The "Abeyta Settlement": Miss the Deadline, Lose the Money, Back to Trials

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I want to thank WRRI for inviting me to speak to you this afternoon. I am the water ombudsman for the geographic state of New Mexico and as such have participated in conducting the public outreach concerning the Taos Pueblo Water Rights Settlement. The opinions I express are my own and not those of the Utton Center or the University of New Mexico.

I thought I would open with a disclaimer: I was not at the table when this settlement was put together. The people who really know it inside and out and were at the table—the audience is liberally salted with those folks—they will correct me and expound on items where I have not been clear or am not complete enough in my description.

At the time I was asked to do this presentation, the settlement had not been funded. The State of New Mexico has now funded the settlement and that has changed the status of the adjudication considerably.

In order to talk about the settlement I need to tell you how we got here; why we do adjudications; and why we do settlements. I will talk too about some of the concerns people have expressed about the settlement and what the consequences of failure will be.

I do have a bias toward settlement over litigation. I have been an adjudication attorney for 25 years, and my experiences have really seated my belief in settlement if possible—litigation, only if not.

History

Let me start with a tiny history of the valley. In about the year 1000 A.D. the Pueblos moved to the valley and settled. Then in 1540 Spanish-Mexican-European folk came to the valley. These populations were engaged in agriculture and raising livestock as a foundation for their communities. Not long after that, other Anglos started to enter the valley.

In 1940 the population was under 1,000 people. By 2010, there were more than 5,700. The more people you get in a place, the more demands there are on the natural water systems, the more cultural aspects come into play, the more opinions there are about how to operate in the natural systems, and the more people there are to educate about proposed change. All of this leads to increased difficulties in trying to settle a water issue.

When you finish a settlement, the people at the table feel as though they gave away the farm—that they have made huge concessions, that they have worked and worked for years, and now, at the place they find themselves today, they are being slapped. Some of the people who were not at the table feel like their farms were given away, and they did not have a say in it. The fear factor goes way up. They are very critical of the people who were at the table.

There are high emotions involved in the place we are today.

The critical question is how we are going to manage water with increased population, ancient cultural values and entitlements, and in the face of drought that adds even more pressure to the whole situation.

While it was a territory, New Mexico addressed this question by placing the water code into the 1907 statutes. In that code, the legislature told us how we will identify who is using what water and when they started using it. It also adopted a system of prior appropriation. Prior appropriation means (in very broad terms) that in times of shortage, the most senior users will get 100 percent of their water, then if there is anything left over, the next most senior user will get all of his or her water, and on down the line—until there is nothing left.

The population growth happened in a period when we were experiencing a lot of precipitation. Today there is not so much, so the pressures on available water have intensified.

The water allocation question throughout the West is what do the native tribes have—what do the Pueblos have? We know those water right entitlements are very early and very large. However, you cannot manage a system knowing "very early and very large," you have to know how much and when. In the case of the Pueblos their water right is first in time, or aboriginal, or for time immemorial. Those are the words used to define the priority, and therefore, where do their water rights fall in the prior appropriation line-up? They are FIRST, and they have a lot of supply.

The State Engineer is the individual in our system who administers water. However, that person does not have the automatic authority to administer the water rights of the tribes and Pueblos. The tribes may grant the State Engineer authority to do so, but as a general principle, the State Engineer does not have authority to carry out water administration on

tribal lands. He or she also does not have authority to collect information about tribal water uses. In order to know how to manage the rest of the water in an area, the State Engineer needs to, in some fashion, craft a deal, or have a court determine, the nature of a tribal water right so that he or she will have the necessary information for managing the relevant stream systems.

The statutes say that the way you figure out how much water people are using is through adjudications. The goal of these lawsuits is to collect the information necessary for the State Engineer to manage a natural water system. An adjudication gives individuals and entities a formal statement of their water rights—it legitimizes, formalizes, and provides access to water. It is the gold standard for identified water rights. It makes a water right holder's access to water more secure, or at least informs that person of where s/he stands with regard to access in times of shortage.

These adjudications are taking place across the West. Defining tribal water rights is a tough nut to crack. The Taos adjudication was filed in 1969. Originally it was two lawsuits: one for the Rio Taos and one for the Rio Hondo. The Court combined them in the summer of 1969. They were filed in response to the needs of the federal water project known as the "San Juan/Chama Project."

The San Juan/Chama Project was constructed to bring New Mexico's share of the Upper Colorado River water into the state for use by the state's residents. The San Juan River is a tributary of the Upper Colorado and passes in part through New Mexico. The water is diverted from the San Juan River in Colorado, passes through tunnels in the mountains and dumps into the Chama River. It flows down the Chama to the Rio Grande. The water is contract water; it is not native water. People and institutions contract for the use of that water.

In order to manage that imported water, the State Engineer needs to know what is green water (contract water) or blue water (native water). Between 1966 and 1972 many adjudications were filed for the tributaries to the Rio Grande in order to determine who is using what so that the State Engineer can manage the contract water as well as native water.

For the first twenty years of the adjudication, the State and the parties worked on identifying and formalizing non-Indian irrigation water rights. The technology was not what it is today. For example, the Office of the State Engineer's technical staff drew the maps on linen cloth using India ink. Legal staff had no copiers or computers, but rather used carbon paper and typewriters. This level of technology allowed only slow progress. Today, the situation is much improved with computers, copiers, the Internet, and sophisticated technical mapping tools.

The Taos Pueblo was generally not engaged in the case while the non-Indians rights were being identified and processed through the Court. In the late 1980s, the Court ordered the parties to move ahead with Taos Pueblo's water claims. The Pueblo has its own attorney and the United States represents its interests as the Trustee of the Taos Pueblo. These two parties filed claims for the Pueblo between 1989 and 1997. Adjustments were made as the scope of the case unfolded before us.

The end result was that the Pueblo and United States essentially claimed all the water in the Rio Hondo and Rio Taos. Tribal water rights are different than state water rights because they are based on federal law. They have some of the same indicia regarding priority rights and quantity, but they do have a couple of unique characteristics that are very important.

1) They do not lose rights through non-use.
2) They do not have to put their rights to beneficial use.

Water rights are held in trust and cannot be sold, but they may be leased under certain conditions. These claims, which were in the vicinity of 68,000 acre-feet, were just the historic and present-day uses. Tribes and pueblos are also entitled under federal law to future uses. Just in their past and present uses, they laid claim to all of the water in the valley. There was one exception: there was a repartimiento, a decision made in 1823 that permitted a small amount of water from the Rio Lucero to go to Arroyo Seco. The Pueblo recognized that right when they submitted their claims. This water may be used for commercial, municipal, household, agricultural, livestock, wild game habitat, irrigation, and for religious and ceremonial purposes.

The 68,000 acre-feet claim was based on archaeology and a 1997 water survey. The use of these tools was based on generally accepted, standard business procedures used in determining a water right. All these claims had first priority in the valley. If the Pueblo and United States were to go to the future-use claim, it would be based on practicably irrigable acreage and would be well above the amount of water already claimed.

In 1990, the Taos Valley Acequia Association approached the Pueblo and said it would like to negotiate and settle the question of how to deal with water in the valley. It had two goals in order to preserve the future viability of the acequia system:

1) To negotiate the Taos Pueblo's water right, and
2) To build into the settlement some protections for acequias that were experiencing buyers from outside the acequia association trying to purchase water rights and transfer them to other uses.

The negotiation involved the Pueblo, the United States, the State of New Mexico, and the Taos Valley Acequia Association. They were highly adversarial proceedings. The parties quickly realized that if they had more hydrologic information about the valley and how water operated in the valley, they would be able to vet the suggestions being made against a scientific model. They wanted to avoid bringing unworkable solutions to the table and to come up with a technological solution that was feasible.

Dr. Peggy Barroll of the Office of the State Engineer led this effort with the help of John Shomaker, a private hydrologist. They realized that more test wells were needed. With $2 million provided by Congress, the wells were drilled and the data collected. By August 2002, there was sufficient data to allow the development of groundwater and surface water models.

In 2004, more parties came to the table: El Prado Water and Sanitation District, a group of mutual domestics, and the Town of Taos. These are all governmental or quasi-governmental organizations. They worked together until 2006 when they had crafted a draft settlement, which they took to the area residents in public meetings. In May 2006, the parties had a ceremonial signing.

At this point, there is agreement among all the parties except the United States. The United States can't negotiate such an agreement until given permission by the Congress. From 2006 until 2010, the parties took the settlement to Congress and actively worked with the Congress, the congressional delegation, and the budget office, which approves the cost. Agreement adjustments are made during this process. Then the legislation is linked with other settlements or funding requests so that a package is created that enough legislators will support.

The Claims Resolution Act of 2010 contained four water right settlements for tribes, including that for Taos Pueblo, and a settlement for black farmers' claims against a federal agency for unfair loss of funding for their farming activities. This Act was signed into law in December 2010.

The Pueblo water rights act contains seven conditions precedent that have to be completed by a date certain, that is, March 31, 2017:

1) The President must sign the Act into law, which was done on December 8, 2010.
2) The settlement agreement must be reconciled with the Act, which was a difficult process and required complicated negotiations.
3) All parties must sign off again after reconciliation, including the Secretary of the Interior. The signing occurred on December 12, 2012, which was extraordinarily fast.
4) The United States must appropriate all the monies committed to in the Act.
5) New Mexico must appropriate all the monies it was committed to provide.
6) New Mexico has to amend a statute to permit the Pueblo to lease water outside of tribal lands.
7) A partial final decree for the Pueblo rights must be entered after conditions 1-6 are completed. (The partial final decree was entered on February 11, 2016.)

The Adjudication Process

In adjudications, the New Mexico Office of the State Engineer (for non-Indians), the tribe, and the United States make an inventory of all water uses in a stream system and create a hydrographic survey. The survey of non-Indian rights consists of abstracts of every water use found in the public record as well as maps that locate the uses. The survey helps people understand the legal paperwork describing their water rights when it arrives from the State Engineer.

When a rights' owner receives a package, there is a time for negotiation if the owner thinks that their right is not described correctly. This can happen since, in this valley, the State Engineer did not have authority to collect information on surface water uses that were developed prior to 1907, and on groundwater rights prior to November 29, 1956, when the groundwater basin was declared. After these dates, the State Engineer could research and permit new water uses in the valley.

The State Engineer recognizes the problem of determining rights correctly and invites people to say, "this description does not adequately describe how I use water or how much I use—let's talk about it." Generally speaking, they can reach an agreement. If not, they must resort to the court process and go into litigation.

Once there is an agreement, the State Engineer supplies the court with an order that describes that agreement, which is entered by the court. When everyone in the valley has their agreement, a new phase begins called "inter se." Inter se is Latin for "among each other," and it means anyone in the valley can challenge anyone else's water right. Their own water right has been settled with the state and cannot be revised.

The end result of this process is a decree that recognizes that your water right is good against the government and the community. You can do things that alter your water right: you can lose it, you can expand upon it based on permission, etc., but for that moment in time it says your water right is determined and past sins are forgiven.

We are in the "inter se" phase of the Taos Pueblo water adjudication. We have almost finished it. People were allowed to file objections, but there were less than 100 filed. The Special Master, who is an arm of the court, considers the objections and makes recommendations to the court. The court considers any objections to the Master's recommendations and enters a final order.

In this case, the Special Master recommended that the objections to the settlement filed by community members be overruled. That is because the objections were not specific enough so that the court could rule on them, or because the objectors did not show harm to their own interests, e.g., the harm alleged was too broad. The claimant has to be specific about the concern, and how s/he is harmed in particular.

The Special Master also recommended that the court not enter a final decree until all the seven conditions precedent were resolved. Today we are waiting for the final payment from the federal government. That payment is in the president's budget, which is before Congress. When finalized by Congress, that condition will be met. When that final payment is secured, the Court has indicated that it will enter the final decree. (The Court entered the partial final decree for Taos Pueblo on February 11, 2016.)

Yet another condition to the finalization of the settlement is that all appeals to the decree must have run. If someone appeals to the Tenth Circuit in Denver, the resolution of the appeal must happen by March 2017.

What Do the Parties Get (in general terms):

- The Pueblo water right is supplied by the Rio Pueblo, the Rio Hondo, and the groundwater. It also has a component of San Juan/Chama water. This right may be used for any purpose subject to certain conditions. It is first priority unless otherwise stated, and the uses and changes to current uses are subject to conditions within the Settlement Agreement Exhibit A and applicable law.

- The Pueblo received:
  - 22,000 acre-feet of San Juan/Chama contract water (in round numbers).
  - Water to irrigate about 5,700 acres or to divert about 22,500 acre-feet of water per year based on historic and present uses (compared to its original claim to 68,000 acre-feet);
  - About 300 acre-feet for municipal, domestic, and industrial purposes;
  - 77.5 acre-feet to divert with variable priority for livestock impounds;
  - About 15 acre-feet for livestock wells; and
  - 1,300 acre-feet from other wells (a new use).

- The Pueblo also received protections and funds for the restoration of the Buffalo Pasture—a hugely important cultural and religious area for the Pueblo. Non-Indian wells, such as those of El Prado and the Town of Taos, had been depleting and damaging the wetlands that make up the Buffalo Pasture. The solution to that issue was based on the hydrologic models developed for the case. The models used site mitigation wells and new, deep wells closer to the Rio Grande for El Prado and the Town. This solution allowed these parties to ease use of the older wells and thus the pressure on the wetlands.

- The Pueblo gave up a lot of its claims to water and agreed to various conditions upon the use of that water. It agreed to:
  - Report its diversions and depletions from the Rio Pueblo and Rio Hondo to the Secretary of Interior, who in turn agreed to report this information to the State Engineer and the County of Taos; and
  - Accept a condition to the transfer and use that if a Pueblo water right is used outside of Pueblo lands, state laws will apply. The non-Indian community thus has the opportunity to support or object to that activity. If the transfer goes through, the Pueblo retains ownership. The water right, however, does not expire if the lessee fails to maintain a water right under state law.

- Other parties received settlement benefits:
  - Mutual benefit projects were created for all. These are largely mitigation wells and deep wells to be placed in areas that will not adversely affect existing water rights.

  - For all, an end to the lawsuit, which has cost untold millions in technical, legal, community dissension, and personal stress costs to the claimants.
  - Water sharing provisions stated in the water settlement agreement.
  - Protections to non-Indian water right holders from Indian withdrawals and uses of their groundwater rights.
  - No inter se challenges to the acequias from any of the settling parties, except that acequias can challenge each other, and their parciantes can also make challenges on their own behalf.
- The Pueblo agreed:
    - Not to make a priority call on surface water uses by non-Indians so long as the uses are made within the valley and according to the individual sub-file orders entered by the Court.
    - To abide by the water-sharing provisions in the settlement.
    - To transfer some of its irrigation away from the Rio Hondo so that the impacts on non-Indian uses are less severe.
    - To limit irrigation to 2,300+ acres immediately. As water rights are retired in the valley and other rights are purchased, those water rights will be moved to the Pueblo. Gradually, in a limited and organized fashion, the Pueblo will be able to come up to their full amount of 5,700 acres. It is intended that the effects will be gradual and not create a dramatic impact on the other residents of the valley.
- If the above provision was not in place, the Pueblo could make a priority call, as soon as there is a shortage, for its full amount of water for 5,700 acres.
- There is an implementation state fund of $2 million for the Arroyo Seco Arriba ditches to acquire 100 acre-feet of water for winter storage and to smooth out the delivery of water to their properties.
- The mutual domestics received recognition of their existing pumping in perpetuity, state funding for the acquisition of water rights, and construction of mitigation wells to offset their pumping.
- El Prado Water and Sanitation District agreed to limit its pumping from the wells near Buffalo Pasture and received funding for two new deep wells near the Rio Grande and funding to acquire new water rights. It also received 40 acre-feet of San Juan/Chama contract water.
- The Town of Taos received:
    - An additional 366 acre-feet of San Juan/Chama water;
    - The withdrawal of protests by settlement parties to the Town's pending water right transfers;
    - A new groundwater appropriation for future water supply of up to 800 acre-feet;
    - An agreement that there would be no objections to new well applications from the settlement parties.

The federal government's funding share is $124 million, and it is paying for 75 percent of the mitigation of the mutual benefits projects. The State of New Mexico's funding share is $20 million.

Many things were not resolved by this settlement. Most importantly, the enforcement and administration mechanisms of the settlement in the valley were not addressed… which is typical in adjudications. Parties resolve what can be resolved and save other issues for later.

Concerns expressed by non-settlement persons

These concerns, beliefs, and questions come from the objections to the Taos Pueblo settlement and from conversations with members of the community:

- Is there enough water to satisfy these agreements?
- Many people wanted more time to evaluate the settlement.
- How much will future operating and maintenance costs of the deep wells and mitigation wells be, and who will pay these costs? If residents will pay, will they be able to afford it?
- Mitigation wells may lower the water table further and make the surface flow situation worse.
- The Pueblo is not entitled to water from the Rio Hondo.
- Mitigation wells will have effects on domestic wells.
- How will the administration process work, particularly if there is over-pumping of wells?
- The settlement agreement misconstrued the history of the valley and essentially re-writes that history.
- There was inadequate representation of the acequias. The acequia approval was not obtained properly.
- People are concerned about environmental flows, which were not a part of the settlement.
- People are concerned about noise from pumps, the siting of wells, and issues between the Town and a particular ditch.
- The settlement agreement violates the public welfare provision in state law.
- There is concern about the trans-basin transfers and effects on the move from communities.
- Are we destroying our neighbors by taking their water?

Of the objections filed with the Court, the Special Master reported none of these concerns were sufficient to overrule the standard of fair, reasonable, and adequate that is applied to the review of a settlement. The Court agreed with the Special Master and has entered its order adopting the recommendations. Once the Pueblo water right decree is entered, we will move forward with implementation.

Implementation

Implementations are difficult. Parties who do not like aspects of the settlement will be able to participate in the State Engineer's processes for reviewing and granting transfers and new well applications.

The settlement will not fail because the final decree was not entered. But it could fail when it comes time to implement provisions for the mutual benefit projects. If settling parties do not get the bargain they negotiated, the settlement can fail.

There is a provision that will bring people back to the table. It is my hope that going back to the table, if necessary, will not be limited to settlement parties because I think it is important for other people to participate in one form or another. If they are not sitting at the table, they need to be included in some fashion. Settlements around the West face this problem. The general population feels disenfranchised by the negotiations that go on behind the closed doors.

I have been a mediator in a settlement process that involved three states, a university, two irrigation districts, and a whole lot of other people—around 80 people at the table. Having more than the handful of people at the table is very difficult to manage. However, we need to find a better settlement process so that communities do not feel so excluded. Exclusion raises the fear factor hugely, and it can cause bad feelings within a community going forward.

Ultimately, here is the bottom line: everybody had the farm taken away, and everybody sold the farm.

Thank you, you've been a great audience.