PANEL - WATER IN LAND DEVELOPMENT

Harvey Mudd*

The speculative land boom that has so drastically altered the land and social structure of California and Arizona has spread east to New Mexico. Profit-taking on vast tracks of unimproved and often worthless desert real estate is accomplished by the large scale subdividing and high pressure marketing of this land in the centers of urban discontent. While many of the lots sold in New Mexico in this new land rush will never see a homebuilder, and will forever lie useless, thousands of under-an-acre monuments to man's greed and gullibility will be built, and many of the subdivided lots will eventually see their new owners, shovel, hammer, and grass seed in hand.

It has been estimated that already over 1 million acres have been platted for sale. Guessing at densities and sizes of families, we have a potential increase of 2 million people to the state's population. No one knows how many people will actually come. The great degree of environmental and social impact of subdividing will, of course, depend on how many souls respond to the promotional talk of 99% pure water and unlimited opportunity and the photos of well-watered golf courses. There can be no doubt that there will be some impact.

In the arid Southwest, the area of greatest concern should be water. Each new family will consume some .7 acre feet per year. The obvious question should be from where and from whom will the water come. Unfortunately, the way the present water law reads, the water for the new people is likely to belong to an existing water user, and it will be taken from him whether he likes it or not. It is this situation that I will focus on, for it is in urgent need of correction.

The basic tenet of New Mexico water law is the doctrine of prior appropriation. The law says that all the waters of the state belong to the public and may be appropriated for beneficial use. The establishment of a water right is accomplished by putting a quantity of an appropriated water to beneficial use. And in the words of the State Constitution, Section 3, Article 16, "Beneficial use shall be the basis the measure and the limit of the right to use water." The Constitution goes on to say in Section 2, Article 16, "Priority of appropriation shall give the better right." This, in effect, says that the first user of water, the first appropriator, has the better or stronger water right than a later appropriator. The prior appropriation doctrine is essential and an obvious necessity if there is to be any orderly economic development of the state's water resources. Obviously, no capital investment involving water would occur in a situation where a later water user

* Central Clearinghouse, Santa Fe, New Mexico.

could, with impunity, wipe out the viability of an earlier investment. And what capital investment, be it a home, a farm, a factory, or a city, does not involve water?

The language of the Constitution refers to surface waters. The concept was extended statutorily to cover underground waters within those areas declared by the State Engineer to be an underground water basin (Section 75-11-3, NMSA 1959). In addition to the statutory extension of the doctrine, judicial interpretation has, in effect, stated that, "There does not exist one body of substantive law related to appropriation of stream water, and another body of law relating to the appropriation of underground water. The legislature has provided somewhat different administrative procedure whereby appropriators' rights may be secured from the two sources, but the substantive rights, when obtained, are identical." (City of Albuquerque vs. Reynolds, 71 NM 428, 379P, 2d, 73).

The procedures to be followed for the appropriation of underground waters within a declared water basin are set forth in Section 75-11-3. This section states, and I will quote extensively from the section, that:

> "Any person, firm or corporation desiring to appropriate for irrigation or industrial uses any of the waters described in this act . . . shall make application to the state engineer in a form to be prescribed by him . . . .
>
> Upon the filing of such application the state engineer shall cause to be published in a newspaper of general circulation in the county wherein the proposed well will be located . . . a notice of the filing of such application, and that objections to the granting thereof may be filed . . . .
>
> The state engineer shall, if he finds that there are in such underground stream, channel, artesian basin, reservoir or lake, unappropriated waters, or that the proposed appropriation would not impair existing water rights from such source, grant the said application and issue a permit to the applicant to appropriate all or a part of the waters applied for subject to the rights of all prior appropriators from said source.
>
> If objections or protests have been filed with the time prescribed in the notice, of if the state engineer is of the opinion that the permit should not be issued, the state engineer shall notify the applicant of that fact by certified mail . . . . If, after such hearing, it shall appear that there are no unappropriated waters in the designated source, or that the proposed appropriation would impair existing water rights from such source, the application shall be denied."

To summarize the above, Section 75-11-3 states that before an appropriation for irrigation or industrial use may be made there must be public notification of the intention to make the appropriation, opportunity for protest, public hearings, and, quoting again, "if after such hearing, it shall appear that there are no unappropriated waters in the designated source, or the proposed appropriation would impair existing water rights from such source, the application shall be denied."

The principles contained in this section were by judicial interpretation extended to cover appropriations made by a city or municipality, in the case of the City of Albuquerque vs. Reynolds (71NM 428, 379, P, 2d, 73).

The Due Process of Law provisions of Section 75-11-3 and the doctrine of prior appropriation hold for all uses of water in the state. There is one exception. This is the exception or loophole allowed under Section 75-11-1 of the State Code. Quoting from that section:

> "By reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock, in irrigation of not to exceed one (1) acre of non-commercial trees, lawn or garden; in household or other domestic use, and in prospecting, mining, or constructing of public works . . . application for any such use shall be governed by the following provisions.
>
> 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 (1) 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 prescibed 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."

This provision in the State Water Code is the heart of the problem. It, in effect, allows domestic water users to establish a water right of up to 3 acre feet per year without going through any of the due process procedures that are described in Section 75-11-3. It does not require that the State Engineer find that there is some quantity of unappropriated water in the declared water basin, which quantity can then be appropriated by the domestic well. It does not require that the State Engineer first satisfy himself that no existing water right will be impaired by the new use. It is, in effect, an automatic granting of a water right which ignores the protection afforded by Section 75-11-3 and by the basic concept of prior appropriation. When 75-11-1 was enacted in 1953, it was never contemplated that it would be used by large scale land subdividers as the way in which they would provide water to prospective lot purchasers. And yet that is the case today. An examination of the disclosure statements of countless subdivisions, large and small, finds that in many cases, the subdivider provides water service to a small core development area. The majority of the acreage, however, is not serviced by the water system. For the areas not so serviced, the subdivider says in his disclosure statements, and I paraphrase, "New Mexico law allows any individual to drill a domestic well and remove 3 acre feet per year."

If the appropriation of water made through a 75-11-1 well occurs in an already fully appropriated underground water basin, as would be the case in the Rio Grande Basin and in the Roswell Artesian Basin, it

means, very simply, that the well is using somebody else's water, without giving the existing water user opportunity to protest the new use and without giving the State Engineer the authority to deny the application. The only protection that is available to the holder of a prior water right is to sue the driller of the 75-11-1 well for damages. The burden of proof would fall on the injured party. This is in direct contrast to the burden of proof under section 75-11-3 where, by judicial interpretation, it has been made very clear that the burden falls on the applicant for a permit to make a new appropriation of waters. (Matthers vs. Texaco, Inc., 77, NM, 239, 421, P, 2d, 71.)

The language of 75-11-1 refers to the ". . . relatively small amounts of water consumed . . . in irrigation of not to exceed one (1) acre of non-commercial trees, lawn or garden; in household or other domestic use . . . ." It is obvious that in referring to the relatively small amounts of water, the drafters of this language never contemplated that a subdivision of 160,000 acres, as exists in Valencia county, for instance, platted in half-, one-, and five-acre lot sizes, would rely on wells under Section 75-11-1 as its source of water. It is obvious that if that subdivision were ever to fill with homes, each one relying on 75-11-1 wells as a source of water, that the quantity of water appropriated and consumed would not be relatively small.

It was this loophole in the state law which the subdivision-water conservation bill introduced in the last legislature attempted to plug. Let me quote to you from the language of that piece of legislation, HB63-SB39, that dealt with appropriations of water inside a declared water basin: "A plat shall not be approved until the owner or subdivider has been issued a permit, other than a permit allowed under 75-11-1 NMSA 1953, by, or has been demonstrated satisfactory arrangements for water supply to the State Engineer for use of water in quantity adequate to fulfill the subdivision's requirements determined under (sic) an earlier paragraph. And for the purposes of this subsection, no water within land subdivisions shall be provided under permits issued under Section 75-11-1 NMSA 1953." This language was an amendment to the State Land Subdivision Act, 70-3-3. It would have in no way affected the uses of 75-11-1 well permit, as intended by the drafters of the original language. The farmer, the sole householder in a remote area, feedlot operator, and the like would still have been granted the permits under 75-11-1. The bill attempted to recognize the fact that land subdivision is a commercial activity and should be regulated in terms of water in the same way agricultural, industrial, or municipal water users are regulated. The fate of this piece of legislation is, I think, well known. It did not pass. And the major objection to it was the closing of the 75-11-1 loophole. It meant, essentially, that subdividers would have been required to subdivide in a direct relationship to a real housing need, to the physical availability of water, to the ability to obtain water rights, to the ability to show that water consumption by the subdivision would not impair existing water rights. This attempt to bring subdivision use of water, both conceptually and economically, within the same framework as other water users in the state was fought vigorously by the speculative land sellers. In light of the magnitude of the land

speculation that is occurring in the State of New Mexico at this time, I can think of no greater threat to our water resource and to the property rights of existing water users than this particular loophole in the law. It is my hope that in the coming legislative session, the legislature will see their obligation to the people and correct this matter.

I thank you for your attention.