

Tribal Water Rights Settlement Case Study: Provisions of 2022 Senate Bills for New Mexico Pueblos, How the Politics Played Out, and Lessons for Future Legislative Efforts

S.595, Title I (Pueblos of Acoma and Laguna)

Ann Berkley Rodgers¹

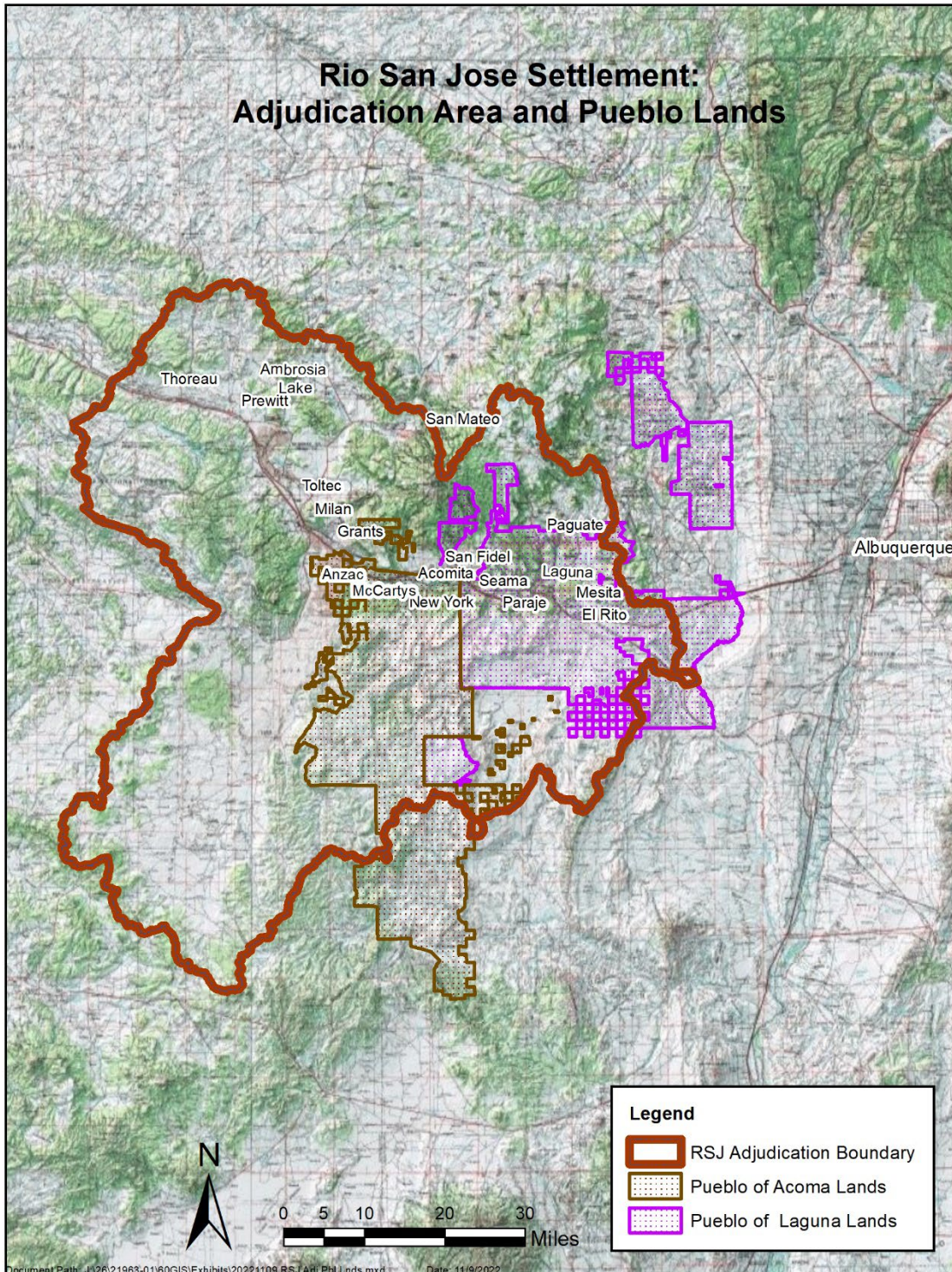
S. 595 (and H.R. 1304) would give federal approval to the settlement of Pueblo water rights in *New Mexico v. Kerr-McGee Corp., Case No. CB-83-190-CV & CB-83-220-CV (consolidated) (13th Judicial District, Cibola County)*, the Rio San José stream-wide adjudication.

The Rio San José is a minor tributary to the Rio Puerco which sometimes flows into the Rio Grande south of Albuquerque.



¹ Partner at Chestnut Law Offices, P.A. Counsel for Pueblos in water rights adjudications in New Mexico since 1983 including *New Mexico v. Aamodt*, *New Mexico v. Abbott*, *New Mexico v. Kerr-McGee*.

The Pueblos of Acoma and Laguna are located along the San José and are the holders of federally recognized aboriginal water rights in the river basin.



Others claiming water rights are land grants given by Spain and Mexico, several towns established during the U.S. period, uranium companies, an electrical generating station and an irrigation district.

New Mexico v. Kerr-McGee Corp. was filed in 1983, 40 years ago. Litigation, though, began long before that. In 1921, in response to the Pueblos' concerns of loss of water, the United States brought suit to cancel easements for an upstream dam site in *United States v. Bluewater Land and Irrigation Company, et. al.* No. 805 Equity (D. Ct. N.M.). But rather than protecting the Pueblos by vigorously litigating this case, the United States failed to prosecute the claim and, in 1923; the lawsuit was dismissed for non-prosecution. Finally, in 1982 the United States filed an action, and non-Indian water users including Kerr-McGee Corporation filed actions in New Mexico District Court for a stream-wide adjudication. It took until 1986 to decide which court – state or federal - would adjudicate the Rio San José.

Litigation resumed in earnest; the parties were realigned so that the State was the sole plaintiff and initial motions for summary judgment were filed on various legal theories. The result was a decision of the New Mexico Court of Appeals denying the Pueblos water rights based on the Winters doctrine but allowing claims for their federally recognized aboriginal rights and other water rights to go forward.² Then, nothing happened for several years. The district court was not pleased and in 1999 it dismissed the case for failure to prosecute. The State apparently decided that it wanted to litigate the case and the Court granted its motion to reinstate the case a year later. In 2002, with a new Special Master, the case was organized into subproceedings. The first subproceeding was the adjudication of the water rights of Acoma and Laguna Pueblos based on past and present uses. The Pueblos' future rights were to be litigated in a separate later subproceeding.³ Discovery was extensive over the next twelve years with the deposition of over 40 expert witnesses and production of over 30,000 documents.

The history of the tortuous negotiation of this settlement is fully set out elsewhere. Negotiations began in 2014, initially between the Pueblo of Acoma and the State who were joined in short order by the Pueblo of Laguna and then other active participants in the litigation.⁴ In 2016, only after the active parties had reached settlement terms of matters before the Court, the Court stayed litigation to allow the parties to devote their full efforts to negotiation of remaining issues. The result was a local parties settlement agreement finally approved the Pueblos, the State of New Mexico,, the Association of Community Ditches (and each of its member ditches or acequias) in September of 2022.

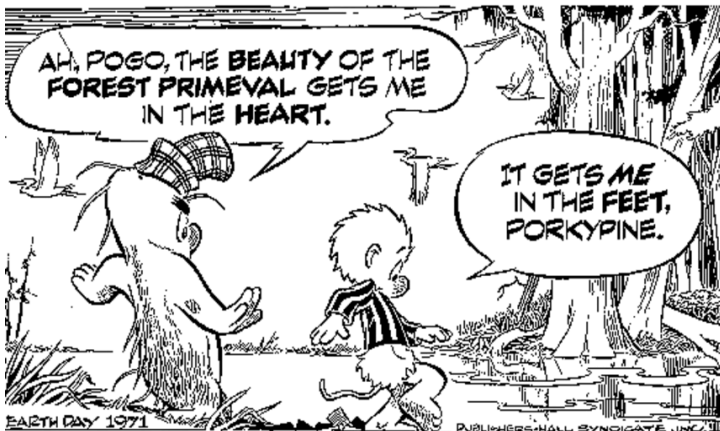
² 2. *New Mexico ex rel. Martinez v. Kerr-McGee Corp.*, 1995-NMCA-041, ¶¶ 1, 7, 120 N.M. 118. cert den'd

³ The Navajo Nation also is a party to the adjudication due to Navajo communities located at the western and eastern extremes of the Basin. That Nation elected not to have their water rights determined in Subproceeding 1, but at a later time.

⁴ See, Hughes, R.W., *Pueblo Indian Water Rights: Charting the Unknown*, 57 Nat. Resources J. 219, 230-236 (2017). Available at: <https://digitalrepository.unm.edu/nrj/vol57/iss1/8>

Shortly thereafter, the settlement legislation was introduced in the House of Representatives (H.R. 8920) and the Senate (S.4898). The Senate Committee on Indian Affairs held a hearing on the bill on November 17, 2022, and up until the end of the 117th Congress there were political maneuverings to attempt to get the bill through the House to the finish line. Unfortunately, those efforts came to naught. In January of 2023, the New Mexico Congressional delegation suggested that the Rio San José and Rio Jemez Settlements be combined into one bill for the 118th Congress. The settlement parties concurred and S. 595 and its companion House bill (H.R. 1304) were introduced on March 1, 2023 with the entire New Mexico delegation as co-sponsors. Title 1 of the Bills is the settlement of the Pueblos' water rights in the Rio San Jose. The bill went to mark-up in the Senate Committee on Indian Affairs on March 29, 2023 and no changes were made. The timing in the House is much more problematic.

I have seen very little progress in actually achieving binding settlements for Pueblos in my 40 years of practice in Pueblo water rights adjudications in New Mexico. For so very long, the State always seemed to see these as a NM vs. Tribes fight over power and control of the water, while the water supply for the entire region was being exhausted.



NOW IT IS A BIT DIFFERENT

AT THE STATE LEVEL –

It still can take forever to get the parties to actually negotiate; the State never actually appropriates the funds necessary to reach settlement, so the state attorneys always are juggling the cases, giving the perhaps unwarranted picture that the State seems more interested in delaying the inevitable, or pouring its limited resources into interstate water battles. For Tribes the incentives to actually reach finality as to the extent of tribal water rights is always daunting; it's easier to just not talk about it. Now though, there is the very harsh reality that water supplies are dwindling; competition for water will only get worse in a region where water is the most precious of natural resources. The result is some refreshing changes. The State appears to be realizing that water management in an age of climate change and dwindling supply supports finalizing tribal water rights. The State Engineer's Office now has resources dedicated to reaching settlements with the Pueblos in New Mexico. The State legislature recently revised its regional water planning statute and explicitly now provides for a tribal advisory group and other changes that require regions to take tribal water rights into consideration for a regional water plan to be approved. Whether there must be an adjudication to negotiate a settlement is now a serious topic of discussion.

- Focus on the Governmental Entity not the particular Basin

The different approach of the State is obvious in the Rio San José settlement. Rather than limiting the water rights to be settled to the Rio San José Basin, this settlement includes Pueblo of Acoma water rights in the Salado Basin south of the Rio San José and Pueblo of Laguna water rights in the Rio Puerco Basin to the east. Neither of these basins is being adjudicated at this time, but that allowed for settlement of all of these Pueblos' water rights, subject to re-negotiation if the basins are ever adjudicated and those rights are challenged.

- Recognition of the Role of Tribes as More Than the Holders of Water Rights

The Rio San José settlement agreement provides for Tribal management and regulation of tribal water rights, subject to limited state court review. It fully anticipates the non-Indian water users participating in those tribal regulatory systems.

AT THE FEDERAL LEVEL

- Movement to Fund-based Settlements.

In the past, every tribal water settlement revolved around a "project", with most to be done by the Bureau of Reclamation, and once selected, Tribes were bound to it. The cost of the project was the justification for a large percentage of the amount of federal funds needed. Now, though, due to several projects costing substantially more than the initial estimates, the federal government now insists that water settlements be "fund-based." That does not mean no more projects, only that the risks of funding now fall on the Tribes and not the United States. For Tribes, this can be daunting, but it can provide

Tribes with a greater degree of flexibility in actually meeting wet water needs. The Rio San José settlement is a case in point. The amount of funding sought will allow the two Pueblos to access the last remaining alternative water supply in the region to meet their senior rights so they can obtain wet water without cutting off junior users who developed water rights under state law. However, the feasibility of that project is not certain, so the Pueblos have several alternative projects that could increase supply to meet at least some of their senior rights if the larger project is ultimately not feasible. While in the past the Tribe would be wedded to just the one or two projects set out in federal legislation, Acoma and Laguna have a degree of flexibility and what the final outcome is, will be of their choosing.

- The Ever Increasing Cost of Water Settlements

While the amount of funding called for in Tribal water settlements has always been a bit staggering because of the projects needed, the reality we face today is that absent significant decreases in the overall rights to a water supply, merely building a project does not solve the problem. Our surface water systems cannot meet existing and future needs. Groundwater is increasingly viewed as the alternative supply, and that raises a host of other issues: First, a groundwater aquifer that is pumped faster than it is recharged is not a renewable water supply; it is a water mine and will need to be replaced as a water source. Second eventually what is the usable water supply from the aquifer is a matter of geology AND economics. As water is depleted, the cost of producing it and treating it for human uses increases significantly. What is usable water will depend on what people are willing to pay to make a water supply usable. Now, factor in two other variables. (1) the situation in the southwestern United States where surface water that was long thought to be recharging aquifers is no longer flowing due to climate change - Little snowpack means little surface water means little recharge; and (2) In the modern world, groundwater supplies are not only dwindling, sometimes those aquifers are contaminated beyond the point of restoration.

Again, the Rio San José is an example, but it is not unique. The surface water flows across Acoma and Laguna Pueblos are the result of groundwater pushed to the surface due to faulting and other geologic conditions. Today over 80% of the flow across the Pueblos originates from the San Andres Glorieta Aquifer. That Aquifer has been significantly depleted over the last century so that the surface flow across the Pueblos is about one tenth of what it was in the early part of the 20th century. At the same time uranium mining and milling in the region has contaminated large portions of the aquifer, with contamination plumes slowly moving toward the Pueblos and their neighbors. Today, what some would call brine, is used as drinking water in the Rio San José for several communities, not just the Pueblos, and future access to that brine is threatened by the contamination plumes. So the costs of the settlement must reflect not only what it may cost to tap a usable supply, but also the cost to treat it, and supply a replacement when the supply inevitably is depleted.