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PUEBLO INDIAN WATER RIGHTS: STRUGGLE FOR A PRECIOUS RESOURCE

CHARLES T. DUMARS, MARILYN O'LEARY & ALBERT E. UTTON.
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Legal scholars do not often write books with broad appeal. *Pueblo Indian Water Rights* is a major exception. The study is a remarkable one for a number of reasons. It not only confronts a series of issues central to the future of continued growth in the southwest, but also addresses an even more fundamental issue. What should be the role of equity in the competition for a scarce natural resource?

As lawyers the authors are, of course, interested in legal precedent and case law, but they frame their answers within the broader cultural construct of the region's history. They are able to pursue this line of inquiry because of the massive amount of new historical data made available for the first time in the longstanding Pueblo Indian water rights case, *New Mexico v. Aamodt*. The three authors provide a fresh and eminently reasonable legal perspective to the historical evidence marshalled by historians William Taylor, Lawrence Kelley, Richard Frost, Daniel Tyler, Susan Deeds, and Michael Meyer in that controversial case.

The Pueblo Indians of the upper Rio Grande valley of New Mexico have been disputing water with their non-Indian neighbors since the first Spanish colonization of the region in the late seventeenth century. During the years following that initial settlement Spanish water law was transplanted to the northern frontier of the Viceroyalty of New Spain where it matured and mutated with the exigencies of time and place. It is this Hispanic tradition, the authors argue, that should provide the framework for an equitable solution to Pueblo Indian water disputes today. The Winter's Doctrine, defining Indian water rights in 1908 on the Fort Belknap Reservation of Montana, has no legal applicability to the upper Rio Grande valley because the United States made no treaty with the Pueblos similar to that which it concluded with the Gros Ventre and Assiniboine Indians. The applicable treaty for New Mexico is the Treaty of Guadalupe-Hidalgo, the document which ended the war between the United States and Mexico in 1848. Although the Pueblo Indians were not a direct party to the Treaty, the document did, nevertheless, guarantee the property rights of all Mexican citizens at the time of the transfer of territorial sovereignty. Indians were citizens of Mexico at the time.

Spanish and Mexican law, as well as the Winters Doctrine, recognizes that Indians enjoy first priority to water usage. But they differ tremen-

dously on what that means. The difference centers on the crucial issue of quantity. Inherent in the *Winters* decision is the concept of "practicably irrigable acreage." The Indian population is guaranteed water in an amount sufficient to cultivate all of the "practicably irrigable acreage" on their respective land grants or reservations. Spanish and Mexican law was not nearly so sweeping, as it had other priorities. To be sure, Indian water rights were carefully protected in the *Recopilacion de 1680* and in subsequent decrees both before and after Mexican independence. Indians were to enjoy *derechos de primacia,* primary rights. These rights were elastic and could be expanded as the Indian population grew or their needs changed. But water rights were not predicated on a fixed quantifiable scale such as "practicably irrigated acreage." Because Spanish colonial and Mexican law concerned itself with protecting the rights of others as well, the body of water law was much more flexible.

Throughout the study the authors strongly support the Hispanic water tradition of New Mexico, not the Winters Doctrine:

> How can a court apply *Winters* to lands that were not set aside by the United States but were in existence under another sovereign and another legal system that not only defined land protected and Pueblo water rights but also considered the rights of others? The United States obligated itself to honor Pueblo water rights under the Treaty of Guadalupe Hidalgo; it did not agree to protect under case law yet to be decided. (p. 113)

Interestingly enough, both the historical data and the case law prompted this important conclusion. It is fortuitous that the evidence led the authors in this direction because the hallmark of the Hispanic legal tradition, nurtured in arid Iberia, was balancing the interests of contending parties in water allocations on a scale uniquely fashioned to weigh equity. It not only sought to protect third parties but to assess need and intent and to reject claims to exclusive ownership and use. Few historians would suggest that these lofty goals were attained in New Mexico or elsewhere in northern New Spain. But if Spanish and Mexican officials innocently or purposely misread the scale, it was not the fault of the judicial mechanism itself.

This work, carefully researched and nicely written, instructs the courts and the politicians on a sensible course to be followed in future apportionment of the waters of the Rio Grande. I commend it to the public as well.

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