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Water and Growth Issues for Tribes and Pueblos in New Mexico Legal Considerations

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THEME

Water is a finite resource with competing demands. Full use of tribal rights can have significant impacts on existing uses.

A. Pueblos are Federally Recognized Tribes. The United States federal government recognizes 557 Indian Tribal governments. Of these, 227 are in Alaska, and over 100 in California, New Mexico has 22: the 19 Pueblos, Navajo, Mescalero Apache Tribe, and Jicarilla Apache Tribe.

B. Components of Pueblo Indian water rights (see Appendices 1 and 3): Pueblo ancient aboriginal rights remain federally protected in the 21st Century. The leading case involving Pueblo Indian water rights is *State of New Mexico v. Aamodt,* a federal water rights adjudication for the Pojoaque River Basin. Pueblo Indian water rights are measured according to and protected by federal, not state, law. *State of New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976) ("Aamodt I"). Pueblos are governments that pre-date European presence here. Pueblos remain governments today, with responsibilities for meeting present and future needs. Each of the 19 Pueblos of New Mexico retain all aboriginal rights, except as Congress limited in the Pueblo Lands Act of 1924. *State of New Mexico v. Aamodt,* 618 F.Supp. 993 (D.N.M. 1985) ("Aamodt II").

1. Historically irrigated acreage (HIA)
2. Replacement rights, based on Pueblo Lands Acts of 1924 and 1933.
3. Livestock/stock ponds/reservoirs, other catchments, and wells.
4. Domestic present and future needs.

a. Households
b. Community infrastructure
c. Economic development
d. System losses and unaccounted (leaks)

5. Traditional and ceremonial - continuous flows through Nambe Dam for traditional and ceremonial purposes recognized.
6. Both surface water and hydrologically related groundwater available to satisfy Pueblo Indian water rights.
7. Not subject to forfeiture or abandonment for non-use.
8. Place and purpose of use within Pueblo can be changed without state involvement.

C. Senior priority water rights for Pueblos.
   1. Protected by Congress in 1933 Act, § 9 (see Appendix 1).
   2. Rio Grande Compact (see Appendix 4).
      a. Does not affect Indian rights.
      b. Pueblos above Otowi Gauge at San Ildefonso Pueblo - uses have no effect on Rio Grande Compact delivery requirements, which are based on measurements at that gauge.

D. Indian "trust assets" include water rights--federal duty to protect.
   1. Tribal rights to meet present and future needs. Rooted in Pueblos' aboriginal rights, respected and protected by other sovereigns, including Spain, Mexico, and now the United States.

E. Endangered Species Act - effects on water rights and water management.

F. Concern: Office of State Engineer (OSE) allows non-Indian pumping without water rights, until stream flows are affected, (see Appendix 2).
   1. Economic benefits taken by junior users.
   2. Long-term effects fall on senior wafer rights holders - stream flow diminishes and water table drops.

G. Water quality standards - federal law recognizes Tribes can be treated as states for purposes of setting water quality standards.
   1. Several Pueblos have set standards, others do not.
   2. Upstream users can be affected by tribal standards. *See City of Albuquerque v. Browner,* 97 F.3d 415, 423 (10th Cir. 1996) (Pueblo of Isleta water quality standards must be met by City of Albuquerque); *Montana v. Environmental Protection Agency,* 137 F.3d 1135 (10th Cir. 1998).

APPENDICES

Appendix 1: Fact Sheet on Pueblo Approach to Regional Water Planning
Appendix 2: Fact Sheet on New Mexico Water Law
Appendix 3: Fact Sheet on State ex ref. State Engineer v. Aamodt
Appendix 4: Fact Sheet on Rio Grande Compact

Appendix 1
Fact Sheet
Pueblo Views of Regional Water Planning

The initial Pueblo position in the Jemez y Sangre regional water planning process has been to look for ways to be partners with state, based on State recognition that water is a resource over which both jointly share regulatory rights and responsibilities. Rather than using the planning process to "quantify rights," the approach was to acknowledge the different types of rights and interests in the resource held by tribes and the states, but then to work cooperatively to meet reasonable need. This approach is radically different from the highly adversarial approach now taken by some regions in the State. Rational water use cannot flourish where it is a we vs. them approach. To quote POGO, we have met the enemy and it is us. Rational water use can only come through recognition and respect for each others' rights and needs. This is not new. The first water rights case recorded in New Mexico took this approach.

The oldest recorded water rights case in New Mexico is the Taos repartimiento of 1823. During that period, the approach was practical, it respected the senior water right, but looked to meeting need through cooperative agreement. Here are excerpts from that basic ruling:

STATEMENT OF WHO HAS THE RIGHT

> The natives of this Pueblo of Taos, besides the water of the river which cuts through their pueblo, have always used the water from the Rio de Lucero for irrigating their cultivated fields, and it appears that they have done so from the period of their paganism,. That is, since the foundation of their pueblo, with the sole object of enjoying the water of both rivers, from which it is inferred clearly that, those natives, from time immemorial, have been the sole owners and have complete right to the water of the Rio de Lucero.
>
> The settlers of Arroyo Seco ... have no right to the source of the Rio de Lucero for the irrigation of their lands, because the old grant which they claim favors them does not give them the right.
>
> Your excellency will see from this report that the sons of this Pueblo, the aforesaid Indians, are the ones who have the right to the Rio de Lucero.

MEETING NEED

> But this ayuntamiento, having pity on the new settlers of Arroyo Seco, considered it carefully at various sessions and has ordered that one surco of water shall be allowed them from the Rio Lucero when the water is abundant, and when water is short it shall be given to them proportionately and according to the judgement of this ayuntamiento, so that there is no lack for the first ones who enjoy the antiquity and priority, who are the sons of said Pueblo, and the surplus of these to those residents of San Fernando who settled there long before those of Arroyo Seco.

Taken from SANM (Spanish Archives of New Mexico) Series I, No. 1292; translated by Myra Ellen Jenkins, and quoted in State of N.M. ex rel. Reynolds v. Aamodt, 618 F. Supp. 993, 9991 (D.N.M. 1985). By allowing the need to be met, the Pueblo did not permanently give up its senior priority right; it merely allowed others to use its water.

Reasonable need is not a wish list, but a practical accommodation in light of all of the relevant facts.

The process is not intended to quantify rights. For example, it is unreasonable for a municipality to insist on

"right" to a 250 gpdpp (gallons per day per person) minimum need, and at the same time limit tribal users' water rights, the senior rights holders who have a much smaller gpdpp due to clearly inadequate infrastructure, for the same municipal water uses.

With acknowledgment of the Pueblos' senior rights and other federally reserved water rights for the benefit of Indian tribes, the parties can cooperatively plan to accommodate, to the extent feasible, each other's needs for certain specific uses for a certain period. This can be done through voluntary agreement or through legal process as was done in 1823.

Federal law supports this approach:

The Pueblo Lands Act of 1933, Section 9 states:

> 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 the lands remaining in Indian ownership, and such water rights shall not be subject to loss by non-use or abandonment thereof as long as title to said lands shall remain in the Indians.

FOCUS should not be on rights but meeting need based on recognition of present situation, planning was to define the need at present and into the future for a certain period. The best way to alter this focus is through explicit recognition by the State of what the Spanish and Mexican Governments, as well as the United States have recognized - the senior right of the Pueblos to water for their needs. However, it is not the State's job to define that need - that is the responsibility of tribal governments, just as it is the responsibility of the State's communities, under regional water planning, to define those communities' needs.

Appendix 2
Fact Sheet
A Brief Description of Water Law in New Mexico

How New Mexico Manages Water

Since 1907, the New Mexico State Engineer has regulated water use. Initially the Engineer only had authority over surface water. Since 1931, this authority applies to all declared groundwater basins as well. The State Engineer is appointed by the Governor and confirmed by the New Mexico Senate. The State Engineer must act upon any application for new water uses or any application to change the point of diversion or the purpose or place of water use (referred to as a transfer). The State Engineer must deny an application when he determines that the use would result in **impairment** (i.e., diminished supplies or water quality) to existing users or that the proposed use is contrary to the **public welfare** or conservation of water. After an application is filed with the State Engineer, existing water users and others may file protests stating why the State Engineer should not approve the application. If a protest is filed, the protestant or the applicant may request a hearing or the State Engineer may require a hearing. State Engineer decisions can be appealed to the district court.

An **adjudication** is a lawsuit filed to determine "all rights to the use" of water within a stream system. Water rights are never fully determined until there is an adjudication because a water right is measured under state law by the water put to actual **beneficial use.** For example, the State Engineer may permit Joe Smith to use 40 acre-feet of water per year. However, if Joe Smith only uses 20 acre-feet under the permit, a court will not automatically grant Smith a right to 40 acre-feet per year. For purposes of water planning, municipalities and counties are allowed to apply for a permit for sufficient water to meet need for the succeeding forty years. However, if not used within that time frame, there is no "water right" to the amount of the permit. The **adjudication** begins with a hydrographic survey of the stream system that maps all water uses, surface and groundwater. The priority date declared by the user is deemed to be correct until the priority date is determined by a court. Many adjudications are on-going in the Jemez y Sangre Regional Water Planning area, two of which are: *State of New Mexico v. Aamodt* (Pojoaque, Nambe and Tesuque Basins) and *State of New Mexico v. Anaya* (Santa Fe River Basin). These adjudications are not completed. In the future, there will likely be another adjudication in the region: the adjudication of the mainstem of the Rio Grande.

Water quality is generally controlled by the New Mexico Environment Department and the Water Quality Control Commission. The State Engineer, when ruling on applications, can take effects on water quality into consideration.

Regional Water Planning

The New Mexico legislature enacted a statute in 1987 enabling regions in the state to plan their water future. Pursuant to that statute, the Jemez y Sangre Regional Water Planning Council area was established in 1998. Water planning was initiated at the regional level so that unique characteristics of each region of the state could be equally protected. Regional water plans are to determine future water demand and, based upon the available *supply,* determine how the region will balance demand and supply. Through this process, the region can significantly impact any evaluation of what uses are consistent with the public welfare.

The Prior Appropriation Doctrine

In water rich areas of Europe and the United States, water is acquired from natural water courses on or adjacent to a person's land. The measure of the right is one of reasonable use. If the use is reasonable, there is no limit on the quantity that can be put to that use. This is called the **riparian doctrine.** Where water is relatively scarce, the riparian doctrine is not used to define rights to water. Because of the scarcity of water in

New Mexico, a different doctrine developed to define rights to water. New Mexico and other western states use some version of the **"Prior Appropriation Doctrine."** The exact origin of the doctrine is disputed. Some say it came from California miners; at least one New Mexico case finds the origin in the water practices of the Pueblos; others say it comes from Spain. In New Mexico, two clear principles govern establishment of water rights:
1. Priority of appropriation shall give the better right;
2. Water may be used only for beneficial purposes.

An **appropriation** means dedication of water for a beneficial use. **Priority of appropriation** is often summarized as **"first in time, first in right."** This means that the person who first puts water to use has the senior priority and each additional user has a junior priority. The senior priority holder is entitled to receive the full quantity of water that the senior priority holder can apply to beneficial use or the maximum quantity permitted, which ever is less. Junior priority holders must satisfy their uses out of what remains in the order of their relative seniority. The first recorded priority call in New Mexico was in 1823. The *ayuntamiento* of Taos determined that, despise that Taos Pueblo owned all of the rights to a stream, since the Pueblo was not putting it all to use at that time, junior users were permitted to use what was not needed by the Pueblo.

Beneficial use has not been fully defined. Only waste and mine dewatering have been ruled to be a non-beneficial use of water. Unlike other western states, New Mexico has no statute giving any use more beneficial status over another use. New Mexico statute 72-12-1 does provide a different standard to be met for issuance of a domestic use permit. If water is available, the State Engineer cannot deny this type of permit. Generally, the permitted use is up to a maximum of three acre feet per year. However, when these rights are adjudicated. the adjudicated right will depend on what has actually been used. A water right may be **declared forfeited** and it can be **abandoned** for non-use.

Establishing Water Uses

As discussed previously, after 1907 or the date when the State Engineer declared authority over any groundwater basin (1956 for most of the Rio Grande basin), one must obtain a permit to use water from the State Engineer. These uses will have a priority date of the date the application for a permit was filed. When these uses are transferred, the priority date is retained but the amount of water that can be transferred may be significantly less.

If a water use began before 1907 or the date when the State Engineer declared authority over any groundwater basin, then the date that the use began determines the priority of the right. The State Engineer cannot adjudicate or determine a water right.

Federal Water Rights

On federal lands (e.g., Forest Service, Park Service, Bureau of Land Management), water rights are reserved by the United States for use on those lands. The priority date of **federal reserved water rights** is the date the United States reserved the land for the particular use. not the date that the actual use began. In some cases, the United States may have state law rights under the prior appropriation system, if, for instance, the United States acquires lands with existing, water rights.

Pueblo and Tribal Water Rights

The Pueblos of New Mexico can have state law created rights in some instances where they acquire lands with appurtenant pre-existing state law water rights. They can have federal reserved water rights where lands outside Pueblo grants have been reserved for them by the United States. Pueblos also have a third type of water

right, referred to as **"Mechem doctrine" or "aboriginal"** water rights. The Pueblos of New Mexico, unlike many other tribes, reside on lands that they have never left. While the United States recognized those prior holdings, thereby giving Pueblo rights to land and water federal protection, these rights do not depend on any federal action for their existence. In *Aamodt,* Judge Mechem held that these rights have the senior priority right as the Pueblos were the first land holders. This right extends to **historically irrigated acres, livestock watering, municipal and domestic uses.** Historically irrigated acreage means all lands used for irrigation as of 1846 and any additional lands placed into irrigation from 1846 to 1924. In addition to senior priority, these rights cannot be lost through forfeiture, abandonment, or other forms of non-use.

Pueblos are governments, and pursuant to their inherent powers as confirmed by federal law, each Pueblo has authority to **regulate water quality and water use** by users within Pueblo boundaries.

Interstate Stream Compacts

Streams and rivers ignore political boundaries. Where a river runs through several states, those states form a compact to determine each state's share. The United States Congress must approve these compacts. New Mexico is a party to several compacts, including the Pecos, the Rio Grande, and the Colorado River Compacts. The Compacts obligate the State to deliver water to other states. No matter how vested a water right might be, if using it violates a compact, it cannot be used. Pueblo water rights are not affected by the Rio Grande Compact. Compacts can place significant constraints on the water supply available for use.

Appendix 3
Fact Sheet
State of New Mexico, et al. V. Aamodt, et al.
U.S. District Court No. 6639 M Civil

State of New Mexico v. Aamodt. et al., in the federal District Court for New Mexico, filed in 1966, is the lead case determining the nature and extent of Pueblo Indian water rights. Many important elements of Pueblo Indian water rights have been decided in the *Aamodt* case. These rulings are the "law of the case" subject to review on appeal. Decisions, so far, include:

1. Tributary is adjudication unit. In 1971, the federal court decided that adjudication of water rights in the Rio Pojoaque tributary of the Rio Grande could proceed separate from the main stem.

2. State law rejected for Pueblo rights. The Tenth Circuit Court of Appeals in State v. Aamodt, 537 F.2d 1102(10th Cir. 1976) (Aamodt I) ruled that Pueblo water rights are not governed by State law in measure or administration.

3. Junior non-Indian wells restricted. In 1983, the District Court enjoined the State from issuing domestic well permits unless restricted to indoor use only for "household, drinking, and sanitary purposes." This unpublished opinion affects over 600 permits issued, and almost 300 wells drilled since January 13, 1983. The District Court's Order filed July 22, 1994 limited defendants' water rights under subfile judgments for domestic and livestock wells to historic beneficial use. In 1999 several parties negotiated a settlement that is available for these claims. In exchange for accepting a maximum water right of .7 acre-feet, metering and fees, households joining in the settlement can use water for any non-wasteful purpose.

4. Winters doctrine limited. In 1983 the court decided that the *Winters* doctrine does not apply to Pueblo Indian grant lands. Each of the nineteen federally-recognized Indian Pueblos in New Mexico has a land grant recognized by Congress. In addition, some Pueblos have "reservation lands," as a result of additional action by Congress or the executive branch. These "reservation lands" have *Winters* rights. Such rights are for present and future uses, generally measured by "praticably irrigable acreage (PIA)" but also by grazing and wildlife needs when reserved by United States of America for that purpose.

5. Senior Pueblo priority: aboriginal priority recognized. The *Aamodt II* opinion, 618 F.Supp. 993 (D.N.M. 1985) made numerous conclusions of law about water rights during the Spanish and Mexican periods of sovereignty, as well as discussion of the Pueblos' water rights under the United States law. The federal court concluded that Pueblo water rights held the senior priority in relation to "any non-Pueblo in the stream system." It determined that The Pueblos have the prior right to use all of the water of the stream 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. The acreage to which this priority applies is all acreage irrigated by the Pueblos between 1846 and 1924. Acreage under irrigation in 1846 was protected by federal law including the Treaty of Guadalupe Hidalgo, and the 1851 Trade and Intercourse Act. The Pueblo aboriginal water right, as modified by Spanish and Mexican law, included the right to irrigate new land in response to need.... 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. 618 F.Supp. at 1010 (D.N.M. 1985).

6. Surface and groundwater source. The *Aamodt* court determined that the Pueblos' senior water rights apply to both surface water and hydrologically related groundwater. The Special Master held that this principle applies to the Winters rights for the 1902 Nambe Reservation.

7. Purpose of use unrestricted. Subsequent rulings decided that Pueblo water rights can be used for any purpose within Pueblo boundaries (Order of December l, 1986). No impairment of other uses occurs until there is a showing that Pueblo uses exceeds the amount of federally-protected water rights.

8. Non-Indian priority. Non-Indians must prove priority on a tract-by-tract basis, and not on a state desired shared aboriginal basis, or ditch-by-ditch basis (Order of February 26, 1987).

9. Pueblos' water rights measured by historically irrigated acreage (HIA). The measure of Pueblo Indian aboriginal water rights was determined on the basis of a 1931 letter from a federal attorney describing a hydrographic survey done during the Pueblo Lands Act proceedings. In 1987, the District ruled that the four Pueblos have first priority rights for water necessary to irrigate 1,094 acres of HIA land.

10. Pueblo Replacement rights. The Pueblos are entitled to first priority water rights acquired, reacquired or developed to replace those taken pursuant to the Pueblo Land Board activities. These additional "replacement" water rights have been recognized based on the Pueblos Lands Acts of 1924 and 1933.

11. Hydrology. A major stipulation and order on the hydrology of the basin exists only for the *Aamodt* case. The hydrology facts were approved by the Court on May 6, 1993.

12. Duty of water. Pueblo irrigation water requirements include the right to divert 4.65 acre- feet. and consumptively use 1.84 acre feet per year, per acre, based on the crop mix in the 1964 hydrographic survey. This will apply for both Pueblo and non-Indian irrigators.

13. In-stream aboriginal water use recognized. Aboriginal water use for hunting and grazing on San Ildefonso Eastern Reservation, or other aboriginal in-stream uses to establish water rights. Right to continuous flows through Name Falls recognized, in a limited amount.

14. Domestic uses. The Pueblo Compensation Act of 1933, in section 9 states: Nothing herein contained shall be in any manner be construed to deprive any Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective Pueblo 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 non-use or abandonment thereof as long as title to said lands shall remain in the Indians.

17. Alienation prohibited. Only Congress can terminate or limit the senior priority water rights of a Pueblo.

The *Aamodt* case continues to produce the guiding principles for Pueblo Indian water rights. The New Mexico Court of Appeals relied on the *Aamodt* rulings about *Winters* rights in another water adjudication involving other Pueblos. See, State v. Kerr McGee Corporation. 898 P. 2d. 1256, 120 N.M. 118, 126 (Ct. App. 1995).

Appendix 4
Fact Sheet on
The Rio Grande Compact

A. **The Compact allocates surface waters of the Rio Grande,** first to Colorado, second to the Lower Rio Grande, below Elephant Butte Reservoir (San Marcial Gauge) based on flows at Otowi Gauge, located within the Pueblo of San Ildefonso. The Lower Rio Grande, commonly referred to as "Texas" for Compact administration purposes, includes one irrigation district in New Mexico and one in Texas. Note that New Mexico's southern boundary for Compact administration differs by 165 miles from the New Mexico state border with Texas. See El Paso v. Reynolds, 563 F.Supp. 379 (D.N.M. 1983).

B. **The Middle Rio Grande (between Otowi and San Marcial Gauges)** is entitled to native waters, according to Compact Article IV (4), plus storage from El Vado Dam. The Middle Rio Grande includes about 160 miles of the main stem, beginning at San Ildefonso Pueblo (Otowi Gauge) and ending around Socorro (San Marcial Gauge). This **is "New Mexico"** for Compact administration purposes.

C. **New Mexico obligations under the Compact** are described in Article IV. That article requires uses of flow measurements at the Otowi Gauge as the basis for determining the delivery requirements at Elephant Butte Reservoir, "except for July, August, and September." Groundwater is not mentioned in the Compact.

D. **No Impairment of Tribal Rights:** Compact Article XVI (16) states:

> 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.

E. "Indian tribes" referred to in the Rio Grande Compact include the Pueblos. The six Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta. are all on the mainstem and within the Middle Rio Grande Conservancy District (MRGCD) service area.

F. Pueblo water law ("the ancient law of the Indians") is the basis for New Mexico's prior appropriation doctrine. See discussion in the State v. Red River Valley Co., 5 I N. M.207,221; 182 P.2d 421 (1947).

G. **Congress recognized and protected Pueblo water rights in the Middle Rio Grande Conservancy District Act** of March 13,1928. Chapter 219,45 Stat.312. These include "prior and paramount" rights for irrigation and for domestic and livestock purposes. For irrigation, the six Pueblos have "prior and paramount" rights to irrigate 8,847 acres, and co-equal priority with the MRGCD for "newly reclaimed" lands. These rights together total enough water to irrigate over 20,000 acres for the six pueblos.