

## WATER LAWS AS THEY AFFECT NEW MEXICO

Ross L. Malone\*

The history of the effect of water laws upon New Mexico is the history of New Mexico itself. Water is the life blood of our state. The laws by which the development of adequate supplies has been encouraged, its regulation has been effected and conservation has been accomplished may be said to constitute the very warp of the fabric of the existence of New Mexico.

Fortunately, the United States, by the Act of July 26, 1866, and supplemented by the Desert Land Act of 1877, accepted the laws of the state as the basis for determining the validity and extent of rights to water found within the state. As a result it has been the laws of New Mexico and not the laws of the United States which principally have affected the development of the state and its water resources.

To say that such state control is highly desirable is the ultimate in understatement. With water the sine qua non of our existence, if the Federal government had retained the right to control the surface and underground waters of New Mexico, it would have been of little consequence whether other state rights were reserved or protected. It is doubtful that any more effective means of controlling the social, economic and political life of a state such as New Mexico could be devised than through absolute control of its water resources. The fact that this control has been in the state and not in the Federal government has been an important factor in the development of the laws which govern the use of water in New Mexico. We can only speculate as to the situation had not Congress quit-claimed control of water on the public domain to the states, but many considerations indicate that only with state control could we have devised a system so well suited to the needs of the state, at a time when many other states had no appreciation, and were giving little serious attention, to the problems involved.

In considering water laws as they affect New Mexico, it is important to bear in mind the relative importance of underground water in New Mexico as compared to surface water. When Dr. Black opened this conference last year, he directed attention to the fact that of the 860,000 acres of land under irrigation in the state, 66% was being irrigated from underground sources. Inasmuch as 94% of the water used in New Mexico is used by agriculture, it is apparent that underground sources are supplying well over 50% of the water used in the state for all purposes. It is also apparent that while the amount of water available from surface sources is decreasing, the water used from underground sources is increasing as new deposits are discovered and developed.

In the light of that situation, and because the regulation of surface waters has posed fewer legal problems than has underground water in the history of New Mexico, my discussion today will deal primarily with the impact of our water laws upon the development of the underground waters of the

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\*President of American Bar Association, Roswell, New Mexico.

state. If a further ground for this emphasis upon underground water is needed, I will confess that it results also from the fact that my personal experience and interest in water law in New Mexico during the past 25 years has involved underground water principally.

The impact of laws governing the use of underground water upon New Mexico has been, to a large degree, the impact of the doctrine of prior appropriation upon the state.

The drafting and enactment of the first comprehensive underground water control act in the United States resulted directly from the overdevelopment of the Roswell Artesian Basin, which had become acute by 1925. The decline in water levels which resulted, coupled with the rudimentary pumping equipment then available, caused farms to be abandoned and destroyed land values throughout the area. Loan companies were only willing to accept irrigated lands as security at dry land values, even though market prices of such lands were many times those of dry lands.

Assistance was sought from the United States Geological Survey, which responded generously, as it has throughout its history. The Fiedler & Nye study during the period from 1925 to 1928 made available for the first time authoritative information as to the quantity and sources of the water in the Roswell Artesian Basin, the speed of recharge and other factors necessary to establish a sound economic basis for the regulation and use of the waters of the basin.

In the first preliminary report of the study, published in 1926, the authors recommended the enactment of legislation which would make possible the control of withdrawals from the basin. The Fiedler study having established the extent of the supply and rate of recharge of the basin, it would be possible to intelligently administer the waters of the basin if suitable legislation were enacted to make it possible. The objective of balancing the recharge and withdrawals was thus within reach for the first time.

The authors of the legislation which became Chapter 182 of the Session Laws of 1927 had at least five different precedents available from other states which could have been made the basis of the proposed legislation. Some had come into existence through court decree, others were given force by statute. Some had evolved as applicable only to surface waters, others to underground streams and still others had been applied to percolating ground water. No doubt all were considered as underground water was then thought to be in an entirely separate category from surface waters and not necessarily to be governed by the same basic rules of law. The alternatives available were these five rules, each of which would have had a different effect upon New Mexico if adopted:

- (1) The English rule of absolute ownership by the landowner of the sub-surface waters found within his land.
- (2) The so-called American rule of reasonable use.
- (3) The rule of correlative rights.
- (4) The rule of riparian rights.
- (5) The rule of prior appropriation.

The English rule laid down in Acton V. Blundell, (12 Mess & W. 324, 1843), which recognized absolute ownership of the ground water in the

landowners and permitted any use by him without reference to its effect on others held no promise for New Mexico. This was the basis on which the Roswell Artesian Basin had been overdeveloped. Every landowner had claimed the right to drill as many wells on his land as he desired and to produce as much water as he might see fit. Neither the state nor his neighbors had the right to stop him, regardless of the effect of his action upon other property owners. But it had become obvious that there was more land underlaid with water and suitable for irrigation in the Pecos Valley than there was water in the Roswell Artesian Basin with which to irrigate it. The English rule obviously offered no solution for the problems besetting the Pecos Valley.

The so-called American Rule had its origin in the dissenting opinion in the English case of Chasemore v. Richards, decided in 1857. (2 Harl. & N. 168, 1857). In that case, which affirmed the doctrine announced in Acton v. Blundell, the defendant had diverted percolating underground water which supplied a stream on which the plaintiff operated a mill, thus interfering with the plaintiff's mill operations. Plaintiff sought relief. The majority of the court applied the rigid English rule of absolute ownership and denied relief on the principle that the landowner owned from the center of the earth to the heavens. Justice Colclough dissented, arguing that the rule that one must so use his own property as not to injure another's should be applied, and, hence, that the court should consider the reasonableness of the use by the defendant in deciding whether relief would be granted. This minority view was subsequently adopted by many American courts and became known as the American doctrine. It permitted the use of underground water by a landowner, regardless of its effect upon other users, so long as the use involved was a reasonable one.

Obviously this rule also provided no solution for the problem with which the 1927 legislature was dealing, inasmuch as substantially all water in the Pecos Valley was being used for agriculture - an obviously reasonable use. In that situation the result of the application of the American rule would have been substantially identical with adoption of the English rule.

The third possibility available to the legislature in 1927 would have been the application of the doctrine of correlative rights to underground water produced from a common source of supply. This doctrine was originally developed in the states of California and Utah, although Utah later abandoned it for a system of appropriation. The doctrine recognizes the right of each landowner overlying a common source of supply to an amount of water proportionate to the surface area owned by him. The doctrine is a familiar one to the oil and gas industry today. Its application is the basis for the allocation of allowable between oil and gas wells in almost all pools today, but most of its development has occurred since 1927. As applied to water it would permit an owner of land overlying a common source to drill for and produce water in an amount proportionate to his acreage, and when the development reached the point that the supply was inadequate for the needs of all owners, all would be subject to a reduction similarly in proportion to their acreage.

While this doctrine undoubtedly had some appeal as treating all property owners equally, in relation to their acreage, it had many of the disadvantages of the English rule, as applied to New Mexico. It had been demonstrated conclusively that the land overlying the Roswell Artesian Basin

exceeded the supply of water available to irrigate it. In other words, there just was "not enough water to go around." That being true, while it would be fair and just to divide the available supply between all owners on the basis of their ownership, experience had proved that it would not provide anyone enough water to make a crop. Such a system not only would subject all property owners to slow death by starvation, but would not be in the public interest in that it would not result in a maximum contribution to the economy of New Mexico from the lands affected. Such a system had little to recommend it when viewed in the light of the problems with which the people of the Pecos Valley and the legislature were wrestling.

The fourth alternative, which was provided by the riparian rights doctrine, probably received little consideration even though it has been said that "by 1900 it constituted the backbone of American water rights law in the eastern states." As applied to surface waters, and it is, of course, basically a surface water doctrine, the rule provides that the water from streams and lakes may be used only by persons owning land adjacent to these bodies of water, and that each owner must use the water reasonably in relation to the uses which other persons similarly situated are making. The doctrine further limits the use of the water to those tracts actually in contact with the body of water and does not permit the enlargement of "riparian lands" through acquisition by a riparian owner of a tract of land adjacent to his but not to the water source. No transfer of riparian water rights is possible. But this doctrine was already in disrepute in New Mexico.

In 1898, when the Supreme Court of New Mexico first considered the possible applicability of the riparian rights doctrine in New Mexico, the Court in U.S.A. v. The Rio Grande Dam and Irrigation Company, (9 N.M. 292, 51 Pac. 674), pointed out that the United States had surrendered its riparian rights to water on the public domain in 1866, and that prior to that time "it had become established that the common law doctrine of riparian rights was unfitted to the conditions in the far West . . . ."

In 1907 the legislature had enacted a comprehensive surface water control act, Section 1 of which provided:

"All natural waters flowing in streams and water courses, whether such be perennial or torrential, within the limits of the Territory of New Mexico, belong to the public and are subject to appropriation for beneficial use."

This was followed by the adoption of the Constitution of New Mexico in 1911, Article XVI, Section 2, of which reaffirmed and expanded the provision of the 1907 act quoted above and established prior appropriation as the law of this state with reference to surface waters.

The constitutional provision having sounded the death knell of the riparian rights doctrine in New Mexico, and the courts having given their blessing to the doctrine of prior appropriation as applied to surface water on a number of occasions, it is not surprising that the legislature of 1927 turned to the prior appropriation doctrine in finding a solution for the underground water problems typified by the situation in the Pecos Valley.

The decision to make the doctrine of prior appropriation applicable to underground water in New Mexico was effectuated by Section 1 of Chapter 182

of the Laws of 1927, which provided:

"All waters in this state found in underground streams, channels, artesian basins, reservoirs, or lakes, the boundaries of which may be reasonably ascertained by scientific investigations or surface indications, are hereby declared to be public waters and to belong to the public, and subject to appropriation for the beneficial uses under the existing laws of this state relating to appropriation and beneficial use of waters from surface streams."

The further provisions of the Act vested administrative control in the State Engineer, recognized existing rights based on application to beneficial use and provided that the Engineer should proceed with administration of any underground water supply subject to the Act on petition of 10% of the users of water from the source in question.

It was inevitable that the law would be challenged on constitutional grounds, and the challenge was not long in coming. In fact, sponsors of the law encouraged the attack in order that there might be a judicial determination of the validity of the legislation before too many investments had been made in reliance upon it.

The case of Yeo v. Tweedy, and its companion cases involving the validity of the 1927 Act, were among the most important cases ever considered by the New Mexico Supreme Court. Had the court held, as contended by opponents of the 1927 Act, that proprietors of property had a vested property interest in the water underlying their land, or that the riparian rights doctrine had been applicable to underground water in New Mexico prior to passage of the Act, the statute would have been declared unconstitutional. If that had occurred, it is extremely doubtful that any effective control statute could have been passed by the New Mexico legislature without an amendment of the Constitution. The chaotic conditions which could have resulted from that situation are frightening to contemplate when we realize that more than half of the state's current water supply comes from sources which would have been affected by them.

The Supreme Court's opinion in Yeo v. Tweedy upheld the statute against all substantive constitutional attacks, but held it fatally defective in seeking to expand by reference the provisions of various surface water statutes to make them applicable to underground water. This defect was one readily susceptible of correction by redrafting certain provisions of the Act. The 1931 session of the legislature convened about eight months after the final decision in Yeo v. Tweedy. A new act, redrafted to correct the defects pointed out by the Court, but in its principle aspects a re-enactment of the provisions of the 1927 Act, was promptly passed and, with minor amendments, has regulated the use of underground water in New Mexico since that date.

One aspect of the decision in Yeo v. Tweedy merits special mention. In spite of the fact that the Court's opinion held the statute void for attempted expansion of legislation by reference, it considered at length, and approved, its application of the doctrine of prior appropriation to underground water and its declaration that they are public waters.

In legal parlance, anything discussed by a court in its opinion which

is not required as a basis for the decision in the case is known as dicta. Because dicta constitutes a gratuitous expression of opinion by the court, not required by the disposition made of the case, it is not considered precedent for future cases. Only the disposition of the issues upon which the decision in the case rests become precedent.

Since the effect of the decision in Yeo v. Tweedy was to declare the statute invalid, the extended discussion of principles applicable to the constitutional attack and the court's conclusion that in that respect the statute was valid, constituted dicta in every sense of the word. Nonetheless, the court devoted some fourteen pages of its opinion to the dicta. This very unusual deviation from accepted standards of appellate opinion writing undoubtedly reflected the court's appreciation of the unique and vital importance of the legislation being considered and the urgent need that valid legislation on the subject be enacted at the earliest possible time.

That the court's effort to set at rest the substantive constitutional questions involved was successful is attested by the fact that the validity of the 1931 Act was not attacked in the courts until the case of State v. Dority some twenty years later.

The Dority case, which was decided by the Supreme Court of New Mexico in 1950, resulted from an enforcement campaign undertaken by the Pecos Valley Artesian Conservancy District and the State Engineer jointly following World War II. High prices during wartime, coupled with a patriotic salve for their consciences, had led a substantial number of Pecos Valley farmers to expand their irrigated land without the benefit of water rights. A great many suits for injunction were filed to enjoin illegal irrigation of dry land. A group of farmers, many of whom were defendants in these cases, joined together, raised a fund and announced their intention to contest the validity of the 1931 Act all the way to the Supreme Court of the United States on the ground that they owned the water under their lands and the state could not take it away from them without compensation.

Three typical cases were selected to constitute test suits. The defendants in the three cases were Bert Troy Dority, Loman Wiley and T. A. Lanning, Jr. One case involved the use of artesian water, one the use of shallow ground water of the valley fill and the third involved the use of artesian water on lands having shallow rights only.

The validity of the 1931 Act and of the State Engineer's action in assuming jurisdiction of both the artesian and shallow ground water deposits of the Roswell Artesian Basin were upheld by the trial court, the Supreme Court of New Mexico and the Supreme Court of the United States - and thus were finally set at rest the questions as to the applicability of the doctrine of prior appropriation to the underground waters of New Mexico and the validity of the principles involved in the 1927 Act.

When enacted, the 1927 Act was the first comprehensive underground water control act in the United States. The same year Oregon enacted a similar statute, a portion of which was modeled after the New Mexico Act. The benefits to New Mexico of this early action to establish the law of underground water in New Mexico are obvious. Suffice it to say that in a conference with a group of Texas state officials, who came to New Mexico to

observe the operation of an underground water control act a few years ago, one statement was heard time and again from the Texans: "If only we had done this back when you did."

Having benefitted to such a great extent from the early enactment of our statute and establishment of its validity in the Courts, we have a special responsibility to see that New Mexico continues to progress and does not retrogress in the utilization and conservation of our underground water resources. This Conference by its contribution to public understanding of our water laws and public appreciation of the importance of our water resources, renders a significant service to the State of New Mexico. I congratulate New Mexico State University upon its sponsorship and express my appreciation of the opportunity to participate with you in the Conference.