

LAW OF THE RIO GRANDE

PUEBLO INDIAN WATER RIGHTS

THE FEDERAL LAW SOURCES

A NON-PUEBLO POSITION

Mark F. Sheridan
Holland & Hart LLP
Post Office Box 2208
Santa Fe, NM 87504
505-988-4421

January 2002

I. A BRIEF SUMMARY OF THE AAMODT LITIGATION

The State of New Mexico filed the *Aamodt* suit in 1966 to adjudicate all water rights in the Rio Tesuque and Nambe/Pojoaque stream system, a tributary of the Rio Grande. In 1975, the Indian Pueblos of Tesuque, Nambe, Pojoaque and San Ildefonso moved to intervene as parties-plaintiff in the case, seeking to have their water rights determined in accordance with federal law. The district court denied the motion and held that the Pueblos' water rights were required to be determined under the law of New Mexico. That order was the subject of an interlocutory appeal in *State of New Mexico ex rel. Reynolds v. Aamodt*, 537 F.2d 1102 (10th Cir 1976) ("*Aamodt I*"). In *Aamodt I*, the Tenth Circuit reversed. The court held that the Pueblos' water rights were not subject to state law but were to be determined under federal law. *Aamodt I* at 1112. The case was remanded to the district court for determination of the Pueblos' water rights under federal law.

Since 1976 the district court has considered a number of federal law theories advanced by the parties to establish the Pueblos' water rights. In 1985, the court issued its most significant and only published decision. See *State of New Mexico ex rel. State Engineer v. Aamodt*, 618 F.Supp. 993 (D.N.M. 1985) ("*Aamodt II*"). In *Aamodt II*, the court held that the *Winters* or federal reserved rights doctrine does not provide a basis for determination of the Pueblos' water rights. See *Aamodt II* at 1010 ("Other [than Executive Order or Congressional reservations,] Pueblo lands do not have *Winters* rights."). Instead, the court held that the Pueblos' water rights are derived from the federal Indian law doctrine of aboriginal title. *Id.* at 1009 (The Pueblos have "aboriginal title, Indian rights or original Indian rights to their lands and the use of

them including appurtenances.”). Relying on the theory of aboriginal title, as modified by its view of Spanish and Mexican law, the court held that the Pueblos are entitled to first priority to the use of the water of the Rio Tesuque and Nambe/Pojoaque stream system. *Id.* at 1010. With respect to the number of acres of land to which the Pueblos’ first priority applies, the court held that all lands irrigated by the Pueblos between 1846 and 1924 were entitled to first priority, “saving and excepting the land ownership and appurtenant water rights terminated by the operation of the 1924 Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 636,” thereby fixing “the measure of the Pueblos’ water rights to the acreage irrigated as of [1924].” *Id.*

As counsel for certain non-Pueblo defendants in *Aamodt*, I believe that the court failed adequately to consider the federal law sources which determine the Pueblos’ water rights; I believe that the court’s aboriginal title ruling is erroneous; and I believe that the court’s understanding of Spanish and Mexican law, as well as the effect of water law in New Mexico Territory, following the transfer of sovereignty from Mexico to the United States, both of which are essential to the determination of the Pueblos’ water rights, is lacking. My analysis follows.

II. PROTECTION OF MEXICAN PROPERTY RIGHTS UNDER THE TREATY OF GUADALUPE HIDALGO

Articles VIII and IX of the Treaty of Guadalupe Hidalgo afforded protection to all Mexican property rights recognized under the laws of the prior sovereigns, Spain and Mexico, including Pueblo property rights. *See Aamodt I* at 1111. (“By the Treaty of Guadalupe Hidalgo the United States agreed to protect rights recognized by the prior sovereigns.”); *see also Aamodt II*, 618 F.Supp. at 1000 (“The Pueblos’ status as property owner-citizens of the United States was provided for under the Treaty of

Guadalupe Hidalgo . . .”). In pertinent part Articles VIII and IX of the Treaty provide as follows:

ARTICLE VIII

RIGHTS OF MEXICANS ESTABLISHED IN TERRITORIES
CEDED TO UNITED STATES

* * *

In the said territories, *property of every kind*, now belonging to Mexicans not established there, shall be *inviolably respected*. The present owners, the heirs of these and all Mexicans who may hereafter acquire said property by contract, *shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States*.

ARTICLE IX

HOW MEXICANS REMAINING IN CEDED TERRITORIES
MAY BECOME CITIZENS OF THE UNITED STATES

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the union of the United States, and be admitted at the proper time (to be judged by the congress of the United States) to the enjoyment of all rights of citizens of the United States, according to the principles of the constitution; and *in the meantime shall be maintained and protected in the free enjoyment of their liberty and property*, and secured in the free exercise of their religion without restriction.

Art. VIII-IX, *Treaty of Peace Between the United States and Mexico*, 9 Stat. 922

(emphasis supplied).

As originally signed, Article IX contained the following language with respect to Mexican property rights:

. . . In the meantime [referring to the period before acquiring U. S. citizenship], they [Mexicans] shall be maintained and protected in the enjoyment of their liberty,

their property, and the civil rights now vested in them according to the Mexican laws.

H. Miller (Ed.), *5 Treaties and Other International Acts of the United States of America*, 241 (1937) (emphasis supplied). The language thus contemplated that all property rights vested under Mexican law in 1848 would be maintained and protected.

As ratified, Article IX omitted reference to rights “vested” under Mexican law. It provided simply that Mexicans would be maintained and protected in the free enjoyment of their liberty and property. The legislative history of the Treaty makes clear, however, that this change was intended merely to limit the protection of Mexican property to those rights not in conflict with United States law or the Constitution. The intent of the Senate in amending the original Treaty language was recorded on March 7, 1848. Sitting as a committee of the whole, the Senate dealt with Article IX. On motion of Senator Johnson of Georgia, the Senate considered an amendment of Article IX to read as follows:

. . . In the meantime, they shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them according to the Mexican laws *not inconsistent with the constitution and laws of the United States.*

S. Rep. No. 52, 30th Cong., 1st Sess. 19 *et seq.* (1848) (emphasis supplied). The question was put to the entire Senate whether these words should be made part of Article IX, and by an affirmative vote of 38 in favor and 7 against the motion passed.

In subsequent proceedings, other amendments to Article IX were considered. Such later amendments concerned the language of Article IX, which as originally signed dealt with the status of the Roman Catholic Church and its property in the territory ceded to the United States. *Id.* As ratified, Article IX was revised to meet

senatorial concerns regarding church status and property. With respect to non-church related property interests, however, the Johnson amendment, declaring that all property rights vested under Mexican law not inconsistent with the laws of the United States or the Constitution would be maintained and protected, remains as a formal expression of senatorial intent.

The protocol to the Treaty further documents that property rights vested under Mexican law would be protected. Prior to exchanging ratifications of the Treaty, the United States and Mexico entered into a protocol to ameliorate Mexican government concern over Senate amendments to the Treaty. Although the protocol is not part of the Treaty and is without legal force of its own, it is evidence that the substance of Article IX as ratified was not intended to materially change Article IX as originally signed.

The protocol states:

The american Government by suppressing the IXth article of the Treaty of Guadalupe and substituting the III. Article of the Treaty of Louisiana *did not intend to diminish in any way what was agreed upon by the aforesaid article IXth in favor of the inhabitants of the territory ceded by Mexico.*

H. Miller, *supra*, at 381 (emphasis supplied).

Neither Article VIII nor Article IX specifically defines the property rights subject to protection. Nevertheless, there is no doubt that the Treaty was intended to protect all forms of property, whether acquired by grant or otherwise. Following ratification of the Treaty, Secretary of State James Buchanan wrote on March 18, 1848, to the Minister of Foreign Relations of the Mexican Republic. Buchanan's letter must be read in the context of the ratification proceedings and Senate amendments. *Id.* at 253. Speaking directly to the issue of protection of Mexican property, he wrote:

The present treaty provides amply and specifically in its VIIIth and IXth Articles for *the security of property of every kind belonging to Mexicans, whether acquired under Mexican grants or otherwise* in the acquired territory. The property of foreigners under our Constitution and laws, will be equally secure without any Treaty stipulation.

Id. at 256 (emphasis supplied).

Finally, general principles of international law demonstrate that the term “property” as used in the Treaty was intended to include all forms of property, including property interests acquired by custom and usage. As stated in H. W. Halleck, *International Law*, 829 (1861):

It seems to be a well-established rule of the law of nations, that, on the cession of a conquered territory by a treaty of peace, *the inhabitants of such territory are remitted to the municipal laws and usages which prevailed among them before the conquest, so far as not changed by the constitution or political institutions of the new sovereignty, and the laws of the sovereignty which proprio vigore extend over them.*

This rule was specifically applied to the territory of New Mexico in *In Re Chavez*, 149 F. 73, 75 (8th Cir. 1906), which upheld maintenance and protection of community property rights under the law of Mexico as the law of New Mexico following the transfer of sovereignty to the United States. This principle also has been used to explain the legitimacy and effect of the Kearny Code. *Leitensdorfer v. Webb*, 61 U.S. (30 How.) 891 (1858). *See also Ward v. Broadwell*, 1 N.M. 75 (1854).

The international law principle that laws and usages prevailing in a territory before a transfer of sovereignty continue in effect after the territory is ceded, is significant to determination of the Pueblos’ water rights. When New Mexico was occupied by the United States in 1846, General Kearny promulgated the Kearny Code of Laws. International law of conquest accorded *de jure* recognition to the Kearny Code

as the law of New Mexico. In Section 1 of the article dealing specifically with water courses, the Kearny Code provided that the laws previously in force concerning water courses were to continue in force. Thus, in 1846 the United States expressly adopted the system of Mexican water laws as the law of the territory ceded to the United States. When the Treaty of Guadalupe Hidalgo was ratified in 1848, it granted formal protection to all property rights vested under Mexican law not in conflict with the laws of the United States or the Constitution. Water rights vested under Mexican law posed no such conflict. Accordingly, Mexican water law, as it existed in 1848, was incorporated into the Treaty of Guadalupe Hidalgo to the extent of determining vested water rights, including Pueblo Indian water rights, as of the transfer of sovereignty.

III. IMPLEMENTATION OF THE TREATY OF GUADALUPE HIDALGO AND ITS EFFECT ON PUEBLO WATER RIGHTS

To discharge the United States duty under the Treaty to provide for the manner of securing property rights in the territory of New Mexico already vested under the laws of Mexico, Congress passed the Act of 1854. 10 Stat. 308. In the 1854 Act, Congress established the Office of the Surveyor General of New Mexico, and it delegated to him expansive powers relating to the validity of real property claims in New Mexico. Thus, Section 8 of the 1854 Act directed the Surveyor General:

To ascertain the origin, nature, character and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico . . . [and to make a report to Congress] on all such claims as originated before the cession of the territory to the United States by the Treaty of Guadalupe Hidalgo . . . denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages and customs of the country before its cession to the United States.

Pursuant to Section 8, the Surveyor General addressed the property claims of the four Pueblos in *Aamodt*. He found that they each held “title-deeds” to their lands, granted to them by the Spanish crown. In questioning the Chief of the Tesuque Pueblo, the Surveyor General asked:

Did your pueblo ever have any title-deeds to their lands?

Answer: There were title-deeds to the pueblo [granted from the Spanish government]. . . .

See Report of the Secretary of the Interior, Sen. Exec. Doc. No. 5, 34th Cong. 3d Sess. 411, 515, 516, 517 (1856 - 1857). The Surveyor General reported his findings with respect to the Pueblos’ land claims to Congress. And Congress *accepted* the Surveyor General’s report as to each Pueblo. In the Act of December 22, 1858, 11 Stat. 374, Congress acted on the Surveyor General’s report, and it confirmed *bona fide* land grants which the Surveyor General found that the four Pueblos in *Aamodt* had received from the Spanish crown.

In *Aamodt I*, the Tenth Circuit expressly recognized the importance of the Treaty of Guadalupe Hidalgo and its implementation by Congress to the determination of the Pueblos’ water rights. The court stated:

By the Treaty of Guadalupe Hidalgo the United States agreed to protect rights recognized by the prior sovereigns. *Whatever those rights may have been, they were validated by the 1858 Act which confirmed the land claims of the four Pueblos.* . . .

Aamodt I, 537 F.2d at 1111.

With respect to water rights protected by the Treaty of Guadalupe Hidalgo, the Supreme Court has further made clear that the patents issued by the United States, in confirmation of Spanish and Mexican titles to land, such as the patents issued to the

Pueblos in *Aamodt*, confirmed only such water rights as the confirmer possessed under the laws of the prior sovereign. Specifically addressing a riparian water rights claim made by an Arizona land owner, whose title was derived from a Mexican land grant and confirmed by a United States patent issued pursuant to implementation of the Treaty, the Supreme Court held that such confirmation represented the federal government's "approbation or assent to an estate *already created*, which, as far as in the confirmer's power makes it good and valid. . . ." See *Boquillas Land and Cattle Co. v. Curtis*, 213 U.S. 339, 344 (1909). The Court stated:

It is *not* to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to *enlarge the grant*.

Id. (emphasis supplied).

Articles VIII and IX of the Treaty of Guadalupe Hidalgo and the 1854 and 1858 Acts of Congress, implementing those provisions with respect to the Pueblos, establish that the Pueblos' water rights must be determined as of the date of the cession under the laws of the prior sovereign.

IV. INAPPLICABILITY OF THE DOCTRINE OF ABORIGINAL TITLE TO PUEBLO WATER RIGHTS

The district court's ruling in *Aamodt II* that the Pueblos have aboriginal title to their lands, including appurtenances like water, 618 F.Supp. at 1009, is error.

When Congress passed the 1854 Act to protect Mexican property rights in New Mexico as required by the Treaty, it exercised its *legislative prerogative* under the separation of powers doctrine to prescribe both the manner and the method of such protection. That is, in passing the 1854 Act and setting up the Office of the Surveyor General, Congress *reserved to itself* all questions concerning "the origin, nature,

character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico.” As a result, the nature of the Pueblos’ title -- “aboriginal title” versus “title-deeds” -- is not a justiciable question. This proposition was made explicitly clear by the Supreme Court in its decision in *Tameling v. United States Freehold and Emigration Co.*, 93 U.S. 644 (1876).

In *Tameling*, the plaintiff sued to recover a tract of land in New Mexico, which was located within a larger tract, both of which had been ceded to the United States by the Treaty of Guadalupe Hidalgo. The larger tract apparently had been granted to two individuals, Lee and Beaubien, by the Mexican government in 1843. Pursuant to Section 8 of the 1854 Act, the Surveyor General investigated Lee’s and Beaubien’s claim to the larger tract. The Surveyor General found that they had valid legal title to the land pursuant to a grant from the Mexican government. The Surveyor General’s findings were embodied in his report, which was laid before Congress for its consideration and action. Congress acted on the report, which recommended confirmation of Lee and Beaubien’s claim, and confirmed the land grant.

On these facts the Supreme Court *dismissed* Tameling’s claim to the smaller tract located within the larger Lee and Beaubien grant. Expressly recognizing that the protection of Mexican property rights in New Mexico under the Treaty of Guadalupe Hidalgo had been reserved to Congress as part of its legislative prerogative, the Court held:

Final action on the subject is reserved to Congress.
*Such action is, of course, conclusive and, therefore, not
subject to review in this or any other forum.*

* * *

It is obviously not the duty of this Court to sit in judgment *upon either the recital of matters of fact by the Surveyor-General, or his decision declaring the validity of the grant.*

Id. at 664 (emphasis supplied).

The decision in *Tameling* applies with full force to the district court's erroneous ruling in *Aamodt II* that the Pueblos possessed aboriginal title to their lands, and therefore aboriginal water rights. Final action on the origin, nature, character and extent of all claims to lands in New Mexico, including the Pueblos' land, was by force of the 1854 Act reserved to Congress. The action of Congress on all such claims, including the Pueblos' claims, is conclusive and not subject to judicial review. Congress confirmed "title-deeds" in the Pueblos -- *legal* not aboriginal title.

By sitting in judgment on the Surveyor General's report, and finding his report to be clearly erroneous, *see Aamodt II*, 618 F.Supp. at 997, the district court not only re-characterized the property rights of the Pueblos as "aboriginal" in nature, but it violated the doctrine of separation of powers in direct derogation of the final action on Pueblo title taken by Congress in 1858. The result has been mistakenly to confer aboriginal water rights with a time immemorial priority on the Pueblos under tenets of judicially-created federal Indian law, when the proper legal determination of the Pueblos' water rights must be based on the property rights of the Pueblos protected by the Treaty of Guadalupe Hidalgo as confirmed by Congress. *See Aamodt I*, 537 F.2d at 1111.

V. PUEBLO WATER RIGHTS UNDER THE LAWS OF SPAIN AND MEXICO

Prior to the district court's 1985 ruling in *Aamodt II*, there was a lengthy trial segment before Special Master Yudin, which addressed the Pueblos' water rights under the laws of the prior sovereigns, Spain and Mexico. The Special Master made

conclusions of law on these subjects which the district court adopted or modified, as set forth in its 1985 opinion. *See Aamodt II*, 618 F.Supp. at 998-999. If ultimately there is an appeal from a final judgment in *Aamodt*, the district court's conclusions in *Aamodt II*, respecting the rights of the Pueblos under Spanish and Mexican law, no doubt will be challenged. For purposes of presenting a non-Pueblo perspective on the Pueblos' water rights, however, it should be sufficient to compare the conclusions of law adopted by the district court with those requested by non-Pueblo defendants following the Spanish and Mexican law trial segment held in 1983:

NON-PUEBLO REQUESTED CONCLUSIONS OF LAW

Spanish Water Law

1. All waters in the Indies were common to both Spaniards and Indians.
2. The common uses of water were subject to two overriding servitudes in favor of all individuals in order to meet domestic and sanitary needs.
3. Subject to such domestic and sanitary uses, all persons were entitled to use water for irrigation.
4. The use of water for irrigation was a usufructuary right appurtenant to land.
5. The right to use water for irrigation did not depend upon ownership or title to the land on which the water was diverted. Any person cultivating land had the right to use water for irrigation regardless of whether he was the owner, occupant, peaceful possessor or even a trespasser.
6. To have priority over others in the use of water for irrigation, a royal grant -- a "merced de aguas" -- was required.

7. The Pueblos have all failed to prove that they ever received a royal grant of water, and thus have failed to prove that they were entitled to any priority over others in the use of water for irrigation.

8. In the absence of a merced, all persons were entitled to share equally in the use of water for irrigation.

9. In the event of a dispute over the use of water, allocations and quantification of irrigation rights were made in a “repartimiento.”

10. A “repartimiento” was a quasi-judicial and administrative proceeding in which government officials applied controlling principles of equitable distribution to apportion available water supplies. A repartimiento does not take into account abandoned uses or previous needs for water.

11. In a “repartimiento” the domestic and sanitary needs of all users were first satisfied; persons holding “mercedes de aguas” were then accorded priority based on the antiquity (that is, the date) of their grants; all other persons received an allocation of water for irrigation based upon the relative needs of all users and application of the principle of non-injury, that is, that no one’s use of water should result in injury to any other person. A repartimiento thus attempted to balance the interests of all users in the water system.

12. Need was the measure of a water allocation in a repartimiento. Need consisted of what was necessary for maintenance, that is, to grow the necessary supply of food and crops for subsistence.

13. All persons had the burden of proving what their needs were. The basic principle by which need was measured was proof of customary and existing water use.

Neither a collectivity or an individual could expand water use beyond that which was existing and customary if the result would be to cause injury to a third party.

14. In a repartimiento for those without formal grants, “antigüedad” or prior use, in the sense of the date of origin of use had significance only in terms of proof of one’s needs: the longer the period of time over which a person could demonstrate continuing use of water, the more likely he could show that such customary use constituted his existing needs.

15. In times of water shortage the concept of prior use or first in time gave no priority in terms of the right to use. Water shortages were shared ratably or proportionally among all users following an assignment or allocation of water in a repartimiento.

16. A “repartimiento” was not a permanent decree and was not intended to provide a permanent definition of a person’s irrigation rights. It could not have the effect of *res judicata* because it did not have the effect of a judicial decision. A repartimiento simply defined relative needs in equitable terms at a given time. It was always subject to subsequent modification.

17. In the Spanish colonial period, Indian irrigation rights were measured by the principle of “necesario para su sustento,” that which was necessary for their sustenance. To this limited extent Indians were accorded a type of preference in the use of water for purposes of irrigation. Book IV, Title 12, Law 18, and Book IV, Title 12, Law 5. The quantity of water which defined “necesario para su sustento” was determined by reference to customary and actual use, that is the amount of water necessary to grow crops for basic life support in fields under cultivation.

Mexican Water Law

18. The system of water laws in force in New Mexico during the period of Mexican sovereignty was essentially the same as the system in force during the period of Spanish sovereignty.

19. The system of laws in force in New Mexico during the period of Mexican sovereignty fundamentally altered the legal status of Indians from the system of laws in force during the period of Spanish sovereignty with the result that Indians were no longer the beneficiaries of special rights or preferences. Under Mexican law Indians became Mexican citizens with equal standing before the law as shown by Article XII of the plan of Iguala; the Constitution of March 19, 1812; the Decree of the Mexican Congress of September 17, 1822; the Act of February 24, 1822; the Act of April 9, 1823; and the Plan of Mexico of January 27, 1827. The special Indian court in force during Spanish sovereignty was abolished, and the special office of protector of the Indians was also eliminated. While Indians had no fewer rights than other Mexican citizens under Mexican law, they had no greater rights.

20. After Mexico gained independence from Spain even the term Indian (“Indio”) was eliminated from all official acts and documents, and practically disappeared from use in Mexico. Equality of all Mexicans, including Indians, became the law.

21. The change in the legal status of Indians affected the distribution of water for purposes of irrigation in that Indians were no longer accorded any preference on account of race in the allocation of water for irrigation purposes because all distinctions between Indians and non-Indians were eliminated as a matter of law. Thus, the

provisions of the Recopilacion in Book IV, Title 12, Law 18, and Book IV, Title 12, Law 5 were no longer of any force or effect.

22. In the Mexican period the principles of the *Repartimiento* continued to apply.

23. In the Mexican period water disputes between Indians and non-Indians were settled no differently from water disputes among non-Indians. The principles of need and non-injury were considered in similar fashion in either case. The central factors in the determination of need were population and amount of land under cultivation necessary to sustain the population. There is no evidence in any repartimiento of an allocation of water being made for religious or ceremonial purposes or for any purpose other than to meet irrigation needs.

24. Waters arising from a spring on Indian land were equitably apportioned among an Indian and non-Indian users in Tesuque in 1842.

25. The Taos-Arroyo Seco repartimiento in 1823 demonstrates application of the principles of need and non-injury in the equitable distribution of water among Indian and non-Indian users. The non-Indian settlers of Arroyo Seco received an allocation of water sufficient to meet the needs of the settlement. The Taos Pueblo's use of water was limited so as to prevent injury or harm to new water users at Arroyo Seco. The Ayuntamiento's use of the terms "antiguedad", "primacia", and "duenos despoticos" did not involve recognizing or granting the Taos Pueblo any prior, paramount or superior irrigation rights over subsequent users. On the contrary, the decision made specific allocation of water to all users and expressly provided that in

times of shortage the amount of water allowed to all users, Indian and non-Indian alike, would be reduced proportionately in accordance with the allocations.

26. Under the Mexican law, between 1821 and 1846, any person occupying the land of another, including Indian land, had the right to use water to irrigate the land and receive an allocation of water in a repartimiento sufficient to meet the needs of his cultivation. So long as a person was in peaceable possession of the land his irrigation needs would be taken into account, and he would not lose his irrigation rights unless ejected from the land.

27. Under Mexican law, Indians and non-Indians were part of the same political community and the same community of water users.

28. Neither Spanish nor Mexican law possessed any legal doctrine similar to “prior appropriation” as that body of law exists in the western states of the United States and the state of New Mexico. Without a specific grant of water for irrigation purposes, no water user whose appropriation was prior in time had any prior right to satisfy his irrigation needs before the needs of subsequent appropriators were met.

29. Under Mexican law, Indians had no *Winters*-type rights. Lands were neither “reserved” nor set aside for Pueblo Indians to achieve a particular purpose; instead, Mexican laws were enacted and in force in New Mexico to reduce communal Indian land holdings to private property which could be freely sold and alienated by the Indians. Repartimientos did not give any preference or prior and paramount interest to Indian irrigation needs; instead, the competing needs of all water users were taken into account and allocations made on the basis of relative needs. By definition the repartimiento involved a balancing of needs to achieve an equitable distribution of

available water. Repartimientos were not designed to provide for Indian irrigation needs or the needs of any other Mexicans on a permanent basis. Rather the repartimiento resolved present irrigation disputes by allocating water based on the needs of all users at a specific point in time. The concept of need in the repartimiento was never measured according to the standard of “practicably irrigable acreage”; instead, need was defined by reference to that amount of water necessary to sustain the population, that is, the amount of water necessary to irrigate cultivated lands in order to maintain subsistence. No one, including Indians, could expand their irrigated lands beyond customary and existing uses if the result would be to cause injury to another.

VI. QUANTIFICATION OF PUEBLO WATER RIGHTS UNDER THE TREATY OF GUADALUPE HIDALGO

In *Aamodt* certain non-Pueblo defendants have asserted that pursuant to the Treaty of Guadalupe Hidalgo and the Acts of 1854 and 1858, the Pueblos’ water rights should be quantified first, by the amount of water sufficient to meet the domestic, sanitary and irrigation needs of each Pueblo’s population as of the cession of New Mexico to the United States in 1846. Such water uses were vested property rights under the laws of Mexico, protected by the Treaty, and confirmed by Congress. For purposes of priority administration today, all such Pueblo water rights would have an 1846 priority date. That priority date would be shared, however, with all non-Pueblo water rights where the use of water for domestic, sanitary or irrigation purposes can also be traced to a date preceding the transfer of sovereignty in 1846. Such equal, common or shared priority among pre-1846 water rights owners is required because under the law of Mexico, in the absence of a grant from the Spanish crown or Mexican government

for the purpose of irrigation (a *merced de aguas*), all water rights, Indian and non-Indian alike, possessed the same priority for domestic, sanitary and irrigation uses.

VII. WATER RIGHTS IN NEW MEXICO AFTER 1846

The evolution of the doctrine of prior appropriation in New Mexico took place over the fifty year period leading up to 1900. Mexican water laws in effect in 1846 were changed slowly and in fragmented fashion.

When the first legislative assembly met in 1851, following the organization of the New Mexico territory, it passed two laws on water rights. First, the legislature ratified the laws in force since 1846, including the provisions of the Kearny Code pertaining to water courses. 1851 N.M. Laws §1. Second, the assembly made even more specific its adoption of the system of equitable distribution of irrigation rights previously in force under the law of Mexico:

It shall be the duty of the overseers . . . *to distribute and apportion the water in proportion to which each one is entitled, according to the land cultivated by him*, also taking into consideration the nature of the seed, crops and plants cultivated, and to conduct and carry on said distribution *with justice and impartiality*.

1851 N.M. Laws Ch. III, §13 (emphasis supplied). From the text of this statute it is clear that the legislature not only was aware of the *repartimiento* principles under Mexican water law, but that it endorsed those principles as the law of the federal territory.

Over time territorial legislation affecting water rights was written for individual geographic locales. Through such piecemeal local legislation the chord of prior appropriation began to be struck. In 1861, for example, an act concerning the town of Socorro gave preference in the use of water from a certain spring to Socorro residents

and those owning lands cultivated by the first settlers of Socorro. 1861 N.M. Laws §1. This preference was the same for both groups, but operated to the detriment of new users opening fields after passage of the act. A similar statute was passed in 1862, affecting the waters of the Rio Chiquito in the eighth precinct of Taos County. Under this act farmers of newly cultivated fields were required to obtain consent of the “mayordomo, or distributor of water of the ditch” in order to obtain water rights, and such rights could not be given in prejudice to older irrigated fields. 1862 N.M. Laws §1.

For each example of local legislation seeming to recognize principles of prior appropriation, however, there are other examples of legislation written in the familiar terms of equitable distribution called for by a *repartimiento*. Thus, in 1872 a law pertaining to Precinct 5 of Taos County provided:

It is hereby made the duty of the overseer of said ditch of Rebalse to distribute the water between the different ditches, *according to the number of cultivators on said ditches respectively.*

1872 N.M. Laws Ch. XXXIII, §2 (emphasis supplied). There was no mention of priority based on first in time, first in priority principles.

The only territorial water legislation concerning Santa Fe County was passed in 1880. 1880 N.M. Laws Ch. XLVII. It provided for the election of mayordomos on both the north and south sides of the Santa Fe River, whose duties were set forth as follows:

It shall be the duty of said mayordomos to comply with the laws now in force relative to the distribution of water; and it shall be the further duty of the mayordomo of the south side, or of the principal ditches, *when the water is scarce*, to culvert and keep the same for three days and three nights, and the mayordomo of the north side (of river) two days and two nights, otherwise it shall be distributed and used by them as has been the custom.

1880 N.M. Laws Ch. XLVII, §3 (emphasis supplied). The dedication in times of shortage of three days' water use to south side irrigators and two days' water use to north side irrigators demonstrates continuing use of the principles of equitable distribution of water for irrigation purposes. In 1880, there was no mention of priority based on the earliest date of water use, whether on the north side or south side of the Santa Fe River.

In Rio Arriba County, the continuation of equitable distribution principles also is apparent in 1880 legislation. There, the legislature specified the manner in which the waters of the Rito Colorado were to be allocated. 1880 N.M. Laws Ch. XLV. The act provided that two mayordomos be elected and:

That each of said mayordomos, separately, shall be authorized to distribute the water on the side of the river for which he was voted for; and *when the water of the river is not sufficient for their respective ditches, it shall be settled by a majority of the planters in said limits in a meeting, which may be called by any party interested; which shall be presided over by one of the said mayordomos, or by both, if they should be present, and the determination had in regard to the matter, shall be carried into effect.*

1880 N.M. Laws Ch. XLV, §5 (emphasis supplied). Distribution of water by *majority vote* of all irrigation farmers affected by water shortages is not evidence that prior appropriation was the law of New Mexico.

Moreover, the Compiled Laws of the Territory in 1884 show that prior appropriation had no general application. The compilation reflects the duty of overseers to

distribute and apportion the water in the proportion to which each one is entitled, according to the land cultivated by him, also taking into consideration the nature of the seed crops and plants cultivated and to conduct and carry on said distribution with justice and impartiality.

1884 N.M. Laws Ch. I, §26. The same law, passed by the first legislative assembly in 1851, remained the general law of New Mexico in 1884.

Later territorial legislation took cognizance of water uses other than irrigation. With such recognition the legislature indicated that the time of acquiring a water right would affect the status of the right. Thus, in 1887 an act was passed authorizing the formation of companies to construct and maintain reservoirs and canals for domestic and other public uses of water as well as for irrigation. 1887 N.M. Law Ch. XII. Companies incorporated under the act were not allowed to interfere with the water rights of any other individual or company acquired prior to passage of the act. 1887 N.M. Laws Ch. XII, §25. Significantly, the act did not distinguish among the priority of water rights acquired prior to the act; all apparently were equal.

In 1897, the legislature recognized the importance of assuring adequate water supplies for domestic use by towns and villages. The Compiled Laws of 1897 confers a “prior right” to the use of flowing waters in close proximity upon any town or village with a population of more than 3,000 people. 1897 N.M. Law Title I, §7. Use of the term “prior right” seemingly meant superior right but was not based on the date of appropriation.

The inconsistent and locally fragmented nature of New Mexico water laws finally caused the legislature to create a commission in 1897 which was

directed to inquire into the conditions existing in different portions of the territory, with reference to irrigation and water rights, to examine the laws upon this subject in force in this territory, and in other states and counties, and to recommend to the next legislative assembly such legislation as in the opinion of said commission shall meet all requirements on this subject.

1897 N.M. Laws Title I, §62.

Before the legislature could consider passage of a uniform system of water laws, however, the judicial branch acted. In 1900, the territorial Supreme Court, in *Albuquerque Land and Irrigation Co. v. Gutierrez*, 10 N.M. 177, 240, 61 P. 357 (1900), declared:

The doctrine of prior appropriation is the law governing water rights in this territory. . . .

Although *dictum* in previous cases had alluded to prior appropriation as the law of New Mexico, *see, e.g., United States v. Rio Grande Dam & Irrigation Co.*, 9 N.M. 292, 51 P. 674 (1898), such statements were based on citation to California court decisions and Congressional legislation acknowledging the validity of prior appropriation where it already existed as local law. No such judicial pronouncement constitutes the holding of any such case, however, nor were such statements based on any systematic analysis of the water laws in effect in New Mexico after 1846 or derived from the laws of the prior sovereign. Indeed, the territorial Supreme Court subsequently recognized that the doctrine of prior appropriation was not judicially adopted in New Mexico until the decision in *Albuquerque Land and Irrigation Co.* in 1900. *See Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914) (“When the question of law came before the Courts for adjudication (*Albuquerque Land and Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 Pac. 357), the doctrine of prior appropriation was recognized by the courts and became the settled law of the Territory.”).

Once prior appropriation was judicially recognized throughout the territory, the legislature gave its approval to the doctrine. In 1905, the first comprehensive New Mexico water code was passed. For the first time in a statute of general application, the doctrine of prior appropriation was made the law:

Beneficial use shall be the basis, the measure, and the limit of the right to use water. *Priority in time of use shall give the better right*, and in all cases the claims to the use of water shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary preliminaries, and the construction of the works and means of diversion and appropriation; and all dams, ditches, canals, conduits, acequias, reservoirs, and other works heretofore made or constructed, by means of which any waters have been applied to any beneficial use, must be taken to have secured the right to use waters claimed, to the extent of the quantity, which said works are capable of conducting or utilizing:

1905 N.M. Laws Ch. 102, §2 (emphasis added). Of equal significance, however, the principle that priority in time gives a prior right to use of water was qualified. The statute continued:

Nothing in this act must be so construed as to in any manner interfere with the vested rights of individuals, companies, or corporations, or the appropriation of waters, which said individual, association or corporation may be applying to a beneficial use.

Id. (emphasis supplied). In delineating the effect of prior appropriation principles, the legislature intended to make the doctrine subject to the vested rights of all appropriators using water before passage of the act.

Two years later, in 1907, the territorial legislature enacted the water code in its present form. 1907 N.M. Laws Ch. 49. Although the wording was changed slightly from the 1905 Act, water rights remained based on priority in time of appropriation, 1907 N.M. Laws Ch. 49, §2, and subject to existing vested rights. 1907 N.M. Laws Ch. 49, §59.

VIII. QUANTIFICATION OF POST-1846 PUEBLO WATER RIGHTS

In the 1858 Act, 11 Stat. 374, Congress provided that the patents issued to the Pueblos shall “be construed *as a relinquishment of all title and claim* of the United States to any of said lands . . .” Addressing the nature of the Pueblos’ title as a result of the 1858 Act, the Supreme Court held as follows:

The pueblo Indians, on the contrary, hold their lands by a right *superior* to that of the United States. Their title dates back to *grants* made by the government of Spain before the Mexican revolution, - a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its habitants were transferred to the United States.

United States v. Joseph, 94 U.S. 614, 618 (1877) (emphasis supplied). With respect to the patents issued to the Pueblos pursuant to the 1858 Act, the Supreme Court specifically ruled as follows:

. . . this was a recognition of the title previously held by these people, and *a disclaimer* by the government of *any* right of present or future interference . . .

Id. at 619 (emphasis supplied).

The Supreme Court’s decision in *Joseph*, disclaiming federal government authority over Pueblo land and its appurtenances, was not changed until New Mexico became a state in 1910, at the earliest. As a result, from the date of the Mexican cession until New Mexico statehood, “the Pueblos had a legal status sharply distinguished from that of most other Indian tribes and comprehended under Indian legislation only where Congress had expressly so provided . . .” F. Cohen, *Federal Indian Law*, 388 (1942). Thus, with respect to Pueblo property rights, it was “generally believed that the Pueblo Indians had the same unrestricted power” over their lands “as

non-Indians whose title had originated in Spanish grants.” *See Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 240 (1985). “This view,” the Supreme Court stated in *Santa Ana*, “was supported . . . by this Court’s square holding in *United States v. Joseph* . . .” *Id.* at 240-41. Accordingly, Pueblo water rights acquired after 1846 necessarily had to be acquired in accordance with the laws of the territory of New Mexico.

There are perhaps two different ways that water rights in New Mexico, acquired between 1846 and *de jure* adoption of the prior appropriation doctrine in 1900, can be determined. First, if it were found that sufficient legal justification exists, then the doctrine of prior appropriation conceivably might be treated as rule of property applicable to the adjudication of all water rights acquired throughout that period. Alternatively, if the history of water use and customary law, as embodied the 1851 and 1884 territorial statutes, were given effect, then the principles of equitable distribution, derived from the law of Mexico, could be used to adjudicate water rights vested between 1846 and 1900. In either case, the rule of prior appropriation would be controlling for water rights after 1900. Application of the principles of prior appropriation or equitable distribution is relatively straightforward. And because Pueblo property rights were no different from non-Indian property rights during the period in question, Pueblo water rights would be determined the same as all similarly situated non-Pueblo water rights.

CONCLUSION

The Treaty of Guadalupe Hidalgo protected Pueblo Indian water rights vested under laws of Mexico as of the transfer of sovereignty over New Mexico to the United

States in 1846. In the 1858 Act, Congress confirmed only those vested water rights. In the 1858 Act, Congress also confirmed that the Pueblos held legal, not aboriginal, title to their lands. Throughout the territorial period, it was settled *federal* law that the Pueblos had the same property rights respecting their lands, as non-Indians in New Mexico. No more, no less. Accordingly, all Pueblo water rights acquired after 1846 should be determined under the same principles of law applicable to all other water rights claimants.