

CURRENT NEW MEXICO WATER LITIGATION: HARD CHOICES
FOR NEW MEXICO IN THE FUTURE

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The importance of water in the world and in the Southwest cannot be overstated. Dr. Philip Handlar, former president of the National Academy of Sciences has concluded: "It is the world's fresh water supply that will really determine the number of Homo sapiens (mankind) in the next century." This statement is particularly true in arid regions of the world such as the Southwest. The majority of the states in the United States are experiencing some water shortage. Yet, we cannot seem to cope with the problem. It takes at least a generation--26 years or longer--to move water projects from inception to completion. The demand for water is a combination of the need for food and energy.

As an example of the escalating demand for food, suppose that at the time of Christ, the world population had been only one couple, and the population had grown at 2 percent a year, as it does now, the population of the earth would be 25 million times its present size. This supposition reflects, perhaps the truth of the predictions of Thomas Malthus in 1798, that our capacity to produce people so far exceeds our power to produce food that the world will someday face massive starvation.

Irrigated land is essential to food production. While only 15 percent of the world's cropland is irrigated, it produces 30 percent of the world's food supply. In the short run, however, it is unlikely that water will remain in irrigation, at least in the western United States. Water is demanded for energy and municipal and industrial development throughout our fast growing Sunbelt region. Indeed, when an air conditioner is turned on in Los Angeles, the power generator is turned on in our Four Corners region. New Mexico's water supply is used to generate steam to serve the generators in those coal-fired power plants.

By the year 2020, New Mexico will face a possible water deficit of 720,000 acre-feet. This deficit, however, is dwarfed by the anticipated

deficits in its sister states Arizona, of 1.6 million acre-feet and Texas, of 9.5 million acre-feet. By the year 1990, Texas alone will have a deficit four times the annual depletions from the Rio Grande in New Mexico.

These figures lead to the inevitable conclusion that the product of this water scarcity will be intense competition; competition between agriculture and industrial uses; competition between states; and competition between the federal government and the states. Four New Mexico cases illustrate this point.

On the issue of interstate competition, we in New Mexico are aware of the Sporhase decision as well as the El Paso case. Another decision, Colorado v. New Mexico illustrates this same interstate competition.

The Vermejo River originates in Colorado and flows into New Mexico for about 55 miles before it joins the Canadian River. No one in Colorado has ever used the river. In New Mexico, however, in 1941 a New Mexico State District Court in effect ruled that the river is fully appropriated and apportioned its waters among New Mexicans. In 1978, however, Colorado filed an original action in the U.S. Supreme Court to apportion 4,000 acre-feet of the river to Colorado to be used in steel production. A special master heard the case and ruled for Colorado. On appeal to the U.S. Supreme Court, the special master was upheld in principle, but the case was reversed and remanded to the special master because the factual findings were insufficient.

The importance of the case is that the court adopted a "cost-benefit" analysis and ruled that even though New Mexico had prior rights to the entire stream, some of that water may go to Colorado if the existing agricultural uses are so wasteful and the new industrial uses are so efficient that "the benefits (to Colorado) outweigh the harm to existing uses in another state (New Mexico)." The case has been reargued and the U.S. Supreme Court will, I hope, rule that the benefit to Colorado does not outweigh the injury to New Mexico.

Two cases in which I am currently participating, and which are now pending, clearly reflect the agricultural/industrial competition for water. In one case, the Angel Fire Development Corporation is seeking to

put down wells in a ground water aquifer hydrologically connected to a stream that fills Eagle Nest Lake where senior agricultural users have rights. Rather than buy and retire surface rights as they are affected by the well pumping, Angel Fire argues that the creation of parking lots and ski runs creates more runoff to the stream. The corporation argues that the surface owners should accept this new source of supply as a replacement for the water lost by well pumping. The agricultural users relying on Eagle Nest water argue that the new source is an insufficient and illegal substitution.

Another case involves the attempt by the New Mexico Department of Game and Fish to transfer water rights out of the Carlsbad Irrigation District up the Pecos River to Santa Rosa Lake. The irrigation district argues that the transfer would substantially impair the agricultural base of the district. The Game and Fish Department argues that the water will be used in a recreational lake, which would be a beneficial use, and the transfer is consistent with New Mexico water law.

The final case is New Mexico v. Aamodt, involving the Pueblo Indians on the Rio Grande and its tributaries above Santa Fe. This is an action to adjudicate the rights of certain northern New Mexico water users, including the Nambe, Tesuque, Pojoaque and San Ildefonso pueblos. At issue is the Nambe-Pojoaque River system tributary to the Rio Grande. The pueblos claim sufficient water to irrigate all of the "practicably irrigable acreage" on their reservations, with the first priority on the river, even though those lands have never been irrigated.

If the same argument were made and won by all of the other pueblos on the Rio Grande, such a ruling would grant to the pueblos an amount many times greater than the entire flow of the river. A major issue in the case is how Mexican and Spanish law would have resolved the controversy. The non-Indians have argued that under Spanish law there was an obligation to balance all interests of the parties in a way that maximizes the interest of all and not just the interests of one group to the absolute detriment of another. The existence of this important Indian water rights case once more illustrates my point that the name of the game in 1984 is competition.

In conclusion, I am obligated in a forum such as this to make some predictions as well as some recommendations. First, the impact of interstate competition, as reflected in the Vermejo case, will not be great because of existing interstate compacts. I believe, however, it will be difficult to stop the more economically powerful and politically influential states from taking the waters of resource-colony states such as New Mexico. It is my firm hope that Congress in its wisdom will acknowledge the principle embodied in the 10th Amendment to the U.S. Constitution. The principle holds that states constitutionally cannot be forced out of business because of lack of water, and that the concept of the public welfare of the state means the constitutional right to conserve water for each state's future generations.

If Congress does not recognize the concept of state sovereignty, New Mexico should consider establishing a system of "state reserved rights." The federal government and the Indian tribes have long recognized this concept. We western states have somehow missed the vital idea of reserving water for the future. We need to assert our state reserved rights by negotiating compacts and, where necessary, appropriating out of the water market, sufficient water to meet the needs of future generations. We already have done so with surface water in the recently dedicated Ute Reservoir in eastern New Mexico. Where necessary, we may need to do the same for ground water.

Second, concerning intrastate competition among agricultural, municipal and industrial uses, it is likely that the water will be transferred to uses that can generate more money. The state law does now, and should continue, to support a forum that allows a free and fair exchange of price between buyer and seller and allows other water right owners who might be involved, the right to protest those exchanges. In addition, an appropriate state agency should look closely at the environmental and conservation consequences of these water rights transfers to higher economic valued uses.

Finally, on the issue of federal versus state competition, the Indian water rights cases do not frighten me. I know of no reserved water rights case that has ever actually curtailed off-reservation ground water

pumping to support a subsequently adjudicated Indian water right. Neither do I believe that the Pueblo Indians want, nor could use, all the surface water rights on the Rio Grande. Rather, I believe the tribes want respect for their tribal governments and a reasonable amount of water to support their tribal needs, both of which I hope and expect they will receive.

An additional concern at the federal and state level is the possibility that water in the public domain could one day be seen as a federal asset, or cash register, for financing the federal debt of the more populous eastern states. By this, I mean that tomorrow Congress, by simple amendment of the Desert Lands Act, could pass a law that says all unappropriated ground water in the public domain belongs to the federal government and is not subject to appropriation under state law. Vast quantities of ground water thus could be taken from the western states' jurisdiction immediately. Congress is now taking a hard look at hydropower electricity generated from reservoirs in the West as a source of federal revenue. With equal ease, Congress could place a federal severance tax on water, or it could decide to lease water like coal, oil and gas. Coal was a locatable mineral until the 1920s when its obvious basis as a source of revenue brought about the leasing system. Geothermal waters on federal land are allocated by a leasing system. Of course, Congress is not going to act tomorrow, and hopefully never, on such all-encompassing legislation. Once again, though, the state has the capacity to pre-empt such action under the existing Desert Lands Act by appropriating ground water on the public domain and taking it out of Congress' hands.

I am not now advocating massive state appropriation of water. Rather, I hope I am giving you food for thought about what the water demands for the next 20 years may be. I am saying only that the competition for fresh water will be fierce and that federal and tribal governments may have something in this concept of "reserved rights" for future generations.

To show I am on the right side of every issue, I have decided to close with a quote from the Bible, Genesis 26:18-22:

Isaac dug anew the wells which had been dug in the days of his father Abraham and which the Philistines had stopped up after Abraham's death; and he gave them the same names his father had given them. But when Isaac's servant, digging in the wadi, found there a well of spring water, the herdsmen of Gerar quarreled with Isaac's herdsmen, saying, "The water is ours." . . . And when they dug another well, they disputed over that one also . . . He moved from there and dug yet another well, and they did not quarrel over it; so he called it Rehoboth, saying "Now at last the Lord has given us ample space to increase in the land."

I am afraid that in New Mexico, the search for Rehoboth is over. Unlike Isaac, New Mexico cannot just move on and find new water. Rather, we must conserve and control what we have.