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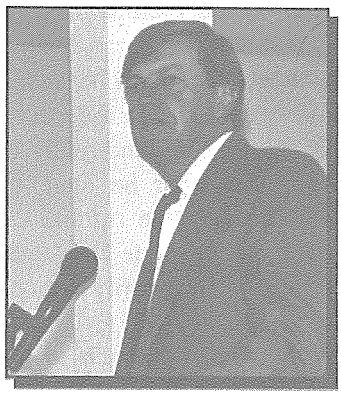

CONFLICT RESOLUTION: ONE ATTORNEY'S PERSPECTIVE

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Conflict resolution in water is something in which I've been involved for some time. Today I'll discuss the principles of conflict and how, in the water area, there seems to be a tremendous motivation to presume that because someone owns something, it necessarily leads to conflict.

How many people in this audience have had a quiet title lawsuit on their home? Three, four or five of you. Does that mean the rest of you do not own your homes because there is no judicial decree that says you are the owner? Most of you have never looked at your property's abstract. You have neighbors but you do not presume that because you have not had a court decree indicating that you are the owner, the boundaries are necessarily wrong. Conflicts occur occasionally when somebody's dog barks too loudly or somebody makes a mistake and builds something on your property. In general, the judicial process is not essential to making you the owner of your property or eliminating conflict between you and the people who live around you.

Fifteen years ago, the Santo Domingo de Cundiyo land grant board came to me and said that they had a grant in northern New Mexico consisting of 2,500 acres of common land on over 100 separate parcels. Virtually no one living on this land was able to obtain mortgage money because everyone in the area was named Vigil, there had been only two probates in the last 150 years and nobody had ever surveyed their property. Thus, these people were unsuccessful in getting a title binder. They wanted me to quiet title all parcels of land. I, along with my fellow workers at the Land Title Demonstration Project agreed; it didn't sound too tough.

There were two ways to go about solving the problem. One would be to presume that because people did not have good title documents, they were necessarily in conflict. You could abstract each parcel, many of which were

pretty small tracts, and provide each individual with an abstract of their property with title documents. You could then say that an individual's fence belongs over there, and if they try hard enough, maybe they can beat their neighbor out of his land because even though he has been using it for 35 years, that land really belonged to your ex-cousin, and after he died, through the genealogy, you became the rightful owner. That is one approach; to presume that everyone who owns something is necessarily in conflict with everyone else.

We took another approach to the problem. We took aerial photographs of the town, met at the town hall with all the individuals involved, and had everyone mark their boundaries on the map. Everybody knew what they owned. Only one fist fight occurred over a fence. We adjusted the map to scale, put the boundaries together, and let everybody agree on what everybody owned. We then provided quiet title in one lawsuit and we did not file the suit until we had worked for a year and a half figuring out how to deal with the problem. In one lawsuit, everybody's boundaries were settled. The main point is that we had started with the proposition that anyone who owns something is not necessarily in conflict with everyone else who also owns something that touches or concerns his land or water. We were not involved in making promises to people. We were not encouraging people to get more than what they currently use, or warning people that they may be hurt by what someone else claims.

From a lawyer's standpoint, not to counsel people on those two situations makes me a little nervous. It is the way we lawyers make money—using the judicial process to keep people from taking something from someone else or to encourage someone to get more than what they currently may own. A difference exists, of course, between water and land. Whether or not you actually use the land, or fence the land, it is your land and while can lose it by non-payment of taxes, you can not lose it by forfeiture or abandonment. Land boundaries do not move and the quantity of land does not vary with streamflow. The point is that ownership does not necessarily imply conflict.

Why is there so much conflict when the resource involved is water, not land? There are a number of reasons and I will give you a few. The first is that when a commodity's price rises, there are significant arguments as to what should be done with that commodity. For example, as land prices increase in an arid state, there is discussion on how the land should be used. Zoning laws become very powerful tools.

Likewise, water is often the source of power to stop someone from doing something. In areas like Santa Fe, Albuquerque or Las Cruces, you find that when there is a real or perceived scarcity of water, the ability to keep water from flowing to somebody can allow you to pursue some other goal totally unrelated to the real value inherent in the resource, such as stopping development or protecting wildlife needs. The water becomes nothing but a whipping boy for other goals. From those who care about the good, equal and fair allocation of water resources, this is a terrible thing.

Another reason for so much contention is that water conflicts make great press. I never saw so many one-liners in my life as during the El Paso suit. Once when I was in Austin, a lawyer who was a sarcastic gentleman said, "Well, you know in New Mexico they just want that water for those pecan trees and there is no basis for that argument, except maybe on an I.Q. level a pecan tree's is higher than a New Mexican's." It makes great press if there is a potential for water conflict. The press itself generates it and creates a tremendous amount of animosity where often it should not exist.

In the context of government allocation of water, water is power. It has been so since the Reclamation Act and continues to be. Those in government in positions of power, the Secretary of the Interior on the domestic level, for example, are in immensely powerful positions. Bruce Babbitt wields a tremendously significant resource in water, and politicians, of course, love power and love to wield it. One way to create conflict is to unilaterally make a choice about a water project relying on engineering studies which optimize the engineer's view of aquifer coefficients, to the extent that individual rights

are trampled. Designing a project for people creates conflict because you have government unilaterally redirecting resources around and over individuals.

Real individual conflicts over water exist, and there are many imaginary conflicts. My great-grandfather and father loved to tell the story about how someone once came onto our ranch and fenced off the waterhole that had been in use for 35 years. My great-grandfather shot the guy and went to jail for a month for the shooting. That was a real conflict. But there are many illusionary conflicts created because the legal processes dealing with water often hamper our ability to resolve problems in the same way as with land titles.

I would say in this room, as knowledgeable as you people are, if I were to ask you to each write down the size of your water right, what determined the right, and how sure you are that you own the right, you would each give a very different answer. If I asked you to tell me what documents you relied upon in making your determination, you really couldn't tell me what they were. Think of this in the context of an adjudicaton suit.

Contemplating a town of 20,000 people, all suing each other in an attempt to prove ownership is frightening and does not make much sense. If there is a need to prove ownership, it must be because the people do not understand what it is they own. If you want to avoid conflict, you do not go into an area where water supply exceeds demand, where people are getting along, where water shortages are very rare. You do not go with some hypothetical list of names, start an adjudication suit, and send everybody a complaint in the mail. This scares people.

For example, Arizona groundwater law contains a grandfather clause pertaining to all domestic and ranch-type wells. Years ago, my father called and asked me for ideas concerning one of his wells that was next to an Indian reservation. He wanted to know what I thought he should do about it. I told him to claim as much water as he wanted out of it, and asked him how much water he had used. He indicated he pumped water to 10 acres and I told him to claim all 10 since nothing could go wrong if he did. He filed as such and two days later he received a complaint in the mail for $150 million in which he was the defendant. He sent it to me with a note that said, "Son, take care of this." I asked him how much his well had gone down since he had been pumping. He said the water level had been going up every year for the last five years because a surface water diversion had been moved and everybody's well water had increased. There was no conflict on the face of it. He had become a nominal defendant in a massive suit involving 10,000 people claiming $150 million worth of impairment by everyone, jointly and separately. This made no sense.

Before you start down that road, before you put my kids through college, I would recommend that we look at doing some things differently. I think there are four possible goals inherent in trying to eliminate conflict. These goals would involve a process that would help make our water records more like land records so that we have a system for identifying who owns what with confidence, even if you have not gone to court. It is not necessary to have a judicial decree to own something. The lawyer's bar association in Colorado was a lot smarter because to have a water right in Colorado you have to have a judicial decree. That explains why they have more water lawyers per capita than any other place in the world—more water lawyers, more water laws and more lawsuits. I am not a fan of that system. I do not think you have to go to court to own something.

The second thing to be done is to get a good handle on supply. How much of the resource is there? Once you get into a lawsuit over water, you immediately have war—dueling geologists and hydrologists, captives of the client who hires them. They build the models and do the things they are asked to do. The discovery rules and the entire process is not conducive to communication. As a lawyer, if I am asked for all my hydrologic data, I say, "Time-out. That is privileged information and you can not see it. You will have to wait till we get into court." You hope at some point to get an edge on the hydro-

logic parameters of the aquifer, the transmissivity rate, the hydrologic conductivity of the soils, and so on. To avoid conflict, before any major lawsuit attempting to allocate or determine ownership in an aquifer gets underway, there should be a rule that all the hydrologists and all the people who are going to participate must get together and form a hydrology committee and a water supply committee. All the data should be shared and a model for aquifer coefficients and streamflows should be developed jointly. When the committee of hydrologists representing various interests is done, the description of supply must be available to everyone and considered prima facie proof of the situation. What good is it to have a water right on paper if the supply is such that junior priorities are never going to be met? You will end up spending a lot of money in litigation.

Thirdly, identify not only present use but future demand. A water policy demand-side committee should be formed. In a typical adjudication suit, where people are trying to tie-up as much resource as possible with respect to municipal supply, demographers are hired. How many people are going to live in Aztec, or Questa, New Mexico in the future? Well when molybdenum prices increase, there are going to be 600,000 people living in Questa according to my predictions. If there are, then we can tie-up a 40-year supply for 600,000 people times 13 acre-feet per capita per day because they are very clean up in Questa. Thus, we have a huge demand. Why not require that prior to going to court, you attempt to settle the issues by bringing people together to work on water demand, using projections from common demographic data. Do not get involved with boring demographers, get the demographers to agree in advance and once the demographics are completed, then it is prima facie true of what the situation is, given low and high ranges.

There also is a potential for conflict over the water one needs to grow crops. For example, someone might say, "You know, it takes me up here in Aztec 18 acre-feet per acre per year to grow my alfalfa." They might say this because they know that the price of water rights is increasing all the time. If they use 18 acre-feet per year on their alfalfa and they have 10 acres, they have 180 feet of water rights. That scenario is not helpful, having people in court using agronomists. I remember someone from an agricultural university taking a deposition. I asked him what he felt the duty of water was for particular crops. He based his answer on his experiences of pumping water from a nearby lake. I told him that the farm was located about five miles away from the lake, and asked him for his experience in the area in question. He said he had never been over there—he had never driven up that road—he had simply gone directly to the lake for water to do his work.

Huge debates arise about duties of water. Wouldn't it make sense to put together a regional committee with people who had historically practiced farming in the area, and allow them to arrive at a reasonable duty of water? The state engineer could participate because he dictates water usage. Thus, before you get to court, both sides have agreed on the demographics and on agricultural consumption.

The fourth area for attaining agreement is water conservation and reuse. Surely all agree that in all regions, conservation and reuse are critical concepts. Both are directly a function of your current water rights. Whatever may have been the law in 1950 is not the law today. When transferring a water right today, there is a requirement that the amount of water you have used historically and the amount you intend to use is measured by principles of water conservation. Industry's ability to reuse water is a part of that calculus. Those items should not be litigated but decided in advance of any litigation.

I do a lot of work in the Middle Rio Grande Valley. We transfer a lot of water rights. When you put together a water rights transfer package, you have two documents: a set of land title documents and a set of water rights title documents. The title documents for agricultural water rights include all the documents showing you as the owner of the land. The water rights title abstract contains all the documents indicating ownership of the water right. Those documents and records are often in a state of substantial

confusion, but it does not require a lawsuit to get them in better shape.

People do not have good records of their water rights because there is no really good place to index them, and there is no one good set of maps to determine a good baseline. Not enough effort has been made in the past to use the high tech innovations like GIS software. Therefore, it is very difficult to develop a set of water records like land title records. For example, on one declaration form I read, an individual claimed to be the owner of all the water and all the beer in the Milky Way Galaxy.

In addition, there are no really good ways to provide people the opportunity to even make their claims. The first time most people ever consider their water rights is when they are asked to file an answer to a complaint in a lawsuit in so many days or they lose their water rights. Or they get a complaint and an offer of judgement from the State Engineer indicating that the State Engineer Office has reviewed their property and they either have none or half of what they thought they owned. Prior to initiating a lawsuit, there should be somebody in charge of giving people the opportunity, tools, and support to make their claims. It is a tremendous tragedy that in many areas, particularly in rural areas, people are losing the ability to ever explain the size of their claim or protect it if it is a pre-1907 right because the elderly people who have the information concerning the pre-1907 water rights are dying. It does not take a lawsuit or a lawyer or a judge to get that information while it can still be obtained. Before you go to court, everybody should be given the opportunity to come forward and make a claim. An index of claims should be developed and it should reside in a neutral place, not in the State Engineer Office. Records could be contained in a water rights inventory storehouse similar to where county records are kept.

During earlier stages of the *Amodt* case, I wrote a book on Pueblo Indian water rights. I disagreed with both sides in the Amodt case, and made everyone unhappy. My commentary then concerned how water rights adjudications create a growth industry for historians. Suddenly, when you are involved in an adjudication suit, people come out of the woodwork who are willing, for money, to study the area's history. Historians are captives of particular points of view. Instead of this, what is needed is an unbiased history of an area's development.

Perhaps the fourth sort of general information needed is an historical development of water use. This information should be available to everyone, supported by public money, and generated by a committee representing all interests. The final product would be a good description of the evolution of water use in an area. If an individual lives in a certain part of the stream system, they can offer what they remember their grandfather said or did, with appropriate proof. Many historical facts are highly relevant and significant in the process. None of this data gathering requires going to court.

In my personal opinion, no one should ever be able to claim abandonment against his neighbor. If there is an abandonment or a forfeiture of a water right, it is between the state and the individual. It is not the business of someone's neighbor to go down to the State Engineer Office and try to forfeit another person's water rights. That is a built-in conflict, and not allowing it would eliminate a tremendous number of *inter se* conflicts. If you allow such a practice, you are creating conflicts that are inconsistent with the purpose of the adjudication law. Secondly, to help straighten out the records in a stream system, there should be an absolute amnesty by the state on abandonment, for at least the last 25 years, so that people who have not fully understood the importance of beneficial use, and for those who are unaware of the nature of water law can be protected.

The state ought to focus on the four goals I am suggesting and it ought to be done outside of a lawsuit. If there is a lawsuit, no *inter se* abandonment should be allowed. People are pretty much aware of the amount of water they are using. People will rarely ask for more than what they believe they are entitled to if they fully understand the system.

Perhaps there should be a lawyers' court and a non-lawyers' court. All small claims could be handled by alternative dispute resolution with no

lawyers present or involved in anyway. People could try to work out their conflicts in this way first and if they are unable to, then proceed to court if they have a real dispute with their neighbor over someone affecting someone else's headgate or directly impairing their rights. Large claims should be handled separately and possibly broken into separate lawsuits to simplify matters. Get those big water rights issues out of the dispute and don't make people pay a lot of money for something they don't really care about.