American Indian Law Review

Volume 36 | Number 1

1-1-2011

# Five Tribes' Water Rights: Examining the Aamodt Adjudications' Mechem Doctrine to Predict Tribal Water Rights Litigation Outcomes in Oklahoma

Taylor Henderson

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

 Part of the Indigenous, Indian, and Aboriginal Law Commons, and the Water Law Commons

## Recommended Citation

Taylor Henderson, *Five Tribes' Water Rights: Examining the Aamodt Adjudications' Mechem Doctrine to Predict Tribal Water Rights Litigation Outcomes in Oklahoma*, 36 AM. INDIAN L. REV. 125 (2011), https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

# FIVE TRIBES' WATER RIGHTS: EXAMINING THE *AAMODT* ADJUDICATIONS' MECHEM DOCTRINE TO PREDICT TRIBAL WATER RIGHTS LITIGATION OUTCOMES IN OKLAHOMA

*Taylor Henderson*[*]

## *I. Introduction*

The unique history between the Five Tribes of Oklahoma and the federal government may provide a basis for greater recognition of the Five Tribes' rights in land and natural resources than nearly all Indian tribes whose rights have thus far been adjudicated. Based on a rubric known as the Mechem Doctrine, developed through a general stream adjudication regarding Pueblo water rights, an Indian tribe has water rights superior to those expressed in *Winters v. United States*[1] when it: (1) holds its lands in fee; (2) is protected under the jurisdiction of the federal government, as promised in Congress's enabling acts; and (3) holds rights to water which have never been diminished or abrogated by an act of Congress.[2]

All Oklahoma tribes have a claim at least equal to a *Winters* right, which affords practicably irrigable acreage.[3] In other words, Oklahoma tribes have reserved water rights measured objectively by the acreage of practicably irrigable reservation lands, as opposed to reasonably foreseeable needs.[4] But because of the similar histories between the Five Tribes and the

---

* J.D. 2011, University of Oklahoma College of Law; B.B.A. 2006, University of Oklahoma. First, I would like to thank Professor Taiawagi Helton at the University of Oklahoma College of Law for sharing your love of Native American law and history, and compelling me to develop my own passion in the area. Your encouragement, insight, and guidance in structuring this article proved instrumental to its completion. I also owe much appreciation and praise to Stephen Greetham, University of Oklahoma College of Law Adjunct Faculty Member, Chickasaw Nation's Special Counsel for water and natural resources, and Chief General Counsel to the Chickasaw Nation's Division of Commerce, for sharing his vast knowledge on the *Aamodt* adjudications and cultivating the idea for this article. Finally, I would like to thank my husband, family, and friends, who continuously offer unending support (and sometimes much-needed distractions) when I undertake time-consuming endeavors such as writing this article.

1. 207 U.S. 564 (1908).

2. New Mexico *ex rel.* Reynolds v. Aamodt (*Aamodt II*), 618 F. Supp. 993, 1009 (D.N.M. 1985).

3. *See infra* Part II.B.

4. 2 WATERS AND WATER RIGHTS § 37.01(b)(3) (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) [hereinafter WATERS]; *see also* L. Susan Work, *Tribal Water Rights in Eastern Oklahoma – The Inapplicability of General Principles Concerning State Water*



Published by University of Oklahoma College of Law Digital Commons, 2011

Pueblos, the Five Tribes are in a position to assert rights superior to *Winters* rights – and possibly so much as the full ownership and regulatory control of water resources within their boundaries.[5] Because there are, as yet, no adjudications specifically addressing any of the Five Tribes' water rights, one must look west to similar adjudications to predict what the outcome may be, and, more importantly, to make informed decisions with regards to negotiations and possible litigation.

This article applies the background and analysis of a general stream adjudication involving the Pueblo Indians of New Mexico to water-related issues facing the Five Tribes of Oklahoma. In addition to federal reserved water rights principles, Part II illustrates relevant state water law principles and processes. Part III details the similar histories of the Pueblos and the Five Tribes. Part IV provides a synopsis of the *Aamodt* adjudications, and uses the resulting doctrines to demonstrate the basis for and a theoretical application of the *Aamodt* principles to the current water issues facing the Five Tribes. This article concludes in Part V.

## *II. Relevant Water Law Concepts*

### *A. General Water Law Principles*

Two primary systems govern the distribution of surface water in American jurisprudence: the riparian system and the prior appropriation system.[6] Generally, a state applies one of the two systems to perfect water rights within the respective state.[7] Three exceptions exist, however, in California, Nebraska, and Oklahoma, which adopt a dual-system approach, thereby applying both the riparian and prior appropriation systems simultaneously.[8]

The 100th meridian is a vertical line running through the middle of North Dakota and stretching into Texas, splitting the United States into the East and West,[9] but also splitting the doctrinal jurisdictions vis-à-vis water-related legal regimes.[10] More specifically, with respect to the water rights

---

*Interests*, SOVEREIGNTY SYMPOSIUM XXII 2009 – LAND, WIND AND WATER II-14, II-15 (June 2009), *available at* http://www.itecmembers.org/LinkClick.aspx?fileticket=M0COvunyOjY%3D& tabid=3597&mid=6755.

5. *See infra* Part IV.
6. *See* 1 WATERS, *supra* note 4, § 4.01.
7. *See id.* § 4.05(a).
8. *See id.* § 8.02.
9. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 22 (4th ed. 2009).
10. *Id.* at 5-8, 22.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

system to which a given state adheres, it is generally true that the states east of the 100th meridian (featuring a wet climate) adopt the riparian doctrine, while states west of the 100th meridian (featuring a more arid climate) adopt the prior appropriation doctrine.[11]

For groundwater, states generally apply legal regimes separate from riparianism or prior appropriation.[12] While surface water, rather than groundwater, is the principal focus of this article, it is important to note (for purposes of differentiating the two) that Oklahoma defines groundwater as "fresh water under the surface of the earth regardless of the geologic structure in which it is standing or moving outside the cut bank of any definite stream."[13] Through the application of this definition, one can determine whether a surface water or groundwater rule applies.

*1. Riparianism*

A derivative of European law,[14] the riparian system applies in the eastern states, where water is more abundant and scarcity is not generally at issue.[15] In a riparian system, the right to use water derives from the ownership of land.[16] Only those lands touching or abutting surface water are riparian and thereby capable of perfecting a right in water.[17] The reasonable use of the water for domestic, agricultural, industrial, or natural uses (rather than a temporal priority in the use of the water) defines the nature of one's right.[18] This right to reasonable use is correlative, in that it is subject to the rights of the water source's other riparian users.[19]

*2. Prior Appropriation*

As westward expansion progressed, it became apparent that the riparian system was ill-suited to accommodate the drier states – particularly the riparian system's requirement that land abut the water, an implausible

11. 1 WATERS, *supra* note 4, § 4.05(a).

12. *See id.* § 4.05(c). Because the location of groundwater is mostly unknown, state courts have historically resolved disputes in a context-specific manner and applied one of five legal regimes: common law rule of capture, American reasonable use rule, correlative rights, Restatement (Second) of Torts, or prior appropriation. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 415-19 (4th ed. 2006).

13. 82 OKLA. STAT. § 1020.1 (2011).

14. 1 WATERS, *supra* note 4, § 7.01(a).

15. *See id.* § 8.01.

16. JOHN W. JOHNSON, UNITED STATES WATER LAW: AN INTRODUCTION 36 (2009).

17. 1 WATERS, *supra* note 4, § 7.02(a).

18. *Id.* § 7.02(b)-(d).

19. *Id.* § 7.01.

Published by University of Oklahoma College of Law Digital Commons, 2011

constraint for an arid climate requiring the off-tract use of water.[20] Moreover, a majority of the lands in the West were owned by the federal government and could not easily be purchased to acquire riparian water rights.[21]

Because of these practical challenges, the prior appropriation doctrine was developed, requiring two elements to obtain an appropriation in water: first, "diversion of water from a natural source," and second, "intent to apply water to a beneficial use."[22] The first element is often described as the "first in time, first in right" rule: that is, "[t]he person who is first in time to appropriate water is the first in right,"[23] protecting the user against later appropriators of the same water source.[24] The second element is often described as the "use it or lose it" rule, validating the right to continue appropriation for so long as the beneficial use continues.[25]

When the federal government disposes of land in a prior appropriations state, the water rights are not conveyed to the purchaser. Rather, the water rights are left to the respective state within which the water is located, and thus a permit system is used to perfect or allocate water rights for private use.[26]

*3. Dual System*

States along the 100th meridian, whose climate features an abundance (or at least a significant amount) of water in the East but a more arid and dry climate in the West, use both the riparian and prior appropriation systems to accommodate the varying needs within the state.[27] For the same reasons, the states along the West Coast also adopt the dual-system approach.[28]

With the exception of California (which initially adopted the dual system), the dual-system states first applied the riparian doctrine but then later adopted the prior appropriation doctrine as well.[29] In most dual-system states, the riparian rights established before the prior appropriation system's adoption are essentially granted a priority in front of the later prior

20. *Id.* §§ 8.01, 11.01.
21. GETCHES, *supra* note 9, at 81.
22. *See id.* at 77 (emphasis omitted).
23. 1 WATERS, *supra* note 4, § 12.01.
24. GETCHES, *supra* note 9, at 81.
25. JOHNSON, *supra* note 16, at 45.
26. *See* GETCHES, *supra* note 9, at 148-60.
27. *See id.* at 205.
28. *Id.*
29. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

appropriations.[30] But in California, Nebraska, and Oklahoma, riparians can perfect new rights among the prior appropriators – even jumping their priority in line.[31]

*B. Reserved Water Rights*

Residual public domain lands, as well as lands reserved from disposition or set aside by the federal government for a particular purpose are not generally subject to state-adopted water law systems.[32] Instead, these lands are subject to the reserved rights doctrine.[33]

Water rights disputes involving Indian tribes usually revolve around the tribe's reserved rights to water – that is, rights reserved by or for tribes in the treaties, agreements, and other instruments that ceded aboriginal lands and/or created reservations.[34] In *Winters v. United States*, the Supreme Court held that, even without express language, an 1888 congressional agreement (whereby the tribe ceded a large tract of land for a smaller reservation) impliedly carried with it tribal rights to water.[35]

More specifically, the Court held that the government's reservation of land for the Fort Belknap Tribe reserved with it the right to water from the Milk River for three reasons. First, the Court examined the reasoning surrounding the Tribe's cession of a large tract of land in exchange for a smaller one.[36] According to the Court, the government's policy was to change the Indians from nomadic and uncivilized people to pastoral and civilized people.[37] The original large tract of land was too vast to achieve

30. *See id.* at 205-06.

31. *Id.* A riparian's ability to perfect new rights in front of a prior appropriator's rights may prove irrelevant, however, in an analysis of Indian water rights. Because Indian water rights are based in federal law, they would not be subject to a state law doctrine pursuant to the Supremacy Clause. For an in-depth discussion of the complexities this form of dual system creates vis-à-vis Indian Country, see Taiawagi Helton, Comment, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979 (1998).

32. GETCHES, *supra* note 9, at 332.

33. *Id.*

34. JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 396-401 (2002).

35. 207 U.S. 564, 577-78 (1908).

36. *Id.* at 576.

37. *Id.* The federal government's policy regarding tribes has vacillated since the time of European conquest, shifting variably from separation to assimilation. At the time that the Supreme Court decided *Winters*, federal sentiment favored allotment and assimilation, stimulated in large part by the General Allotment Act, Ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (2006)). *See* Katheleen R. Guzman, *Give or Take an Acre: Property Norms and the Indian Land*

Published by University of Oklahoma College of Law Digital Commons, 2011

this goal, and thus a smaller tract was required. But without irrigation, the smaller tract was arid and practically valueless for the intended purpose.[38] For this reason, the Court inferred that the agreement impliedly reserved water from the nearby Milk River along with the land, notwithstanding a lack of express declaration.

Second, the canons of construction[39] reinforce the Court's conclusion that the parties must have intended to include the water with the reservation of land. Referencing one of the canons, the Court wrote that "ambiguities occurring will be resolved from the standpoint of the Indians."[40] Accordingly, even if Congress had no intention to reserve the water rights, where there lacks clear and express language, the interpretation will be construed in favor of the Indians. Because it was in the best interests of the Indians, the *Winters* Court interpreted the agreement to the effect that water rights were reserved.

Last, the *Winters* Court noted that the original, larger reservation contained the Milk River to begin with, and that the Indians relied upon and "had command" of it for their beneficial use.[41] To give up this command would again leave the land valueless, begging the question whether this was an agreement with Congress or a forced cession of land with no benefit to the tribe. The Court reasoned that the Indians surely did not "give up all

---

*Consolidation Act*, 85 IOWA L. REV. 595, 597 (2000) ("In 1887, Congress passed the General Allotment Act to privatize Indian reservations and advance the assimilationist sentiment of the day. The Act divested land from tribes to their members, each of whom received a tract of land on a wing and a prayer: become an autonomous Christian agrarian. With various goals (benign and otherwise) in mind, the Act's proponents envisioned its transformative ability to supplant communitarian tribal norms with the classical liberal virtues of self-sufficiency, individuality and private ownership."). For an overview of the various policy eras, see Benjamin W. Thompson, *The De Facto Termination of Alaska Native Sovereignty: An Anomaly in an Era of Self-Determination*, 24 AM. INDIAN L. REV. 421, 435-38 (1999-2000) (noting that federal Indian policy shifted from the early trade and intercourse era, to removal, to allotment and assimilation, to termination, and finally, to modern-era self-determination).

38. *Winters*, 207 U.S. at 576.

39. Courts have long recognized that the unique trust relationship between the United States and the Indians requires a specific set of rules when interpreting treaties. Specifically, courts have articulated the canons to provide that absent explicit statutory language, Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979), treaties are to be construed liberally in favor of the Indians, Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943), with ambiguous provisions interpreted to their benefit, *Winters*, 207 U.S. at 576-77.

40. *Winters*, 207 U.S. at 576.

41. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

this," nor were they "awed by the power of the Government or deceived by its negotiators."[42]

*Winters* considered reserved water rights implied from the creation of reservations for the purpose of *new* uses. Likewise, the Supreme Court in *United States v. Winans*[43] recognized similar water rights reservations for *existing* uses (such as fishing), known as aboriginal rights.[44] In *Winans*, the Court reasoned that rights not expressly stated in the treaty remain with the tribe. "In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted."[45]

Courts use the *Winans* and *Winters* decisions to distinguish whether water rights are "reserved" or "aboriginal" at the time of the treaty's establishment.[46] But both doctrines recognize water rights in an Indian tribe. The distinction lies in whether the purpose of the reservation was for new or existing rights.[47] For example, in *Winans*, the purpose for the reservation of rights was to maintain hunting and fishing rights, two activities practiced by the tribe for many years.[48] In contrast, in *Winters*, the reservation of rights was for the purpose of establishing a new right – rights in irrigation and farming.[49] The distinction between reserved and aboriginal rights is important for quantification and basis-of-law issues in the *Aamodt* adjudications, as well as all general stream adjudications involving Indian tribes.[50]

---

42. *Id.*

43. 198 U.S. 371 (1905).

44. *Id.* at 381.

45. *Id.*

46. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1172-73 (Nell Jessup Newton et al. eds., LexisNexis 2005) [hereinafter COHEN].

47. *See id.*

48. *Id.*

49. *Id.*

50. *See generally* Paul Bossert et al., *Rio Jemez Background Papers on the Adjudication Proceeding and Water Rights Issues*, UTTON TRANSBOUNDARY RESOURCES CTR., UNIV. OF N.M. SCH. OF LAW (Fall 2004), http://uttoncenter.unm.edu/pdfs/Rio_Jemez_Background_Papers.pdf. A stream system adjudication is the judicial determination of the quantity and priority of all individual water rights to a common source of water. *Id.* at 1. Once a stream adjudication suit is filed, either by a private party or the state, the court joins all known claimants and those who can be reasonably ascertained. *See id.* The adjudicating court has exclusive jurisdiction to hear and determine all questions of all rights within the entire stream system. Upon completion of the trial, the court issues a decree, which declares the following things for each water right adjudged to each party: priority, amount, purpose, periods and place of use, and, in irrigation contexts, specific tracts of land to which the right shall be appurtenant. *See id.* at 6-7.

Published by University of Oklahoma College of Law Digital Commons, 2011

## *III. A History and Comparison of the Pueblos and the Five Tribes*

### *A. The Pueblos*

Archeological evidence of the Pueblos[51] in what is today known as the Four Corners area (New Mexico, Utah, Colorado, and Arizona) dates back to 10,000 B.C.[52] In the thirteenth century, on account of drought, erosion, and famine, the Pueblos migrated to an area with more stable water supplies – the Rio Grande Valley of New Mexico.[53]

Artifacts dating back to this time provide evidence of the Pueblos existence as a stationary, highly adaptive tribe, dependent on irrigated agriculture as the lifeblood of village economic activity.[54] The Pueblos' storied history as a tribe living off the land, as well as their encounters with the Spanish, Mexican, and American governments beginning in the sixteenth century, defined and shaped their unique legal history into what it is today.

#### *1. Spanish Rule over the Pueblos*

In the early sixteenth century, members of the Zuni Pueblo Tribe came upon four men – all notably dissimilar in complexion from the Pueblos – wandering through their lands.[55] The men had wandered from the Gulf of Mexico for eight years after being the only survivors of a sunken Spanish vessel.[56] This encounter was the first interaction between the Pueblos and the Spanish.[57]

The foreigners eventually made their way back to colonized Mexico, telling the Spanish Viceroy of their journey and the splendor they discovered.[58] These tales ultimately inspired Francisco Coronado's 1540 expedition for the Seven Cities of Gold.[59] Ravaging through the Pueblo lands for riches, he and his soldiers waged violence against those who

---

51. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 27, 162 (1989) (explaining that "Pueblos" derived from the word "villages" and represents what we know today as the Pueblo Indians of New Mexico).

52. JOE S. SANDO, THE PUEBLO INDIANS XIII (1976); CHARLES R. CUTTER, THE PROTECTOR DE INDIOS IN COLONIAL NEW MEXICO, 1659-1821, at 22 (1986).

53. CUTTER, *supra* note 52, at 22.

54. *Id.* at 22-23.

55. O'BRIEN, *supra* note 51, at 163.

56. *Id.*

57. SANDO, *supra* note 52, at 41-46.

58. O'BRIEN, *supra* note 51, at 163-64.

59. *Id.* at 164.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

resisted their occupation.[60] With the expedition a disappointment, Coronado and his soldiers departed from the Pueblo lands and returned to Mexico empty-handed.[61]

It was not until the very late sixteenth century that Spanish rule over the Pueblos began. In 1598, Juan de Onate led a group of colonists from Mexico into the Pueblo lands, claiming 150,000 acres in the name of Spain.[62] The Spanish forced the Pueblos to adopt Catholicism, as well as a system of Spanish laws. By protecting the Pueblo landholdings, the Spanish legal system distinguished the stationary Pueblos from that of the nomadic Apaches and Navajos.[63] The Spanish "viewed the Pueblos as wards of the Spanish Crown, restricted sales of their lands, forbade non-Indian settlement on Pueblo lands, and provided legal assistance."[64] Moreover, Spanish statutory laws provided that Indians had prior rights to all streams, rivers, and other waters that crossed or bordered their lands.[65]

Despite Spain's protection and recognition of the Pueblos' property rights, Spanish encroachment (which continued until 1821) proved devastating to the Pueblos. Overgrazing of Spanish livestock resulted in soil erosion, water shortages, and lack of food.[66] Moreover, "[a]ny Pueblo resistance to Spanish rule was met with brutal repression."[67] In one such retaliation, "Spanish soldiers burned the pueblo, executed a large number of men, and amputated one foot of all survivors."[68] Village raids instigated by the Apaches and Navajos further compounded the strife between the Pueblos and the Spanish government. Ultimately, the Pueblos' population dwindled from approximately 60,000 prior to Coronado's expedition to a mere 10,000 by 1821.[69]

*2. Mexican Rule over the Pueblos*

"In 1821, Mexico won its independence from Spain."[70] Mexico's "revolutionary government . . . declared that 'all the inhabitants of New

60. *Id.*
61. *Id.* at 164-65.
62. *Id.* at 164.
63. *See* COHEN, *supra* note 46, at 320; CHARLES T. DUMARS ET AL., PUEBLO INDIAN WATER RIGHTS: STRUGGLE FOR A PRECIOUS RESOURCE 17-23 (1984).
64. *See* COHEN, *supra* note 46, at 320-21; DUMARS ET AL., *supra* note 63, at 17-23.
65. *See* DUMARS ET AL., *supra* note 63, at 23.
66. O'BRIEN, *supra* note 51, at 164-65.
67. *Id.*
68. *Id.*
69. *Id.*
70. COHEN, *supra* note 46, at 321.

Published by University of Oklahoma College of Law Digital Commons, 2011

Spain . . . are citizens of this monarchy,' and that 'the person and property of every citizen will be respected and protected by the government.'"[71] Mexico's law recognizing Pueblo land rights was similar to that of Spain, including Mexico's prohibition of non-Indian settlement on Pueblo lands. The recognition of the Pueblos' prior rights in the water thus remained.

With respect to strife and intrusion, the time during which Mexico ruled the Pueblos could be characterized as uneventful, paling in comparison to Spain. "In 1846, the United States took possession of New Mexico during the war with Mexico and established a territorial government,"[72] thereby ending Mexico's rule over the Pueblos.

*3. The Treaty of Guadalupe Hidalgo & the Trade and Intercourse Act*

In 1848, under the Treaty of Guadalupe Hidalgo, New Mexico residents were given the choice to retain their Mexican citizenship by declaring their intention to do so within a year from the date of exchange of ratifications. "[T]hose who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States."[73] The people were immediately given "free enjoyment of their liberty and property."[74] Because Mexico had recognized Pueblo Indians as citizens in 1821 and because Mexican citizens now had the opportunity to be United States citizens, it follows that those Pueblos who remained in their territory thereby became United States citizens. "Not a single Pueblo Indian elected to retain Mexican citizenship."[75]

This transfer of citizenship created a host of questions regarding whether the Pueblos retained their status as Indians, as well as their rights to protection by the United States. In 1851, Congress extended the Trade and Intercourse Act[76] over the Indian tribes of New Mexico, which protected them against trespass and prohibited settlers from entering or settling on Indian lands.[77] But in 1869, a New Mexico territorial court rendered a

71. *Id.* (citing United States v. Ritchie, 58 U.S. 525, 538 (1855); Territory v. Delinquent Taxpayers, 76 P. 307, 308 (N.M. 1904)).

72. *Id.*

73. SANDO, *supra* note 52, at 71 (internal quotation marks omitted).

74. *Id.* at 72 (internal quotation marks omitted).

75. *Id.* at 71.

76. Trade and Intercourse Act, ch. 161, 4 Stat. 729 (1834) (codified as amended at 25 U.S.C. § 177 (2006)). The Trade and Intercourse Act is also commonly referred to as the Non-Intercourse Act. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 14 (5th ed. 2009).

77. *See* CANBY, JR., *supra* note 76, at 14.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

decision that would deprive the Pueblo Indians of the Trade and Intercourse Act's protections.[78] The court found the Pueblos different from the "wild, wandering savages" Congress intended the Act to protect.[79] Rather, the Pueblos were "the most law-abiding, sober, and industrious people of New Mexico."[80]

Through various acts, Congress consistently tried to afford Pueblos the same judicial protections as other tribes.[81] But in *United States v. Joseph*,[82] the U.S. Supreme Court upheld the territorial court's decision that the Pueblos were exempt from the Trade and Intercourse Act.[83] Following these decisions, "non-Indians acquired Pueblo land holdings through sale, adverse possession, delinquent taxes, and other methods."[84]

In retaliation to these decisions, Congress passed the Enabling Act in 1910. The Enabling Act granted New Mexico statehood, but only under the conditions that the State prohibit the introduction of liquor into Indian Country and that it require citizens of the state to disclaim title to lands owned or held by Indians or Indian tribes.[85] Additionally, Congress defined the terms "Indian" and "Indian Country" to include the Pueblo Indians of New Mexico and the lands they owned or occupied.[86] And, in *United States v. Sandoval*,[87] "the Supreme Court upheld Congress's decision in the Enabling Act to include the Pueblos as Indians under federal control."[88] Moreover, "[t]he Court also noted that the Constitution expressly authorizes Congress to regulate commerce with the Indian tribes," and that "the United States has the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders."[89]

*4. Pueblo Lands Act 1924 and Pueblo Compensation Act 1933*

Following the Enabling Act and the *Sandoval* decision, Congress responded with the Pueblo Lands Act of 1924, attempting to compensate

78. SANDO, *supra* note 52, at 73.
79. *Id.*
80. *Id.* at 72 (discussing United States v. Lucero, 1 N.M. 422 (1869)).
81. *See* CANBY, JR., *supra* note 76, at 14.
82. 94 U.S. 614 (1876).
83. *Id.* at 617-18.
84. COHEN, *supra* note 46, at 324.
85. New Mexico Enabling Act, ch. 310, § 2, 36 Stat. 557, 558 (1910); COHEN, *supra* note 46, at 324-25.
86. New Mexico Enabling Act § 2, 36 Stat. at 560; COHEN, *supra* note 46, at 324-25.
87. 231 U.S. 28 (1913).
88. COHEN, *supra* note 46, at 325.
89. *Id.* (internal quotation marks omitted).

Published by University of Oklahoma College of Law Digital Commons, 2011

the Pueblos with "the fair market value of the lost land and water rights" for the period between 1848 (when the United States took control of New Mexico) and 1910 (when the Enabling Act recognized Pueblos as Indians deserving protection).[90] But the board established for processing this compensation did not believe that the Pueblos had lost water rights to lands acquired by non-Indians, and only compensated the Pueblos for one-third of the fair market value.[91]

"In 1933, Congress enacted the Pueblo Compensation Act . . . raising the level of compensation to full fair market value" to make up for the other two-thirds not previously compensated.[92] Additionally, the Act stipulated that "Pueblo water rights cannot be lost by non use or abandonment . . . as long as title to said lands shall remain in the Indians."[93] Therefore, the "use it or lose it" element ordinarily applied under the prior appropriation doctrine would not apply in this case, or theoretically, in any case where Indian lands were purchased or somehow divested.

*B. Five Tribes' History*

The following discussion details the Five Tribes' history, their removal to Indian Territory, and the allotment of their lands, as well as the details surrounding Oklahoma's admission as a state as it applies to the Five Tribes and their water rights. All of these factors taken as a whole fit within the rubric set by the *Aamodt* court to give the Five Tribes water rights amounting to something greater than a *Winters* right.

The following sentences establish the rubric set forth in the *Aamodt* adjudications. First, the tribes retained their lands in fee simple through the removal treaties. Second, both the tribes and the United States intended that the reserved lands would never be subject to any state or territorial organized government.[94] Third, no event since the tribes' removal to the Indian Territory changed these rights with regards to water.[95] As the following sections establish, the Five Tribes' historical land tenure fits seamlessly within this rubric.

90. *Id.* at 331.
91. *Id.* at 332.
92. *Id.* (citing Pueblo Compensation Act, ch. 45, 48 Stat. 108 (1933)).
93. *Id.* (internal quotation marks omitted).
94. *Id.*
95. *See* Helton, *supra* note 31, at 995.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

*1. Andrew Jackson's Removal Policy and the Resulting Removal Treaties with the Five Tribes*

The Five Tribes of Oklahoma, whose lands today comprise the eastern portions of Oklahoma, originally occupied portions of Mississippi, Florida, Georgia, and Alabama.[96] It was President Jackson's forceful policy to remove the Choctaw Indians from Mississippi that marked the beginning of the Five Tribes' removal from the southeastern parts of the United States to the Indian Territory, or what is today known as Oklahoma.[97]

In 1828, the year of Andrew Jackson's presidential election, an estimated 23,400 Indians remained in Mississippi – "almost as many Indians as all states of the North combined."[98] If the federal government were able to relocate the Indians, "Mississippi – because of its superior cotton lands – could become one of the greatest and richest states in the country."[99] Ignoring Supreme Court decisions recognizing Indian tribes as "domestic dependent nations" and wards of the federal government,[100] President Jackson affirmed the removal policy on December 8, 1829, in his inaugural message to Congress. Jackson's removal policy declared that if the Choctaws wished to retain their tribal lands and identity, they must accept lands west of the Mississippi river in exchange for their current lands in Mississippi.[101] A "voluntary" move west of the Mississippi River would allow the Choctaws to remain "free of white men."[102] Remaining east of the Mississippi River, however, meant becoming subject to the laws of the United States.[103]

Hopes of removing the Choctaws from Mississippi began long before President Jackson's inauguration. In 1801, the Choctaws signed the first

96. GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 21, 107, 229, 315 (1972); *see also* COHEN, *supra* note 46, at 294-95.

97. *See* ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 117 (1970).

98. ARTHUR H. DEROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS 100 (1st ed. 1970).

99. *Id.*

100. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (recognizing the tribes as "domestic dependent nations" and affirming the existence of a guardian/ward relationship between the tribes and the federal government); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (concluding that the State of Georgia had no authority within Cherokee territory).

101. DEROSIER, JR., *supra* note 98, at 100-04.

102. *Id.* at 104.

103. *See id.*

Published by University of Oklahoma College of Law Digital Commons, 2011

treaty dispossessing them of portions of their Mississippi lands.[104] Through a series of treaties (ending in 1830 with the Treaty of Dancing Rabbit Creek), the Choctaws were entirely dispossessed of their homeland, consisting of more than 23 million acres, and removed west of the Mississippi River to lands consisting of only 13 million acres.[105] That final and most fateful treaty did not come without extensive negotiations. Although they lacked much in the way of bargaining power, the Choctaws did not agree to the treaty until it included provisions conveying the new lands in fee simple, guaranteeing that the United States would never possess the new lands, and affirming that the Choctaws would not be subject to state laws.[106] After signing the Treaty of Dancing Rabbit Creek and "more than thirty years of negotiations, the Choctaws had been persuaded to relinquish their precious homeland and emigrate to a new Indian territory in the west."[107]

In keeping with the policy of complete Indian removal, the United States negotiated with the Creek Tribe to trade its lands in Alabama for lands west of the Mississippi River. The negotiators assured the Creeks that removal was the only way to escape the atrocities inflicted upon them by the white settlers trying to appropriate their homelands.[108] For fear of continued

---

104. VALERIE LAMBERT, CHOCTAW NATION: A STORY OF AMERICAN INDIAN RESURGENCE 39 (2007).

105. *Id.*; *see also* DEROSIER, JR., *supra* note 98, at 29.

106. *See* DEROSIER, JR., *supra* note 98, at 121-25; FOREMAN, *supra* note 96, at 29. Specifically, Article IV of the treaty provided:

> The government and people of the United States, are hereby obliged to secure to the said Choctaw nation of red people the jurisdiction and government of all the persons and property that may be within their limits West, so that no state or territory shall ever have a right to pass laws for the government of the Choctaw nation of red people and their descendents: and that no part of the land granted them shall ever be embraced in any territory or state, but the United States shall forever secure said Choctaw nation from and against all laws, except such as from time to time may be enacted in their national councils, not inconsistent with the constitution, treaties and laws of the United States; and except as may and which have been enacted by Congress to the extent that Congress under the constitution are required to exercise a legislation over Indian affairs. But the Choctaws, should this treaty be ratified, express a wish that Congress may grant to the Choctaws the rights of punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations.

Treaty with the Choctaws of 1830, art. 4, 7 Stat. 333, 333-34 (Treaty of Dancing Rabbit Creek).

107. DEROSIER, JR., *supra* note 98, at 128.

108. FOREMAN, *supra* note 96, at 107-08.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

murders, robberies, and frauds, the Creeks signed the Treaty of 1832, sacrificing their homeland in exchange for a promised safer existence in the Indian Territory.[109] Like the Choctaws' removal treaty, the Creeks' treaty also included provisions ensuring that the new lands be vested in fee simple, as well as freedom from state interference.[110]

President Jackson's forced removal policy "resulted in several years of war with the Seminoles in Florida."[111] Although the removal treaty with the Seminoles was signed in 1832, the forced removal to Indian Territory did not actually begin until 1839 because of the war.[112] But it was not until 1856 that the Seminoles owned their own lands.[113] In the meantime, they were forced to settle among the Creeks.[114] The 1856 Treaty between the Seminoles, Creeks, and United States (whereby the Creeks ceded a portion of their lands to the Seminoles) carried with it a provision similar to the treaties with the other Five Tribes, forever exempting the territory from cession by way of treaty without the consent of the ceding tribe.[115]

Despite the Supreme Court's decision in *Cherokee Nation v. Georgia* and *Worcester v. Georgia* describing the tribes as semi-sovereign nations free from the rule of Georgia or the United States,[116] President Jackson imposed his removal policy upon the Georgia Cherokees as well.[117] The

---

109. *Id.* at 111.

110. *Id.* ("The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and cause a patent or grant to be executed to the Creek tribe for their land.") (citation omitted) (internal quotation marks omitted).

111. L. SUSAN WORK, THE SEMINOLE NATION OF OKLAHOMA: A LEGAL HISTORY 3 (2010).

112. *Id.* at 8-9.

113. *Id.* at 9.

114. *Id.*

115. Treaty with the Creeks and Seminoles of 1856, art. 4, 11 Stat. 699, 700 ("The United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.").

116. *See generally* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

117. In response to the Court's decision in *Worcester v. Georgia*, President Jackson reportedly remarked, "John Marshall has made his decision; now let him enforce it!" *See*

Published by University of Oklahoma College of Law Digital Commons, 2011

Cherokees signed the Treaty of 1835, agreeing to cede their lands and remove west of the Mississippi River. The federal government again allowed a provision prohibiting future encroachment by any state or territory.[118]

In 1832, a treaty was signed (although never ratified) between the Chickasaws and the United States. The treaty called for the Chickasaws to cede their lands in Alabama and Mississippi in exchange for portions of the Choctaws' lands in the Indian Territory.[119] Because the Choctaws refused to sell their lands and the Chickasaws refused to live on the lands as cotenants, negotiations between the two stalled the Chickasaws' removal.[120] But in 1837, through the Treaty at Doaksville, the Chickasaws, Choctaws, and United States reached an agreement whereby the Chickasaws purchased land from the Choctaws comprising the western portions of their territory.[121] It was through this treaty that the Chickasaws were removed to lands west of the Mississippi River. And as with the treaties of the other Five Tribes, the treaty promised that the Chickasaws' lands would never become subject to another territory or state.[122] The treaty provided that the new Chickasaw land was "to be held on the same terms that the Choctaws now hold it."[123]

*2. The Allotment Period*

In 1871, the United States ended its policy of making treaties with tribes.[124] But westward expansion by white settlers still required the United States to reduce tribal landholdings.[125] The policy for the acquisition of Indian lands then became "civilization and assimilation," to be accomplished through the allotment acts.[126] The goals of allotment and assimilation were two-fold: first, to civilize the Indians by forcing them to

---

Matthew L. Sundquist, Worcester v. Georgia: *A Breakdown in the Separation of Powers*, 35 AM. INDIAN L. REV. 239, 246 n.65 (2010-2011).

118. Treaty with the Cherokees of 1835, art. 5, 7 Stat. 478, 481 ("The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory.").

119. FOREMAN, *supra* note 96, at 196-97.

120. *Id.* at 200.

121. *Id.* at 203.

122. *See* Treaty with the Choctaw and Chickasaw of 1837, art. 1, 11 Stat. 573, 573.

123. *Id.*

124. COHEN, *supra* note 46, at 75.

125. *See id.* at 76.

126. *Id.* at 77 (internal quotation marks omitted).

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

adopt American lifeways (including farming on smaller plots of land), and second, to sell the surplus lands no longer "needed" to white settlers.[127] Through the Dawes Severalty Act of 1887 (often referred to as the General Allotment Act), Indian reservations were parceled into tracts to be divided among tribal members.[128] The lands would be distributed as follows: "160-acre tracts to heads of families, 80 acres to unmarried adults, and 40 acres to children."[129] The government would then purchase any remaining lands from the tribes for homesteaders.[130]

The Dawes Act applied only to those lands held in trust, or owned by the federal government.[131] Thus, the lands of the Five Tribes were not allotted under the Act because they held their lands in fee pursuant to their respective removal treaties.[132] To remedy the government's inability to allot the Five Tribes' land, Congress established the Dawes Commission in an effort to negotiate with the tribes.[133] In 1898, after an unsuccessful five years of negotiations, Congress passed the Curtis Act, which threatened the Five Tribes with "forced allotment and termination of tribal judicial authority and land ownership, unless the Tribe agreed to allotment."[134] The Five Tribes then entered into separate agreements allowing individual allotments, and the liquidation of their territories began.[135]

As opposed to the government deeding the allotments to the individual allottees under the Dawes Act, the Five Tribes deeded the lands directly to the allottees.[136] Thus, the "Five Tribes' land ownership was not placed in the United States and their lands did not become part of the public domain, before or during the allotment process."[137] Therefore, when the State of Oklahoma entered the Union, it did not receive any grant of ownership over these lands because the United States did not have any ownership to transfer to it.[138] Because allotment of the Five Tribes' lands did not give the United States or the State of Oklahoma ownership of the Five Tribes'

127. *Id.*

128. ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 23 (paperback ed. 1984).

129. *Id.*

130. *See id.*

131. *See* Work, *supra* note 4, at II-25.

132. *See id.* at II-23 to 25.

133. *Id.* at II-25.

134. *Id.*

135. *See generally* DEBO, *supra* note 128, at 23-60.

136. Work, *supra* note 4, at II-25 to 26.

137. *Id.*

138. *See id.* at II-26.

Published by University of Oklahoma College of Law Digital Commons, 2011

lands, it stands to reason that allotment of the Five Tribes' lands similarly did not constitute a transfer of water rights to the United States or the State of Oklahoma.[139] Along with the lack of implied transfer, there is no express statement "in the allotment agreements relinquishing their water rights to the future state."[140]

*3. Oklahoma Becomes a Territory*

*a) The Organic Act of 1890*

Until the Oklahoma Organic Act's 1890 enactment, the Indian Territory to which the tribes were removed was never a part of an organized territory of the United States.[141] Pursuant to the Organic Act, lands from the western portion of the Indian Territory were taken to form the Oklahoma Territory with a territorial government of its own.[142] But the eastern portion of Indian Territory remained land of the Five Tribes. The eastern land was not encompassed by the new Oklahoma Territory government, but instead by the tribal governments.[143]

*b) The Oklahoma Enabling Act and the Oklahoma Constitution*

In 1906, Congress passed the Oklahoma Enabling Act to admit the people of Oklahoma and the Indian Territory into the Union and to form a constitution and a state government.[144] Admitted to the Union in November 1907, "[t]he newly formed state was compelled to disclaim all right and title to Indian lands, [] and the federal government expressly retained its exclusive authority over Indian matters."[145] By prohibiting constructions of the Constitution that could "limit or impair the [unextinguished] rights of person or property pertaining to the Indians" of the newly formed territory, the government was "careful to preserve the authority" that it had "over the Indians [and] their lands . . . prior to the passage of the act."[146] Therefore, it cannot be said that it was the federal government's intention that Oklahoma would receive any rights in natural resources from the tribes or the United States in entering the Union. This principle was affirmed in *Choctaw*

139. *Id.* at II-25 to 26.
140. *Id.* at II-25.
141. *Id.* at II-24.
142. *Id.*
143. *Id.* at II-24 to 25.
144. Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906).
145. Helton, *supra* note 31, at 992-93 (internal quotation marks omitted).
146. Work, *supra* note 4, at II-28 (citing Tiger v. W. Inv. Co., 221 U.S. 286, 309 (1911)).

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

*Nation v. Oklahoma*,[147] in which the Court held that upon Oklahoma's entry into the Union, the United States did not have title to convey to the beds of the Arkansas River.[148] Rather, title was previously conveyed to the tribes through treaties with the United States.[149]

As Part IV details, based on a comparison to the previously adjudicated Pueblo water rights and the application of the resulting rubric known as the Mechem Doctrine, the special historical beginnings the Choctaws' and Chickasaws' Oklahoma landholdings through unusual treaties and land grants may provide for a greater recognition of their rights in water. While never applied beyond the *Aamodt* adjudications, the application of the Mechem Doctrine theoretically requires a tribe to: (1) hold its lands in fee; (2) be protected under the jurisdiction of the federal government, as promised in Congress's enabling acts; and (3) hold rights to water which have never been diminished or abrogated by an act of Congress. Rather than being held in trust by the federal government, the Five Tribes were granted their lands in fee simple. Because that grant of land carried with it rights in water which appear never to have been limited or diminished, an application of the Mechem Doctrine may prove insightful to any inquiry into or adjudication of the Five Tribes' water rights.

## *IV. The* Aamodt *Adjudications: A Synopsis and an Application to the Five Tribes' Disputes*

### *A. The* Aamodt *Adjudications*

#### *1. The San Juan Chama Project: The Source of the Dispute Between the Pueblos and the State of New Mexico*

The Pojoaque Creek watershed, a tributary to the Rio Grande, includes the Nambe, Pojoaque, San Ildefonso, and Tesuque Pueblos. The watershed lies between the Rio Grande on the west and Sangre de Cristo Mountains on the east.[150]

Pursuant to the 1956 Colorado Storage Act, the Secretary of the Interior was

> authorized to construct, operate, and maintain the initial stage of the San Juan-Chama project . . . for the principal purposes of furnishing water supplies to approximately thirty-nine thousand

147. 397 U.S. 620 (1970).
148. *Id.* at 635.
149. *Id.*
150. *Aamodt II*, 618 F. Supp. 993, 995 (D.N.M. 1985).

Published by University of Oklahoma College of Law Digital Commons, 2011

> three hundred acres of land in the Cerro, Taos, Llano, and Pojoaque tributary irrigation units in the Rio Grande Basin . . . for municipal, domestic, and industrial uses, and providing recreation and fish and wildlife benefits.[151]

The units would receive their proposed new water by diversion from the Rio Grande through the use of dams, diversions, canals, etc.[152] The majority of the diverted water would be allocated to municipalities, such as Albuquerque and Santa Fe, among others.[153]

To properly account for and distribute the water, the State Engineer's Office, in accordance with New Mexico Water Code, began inventories and adjudications of existing water supplies and water rights in each of the tributary watersheds.[154] "All except the project in the Rio Pojoaque Basin were dropped because of local opposition or other factors."[155] Subsequently, "[t]he Nambe Falls Dam was built in the upper part of that watershed, and its storage reservoir now provides supplemental irrigation water to the Pojoaque Valley Irrigation District and the pueblos of San Ildefonso, Nambe and Pojoaque."[156] This accounting and adjudication of water rights would ultimately lead to the *Aamodt* litigation.[157]

The San Juan-Chama Diversion project in New Mexico during the early 1960s proposed that water imported into the Rio Grande Basin be made available to several separate watershed areas that feed into the Rio Grande, including the Pojoaque River Basin.[158] For proper distribution and accounting, the State Engineer's Office initiated water rights adjudications.[159] This led to the State Attorney General's 1966 court filing "for determination of rights to the use of the water of the Nambe-Pojoaque River System."[160] Filing in accordance with the New Mexico water adjudication statute,[161] the State named as defendants: the United States, as

---

151. San Juan-Chama Reclamation Project of 1962, Pub. L. No. 87-483, § 8, 76 Stat. 96, 97-98.

152. *Id.* at 98.

153. *See Aamodt Adjudication*, UTTON TRANSBOUNDARY RESOURCES CTR., UNIV. OF N.M. SCH. OF LAW, 1 (Dec. 2010), http://uttoncenter.unm.edu/pdfs/WM_Aamodt.pdf [hereinafter *Aamodt Adjudication* (Dec. 2010)].

154. *Id.* at 2.

155. *Id.* at 1-2.

156. *Id.* at 2.

157. *See id.* at 3.

158. *Id.* at 1.

159. *Id.* at 2.

160. New Mexico v. Aamodt (*Aamodt I*), 537 F.2d 1102, 1105 (10th Cir. 1976).

161. *See* N.M. STAT. ANN. § 72-14-21 (2011).

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

the Pueblos' trustee or guardian and as owner of the Santa Fe National Forest lying within the Rio Grande Basin; the four Pueblo tribes (San Ildefonso, Pojoaque, Nambe, and Tesuque); and about 1,000 other non-Indian claimants.[162]

*2.* New Mexico v. Aamodt *(1976)*

*New Mexico v. Aamodt*, commonly referred to as *Aamodt I*, was an appeal from the district court's decision, which determined that Pueblo rights are to be adjudicated under state law and denied the Pueblos a right to private counsel beyond that provided by the U.S. Department of Justice.[163] The Tenth Circuit Court of Appeals reversed and remanded the central issues,[164] including the district court's ruling that the Pueblos' rights to use the water system were subject to New Mexico's appropriation laws. The circuit court reversed the water rights issue for two reasons. First, the court pointed to the *United States v. Sandoval* and *United States v. Candelaria*[165] decisions to show that the federal government never relinquished its guardian/ward relationship with the tribes.[166] Second, the court noted that nothing in the acts of 1924 or 1933 abrogated the Pueblos' water rights.[167]

The court recognized the uniqueness of the form and history of Pueblo land title.[168] But those differences have no effect on the federal government's control and jurisdiction over the Pueblos, nor on the duty of protection it owes them. The foundations of the federal government's fiduciary role are well established. The United States Constitution gives Congress the power to regulate commerce with the Indian tribes.[169] It also gives the executive branch the power to make treaties.[170] Along with these legislative directives, Justice Marshall's judicial characterization of the fiduciary duty in *Cherokee Nation v. Georgia* was clear. Marshall described Indian tribes as "domestic dependent nations" with relations to the United States resembling "that of a ward to his guardian."[171] In *Aamodt I*, the court of appeals confirmed this foundational principle as applicable to the Pueblos by citing *Sandoval*, which held that the Pueblos enjoy the same

162. *Aamodt I*, 537 F.2d at 1105.
163. *Id.* at 1104.
164. *Id.*
165. 271 U.S. 432 (1926).
166. *See Aamodt I*, 537 F.2d at 1109, 1111.
167. *Id.*
168. *Id.* at 1105.
169. U.S. CONST. art. I, § 8, cl. 3.
170. *Id.* art. II, § 2, cl. 2.
171. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

Published by University of Oklahoma College of Law Digital Commons, 2011

protected status as the Indian tribes to which Justice Marshall originally referred.[172] The court of appeals pointed to the *Sandoval* Court, noting that "the United States has treated the pueblos as requiring special consideration and protection, like other Indian communities."[173] And, as the court of appeals further noted, this protection was confirmed in *Candelaria*, which found that 1934 Act's extension to "the Indian tribes" of New Mexico applied to the Pueblos.[174] Therefore, where the federal government serves as trustee to the tribes, its jurisdiction and control remains, regardless of the status of the given tribe's land.

Based on the district court's interpretation of *Sandoval* and *Candelaria*, the court of appeals rejected the State of New Mexico's and non-Indian claimants' argument that the Pueblos lost any rights they may have had to water under the 1924 and 1933 acts quieting title to their lands and compensating them accordingly.[175] And based on the 1924 and 1933 acts, the court of appeals also rejected the State's argument that where those rights were lost, any rights theretofore would be subject to New Mexico appropriation law, as opposed to federal law.[176] The court of appeals reasoned that increased compensation for the Pueblos in the 1933 Act was not the result of a loss of reserved water rights, but instead because of an error of the Lands Board under the 1924 Act.[177] The additional compensation was intended to replace lost land and water rights and to construct new irrigation works.[178] Moreover, a reading of section 9 of the 1933 Act confirms that Congress never intended to divest any rights:

> Nothing herein contained shall in any manner be construed to deprive any of the Pueblo Indians of a prior right to the use of water from streams running through or bordering on their respective pueblos for domestic, stockwater, and irrigation purposes for the lands remaining in Indian ownership, and such

172. *Aamodt I*, 537 F.2d at 1109.

173. *Id.* (internal quotation marks omitted).

174. *Id.*

175. *Id.* at 1110.

176. *Id.*

177. *Id.* at 1109-11 ("The error was a failure to recognize that, when the claims of non-Indians were sustained, the Pueblos lost both lands and the water rights appurtenant thereto. Litigation brought pursuant to the 1924 Act had resulted in decisions that appurtenant water went with the land. Congress increased the awards to include the value of appurtenant water."). *See generally supra* Part III.A.4 (providing a history of the 1924 Act).

178. Ed Newville, Comment, *Pueblo Indian Water Rights: Overview and Update on the Aamodt Litigation*, 29 NAT. RESOURCES J. 251, 256 (1989).

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

> water rights shall not be subject to loss by nonuse or abandonment thereof as long as title to said lands shall remain in the Indians.[179]

The court of appeals then rejected the State's argument that the mention of nonuse and abandonment would only be necessary where state appropriation law applied, and therefore, Congress must have recognized that state appropriation law did apply.[180] The court based its reasoning on the 1910 Enabling Act, whereby the State of New Mexico disclaimed title to lands "owned or held by any Indian or Indian Tribes and recognized with respect to such land the absolute jurisdiction and control of the Congress of the United States."[181] Moreover, it noted that any relinquishment by Congress must be express, rather than implied.[182] Nothing in the legislative history points to any express relinquishment, and such a finding would violate Congress's mandate in the 1933 Act.[183]

In sum, the court of appeals recognized that the Pueblos held land and water rights from prior sovereigns that the United States agreed to protect under the Treaty of Guadalupe Hidalgo[184] – a protection not unlike that afforded to any other tribe under the guardian/ward relationship. Moreover, neither that duty nor those rights were relinquished, and therefore, federal law applied, rather than New Mexico state appropriation law. With these conclusions, the court of appeals left for the district court on remand the task of analyzing the legal basis, scope, and quantification standards of those water rights, as well as whether they are based on *Winters*, laws of a prior sovereign, or something else.[185] In other words, the court of appeals directed the district court on remand to focus not on the existence of the rights, but rather on the legal basis, scope, and quantification thereof.[186]

*3.* New Mexico *ex rel.* Reynolds v. Aamodt

On remand, Judge Mechem presided over *New Mexico ex rel. Reynolds v. Aamodt*, commonly referred to as *Aamodt II*.[187] The task of analyzing the legal basis, scope, and quantification standards of the water rights was a

179. *Id.* at 257 n.35.
180. *Aamodt I*, 537 F.2d at 1110-11.
181. *Id.* at 1111 (internal quotation marks omitted).
182. *Id.*
183. *Id.* at 1113.
184. *Id.* at 1111.
185. Newville, *supra* note 178, at 260.
186. *Aamodt I*, 537 F.2d at 1111.
187. *Aamodt II*, 618 F. Supp. 993, 995 (D.N.M. 1985).

Published by University of Oklahoma College of Law Digital Commons, 2011

difficult one for the district court. It took nine years of extensive historical and analytic research by a special master before Judge Mechem issued an opinion.[188] Judge Mechem held that the Pueblo Indians did not hold reserved rights consistent with *Winters*, but instead held aboriginal title that carried water rights prior and paramount to all others.[189]

Judge Mechem quickly dispensed with the theory that *Winters* reserved rights could apply to the Pueblos simply because they "were in their possession and use long before the sovereignty of the United States or the adoption of the *Winters* doctrine."[190] He first made clear that the Pueblos' lands and waters were not "reserved" by the Spanish, but were instead "recognized" and protected by the Spanish (and subsequently by the Mexicans).[191] Judge Mechem noted that "reserved" is a term of art.[192] For clarity, Judge Mechem added, "The Spanish government did not reserve Pueblo lands in the same way the United States reserves public land for use as an Indian reservation. It simply recognized them and protected them."[193]

Judge Mechem's analysis left room for inference. Under his reasoning (and to come to the conclusion that *Winters* does not apply), one must infer that rights recognized by the prior sovereigns were the only rights recognized by the United States. Further, one must also infer that the action recognizing their rights under the prior sovereign (presumably the Treaty of Guadalupe Hidalgo and the Trade and Intercourse Act) lacked the purpose of establishing a "reservation" – the foundational requirement necessary for a reserved right.

Judge Mechem held that the legal basis for the Pueblos acquired water right was its recognition under the prior laws of Spain and Mexico.[194] He adopted the special master's findings that:

> [t]he water rights of the Pueblos, which were recognized and protected by Spain and by Mexico, were defined as a prior and paramount right to a sufficient quantity to meet their present and future needs. Both Spain and Mexico used the flexible *repartimiento* system for allocating waters, under which the

188. *Id.*
189. *Id.* at 996, 998.
190. *Id.* at 1010 (clarifying that *Winters* rights do exist on Pueblo lands set aside by executive order, such as for the Nambe Pueblo in 1902, or by congressional reservation).
191. *Id.* at 996.
192. *Id.*
193. *Id.*
194. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

> quantities allocated were never final, and did not have the effect of *res judicata*, but could be changed as needs changed.[195]

While Judge Mechem looked to the prior laws and relevant repartimiento[196] to establish water rights under 1823's system, today's courts will not use these laws as a means to allocate water rights, but instead only as a basis for the legal right.[197] "In the absence of any action by either prior sovereign to limit or quantify in any way the Pueblos' water rights, the United States asserted that Spanish and Mexican law are irrelevant to quantification of the Pueblos' present rights."[198] In other words, Judge Mechem used the laws and recognition of the prior sovereign to confirm the existence of the right – not the quantification of the right – because the prior sovereigns had recognized it in full. And because the United States recognized the rights as they previously existed, only where the rights had been previously limited would allocation or quantification by a prior sovereign matter. In terms of priority, this confirms that the Pueblo were "first in time, first in right."

In defining the scope of the Pueblos' water rights under the laws of the United States, Judge Mechem pointed to a long line of precedent recognizing aboriginal title. "Original Indian title gives an Indian tribe the right to exclusive occupation and use of their aboriginal land until that title is extinguished by the United States."[199] Outlining cases involving aboriginal title with respect to the discovery doctrine, the canons of construction, and entitlement to protection (regardless of whether a treaty, statute, or government action existed), Judge Mechem concluded, "This line of cases establishes that the Pueblos have aboriginal title, Indian rights or original Indian rights to their lands and the use of them including appurtenances."[200]

As to the quantification of the water rights, Judge Mechem noted that until arrival of the Spanish, the Pueblos developed and had the only rights

---

195. *Id.* at 998.

196. Newville, *supra* note 178, at 265 ("The special master's findings continued to explain the flexible *repartimiento* system of water allocation used by both Spain and Mexico. The system was a quasi-judicial administrative proceeding under which the quantities allocated were never final and could be changed as needs changed. The system attempted to balance the needs of all users.").

197. *Id.*

198. Bossert et al., *supra* note 50, at 34.

199. Newville, *supra* note 178, at 266.

200. *Aamodt II*, 618 F. Supp. at 1009.

Published by University of Oklahoma College of Law Digital Commons, 2011

to use all of the stream system's waters.[201] On account of this aboriginal right, the Pueblos maintained a "prior right to use all of the water . . . necessary to irrigate their lands," applying to "all acreage irrigated by the Pueblos between 1846 and 1924."[202] In addition to priority-based rights, "[t]he Pueblo aboriginal water right, as modified by Spanish and Mexican law, included the right to irrigate new land in response to need," extending federal protection to the rights as well.[203] "The 1924 Act, which gave the non-Pueblos within the Pueblo four-square-leagues their first legal water rights, also fixed the measure of Pueblo water rights to acreage irrigated as of that date."[204]

This quantification of rights is referred to as the historically irrigated acreage doctrine and has only been applied in the *Aamodt* case.[205] This method of quantification applies to "water rights appurtenant to their lands," which are "surface waters of the stream systems and the ground water physically interrelated to the surface water as an integral part of the hydrological cycle."[206] The historically irrigated acreage doctrine is in contrast to the practicably irrigable acreage doctrine, which is the most common quantification standard applied by courts for the quantification of reserved water rights.[207] Courts use the practicably irrigable acreage doctrine where lands are set aside for agricultural purposes, with the intention to provide for both the tribes' present and future needs.[208]

*4. Subsequent Memorandum and Orders*

In 1993, the district court expanded upon Judge Mechem's previous findings regarding quantification, and clarified the types and elements of the Pueblos' irrigation water rights. The court outlined that the Pueblos hold aboriginal rights, Indian reserved rights, and state law rights.[209] But this list is not exhaustive.[210] Aboriginal irrigation water rights exist on any lands occupied and irrigated by the Pueblos from time immemorial, and are

201. *Id.*
202. *Id.* at 1010.
203. *Id.*
204. *Id.*
205. Bossert et al., *supra* note 50, at 34.
206. *Aamodt II*, 618 F. Supp. at 1010.
207. Memorandum Opinion and Order at 3, New Mexico *ex rel.* Reynolds v. Aamodt, No. No. 66-cv-06639 (D.N.M. Dec. 29, 1993) [hereinafter Memorandum Opinion and Order 1993]. *See generally* 2 WATERS, *supra* note 4, § 37.02(c)(1).
208. COHEN, *supra* note 46, at 1185.
209. Memorandum Opinion and Order 1993, *supra* note 207, at 2.
210. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

quantified by the historically irrigated acreage standard.[211] Indian reserved rights – those created by acts of Congress or executive orders – use the practicably irrigated acreage standard for quantification, which allows for future uses.[212] And from the period between 1846 and 1924, where the Pueblos' level of use exceeds the historically irrigated acreage standard, New Mexico state water rights apply.[213]

In 2000, the district court clarified what kinds of water rights attach to Pueblo "replacement lands,"[214] or those "lands purchased with funds that Congress appropriated in 1933 to compensate Pueblos for lands transferred to non-Indians during the territorial period."[215] For those replacement lands located within the boundaries of the grant lands, the aboriginal water rights or federal Pueblo water rights apply. But where the replacement lands lie outside the exterior boundaries and within the aboriginal territory, the replacement lands will carry: (1) federal Pueblo water rights based on historically irrigated acreage where a history of such can be proved; or (2) state law water rights or replacement law where historically irrigated acreage history cannot be proved.[216]

*5. 2006 Settlement*

In 2006, 40 years after the *Aamodt* litigation and the State Engineer's investigation into the occupants' water rights began, a settlement agreement was signed by the State of New Mexico, Santa Fe County, City of Santa Fe, and the four Pueblos.[217] The settlement was contingent on federal legislative approval.[218] Approval required approximately $292 million in funding, divided among five governments.[219] The majority of the funding was for the construction of a regional water system, which features a pipeline to convey additional water to the area's landowners.[220] In 2010,

211. *Id.* at 3.

212. *Id.* at 4-5.

213. Newville, *supra* note 178, at 268.

214. *See* Memorandum Opinion and Order at 6, New Mexico *ex rel.* Reynolds v. Aamodt, No. 66-cv-06639 (D.N.M. Apr. 14, 2000), ECF No. 5596 [hereinafter Memorandum Opinion and Order 2000].

215. COHEN, *supra* note 46, at 334.

216. Memorandum Opinion and Order 2000, *supra* note 214, at 9.

217. *See Aamodt Adjudication* (Dec. 2010), *supra* note 153, at 4.

218. *See id.* at 1.

219. *Aamodt Adjudication*, UTTON TRANSBOUNDARY RESOURCES CTR., UNIV. OF N.M. SCH. OF LAW, 100-01 (Nov. 2009), http://uttoncenter.unm.edu/pdfs/WM_Aamodt_Adjudication.pdf.

220. *Aamodt Adjudication* (Dec. 2010), *supra* note 153, at 1, 5.

Published by University of Oklahoma College of Law Digital Commons, 2011

President Obama signed a bill, passed by both the House of Representatives and Senate, approving funding for several Indian water rights settlements, including the *Aamodt* adjudications.[221]

### *B. Applying the Mechem Doctrine to Current Water Disputes Involving the Five Tribes of Oklahoma*

#### *1. The Current Disputes*

##### *a) Sardis Reservoir*

In 1974, the State of Oklahoma contracted with the United States for the Army Corps of Engineers to "build [a] lake for the purpose of present and future use water supply storage."[222] The Oklahoma Water Resources Board (OWRB) was to finance the lake (known today as Sardis Lake or Sardis Reservoir) in 50 annual payments.[223] The OWRB made its sixth annual payment in March 1990, but later breached the contract by failing to tender sufficient payment, prompting the United States to sue for breach of contract.[224] The district court awarded the United States $27 million in money damages, declaratory relief, and injunctive relief.[225] The court of appeals affirmed the judgment and the U.S. Supreme Court denied certiorari.[226]

The first of the judgment's five installments was due on July 1, 2010.[227] Unable to produce the first $5.2 million installment, the OWRB sold its rights in the lake to the City of Oklahoma City for $42 million in June 2010.[228] The City of Oklahoma City agreed to pay off the $27 million debt to the federal government and would retain the majority of the rights in the lake.[229]

---

221. Claims Resettlement Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064.

222. United States v. Oklahoma, 184 F. App'x 701, 702 (10th Cir. 2006).

223. *Id.*

224. *Id.*

225. *Id.*; Complaint at 10, Chickasaw Nation v. Fallin, No. 11-cv-00927 (W.D. Okla. Aug. 18, 2011), ECF No. 1.

226. *Oklahoma*, 184 F. App'x at 705.

227. M. Scott Carter, *Senators Oppose OKC Plan to Buy Sardis Lake Water*, J. REC. (Okla. City), Apr. 20, 2010, *available at* http://journalrecord.com/2010/04/20/senators-oppose-okc-plan-to-buy-sardis-lake-water-capitol/.

228. John Estus, *Oklahoma Water Resources Board Approves Sardis Lake Deal for Oklahoma City*, OKLAHOMAN, June 12, 2010, *available at* http://newsok.com/oklahoma-water-resources-board-approves-sardis-lake-deal-for-oklahoma-city/article/3468165.

229. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

"The Choctaw, Chickasaw and Caddo Nations claim various rights to the lake's water and wanted the Oklahoma City deal delayed until a statewide water use study [was] completed . . . ."[230] Choctaw and Chickasaw leaders "had offered to pay the state's Sardis debt if the Oklahoma City offer was delayed."[231] Additionally, the Governor of the Chickasaw Nation, the Chief of the Choctaw Nation, and the Assistant Secretary of the Department of the Interior wrote letters to the Governor of Oklahoma and the OWRB requesting that the sale be terminated.[232] The deal nevertheless went forward.

On August 18, 2011, the Chickasaw and Choctaw nations filed a complaint in federal court, naming the Governor of Oklahoma, the OWRB, and the Oklahoma City Water Trust (the group acting on behalf of the City of Oklahoma City) as defendants.[233] The Chickasaw and Choctaw nations sought "declaratory and injunctive relief to protect their federal rights – including their present and future use water rights, regulatory authority over water resources, and right to be immune from state law and jurisdiction."[234] The tribes cite the Treaty of Dancing Rabbit Creek as the basis of those rights.[235]

The complaint states that a fundamental element of the Storage Contract Transfer Agreement between the OWRB and the Water Trust is a water-use permit granting the Water Trust the right to withdraw water from the reservoir.[236] The tribes maintain that the issuing of permits, selling of water, or exporting of water from the treaty territory is contrary to federal law.[237] Moreover, the tribes' "rights to and regulatory authority over Treaty Territory water resources are prior and paramount to any water rights claimed by or derived from the Defendants in the Treaty Territory under state law, and federal law preempts interference with the Plaintiff Nations' rights by Defendants."[238]

On February 10, 2012, the Oklahoma Attorney General, on behalf of the OWRB, filed a civil petition in the Oklahoma Supreme Court requesting

230. *Id.*

231. *Id.*

232. M. Scott Carter, *Fourth Reading: Sardis Issue Will Reach Boiling Point*, J. REC., Oct. 28, 2010, *available at* http://journalrecord.com/2010/10/28/fourth-reading-sardis-issue-will-reach-boiling-point-opinion/ [hereinafter Carter, *Sardis Issue*].

233. *See* Complaint, *supra* note 225.

234. *Id.* ¶ 1.

235. *Id.*

236. *Id.* ¶ 3.

237. *Id.* ¶ 4.

238. *Id.* ¶ 5.

Published by University of Oklahoma College of Law Digital Commons, 2011

that the court commence a general stream adjudication for the stream systems located within the Choctaw and Chickasaw boundaries.[239] In its petition, the OWRB recognized that the rights of the federal parties involved may be based in federal law.[240] Pursuant to the Oklahoma General Stream Adjudication statute in conformity with the McCarran Amendment, however, those rights are subject to adjudication in state court.[241] Moreover, based on the significant issues of public interest and policy relating to adjudication, the Supreme Court of Oklahoma is the proper venue, rather than the federal court.[242]

On Febraury 23, 2012, the Oklahoma Supreme Court granted the OWRB's application to assume original jurisdiction in the general stream adjudication. In response, on March 12, 2012, the United States Department of Justice, representing eight named federal respondents in the petition, removed the water rights case to the United States District Court for the Western District of Oklahoma.[243] At the time this article was sent to publication, no further developments had occurred.

*b)* Oklahoma v. Tyson Foods

In 2005, the State of Oklahoma sued Tyson Foods, Inc. because of poultry waste originating from the poultry producer. The State claimed that the waste was polluting the Illinois River Watershed, an area located within the boundaries of Oklahoma and the tribal lands of the Cherokee Nation of Oklahoma.[244] "Tyson moved to dismiss the monetary claims on the ground

239. Petition of the Oklahoma Water Resources Board for a General Stream Adjudication, Oklahoma Water Res. Bd. v. United States, No. 110375 (Okla. 2012).

240. *Id.* at 7-16.

241. *Id.* at 8.

242. *Id.* at 16.

243. Notice of Removal to the United States District Court for the Western District of Oklahoma at 1, Okla. Water Res. Bd. v. United States, No. 23-cv-00275 (W.D. Okla. 2012) ("The United States of America, through its undersigned attorneys, respectfully represents the following: The United States of America; United States Department of the Interior; United States Bureau of Reclamation, an agency of the U.S. Department of the Interior; United States Army Corps of Engineers; the United States on behalf of the Choctaw Nation of Oklahoma, a federally recognized Indian tribe; the United States on behalf of the Chickasaw Nation of Oklahoma, a federally recognized Indian tribe; the United States on behalf of the individual members of the Choctaw Nation of Oklahoma; and the United States on behalf of individual members of the Chickasaw Nation.").

244. Oklahoma *ex rel.* Edmondson v. Tyson Foods, Inc., 237 F.R.D. 679 (N.D. Okla. 2006), *aff'd*, 619 F.3d 1223 (10th Cir. 2010).

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

that the [Cherokee] Nation was a required party that had not been joined."[245]

In court, the State of Oklahoma countered the motion, arguing that the Cherokee Nation was not an indispensable party.[246] But outside of court, the State of Oklahoma "negotiated an agreement in which the Nation purportedly assigned the State its interest in the litigation."[247] Realizing the State of Oklahoma would not fully protect its interest in the lands, the Cherokee Nation of Oklahoma sought to intervene in the dispute, as it also claimed an interest in the land and waters at issue, based on treaties with the United States.[248] In 2009, the court denied the Cherokee Nation's motion to intervene, ruling that the motion was untimely.[249]

*2. Application of the Mechem Doctrine to the Five Tribes' Disputes*

*a) The Basis of the Right*

Because the Five Tribes hold their lands in a way similar to the Pueblos and decidedly distinct from that of other tribes, their lands may not be subject to the reserved rights doctrine, but rather the doctrine set forth in the *Aamodt* adjudications – the Mechem Doctrine. Therefore, as established in the *Aamodt* adjudications, the Five Tribes may possess the full ownership and regulatory control over their resources because they: (1) hold their lands in fee; (2) are protected under the jurisdiction of the federal government, as promised in Congress's enabling acts; and (3) hold rights to water which have never been diminished or abrogated by an act of Congress.

The theory that the Five Tribes' interest in their lands is equivalent to that of the Pueblos is based on the similarities in the tribes' historical acquisition and recognition of land. The federal government holds most reservation lands in trust for tribes.[250] Federally held trust lands, or reservations, are subject to the reserved rights doctrine.[251] But under the Treaty of Guadalupe Hidalgo, the Pueblos were granted land patents and therefore hold fee simple title to their lands, as opposed to the federal

245. Oklahoma *ex rel.* Edmondson v. Tyson Foods, Inc., 619 F.3d 1223, 1226 (10th Cir. 2010).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. CANBY, JR., *supra* note 76, at 424.

251. Helton, *supra* note 31, at 980-81.

Published by University of Oklahoma College of Law Digital Commons, 2011

government holding them in trust.[252] Similarly, the Five Tribes were granted patents pursuant to their removal treaties, and therefore also hold fee simple title to their lands.[253] The Five Tribes never relinquished the lands to the government for allotment, but instead deeded the lands directly to their members for purposes of allotment.[254] And like the Pueblos under the Treaty of Guadalupe Hidalgo, the Oklahoma Enabling Act of 1906 and the Oklahoma Constitution provided for federal jurisdiction over the Five Tribes and their property.[255] Upon entry into the Union, Oklahoma took control of the land with its then-existing status. At that time, the Five Tribes – not the federal government – held title to their land in fee. Therefore, on the basis of the equal footing doctrine, it cannot be said that the Five Tribes' control of the land or natural resources passed to the State of Oklahoma when it entered the Union.[256]

In its conclusion that the Pueblos held something greater than a reserved right, the *Aamodt I* court regarded the Pueblos' fee simple landholdings to be dispositive.[257] Because *Winters* applies in instances where lands are reserved from those encompassed within organized territories or governments, it did not apply to the *Aamodt* adjudications and, therefore, it presumably would not apply in an adjudication involving the Five Tribes of Oklahoma. Because the Pueblos were regarded as living upon their lands since time immemorial, well before an organized territory or state existed, their lands did not meet the definition of reserved lands.[258] Likewise, the lands to which the Five Tribes were removed were not encompassed within a previously existing organized territory or government. It was not until 1851, well after the removal of the Five Tribes to Oklahoma, that the

252. COHEN, *supra* note 46, at 322-23.

253. LAMBERT, *supra* note 104, at 221-22; *see also* TRIBAL WATER RIGHTS: ESSAYS IN CONTEMPORARY LAW, POLICY, AND ECONOMICS 64 (John E. Thorson et al. eds., 2006).

254. *See* discussion *supra* Part III.

255. *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 267-70 (1906).

256. Article IV, section 3 of the Constitution provides that upon entry into the Union, a new state is granted the same rights as any other state. U.S. CONST. art. IV, § 3. In *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), the Court found that the equal footing doctrine did not apply in Oklahoma with regards to submerged lands. The Court reasoned that the submerged lands did not transfer to the State of Oklahoma upon statehood, but rather remained with the Choctaw Nation because of the special historical origins of the Choctaw, its treaties, and the provisions granting Indian lands in fee simple and promising freedom from State jurisdiction. Essentially, the federal government did not have any rights in the riverbeds to convey to the State of Oklahoma. *Id.* at 635-36.

257. *Aamodt II*, 618 F. Supp. 993, 995 (D.N.M. 1985).

258. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

federal government adopted the policy of removing tribes to reservations located within organized territories and states.[259]

While the Five Tribes did not live on the lands in the Indian Territory since time immemorial, they received their lands in fee during the 1830s, prior to the policy of reserved lands.[260] Moreover, lands that both the government and the tribes agreed would never be included in a territory or state certainly cannot fit within the rubric of "reserved." Just as Judge Mechem noted in *Aamodt II*, the government recognized and protected – but did not reserve – these lands for the tribe.[261]

The court in *Aamodt* found that nothing in the Enabling Act, Trade and Intercourse Act, or subsequent acts associated with the Pueblos after statehood could be read as divesting the tribe of any water rights because the acts were not explicit as to any divestiture.[262] Likewise, it is established that the Five Tribes' allotment agreements could not divest them of any rights because lands were not surrendered to the government to disperse, but rather were transferred directly to individual landholders.[263] "The General Allotment Act, Dawes Act, Curtis Act, Oklahoma Organic Act, and Oklahoma Enabling Act are silent as to water rights."[264] Whether the state legislation or action was silent is of no significance. Pursuant to the Court's holding in *Winans*, a tribe that holds rights based on a pre-statehood treaty cannot be divested of those rights through state acts.[265] Moreover, as noted in *Aamodt I*, pursuant to the canons of construction, a congressional divestiture must be explicit.[266] Therefore, no water rights could transfer from the tribe to any other sovereign or state by means of legislation or state action. Instead, it may be that the Five Tribes would be considered to hold a prior and paramount right with respect to water.

*b) The Quantification of the Right*

On account of the basis of the right being aboriginal title rather than reserved rights, the *Aamodt* adjudications applied the historically irrigable acreage standard. If the Five Tribes hold aboriginal title in their lands (as did the Pueblos), the historically irrigated acreage doctrine would

259. COHEN, *supra* note 46, at 185.
260. *See supra* Part III.B.
261. Newville, *supra* note 178, at 260.
262. *See supra* notes 135-44 and accompanying text.
263. *See supra* Part III.B.
264. Helton, *supra* note 31, at 995.
265. United States v. Winans, 198 U.S. 371, 384 (1905).
266. *Aamodt I*, 537 F.2d 1102, 1111 (10th Cir. 1976).

Published by University of Oklahoma College of Law Digital Commons, 2011

theoretically apply in the quantification of the Five Tribes' rights. Pursuant to the historically irrigated acreage doctrine, the Five Tribes would have the prior right to use all of the water in the water systems necessary to irrigate their lands within the acreage that the Five Tribes irrigated from their arrival to the Indian Territory until Oklahoma's entry into the Union.

But if the Five Tribes' right is based upon a reserved right, the practicably irrigated acreage standard would apply. In that instance, the Five Tribes would have prior rights to water in the amount needed to irrigate all of their lands' practicably irrigable acreage. This is the amount of water necessary to satisfy both the present and future needs of the reserved lands.[267]

As the *Aamodt* adjudications established, the federal government, as guardian of the tribes, could not relinquish its duty to govern water rights, and federal law therefore applies to reserved and aboriginal rights.[268] State law is thus inapplicable to reserved or aboriginal rights. But like in the *Aamodt* adjudications, state law applies where the tribes hold some rights in areas outside the boundaries of the reservation. And in that instance, Oklahoma's dual-system approach to water law would apply in quantifying the Five Tribes' water rights.

*3. The Need to Avoid Litigation*

The waters in both the Sardis and Tyson disputes lie within the original boundaries of the Five Tribes' lands, placing the disputes squarely within the realm of a logical application of *Aamodt*'s Mechem Doctrine. But the *Aamodt* litigation and subsequent negotiations spanned more than 50 years for one single water project.[269] Considering the large amount of lands held in trust for the Indians across the western United States and the grave need for water allocation, one can imagine how many similar and equally complicated disputes exist. While the adjudication process sounds similar to any other judicial determination, reaching the final stages or obtaining a decree can take 50 years or more.[270] This process often leads to the parties negotiating outside of court in an effort to come to a more timely resolution. For this reason, the State of Oklahoma, the tribes of Oklahoma, and other interested parties involved in Oklahoma tribal water issues should avoid litigation at all costs. Academics, legislators, and tribal governments all

267. Arizona v. California, 373 U.S. 546, 600-01 (1963), *disavowed by* California v. United States, 438 U.S. 645 (1978).

268. *See supra* Part IV.A.2.

269. *See supra* Part IV.A.

270. *See supra* Part IV.A.2-3.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2

appear to agree with this notion;[271] however, the State of Oklahoma continues to act without due regard for the Five Tribes' interests. Given the number and variety of the rights-holders involved – from the non-Indian water rights holders, to the city and state governments, to the tribes and residents of the area – the resolution will dramatically affect each and every user for hundreds of years to come. The state should consider the far-reaching, burdensome effects before forcing litigation that could cost millions in state taxpayers' dollars and decades in time.

Given their involvement with the Five Tribes' interests, the Sardis and Tyson disputes represent two examples illustrating the *Aamodt* adjudications' helpfulness in predicting an outcome and serving as an incentive for the State of Oklahoma to include the tribes in negotiations or to begin to recognize tribal rights in a more efficient manner. But the water disputes between the Five Tribes and the State of Oklahoma are not the only issues pending for the state. The Apache Tribe of Oklahoma is also involved in a dispute between the State of Oklahoma and the City of Forth Worth for the sale of water appurtenant to Apache tribal lands.[272] While the *Aamodt* litigation may not seem immediately applicable to the Apache's Tribe's issues given the lack of a Five Tribes' interest, the Apache Tribe's land is located in western Oklahoma and was previously owned in fee by the Five Tribes.[273] Because of this connection, the Mechem Doctrine may be pertinent to disputes involving the Apache Tribe's water rights (or those of other tribes now residing within the original boundaries of the Five Tribes).[274]

From applying the *Aamodt* adjudications' holdings to the Five Tribes' water disputes, one can infer that, at the very least, the Five Tribes have *Winters* rights and, at most, the states lack any rights at all, with the Five Tribes holding all rights and the full and unilateral ability to regulate and

---

271. Carter, *Sardis Issue*, *supra* note 232; *see also* Neil McCaleb, Chickasaw Nation Business Development Leader, Speaking in Professor Lindsay Robertson's Federal Indian Law Class at the University of Oklahoma College of Law (Summer 2010) ("Litigation must be a last resort – the parties need to come to the table and negotiate.").

272. The Tarrant Regional Water District sued the Oklahoma Water Resources Board for refusing to approve permits whereby the water district would purchase rights in the water appurtenant to Apache land. Tarrant Reg'l Water Dist. v. Herrmann, No. CIV-07-0045-HE, 2010 WL 2817220 at *1 (W.D. Okla. 2010). Judge Heaton, for the Tenth Circuit, found the memorandum of understanding between the Apache Tribe and the water district to be "so fraught with uncertainties and contingencies it did not provide the necessary basis for a justiciable claim." *Id.* at *3.

273. *See* Work, *supra* note 4, at II-15.

274. *Id.* at II-15.

Published by University of Oklahoma College of Law Digital Commons, 2011

control the water. Either characterization of rights certainly makes the Five Tribes an indispensible party to the resolution of these issues.

## *V. Conclusion*

For Oklahoma tribes, having had neither a general stream adjudication relating to Indian tribes nor a state that recognizes the tribes' rights in the water, the *Aamodt* adjudications may play a crucial role in forecasting the resolution of water issues currently involving the State of Oklahoma, the Five Tribes, and the federal government. Based on the holdings in the *Aamodt* adjudications and the similar histories of the Pueblos and the Five Tribes, the Five Tribes may hold a prior and paramount right with respect to the regulation and control of water within their lands similar to that of the Pueblos. *Aamodt*'s Mechem Doctrine maintains that tribes hold aboriginal title with water rights prior and paramount to all others where the tribes: (1) hold their lands in fee; (2) are protected under the jurisdiction of the federal government, as promised in Congress's enabling acts; and (3) hold rights to water which have never been diminished or abrogated by an act of Congress. The *Aamodt* court already held that the Pueblos indeed have such prior and paramount water rights, and the Fives Tribes, like the Pueblos, fit seamlessly within the Mechem rubric, providing a legal basis for the Five Tribes' claim that they hold greater rights than are now being afforded – and possibly so much as a prior and paramount right to full regulation and control of their lands' waters.

In litigation, and even in negotiations, not every party comes out a winner. Often, even the winner walks away with less than he deserves. From the Five Tribes' perspective, a right to future uses should be implied, given the theory of natural progression. In other words, without the interruption and invasion of other sovereigns, the Five Tribes, over time, would have developed their cultivation and processes, and had all rights to the water. But from the state's perspective, the land falls within Oklahoma Territory and is subject to the Oklahoma Constitution, based upon the equal footing doctrine. Both sides must consider that based on the adjudication of similar disputes in the court system, litigation will provide the least efficient means, with respect to both time and money, to solve these disputes.

https://digitalcommons.law.ou.edu/ailr/vol36/iss1/2