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## United States v. Aboulseman, CV 83-1041 MV/WPL, 2016 WL 9776586 (D. N.M. October 4, 2016)

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live controversy to review. The court did certify that: (1) all parties agreed Denver had been diligent in developing the full 654 cfs at issue for beneficial use; (2) Denver had a conditional right to that amount; and (3) that all parties were estopped from asserting otherwise. Despite Denver's diligence and the lack of opposition, the court declined to grant Denver the absolute right it requested.

The court then turned its attention to the jurisdictional issues of the case, and the Blue River Decree at large. When the initial case involving Blue River rights first entered federal court, Colorado had not yet developed the sophisticated water court system that is in place today. Even after establishing the water courts in 1969, federal judges were still more apt at adjudicating certain water rights issues due to years of prior experience. In 1977, a federal judge issued an order regarding the Blue River Decree that kept the companion cases under federal jurisdiction even after the federal water issues had been resolved. The present court surmised that order was intended to allow federal judges, who have more knowledge and expertise on the subject, to supervise or help with transitioning water law case adjudication to the Colorado Water Court for District No. 5.

Given the changing circumstances behind this case's long history, the District Court vacated the 1977 Order, removing federal jurisdiction over state water issues within the Blue River Decree. While the court ruled separately on the issues of federal jurisdiction and Denver's claim on the 654 cfs water right, the key takeaway seems to be that the Colorado water court, not the federal courts, is the proper venue for determining if Denver can perfect its conditional rights under the Blue River Decree.

*Joseph Chase*

## UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

**United States v. Abousleman, CV 83-1041 MV/WPL, 2016 WL 9776586 (D. N.M. October 4, 2016)** (finding the Pueblos possessed aboriginal water rights that predated Spanish occupation, but that Spanish occupation extinguished the right, and the *Winans* doctrine did not apply to any of the Pueblos' grant or trust lands).

This case came before the United States District Court on opening, response and reply briefs of the Jemez River Basin Users Coalition ("Coalition"), the Pueblos of Santa Ana, Zia, and Jemez, and the United States ("US/Pueblos"), and the State of New Mexico ("State"). The court decided two issues: (1) whether the Pueblos ever possessed aboriginal water rights in connection with their grant or trust lands, and if so, whether any actions of Spain, Mexico, or the United States subsequently modified or extinguished those rights; and (2) whether the *Winans* doctrine applied to any of the Pueblos' grant or trust lands. The district court magistrate judge considered the briefs of the parties and the expert testimony that both sides presented in coming to its conclusions and recommendations.

For a tribe to assert aboriginal title, it must prove it had actual, exclusive, and continuous use and occupancy for "a long time" prior to the loss of the

land. Exclusive possession means the tribe used and occupied the land to the exclusion of others, including other Indian tribes, unless the tribe can also show the land was shared with other tribes in “joint and amicable” possession. The requirement of a “long time” means the tribe must have made the land into domestic territory. The experts testified that the Pueblos used and exploited the water sources and that they used and occupied the lands continuously for a long time prior to the European occupation of New Mexico. The court noted that the parties did not provide any evidence that other Indian groups besides the Jemez, Zia, and Santa Ana Pueblos occupied the land and used the water. The court concluded that the Pueblos actually and exclusively used water continuously for a long time prior to European occupation and they thus possessed aboriginal water rights in connection with their grant or trust lands.

The court, having concluded the Pueblos possessed aboriginal water rights, then considered whether any subsequent actions by Spain, Mexico, or the United States extinguished those rights. While the experts for both sides largely agreed on factual issues, the court resolved any remaining conflicting factual testimony in favor of the US/Pueblos expert. Based on this, the court determined that Spain recognized the Pueblos’ ownership of their land and their right to use water based on their prior use when it incorporated the Pueblos into the Spanish empire. The Spanish utilized a system known as “regalía” in exercising supreme power over the administration, licensing, and adjudication of certain activities and resources, but they did not apply this power to properties owned by the Indians. The Spanish would only exercise this power over Indian lands if they were planning major projects and a need for a right of way via the exercise of eminent domain was necessary.

Included in the Spanish crown’s regalía was the power to determine rights to public shared waters and to resolve conflicts of those rights. The crown did this through a process known as “repartimiento,” in which the crown allocated water to all involved parties by application of the following factors: prior use, need, purpose of use, legal rights, injury to third parties, and equity and the common good. Because there was never any conflict over water in the Jemez Valley watershed with respect to the Pueblos of Jemez, Santa Ana, and Zia, there was no historical record of any formal repartimiento occurring there.

The US/Pueblos argued that a sovereign must assert some affirmative act to extinguish aboriginal rights, and because no repartimiento or other affirmative act ever occurred limiting the Pueblos’ use of water, the Spanish did not extinguish or modify the Pueblos’ aboriginal rights. The US/Pueblos asserted *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941) as a source of authority for this argument. This argument did not persuade the court, who found instead that *Santa Fe Pacific* indicated a number of ways that sovereigns could extinguish Indian title, including “by treaty, by sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise.” *Santa Fe Pacific*, 314 U.S. at 347.

The court found that because Spain imposed a legal system administering the use of public waters (regalía), this ended the Pueblos’ exclusive use of public waters and subjected their later use to potential repartimientos. The court held this to be clear and unambiguous evidence that Spain extinguished the Pueblos’ right to increase their use of public water without restriction. Thus, the Spanish exercised complete dominion adverse to the Pueblos’ aboriginal rights and

needed perform no further act, affirmative or otherwise, to extinguish the Pueblos' aboriginal water rights.

The court also explored the history of land and water rights under Mexican and United States sovereignty, but, because the court concluded that the Spanish occupation extinguished the Pueblos' aboriginal rights, any effects on Indian aboriginal water rights resulting from Mexican or American government action were moot.

Finally, the court decided the issue of whether the *Winans* doctrine applied to any of the Pueblos' grant or trust lands. *Winans* rights are recognized aboriginal rights which preserve pre-existing rights, establishing priority from "time immemorial," i.e., before white settlement. The scope of a *Winans* right depends on actual use over an extended period of time. This right is not a function of land title, and the court determines such rights on a needs-based test rather than a practicably irrigable acreage test.

Because the court concluded that the Spanish occupation extinguished the Pueblos' aboriginal water rights, and thus there were no existing aboriginal water rights for the United States to recognize, the court held that the *Winans* doctrine did not apply to any of the Pueblos' grant or trust lands.

The U.S. District Court Judge adopted the recommendations of the magistrate in *United States v. Abousleman*, 2017 U.S. Dist. LEXIS 164733 (D.N.M. Sept., 30, 2017) and determined that the Pueblos did indeed possess aboriginal water rights that predated Spanish occupation; however, that right was extinguished under Spanish rule, and the *Winans* doctrine did not apply to the Pueblos' grant or trust lands.

*Megan McCulloch*

## STATE COURTS

### IDAHO

**City of Blackfoot v. Spackman**, 396 P.3d 1184 (Idaho 2017) (holding that: (i) the City must file for transfer before using its water permit for groundwater recharge; (ii) a settlement agreement with a private party does not allow the City to use its permit for groundwater recharge or mitigation purposes affecting future groundwater rights; (iii) seepage from the City's water use cannot be a basis for a claim of separate or expanded water right without transfer; and (iv) intervening parties were entitled to recover their attorney fees).

Currently, the City of Blackfoot (the "City") pumps water from the Blackfoot River and delivers it to irrigators east of I-15. In order to save money on the cost of operating and maintaining the pump, the City filed a water right application for permit No. 27-12261 ("12261") to appropriate 9.71 cfs of groundwater from the Blackfoot River. The City wished to offset the injury resulting from this appropriation with 1,066 afa of mitigation credit resulting from seepage that occurs under Water Right No. 01-181C ("181C").

Under its "purpose of use" element, 181C allows for five different uses: Irrigation Storage, Irrigation from Storage, Diversion to Storage, Recreation Storage, and Irrigation. During the irrigation season, this element allows the City to divert 2,466.80 afa from the Snake River to fill a recreation reservoir in Jensen's Grove. From that diversion, 1,100 acre-feet travels to the reservoir for