

## A HISTORICAL PERSPECTIVE OF WATER MANAGEMENT IN NEW MEXICO

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Last month Tom Bahr asked me to tell you what has happened to water management in New Mexico in the last 25 years. My first reaction was that this should be a piece of cake for a guy who has been State Engineer for most of that time.

After some hard thought I concluded that I should tell you the good news first: not much has happened to water management in New Mexico in the last 25 years. The bad news is that you will have to listen to my news analysis for about 30 minutes.

The principles of our laws controlling the management of water, as they were codified for surface water in 1907, affirmed by our Constitution in 1912 and applied to groundwater in 1931, remain substantially unchanged and enjoy the emulation or envy of most of the states.

A paper by Robert G. Dunbar, Professor of History at Montana State University, printed in the Pacific Historical Review in November of 1978, (Vol. XLVII, No. 4) says:

New Mexicans...(have created) institutions for the management of groundwater which have influenced many other states. Of the 19 states lying west of the 98th Meridian, no less than 14 have followed New Mexico's example, by abrogating the applicability of the English rule to groundwater and replacing it with the appropriation doctrine. The New Mexican pattern of restricting drilling and water

consumption...(in) designated groundwater basins critically short of this resource has been copied by all of the Rocky Mountain states as well as Oregon, Washington, Nebraska, Oklahoma, and Hawaii. Those states which have applied the appropriation doctrine to groundwater have also adopted, with some modifications, New Mexico's permit system, which in turn was modeled on Wyoming's surface water law. And in the more humid section of the United States at least 12 states have borrowed either consciously or accidentally some aspects of the system of groundwater control which...(New Mexicans) originated. Indeed, half of the states of the Union have benefited from New Mexico's institutional pioneering.

I am going to limit my savoring of the piece of cake Tom offered to accepting a small measure of the credit for little change in our water-management institutions. I want to take this opportunity to express the view that most of the people of New Mexico do not fully appreciate the importance of the role that our courts have played in establishing and preserving New Mexico's water-management institutions.

This is not to say, of course, that the public does not understand pretty well the controlling role that the legal profession plays in government. They know that profession is usually better represented in the legislature than any other occupation. The lawyer legislators and the lawyer lobbyists are often the controlling factor in the enactment of legislation. The executive department officer delegated the responsibility of administering the act has a lawyer who tells him what the law requires him to do. And then the lawyers in black robes tell the administrator what he did wrong.

I am sure you will recognize that these remarks are tongue-in-cheek -- an engineer baiting the lawyers as tradition requires. I must admit that to the extent I am sanguine about our water laws -- and I am -- much credit to the legal profession is implied.

Realizing the importance of water to the economy of the State and the welfare of its citizens, many logically conclude that the office of the State Engineer is vested with great power. As are many logical conclusions, that one is not well founded. Our statutes on water fill a volume about two inches thick and the case law -- our Supreme Court opinions in water cases -- stack up another 3.5 inches on 8.5 x 14 sheets. The statutory and case law rather effectively constrain the discretion of the State Engineer. Furthermore, the State Engineer's every "decision, act, or refusal to act" is subject to appeal to the district court; and this recourse is not infrequently sought.

The late Supreme Court Justice Carmody once told me, "You are the most litigious S.O.B. in the history of the State." Those of you who knew Judge Carmody will remember that he was a great judge and not given to euphemisms, but he would approve my constraint in speaking to young, impressionable students. The Judge's clerk had made a count and found my name in the style of more Supreme Court cases than the name of any other individual. There have been about 60 Supreme Court opinions involving the State Engineer in the last 25 years.

I recognize that in our system of government, judicial legislation is frowned on. But, an essential function of our courts is to ensure that the statutes are enacted and administered in accordance with the principles enunciated in our Constitution. This function is particularly difficult and essential in the interpretation of laws dealing with technical subjects such as water. The record shows that our Supreme Court has been studiously careful and has exhibited great wisdom in its opinions in water cases. With your indulgence I will cite just a few examples from the Supreme Court opinions of the last 25 years.

In considering the Court's opinions it is important to have in mind that our Constitution provides that the unappropriated waters of the natural streams of the state, perennial or torrential, belong to the public; that these waters are subject to appropriation in accordance with law; that beneficial use is the basis, the measure and the limit of a right to use of the public waters; and that priority of appropriation gives the better right. It is also important to have in mind that our Supreme Court held in State ex rel Bliss v. Dority (55 N.M. 12), 1950 opinion, that these constitutional provisions are applicable to the groundwaters as well as to the surface waters of the state. I would emphasize the importance of this decision by pointing out that in 1955 the State Engineer had asserted jurisdiction over the groundwater underlying 8 percent of the state's total area by the declaration of eleven underground water basins. At this time, there are 27 declared

underground water basins encompassing about 60 percent (71,700 square miles) of the total area of the state.

In Templeton v. the Pecos Valley Artesian Conservancy District and the State Engineer (65 N.M. 59), a 1958 Supreme Court decision, the issue was whether a person having a right to divert the surface waters could drill a well to supplement his supply which had been diminished by junior appropriators drilling and operating wells which intercepted the natural discharge of an aquifer to the stream upon which the surface-water user depended.

Considerations of equity might seem to make the answer clear, but our statutes and rules and regulations gave ample ground for plausible, technical argument. The effect of the Court's opinion was that the prior appropriator of stream water has the right to follow the stream water to its underground source and the right to drill wells and take the underground water necessary to fill his prior stream right, regardless of detriment to other underground water appropriators whose rights were subsequent in time to the stream rights.

In City of Albuquerque v. the State Engineer (71 N.M. 428), a 1962 decision, the question was whether the State Engineer could impose as a condition on a permit to appropriate underground waters a requirement that surface water usage under valid water rights be reduced by an amount sufficient to offset the effects of the groundwater appropriation on the fully appropriated stream flows.

The Court held that the engineer had not only the power, but the duty to impose such conditions on new groundwater appropriations as are necessary to protect surface water rights in a situation where there is a significant hydrologic relationship between the groundwater source and the stream. It is interesting that in this decision the Court relied on and made clear its decision in the Templeton case.

In Templeton and Albuquerque the Court made it perfectly clear that the coordinated management of surface and groundwater is not only possible but is essential under New Mexico's Constitution. These decisions put New Mexico a quantum jump ahead of the other states in the management of groundwater appropriations. That the coordinated management of surface and groundwater is essential is now generally conceded and several states have emulated our law in this respect.

In Mathers v. Texico and the State Engineer (77 N.M. 239), a 1966 decision, the issue was groundwater mining in the Lea County Underground Water Basin. The term "mining" denotes withdrawals in excess of recharge. In that basin the amount of water in storage in the aquifer is very large compared to the annual recharge; and any practical pattern of withdrawals can have little effect on the discharge from the aquifer in New Mexico across the Texas state line. In discussing the facts the Court termed the aquifer "nonrechargeable."

The Court held that in a geohydrologic situation such as that obtaining in Lea County, mining of the groundwater is acceptable under the doctrine of prior appropriation. The Court concluded:

The administration of a "non-rechargeable basin," if the waters therein are to be applied to beneficial use, requires giving to the stock or supply of water a time dimension, or, to state it otherwise, requires the fixing of a rate of withdrawal which will result in a determination of the economic life of the basin at a selected time.

In effect, the Court held that it was reasonable for the State Engineer to establish an "economic life" for the basin and to distribute the allowed withdrawals over the area of the basin to achieve an areally uniform time of depletion of the water supply, and thus establish a time of use for the rights granted at something less than perpetuity.

Had the court gone the other way the first appropriator in a nonrechargeable basin might be the last and much of our fresh underground water would have been locked in place.

State ex rel State Engineer v. Miranda (83 N.M. 443), a 1972 opinion of our Supreme Court, treated the question whether a water right had been created by the grazing and cutting of grasses on land that had been irrigated by the natural spreading of water in Abo Wash. While the court had not before addressed this specific question, it had in Harkey v. Smith (31 N.M. 521), a 1926 decision, enunciated the principles involved. In that case, the court held:

It may be stated generally that, under the arid region doctrine, uncontrolled by statute, the appropriation of water is accomplished by taking or diversion of it from a natural stream or other sources of water supply, with intent to apply it to some beneficial use or purpose, and consummated within a reasonable time by the actual application of the water to the use designed or some other useful purpose.... Under this doctrine it is quite as necessary to make use of the water as it is to divert it; in fact no appropriation can be effected without such use. The intent, diversion, and use must coincide.

In its opinion in Miranda the Supreme Court pointed out that in the trial before the district court, the court, together with counsel for both parties, had agreed that the case would turn on one legal issue, "whether physical efforts of man resulting in visible diversion of water are necessary to the establishment of water rights in the State of New Mexico"; the Supreme Court then applied the principle of Harkey v. Smith saying:

We hold that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes.

Miranda makes it clear that there can be no "instream" water right in New Mexico. The importance of this decision perhaps was not fully appreciated until it became clear that the several federal executive department task forces appointed to formulate a national



water policy, pursuant to President Carter's June 1978 Water Policy Message, were undertaking to make the protection and enhancement of instream flows, rather than conservation as proposed by President Carter in 1977, the cornerstone of a national water policy.

The necessity of a man-made diversion to establish a water right is perhaps the principal factor distinguishing the appropriation doctrine from the riparian doctrine of water rights. Under the latter, the riparian, the owner of the banks of the stream, has a right to the continued natural flow of the stream through or along his property. The Colorado Supreme Court, in a 1965 decision, has stated the proposition this way:

The right to the maintenance of the "flow" of a stream is a riparian right and is completely inconsistent with the doctrine of prior appropriation.

Most authorities that I am aware of agree that the adoption of the riparian doctrine would have virtually prohibited economic enterprise other than grazing in a semiarid state such as New Mexico.

I am aware that the question of instream rights is the subject of some difference of opinion among New Mexicans. I would offer some brief comments on the issue, not with the hope of resolving the differences, but with the hope of perhaps changing perspectives on both sides.

Those who argue that it would not be prudent to make it legally possible to establish instream flow rights in New Mexico do not

contend that instream flows and the use of water for fish and wildlife, recreation, and esthetic purposes in the State are not beneficial. The State, as well as private enterprise, has appropriated water and developed reservoir and irrigation projects, in accordance with State law, to enhance the environment, fish and wildlife habitat, and recreation opportunity.

The stream flow required at various points in the State is governed by interstate compacts, international treaties, federal court decrees, water rights conferred by the State under the doctrine of prior appropriation, and legislation authorizing federal water-development projects. In many situations, an incidental effect of these institutional constraints is an instream flow having important value in terms of recreation, fish and wildlife habitat, and esthetics.

Furthermore, in many areas of the State the geography and public land ownership patterns adequately protect instream values. Mountain streams generally do not provide favorable sites for conservation storage.

The effects of a change in State or federal law that would allow the establishment of instream flow rights in New Mexico would be greatly mitigated by the fact that most of our stream flows are not fully appropriated, and it seems clear that those appropriation doctrine rights could not be taken for instream flows without compensation. However, in New Mexico a water right is a property right and the right to change the point of diversion, place and

purpose of use of a water right, is an intrinsic part of that property right. The establishment of instream flow rights, at this time, could be detrimental to the interests of the State and its water-right owners by limiting flexibility in the diversion and use of the State's water. Instream rights could affect the value of existing irrigation water rights by precluding a change in point of diversion from below what might be claimed as an instream right to above the reach where the instream claim is made. Changes in the point of diversion of appropriation doctrine rights may be necessary to meet our growing municipal and industrial needs.

The decision in Miranda seems to have foreseen the state versus federal controversy over the protection and enhancement of instream flows, but we cannot be sure that it will resolve that controversy. A June 25, 1979 opinion of Leo Krulitz, then Solicitor for the Department of the Interior, contends that the federal government can establish instream flow rights on federal land under what has been termed the "non-reserved federal water right theory" without regard to state law; that is, specifically without regard to our Supreme Court's decision in Miranda. New Mexico, and most if not all of the other western states, have advised Secretary Andrus that the Krulitz theory is without legal foundation and the Secretary has deferred implementation of that theory, but we cannot yet be sure that the problem is resolved.

I have cited only six of about 160 Supreme Court decisions in water cases, but these seem to me to demonstrate the wisdom and

sound common sense that the court has applied to our water law. I submit that we have reason to be profoundly grateful for the contribution that our judicial system has made to water management in New Mexico.