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A Reservoir Runs Through It: A Legislative and Administrative History of the Six Pueblos' Right to Store "Prior and Paramount" Water at El Vado

ABSTRACT

This article explores the Six Middle Rio Grande Pueblo tribes' right to store water at El Vado Reservoir. Although not explicitly authorized in the Act of 1928, the legislative history suggests that implicit in the Act is authority for the Six Pueblos to store water at El Vado. The seventieth Congress believed the Six Pueblos' land suffered from a rising water table, antiquated irrigation works, and an unreliable river flow. Accordingly, it intended all of the Pueblos' lands within the boundaries of the Middle Rio Grande Conservancy District (MRGCD) to "materially benefit" from the Conservancy Project, which included storage at El Vado. The Department of the Interior acted upon the authorizations contained in the 1928 Act by entering into a series of agreements with the MRGCD. Those agreements explicitly recognized the Pueblos' right to store water at El Vado. Additionally, the Pueblos may have a right to store under New Mexico law through the MRGCD's storage permit No. 1690. That permit does not contain any limitation on the type of water rights authorized for storage at the Reservoir. The MRGCD included the Six Pueblos' lands in its permit application No. 0620 and did not exclude them from its permit application No. 1690.

I. INTRODUCTION

As it makes its way down and through the arid land of New Mexico, the Rio Grande swells with the promise of life and conflict. Many thirsty users—Native American tribes, struggling farms, sprawling municipalities, growing industry, the downstream state of Texas, the endangered Rio Grande Silvery Minnow, and the river itself—compete for

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supply. Meanwhile, climate change and the threat of severe drought contribute to the impossible task of New Mexico's State Engineer to administer the precious resource. The controversy over the Six Middle Rio Grande Pueblo Tribes' (Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta) right to store water at El Vado Reservoir rests squarely in this quagmire. This article explores where that storage right springs from.

The article begins with a brief introduction to El Vado Reservoir, the Middle Rio Grande Conservancy District (MRGCD), and the Pueblo Indians. The article next examines federal law through the Acts of 1927 and 1928, using the legislative history to amplify statutory language. The article then turns to a series of contracts between the Department of the Interior (DOI) and the MRGCD to show how the DOI interpreted and acted upon the authority granted in the 1928 Act. Finally, the article looks at New Mexico law and the MRGCD's two State Engineer-approved permits to determine what right the Six Pueblos may have pursuant to state law.

A. El Vado Dam and Reservoir

At the center of the Pueblo storage controversy is El Vado Dam and Reservoir. The Dam appears as a giant two-faced barricade wedged between two mountainsides. Off-white gravel fills the downstream face, while grey steel and rust armor the upstream face, which holds back the flow of the river. El Vado rests in north-central New Mexico about 75 miles above the Rio Chama's confluence with the Rio Grande and about 160 miles north of Albuquerque. The Reservoir is approximately five miles long, one mile across at its widest point, and has a crest elevation of 6,902 feet.¹ El Vado is a state park that provides opportunities for fishing, boating, water-skiing, and cross-country skiing. Bald eagles, red-tail hawks, water ouzels, and ospreys winter there. However, the reservoir's *raison d'être* is to store native Rio Grande water for the Middle Rio Grande Conservancy District and the Six Middle Rio Grande Pueblos.

B. The Middle Rio Grande Conservancy District

The MRGCD is a powerful political subdivision of the state of New Mexico formed to alleviate flooding, reclaim waterlogged land, and provide irrigation to farmlands in the Middle Rio Grande Valley.² As early as the 1890s, various organizations and individuals discussed plans for improving

1. N.M. Bureau of Geology & Mineral Resources, El Vado Lake State Park, http://geoinfo.nmt.edu/tour/state/el_vado/home.html (last visited Aug. 28, 2007).

2. See *In re* Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 190-91, 242 P. 683, 684 (1925) (discussing the formation of the MRGCD).

the old *acequia*³ systems in the Middle Rio Grande Valley. However, it took several more decades of water seeping into the land before the state forged an adequate legal machine to carry out plans for drainage, storage, flood control, river protection, and adequate irrigation of the valley. In 1923, the New Mexico legislature passed the Conservancy Act,⁴ which provided the legal framework for the organization and operation of conservancy districts throughout the state. On August 26, 1925, pursuant to that law, New Mexico's Second Judicial District Court (the Conservancy Court) approved the organization of the MRGCD. The "official plan"⁵ to reclaim land in the Middle Rio Grande Valley included the construction of drainage and irrigation works and a dam and reservoir. The project is known as the Middle Rio Grande Conservancy Project (Conservancy Project).

The geography of the Middle Rio Grande Valley is such that the Six Pueblo Tribes are interspersed between non-Indian lands. Therefore, engineering logistics and the Conservancy Court required the MRGCD to include the Six Pueblos in its plan to reclaim the Valley. Because the Conservancy Project would benefit those Pueblos, the MRGCD sought a contribution of construction costs as well as future operation, maintenance, and betterment works (O&M) costs from them. Due to the Pueblos' trust relationship with the federal government, the MRGCD had to work with the DOI and then the United States Congress. The MRGCD initiated construction of El Vado Dam in 1929 and completed it in 1935.⁶

By the 1940s the MRGCD was struggling to sustain its reclamation operations and looked to the federal government for support. The MRGCD could not afford the necessary maintenance on much of its works and many irrigable lands sat unused because their owners could not pay the assessment fees.⁷ The situation was exacerbated when floods threatened the Middle Rio Grande Valley in 1941 and 1942. Unable to resolve the financial

3. "Acequia" is a Spanish term for a community operated irrigation ditch.

4. 1923 N.M. Laws 211. The original Conservancy Act was repealed and replaced with the 1927 Conservancy Act. 1927 N.M. Laws 135, 193 (codified at N.M. STAT. §§ 73-14-1 to 88 (1978)). See also *Gutierrez v. Middle Rio Grande Conservancy Dist.*, 34 N.M. 346, 348-49, 282 P. 1, 2-3 (1929) (discussing the 1923 and 1927 Acts)).

5. See STATE OF NEW MEXICO/MRGCD, REPORT OF THE CHIEF ENGINEER, JOSEPH L. BURKHOLDER, SUBMITTING A PLAN FOR FLOOD CONTROL, DRAINAGE AND IRRIGATION OF THE MIDDLE RIO GRANDE CONSERVANCY PROJECT, IN THREE VOLUMES, VOLUME I, THE OFFICIAL PLAN 195 (1928), available at <http://mrgcd.com/cms/kunde/rts/mrgcdcom/docs/342044733-04-16-2007-15-03-21.pdf>.

6. N.M. ENERGY, MINERALS & NATURAL RESOURCES DEP'T, HERON/EL VADO LAKES STATE MANAGEMENT AND DEVELOPMENT PLAN 12-13 (2002), available at <http://www.emnrd.state.nm.us/prd/documents/HeronandElVadoLakesStatePark.pdf>.

7. See Middle Rio Grande Conservancy District, A Little History: The MRGCD over the Years 2 (n.d.), <http://www.mrgcd.com/cms/kunde/rts/mrgcdcom/docs/619590059-05-25-2007-13-35-52.pdf> (last visited Aug. 28, 2007).

crisis on its own, the MRGCD asked the U.S. Department of the Interior's Bureau of Reclamation (BOR) for help.

Accordingly, Congress passed the Flood Control Acts of 1948⁸ and 1950,⁹ approving the Middle Rio Grande Project. This project aimed to improve and stabilize the economy of the Middle Rio Grande Valley by rehabilitating the MRGCD's facilities and by controlling sedimentation and flooding in the Rio Grande. The BOR and the U.S. Army Corps of Engineers (Corps) jointly planned the comprehensive development of the Middle Rio Grande Project. The Corps handled the construction of flood control reservoirs and levees for flood protection, and the BOR undertook the rehabilitation of El Vado Dam and the Middle Rio Grande Project's irrigation and drainage works and maintenance of the river channel.¹⁰ In exchange for federal assistance, the MRGCD transferred title to El Vado to the BOR in 1951.

C. The Pueblo Indians

The Pueblo Indians of New Mexico¹¹ (Pueblos) have a claim to water on the Rio Grande unlike any other user. They are descendants of ancient farmers who from "time immemorial" have put the life-giving water of the River to "beneficial use." Pueblo Indians inhabit the same homelands as their ancestors. Conversely, "Reservation" Indians inhabit lands "reserved" by treaty with the United States or Executive Order and have a right to water based upon the implied purpose of the "reservation."¹²

The Pueblos' water rights are based upon laws spanning hundreds of years and several crowns. When the Spaniards found their way to the Rio Grande Valley in the sixteenth century, they distinguished the Pueblo tribes, who lived in concentrated village settlements, from the Navajo and Apache, who were nomadic.¹³ Particularly, the Spanish colonizers recognized and

8. Pub. L. No. 80-858, tit. II, 62 Stat. 1171, 1175-82 (1948) (codified at 33 U.S.C. § 701(s) (2000)).

9. Pub. L. No. 81-516, tit. II, 64 Stat. 163, 170-84 (1950) (codified at 33 U.S.C. § 701(f)(2) (2000)).

10. Bureau of Reclamation, *Middle Rio Grande Project: New Mexico*, DAMS, PROJECTS AND POWERPLANTS, <http://www.usbr.gov/dataweb/html/mrioGrande.html> (last visited Aug. 28, 2007).

11. New Mexico is home to 19 Pueblo Indian tribes: Acoma, Cochiti, Isleta, Jémez, Laguna, Nambe, Pojoaque, Picuris, San Felipe, San Ildefonso, Sandia, Santa Ana, Santa Clara, Santa Domingo, Ohkay Owingeh (formerly San Juan), Taos, Tesuque, Zia, and Zuni. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.07[2][a] (Nell Jessup Newton et al. eds., 2005 ed. LexisNexis 2005) [hereinafter COHEN'S 2005 HANDBOOK].

12. See *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 699-700 (1978).

13. COHEN'S 2005 HANDBOOK, *supra* note 11, § 4.07[2][a].

protected Pueblo land holdings and water rights.¹⁴ Spain recognized that the Pueblos "had prior water rights to all streams, rivers, and other waters which crossed or bordered their lands,"¹⁵ and were entitled to enough water to satisfy their needs.¹⁶

The Spanish Government named the Pueblos wards of the crown in order to manage land conflicts between the Pueblos and their non-Indian neighbors. Non-Indians would claim that they had, in good faith, acquired and improved lands subsequently claimed by the Pueblos.¹⁷ Meanwhile, white ranch owners would encroach upon Pueblo lands and appropriate them by fraud or violence.¹⁸ Consequently, the Spanish crown required all sales of Pueblo lands be validated by high-ranking officials.¹⁹ Although citizenship was granted to the Pueblo Indians under Mexican law, they were still considered wards of the government and sale of their land was still limited.²⁰

In 1848, the United States acquired the New Mexico Territory, and the Treaty of Guadalupe Hidalgo²¹ guaranteed the Pueblos' property rights acquired under the Spanish and Mexican governments.²² Under territorial government authority, the Pueblos' legal status sharply differed from that of most other Indian tribes.²³ The Pueblos were not considered Indians within the meaning of existing statutes and were not afforded the same protections. The U.S. government could alienate Pueblo lands and have them adversely possessed.²⁴ In most respects, each Pueblo had a status similar to that of any other municipal corporation of the territory.²⁵ However, the admission of New Mexico to statehood created a clear distinction between state and federal authority, and the center of control

14. *Id.* § 4.07[2][a], [c].

15. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 383 (Univ. of N.M. Press reprint 1971) (1942) [hereinafter COHEN, 1942 HANDBOOK].

16. COHEN'S 2005 HANDBOOK, *supra* note 11, § 4.07[2][c] (citing *New Mexico ex rel Reynolds v. Aamodt*, 618 F. Supp. 993, 998 (D.N.M. 1985)).

17. COHEN, 1942 HANDBOOK, *supra* note 15, at 384.

18. *Id.*

19. *Id.* at 383.

20. COHEN'S 2005 HANDBOOK, *supra* note 11, § 4.07[2][a].

21. Feb. 2, 1848, U.S.-Mex., 9 Stat. 922, T.S. No. 207.

22. *See Mtn. States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240-41 (1985); *see also Memorandum on Behalf of the United States, as Amicus Curiae*, October Term, 1951 at 4 ("The rights of the Indians to occupy the lands, referred to as pueblos, and to irrigate the lands were recognized by the Spanish Conquistadores and frequently resulted in the Indians receiving actual grants from the King of Spain.... The property rights of the former Mexican citizens and Indians were recognized in the treaty of Guadalupe Hidalgo...and were meticulously observed when the territory became a state...." (citations omitted)).

23. COHEN'S 2005 HANDBOOK, *supra* note 11, § 4.07[2][b].

24. COHEN, 1942 HANDBOOK, *supra* note 15, at 383.

25. *Id.* at 399.

over the Pueblos shifted from the territorial capitol in Santa Fe to Washington, DC.²⁶ Consequently, the Pueblo Indians came to be treated more and more like other Indian tribes.²⁷ In *United States v. Sandoval*, the Supreme Court upheld the extension of federal control over the Pueblos.²⁸

In 1924, Congress passed the "Pueblo Lands Act"²⁹ to resolve conflicts over land ownership between the Pueblo Indians and non-Indians. The Act established a "Pueblo Lands Board" consisting of three officials, including the Secretary of the Interior. The Board's purpose was to determine "the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise."³⁰ The Act also stated that the Secretary of the Interior must validate all Pueblo transfers of interest in land.³¹

The 1924 Pueblo Lands Act evolved the relationship between the Pueblos and the federal government. The United States government acknowledged a trust relationship between it and the Pueblos.³² The Pueblos are now treated like other American Indian tribes and their lands cannot be alienated without federal consent.³³ Congress has plenary power to declare the rights to the use of water appurtenant to Indian lands.

In the Act of 1928, Congress protected the Six Middle Rio Grande Pueblo Tribes' "prior and paramount" right to the water necessary to irrigate their 8,346 acres of historically irrigated land (the Secretary of the Interior later increased this to 8,847 acres) within the boundaries of the MRGCD. Also in that Act, Congress recognized roughly 15,000 acres (later reduced to 11,074.40) of Pueblo land that could be "newly reclaimed" by the Conservancy Project. However, even today the full extent of the Six Pueblos' water rights has yet to be determined. As discussed later in the

26. *Id.* at 389.

27. *Id.*

28. 231 U.S. 28 (1913).

29. Pueblo Lands Act of June 7, 1924, ch. 331, 43 Stat. 636.

30. *Id.* at 636.

31. *Id.* at 641-42 ("No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.").

32. *Sandoval*, 231 U.S. at 47.

33. *United States v. Candelaria*, 271 U.S. 432 (1926).

article, their rights, including the right to store at El Vado Reservoir, are in limbo until they are adjudicated by a court of law.

II. THE ACT OF 1928

The Act of 1928³⁴ appropriated funds to pay for the Six Pueblos' portion of costs associated with the Conservancy Project, which included construction of El Vado Dam and Reservoir. However, that legislation does not explicitly state whether under federal law the Six Pueblos have authority to store their water at El Vado reservoir. Therefore, statutory interpretation is necessary to determine whether this authority is implicit in the Act.

The Supreme Court has held that, when interpreting statutes, the function of the courts is "to construe the language so as to give effect to the intent of Congress."³⁵ Of course, the most persuasive evidence of congressional intent is the language of the statute, which is why statutory interpretation begins there.³⁶ Canons of statutory construction guide courts with rules containing certain presumptions, which can tip the balance in favor of one side over another. There exists a federal Indian law canon of construction that holds that courts should construe ambiguities liberally in favor of Indians.³⁷ If the language is ambiguous or would produce an "absurd" result, interpreters must look beyond the words to the purpose of the act.³⁸ The second most reliable evidence of congressional intent is the legislative history.³⁹

This article explores the authorization of the Act of 1928 by first looking to the Act of 1927, which provided authority to appropriate funds to pay for reconnaissance work on the Conservancy Project, and the legislative history behind the Act. Next the article examines the language of the 1928 Act followed by a detailed account of the legislative history supporting it. The following section of the article reviews a series of agreements entered into by the DOI. All of these sources support a finding

34. Act of Mar. 13, 1928, ch. 291, 45 Stat. 312 [hereinafter Act of 1928].

35. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940).

36. *Id.* at 543.

37. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (Statutes relating to Indians are to be construed liberally in favor of the Indians, with doubtful or ambiguous expressions interpreted to their benefit.); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 222 n.40 (Rennard Strickland & Charles F. Wilkinson eds., Michie 1982).

38. *Am. Trucking Ass'ns*, 310 U.S. at 543. *See also* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (Statutory provisions that are not clear on their face may be clear from the surrounding circumstances and legislative intent.).

39. *See* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

that the Act of 1928 contained implicit federal authorization for storage of the Six Pueblos' water at El Vado Reservoir.

A. The Act of 1927

In 1927, the MRGCD successfully lobbied Congress to authorize a \$50,000 appropriation to commence reconnaissance work in the Middle Rio Grande Valley. The Act provided that the Secretary of the Interior (Secretary) work in conjunction with the MRGCD to determine whether certain lands of the Six Pueblos were susceptible to "reclamation, drainage, and irrigation."⁴⁰

The 1927 Act was the precursor to the 1928 Act and established the method by which Congress would be informed about the details of the Conservancy Project and thereby decide what to provide for in the 1928 Act. Accordingly, the 1927 Act delegated to the DOI the jobs of assisting the MRGCD in the preparation of the Official Plan for the Conservancy Project, reporting on the reconnaissance work, and making recommendations.

[The] Secretary, through the Commissioner of Indian Affairs, shall designate an engineer, who shall represent the department in the preparation of said plans and report thereon...[and] the Secretary of the Interior shall report to Congress the results of said reconnaissance work and his recommendations thereon.⁴¹

On January 19, 1927, prior to the enactment of the 1927 Act, representatives of the MRGCD testified before a Subcommittee of the House Committee on Appropriations on the Conservancy Project and the need for federal assistance. Pearce C. Rodey, the MRGCD's Attorney, and J.L. Burkholder, the MRGCD's Chief Engineer, appeared throughout the congressional hearings to advocate for the Conservancy Project and explain its mechanics and its benefit to the Six Pueblos. Mr. Rodey began by describing the geography in the Valley. "[T]he Indian lands are so interspersed with the white lands that it would be impossible to drain or reclaim any of this area without treating it as a unit. The Indian lands cut right across certain areas, and then come the white lands. Then come more Indian lands."⁴² He then explained that prior to constructing the Conservancy Project the MRGCD needed to receive clearance from the

40. Act of Feb. 14, 1927, Pub. L. No. 69-620, 44 Stat. 1098.

41. *Id.*

42. *Second Deficiency Appropriation Bill of 1927: Hearing on H.R. 16209 Before the Subcomm. of H. Comm. on Appropriations, 69th Con. 95 (1927)* (statement of Pearce C. Rodey, Attorney for the Middle Rio Grande Conservancy Dist.).

Conservancy Court and the Six Pueblos were integral to attaining that approval.

[W]hen we file this plan in the court, the court will want to know whether or not the United States Government is going to help us with the Indian lands. It is an engineering impossibility to undertake this without undertaking it as a unit, and the court will say to us, you have a fine plan here, but what assurance have you that the Indian lands will be taken care of.⁴³

Mr. Rodey attested to the fact that the Pueblo lands were in poor condition and were in need of reclamation by the Conservancy Project. He related stories of the current and diminished state of the Pueblos' land, which was waterlogged and alkalized.

I might say this, gentlemen, that the lands as they now stand are practically valueless. Last year at the pueblo of Isleta, they had a water shortage. There was a period of about 60 days when there was not any water going by Isleta, and they had to move their intake further up. The Indians are in the same position we are in; their lands have water lying on the surface, and the rate of evaporation is very great....As far back as 1880 we had 125,000 acres under cultivation in this valley. But through the rise in the water table the lands have become water-logged and now we are going back until our area under cultivation is probably less than 40,000 acres. The Indians at one time had almost 25,000 acres under cultivation.⁴⁴

Mr. Rodey repeatedly stated that the total amount of land benefited by the Conservancy Project was 146,000 acres, 17.9 percent of which was the Six Pueblos' (26,134 acres, which included their historically irrigated lands).

The Indian Office and the DOI supported the Conservancy Project and sent the Supervising Engineer of the Indian Irrigation Service to testify about the quantity and quality of the Six Pueblos' lands. "The total area now in the hands of the Indians is 23,002 acres, of which at the present time, because of the water-logged condition of the land, there are only under cultivation 6,293 acres."⁴⁵

As to the Indian lands, I know from my knowledge of 20 years in the valley, that they need drainage and river

43. *Id.* at 98.

44. *Id.* at 97.

45. *Id.* at 98 (statement of H.F. Robinson, Supervising Engineer of the Indian Irrigation Service).

protection. For a number of years past there has been an appropriation made each year by Congress for protection given the Indian irrigable lands in these pueblos, from encroachment by the Rio Grande.⁴⁶

An exchange between the Supervising Engineer, H.F. Robinson, and several Representatives revealed the antiquated nature of the Pueblos' irrigation system and the Pueblos' need for works to conserve water and drain the land.

MR. ROBINSON: Most of the existing ditches on the Indian pueblos are ditches built by the Indians themselves. Many of them were in operation at the time when the Spanish settlers first came in 1534.

MR. WOOD: What is the matter with the ditches they have there?

MR. ROBINSON: Nothing, beyond the fact that they are not built in the most scientific manner. The important thing is not to build new ditches but to conserve water and drain the land.

MR. MORROW: In answer to your question, the land has been irrigated for the period he has spoken of and has become water-logged because of the water table coming up, and it is practically useless now without drainage.⁴⁷

The hearing included only brief discussion of the method for determining the proportional costs of the Conservancy Project charged to the Six Pueblos. However, that issue emerged as a paramount controversy in the hearings before the 1928 Act and is imbedded in the Act itself.

B. The Act of 1928

The Act of 1928 is a multifaceted piece of legislation that protected Pueblo water rights, appropriated funds to pay for the Six Pueblos' share of Conservancy Project costs, authorized the Secretary to enter into an agreement with the MRGCD, and provided an arcane method for those Pueblos to reimburse the federal government. Through the Act, the seventieth Congress appropriated enough funding to pay for the Pueblos' entire share of Conservancy Project costs, including payment for works benefiting "prior and paramount" lands. What the document does not provide for is also notable. Nowhere are the terms "storage," "El Vado," "dam," or "reservoir" used. Rather, "storage" is embodied in the terms

46. *Id.* at 101.

47. *Id.* at 103 (exchange between Representative William R. Wood and H.F. Robinson).

used to describe the general purpose of the Act – to provide “conservation, irrigation, drainage, and flood control.”⁴⁸

One of the most significant aspects of the Act is Congress’s protection of the Six Pueblos’ “prior and paramount” right⁴⁹ to the water needed to irrigate approximately 8,346 acres of historically irrigated lands existing within the boundaries of the proposed project.

[A]ll present water rights now appurtenant to the approximately eight thousand three hundred and forty-six acres of irrigated Pueblo lands owned individually or as pueblos under the proposed plans of the district, and all water for domestic purposes of the Indians and for their stock shall be *prior and paramount* to any rights of the district or of any property holder therein, which priority so defined shall be recognized and protected in the agreement between the Secretary and the Middle Rio Grande Conservancy District....⁵⁰

The Act also recognized water rights for lands “newly reclaimed” by the Conservancy Project. “[N]ewly reclaimed lands shall be recognized as equal to those of like district lands and be protected from discrimination in the division and use of water....”⁵¹ Importantly, the Act protected the Six Pueblos’ “prior and paramount” and “newly reclaimed” lands from forfeiture or abandonment under state law: “[S]uch water rights, old as well as new, shall not be subject to loss by nonuse or abandonment thereof so long as title to said lands shall remain in the Indians individually or a pueblo or in the United States....”⁵² In sum, under this Act the Six Pueblos had water rights appurtenant to over 23,000 acres of land, none of which could be forfeited or abandoned under New Mexico law. The water rights for 8,346 acres were given first priority on the system, and the remaining land (approximately 15,000 acres) would be treated equally with other District lands “newly reclaimed” by the Conservancy Project.

The provisions of the Act that dealt with assessing and paying for the Six Pueblos’ share of costs for the Conservancy Project show that Congress appropriated enough funds to pay a charge proportional to the water rights allotted for the Six Pueblos’ “prior and paramount” and “newly reclaimed” lands. The first few sentences of the Act authorized the

48. Act of 1928, *supra* note 34.

49. The term “prior and paramount” is significant to New Mexico water law, as discussed in Part IV, which holds that in times of water shortage the oldest or most senior users get their water supply first.

50. Act of 1928, *supra* note 34 (emphasis added).

51. *Id.* (emphasis added).

52. *Id.*

Secretary to enter into an agreement with the MRGCD, "providing for conservation, irrigation, drainage, and flood control for the Pueblo Indian lands situated within the exterior boundaries of the said Middle Rio Grande Conservancy District, as provided for by plans prepared for this purpose in pursuance to an Act of February 14, 1927."⁵³ Congress stated that the Secretary would offer payment covering the Six Pueblos' share of costs for the construction of Conservancy Project works limited to a total maximum amount of \$1,593,311. The Act goes on to provide criteria by which the Secretary shall determine the appropriate share to be paid – Pueblo lands "materially benefited" by the Conservancy Project. "[S]uch acreage shall include only lands feasibly susceptible of economic irrigation and cultivation, and *materially benefited* by this work, and in no event shall the average per acre cost for the area of Indian lands benefited exceed \$67.50."⁵⁴ Dividing the maximum appropriation, \$1,593,311, by the maximum average per acre cost, \$67.50, shows that Congress authorized enough funding to pay a share of Conservancy Project costs for all 23,605 acres of Pueblo land. It follows that if Congress provided just enough funding for the land intended to "materially benefit" from the Conservancy Project, then Congress intended for the Conservancy Project to benefit both "prior and paramount" and "newly reclaimed" lands.

Although Congress authorized funding for all of the Pueblo lands, it placed certain limitations on future expenses and reimbursement. The Act states that Congress did not authorize payment for future operation and maintenance or betterment work (O&M) for "prior and paramount" land: "[The] irrigated area of approximately 8,346 acres shall not be subject by the district or otherwise to any pro rata share of the cost of future operation and maintenance or betterment work performed by the district."⁵⁵ The reimbursement provisions are the most abstruse part of the whole document and were the subject of heated debate in the Senate. These provisions reveal some of Congress's ambivalence regarding the degree to which the two types of Pueblo lands were thought to benefit from the Conservancy Project. The provisions state that the Six Pueblos must reimburse the federal government for all of the money expended by it, but that reimbursement would only be made from proceeds of leases generated from the Six Pueblos' "newly reclaimed" land. However, the leasing proceeds generated from 4,000 acres of "newly reclaimed" land were exempt so long as those 4,000 acres were farmed by Indians. Additionally, the proceeds of leases would first be used to pay off the share of costs associated with the "prior and paramount" lands, and then liens would be

53. Act of 1928, *supra* note 34.

54. *Id.* (emphasis added)

55. *Id.*

placed upon the “newly reclaimed” lands for the entire sum expended and enforced if the land was transferred from the Six Pueblos or individual Indian ownership.⁵⁶

The Act explicitly authorized funding to pay for the Pueblos’ entire share of Project costs. However, whether Congress authorized storage at El Vado for the Pueblos is not explicit in the Act and examination of the legislative history is necessary to determine Congress’s intent.

C. The Legislative History

The legislative history preceding the Act of 1928 shows that Congress implicitly authorized the storage of Pueblo water at El Vado. It shows that all of the Six Pueblos’ lands within the MRGCD suffered from an unreliable water supply, the threat of flooding, a rising water table, and antiquated irrigation works. Accordingly, Congress intended all of those lands to benefit from the storage, drainage, and irrigation works promised by the Conservancy Project.

The historical record contains transcripts from hearings before congressional committees and debates on the floor of both the House and the Senate. Additionally, these records contain various letters, memos, and reports that members and witnesses entered into the official record. The documents track the evolution of the Conservancy Bill (S-700 in the Senate and HR-70 in the House), which became the Act of 1928, and provide a context from which to understand the provisions of the Act and agreements entered into subsequent to the Act. Particularly, the record explains a deduction, contained in the 1928 Agreement, for El Vado construction costs proportionate to the percentage of “prior and paramount” lands benefited by the Conservancy Project. The record shows that the deduction was in alignment with earlier versions of the bill that provided the Six Pueblos with a complete gratuity for the entire cost of the Project. Furthermore, the deduction is explained in the legislative history primarily as recognition of the Pueblos’ first priority to the natural flow of the river, which would guarantee their full supply without the need for a regulating reservoir.

1. Hearings

a. *The House of Representatives: Subcommittee of the House Committee of Appropriations*

On December 17, 1927, a hearing before a Subcommittee of the House Committee of Appropriations probed the reasoning behind providing gratuities to the “prior and paramount” lands and revealed that

56. *Id.*

the priority status of those lands as well as concern for the Six Pueblos' ability to pay for the Conservancy Project were primary considerations. Participants at the hearing discussed an early version of the bill that both relieved the federal government from having to pay for certain costs associated with "prior and paramount" lands and relieved the Six Pueblos from having to reimburse the U.S. Treasury for the costs that were charged.

*Provided further, That the irrigated area approximating 8,346 acres of Indian lands shall not be subject to a share of the cost for storage chargeable against all other lands benefited by the district, and that the said 8,346 acres more or less of Indian lands shall not be subject to a pro rata share of future operation and maintenance or betterment work....*⁵⁷

Representative John Morrow, from New Mexico, introduced the bill in the House and provided some opening comments at the hearing expressing the Pueblos' historic irrigation, the increasingly waterlogged state of their land, and the benefits of the Conservancy Project to the Six Pueblos.

As this committee understands, or some of you understand, these Indian lands have been irrigated in various ways, going back for a period, I imagine, of 400 years, and they have become waterlogged. I think there were some 8,000 acres of this land that originally was irrigated....Of course, at this time that land is almost useless to the Indians without drainage and without a system of irrigation, and in connection with the district it should be included, on a basis economical for the Government, economical for the Indians, and to provide a real means of civilization for those Indians.⁵⁸

Mr. Rodey and Mr. Burkholder were present on behalf of the MRGCD to support and explain how the bill benefited the Six Pueblos. Mr. Rodey asserted that all of the Pueblo lands would receive significant benefit from the Conservancy Project, including reservoir storage and drainage, as measured by the increase in the value of all their lands.

[The] Indian lands now have a value estimated at \$1,025,000, which includes both their cultivated area and the swampy and wooded area. It is believed that with those lands properly drained, provided with adequate *storage facilities*, and an adequate diversion system for irrigation needs, the total value

57. *Rio Grande Conservancy District: Hearing on H.R. 70 Before the H. Subcomm. of the H. Comm. on Appropriations on H.R. 70, 70th Cong. 357 (1927)*. Although this proviso was later edited out, it emerged again in the 1928 Agreement.

58. *Id.* at 358 (statement of Hon. John Morrow, Rep. from N.M.).

of their lands will be an average of \$200 an acre, or \$4,721,400.⁵⁹

A thorough discussion comparing the Conservancy Project benefits to Indians and non-Indians ensued. Mr. Rodey broke down the deductions and credits that the MRGCD was going to give for the Pueblos' "prior and paramount" lands. He explained that construction costs for storage at El Vado were deducted in recognition of the priority status of the "prior and paramount" lands.

[I]t being recognized that the existing Indian area which is now irrigated has priority of water rights, we do not expect to charge that land for any storage of water, because they have a prior right. They have been cultivating there since the time the Spaniards came to New Mexico, as to that recognized area. That deduction from the reservoir cost amounts to \$103,300.⁶⁰

Representative Cramton then questioned Mr. Burkholder about whether the "newly reclaimed" land would benefit from storage. Mr. Burkholder responded that those lands needed the benefit of supplemental storage because the Six Pueblos were already "very largely" using the natural flow of the Rio Grande for their "prior and paramount" lands.

MR. CRAMPTON: It is provided in the bill that the irrigated area, approximating 8,346 acres of Indian land, shall not be subject to share the cost of the storage chargeable against all the other land, and that they shall not be subject to a pro rata share of future operation and maintenance or betterment work. Now, as to the other 15,000 acres not now under irrigation, of Indian lands, in what status does that proviso leave them?

MR. BURKHOLDER: It leaves them subject to that cost.

MR. CRAMPTON: To share in the cost of the storage?

MR. BURKHOLDER: Yes, sir.

MR. CRAMPTON: Is it expected that those lands will be benefited by that storage?

MR. BURKHOLDER: Yes, sir.

MR. CRAMPTON: And that storage is necessary for these additional lands. In other words, the Indians are very largely using the water now available for their lands?

MR. BURKHOLDER: Yes, sir.⁶¹

59. *Id.* at 359 (statement of Pearce G. Rodey, Gen'l Counsel, Middle Rio Grande Conservancy Dist.) (emphasis added).

60. *Id.* at 362.

61. *Id.* at 375.

The hearing next moved to a discussion of why the "prior and paramount" lands would not be charged O&M costs. Mr. Burkholder explained that the Pueblos would operate and maintain the irrigation ditches that only served Pueblo lands, but the MRGCD would operate and maintain the main canal that served all of the Conservancy Project lands. Further, only the "newly reclaimed" lands would be charged for O&M work performed by the MRGCD. Representative Cramton suggested that the MRGCD charge the Pueblos for betterment work costs that did not benefit the whole district. Mr. Burkholder replied that the Pueblos currently did not pay for the irrigation costs for their historically irrigated lands and could not afford such costs. However, reasoned Burkholder, it would be fair to charge the Pueblos for costs associated with their "newly reclaimed" lands, because the Pueblos could pay that fee from the proceeds generated from leasing those lands.

MR. BURKHOLDER: As to the question you asked directly about our leaving out the 8,000 acres or exempting that land from betterment work charges, the reason, I think, is that the Indians now get their water through those primitive systems of irrigation, without any direct payments to take care of.

MR. TAYLOR: They are not using much water or they are not irrigating much land?

MR. BURKHOLDER: They are not, but it sustains the lives of the Indians who exist there. If they are compelled to pay the actual cost there for the irrigation of their small acreage, on which they raise their beans, we do not believe they could do it. In other words, it would drive them out, perhaps. The reason there is a distinction there is that the acreage they have now, or the 8,000 acres, more or less, does sustain the Indians in the valley. It is their bread and butter, and if that is to go to him without any maintenance or betterment charges we know that he can sustain life and continue to exist. Then if we charge them for the additional area which they might lease or farm in part by themselves that seems to us to be absolutely fair.⁶²

This hearing shows that the attending Representatives understood several things: (1) the Six Pueblos had been irrigating the "prior and paramount" lands with the natural flow of the Rio Grande; (2) the rising water table was detrimental to those lands; (3) the ancient irrigation works were in need of repair; (4) because the "prior and paramount" lands were "largely using" the available water, the "newly reclaimed" lands needed to benefit from storage supply; (5) the MRGCD intended the "prior and

62. *Id.* at 376.

paramount" lands to also benefit from storage regardless of their first priority status; (6) those lands were not charged construction costs in recognition of their priority status; and (7) nor were they charged for O&M work because (a) they had existing systems that they did not have to pay for and (b) such payment could force the Pueblo members off of their land. This information was also conveyed during the Senate hearings.

b. The Senate Committee on Indian Affairs

i. January 20, 1928

The Senate Committee on Indian Affairs held two hearings on the Conservancy bill. At the first hearing the bill contained a full gratuity for the Pueblos' "prior and paramount" lands, but by the second hearing that gratuity had been stripped.

During the first hearing, on January 20, 1928, the Committee discussed the bill and the gratuities to the "prior and paramount" lands. Senator Sam G. Bratton, from New Mexico, who introduced the bill to the Senate, began the hearing by introducing several proposed amendments. The first witness, Edgar B. Meritt, Assistant Commissioner of Indian Affairs, stated that the Commissioner approved the MRGCD's plan and entered into the record a letter from the Commissioner on Indian Affairs to the Secretary of the Interior. The letter discussed the variable flow of the Rio Grande, the Six Pueblos' need for storage and flood control, the amount of Pueblo land intended to benefit, the deduction of construction costs, and the benefit the Conservancy Project provided to all the Pueblo lands.

The flow of the Rio Grande River at times is far below the irrigation requirements which necessitates provision for a regulating reservoir. For this purpose a reservoir of the capacity of 190,000 acre-feet is considered sufficient, and a reservoir of this capacity is included in the plan, being situated on the upper Chama River near El Vado....

The total area benefited under the project approximates 132,000 acres, of which approximately 23,000 acres are Pueblo Indian lands. Of the Pueblo Indian lands approximately 8,346 acres are under cultivation. It is contemplated that the expenditures covering the share of the cost for the benefits that will accrue to these Indian lands, after certain deductions, shall be borne by the Federal Government.... These deductions involve...\$103,300 on behalf of the El Vado Reservoir....

The work is necessary, and, owing to the fact that the Indian lands are interspersed with the lands of the district, and therefore a benefit to the district lands can not be accomplished without corresponding benefit to the Indian lands, and vice versa, it is felt that the report should be

approved, since the Indian lands will be materially benefited by the work to be accomplished by the middle Rio Grande conservancy district; and it is accordingly recommended that you approve [the] same.⁶³

The Assistant Commissioner then entered into the record a letter from the Secretary of the Interior to the Chairman of the Senate Committee. It addressed the Six Pueblos' need for a reliable water supply and the complete gratuity that they would receive under the Act.

At the present time there are approximately 8,346 acres of Pueblo Indian lands under cultivation. A water supply, though somewhat inadequate, is available for this acreage. The plans of the conservancy district when carried out will assure an adequate water supply for this acreage in addition to the balance of the Indian acreage involved which has not heretofore been irrigated. Flood protection will be provided for the entire acreage, and a much needed drainage system will be constructed. *The bill as now drafted provides that the acreage under cultivation will not be subject to any lien for the benefits that will be conferred upon it, and further, that the cost of the work apportioned to this acreage will not be subject to reimbursement to the United States.*⁶⁴

The letter went on to state that the Six Pueblos would only have to reimburse the federal government for the "newly reclaimed" lands.⁶⁵ The Assistant Commissioner next introduced a memo he wrote to clear up any questions concerning the Conservancy Project. The memo stated that the bill gave the Pueblos a total gratuity for all previously irrigated lands.⁶⁶ Later in the hearing, the Assistant Commissioner again made clear the Department of the Interior's intent to provide the Pueblos with a gratuity in recognition of their priority status and because of the heavy burden the Conservancy Project would place upon them.

63. *The Middle Rio Grande Conservancy District: Hearing on S. 700 Before the Comm. on Indian Affairs U.S. S., 70th Cong. 8-9 (1928)* (letter from Charles H. Burke, Comm'r of Indian Affairs, to Hubert Work, Sec'y of the Interior).

64. *Id.* at 10 (letter from Hubert Work, Sec'y of the Interior, to Sen. Lynn J. Frazier, Chairman of the Comm. on Indian Affairs) (emphasis added).

65. *Id.*

66. *Id.* at 13 (memo from E.B. Meritt, Ass't Comm'r of Indian Affairs). ("The exemption for irrigated lands now cultivated by the Indians is found on page 4 of House bill 70, and reads as follows: 'That the total share for the cost of the work for which payment is to be made to the middle Rio Grande conservancy district, as herein provided, *except that part of such Indian costs properly chargeable to improvements for the area now irrigated shall be reimbursed to the United States.*'").

We are very strongly of the opinion that this ["prior and paramount"] land should be free from an irrigation charge. Under the terms of the bill—I want to speak very frankly to the committee—this 8,000 acres is not now charged with the cost of this project....

The money comes out of the Treasury of the United States, and it will amount to approximately a half million dollars. I think we ought to make that perfectly clear to the committee, so that there can be no question about it hereafter. We believe that should be done. We recognize, at the same time, that it would be a generous act on the part of Congress on behalf of these Indians[.] *Inasmuch as these Indians have been cultivating these lands for hundreds of years and are now making a rather indifferent living on these lands, and will continue to make that living on these lands, we feel that there should not be an additional burden placed on those Indians.*

We realize that this project will very greatly improve those lands, will put them in first-class condition, and will further prevent the lands from being flooded, and they will get *material benefit* from this legislation if it is enacted by Congress in its present form, but we do ask that this land be free from all irrigation construction charge.⁶⁷

Mr. Rodey also spoke at this Hearing and reiterated his earlier comment to the House that the "prior and paramount" lands were not charged for storage because their upstream location and priority status would insure their full supply of water.

Then it was felt that as to the present Indian lands, being at the head of the stream, or farther up the river, and having been in cultivation since the Spaniards first came to New Mexico in 1540, they should not pay anything for storage water, so that their proportion of what would amount to storage reservoir charges amounting to \$103,300, was deducted....⁶⁸

Mr. John Collier, Executive Secretary of the Indian Defense Association, presented at the hearing on behalf of the Six Pueblos. He introduced several letters from the various Pueblo tribes regarding their concern about reimbursement and their support for the version of the bill that provided a gratuity.⁶⁹ "Now I desire to speak to only one point, which

67. *Id.* at 18 (statement of Edgar B. Meritt, Ass't Comm'r of Indian Affairs) (emphasis added).

68. *Id.* at 25 (statement of Pearce G. Rodey, Gen'l Counsel, Middle Rio Grande Conservancy Dist.).

69. *Id.* at 31-33.

is to concur with the recommendations of the department that the reimbursable debt to be created shall in no event, be it large or small, be collectible out of the acreage now under cultivation."⁷⁰ This hearing shows that the deduction for construction costs for El Vado for "prior and paramount" lands contained in the 1928 Agreement was in accordance with the bill's original intent, which provided those lands with a complete gratuity as well. This Senate hearing also recognized the priority status of the land, the need for the Conservancy Project, and the heavy burden it would place on the Six Pueblos.

ii. February 17, 1928

By the time the Senate Committee on Indian Affairs held another hearing on the bill on February 17, 1928, the House had stripped the bill of the gratuity to the "prior and paramount" lands. This marked a significant shift in the tone of the hearing and the debate on the floor of the House and Senate. The ensuing discussion questioned whether the "prior and paramount" lands would receive sufficient benefit from the Conservancy Project to justify the reimbursable costs. The Senators expressed some dismay about the amendment but Senator Bratton summed up their resignation when he said, "In my judgment the situation is such that we are going to have to pass a bill in substantially this form or no measure at all will be passed."⁷¹ The Assistant Commissioner of Indian Affairs agreed with Senator Bratton and stated that, while the House Indian Committee was in support of the legislation as approved by the Senate, opposition by those in control of the legislature meant that "we can not possibly get [the Senate's version of the] legislation though the House of Representatives at this session of Congress."⁷²

However, Mr. John Collier, who represented the Six Pueblos, put up a fight. He passionately argued that the "prior and paramount" lands were already productive and should not be charged for the Conservancy Project. "The fact which can not be escaped is that the Indians are to-day making a complete living off these 8,346 acres. Under such conditions, how can anyone claim that these acres can be newly benefited until they are four or five times as productive as they are already?"⁷³ "In any event, the existing 8,364 acres are under ditch, under cultivation, and they are not

70. *Id.* at 34 (statement of John Collier, Executive Sec'y, Indian Def. Ass'n).

71. *Id.* at 42 (statement of Sen. Sam G. Bratton from New Mexico).

72. *Id.* at 58 (statement of Edgar B. Meritt, Ass't Comm'r of Indian Affairs).

73. *The Middle Rio Grande Conservancy District: Hearings on S. 700 Before the Comm. on Indian Affairs*, Pt. 2, 70th Cong. 50 (Feb. 17, 1928) (statement of John Collier).

waterlogged, otherwise they could not be farmed in this highly productive way in which they are being farmed."⁷⁴

The Chairman of the Committee introduced several letters sent on behalf of the Six Pueblos expressing concern with the "reimbursement," calling it "disastrous" and "crushing."⁷⁵ The Chairman then introduced a dozen letters of support for the measure, including one by the State Engineer of New Mexico, recommending passage of the Senate bill "as it would conserve and preserve water rights of Indians and other water users along the Rio Grande in New Mexico."⁷⁶

The hearing ended with a 7-to-4 vote concurring with the House amendment, with two members not voting. Despite the removal of the "gratuity," the majority of committee members believed that the Six Pueblos needed the Conservancy Project and that its benefit to their "prior and paramount" lands was sufficient enough to justify the costs. The debate intensified on the floor of the Senate.

2. Congressional Debate

a. Debate in the Senate

Shortly after the hearings and over several days, the Senate considered the revised bill, hotly debating the extent to which "prior and paramount" lands would benefit from the Conservancy Project and concluding that the "material benefit" to the lands would outweigh the burden. To bolster their arguments, Senators introduced additional documents into the record and referred repeatedly to documents and statements made during the hearings.

Senator Bratton began the discussion by providing an overview of the Conservancy Project, the scope of the proposed legislation, and the benefit to "prior and paramount" lands. He described the 15,261 acres of land to be "newly reclaimed" by the Conservancy Project and the 8,346 acres of "prior and paramount" lands. He explained that the 8,346 acres were presently cultivated "in an antiquated, obsolete, indifferent, and unsatisfactory manner," and "at one time these Indians cultivated about 25,000 acres of land in this area."⁷⁷

Senator Bratton then received and responded to a flurry of questions, probing the proportional costs, reimbursement and liens. He continually argued that the "prior and paramount" lands would receive sufficient benefit, because "instead of their present 8,000 acres being

74. *Id.* at 53.

75. *Id.* at 5.

76. *Id.* at 61 (statement by Herbert Yeo, State Engineer).

77. CONG. REC. 3745 (daily ed. Feb. 29, 1928) (Senate Debate on S-700).

irrigated in an indifferent, unsatisfactory, backward way, it will be reclaimed and will have a modern system of reclamation, which ought to make it produce fourfold over its present production."⁷⁸ At one point he even asserted that all the Pueblo lands would be "newly reclaimed" by the Conservancy Project.⁷⁹

Despite his urgings, other Senators aggressively questioned the degree to which the "prior and paramount" lands would truly benefit. One of the most outspoken nonbelievers, Senator Robert La Follette, a member of the Senate Committee on Indian Affairs, pointed out that the land was already supporting the Six Pueblos. He referred to fiery statements made during the hearings by Mr. Collier. Senator Bratton countered, stating, "Yes, [the Six Pueblos] are living — such living as it is — from that source. But Mr. Collier described it as an intolerable condition, which must be remedied, or the Indians in the near future will be required to sever their tribal relations, and go out into the world."⁸⁰

Intending to "convince" the Senate that the bill was "liberal and generous" ⁸¹ to the Six Pueblos even without the gratuity, Senator Bratton introduced a report by the MRGCD's Board of Consulting Engineers that explained the reason for the deduction of El Vado construction costs. The document purported itself to be an "equitable and desirable" policy for apportioning Conservancy Project costs to the Pueblos. It is likely the source of the deduction of construction cost for El Vado.

From the Total Cost of the project there should be deducted...*a portion of the cost of irrigation storage, so as to exclude from storage charges the 9,000 acres, more or less now being irrigated.* The remainder of the cost of the project, including the cost of irrigation storage, may be distributed over all the benefited lands on an acreage basis.

The construction cost to the Indian lands would thus be in accordance with the ratio which the benefited area of Indian lands bears to the benefited area of the entire project, with the deduction noted above.⁸²

Bratton later praised the qualifications of the Board, referring to it as a "staff of outstanding consulting engineers of the country, standing at the head of

78. *Id.* at 3746 (statement of Senator Bratton from New Mexico).

79. *Id.* at 3746 ("The total area of Indian lands to be reclaimed would be 23,607.").

80. *Id.* at 3747.

81. *Id.* at 3748.

82. *Id.* at 3749 (statement of Senator Bratton from New Mexico) (emphasis added). Note that this language is used nearly verbatim in the subsequent 1928 Agreement discussed below.

their professions” and stated that the deduction was made “conforming to their recommendations.”⁸³

Senator Bratton went on to explain that, although the \$500,000 gratuity was removed, the “prior and paramount” lands still would not be charged for the Conservancy Project, but that the charge would be assessed against the “newly reclaimed” lands. Senator King from Utah did the calculation and argued that shifting the charge to the “newly reclaimed” lands resulted in too heavy a burden for any farmer.

[W]hile it is perhaps true that the 8,346 acres of land which have been cultivated for hundreds of years by the Indians, and from which they now make their living, may be absolved from a part of the expense incident to this gigantic project, costing more than \$11,000,000, nevertheless the 15,000 acres of so-called raw land, a part of which at least heretofore has been cultivated, will have saddled upon it a burden of more than \$109 per acre. It is obvious, it seems to me that no Indian — and I doubt whether any white man — could go upon that raw land and successfully reclaim it, maintaining himself in the meantime, at a cost of \$109.50 per acre....⁸⁴

Similarly, Senator Blaine from Wisconsin questioned the quantifiable benefit to “prior and paramount” lands. He stated that there was no proof that the project would benefit the 8,346 acres at all. He also stated that no facts justified “the levying of one single cent against the 8,346 acres and compelling the 15,000 acres to reimburse for this mythical benefit that is alleged to flow to the 8,346 acres.”⁸⁵ The Senators continued their debate until the close of the session, agreeing to resume discussions the following day.

The next day’s debate continued along the same lines with Senator La Follette tenaciously arguing for providing a “gratuity” to the “prior and paramount” lands. He asserted that those lands did not receive significant benefit from the Conservancy Project as compared with the weight of the encumbrance. He explained that the originally proposed gratuity recognized that the 8,346 acres “would not receive sufficient benefits under this proposal to justify assessment against them of the large amount of \$67.50 an acre.”⁸⁶ He also argued that the Indians only consented to the

83. *Id.* at 3751.

84. *Id.* at 3749.

85. *Id.* at 3750 (statement of Senator Blaine from Wisconsin).

86. CONG. REC. 3839 (daily ed. Mar. 1, 1928) (Senate Debate on S-700) (statement of Senator La Follette from Wisconsin).

passage of S-700 upon the consideration of the gratuity feature for the 8,346 acres of land.⁸⁷

To bolster his position, La Follette read from several resolutions adopted by the Six Pueblos that showed unanimous Pueblo opposition to the "reimbursement." "[W]e are opposed to any reimbursable debt against the Indians, even as to newly reclaimed lands, considering this a burden too heavy to bear."⁸⁸

We insist that our existing improved acreage...or its equivalent in lands newly reclaimed, shall remain free from debt of whatever character and from all charges for water. We are opposed to any plan under which the amount of free water for irrigation, which the Pueblos now use or which may be recovered under the Pueblos lands act, or through the independent suits authorized in that act, shall be diminished. If any reimbursable debt be placed on Pueblo lands of whatever character we insist that such debt be payable out of a share of the crop yield exclusively from the newly developed lands.⁸⁹

La Follette also read a statement from the MRGCD's legal counsel, Mr. Rodey, stating that "prior and paramount" lands received a "gratuity" under the MRGCD's proposed plan. "Of course, the Indians have really a gratuity under this bill for the present cultivated acreage."⁹⁰

Senator King argued that the Six Pueblos had a prior right to the existing flow of the river and did not need the Conservancy Project.

The fact of the matter is that those Indians do not require additional water. They have a priority. They were the first settlers. Their rights were antecedent to all other rights. They have no desire for additional water supplies. There is more water than the original settlers require. So that no claim can be made, with any validity, that this measure would increase the water supply for that 8,346 acres, because, as stated, that land requires no additional water rights.⁹¹

Senator Lynn Frazier, from North Dakota and Chairman of the Senate Committee on Indian Affairs, argued that any diminished capacity of "prior and paramount" lands was not the Pueblos' fault but was instead due to

87. *Id.* at 3840.

88. *Id.* at 3838 (statement of Senator La Follette from Wisconsin reading from a resolution adopted on December 1, 1927 by the Six Pueblos).

89. *Id.* at 3837 (Senator La Follette reading from a September 17, 1928 resolution adopted by the council representing the Six Pueblos).

90. *Id.* at 3838 (statement of Senator La Follette from Wisconsin).

91. *Id.* at 3847 (statement of Senator King from Utah).

"civilization and not to anything the Indians have done."⁹² Meanwhile, Senator Bratton continued to argue that "prior and paramount" lands would receive a substantial increase in value and therefore the "reimbursement" was justified.

Instead of their being confronted in the future with the condition that their land will become water-logged and alkali, and instead of their little villages being moved, under the terms of the bill their present 8,300 acres will be reclaimed in a modern way. Instead of irrigating it in a crude fashion, they will irrigate it and cultivate it in a modern way.

The value of the land will be increased from its present value of approximately \$25 an acre to from \$150 to \$200 per acre....

Then as to the 15,000 acres, which is absolutely worthless to the Indians now, it is proposed to...make [that land] worth a great deal of money, from \$150 to \$200 per acre....⁹³

Senator Cutting, junior Senator from New Mexico, argued that the Conservancy Project benefited the Six Pueblos more than the "whites" because the Pueblos did not have to pay taxes and interest, were not required to pay within a fixed time period, and no lien was placed on the land. He argued that the "bill not only trebles or quadruples the value of the Indian lands placed under cultivation but it also trebles [the Six Pueblos'] extent."⁹⁴

At the end of the debate, the Senators voted 59 to 13 to pass the bill, with 22 Senators not voting. Over 80 percent of the voting Senators voted in favor of the idea that the "prior and paramount" lands would receive Conservancy Project benefits sufficient enough to outweigh the costs. Senator Copeland from New York distilled this intention when he stated, "[T]he only possible justification for putting such an enormous debt upon the raw lands of the Indians would be a material benefit to the cultivated land."⁹⁵

During the debate, Senator Bratton provided the most concise statement by a congressperson that "prior and paramount" lands were to benefit from storage at El Vado. He stated that all Pueblo lands, not just those "newly reclaimed," were intended to benefit from the entire project, which included much needed drainage and irrigation works and a "modern system of storage" at El Vado.

92. *Id.* (statement of Senator Frazier from North Dakota).

93. *Id.* at 3840-41 (statement of Senator Bratton from New Mexico).

94. *Id.* at 3851 (statement of Senator Cutting from New Mexico).

95. *Id.* at 3840 (statement of Senator Copeland from New York).

As I understand it, the entire district, including the Indian lands, will have a *modern system of storage*, river control, silt control, and will relieve the land from its alkali and water-logged condition. It has been testified without dispute that the cultivatable area in that district is gradually decreasing, because the water level is constantly rising....

It is intended, Mr. President, to change that condition by relieving the lands from being water-logged and alkali and to increase its productivity with a modern, up-to-date system of irrigation, *storage*, river control, flood control, silt control, canals, and the accoutrements that go with a modern system.⁹⁶

No one present argued otherwise.

b. Debate in the House of Representatives

On March 5, 1928, members of the House of Representatives engaged in less lively debate on the subject. Representative Louis Crampton, from Michigan and Chairman of the House Committee on Appropriations, who was responsible for stripping the "gratuity," presented the idea that the "prior and paramount" lands were to "materially benefit" the Six Pueblos even though "no contribution is sought from the Indians, nothing is taken from the greatly increased production from the 8,346 acres, no lien is placed on the 8,346 acres."⁹⁷ No one in the House disagreed and the measure passed.

In conclusion, the statements and documents in the hearings and the debates coupled with the voting record show that the seventieth Congress understood that the Pueblo lands within the boundaries of the MRGCD were suffering from a rising water table, antiquated irrigation works, and an unreliable flow, and, therefore, Congress intended that the Conservancy Project afford relief to those lands through drainage, improved irrigation works, and a modern system of storage. Therefore, through the Act of 1928, Congress implicitly authorized Pueblo storage at El Vado.

III. THE DEPARTMENT OF INTERIOR AGREEMENTS WITH THE MRGCD

Since the signing of the Act of 1928, The U.S. Department of the Interior has entered into a series of agreements with the MRGCD. Nearly

96. CONG. REC. 3747 (daily ed. Feb. 29, 1928) (Senate debate on S-700) (remarks of Sen. Bratton from New Mexico) (emphasis added).

97. CONG. REC. 4097 (daily ed. Mar. 3, 1928) (House debate)

all of the agreements explicitly provide for Pueblo storage rights at El Vado Reservoir.

A. The 1928 Agreement

On December 14, 1928, the United States, represented by the Secretary of the Interior and on behalf of the Six Pueblos, entered into an agreement with the MRGCD to "carry out the purpose"⁹⁸ of the March 13th Act of 1928. The Agreement is true to the language of the Act, except for its deduction of El Vado construction costs proportional to the amount of "prior and paramount" lands.

In the first provision of the Agreement, the MRGCD agreed to construct the works for the Conservancy Project, "which shall afford adequate modern structures and works for accomplishment of the material benefits to the Pueblo Indian lands as contemplated by the said Act of March 13, 1928."⁹⁹ In Paragraph 11, the MRGCD agreed to provide Conservancy Project benefits, including storage, to the Six Pueblos' "prior and paramount" and "newly reclaimed" lands.

The District agrees that the work to be performed by it for the Indian lands is that of providing by construction of necessary works *consisting of impounding reservoir or reservoirs, diversion dams, drainage systems, levees and dikes, irrigation canals and structures, connecting canals and laterals, river protection work, regulating stream channels by changing, widening or deepening same, and flood-control works, that will result in material, permanent and beneficial improvements and actually divert and carry the water to the acreage of Indian lands of the several pueblos approximating 23,607 acres and especially so that the new system will carry and deliver to all areas of Indian lands now irrigated an adequate water supply without cost to the Indians other than as herein provided.*¹⁰⁰

The Agreement detailed the method of calculating construction cost allocations, including the deduction of costs for El Vado. The cost of the Pueblo portion of the Reservoir was determined by multiplying the total actual cost of the Reservoir by the "acreage of irrigated Indian land" divided by the "total irrigable area to be benefited by the total works constructed by the District."¹⁰¹ This cost was calculated to be \$103,500.

98. Agreement between the United States and the Middle Rio Grande Conservancy District, Dec. 14, 1928.

99. *Id.*

100. *Id.* (emphasis added).

101. *Id.*

The 1928 Agreement reflected the intention of Congress that all Pueblo lands within the boundaries of the MRGCD receive benefit from the Project, but it deviated from the Act of 1928 with the deduction of costs for construction of El Vado. As discussed above, that deduction was included in earlier versions of the Conservancy bill, which provided a full gratuity for all costs apportioned to "prior and paramount" lands, but it was not included in the final language of the Act. The legislative history explains the deduction as recognition of the first priority status of the water appurtenant to the Pueblos' "prior and paramount" lands.

B. The O&M Agreements

Starting in 1936, the United States entered into a series of O&M Agreements whereby the Secretary of the Interior agreed to pay the MRGCD for O&M costs for "newly reclaimed" lands and exempted "prior and paramount" lands. In these agreements, the DOI explicitly recognized the Six Pueblos' right to store water at El Vado.

The Act authorizing the Secretary to enter into these O&M Agreements was signed into law on August 27, 1935 and provided a formula to pay for O&M work on "newly reclaimed" lands. It also mandated the MRGCD to recognize the Six Pueblos' 8,346 acres of "prior and paramount" lands and exempt them from O&M charges.¹⁰² The series of O&M Agreements that flowed over the years, under the authority of the 1935 Act and subsequent acts,¹⁰³ are manifestations of Congress's intent and contained all the protections for "prior and paramount" lands that Congress previously established.

For the most part, the O&M Agreements contain identical provisions; however, some features evolved with the passage of time. All agreements specified which canals and laterals the MRGCD would maintain, which works the Six Pueblos would maintain, and referred to Pueblo irrigation of "prior and paramount" lands existing from "time immemorial."

The quantity of Pueblo lands "materially benefited" by the Conservancy Project was not officially established until May 16, 1938 when the Secretary made the final determination that the Pueblo lands totaled 20,242.05 acres, comprised of 11,074.40 "newly reclaimed," 8,847 "prior and

102. Act of Aug. 27, 1935, Pub. L. No. 74-352, 49 Stat. 887.

103. Act of June 20, 1938, Pub. L. No. 75-675, § 5, 52 Stat. 778; Act of April 14, 1946, Pub. L. No. 79-359, 60 Stat. 121; Act of May 29, 1956, Pub. L. No. 84-546, 70 Stat. 22; Act of July 27, 1965, Pub. L. No. 89-94, 79 Stat. 285; Act of Feb. 15, 1978, Pub. L. No. 95-230, 92 Stat. 28.

paramount," and 320.65 purchased by the United States for the Six Pueblos pursuant to the Pueblo Lands Act of 1924.¹⁰⁴

A significant feature of the O&M Agreements was their recognition of storage benefits at El Vado for both "newly reclaimed" and "prior and paramount" lands. The Agreements specified that the District would follow the December 14, 1928 contract and provide the 20,946 acres with "proper modern, efficient structures for the irrigation thereof, *including impounding reservoir, diversion dams, drainage systems, levees and dykes, river protection and flood and other control work, irrigation canals and structures, connecting canals and lateral works, which have resulted in material, permanent and beneficial improvement to the said area of Pueblo Indian lands.*"¹⁰⁵

Beginning in 1958, after the Bureau of Reclamation assumed responsibility for O&M work, a provision was added to the agreements referring to Article XVI of the Rio Grande Compact, which provides protection to Indians against impairment of their rights. As shown, the provisions of these Agreements unequivocally stated that the Six Pueblos have a right to store water at El Vado.

In keeping with provisions of the Compact and by virtue of the generally accepted priority of Indian water rights, it is mutually recognized that the Pueblo Indians of Santo Domingo, Cochiti, San Felipe, Santa Ana, Sandia, and Isleta have enjoyed the right of storage of water in El Vado Reservoir annually for the irrigation of Indian lands, since said Reservoir was placed in operation, and the district hereby agrees to implement and protect such storage rights in the operation and maintenance of the project works.¹⁰⁶

The 2004 Agreement is very similar and specifically acknowledges that the Six Pueblos have "the legal rights (and have previously enjoyed the right) to the storage of water in El Vado Reservoir."¹⁰⁷

104. Agreement between the United States and the Middle Rio Grande Conservancy District, September 2004.

105. Agreement By and Between the United States of America, Acting by the Secretary of the Interior and the Middle Rio Grande Conservancy District, Political Subdivision of the State of New Mexico, Providing for the Payment of Operation, Maintenance and Betterment Charges on "newly reclaimed" Pueblo Indian Lands in the Rio Grande Valley, New Mexico and for Other Purposes [hereinafter O&M Agreement], September 4, 1936 and repeated April 8, 1938 para. 5 (emphasis added).

106. O&M Agreement, November 24, 1958, para. 12 and repeated in O&M Agreement, May 15, 1968, para. 11, O&M Agreement, March 17, 1980, para. 11, and O&M Agreement, June 2, 1992, para. 10.

107. Agreement between the United States and the Middle Rio Grande Conservancy District, September 2004.

Although the O&M Agreements are not significant sources of authority in and of themselves, they are in alignment with the implicit authorization in the Act of 1928 and show that the Department of the Interior understood the Pueblos to have a right to store water at El Vado.

C. The 1951 Rehabilitation and Repayment Contract

The United States and the MRGCD entered into an agreement in 1951 (Rehabilitation Contract)¹⁰⁸ providing for construction and rehabilitation of the existing Conservancy Project works and transfer of operation and maintenance work from the MRGCD to the BOR. In exchange, the District agreed to repay the costs and to transfer title of "the District works now owned by the District" to the BOR.¹⁰⁹ The title would remain with the United States "until otherwise provided by Congress."¹¹⁰ Additionally, the MRGCD agreed to transfer its water rights permits.¹¹¹

The District has made certain water filings including filings for storage and use of water in the El Vado Reservoir and it shall cause any and all such filings made in the name of the District to be assigned to the United States for beneficial use in the project and for Indian lands in the project area.¹¹²

The Rehabilitation Contract provided that the Six Pueblos' land and water rights were not subject to the law of New Mexico and it protected those rights. One of the recitals referenced that the United States fulfilled its payment commitment to the MRGCD for Conservancy Project costs, which included coverage for the "the Indians' interest in and to the El Vado Storage Reservoir."¹¹³ Paragraph 34 of the Contract begins by quoting a portion of the Flood Control Act of 1948, which validates the existing obligations of the United States to the Six Pueblos, including the obligation "to furnish water for irrigation."¹¹⁴ It also protects the Pueblos' rights

108. Contract Between the United States and the Middle Rio Grande Conservancy District for Rehabilitation and Construction of Project Works, and Repayment of Reimbursable Construction Costs Thereof, Contract No. 178r-423 and Amendments (Sept. 24, 1951) [hereinafter Rehabilitation Contract].

109. *Id.* ¶ 26 (On May 29, 1963, the MRGCD granted and conveyed to the United States the water rights as described in its Permit No. 1690.).

110. *Id.* ¶ 29.

111. The MRGCD filed for two water rights permits with the New Mexico State Engineer. Permit No. 0620 was an application for a right to use the water reclaimed by the Project and Permit No. 1690 was an application for a right to store water at El Vado. These permits are discussed *infra*.

112. Rehabilitation Contract, *supra* note 108, ¶ 28.

113. *Id.* ¶ 7.

114. Flood Control Act of 1948 §§ 205, 208, 33 U.S.C. §§ 701s-701t (2007).

"under existing contracts between the United States on behalf of said Indians and the District or under existing laws of the United States relating to the rights of said Indians" and "the priority of right and the quantity of water to which the Indians are entitled."¹¹⁵ Moreover, it states, "every paragraph and provision of this contract shall be so interpreted and construed as to save such rights unimpaired."¹¹⁶

Although the 1951 Rehabilitation Contract did not provide that the BOR would operate and maintain El Vado, an amendment to the Contract on May 22, 1956 provided that the BOR would assume that role as well.

D. The 1981 El Vado Storage Agreement

In 1981, the Secretary of the Interior and the MRGCD entered into an agreement specifically providing procedures for the storage and release of Pueblo water, including "prior and paramount," from El Vado Reservoir. The agreement provides for "a quantity of water to be stored in El Vado Reservoir in order to ensure the prior and paramount water rights of 8,847 acres of land as designated of the Six Middle Rio Grande Pueblos."¹¹⁷ The agreement created a "Designated Engineer" to act on behalf of the United States in carrying out operation and maintenance work for the Six Pueblos. It laid out the overlapping responsibilities of the BOR, the Designated Engineer, and the MRGCD for protecting "prior and paramount" water rights and described the computation of storage for those rights. The agreement authorized the Irrigation Committee of the Six Middle Rio Grande Pueblos¹¹⁸ to represent the Six Pueblos in requesting releases of water to irrigate Indian land and to notify the MRGCD and the BOR of any irrigation shortages that develop. The agreement stated that the BOR "shall annually store, or designate for storage, the quantity of water in El Vado Reservoir necessary to satisfy the prior and paramount water rights of the Six MRG Pueblos, as determined by [the BOR] and Designated Engineer."¹¹⁹ The agreement referenced Article XVI of the Rio Grande Compact and stated, "the District recognizes the priority of Indian water rights of the Six MRG Pueblos as well as the right of storage of water in El Vado Reservoir annually for the irrigation of Indian lands."¹²⁰

115. Rehabilitation Contract, *supra* note 108, ¶ 34.

116. *Id.*

117. Agreement: Procedures for the Storage and Release of Indian Water Entitlements of the Six Middle Rio Grande Pueblos, approved by the Secretary of the Interior, December 28, 1981 [hereinafter 1981 Agreement].

118. The Six Middle Rio Grande Pueblos Coalition has since replaced the Irrigation Committee.

119. 1981 Agreement, *supra* note 117, at 3.

120. *Id.* at 4.

In sum, examination of the Acts of 1927 and 1928 together with their legislative histories show that Congress understood that the Pueblo lands were suffering from a rising water table and varying river flows. Consequently, Congress intended that all Pueblo lands within the MRGCD should benefit from drainage, modern irrigation works, and storage at El Vado Reservoir and authorized such with the Act of 1928. The O&M Agreements, the Rehabilitation and Repayment Agreement, and the El Vado Storage Agreement show that the DOI acted upon that congressional authorization by explicitly recognizing the Six Pueblos' right to store water for both "newly reclaimed" and "prior and paramount" lands at El Vado.

IV. NEW MEXICO LAW

In the Desert Land Act of 1877, the federal government expressly relinquished to the states plenary control over water resources in the public domain.¹²¹ Congress reiterated the primacy of state water law in 1902 under the Reclamation Act,¹²² and in 1951, through the McCarran Amendment,¹²³ it waived federal sovereign immunity for the adjudication and administration of federal water rights. Accordingly, New Mexico exercises jurisdiction over the waters within the state's boundaries¹²⁴ and its State Engineer (OSE) has authority to regulate those waters.¹²⁵ The OSE has granted one permitted right to store at El Vado. Analysis of that water right suggests that the Six Pueblos have a right to store under state law.

A. Water Rights

Like most of the American West, New Mexico follows the doctrine of prior appropriation, which protects the oldest water users on a stream system in times of shortage or drought.¹²⁶ A water right under this regime is created by a person's actual diversion of water¹²⁷ and application of that water to "beneficial use."¹²⁸ The water right is then defined in relation to other users through a judicial process known as stream system

121. 43 U.S.C. § 321 (2007).

122. *Id.* § 374.

123. 43 U.S.C. § 666 (1988).

124. N.M. CONST. art. XVI, § 2; NMSA § 72-1-1 (1978).

125. NMSA 1978, § 72-2-9 (1997).

126. N.M. CONST. art. XVI, § 2.

127. *State v. Miranda*, 83 N.M. 443, 444, 493 P.2d 409, 410 (1972) (quoting *Harkley v. Smith*, 31 N.M. 521, 247 P. 550 (1926)).

128. NMSA 1978, 72-5-6 (2007); N.M. CONST. art. XVI, § 3 ("Beneficial use is the basis, the measure and the limit of the right to the use of water.").

adjudication.¹²⁹ In theory, the law of prior appropriation allows senior users to get their full supply by making a "priority call" and curtailing junior users.¹³⁰ Accordingly, the key elements of a water right are its quantity and priority. The latter is relative to the date the water was put to "beneficial use" or the date of the permit application to the OSE.¹³¹

Since 1907, when the Territorial Engineer established jurisdiction over the waters of New Mexico, prospective water users must apply for a permit from the OSE.¹³² Prior to authorizing a permit, the OSE must consider whether unappropriated water exists, whether the application is contrary to the conservation of water within the state or detrimental to the public welfare of the state,¹³³ and whether it will impair existing water rights.¹³⁴ The State Engineer can then issue a permit either in whole, in part, or conditioned to ensure non-impairment of water rights. Once a permit is authorized, the holder of the permitted right may begin to apply the water to "beneficial use." However, the right is incomplete until the owner provides a proof of "beneficial use" to the OSE and is issued a license.¹³⁵

Storing water has long been held a valid "beneficial use." A storage right is a right to store water for a future use, whereas a water right is an appropriative right whereby the user has a right to consumptively use a quantity of water. With limited exception, storage rights are similar to other types of water rights and are subject to priority administration.¹³⁶ Storage rights have a quantity and a priority set to the date the applicant applied for the permit. It is a fundamental rule that storage of water and delayed use cannot impair the vested rights of other users or senior appropriators.¹³⁷ Theoretically, in times of shortage the OSE would limit storage at upstream reservoirs serving junior users so that downstream senior users can get their full supply from the natural flow of the river.¹³⁸ Review of the MRGCD's

129. NMSA 1978, § 72-4-17 (2007).

130. There has never been an adjudication of water rights in the Middle Rio Grande Valley. The OSE does not administer priorities in that stream system and junior users do not get curtailed.

131. NMSA 1978, § 72-1-2 (2007).

132. NMSA 1978, § 72-5-1 (1997). This article does not discuss the OSE's regulation of ground water.

133. NMSA 1978, § 72-5-6 (2007).

134. *City of Roswell v. Berry*, 452 P.2d 179, 182 (N.M. 1969).

135. NMSA 1978, § 72-5-6 (2007).

136. WATERS AND WATER RIGHTS 13-2 (Robert E. Beck ed., 1991). In New Mexico, the storage of water during spring snowmelt and periods of heavy rainfall for later use is vital during dry seasons and drought years.

137. *Id.* at 13-4.

138. Because the OSE does not enforce priority or curtail junior users, senior users such as the Six Pueblos cannot always get their full supply from the natural flow and storage is often needed.

two permits for water rights provides some insight into the nature of the storage right at El Vado Reservoir and whether the Six Pueblos have a right to store water there under New Mexico law.

B. The MRGCD's Permits

The MRGCD obtained its right to store at El Vado Reservoir pursuant to Permit No. 1690 and obtained a water right pursuant to Permit No. 0620. Because Permit No. 1690 does not explicitly state which water rights were requested for storage authorization and the MRGCD included the Six Pueblos' water righted lands in its application for Permit No. 0620, the Pueblos arguably have a right to store under Permit No. 1690.

The MRGCD filed application No. 0620 on November 25, 1930 as a request to "change the points of diversion and place of use of certain waters."¹³⁹ The application proposed changing the points of diversion from 71 historic irrigation ditches to the MRGCD's six main canals and four diversion dams. The application asserted that the MRGCD's rights totaled 123,267 acres of land with appurtenant water rights. The MRGCD claimed to be the successor in title to "perfected" pre-District irrigated acreage totaling 80,785, which included the Six Pueblos' "prior and paramount" lands, and it claimed a right to irrigate newly reclaimed acres totaling 42,482, which included the Six Pueblos' "newly reclaimed" lands.

The MRGCD filed its other application with the OSE for the right to store water at El Vado Reservoir on May 27, 1930. The application for Permit No. 1690 requests authorization to store 198,110 acre-feet of water but does not differentiate between types of water rights or exclude any of the rights described in Permit No. 0620. The document merely states, "This reservoir is to be used as a regulating reservoir, and the water is to be used to supplement the natural flow of the Rio Grande during the irrigation season."¹⁴⁰ On August 20, 1930, the OSE approved Permit No. 1690 with one condition: "This application is approved provided it is not exercised to the detriment of any others having prior valid existing rights to the waters of said stream system."¹⁴¹ There are no other statements on Permit No. 1690 indicating or limiting which water rights are authorized for storage.

Although it is unclear from the No. 1690 application and approval which water rights were requested and authorized for storage at El Vado

139. Permit No. 0620 at 1 (on file with the OSE's District 1 Office). The application was filed pursuant to the Official Plan of the MRGCD, which gained approval from the Conservancy Court on August 15, 1928—just six months after Congress passed the Act of 1928. The State Engineer, Herbert W. Yeo, granted Permit No. 0620 on January 26, 1931.

140. Application for Permit No. 1690.

141. Approval of State Engineer Permit No. 1690.

Reservoir, the MRGCD's statement accompanying application No. 0620 suggests that it intended to obtain authorization to store any of its water rights. The first mention of El Vado is under the heading "Water Supply" and is listed as one of three sources of water supply for MRGCD lands.

The water for the irrigation of the Middle Rio Grande Conservancy District lands is to be obtained from the natural flow of the Rio Grande, from the El Vado reservoir to be constructed on the Rio Chama, a tributary of the Rio Grande, and from water developed by the drainings of district lands having a high water table.¹⁴²

The statement does not delineate which lands would be served by which supply source. This suggests that the MRGCD intended for all of its lands to benefit from any of the three sources. The District likely took that approach because the different types of lands were mixed together within the District's boundaries and differentiating between supply sources would be an extreme administrative hardship.

At another point in the document, the MRGCD addressed concern that enough water existed to irrigate the newly reclaimed lands.

In order to safeguard still further, the existing rights and the supply for new lands, the District proposes as a part of its Official Plan the construction of a reservoir on the Rio Chama, with a capacity of 198,110 acre feet, for the purpose of regulating and equalizing the flow of that stream and supplementing the low season flow of the Rio Grande with stored water during the irrigation season.¹⁴³

Although this statement may be read several ways, the reading most in alignment with the rest of the application and clearest on its face is that the MRGCD intended El Vado to benefit, protect, and store water for new lands and water for existing rights, which included the Six Pueblos' "prior and paramount" rights.¹⁴⁴

142. Application for Permit No. 1690 at 8.

143. Application for Permit No. 1690 at 22.

144. In a brief to the U.S. Supreme Court, the MRGCD made a qualified statement about the Six Pueblos' storage rights: "Defendant admits that the Indians have both natural-flow and storage rights but they do not know and cannot ascertain the extent of such rights." Answer of Defendants, Middle Rio Grande Conservancy District, Oscar M. Love, Loyal D. Betty, Emiliano Castillo, John T. Cook, and L.G. Zartman, Directors of Said District, and Hubert Ball, Chief Engineer of Said District at 13, October Term, 1951, *Texas v. New Mexico*, 352 U.S. 991 (1957) (No. 9, Orig.). In a pleading in that same case, the United States stated that it "believes that the Indians have substantial storage rights in El Vado Reservoir." Memorandum on Behalf of the United States, as Amicus Curiae at 9-10 (Apr. 1952) *Texas v. New Mexico*, 352 U.S. 991 (1957) (No. 9, Orig.).

In sum, although Permit No. 1690 does not expressly state that it authorized storage of the Six Pueblos' water rights, it does not limit which rights may be stored at El Vado. Consequently, neither the MRGCD nor its successor in interest, the BOR, is barred under New Mexico law from storing "prior and paramount" water at El Vado. Additionally, the statements the MRGCD made in its application No. 0620 strongly suggest that the MRGCD intended to apply for the right to store any of its water at El Vado. Therefore the OSE's approval of Permits No. 0620 and No. 1690 support a right under New Mexico law to store at El Vado for the Six Pueblos.

V. CONCLUSION

This article reveals that while neither federal nor state law explicitly authorized storage of the Six Pueblos' "prior and paramount" water rights at El Vado, neither explicitly limited such a right and the Act of 1928 implicitly authorized such a right. The legislative history of the Act shows that implicit in the Act is authorization for the storage of all Pueblo water at El Vado. The historical record indicates that the seventieth Congress understood that all the Pueblo land within the boundaries of the Middle Rio Grande Conservancy District suffered from a rising water table, antiquated irrigation works, and an unreliable flow of the river. Accordingly, Congress voted to provide benefit to the Six Pueblos through the drainage, irrigation works, and upstream storage at El Vado promised by the Conservancy Project. Moreover, the Department of the Interior acted upon the authority of the 1928 Act and entered into various agreements over the years, which explicitly recognized "prior and paramount" storage at El Vado. Additionally, the only permitted right to store at El Vado, Permit No. 1690, was granted to the Middle Rio Grande Conservancy District by the Office of the State Engineer of New Mexico, and this right does not contain any limitation on the water the MRGCD or its successor in interest, the Bureau of Reclamation, is authorized to store there. The MRGCD's two permits, No. 0620 and No 1690, taken together, suggest that the Six Pueblos have a right to store "prior and paramount" water at El Vado under New Mexico law.