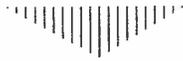




**PUEBLO
INDIAN
WATER
RIGHTS**

**STRUGGLE FOR A
PRECIOUS RESOURCE**



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44

About the Authors

Charles T. DuMars's interest in water and water rights in the Southwest dates back to the stories his grandmother told him of how she and her husband lost their New Mexico homestead for lack of water in the early 1900s. A professor of law at the University of New Mexico, the author has written extensively on water rights and Spanish land-grant law, and has litigated cases at all levels of the federal and state courts in New Mexico.

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Albert E. Utton is codirector of the Natural Resources Center and editor-in-chief of the *Natural Resources Journal*. He combined degrees in geology with his law degrees to build a special interest in water law. He has written numerous books and articles on the subject, including the international dimensions of resources management. The Southwest and the resources shared by the United States and Mexico have been the focus of much of his work.

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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 1924²¹ and 1933²² 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 primacia*) and secondary water rights (*derechos de sobrante*). This

Hidalgo.² The United States agreed by that treaty to protect rights recognized by prior sovereigns.

The government, in attempts to abide by the treaty provisions and to protect these prior rights, enacted certain laws affecting Indians. One of these laws was the Indian Trade and Intercourse Act of 1851,³ which regulated trade with Indian tribes. By this act, the provisions of the Trade and Intercourse Act of 1834,⁴ prohibiting settlement on lands belonging to Indian tribes and providing that Indians could sell their land only to the United States, was extended to Indian tribes in the territories of New Mexico and Utah.

In 1858 the Pueblo land titles, which had been recognized by the Spanish and Mexican governments, were confirmed by Congress.⁵ These protections, however, were eroded by the New Mexico Territorial Court in a series of decisions denying applicability of the Intercourse Acts to the Pueblos by differentiating Pueblo Indians from Reservation Indians.⁶ Indeed, in 1876 the United States Supreme Court, in *United States v. Joseph*,⁷ affirmed a decision of the territorial court that entirely eliminated federal protection of the Pueblos. After the admission of New Mexico to statehood, however, the center of control over the Pueblos shifted to Washington and they began to be treated more like other Indian tribes. The constitutionality of the New Mexico Enabling Act,⁸ which contained a provision including the Pueblos in the terms "Indian" and "Indian country," was upheld by the United States Supreme Court in *United States v. Sandoval*,⁹ and federal protection was finally reinstated in 1913.

The Supreme Court declared that the extension of federal control by the Enabling Act was a constitutional exercise of congressional power and that, notwithstanding outright ownership of land by the Pueblos and claim to citizenship, the assertion of federal guardianship was legitimate.¹⁰ The sale of Indian lands to non-Indians between 1876 and 1913 was therefore illegal because these sales should have been regulated by the Intercourse Acts.

To remedy the situation created by these illegal sales, and in an attempt to clarify the rights of each, Congress created the Pueblo Lands Board in 1924¹¹ to investigate and determine claims of Indians and non-Indians to Pueblo land. In 1933¹² Congress authorized payment of claims presented under the 1924 Act. Between those two enactments, in 1928 the Middle Río Grande Conservancy District Act¹³ was passed. By that act, Indians of the six pueblos located in the district were given paramount water rights that could not be lost by nonuse or abandonment. It is within this series of governmental acts that any claim to a congressionally created *Winters* right must be found.

The Application of the Winters Doctrine to the Indian Trade and Intercourse Act of 1851

The Pueblos may argue that the decision in *United States v. Sandoval*, recognizing the Pueblos as wards, established federal guardianship over the Pueblos and, in effect, created a reservation of Pueblo Indian land for the purposes of the *Winters* doctrine as of the date of the Indian Trade and Intercourse Act of 1851.¹⁴ It could be argued that by that act a trust relationship was established between the United States and other Indian tribes. If they were wards and the United States was trustee, this fact alone entitles them to full protection irrespective of any specific congressional enactment or executive order. If the Pueblos assert a reservation as of 1851, then the priority of their reserved water right dates from 1851.

Alternatively, the Pueblos could argue that the legal process finally declaring the Pueblos as Indians for the purpose of federal guardianship emphasized their particular status prior to the Treaty of Guadalupe Hidalgo. A recognition of this preferred pre-treaty status would preserve their pre-1848 water rights. If the 1851 Act recognized rights existing under Spanish or Mexican law, then the Pueblos could argue that the act incorporated their pre-treaty priority date and, therefore, their rights are senior to those of non-Indians.

The non-Indians could undoubtedly argue that if the 1851 Act were in the nature of a reservation, the 1858 Act granting patents to Pueblo lands would not have been enacted. They would conclude it to be extremely unlikely that the extensive land grant patenting process would have taken place in 1858 if the Pueblos already had their lands and water. Further, if the United States was trustee in 1851, why did the Pueblos get a United States patent in 1858?

If the 1851 Act is seen as creating a reservation, the quantity of water would likely be computed following the standard of practicably irrigable acreage set out in *Arizona v. California*,¹⁵ discussed at the end of this chapter. If it is seen as some type of preservation of pre-1848 rights, the quantity would relate back to historic use, using evidence from the aboriginal, Spanish, or Mexican periods, as discussed in chapter 4.

The Application of the Winters Doctrine to the Act of Congress in 1858 Confirming the Pueblo Grants and to the United States Patent

The Pueblos may argue that the act of Congress in 1858¹⁶ confirming title to Pueblo lands enforced the mandate of the Treaty of Guadalupe Hidalgo that Indian property rights be protected; that is,