear the Pueblos' concerns. In a report to the Court, the Special Master stated that "the U.S.'s duty to protect the Pueblo water rights in the Rio Grande made it an indispensable party to the case." As a result, the Court dismissed the action in 1957.<sup>9</sup>

As pointed out earlier, Article XVI of the Compact creates more questions than answers. Here are a few.

- In terms of the Agreement<sup>10</sup> for "Indian Water Storage in El Vado," what happens to the Pueblos' stored water if native water is sufficient to meet the irrigations needs of the Indians and there is no call? "Indian water" stored for Pueblo use should not be factored in as meeting downstream delivery obligations but should be available for Pueblos to market in any form they choose. How is this being addressed, and what are the Pueblos' options in using this unused stored water?
- How will future acknowledged Pueblo water rights be applied apart from the Compact? This applies to minimum instream flows that have already been recognized,<sup>11</sup> but not

exercised readily by all the Pueblos. Minimum instream flows, if applied by the Pueblos, would support endangered species habitat, while not affecting their other uses.

- Where should the Pueblos' (and other Tribes) water come from? As stated before, the burden should not solely rest with New Mexico but be shared by all three states and maybe Mexico as well. Many claim it is impossible to renegotiate the terms of the Rio Grande Compact. Given that constraint, or inflexibility, choices are few for New Mexico.
- Ramifications of *Arizona v. California* could mean that New Mexico will have to relinquish Indian water to the Pueblos and Tribes. A recent *Albuquerque Tribune* article entitled, "Tribes could be big winners in Arizona water dispute," reported that "Arizona and federal negotiators are working on an agreement that could leave 10 Indian tribes in control of nearly half of the Colorado River water that flows through the Central Arizona Project."<sup>12</sup> What would be the result in New Mexico if a parallel determination were made, especially in light of the Rio Grande's meager supply of water?
- Who on the Rio Grande Compact Commission represents Pueblo water interests? The front cover of the "Report of the Rio Grande Compact Commission" every year states that the report is submitted to the governors of Colorado, New Mexico, and Texas. What about Pueblo governors? Other fundamental questions must be answered. A step forward in resolving our collective water issues would be to first recognize the Pueblos' sovereign status and truly give them the respect they deserve on a "government to government" basis. A positive move, in my opinion, would be to create an *ex officio* position on the Rio Grande Compact Commission and a similar position on the Interstate Stream Commission. So what if there are 18 Pueblos? Let the Pueblos and Tribes determine who would fill the seat.

Lastly, I would like to end my presentation with a suggestion to the Pueblos. It is my understanding that the All Indian Pueblo Council had an Irrigation Committee back in the 1940s. I would urge Pueblo leaders to revive this "water committee" and to take it several levels higher.

With this re-establishment, an “Inter-Pueblo Water Commission” could begin to work more directly with not only the Compact Commission, but with the Interstate Stream Commission as well. Moreover, such a move would augment individual Pueblos’ efforts to take Commissions to task. Perhaps, together we can reach workable solutions.

**Endnotes**

<sup>1</sup>Unknown.

<sup>2</sup>Popularly cited as the “McCarran Amendment” to the Reclamation Act.

<sup>3</sup>Charles T. Dumars, Marilyn O’Leary, and Albert E. Utton, *Pueblo Indian Water Rights: Struggle for a Precious Resource*. Tucson: The University of Arizona Press, 1984, 2.

<sup>4</sup>There are 19 Pueblos recognized, but the Pueblo of Zuni is not included here because their reservation is outside the Rio Grande Basin. Also included here are the Jicarilla and Mescalero Apache Tribes and the Navajo Nation.

<sup>5</sup>See Footnote 3, p.5.

<sup>6</sup>*Institutional and Legal Responses to Global Climate Change in the Upper Rio Grande Basin, Proceedings of the First National Conference on Climate Change and Water Resources Management*. Charles T. Dumars.

<sup>7</sup>Steven J. Shupe and John Folk-Williams, *The Upper Rio Grande, A Guide to Decision Making*, Western Network, 1988.

<sup>8</sup>*Six Middle Rio Grande Pueblos Irrigation Committee Handbook*, Published by the Six Middle Rio Grande Pueblos Irrigation Committee and the Southern Pueblos Governors Council, prepared by Richard Hughes, 1988.

<sup>9</sup>352 U.S. 991, 77 S.Ct. 552, 1 L.Ed.2d 540 (1957).

<sup>10</sup>*Agreement for Procedures for the Storage and Release of Indian Water Entitlements of the Six Middle Rio Grande Pueblos*, formal storage agreement with the Bureau of Reclamation, signed by Secretary Watt, December 28, 1981.

<sup>11</sup>See Footnote No. 3. p.45 note 13., “The Bureau of Reclamation releases water from Nambe Dam to ensure that 0.5 cfs flow is maintained over falls sacred to Indian religion and tradition.”

<sup>12</sup>Shaun Mckinnon (The Arizona Republic), “Tribes could be big winners in Arizona water dispute,” *Albuquerque Tribune*, October 16, 1999, p.3