

PERSPECTIVES ON NEW MEXICO WATER LAW

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The various elements of western water law need to be viewed from a broad perspective in order to realize a uniform system for the administration of water rights. The many differences between surface and ground water and the differences among state, federal, and interstate water law make it difficult to obtain this perspective. Although the prior appropriation doctrine could provide a foundation for a unified system of water law, it will have to be flexible enough to allow for necessary modifications in order to survive the many challenges to its application. As a lawyer, I hope to outline briefly some of the important challenges to the doctrine of prior appropriation in the context of current water law litigation in New Mexico.

The two basic principles governing New Mexico water law are set forth in Article 16 Section 2 of the New Mexico Constitution. Individuals may obtain rights to use public waters, but they do not own water in natural streams or underground water basins and the water right may be lost by nonuse. The public ownership principle originated in Spanish law. The second principle is that the water resources of the state shall be allocated among the water right owners according to the equity maxim: first in time, first in right. This principle arose out of the mining law of California. These two principles are the essential elements of the prior appropriation doctrine, which has been adopted as the law governing the appropriation of water in the western states. Federal and interstate water law incorporate important aspects of the doctrine of prior appropriation.

Probably the most significant development in the doctrine of prior appropriation has occurred in its application to underground water.

The New Mexico ground water code was enacted in 1931. It established a permit system for new appropriations and changes in water rights in basins declared by the state engineer. Since 1931, the state engineer

has declared basins covering approximately 70 percent of the lands in the state. The ground water code requires the state engineer to grant an application to appropriate water if there is unappropriated water and the proposed appropriation would not impair existing water rights. In 1983, the New Mexico Legislature adopted two additional criteria. The appropriation of ground water must not be contrary to the conservation of water within the state, and it must not be detrimental to the public welfare of the citizens of the state.

New Mexico water law is based upon two basic goals: first, the maximum beneficial use of the water resources of the state and, second, the protection of existing water rights from impairment. These goals are hinged upon the concept of "unappropriated water." The appropriation of unappropriated ground water is primarily constrained by time limitations that differ between rechargeable and nonrechargeable basins.

In a rechargeable basin, there is a hydrological interconnection between a surface water stream and a ground water aquifer.

The 1962, New Mexico Supreme Court opinion in City of Albuquerque v. Reynolds was the first case to recognize the statutory authority of the state engineer to conjunctively administer interrelated surface and ground waters. Albuquerque applied to appropriate water from wells in the Rio Grande Underground Water Basin. The state engineer denied the permits on the grounds that the city must acquire and retire from use, surface water rights in amounts sufficient, at each point in time, to compensate for the increasing effects of pumping ground water on the river. The scheduled retirement of rights could ensure that surface water rights would not be impaired while allowing a time-limited new appropriation of ground water in storage.

In a nonrechargeable basin, the natural recharge to the aquifer equals the natural discharge. Any appropriation will result in the mining of ground water.

The 1966 New Mexico Supreme Court opinion in Mathers v. Texaco confirmed the authority of the state engineer to administer ground water in a nonrechargeable basin. Texaco applied for a permit to appropriate 700 acre-feet of water per year from the Lea County Underground Water

Basin for the secondary recovery of oil. When the state engineer declared the Lea County basin in 1952, he determined the amount of water that could be withdrawn from each township in the basin and still leave one-third of the water in storage at the end of 40 years. It was assumed that it would not be economically feasible to withdraw the water remaining after 40 years for agricultural and most other uses. The court ruled that the very nature of the finite stock of water in a nonrechargeable basin compels a modification of the traditional concept of appropriable supply under the prior appropriation doctrine. The court upheld the 40-year economic life, which established a time dimension for defining unappropriated water in a nonrechargeable basin.

The March 1984 opinion of the New Mexico Supreme Court in the consolidated cases of Stokes v. Morgan and Stokes v. Sanders involved applications to change locations of wells in the Portales Underground Water Basin, a nonrechargeable basin. Two kinds of water quality problems were considered by the court: sodium hazard water measured by the sodium adsorption rate, and salinity hazard water measured by electroconductivity. The court stated that the determination of acceptable salinity levels for irrigation water is not a simple task. It suggested that a change in water quality, based upon local soil types, from class 1 to class 2 or from class 2 to class 3 might create a strong inference of impairment of water rights. The court concluded, however, that the "same common sense approach" as that taken in Mathers v. Texaco should be applied in salinity cases. It held that withdrawals of water that cause a minimal increase in salinity do not constitute impairment as a matter of law.

In summary, the time limitations on the appropriation of water in rechargeable and nonrechargeable basins have significantly modified the concept of appropriable water and restricted the priority principle of first in time, first in right.

It might be useful to compare the development of New Mexico ground water law to recent developments in Colorado water law. In April 1984, the U.S. Supreme Court refused to review an opinion of the Colorado Supreme Court, which held that Colorado could control the appropriation

and use of ground water that was not tributary to a natural stream. The landowners in that case had contended before the Colorado Supreme Court that the statutory provisions for the issuance of well permits to appropriate nontributary ground water were inconsistent with or constrained by the landowners' property rights in the water underlying their lands. They had argued that the nontributary ground water was not "severed" from the land at the time the federal government patented the land to private owners. The Colorado Supreme Court rejected this argument and held that, under the federal scheme for the transfer of public domain lands, the states were granted broad authority to provide for the use of non-navigable waters within their borders. The U.S. Supreme Court, in refusing to hear the appeal, affirmed the principle of public ownership of water resources.

In its 1983 opinion, the Colorado Supreme Court also stated that the pure right of prior appropriation applies only to waters in natural streams or tributary to natural streams. The court also ruled that in order to permit full economic development of nontributary ground water, a modified form of prior appropriation applied to the acquisition or rights to such water. The court stated that the "curtailing of junior appropriations in inverse order of priority does not provide a satisfactory method of protecting senior appropriations of nontributary ground water, for cessation of diversion from one well does not immediately make available an equivalent amount of water at another."

In an earlier opinion, the Colorado Supreme Court stated that "the hydrological realities of ground water make categorization a difficult factual issue" The court also stated that the distinction in some cases between tributary and nontributary ground water is "only a matter of degree." In a 1974 opinion, the court held that if it will take ground water over a century to flow a distance of eight miles to a stream, the tributary character of the water is de minimis and it is in effect "non-tributary tributary water." On the other hand, in 1979, the court indicated that if the pumping of wells, not the flow of water, would affect a stream in less than 100 years, the ground water is tributary to the stream.

Colorado's distinction between tributary and nontributary ground water is comparable to the New Mexico distinction between rechargeable and nonrechargeable basins. There is, however, an important difference in the way the two states apply these concepts. Colorado law may allow ground water mining in an aquifer even though it is hydrologically connected to a stream. New Mexico would allow a time-limited new appropriation subject to an obligation to offset effects by retiring surface water rights. In New Mexico three acre-feet domestic and stock wells are exempt by statute from the nonimpairment requirement. The small appropriations of water from these wells, taken individually, should have only a de minimis effect on stream flows. In the Rio Pojoaque adjudication suit, however, the Indian pueblos have requested the federal court to enjoin all domestic and stock wells drilled after 1924 on the grounds that the stream system was fully appropriated prior to 1924, and the 1,500 domestic wells drilled after 1924 impair their surface water rights. The federal court is expected to rule on this priority call after a final adjudication decree is entered. If the pueblos can show impairment, common sense would suggest that the prior appropriation doctrine should be modified to at least exempt some domestic use from their priority call.

I wish to turn now to interstate water law based upon compacts between states or decrees entered by the U.S. Supreme Court. There are eight interstate compacts and one Supreme Court decree apportioning interstate streams in New Mexico. The U.S. Supreme Court has recognized that: "Priority of appropriation is the guiding principle" But if "an allocation between appropriation states is to be just and equitable, strict adherence to the priority rule may not be possible." The only exception to the priority rule applies to junior water rights in a fully appropriated stream system.

In the case of Colorado v. New Mexico, a suit to equitably apportion the waters of the Vermejo stream system, which is fully appropriated in New Mexico, the Supreme Court is considering whether to create two new exceptions to the priority rule. The special master's most recent report to the court recommended an award of 4,000 acre-feet to Colorado. The

master's recommendation was based upon three basic findings: (1) that water shortages do not excuse the failure of New Mexico users to fully develop decreed rights; (2) with proper conservation measures, there is an adequate water supply to satisfy the needs of all users in New Mexico; and (3) the injury, if any, that New Mexico users would likely suffer as a result of Colorado's diversion is insubstantial and does not outweigh the benefits which Colorado would gain.

In the near future, the U.S. Supreme Court will issue an opinion in this case, which may fundamentally alter or restrict the doctrine of prior appropriation as it is applied in the equitable apportionment of interstate streams.

The court will decide whether water that has been or could have been conserved in one state may be claimed for new uses in another state. For example, water users in the Vermejo Conservancy District have constructed a closed domestic and stock water delivery system, which may save 790 acre-feet in providing 36 acre-feet for consumptive beneficial use. Can Colorado claim the conserved water, which is equivalent to a diversion of 1,500 acre-feet in Colorado, even though the water was conserved in order to reduce serious shortages in New Mexico?

The court also may decide whether there should be an exception to the rule of priority based on a benefit-cost analysis. The analysis compares the benefit of future high-value uses of water in one state against the cost of terminating existing low-value uses in another state.

It is unlikely that the court would adopt a benefit-cost analysis exception to the priority rule. If it adopts a conservation standard, which applies to all interstate streams, whether previously apportioned or not, it will fundamentally change interstate water law.

Federal law is the third source of water law in New Mexico. Because the United States was the sole proprietor of most of the lands in the arid West, there was no occasion for the direct application of the common law riparian doctrine. Only upon the disposal of public lands did Congress and the courts have to consider what water rights, if any, were appurtenant to them. The federal reserved doctrine evolved out of the development of public land and water laws.

The public land acts of 1866, 1870 and 1877 severed all waters from the public domain, potentially leaving none under the control of the federal government for existing or future federal purposes. The protected "special uses" of lands reserved from the public domain did not expressly include water rights that might have been needed to facilitate the land uses.

In the 1908 Winters opinion, the Supreme Court established the doctrine of federal reserved water rights for lands withdrawn by the government from the public domain. In doing so, the court implied rejection of any riparian water right claims of the United States.

The United States had brought suit on behalf of the Fort Belknap tribes to enjoin upstream appropriations on the Milk River in Montana. The United States asserted two theories in the complaint: (1) that a modified form of the riparian doctrine was the law of Montana and applied to defendants; and (2) that the 1888 agreement with the Fort Belknap tribes, which was ratified by Congress, retained or granted the right to divert and use the Milk River waters on the Indian reservation.

In a supplemental brief filed with the Supreme Court, the United States changed from the state law riparian theory to a theory of federal reserved rights. It argued that the right of the United States to a continued flow of water applied to property set aside for a specific use, but did not apply to lands that were part of the public domain.

The court adopted the federal reserved water right theory as follows:

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be That the Government did reserve them we have decided, and for a use which would be necessarily continued through the years. This was done on May 1, 1888

The Winters opinion determined who reserved what rights, when, and under what circumstances. The United States reserved the water rights, the Indians did not retain them. The rights so reserved were rights to the then unappropriated water of the public domain at the time of the reservation, not riparian rights within the federal reservation. The implied intent to reserve water rights both defined and limited the rights reserved.

In United States v. New Mexico, a 1978 opinion, the Supreme Court considered the reserved water rights claims of the United States for the Gila National Forest. The court ruled that: "Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude . . . that the United States intended to reserve the necessary water."

In summary, when the United States withdraws public land from entry and reserves it for a specific, congressionally authorized purpose, by implication, it also reserves the necessary unappropriated water to fulfill the purpose of the reservation. The reservation of unappropriated water attaches to and becomes a servitude on those lands granted from the public domain.

Federal reserved water rights are basically appropriative not riparian rights. They differ, however, in two basic ways from rights under the prior appropriation doctrine: (1) due diligence is not required to relate the priority date back to the initiation of the right, and (2) they are not lost by nonuse. In pending adjudication suits in New Mexico, Indian pueblos and tribes are seeking to exempt themselves from the priority rule by claiming legally paramount rights or rights with an aboriginal priority date. Certain tribes also have claimed that the congressional purposes for the federal reservation of land do not limit the adjudication of rights.

In conclusion, I believe that the genius of New Mexico water law is based upon the broad definition of the prior doctrine appropriation in its constitution and the statutes that allow the specific application and evolution of the doctrine by the state engineer and the courts on a case by case basis as the need arises.