PUEBLO INDIAN WATER RIGHTS

STRUGGLE FOR A PRECIOUS RESOURCE

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to say, the Pueblo Indians would argue that their "property" rights protected by the plan of Iguala included the aboriginal right to water.[70]

For many years the major work in Pueblo water rights was Herbert O. Brayer, *Pueblo Indian Land Grants of the "Río Abajo," New Mexico.*[71] Now, because of the substantial funding that is available in the *Aamodt* case, see chapter 6, the amount of detailed historical information about Indian water and land rights in the Spanish and Mexican period has increased greatly. The history that has been unveiled by the litigation has in some instances corrected the earlier account. For example, Herbert O. Brayer concluded that after the successful Mexican Revolution "the Mexican officials in New Mexico considered the status of the Indians to be unchanged."[72] G. Emlen Hall[73] and David J. Weber in a paper for publication in the *New Mexico Historical Review,* "Mexican Liberals and the Pueblo Indians, 1821–1829," argue persuasively that Brayer was mistaken.[74] The correctness of the Hall position is also indicated by the latest research in the *Aamodt* case.

In 1984, yet another round of hearings was concluded in the *Aamodt* case, with the non-Indians presenting their witnesses. Since there are many non-Indians living within the boundaries of the pueblos, the issue of the initial legitimacy of their land titles and their water rights is reflected in the latest series of historical salvos. In a 64-page report entitled *Land and Water Tenure in New Mexico,* Dan Tyler discusses the impact of the change of sovereigns (Spain to Mexico) on Pueblo land rights. While the title refers to water rights, there is virtually no discussion of this topic in the paper. Tyler does, however, point out that the "liberal" views of Spanish laws from the early 1880s, as well as the Mexican Constitutions and laws until about 1830, reflected a different attitude toward the pueblos—one of ethnic neutrality and restoration of civil rights for Indians and elimination of protected pueblo status.

This resulted in some land sales to non-Indians of Pueblo properties. However, he cautions "decisions made in regard to land and water alienation in one pueblo had little applicability when a similar problem arose in another pueblo."[75] In response, government witness Taylor[76] agrees that land sales took place,[77] but faults Tyler for generalizing from the *Pecos Pueblo* case, which Taylor calls a "singular rather than a classic case." He argues further that the record is unclear whether a private sale could take place without approval of Pueblos or other officials.[78]

What the two reports both conclude, however, is that Brayer's blanket statement that Pueblo status remained "unchanged" during

the Mexican period is *not* correct. Pueblo status changed—whether it, in fact, was a generalized change or unique to a few pueblos is far from clear. The legal conclusions about the importance of this change in status during the Mexican period will ultimately be decided by the judges in the Pueblo water rights litigation.

In 1824, Mexico adopted a new constitution after an unsuccessful experiment with monarchy. The 1824 constitution was silent on previous official acts of the Spanish monarchy, including land and water grants. Thus, prior laws were considered to have full legal status.[79] In 1836, President Antonio Lopez de Santa Anna voided the 1824 constitution and adopted a new constitution, called the *Siete Leyes.* Because the *Siete Leyes* was promulgated primarily to centralize political authority,[80] it also would seem not to foreclose the Indian position.

The procedures used for conveying a formal land grant during the colonial period prevailed after independence. Legal patterns established during the colonial period continued to govern water cases tried during the Mexican period. Intent, need, and no injury to third parties played a central role in the adjudicatory process.[81] Whenever possible, compromises were sought in water disputes just as they had been during the colonial period. Special water judges (*repartidores de agua*) were appointed to implement these compromises and to ensure that water was distributed equitably.[82] Also, the doctrine of public good continued to be an important aspect of water cases during this period.[83]

The Pueblos will rely on information such as the foregoing to argue that nothing in the Spanish and Mexican period operated to destroy their aboriginal rights. As a result, when the surrounding sovereign changed from Mexico to the United States, they still held an aboriginal status identical to tribes such as the Gros Ventre. Accordingly, they hold an aboriginal right to water equally as great. The Pueblos will argue that *Winters* mandates that it is a right subject to expansion with Pueblo need, and the non-Indians will argue that it is based on historical aboriginal use and nothing more.

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context of a water adjudication.[10] The difference is that before the treaty, the Gros Ventre, as a separate sovereign, had the right to all the water. Prior to the Treaty of Guadalupe Hidalgo, the Pueblos had only the rights they were accorded under Spanish and Mexican law.

The non-Indians would counter that the treaty is not self-executing and that the decision to enforce the treaty and protect Indian water rights would be up to Congress, not the courts.[11] Further, there is no suggestion in the treaty that any Mexican legal preferences for water rights of a certain group would be preserved. Finally, the non-Indians might argue that the Treaty of Guadalupe Hidalgo protects non-Indians as well as Indians and, if the Pueblos are entitled to assert their rights, non-Indian property-right holders can likewise assert their pre-treaty water rights. Practical arguments would also be made. A conclusion that all parties have water rights based on Spanish or Mexican law would mean that a substantial number of water rights of both Indians and non-Indians on the major river in New Mexico would be governed by the law of prior sovereigns, a result that could scarcely have been envisioned by the drafters of the Treaty of Guadalupe Hidalgo.*

On the issue of quantity, the Pueblos could argue the notion from *Winters v. United States* that the United States must have intended by the treaty to protect the future livelihood of the Pueblos by assuring them sufficient water to meet all of their needs as a "civilized people." This requirement would include needs of future populations, as well as a sufficient amount of water to maximize development of tribal resources. Their water right would, in effect, be an expanding water right based on future domestic and economic development demands.[12]

An alternative Pueblo position would be the argument that the "practicably irrigable acreage" standard of *Arizona v. California*[13] should be adopted. In that decision, in the context of reservations created by Executive Order, the Supreme Court held that the reservation was entitled to sufficient water to irrigate all "practicably irrigable acreage" on the reservation. The Pueblos could argue that, given their history of irrigation farming, this would be a logical formula to follow.

The non-Indians can argue that the treaty on its face specifies the maximum quantity of water that could be used by the Pueblos: the maximum they had used under Mexican sovereignty.[14] Neither the expanding self-preservation right nor the practicably irrigable acreage standard has any foundation in Mexican water law.[15] The

*It is inconceivable that recognition of property rights could mean that Spanish law governs water rights in all the ceded territory.

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Indians in *Winters* were considered to have an expansive water right because as a tribe they had complete dominion over all of their waters. It would be ludicrous to assume that, in negotiating a treaty on their own behalf, the Indians had bargained away that right. The Pueblo Indians, on the other hand, had no such dominion and the Mexican government did not and could not have created such an expansive water right by treaty in derogation of the rights of its other, non-Indian citizens.[16]

Non-Indians could also argue that adoption of the practicably irrigable acreage standard would be inconsistent with Mexican property rights under Mexican water law.[17] If acceptance of this rule would diminish non-Indian water rights protected under Mexican sovereignty, then such a court ruling would itself violate the treaty. The treaty protects all water rights, Indian and non-Indian alike. The court, it could be argued, ought not superimpose on one portion of the treaty a theory that is inconsistent with another.

The Indians would counter that the Kearney Code in 1846,[18] the Indian Trade and Intercourse Act of 1851,[19] the act of Congress confirming the Pueblos in 1858,[20] and the Pueblo Lands Acts of 1924[21] and 1933[22] all reflect an expansive view of Pueblo water rights. The non-Indians would respond that water rights were not specifically mentioned in any congressional act or document until the Pueblo Lands Board was created, and that in section 9 of the 1933 Act these rights were referred to only as "prior" rights.[23]

While arguments and counter-arguments will be made, the linchpin of the treaty argument will be the extent of water rights conferred upon the Pueblos by Spanish and Mexican law. Unlike the aboriginal water rights argument—that the Pueblos rights *survived* Spanish sovereignty—the treaty argument is that the water rights were *created* and defined by the laws of the prior sovereigns and that the United States is bound to honor those laws. Conversely, if there were no rights created by Spain or Mexico, none were preserved by the treaty. In the discussion that follows we provide a general background of the water law of Spain and Mexico. The views of two experts are then compared and contrasted in detail.

AN OVERVIEW OF SPANISH AND MEXICAN WATER LAW

The Prior Appropriation System

The starting point in analyzing Spanish and Mexican water law is the relationship between what they termed primary water rights *(derechos de primacía)* and secondary water rights *(derechos de sobrante)*. This

prioritization of water rights is similar to the current water law in New Mexico.

Prior or senior rights to land and water were rights of *primacía*. *Derechos de sobrante* were subordinate to *primacía* rights. Senior rights were allowed first use of the water. Priority could be conferred in an original grant or in a subsequent *composición* or *repartimiento*. It could be based on prior usage, greatest need, or legal claim.

Sobras, or *demasias,* were secondary rights entitled to a certain quantity of water, but only after the senior rights had used their legal amounts. Once the *derechos de sobrante* were established under law, they constituted legal title that was required to be recognized and was as binding as *derechos de primacía.*[24] *Sobrante* rights were divided into two types, absolute and conditional. In the former a person was entitled to a specific amount of water, and in the latter the right was subject to the discretion and use of those holding *derechos de primacía.* Once secondary rights were established, primary rights could generally not be expanded unless the secondary rights were conditional upon the discretion of those holding senior rights.

This flexibility and obligation to protect junior right holders has been pointed out by Professor Thomas Glick, who cites cases where senior water users were required to allocate some of their shares to others in times of hardship.[25] This excess water could be construed to have been *sobrante* water. It was also the custom in other Spanish possessions to sell *sobrante* water to the highest bidder.[26]

Cases from the Mexican period likewise indicate that a legal right was only one of many criteria considered in making water allocation decisions. Custom and historical prior use also played an important role. The Governor of New Mexico, Santiago Abreu, in an 1832 case refused a new grant of water because the acequia had been used "quietly and peacefully for many years; without the express consent of all of the parties no authority should or can deprive them of the above mentioned *acequia*...and finally [one should consider] the difficulties that are prompted when ancient custom is overthrown, especially when, as in this case, it is legally established."[27]

Expanding Water Rights

Allocations of water rights *(repartimientos de agua)* were not conceived of as final allocations of water based strictly on past or present use. They were subject to revision and did not set an absolute limit on the waters one was entitled to. As needs changed, the assignment of water could change. Future expansion and community needs were taken into consideration. For example, Laguna Pueblo in 1859 had been allowed to extend its field beyond the league boundary in order

to "meet their needs" *("para su manutención").*[28] When changing a water allocation, the expanded needs of a user were considered in the context of the needs of others.

Some *repartimiento* judgments and water *mercedes* expressly protected the needs of the Indian communities. Under these *repartimientos,* Indian communities were given first priority for enough water "to irrigate their land" and "to meet their needs." This allowed for flexibility and expansion in the future based on need.

Another type of grant that provided for elasticity based upon need was the *tierras de labor,* which carried with it irrigation rights. This grant could be expanded in the future to allow for increases in the number of persons. For example, a grant in 1755 to the *vecinos* of San Gabriel de las Nutrias provided that the number of *tierras de labor* could be increased at a later date to accommodate more families.[29]

Groundwater

Surviving records for New Mexico during the colonial and Mexican period rarely mention groundwater, and few formal grants of groundwater can be found. There appear to be at least two types of water subject to allocation during the colonial period: (1) springs where the water was in the form of a reservoir or had been channeled, and (2) perennial streams.[30] Wells on private land are not mentioned in the regulations. The absence of groundwater cases and regulations can be argued as evidence of the proposition that the landowner usually had undisputed use of groundwater on his land. In the courts of Mexico after Independence, the *Diccionario razonado de legislación y jurisprudencia* by Joaquin Escriche y Martin was used as a source of law.[31] This work further supported the rights of landowners to use wells within their boundaries:

> Every owner may open in his house or cultivated land *(heredad)* a spring or well of water even if by so doing he diminishes or removes all the water from the source or well of his neighbor, who nevertheless will have the right to impede the work or demand that it be stopped up or destroyed when it is done unnecessarily and with intent to harm him. He who has a spring on his cultivated land may use it as he sees fit because the spring is his as part of his landed property.[32]

The only limitations on the use of wells on one's land were when a third party had already acquired rights or when the water supplied Pueblos. Interestingly, these notions survive even today in New Mexico. A landowner still has an absolute right to drill one well for his own domestic use.

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The Question of Exclusivity of Spanish and Mexican Water Rights

The standard procedure in water adjudications during the period 1710–1810 consisted of four steps:

> (1) [D]etermine whether there were formal mercedes that might establish preemptive rights; (2) if there were no mercedes,...determine whether an official distribution of waters to local water users had been recorded; (3) if there was no official distribution,...initiate an investigation, based on testimony of witnesses and visual inspection to determine the amount of water available, who had traditionally used the disputed water, and for how long; and (4) based on the investigation,...draw up a *repartimiento de aguas* (distribution of waters agreement) for the users, generally based on prior use, need, availability of water, and protection of Indian communities.[33]

Formal *mercedes,* or grants of exclusive rights to water, were rarely made. In one case where water was extremely scarce, prior use formed the basis for exclusive rights to three Indian communities. The judge refused to confirm water rights to the neighboring sugar mill because it was "the last to participate in irrigation [from the streams]."[34] For example, Professor William Taylor, whose arguments are discussed in more detail below, has concluded that "prior use was a type of superior right but it did not usually serve to establish exclusive rights for the oldest user, especially if there were surplus waters."[35] In addition, in the case of *Pueblo of Taos v. Arroyo Seco,* it is clear that an absolute right (*un derecho total*) did not establish a right to the total waters where the water was scarce, because the Spaniards in the area needed water also.[36] Finally, the needs of competing litigants were also considered in the shaping of the final decision.

Further information on the principle of relative rights is provided by Professor Thomas Glick, who completed a detailed study of Spanish irrigation practices.[37] Glick concluded that a legal right to water did not constitute an absolute right, but yielded when local circumstances were considered paramount.

> Water rights are a society's idealized assessment of the best way to utilize water resources, according to the objectives most highly valued by that society. There is a subtle interplay between rights and practice, between the ideal and the real; and there has been a tendency on the part of legalistically-inclined students of irrigation to over-stress the importance of rights in the overall picture....At best the legal structure provides a framework in which arrangements are worked out. If subsequent practice proves, however, that the idealized assessment of resource utilization was incorrect, or inappropriate to the situation, the rights are altered—often with resistence to meet the exigencies of the environment.[38]

This theme is enriched and elaborated upon in the debate between Professors Taylor and Meyer discussed below.

Implied or Express Water Rights

There is an ongoing debate over the issue of whether a land grant carried with it implied water rights or whether a formal *mercedes* was required. Professor Taylor presents a view that contrasts nicely with that of Professor Glick.

In an examination of several thousand land grants in the audiencia de Mexico district for the period 1542–1796, Professor Taylor found that only approximately 2.5 percent of the total grants provided for water rights.[39] Taylor suggests that the rare appearance of water provisions in the *mercedes* indicates that water rights were not generally established through formal grants. The system used to adjudicate water rights was a more spontaneous process whereby formalization did not take place until landowners' use of the same waters came into conflict. Taylor concludes that the colonial land and water documentation suggests that "mercedes were not essential to the establishment of water rights and that land carried with it an implied right to available water."[40] This conclusion does not conflict with other findings that in water litigation cases the first step is to determine whether "formal" water grants, or *mercedes,* established preemptive rights.

Many Spanish land grants, including those specifically made for farming, did not necessarily provide for irrigation rights. Those grants containing special provisions for irrigation rights *(saca de agua)* usually authorized this water for only part of the grant. For example, a farming and grazing grant would supply water only for farming and the grazing land would carry with it no water rights. If water rights were not granted in the original grant, they could be extended in other ways, for example by a subsequent *repartimiento* or *composición* (legal readjustment). The process of *composición* was usually expensive and was, therefore, not generally used unless circumstances dictated. Those who irrigated without specific rights, however, were subject to judicial punishment. In contrast to Taylor's findings, Glick found that in medieval Spain land grants specifically authorized irrigation rights *(terre in regadvio)* or withheld them *(terre in seccano)* by a *merced de agua* or by some other means.[41] This practice is also explained in the work of Juan de Solorzano Pereira, a renowned Spanish judicial scholar of the seventeenth century: "Except for the lands, meadows, pastures,

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woodlands, and waters that by particular concession and grant have been made...all the rest of this land and especially that which is yet to be plowed and cultivated is and should be of the Royal Crown and dominion."[42] He concludes that water rights would only be implied for domestic or common use of the water, not for irrigation. He, of course, would argue that the absence of specific water rights in many land grants does not suggest that water rights are implied when one considers the number of specific water rights intentionally granted and denied by officials. Needless to say, the intent of the official making the grant is crucial; however, these officials are no longer around to give us the benefit of their thought.

This type of historical debate is not unique and is hardly capable of easy resolution. The case of *New Mexico v. Aamodt,*[43] discussed in detail in chapter 6, gives us a window on the debate as it is currently being waged. In reports prepared in connection with that case, Professors Meyer and Taylor specifically address the water rights of Pueblos under Spanish and Mexican law. This debate is summarized below.

SPANISH AND MEXICAN WATER LAW: A CONTEMPORARY DEBATE ON THE RIGHTS OF THE PUEBLOS

The Treaty of Guadalupe Hidalgo obligated the United States to protect the property rights of those former citizens of Mexico who suddenly found themselves residents of the United States, "to the same extent"[44] that they would have been protected under Mexican law.[45] What property rights in water did the Pueblos have that are entitled to protection under the Treaty of Guadalupe Hidalgo? The answer to this question has not been easy to unravel today, more than a century after the treaty was signed. Documents have been destroyed by events such as the Pueblo rebellion of 1680.[46] Even absent such an event, there was little time for detailed recordkeeping before 1680 in New Spain. Nevertheless, as noted above, two capable historians were asked by the parties in the *Aamodt* litigation to try to determine the relevant law of the preceding sovereigns of Spain and Mexico.[47] William B. Taylor from the University of Colorado testified on behalf of the Pueblos, and Michael Meyer from the University of Arizona testified on behalf of the State of New Mexico. They worked independently of each other and testified for opposing parties, but came to remarkably similar conclusions.[48] They complain of the "relative paucity of documentation" and destruction of records,[49] and they take note of the lack of precision of Spanish colonial jurisprudence.[50]

For example, on the point of precision Meyer says:

> [T]here is little that the historian can do to measure cultivable acreage described in terms of a musket shot, a house lot delineated in terms of a stone's throw, grazing land stipulated as the area a mule can walk in one day, or water allocation calculated as the amount passing through the legs of an ox in a minute.[51]

In spite of the difficulties, the studies of Taylor and Meyer provide a marvelous insight into the working of Spanish and Mexican law in the northern frontier region of the viceroyalty of New Spain.[52]

As discussed earlier, after Mexico threw off the yoke of Spain, the water law applying to Pueblo Indians of the Río Grande remained essentially unchanged. Some minor changes, such as the formalities for taking possession of a land grant, were made. For example, as noted by Professor Meyer:

> During the colonial period an individual taking possession would go out to the land with an official, pull up some weeds, turn over a small amount of soil, and cry out: "Long live King Charles II! Long live the Spanish Kingdom." After independence the same practice prevailed. When Luis Robiduo was awarded a site for his mill in 1839, he went out to the plot, shouted, threw a few stones, pulled up some weeds and proclaimed; "Long live the Mexican nation and our president."[53]

Professor Meyer further reports that "Mexican independence from Spain in 1821 did little to alter the fabric of colonial society,"[54] and that "[w]ater cases tried in New Mexico during the Mexican period indicate that the legal patterns established during the colonial period continued in force."[55]

Spanish and Mexican Law Regarding Priority and Quantity

The historians were asked two principal questions of particular relevance today: What was the Spanish and Mexican law regarding the priority of the Pueblo water right, and what was the law regarding the quantity of the Pueblo water right?

Determination of the Spanish and Mexican law regarding priority and quantity is useful in describing the rights that the United States is obligated to honor under the Treaty of Guadalupe Hidalgo and, thus, the Pueblo water rights today.

Prior use, or priority, was clearly one of the factors considered in allocating water under Spanish and Mexican law. Taylor testified that "Indian Communities have one advantage in the ingredient of prior use, priority...[I]f they could demonstrate that they had existed as

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sedentary farming villages before the arrival of Europeans, they could claim a priority that would precede that of anyone else."[56] There is no doubt that the Pueblos of the Río Grande were using water long before the Spanish arrived on the scene.

Taylor quotes as an example an early Spanish report, dated January 10, 1591, of Castano de Sosa, saying the Pueblos they had visited "are irrigated and have irrigation ditches, a thing which would [not be] believed if we had not seen it with our own eyes. A very great amount of maize, beans and other vegetables is harvested...."[57] Meyer adds that the Pueblos "have been practicing agriculture with irrigation for centuries and that irrigation...antedates the Spanish conquest of New Mexico."[58] Thus, there is little or no disagreement between the historians that the Pueblo usage of the waters of the Río Grande drainage basin antedates all non-Indian usage.

But what of the quantity of Pueblo entitlement under Spanish and Mexican law? Are the Pueblos entitled to protection for the amount they have historically used, or are they entitled to an expanding right as their needs grow and change? If the latter is the case, are they entitled to all the flow of the Río Grande and its tributaries if that is what it takes to satisfy their increasing needs?

Factors Used in Determining Water Quantity

The historians are largely in agreement concerning the factors considered under Spanish and Mexican law to determine the extent of Pueblo water rights. As Professor Meyer testified, "[o]n many of the most important issues, Professor Taylor and I are in total agreement....[W]e independently reached similar conclusions on many matters of substance."[59] They agree that "judicial decisions concerning water distribution were flexible...and could be subsequently amended based upon changing conditions,"[60] that "the doctrines of prior use and need are important considerations," and that "expanding population, and thus expanding need, can result in increased water allocations."[61]

Professor Meyer lists seven principles, with which Professor Taylor is in basic agreement, that were used in deciding water disputes under Spanish colonial and Mexican law:

> 1. *Title*. Without question a Spanish or Mexican judge would first ask parties to the case to produce their titles and from these documents would try to determine (a) if the land grant in question was valid under Spanish and Mexican law and (b) if it contained provisions for the use of water for irrigation purposes. If the land grant did not authorize water, then he would solicit other documentation such as a subsequent *composición* or *repartimiento* in the attempt to establish legitimate water rights.

2. *Prior Usage.* In the absence of all of this critical documentation, the judge would have to resolve the issue on other grounds. To the best of his ability, he would apply other principles of Spanish colonial and Mexican law. A primary consideration in such an eventuality would be application of the doctrine of prior usage. Proof of prior usage could sustain water rights in the absence of a *merced,* a *composición,* or a *repartimiento.* Prior usage was not synonymous with oldest usage; a firmly established newer usage would be taken into consideration as well in subsequent division of water.

3. *Need.* If a litigant or group of litigants asked for a new grant of water or an amount above and beyond that which they had been using, the judge would inquire about the increased need, a fundamental concept in water allocations. If, for example, population increase seemed to substantiate the claim of increased need, he might well have extended additional water rights. At the same time he would weigh this decision against the needs of others who might be using the water or who might have legitimate claim to it.

4. *Exclusivity and Injury to Third Party.* If a group of petitioners asked for exclusive rights to all of the water from a given source or as much water as they wanted to take from that source, without reference to the needs of others, the judge would be hard put to find many precedents for such exclusivity. Even if precedents could be found, they would inevitably be juxtaposed against the consequences of such an action. The most basic principle to be applied in the face of such a request would be the test of injury to a third party, a judicial concept applied to all without respect to ethnicity. Only if the petitioners could demonstrate that their exclusive use of the water would cause no injury to others would the judge be likely to rule in their behalf. If the water in a given area had been shared for centuries by two or more group[s] of persons, such as is the case in the Pojoaque basin, the evidence suggests that [a] Spanish or Mexican judge would be extremely hesitant to honor the exclusive claim of one group to the obvious injury of another.

5. *Intent.* The judge hearing the case would inquire about intent. Why did a petitioner or group of petitioners want more water? How did they intend to use it? Were their goals in harmony with those of the larger community? Would the grant of water contribute to an expansion of agriculture, would it increase tax revenue for Church or State, would it benefit the poor? By contributing to the economic development of a region, would it be of benefit to travellers and other persons in the non-agrarian sector of the society? The responses to these questions would contribute to the ultimate decision.

6. *Legal Right.* In the water disputes the establishment of legal right was important for the contending parties. All other factors being roughly equal, the litigant with legal right would have a

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decided advantage over a competitor without it. But the concept of legal right was not an absolute. Other considerations, such as need and prior use, could subordinate legal right to a secondary position in the process of adjudicating water controversies. The Spanish or Mexican judge would certainly not discount legal right, but neither would he allow it to overshadow all other factors in the distribution of contested waters.

7. *Equity and the Common Good.* Finally, in the solitude of his chambers, the judge might well ponder the doctrines of equity and the common good, the foundations of all Spanish colonial and Mexican law. He would ask himself what was equitable for the petitioners, for other individuals, and for the larger community. He would certainly consider the question of who stands to gain what. But more importantly he would concern himself with the question of who stands to lose what. Equity and the common good, theoretical principles in Spanish colonial law, were often given tangible meaning through compromise, a solution that seldom pleased anyone but, more importantly, did not cause irreparable injury to anyone. Water compromises took the form of the *repartimiento.* In the best tradition of equity and the common good, the *repartimiento* shared the water that was available.[62]

An area of disagreement between the historians concerns the relative emphasis accorded the ethnic factor.[63]

The Ethnic Factor. Spanish colonial law provided special status to the Indians to protect them from the non-Indians. How much weight was given this factor? Professor Meyer concludes that "the special status of the Indians, while in some respects indeed special, should not be construed as synonymous with preferred status."[64] In support of this conclusion, he makes the following observations:

(1) "During the entire colonial period, the Spaniards had everything working in their behalf against a largely powerless Indian population."

(2) "[T]he protective legislation put on the books for Indians was not placed there for the purpose of affording them preferred status under the law. Because they were abused, because they were cheated, because they were not familiar with the intricacies of the Spanish judicial system, because there were virtually no Indian lawyers to guard their interests, they obviously needed an official such as the Protector of the Indians charged with the function of defending them. In the limited sense, it can be argued that this constitutes preferred status, but in the larger sense the object was not to assure them a special legal standing in the community; rather, it was the attempt to assure that they would not be at such a decided disadvantage at the hands of those who wielded enormous power."

(3) "[E]thnicity was not the issue upon which water disputes were resolved. This does not suggest that ethnicity played no role in other considerations that were used to make equitable determination."

(4) "While Indian needs are crucial, they are inevitably weighed against the needs of others."

(5) "But not even the balancing of two sets of needs provides the single paramount guideline. These, in turn, are juxtaposed with other critical criteria—injury to third party, title, legal right, prior use, governmental intent, equity, and the doctrine of the common good. If there is a way to assign priority to the various criteria, I have been unable to find it."[65]

Professor Taylor, on the other hand, argues that the ethnic factor was considered and that special status did mean preferred status. He concludes that "[w]hile no person or group...had absolute or unlimited rights to land and water...Indians...had special legal status that in some ways had a bearing on their claims to land and water,"[66] and, while Indian status was "less important" than some other factors, such as municipal status,[67] an advantage could result from Indian status. However, even Professor Taylor does not suggest that the special status of the Indians meant that the quantity of their water right could be expanded without considering the needs of other users. Rather, he states: "[T]he water rights of a pueblo cannot be...seen in isolation from the total system of the users"[68] but, instead, must be balanced against competing interests and rights.[69]

Expansion of Water Rights Based on Need. The water rights of the Pueblos, as well as those of other users, could be expanded if there was a need, but only, as indicated above, after considering the needs of other users.

In this regard, Professor Meyer observes:

(1) Water distributions "could be amended based upon changing conditions";[70]

(2) "[E]xpanding population, and thus an expanding need, can result in increased water allocations";[71]

(3) Water allocations "did not set an absolute future limit on the water" that non-Indians and Indians might be assigned;[72]

(4) "If a litigant or group of litigants asked for a new grant of water or an amount above and beyond that which they had been using, the judge would inquire about the increased need,...for example, population increase....At the same time he would weigh this decision against the needs of others...."[73]

(5) "If a group of petitioners asked for exclusive rights to all of the water from a given source...the basic principle to be applied...would be the test of injury to a third party."[74]

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Taylor makes similar observations:

(1) Water allocations "were not conceived as final distributions of water based strictly on past or present use."[75]

(2) Water allocations "were subject to revision and did not set an absolute limit on the water an Indian pueblo might be assigned."[76]

(3) Water allocations for sedentary Indian communities "allowed for some expansion in the future based on need."[77]

(4) There were not "[a]bsolute or unlimited rights to water on the part of Indians or others."[78]

(5) "[T]he colonial system of justice in practice rarely dealt with absolutes, preferring to find compromise solutions after weighing the competing interests and rights."[79]

Equity and Flexibility: Touchstone of Spanish Water Allocations. It seems clear that the quantity of water allocated to the Pueblos under Mexican law was not determined by mechanically applying a fixed legal formula, but rather by considering a number of factors such as need, injury to others, and the common good.[80] These considerations are best described as ones of equity and flexibility.

Professor Meyer observes regarding this balancing process:

(1) "The criteria used in settling water disputes during the Spanish colonial and Mexican periods are inherently flexible."[81]

(2) "Decisions rendered by competent authority were never considered to be etched in gold."

(3) "Changing circumstances could and often did occasion a modification of a previous division of water."

(4) "The Spanish or Mexican judge hearing water cases operated within the guidelines outlined above, but he had the necessary flexibility to render justice in any given case."

(5) "Spanish colonial jurisprudence was remarkable for its dedication to equity and benevolent principles, but not for its precision."

Professor Taylor offers parallel observations:

(1) "There's...a good deal of flexibility in the quantity of water assigned...."[82]

(2) "Every royal official...wants...to make a decision on the basis of his knowledge surrounding the circumstances of an individual case."

Professor Taylor adds that "Professor Meyer places more emphasis than I would on the direct applicability of these broad ideals of 'equity for all,'"[83] but nonetheless concludes that "Professor Meyer and I agree on the significance of a Spanish concept of equity and flexibility in the division of water for irrigation among potential users."[84]

After reviewing the historical evidence and the interpretation of that evidence by the historians, what can we say was the Spanish and Mexican water law, by which the Pueblo water rights were to be measured under the Treaty of Guadalupe Hidalgo? Four major points stand out: (1) The Pueblos' water usage predates the arrival of the Europeans; (2) Spanish and Mexican law made extensive provision to protect Indian water rights. Further, this protected status may have given Indians some preferred status, although this is subject to disagreement; (3) The amount of the right was determined by considering a number of factors, including title, legal right, present use, need, injury to third parties, the common good, and equity; (4) Indian, as well as non-Indian, water rights could expand with changing needs, but only in the context of considering the needs of other users. No water rights, including those of the Pueblos, could be expanded on the basis of a rigid standard such as the number of irrigable acres of Indian land in isolation from a consideration of the needs of other users and injury to third parties.

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