

The Network Note October 2020

Focus on New Mexico

Race, Federal Indian Policy, and Access to Water **November 19, 2020 – 10 am PDT**

Dividing the Waters will convene its first webinar on racial justice and water. This first one will focus on how the history of federal Indian policy continues to affect tribes and their natural resources, including water. Today, when water supply suffers stress from urbanization, watershed derogation and climate change, tribes have sought to protect their senior rights to water. Judges find themselves the ultimate arbiters of water disputes whose roots trace back to the historical vagaries of federal Indian policy and the nation's disregard of the tribes' water needs. The speakers include Bethany Berger (U of Conn.) and Monte Mills (U. of Montana). [Sign up here.](#)

10th Cir/NM: Tribes Retained Water Rights in New Spain
In *US v. Abouseiman*, the 10th Circuit held that Spain did not extinguish the aboriginal water rights of the pueblo tribes in NM's Jemez River Valley. Extinguishing such rights requires "clear and adverse affirmative action" by the sovereign.

In 1983, the United States filed an adjudication of the Jemez River, as trustee for the Pueblos of Jemez, Santa Ana, and Zia. The Pueblos have resided on the Jemez River since time immemorial. The adjudication's first stage focused on Spanish law. The trial court held that the tribes had "aboriginal" water rights, but Spain had extinguished those rights by exercising sovereignty over the Pueblos. At the parties' request, the court certified the question to the Circuit.

The Circuit Court first clarified the question that it would answer: "whether aboriginal water rights can be extinguished by the imposition of sovereign authority without any affirmative act." It then provided a comprehensive review of Spanish law and colonial policy. While acknowledging the royal prerogative to take Indian lands, Spain's colonial policy protected the rights of Indians.

The court noted the colonial authority to do a "repartimiento," or adjudication, of water, but Spain never initiated a Jemez River repartimiento. The court affirmed the lower court's finding of aboriginal rights, but overturned its conclusion that Spanish sovereignty had extinguished those rights, without an affirmative action to take those rights. The dissent objected to the interlocutory appeal, arguing the trial judge needed to first decide whether the Pueblos still had water rights.

Recent court decision? Focus edition ideas? Contact the *Network Note* Editor at ALFIII@sbcglobal.net

NM Water: Growing State/Limited Water
Like other western states, New Mexico continues growing but its water remains limited. Climate change, which is widely accepted, adds stress. (Last year was the hottest year on record.) In 2018, Governor Michelle Lujan Grisham campaigned on the promise of a new 50-year water plan that would engage communities and identify emerging water challenges. She has tasked the Interstate Stream Commission and the State Engineer with developing that plan.

NM Water: The Regulatory Agencies
NM has several agencies with responsibilities in water:

- *Office of the State Engineer*: Issues water right permits (including hearings of protests), supports the NM Attorney General in filing general stream adjudications (technical and legal assistance), and validates water right claims from such adjudications.
- *Interstate Stream Commission*: Has broad powers to investigate, protect, conserve, and develop New Mexico's waters. NM is a party to 8 interstate stream basins, and the ISC has responsibility to negotiate with other states.
- *Environment Department*: Surface Water Quality Bureau regulates water quality under the Clean Water Act.

NM Water: Continuing Major Challenges
The NM Territorial Legislature passed its water law in 1907, before statehood in 1912. Its leaders have worked to resolve NM water issues ever since. Its groundwater management law dates to the 1930's. Greg Ridgley, Chief Counsel to the State Engineer, identified four significant NM water issues:

- *Texas*: Filed SCOTUS cases against NM on both the Rio Grande and the Pecos River for not delivering enough water pursuant to their interstate compacts.
- *Tribal Water Rights*: NM includes 23 tribal governments, including 19 pueblos that existed long before Spanish explorers arrived. The NM Supreme Court is now reviewing the 2018 approval of the Navajo settlement.
- *Oil & Gas Development*: Fracking has expanded water conflicts in SE NM. Oil companies lease water rights and deal with water that oil extraction can produce.
- *Local AWRM*: NM Supreme Court, in 2012, affirmed the State Engineer's authority to appoint water masters to manage water in local watersheds, as part of the "Active Water Resource Management" program. The water masters exercising that authority draw public debate.