LEGAL STATUS OF WATER IN NEW MEXICO

By

Charles D. Harris,
Special Assistant Attorney General

THE APPROPRIATION DOCTRINE

In 1846, four years before New Mexico was established as a territory, Brig. Gen. S. W. Kearny promulgated the Kearny Code[1] which provided that the laws theretofore enforced concerning water courses would continue in force except that such regulation as was required was transferred from the governing officials of the villages to those of the counties.

In 1851, the first session of the territorial legislature declared that the courses of ditches or acequias already established should not be disturbed and that all rivers and streams theretofore known as public ditches or acequias were thereby established and declared to be public.

In 1891, the legislature provided that a sworn statement describing any water control works thereafter constructed must be filed within ninety days after the commencement of the work. The penalty for failure to file said statement was a loss of priority. The 1891 law was superceded by two statutes in 1901 and these were in turn replaced by the comprehensive legislation of 1907 which is the basic law in force in New Mexico today.[2]

The 1907 statute showed the clear legislative intent that the surface waters of New Mexico were public waters and New Mexico would follow the doctrine of prior appropriation. This water appropriation statute[3], is still in effect and provides that:

> "All natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A water course is hereby defined to be any river, creek, arroyo, canyon, draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water."

The 1907 water code set out the method of appropriating water and provided that it could be done only by application to and permit from the state engineer. The New Mexico courts have held that the statutory

method of appropriating water is exclusive.[4]

If there were any doubt about the status of surface water in New Mexico, it was removed by provisions of the constitution adopted January 21, 1911 before New Mexico became a state. The constitution provides in Article XVI: (1) All existing rights to the use of any water in this state for any useful or beneficial purpose are hereby recognized and confirmed. (2) The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use in accordance with the laws of the state. Priority of appropriation shall give the better right. (3) Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

As has been pointed out above, the legislature and the constitutional convention have always upheld the doctrine of prior appropriation; however, the courts have consistently held that the legislation implementing the appropriation doctrine has been merely declaratory of the law in New Mexico as it has always been and the legislation has been merely procedural, setting up fair rules and procedures for acquiring water rights. The territorial, state and federal courts have consistently held that the doctrine of appropriation is the law governing water rights in New Mexico and that this doctrine grew out of the conditions of the country and the necessities of its inhabitants.[5]

GROUND WATER

As was pointed out in the report of the President's Water Resources Policy Commission:[6]

> "New Mexico, while not the first state to enact ground water legislation, has pioneered in this field, in that its ground water administrative statute, after having been declared unconstitutional and subsequently re-enacted in correct form, was the first of the western state ground water statutes to be put into active operation and has set the pattern for much of the subsequent legislation in that field in the West."

An example of the effect that New Mexico legislation has had on the ground water law of the West is the "Uniform Underground Water Law for Western States" promulgated by the Assn. of Western State Engineers in 1934. The similarity to the New Mexico code is striking.

The first New Mexico statute, enacted in 1927, was overthrown

by the New Mexico Supreme Court in the celebrated case of Yeo vs. Tweedy[7]. Although the court held the statute invalid because it violated a constitutional prohibition against legislation by mere reference to pre-existing legislation, the court went on to state that the statute was declaratory of existing law, was not subversive of vested rights of owners of lands overlying the waters of an artesian basin the boundaries of which had been ascertained, and was fundamentally sound.

At the 1931 session, the present law was enacted. The pertinent statutes are short and to the point and are contained in three pages of the Annotated Statutes. Section 75-11-1 provides that bodies of ground water with reasonably ascertainable boundaries belong to the public and are subject to appropriation. The statute further provides: "Existing water rights based upon application to beneficial use are hereby recognized." There is also a provision for forfeiture of rights after four years' nonuse. According to the administrative provisions of the act, an applicant for a permit to appropriate must apply to the state engineer, who must cause a notice of such application to be published in order that the public and prior appropriators will be advised. If objections are filed, the state engineer conducts a hearing. Whether any protests have been filed or not, the state engineer must grant the application unless he finds that there is no unappropriated water or that the appropriation will impair existing rights. Under the law as it has been administered, all appropriations, changes of water rights, changes of method of use and changes in well location or construction require a permit form the state engineer. By this procedure, all records involving the use of underground waters are maintained in one state office.

Until 1949, the state was hampered in its administration of ground water law by the absence of legislation dealing specifically with well drillers. To remedy this deficiency, the 1949 session of the legislature passed a law which provided that well drillers operating in basins designated by the state engineer must obtain a license from that official and post a $5,000 bond with him. It was made unlawful for an owner to permit drilling except by a licensed driller. Furthermore, the regulations of the state engineer prohibit the driller from sinking a well unless the landowner has a permit issued by the state engineer.

For almost 20 years after the passage of the ground water law of New Mexico, there was no serious court challenge to its constitutionality. In 1949, however, the validity of the entire act was questioned in the case of State vs. Dority.[8] The defendants claimed that, as they had acquired title to their land through United States government patents which did not reserve the water,

the defendants were the owners of the land and the water underlying it. The court held that, since the passage of the Desert Land Act of 1877, federal patents of land did not carry with them any title to the water.

The court stated:

> "The Desert Land Act provided that all waters upon the public lands except navigable waters were to remain free for the appropriation and use of the public. It was not intended to be taken literally that such water must be upon the surface of the earth to be of such use. The waters of underground rivers with defined banks have always been subject to appropriation. We conclude that all water that may be used for irrigation was reserved by the Desert Land Act to be used beneficially by the public as provided by the laws of the arid states. No interest in such waters was conveyed by the United States patent. The United States Supreme Court has always looked to the laws and decisions of the state courts to determine the extent to which the authority of the state over such water has been exercised.
>
> "No right to the use of water from such sources was obtained by its use by defendants in violation of law nor can it be. The statutory method of securing such rights is exclusive."

The court went on to say:

> "There is another consideration which requires the affirmance of the trial court's decree. The decision of Yeo v. Tweedy, supra, has become a rule of property. In the nineteen years since that decision it may be assumed that many thousands of acres of the one hundred thousand irrigated with water from the Roswell Artesian basin and the valley fill have been sold to purchasers who relied on that decision as determining title to the right to use the water here involved, and the water rights to which would be injured or destroyed if Yeo v. Tweedy is overruled. Whether it stated the correct rule of law (and we are of the opinion that it did), it is now a rule of property that we will not disturb."

In a case involving artesian water,[9] the defendant's well was drilled outside the defined boundaries of an artesian basin and without a permit. The Conservancy District brought an action to enjoin the use of the well and on appeal the supreme court concluded that the Conservancy District had a right to maintain the suit to

enjoin the use of water from the defendant's artesian well even though the well was drilled on land outside the territory defined as within the boundaries of the basin as well as the boundaries of the district. On the second appeal in the same case discussed above[10], the supreme court followed the rule that in a contest over water rights, prior appropriators who complain of injury must prove that their use of water is reasonable and beneficial and that the new appropriators must show that there is a surplus which he may take without injuring prior rights.

The 1953 Legislature set up three types of preferential use of water. The applicable provisions of the act[11] are as follows:

> "Any person, firm or corporation desiring to use any of the waters described in this act for watering livestock, for irrigation of not to exceed one acre of non-commercial trees, lawn, or garden; or for household or other domestic use shall make application or applications from time to time to the state engineer on a form to be prescribed by him. Upon the filing of each such application, describing the use applied for, the state engineer shall issue a permit to the applicant to so use the waters applied for.
>
> "From time to time whenever any person, firm or corporation desired to use not to exceed 3 acre feet of the water described in this act for a definite period of not to exceed one year in prospecting, mining or drilling operations designed to discover or develop the natural mineral resources of the state of New Mexico, only the application or applications referred to in section 3, chapter 131, Laws of 1931 (section 77-1103, New Mexico Statutes Annotated, 1941 Compilation), shall be required. Separate application must be made for each proposed use, whether in the same or in different basins. Upon the filing of such application, the state engineer shall make an examination of the facts, and, if he finds that the proposed use will not permanently impair any existing rights of others, he shall grant the application. If he shall find that the proposed use sought will permanently impair such rights, then there shall be advertisement and hearing as provided in the case of applications made under section 3, chapter 131, Laws of 1931 (now being section 77-1103, New Mexico Statutes Annotated, 1941 Compilation)."

There is some question as to whether or not preferential use of water may be obtained under the New Mexico theory of appropriation. The question arises as to whether later domestic users may take water without any regard to the impairment of prior rights.

The writer has no opinion as to whether this act would be considered to deprive prior appropriators of water without due process of law. There also may be a question as to whether this act violates the federal constitutional provisions as to equal protection of law.

In 1953, the legislature also established the public policy of New Mexico as regards underground water. Under the 1931 act, underground streams, channels, artesian basins, reservoirs or lakes having reasonably ascertainable boundaries were declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use. The 1953 act provides:[12]

> "For the purposes of this act * * *all underground waters of the state of New Mexico are hereby declared to be public waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use within the state of New Mexico. All existing rights to the beneficial use of such waters are hereby recognized.
>
> "No person shall withdraw water from any underground source in the state of New Mexico for use in any other state by drilling a well in New Mexico and transporting the water outside the state or by drilling a well outside the boundaries of the state and pumping water from under lands lying within the territorial boundaries of the state of New Mexico.
>
> "No permit and license to appropriate underground waters shall be required except in basins declared by the state engineer to have reasonably ascertainable boundaries."

By the passage of this act and the acts of 1907 and 1931, all water in the State of New Mexico for all practical purposes was declared to be public. In addition, the 1953 act prohibited using ground water outside the territorial boundaries of the state.

ADMINISTRATION OF WATER RIGHTS

The 1907 Code provides that one intending to acquire the right to the beneficial use of water, before commencing any construction for such purpose, shall make application to the state engineer for a permit to appropriate the water.[13] If the state engineer approves the application, he endorses his approval thereon which thereupon becomes a permit to appropriate the water. A

certificate of construction is issued upon the conclusion of the works and upon the final inspection of the project, a license to appropriate water is issued to the extent and under the condition of the actual application thereof to beneficial use but in no manner extending the rights described in the permit.

The 1907 Code requires the state engineer to reject an application to appropriate water if there is no unappropriated water available for the benefit of the applicant and provides that he may refuse to consider or approve an application if in his opinion the approval thereof would be contrary to the public interest. The statute also provides that the state engineer at his discretion may approve an application for a lesser amount of water than applied for or may vary the periods of annual use of the water and that the approved permit shall be regarded as so limited.[14]

Any discussion of the administration of water rights requires mention of the requirements of appropriation. A valid appropriation of water requires a legal diversion and application of water to beneficial use. To constitute a rightful diversion under the New Mexico statutes there must be an application to appropriate filed with the state engineer[15] plus actual diversion of water. Apart from statute, under the arid region doctrine of appropriation, there must be an intention to appropriate together with the diversion and use of water. The intention alone is not sufficient to initiate a right. There must be some substantial act giving notice of the proposed appropriation and the appropriator must diligently proceed to complete his appropriation by construction of works and by application of water to beneficial use.[16]

Although intention to appropriate plus diversion of water are necessary elements of appropriation, nevertheless, application of the water to beneficial use is necessary to complete the appropriation. The supreme court has stated:[17]

> "Diversion is one of several elements necessary to a legal appropriation of water, and while a valid appropriation may follow immediately upon the diversion of water from a stream by reason of a concurrence of the other necessary elements, it is still but an element of that appropriation, and is not equivalent to it. Water may be diverted from a stream, and still not be appropriated, and it is only when diversion is accompanied or followed by application to some beneficial purpose, that the water is appropriated so as to prevent a subsequent appropriator from acquiring a right to its use."

It is fundamental with the doctrine of appropriation that priority as to time gives the superior right as has been pointed out above. The appropriation is not completed until there has been an application of water to beneficial use but, if the priority attached at the time of completion of the application to beneficial use, there would be resulting hardship. This has given rise to the doctrine of relation.

The doctrine of relation was formally incorporated into the 1907 water code as follows:[18]

> "* * *Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to March 9, 1907, the right shall relate back to the initiation of the claim upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to beneficial use. All claims to the use of water initiated thereafter shall relate back to the date of the receipt of an application therefor in the office of the territorial or state engineer subject to the compliance with the provisions of this article and the rules and regulations established thereunder."

As has been pointed out, this particular provision of the 1907 law was a mere codification of the law as it already existed in New Mexico. The courts have taken the position that the New Mexico water law has been based in part on custom and usage apart from the statutes and yet, New Mexico does not recognize any common law other than codivied law and the English common law.

The appropriator is in danger of losing his priority unless he is diligent in completing his works and applying the water to beneficial use. Financial inability to complete the project has been held to be no excuse for delay in completion of works. The statute, as amended in 1941,[19] provides:

> "* * *that the state engineer may upon the request of the applicant allow additional time for the completion of works equal to the time during which work was prevented by acts of God, operation of law, or other causes beyond the control of the applicant."

LOSS OF WATER RIGHTS

In addition to the method of losing water rights whereby an intending appropriator fails to diligently complete his work and thereby loses his priority, the 1907 code provides:[20]

"When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four (4) years, such unused water shall revert to the public and shall be regarded as unappropriated public water; Provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner."

In a case decided in 1950 on the question of forfeiture, the court stated:[21]

"It is true there were long intervals between 1913 and 1932, the period in which nonuse sifficient to constitute abandonment is claimed to have occurred, when no irrigation of the lands in tract No. 8 actually took place. Nevertheless, the evidence is abundant that throughout such periods of nonuse, droughts producing a shortage of water, the progressively increasing depth and width of Chavez Cnayon, which had its course across a portion of tract No. 8, all combined to render irrigation impractical or impossible.

"* * *Under the conditions shown to exist, a forfeiture through abandonment will not take place. * * *Our statutes recognize the unfairness in loss of a water right through nonuse where conditions beyond the control of the owner of such right prevent use."

Note that Webster defines abandonment as the act of giving up with the intent of never again claiming one's rights of interest in; giving over or surrendering completely; deserting. In the field of water rights there must be an intentional relinquishment of claim in order to constitute abandonment. Forfeiture, on the other hand, is by operation of law and is accomplished in New Mexico by a four years' period of nonuse. It would appear from a reading of Section 75-5-26[22] that the only way that a water right could be lost in New Mexico would be by forfeiture. The writer submits that a forfeiture takes place only through nonuse and that the intent of the appropriator will not control except in the event he is unable to divert water.

The New Mexico law has not been settled on the question of prescriptive rights, limitations and adverse possession. This

writer knows of no case in which the supreme court has held that water rights can be obtained by adverse use or by prescription. The writer would submit that if such rights can be lost or gained by adverse users or by prescription, it will necessitate resolving what interest the public has in such water.

ADJUDICATION OF WATER RIGHTS

The statute governing the appropriation of water contains procedure for the adjudication of water rights.[23] Such adjudications are made exclusively in the courts. Upon completion of the hydrographic survey of any stream system by the state engineer, the attorney general is authorized to initiate a suit on behalf of the State to determine all water rights concerned, unless such suit has been brought by private parties. Also, the attorney general is directed to intervene on behalf of the State in a suit begun by private parties, if notified by the state engineer that in his opinion the public interest requires it. In any suit to determine water rights, all claimants are to be made parties, and the court is required by statute to direct the state engineer to furnish a complete hydrographic survey. Upon the adjudication of rights to the use of waters of a stream system, a decree is issued adjudging the several water rights to the parties involved, containing all conditions necessary to define the right and its priority.

A suit decided in 1931 involved questions relating to both ground waters and stream waters.[24] Jurisdictional principles so decided are stated in the syllabus prepared by the court as follows:

> 1. A statutory suit to adjudicate water rights of stream systems is all-embracing, and includes claim to rights of appropriators from artesian basin within such system.
>
> 2. The jurisdiction of the district court in which is pending a suit to adjudicate water rights of stream system is exclusive of jurisdiction of another district court to entertain suit of artesian basin appropriators attacking right of stream appropriator asserted in adjudication suit or claiming a priority over it.

A suit to adjudicate water rights is of the nature of a suit to quiet title to realty.[25]

INDEX OF REFERENCES

1. Kearny Code, Sec. 1

2. N.M. Laws, 1907, Chap. 49; N.M.S.A. 1953, 75-et seq.

3. N.M.S.A., 1953, 75-1-1

4. Harkey v. Smith, 31 NM 521; 247 P. 550 (1926)

5. Snow v. Abalos, 18 NM 681; 140 P 1044 (1914)
   Albuquerque Land & Irr. Co. v. Gutierrez, 10 NM 177; 61 P. 357 (1900); Affirmed, Gutierrez v. Albuquerque Land & Irr. Co., 188 US 545 (1900)
   Hagerman Irr. Co. v. McMurray, 16NM 172; 113 P. 823 (1911)
   Murphy v. Kerr, 296 Fed. 536 (1923)
   Yeo v. Tweedy, 34 NM 611; 286 P. 970 (1929, 1930)
   Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 US 92 (1938)
   Lindsay v. McClure, 136 Fed. 2d. 65 (1943)
   St. ex rel. Game Com. v. Red River Valley Co., 51 NM 207; 182 P. 2d 421 (1945)

6. Water Resources Law, US Gov. Print. Office, Vol. 3, p. 746

7. Yeo v. Tweedy, 34 NM 611; 286 P. 970 (1929, 1930)

8. State v. Dority, 55 NM 12; 225 P. 2d. 1007 (1950)

9. P.V.A.C.D. v. Peters, 50 NM 165; 173 P. 2d 490 (1945, 1946)

10. P.V.A.C.D. v. Peters, 52 NM 148; 154; 193 P. 2d 418 (1948)

11. N.M.S.A., 1953, 75-11-1

12. N.M.S.A., 1953, 75-11-22

13. N.M.S.A., 1953, 75-5-1 to 75-5-13

14. N.M.S.A., 1953, 75-5-5 & 75-5-6

15. N.M.S.A., 1953, 75-5-1

16. Harkey v. Smith, 31 NM 521; 247 P. 550 (1926)
    Snow v. Abalos, 18 NM 681; 140 P. 1044 (1914)
    Albuquerque Land & Irr. Co. v. Gutierrez, 10 NM 177; 61 P. 357 (1900). Affirmed, Gutierrez v. Albuquerque Land & Irr. Co., 188 US 545 (1900)
    Murphy v. Kerr, 296 Fed. 536 (1923)
    Hinderlider v. La Plata River & Cherry Creek Ditch Co., 30 US 92 (1938)

17. Milheiser v. Long, 10 NM 99; 61 P. 111 (1900)

18. N.M.S.A. 1953, 75-1-2; N.M. Laws, 1907, Chap. 49

19. N.M.S.A. 1953, 75-5-7

20. N.M.S.A. 1953, 75-5-26

21. Chavez v. Gutierrez, 54 NM 76; 213 P. 2d 597 (1950)

22. N.M.S.A. 1953, 75-5-26

23. N.M.S.A. 1953, 75-4-2- to -75-4-10

24. El Paso & R.I. Ry. v. Dist. Court, 36 NM 94, 95; 8P. 2d 1064 (1931)

25. P.V.A.C.D. v. Peters, 52 NM 148; 154; 193 P. 2d 418 (1948)