BENEFICIAL USE, PREFERENTIAL RIGHTS, PROBLEMS IN TRANSFER OF WATER RIGHTS, AND OTHER PROBLEMS UNDER NEW MEXICO STATUTES

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Any discussion of the New Mexico water law involves two key phrases--beneficial use and impairment of rights. These are the legislative guide posts and the standards by which the State Engineer administers water rights. In a larger sense, a discussion of these terms involves some discussion of the basic philosophy of water law which, in turn, involves a discussion of the entire philosophy of property law.

It appears to me that the western states, and particularly New Mexico, in developing the law of prior appropriation have been confronted with two diametrically opposed concepts. These concepts are flexibility and security. Probably the fundamental concept of our water law is that of security, that is, "first in time is first in right."

The early court decisions concerning water law in the west and certainly the early legislation was directed toward securing property rights in water. In the case of Yeo v. Tweedy, 34 N.M. 611, 286 Pac. 970, the New Mexico Supreme Court discussed the alternatives to the prior appropriation doctrine and stated:

> "The preventive for such unfortunate and uneconomic results is found in the recognition of the superior rights of prior appropriators. Invested capital and improvements are thus protected. New appropriations may thus be made only from a supply not already in beneficial use. Nonuse involves forfeiture. A great natural public resource is thus both utilized and conserved."

In New Mexico we have been hard put to achieve the idealization of the doctrine of prior appropriation as pronounced by the Supreme Court in 1929. We know now that in many instances our water resources cannot be both utilized and conserved. In most of our groundwater basins such as Lea County, Portales, Mimbres, and Animas basins any appropriation involves mining of water. In other words, once the water is utilized by man, it cannot be at the same time conserved.

Even in 1929, however, the Supreme Court was concerned with the social implications of the use of water. In the same case, the Supreme Court said:

> "Such bodies of subterranean water are the principal resource of the localities where they occur. Their employment to the best economic advantage is important to the state."

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This same idea was expressed in the recent case of State v. McLean, 62 N.M. 264, decided in 1957. Chief Justice Lujan stated:

> "All water within the state, whether above or beneath the surface of the ground, belongs to the state which authorizes its use and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis for such acquisition is beneficial use. The state as owner of the water has the right to prescribe how it may be used. This the state has done by the enactment of Sec. 75-11-2, which provides that the beneficial use is the basis, the measure and limit to the right to the use of water."

In the McLean case the Supreme Court went on to hold that the defendant had not made beneficial use of the water for a period of more than four years. In that case the defendant had allowed the water to flow from the artesian well in question, uncontrolled, 24 hours a day, without a constructed irrigation system. However, the defendant claimed that water was absorbed on native salt grass and was used to water livestock and that it was a beneficial use. The Supreme Court held against the defendant, ruling that he had lost the right through continuous nonuser through waste.

This case does not help us much in determining the meaning of beneficial use but the Supreme Court did say that allowing water to waste out on the land without being under the control of an irrigator was not beneficial use. As far as we are able to determine, this is as near to a definition of beneficial use as the Supreme Court has ever given us. The McLean case did say that an appropriator is limited to the use of such water as may be necessary and useful for some beneficial purpose on the land from which it is taken but the law has never defined what beneficial use is.

Query: Does the beneficial use have to be beneficial to the landowner or does it have to be beneficial to the public as a whole? Certainly, the McLean case stands for the proposition that waste will not be tolerated and it further stands for the proposition that the standards of care in preventing waste are greater than the standard required in the early days of irrigation.

It may well be that the trend is toward elimination of wasteful practices. Certainly the technological advances which have enabled appropriators to use underground irrigation systems or concrete-lined ditches have gone a long way toward elimination of waste. It may well be as the shortage of water in the state increases, the public will demand stricter enforcement of the laws prohibiting waste.

PREFERENTIAL RIGHTS

Any discussion of transfer of water rights requires discussion of the legal preferences to use of water established in New Mexico. The earliest statute giving a preference to the use of water was enacted in 1876, which declared that all waters in springs, rivers and ditches are free in order that all persons traveling in the state shall have the right to take water therefrom for their own use and that of the animals under their charge. Section 75-1-4, N.M.S.A. 1953, Section 75-1-5, N.M.S.A. 1953. This statute evidently gave travelers and livestock an absolute right to the use of water without regard to the doctrine of prior appropriation. While this statute is interesting as setting up an absolute preference, it has not had much importance on the development of water law.

However, in 1953 the Legislature promulgated an amendment to Section 75-11-1 which creates an important preference. This amendment provides that the State shall issue a permit to applicants for domestic use and for livestock water. These permits do not require advertising and hearing as is usually required in applications for appropriations. Neither does the statute provide any grounds upon which the State Engineer can deny an application for livestock or for domestic purposes. The Legislature recited in the 1953 amendment that this statute was enacted for the reason that relatively small amounts of water were consumed in the watering of livestock or for household or other domestic use. However, it can be seen that even though the amount of water used is small, that this statute gives to appropriators for domestic or livestock water, an absolute preference over other users, the effect of which is a transfer from prior appropriators by operation of law and without compensation. The constitutionality of this section has not been passed upon by the New Mexico Supreme Court.

The same section also gives a preference to appropriators for the use in prospecting, mining and drilling operations designed to discover or develop the natural mineral resources in the State. The preferences given for drilling, prospecting and mining operations is not an absolute one since it is limited to three acre feet of water for a definite period not to exceed one year and the State Engineer is also given the discretion of determining whether or not the proposed use will permanently impair any existing rights. If the State Engineer in a preliminary examination of the application finds that the proposed use will permanently impair existing rights, the statute requires advertisement and hearing as provided in other applications. It can thus be seen, that the appropriation of water used in prospecting, mining or drilling operations designed to discover or develop the natural mineral resources of the State of New Mexico have a preference over any other water users except domestic and livestock uses. This portion of Section 75-11-1 has not been passed upon by the Supreme Court. This is another instance of a transfer of water rights by operation of law.

These are the only preferences which we can find in the New Mexico statutes, however, during the last year important litigation has arisen over the claim of preferential rights for municipal uses. This involves the doctrine of pueblo rights.

Under the California cases, the California Supreme Court has held that the cities of San Diego and Los Angeles were originally formed as pueblos by either the Spanish or Mexican governments and that the original pueblo grants gave to those cities the right to use of waters of the San Diego and Los Angeles rivers respectively, not only for the original pueblos but the right in futuro to the successors of the original pueblos to use all of the water that was reasonably necessary for the growth of the cities, as in the cases of San Diego and Los Angeles. These cities have the right to take all the water and to drive out of business any other users to their source of water without compensation.

The New Mexico Supreme Court has discussed the pueblo rights doctrine in the case of New Mexico Products Co. v. New Mexico Power Company, 42 N.M. 311, but in that case held that Santa Fe never did have a pueblo grant and therefore, the pueblo rights doctrine would not apply. There is now pending before the New Mexico Supreme Court another case involving pueblo rights doctrine, and that is the case of Cartwright v. Public Service Company of New Mexico. In this case the public service company had taken all of the waters of the Gallinas River for use under its franchise to supply the city and town of Las Vegas with municipal water. The agricultural users from Gallinas River brought a suit demanding compensation for the company taking of what they claim their rights. The public service company in its answer to the suit claimed that it had an absolute right by virture of a New Mexico grant to the Pueblo of Las Vegas to take all of the water of the Gallinas River reasonably necessary for municipal uses without compensation to any other users on the Gallinas River.

The State of New Mexico filed a brief in the Supreme Court as a friend of the Court and argued that under the New Mexico Law, beneficial use was the measure, the basis and the limit to the use of water, and that since the city and town of Las Vegas had not beneficially used all of the waters of the Gallinas River prior to the time that the agricultural users had appropriated the water, that the public service company did not have a prior right. In the event the Supreme Court upholds the position of the public service company, then we will see another example of a transfer of water rights by operation of law without respect to the priority of beneficial use. This case could have a far reaching effect especially with regard to the Rio Grande. The City of Albuquerque also filed Amicus Curiae brief in which they supported the position of the public service company. It is the position of the City of Albuquerque that she also has an absolute preference to the waters of the Rio Grande and to the waters underlying the valley fill of that stream.

It can thus be seen that if the Supreme Court of New Mexico adopts the pueblo rights doctrine, that it will create a tremendous change in the administration of water law in New Mexico. In the case of the City of Albuquerque, that city would have prior and paramount rights to all of the waters of the Rio Grande, whether surface or underground and all other users from that stream would take water at the sufferance of the City of Albuquerque.

PROBLEMS IN TRANSFER OF WATER RIGHTS UNDER NEW MEXICO STATUTES

The pertinent statutes providing for transfer of surface water rights are found in Secs. 75-5-21 and 75-5-23 and 75-5-24. Since we are concerned here with the change of place of use or change of purpose, the important statute is Sec. 75-5-23 which provides that an appropriator may change the purpose or place of diversion, storage or use upon application to the State Engineer, provided that no such change shall be allowed to the detriment of others having valid and existing rights to the use of waters of said stream system.

The underground statute is Sec. 75-11-7 which allows a change of location of well or use of water upon application to the State Engineer and upon showing that such change or changes will not impair existing rights.

The most vexatious problem today facing the State Engineer and perhaps the state of New Mexico concerns the changes of water rights occurring in the Rio Grande Underground Water Basin as declared by the State Engineer. This basin extends along the valley of the Rio Grande from the Elephant Butte Dam to the Colorado State line. According to the investigations made by the State Engineer, there is a considerable amount of ground water under the valley floor of the Rio Grande and extending throughout the New Mexico stretch of that river. I understand that the underground water along the Rio Grande is connected with the surface stream and along much of the river there are accretions from the underground reservoir into the river.

There is much water in storage in the Rio Grande Underground reservoir but, according to the State Engineer, this water cannot be taken out of the underground storage without adversely affecting the flow of the Rio Grande. The State Engineer has proposed to administer the Rio Grande Underground Water Basin in a manner that would allow use of the unappropriated water of the underground reservoir and at the same time insure that the perennial flow of the Rio Grande will not be adversely affected.

Under the State Engineer's administration, a person can make an application to appropriate the underground water provided that he at the same time withdraws from use direct appropriations from the surface stream to the extent that the underground use affects the flow of the stream. For instance, if it is determined that the appropriation of one thousand acre-feet over a given period of time will affect the river to the amount of decrease of ground water accretions to the river of one hundred acre-feet, then the appropriator will have to dry up direct diversions from the river to the amount of one hundred acre-feet per annum for a given period of time. It is believed that this system will protect the prior appropriations along the river and at the same time will enable New Mexico to utilize the unappropriated ground water.

This problem is a complex one fraught with many difficulties, not the least of which is the fact that a tremendous amount of the Rio Grande Underground Water Basin lies within the boundaries of the Middle Rio Grande Conservancy District. The Middle Rio Grande Conservancy District, under Secs. 75-28-28 and 75-28-29 have the power to distribute irrigation water for purposes most essential to welfare and economy of landowners within the district. The conservancy district in this instance has not deemed it expedient to take any steps to protect the surface stream from underground water uses and as far as I am aware

have not consented to the transfer of any rights from surface use in order to enable applicants to appropriate underground water.

It may well be that there will be considerable litigation along the Rio Grande and possibly additional legislation before a definitive public policy of the state of New Mexico can be formulated.

OTHER PROBLEMS

The hydrologists tell us that there is a hydrological connection between all waters. Rainfall falls upon the surface of the land, sinks into the land and emerges as spring water or seepage water into surface outlets. In the administration of the Rio Grande, the State Engineer has sought to utilize the scientific facts concerning the inter-relationship between surface and ground waters. Such has not always been the case along the Pecos River. We know now that the development of artesian and shallow water in the Roswell Artesian Basin has affected the flow of the Pecos River. In many cases the surface water appropriators in this area have sought to recapture their original supply of water by drilling wells.

Two such cases are now pending before the New Mexico Supreme Court. In the case of Langenegger v. State Engineer, the applicant sought to drill wells in order to recover drainage rights. This application was turned down by the State Engineer on the ground that the drainage rights were private rights and the applicant had no right to the underground waters and for the further reason that the granting of the appplications would impair downstream Pecos River users. The district court upheld the decision of the State Engineer and upon appeal to the Supreme Court, a decision was handed down denying Mr. Langenegger relief on the basis that the drilling of the shallow wells would impair the surface users. There is some doubt about the decision handed down by the Supreme Court since the Court seems to imply that Mr. Langenegger had a right to the public underground waters. The case is still before the Supreme Court upon a motion for rehearing.

The other case involving the transfer of water rights which is before the Supreme Court is the case of Templeton, et al., v. State Engineer. In this case, the applicants claimed that the appropriations from ground water sources had so depleted the flow of the Felix River that the applicants could not maintain the river appropriations and, therefore, they argue that they should be entitled to drill wells in order to get sufficient water to fulfill their appropriative rights. In this case the district court reversed the decision of the State Engineer and upheld the position of the applicants. This case is now pending before the New Mexico Supreme Court.

With the number of cases now pending before the Supreme Court involving the transfer of water rights, a considerable amount of water law should be made. In the case of Spencer v. Bliss, 60 N.M. 16, the New Mexico Supreme

Court held that the burden was upon the applicant to show that a proposed move would not impair existing rights. Since the applicant's burden is the proving of a negative, this is a difficult burden. The tendency of the administrative decisions by the State Engineer would indicate that it is becoming more difficult to change the place of use of water rights.