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Adjudication Nightmares in New Mexico

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I’m pleased to be trotted out this evening to talk to you about how New Mexico adjudications got their peculiar spots. I’ve been practicing water law in New Mexico since the late 1960s. I started out suing the State Engineer on behalf of water rights holders in these adjudications. In the late 1970’s I switched sides and started representing the State Engineer in the suits. In the mid 1980s I joined the School of law at the University of New Mexico and started teaching about adjudication suits in the New Mexico scheme of water rights. I retired in 2007 and went back to my beginnings, most recently testifying as an expert historian in these adjudications.

The only thing almost as old as me are the adjudication suits themselves. The late, legendary State Engineer Steve Reynolds, sometimes in disgust, usually in laughter, called these interminable law suits “welfare for unemployable lawyers and unemployed historians.” I’m here tonight, thank god still standing, to testify to the truth of what Reynolds said. Tenure in one of New Mexico’s adjudication suits is a far firmer thing than tenure in the most stable university in the world.

There are presently eleven pending stream system adjudications, six of them in federal court and five in state court. I’d like to focus tonight on the adjudications filed between 1960s and 1970s on the Rio Grande tributaries in northern New Mexico. None is yet completed. One, the Aamodt adjudication of the Nambe-Pojoaque-Tesuque stream system just north of here, is the oldest still pending law suit anywhere in the United States federal court system. I’m told that you’re particularly interested in how and why these got filed in the forums that they did. I’m also told that the Arizona folks couldn’t come this year so I’m safe in laying the blame on them.

Arizona made New Mexico do it.

There is some truth to the accusation. The timing, the choice of forums between federal and state courts, the venue all started with troubles stemming from the Colorado River and Arizona v. California in the late 1950s and early 1960s. I don’t need to tell you too much about the 1922 Colorado River Compact, the 1928 Boulder Canyon Act and Lee’s Ferry as the point where the Colorado River divides between the Upper Basin and the Lower Basin. I do need to tell you that New Mexico has the dubious virtue of being both an Upper Basin and a Lower Basin state even though its claim in each basin is relatively small. The life of New Mexico adjudications began in both the Upper and Lower basins.

Let’s start with the Lower Basin and the Gila/San Francisco/San Simon stream systems which head high in the Gila Mountains of southwestern New Mexico and flow quickly into Arizona. When Arizona v. California got started in the late 1950s, New Mexico got sucked in on two fronts, one as a claimant in the basin above Lee’s Ferry, another as a claimant in the basin below as a result of the Gila headwaters in New Mexico. The Upper Basin quite quickly got dropped from the dispute, but New Mexico still got stuck in the suit as a result of its Gila claims, small as they were.

Those New Mexico claims to the Gila backed New Mexico into its own adjudications in this way. Special Master Simon Rifkind, and his assistant Charles
Meyers, made it clear to New Mexico that it would only recognize existing Gila uses in it’s apportionment of lower basin waters. Rifkind said over and over again that he wouldn’t recognize any New Mexico rights to future uses on the Gila. Rifkind even got so tired of New Mexico lawyers trying to resurrect a claim to future uses that he told them to sit down as lawyers and get to the back of the line of witnesses in the case where he could control them better. Existing uses, Rifkind held, were all that New Mexico could get.

But what were those existing Gila uses? No one knew for sure. In the summer of 1956 the United States Supreme Court itself came to southwestern New Mexico to find out. The Court held hearings in Silver City and Reserve, then and now a hot bed of anti-government sentiment. Over a couple of months, 234 New Mexico farmers and ranchers, testified, filling a transcript 3,742 pages long. The farmers were mercilessly cross-examined by what to them seemed fancy out-of-state lawyers from Phoenix and Los Angeles, hell bent on minimizing their claims. Special Master Rifkind initially sided with the out-of-state big shots and initially awarded New Mexico minimal claims to the Gila.

Enter now legendary, but then new, State Engineer Steve Reynolds. Reynolds was convinced that the Gila acreage recognized by the Supreme Court was too small. He got Special Master Rifkind to increase it by 15%, but even that wasn’t enough. In addition in 1963 the Supreme Court itself ordered New Mexico to complete an official determination of Gila San Francisco ground and surface water rights by February, 1968. To comply and to make sure that New Mexicans got their fair share of existing uses, in 1963 Reynolds filed New Mexico’s first true stream system adjudication. (Others had begun an adjudication of ground water in the Roswell basin in 1956.)

Reynolds filed the Gila adjudication in state court in Catron County. His hydrographic survey team did a quick job of surveying all Gila uses, adjusting for many of the inevitable inaccuracies in the massive effort. A local district judge, Norman Hodges, took an active interest in moving the adjudication along, setting a priority for contested claims on his docket. There were less than a thousand claimants, small by the standard of the many more in later adjudications. There were no Native American claims to the New Mexico part of the River. And the Gila adjudication didn’t bother with the messy question of specifying Forest Service rights to federal lands in the basin, mostly because the Supreme Court hadn’t required it.

Still in less than five years, Reynolds had a complete adjudication of all private surface water and all ground water rights in the Gila Basin. In hindsight, it was a remarkable performance, made even more so by the comprehensive nature of the state court decree. The Gila decree included all ground water rights too and I mean all, even domestic wells under New Mexico law pretty much guaranteed and unregulated. To make the Gila adjudication even more remarkable, the State Engineer asked the adjudication court to order him not to issue any more domestic well permits that existing state law required him to issue.

All in all the Gila experience in the Lower Colorado basin from 1963 to 1968 convinced state administrators that stream system adjudications weren’t that big a deal in terms of time and resources. Then they turned to New Mexico’s rights in the Upper Colorado basin and they learned, slowly, how wrong they were.

Because you are all so familiar with it, I don’t need to dwell tonight on the 1922 Colorado River Compact or its corollary, the 1949 Upper Colorado River Basin Compact.
Suffice it say here that under the 1949 Compact, New Mexico was entitled to 11.25% of the available depletions to which the upper basin was entitled under the 1922 Compact. As a practical matter most of this had to come out of the San Juan basin which cut across the northwestern corner of New Mexico. As it turned out, New Mexico had had its eye on the waters of the San Juan basin for at least thirty years, primarily as a supplemental source of water for the Rio Grande basin which had been over-appropriated for years and whose rapid growth in the Albuquerque area was being fed by ground water which New Mexico recognized early on would eventually come from the already over-appropriated Rio Grande surface flows.

Hence, the Bureau of Reclamation’s San Juan/Chama Project. In its final form as authorized by Congress in 1962 the Project proposed to take 110,000 acre feet from three tributaries of the San Juan River in Colorado, send the diverted water through a tunnel under the Continental divide, and dump it into the Chama River, a tributary of the Rio Grande, its ultimate destination. Once there, the primary beneficiaries of the imported water would be the City of Albuquerque and the Middle Rio Grande Conservancy District.

All kinds of political compromises were necessary to get the San Juan Chama Project off the ground. Colorado Congressman Wayne Aspinall had to get his share of the San Juan in the Animas-LaPlata project. The Navajo Nation had to get the Navajo Irrigation Project as its share of wet San Juan water. Arizona had to get the massive Central Arizona Project. When State Engineer Steve Reynolds held out his and powerhouse senator Clinton Andersen’s approval of CAP until he could secure Arizona’s backing of the San Juan /Chama Project, the Arizonans accused Reynolds and New Mexico’s of blackmailing them. With his usual wit and insouciance, Reynolds replied, “Well, if calling it blackmail helps you understand New Mexico’s position, go right ahead.” Eventually the Colorado basin users came around and it looked as if the San Juan/Chama Project would really get off the ground.

The last stumbling block turned out to be New Mexico’s own Senator, Dennis Chavez. Chavez insisted that to win his unequivocal support, the San Juan/Chama Project would have to offer some real benefits to the ancient Rio Grande basin Indian and non-Indian farming communities of northern New Mexico. As a result, the approved Project included four tributary units in northern New Mexico including one in the Taos area, a second near Española and a third in the Nambe area. All called for dams and all called for tributary projects to offset the increased tributary depletions of the projects on the over-appropriated streams.

It was the nature of the imported water into the Chama River and the nature of these tributary unit projects that launched the wave of New Mexico stream system adjudications in the 1960s and the 1970s. (For those of you who are fans of New Mexico literature, it also brought John Nichols’ Milagro Beanfield War to the bookstores in the early 70s.) The necessity for adjudication could be most easily seen on the Chama: If you dumped the imported San Juan/Chama water into the Chama and tried to send it downstream to Albuquerque, how could you be sure that the ancient irrigation communities on the Chama wouldn’t grab it all? You had to administer the water and to administer the water you had to adjudicate the rights.

In a slightly more indirect way, the same was true of Dennis Chavez’s tributary units: to guarantee that the exchange water equaled the increased depletions, you had to
know what the base depletions rights were. Thus the San Juan/Chama Project brought New Mexico most of its pending upper Rio Grande adjudications.

The ease with which Steve Reynolds and the State Engineer blew through the Gila adjudication made everyone relatively confident that the Rio Grande tributary adjudications wouldn’t take too long. True enough the Chama adjudication included the Pueblos of Okey Owingue, then still the San Juan Pueblo and the two principal tributary units included the lands and water rights of five other Pueblos at least: Nambe, Pojoaque, San Ildefonso, Tesuque and Taos. But perhaps the addition of these unique and ancient Native American communities could be finessed and negotiated as easily as the claims of the Navajo Nation apparently had been on the San Juan with the Navajo Irrigation Project. After all the Pueblos would also benefit from the San Juan/Chama Project; maybe they could be convinced to support the adjudications seen as prerequisite to bringing those benefits to them.

State Engineer Steve Reynolds should have seen trouble coming when early on he went to a meeting of the All Pueblo Council to explain the San Juan/Chama project and its connection to the tributary stream system adjudications that he proposed. He told the gathered Pueblo governors and war captains about the Project and about the tributary stream system adjudications which, he said, would start in northern New Mexico and eventually extend south into the territory of the six main stem Pueblos on the Rio Grande itself.

The Governor of the Cochiti Pueblo raised his hand and asked a question.

"Let me see if I understand what you’re saying, Mr. Reynolds,” the Governor said “You mean, you’re going to start in northern New Mexico and you’re going to pick the apples of the Pueblos there. Then when you’re finished there, you’re going to come down here and steal our apples here. Do I have that right?"

Reynolds, who had a wicked sense of humor of his own and a great appreciation for the joking of New Mexicans, only laughed. But he knew that the Pueblos were extremely suspicious of the State of New Mexico in general and extremely wary, like all Native Americans, of state courts in particular. How could Reynolds get the Pueblos to buy into the stream system adjudication of water rights seen as pre-requisite to the delivery of supplemental San Juan/Chama water?

There were mine fields everywhere in the mid-1960s and early 1970s. No court had determined the meaning of the 1952 elliptical McCarran amendment at the time.

No one knew what a stream system was. Was it the whole Rio Grande basin in New Mexico or could you adjudicate tributary by tributary under McCarran. No one knew whether whatever waiver there was included federal reserved rights, let alone that special version of reserved rights, Native American reserved rights.

No one knew whether the amendment’s waiver of sovereign immunity extended to state courts or just federal courts. Wouldn’t it look funny if the State of New Mexico on behalf of the State Engineer, which was how the adjudications were styled, appeared in federal court as a plaintiff?

And, least of all, no one knew how New Mexico’s Pueblos fit into this morass of questions that no one could answer. The Pueblos had always been sui generis. In 1924 New Mexico lawyer and historian Ralph Emerson Twitchell had said that it would take “20 Kings Solomon” to straighten out Pueblo claims to land. It took years of litigation in the state and federal courts at the turn of the 20th century just to determine the status of
the Pueblos under Federal Indian law. Most of their water rights had arisen under the laws of New Mexico’s antecedent sovereigns, Spain and Mexico and had vested prior to the 1848 Treaty of Guadalupe Hidalgo. At the 1964 meeting between Reynolds and the All Indian Pueblo Council, the Cochiti Pueblo apple guardians had served fair notice that the Pueblos could be counted on to resist any messing with their water as they had successfully defended their property for centuries. It didn’t look like it was going to be easy to get the Pueblos into an adjudication suit, let alone determine their rights.

The lawyers for the State Engineer estimated that it would take ten years of hard litigation, trials and appeals, just to straighten out the jurisdictional pitfalls. Indeed, between the Eagle County decision in 1972, the Akin ruling in 1976 and the San Carlos Apache ruling in 1983, it took the Court 11 years to straighten out McCarran amendment ambiguities. The ten year predictions by the State Engineer lawyers looked pretty good in hindsight. But New Mexico couldn’t wait the ten years to get the San Juan/Chama tributary unit adjudications under way. So the State did what I guess all good lawyers do: It started making deals.

Now in the mid to late 1960s it was easier to make deals between Native Americans and enemies like the State than it would be today. For one, when it came to the Pueblos, the issues were restricted to New Mexico and so it was possible to deal directly with the Interior Department’s Field Solicitor in New Mexico, Tom Garrity. (At the time it wasn’t clear that the Pueblos were entitled to attorneys of their own and few had them.) For another and possible equally important reason, the Nambe and Pojoaque Pueblos were to be beneficiaries of the San Juan/Chama project which the adjudications would support. Given the ambiguities of the McCarran amendment at the time and the unclear status of the Pueblos, was there a way of bringing the stream system adjudications in a way the Pueblos would accept?

The State and Pueblo lawyers began by agreeing that the federal courts would be the preferred forum. Indeed, Garrity guaranteed that if the state tried to force the Pueblos into state court there would be no end to the jurisdictional trouble. The Mescalero Apaches in southeastern New Mexico got caught late in a state court adjudication and had spent years trying to get out. (Add a little) When that escape failed, the state court, acting through an unsympathetic special master faced with outlandish claims of irrigable acreage, took a very narrow view of the priority and quantity of Mescalero reserved rights. See what happened, the other Native Americans said, when a state drags you into state court? The Pueblos, said the Interior solicitor and the Pueblos themselves, would not raise jurisdictional issues if the state filed the stream system adjudication in federal, not state court.

That agreed on choice of forums---federal rather than state court---created problems of its own. How exactly was it that a state, seeking to define rights under a state system, even if there were federal rights involved, could invoke the jurisdiction of a federal court? If the McCarran amendment only waived sovereign immunity rather than itself creating subject matter federal court jurisdiction, then what exactly was the Federal question that created jurisdiction and did each claim have to exceed the jurisdictional amount?

In the 1990s I mentioned some of these problems to the maniacal professor of civil procedure at the UNM Law School. You know how those civil procedure guys are, completely carried away by completely abstract questions under the rules. The guy got so
excited that he proposed that he and I teach a new course styled Civil Procedure and Water Law. Just imagine how many students that would have drawn. We never did it. Just imagine how many of you would show up in Santa Fe, New Mexico in November 2008 if you knew that the civil procedure of stream system adjudication was going to be the topic?

But I have you here tonight as a relatively captive audience and these were real questions in the late 1960s and early 1970s and New Mexico had no idea how to finally answer them. Even if the State filed the adjudication in the federal courts, as some Pueblos insisted, if there was no federal court subject matter jurisdiction, that defect could be raised at any time and twenty years down the road all the work could go out the window.

Once again, lawyers for the State Engineer tried to short-circuit the dilemma and the insolvable jurisdictional nightmare by going back to the still cooperative Interior Department speaking for a Nambe Pueblo which was as anxious to get the adjudication over with and get the San Juan Project on line as any state official. How about, suggested the State Engineer’s people, if we join as defendants the United States on behalf of the Pueblos under the McCarran Amendment and then the Nambe Pueblo and the United States move not to dismiss but to realign as plaintiffs? See what would happen? The United States would now be the plaintiff and of course the United States as plaintiff could invoke the jurisdiction of a federal court anytime it wanted to. Hope Decree

Amazingly, the United States agreed on behalf of the Pueblos. These days you’re likely to see that oldest pending lawsuit in the federal system formally referred to as State ex.rel. State Engineer et. al. v. Aamodt et al. Well, Aamodt was Aamodt, damn it. That’s what the mystified Los Alamos Lab engineer was fond of saying when people asked how the famous suit got named after him and all he could to was point to the double “a” at the start of his name, a spelling that put him at the head of an alphabetical list of 2,500 defendants. But it’s not the et.al. after Aamodt that’s the key to New Mexico water adjudications. Instead, it’s the et. al that follows State ex.re. State Engineer. Among the et al. is the United States on behalf of the Pueblos.

Had the parties not pulled off this realignment slight of hand, the jurisdictional story of the New Mexico Pueblo water adjudications could have looked quite different. All the Pueblos did not agree with the Nambe Pueblo solution. Indeed, the apple growers from Cochiti Pueblo registered their objection when they moved to intervene on their own in the early days of the Aamodt litigation and tried to dismiss the stream system adjudication on the grounds that the federal court didn’t have jurisdiction over the Pueblos either. The federal district trial judge rejected the motion on the grounds that the Pueblos didn’t have a right to participate independent of the United States. A decade later the 10th circuit court of appeals reversed that view. But by then the adjudications were off and running and the Pueblos didn’t object.

I wish that I could tell you that these federal court proceedings then ran smoothly on the track laid down by the contemporaneous Gila adjudication. You know that’s not true because the cases are all still pending. But the delay hasn’t been because of the jurisdictional labyrinth that other adjudications have had to negotiate. Instead, I think that it’s because of the incredible historical complexity of the Hispanic and Pueblo claims themselves. I know that the subject of that complexity is beyond what the Office of the State Engineer invited me to talk to you about tonight. But I’d be remiss if I didn’t tell
you what I think makes these New Mexico adjudications so remarkable beyond their lack of jurisdictional conflict.

A few years ago, the Spanish ambassador in Houston offered to come to the University of New Mexico law school where I used to teach to deliver a lecture. The Dean asked him what he’d like to talk about and the ambassador, who was a history buff, said that he would talk about Queen Isabella’s will of 1492. The Dean, who wasn’t a history buff, said “fine”, but he didn’t know what the ambassador was talking about and worried that no one would show up. To lessen the embarrassment of an empty hall, he scheduled the lecture in a small room.

Well, come the evening of the lecture, the Dean and the Spanish ambassador were shocked at the crowd in the room. There were so many people that they had to move the talk to the law school’s largest lecture hall. There were still lawyers and historians and Native American leaders hanging from the rafters. It was still SLO.

That’s because Isabella’s 1492 will is one of the foundational documents of the so-called Derecho Indiana and the basis for Pueblo claims to water in the southwest under Spanish and Mexican law. Everybody came in 1996 to find out what the Pueblo rights were in 1492 and still were 500 years later.

From that perspective, the 45 year old life of the Aamodt adjudication is nothing. Here we have in State and the United States v Aamodt a pending probate case that’s over 500 years old. I’m told that the oldest priority in the Montana system dates from around 1845. Here in New Mexico we have a current issue about whether the priority date of New Mexico’s oldest Hispanic settlement should be 1598 or 1611. The issue is hotly contested in the Rio Chama adjudication and turns on whether “despoblar” as a 16th century Spanish term of art means “abandoned” or just “shrunk” in population.

They say that old Mexico can’t get to its future because it is so weighed down with its incredibly rich and long past. The same probably goes for New Mexico and its adjudications. It’s the history, not the civil procedure, that’s probably so slowed things down here.

But the procedure has contributed, no question about it. Even more important than the jurisdictional issues, the rules about finality have caused delays. I’m told that adjudication attorneys from other states have been particularly curious about how some New Mexico adjudications have ended up in federal court and some in state court. I hope you have the sense that its partly accicent, partly history and partly deals between Native Americans and the State. But, for whatever reason, the different forums have brought slightly different rules. It’s late and this is no place to launch into a difference between federal and state rules with respect to the finality of partial final decrees. Suffice it to say here that its been hard to put the same issues to rest, finally. Not surprisingly, the same issues keep raising their heads.

There’s a personal element to that problem and it’s where I’d like to end tonight. I told you at the start of this talk that I’d been on every side of these adjudications over the last 40 years. How could that be? you ask. Well, institutional memories are short and conflicts of interest have a limited shelf life in New Mexico adjudications. I settled a priority claim in the Rio Hondo adjudication in the early 1970s. The State re-opened the issue in the 1980s. I returned in the 1990’s to try to settle again the issue. When I showed up in court, the new special master made me re-enter my appearance from the 1970s. By then I was a professor. The United State’s attorney, whom I’d known for years, allowed

how as an academic I was having severe re-entry problems as if I was an astronaut-academic finally coming back to earth. Well, I hope that I haven’t troubled you too much this evening with my re-entry into the peculiar world of New Mexico adjudications.