SURVEY OF NEW MEXICO LAW REGARDING INTERRELATIONSHIP OF WATER QUANTITY RIGHTS AND WATER QUALITY CONTROLS

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INTRODUCTION

Recent amendments to the Clean Water Act delegate an expanded role to Indian tribes located on streams in determining surface water quality standards. This expanded tribal role may be the watershed for an increasing interrelationship between traditional water rights and water quality regulation in New Mexico through statute, judicial decision, and administrative authority. The interrelationship between water quantity and water quality will dictate that water allocation and distribution will be subject to a water quality regime as well as the prior appropriation doctrine.

New Mexico clearly has not been on the forefront of the growing movement for establishing a public interest in existing water rights. Nonetheless, New Mexico has recognized that water quality degradation may be a basis for denying water right permits under the existing impairment standard. In addition, the as yet undefined "public welfare" standards in the permit process provide another basis for involving water quality concerns within the existing New Mexico permit process.

An as yet untapped source for interrelating water quality with water quantity rights is interpretation of the nature and extent of water quality rights under the Treaty of Guadalupe Hidalgo. Other potential areas include the public trust, the federal reserved general forest water right, and the more specific federal reserved wild and scenic, or wilderness water right.

This paper will outline the status of these various doctrines within the New Mexico water right regime and their impact on the role of technicians, administrators, property holders and water users. One result of these trends may be an increasing reliance upon ground water to satisfy rights as a means to avoid complicated flow rate, dilution and non-point impacts involved in surface water.

As has been discussed, the impact of the recent amendments to the Clean Water Act may potentially have great consequences for New Mexico. Because the amendments implement water quality standards from other permitting and administrative processes, they

may authorize actions that infringe on existing water rights. While recent amendments to the Clean Water Act occupy just a portion of the potential water quality initiative, they may have a disproportionate impact in New Mexico. The concerns for water quality, in particular the instream flows, dilution and temperature impacts, dissolved oxygen rates, cumulative effect of non-point discharge and return flow, and the effect of diversions on flow rates required to dilute existing or planned water usages, all signal an increasing complexity in the water quality and water quantity realm.

RECENT AMENDMENTS TO CWA

The recent amendments to the Clean Water Act establish Indians as sovereign bodies, identical to states, for purposes of establishing stream standards for waters passing through their territories. (Water Quality Act of 1987, Pub. L. 100-4, §506(e) 101 Stat. 77, 1987.) Under the amendments, Indian water standards for waters entering their boundaries may impact upon upstream discharges. See, e.g., Lake Erie, Etc. v. U.S. Army Corps of Engineers, 526 F. Supp. 1063 (1981) (CWA provisions requiring notice of potential discharge to downstream states for downstream determination of whether "such discharge will affect the quality of its waters so as to violate any water quality requirement in such states"). Currently, where a stream crosses state boundaries, the National Pollutant Discharge Elimination System (NPDES) permit is issued by the state where the discharge occurs. However, the permit includes requirements that the discharge meet the down-stream state's water quality standards. (See attached portion of an NPDES permit which requires discharges into the San Juan Basin to comply with Colorado River salinity standards.) Thus, the downstream state, in addition to establishing its own standards, may establish guidelines that will set policies for discharge levels which may be allowed for upstream states.

The provisions of the amendments requiring that Indian tribes be treated as states envision a procedural mechanism for establishing mutual understanding between tribal and non-tribal standards. Hopefully, the procedural mechanism to be established pursuant to the amendments will assist in solving disputes where a permitted upstream discharge would not meet downstream standards. However, the potential that existing, renewal, and new NPDES discharge permits will have to be altered to meet downstream standards, is very real. In order to determine whether an upstream discharge will meet a downstream standard, it is necessary to incorporate scenarios of flow rates which will dilute the upstream discharge before it reaches the downstream measuring point. This dilution factor

threatens to commit existing water to provide regulated diversions and planned return flow. It may also limit the types of non-point return flow of current or future uses of already appropriated water. Although the Clean Water Act itself does not control non-point discharge, or existing water rights, the types of diversions and return flows of existing rights may be controlled by the downstream quality standards. This scenario would approximate the impact of public trust instream flow, and federal reserved right instream flow doctrines. New Mexico has not been forced to deal with this type of water quality/quantity interrelationship yet.

NEW MEXICO SUBSTANTIVE LAW REGARDING THE INTERRELATIONSHIP BETWEEN QUANTITY AND QUALITY

1. The Permit Procedure for New Appropriations, Change of Location and Transfer.

   A. "Impairment."

   In New Mexico, the permit procedure for change of location has acknowledged that under the impairment standard, change of location which may harm the quality of existing water rights without impairing the quantity may be denied. City of Roswell v. Reynolds, 86 N.M. 249 (1974); City of Roswell v. Berry, 86 N.M. 110 (1969); Stokes v. Morgan, 101 N.M. 195 (1984).

   In the City of Roswell v. Reynolds, the court stated,

   > We are also concerned with impairment by reason of increase and salinity of the water by reason of a lowering of the water table.

   86 N.M. at 253, City of Roswell.

   The court found that allowing the change of location for permitted city rights would increase the salinity level at the new location. The impact of allowing ground water diversion at the proposed location would result in:

   > The upward movement toward the wells in that vicinity of waters of greater salinity found in the lower portions of the artesian aquifer and in a lateral movement from the north and east toward wells of waters of greater salinity.

   The court also looked at the result of increased salinity on crop yields in the moved to area. Thus, the New Mexico Supreme Court has clearly held

that degradation of water quality caused by increased salinity of wells in the region of the new location constitutes impairment.

The impairment standard in the permit process for change of location, transfer, and new appropriation is identical. The burden is on the applicant to prove that no impairment will occur if the permit is granted. The decision in City of Roswell v. Berry applies across the board for all of the permits that incorporate an impairment standard. There has not been a decision regarding extracted water from a surface flow (decreasing available dilution and increasing salinity) that has been denied on impairment grounds. Nonetheless, City of Roswell v. Berry implies that if an appropriation from either a surface or a ground water source did in fact diminish existing water quality levels, the infringement could constitute impairment and thus provide a basis for denying an application.

B. The "public welfare."

The "public welfare" standard is incorporated in each of the permitting procedures involving appropriations, transfer, and change of location for ground and surface waters. The standard may also provide a basis for denying applications that would have an adverse impact upon not only existing water rights users, but upon other parties who have standing to challenge the proposed permit. Sections 72-5-6, 72-5-24, 72-12-3, 72-12-7, NMSA 1978 (1985 Repl. Pamp.). The standing provisions under the new "public welfare" guidelines are very broad.

> Any person, firm, or corporation or other entity objecting that the granting of the application will be contrary to the conversation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protest.

Section 72-12-3 N.M.S.A. 1978 (ground water); } 72-5-5 N.M.S.A. 1978 (surface water). Certainly there is ample precedent from other states, impairment decisions, and the broad public interest statement[1] that would allow protesters to argue that a change of location, a transfer, or a new appropriation would be against the public interest. Those changes which substantially impact existing flow rates required to dilute NPDES discharge or accumulated non-point discharge would fall in this category. The New

Mexico permit procedure allows parties to oppose permits based on water quality concerns.

2. Do Water Rights Under the Treaty of Guadalupe Hidalgo Contain a Water Quality Protection Element?

There are potential lines of argument for supporting the proposition that water rights based upon the Treaty of Guadalupe Hidalgo, (including Pueblo Indian rights)[1] and other rights predating the treaty (such as water rights to a land grant or community) may have an inherent water quality element. It may also be demonstrated that the uses for which the water has historically been put to use, may themselves contain an implicit water quality element. Neither of these arguments has been explicitly tested by a New Mexico court. However, the decisions in State of New Mexico, ex. rel. Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985), and State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976) cites, as well as U.S. v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) give some support for proponents of both lines of argument.

A. Treaty-Based Water Rights Under Spanish-Mexican Water Rights Law Contain a Water Quality Element.

The decisions in Aamodt clearly indicate that a court defining the rights to water from a distribution and delivery system under Spanish-Mexican law, prior to the 1848 Treaty of Guadalupe Hidalgo, must be examined in light of the Repartiamento system which allocated and distributed water. Whether or not this system recognized and protected rights to a given quality of water has not been addressed. The findings of fact and conclusions of law set forth in the Aamodt decisions contain language very similar to the impairment language under the New Mexico statutes, which generally protect water allocation rights from "injury."

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[1] A trial court, in the decision of In re Howard Sleeper, et al., No. RA 84-53C (April 16, 1985, Court of Appeals Docket No.) denied a water transfer based upon the public interest standard after considering cultural impact. Environmental, water quality impacts seem to be equally part of the public interest as cultural dislocation. Thus, under both the impairment and the public welfare provisions of the New Mexico permit procedures involved in appropriations, transfers, and change of location, seem to indicate that future appropriations, transfers and change of location will be considered in terms of the water quality both in terms of impact upon the uses in the existing area, as well as the proposed transfer or change of use location.

The historical roots of the term, "harm" may or may not include a right to a quality of water. See Conclusion of Law #10, Aamodt (1985).

> "... All other persons received an allocation of water for irrigation based upon the relative needs of all users and the application of the principle of non-injury, that is, that no one's use of water should result in injury to another person."[2] 618 F. Supp. at 998.

Under the rationale of the Aamodt decisions, the meaning of "injury" may need to be determined on a case-by-case basis. Perhaps at some point, a general understanding will be reached as to whether water allocations protected under the Repartiamento system included a water quality element. Until clear guidance from an appellate court is given, the issue will remain open.

B. A Treaty-Based Right Includes Quality Implicit in the Particular Usage.

Other rights protected by the treaty, including protection of religious rights, and, perhaps, fishing, hunting, and environmental rights, may dictate a sufficient water quality to meet these treaty-protected uses. The Treaty of Guadalupe Hidalgo guaranteed the protection of liberty and property rights of Mexican citizens residing in the conquered territory, as well as "the free exercise of their religion without restriction." The few cases that have interpreted this language have determined that traditional water rights will be respected. Aamodt, supra. A 1986 New Mexico Federal District Court decision, U.S. v. Abeyta, 632 F. Supp. 1301 (D.N.M. 1986) held that the religious protections guaranteed by the treaty allow Pueblo Indians to violate federal statutes regarding the killing of bald eagles, unless Congress specifically states that the religious protection does not apply. The implication from this decision may be that religious rights, which rely upon a quality of water, such as baptismal ceremonies or the like, may be protected under the treaty. In U.S. v. Abeyta, the court looked to traditional, religious uses of bald eagle feathers and found these uses were protected by the treaty. Under treaty interpretation rules, Congress must specifically abrogate these rights through federal statute in order to override the treaty provisions.

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[2] *perjuicio* is the Spanish term used to denote injury in several early documents. See, Water Ordinances For Salamanca, March 24, 1610, approved by the Viceroy January 22, 1611; Petition of the Fiscal of Mexico, June 26, 1643.

The court in Abeyta alluded to hunting and fishing rights, stating, "the Court need not and does not decide what hunting rights might attach to the New Mexico pueblos by virtue of the 1848 accords between the United States and Mexico." It has been and will continue to be argued that hunting rights and fishing rights may have been considered property rights under Spanish-Mexican law. These rights cannot be infringed upon by activities that interfere with the quality of water; activities that may eventually impact upon either the fishing or hunting habitat or species. Since there is no appellate decision on these particular issues, especially none which address the New Mexico pueblos' rights to water quality for particular uses under Spanish-Mexican law, this area remains at issue and may provide another avenue for protection of water quality by tribes.

C. Are Treaty-Based Rights Immune from the Public Trust?

An added consideration of the relationship between treaty-based property rights and water quality, may be that such rights are not equally susceptible to governmental exercise of doctrine like the public trust. In Summa Corporation v. Calif. ex rel Lands Commis., 466 U.S. 198, 80 L.Ed. 2d 237 (1984), the U.S. Supreme Court decided that title based on rights ensured by the Treaty of Guadalupe Hidalgo was immune from the California easement asserted under the public trust doctrine. The court stated "'sovereign' claims such as those raised by the state of California in the present case must, like other claims, be asserted in the patent proceedings or be barred." In California, all title based on the treaty was determined in federally mandated patent proceedings (Act of March 31, 1851). The court held that these proceedings established title and could not at a later date be subjected to the public trust. This case provides an interesting parallel to rights determined in New Mexico stream system adjudications. Must public trust interests be raised during the adjudication or be barred under Summa Corp.?

Avenues for protection of water rights derived from Spanish-Mexican law, as incorporated by the Treaty of Guadalupe Hidalgo, may be available. Whether these rights would override an existing or proposed upstream or ground water diversion, eventually impacting upon the protected uses, is an open question. Nonetheless, it must be considered that these potential uses could further circumscribe diversions, return flows, or cumulative

non-point discharge because water flows reaching the tribal boundaries may be affected and negatively impact the water relied upon for tribal uses. Further, are tribal rights, if quantified in an adjudication, immune from public trust?

3. Public Trust Doctrine.

New Mexico, along with a handful of other Western states, has not recognized the public trust doctrine as embodied in the California decisions of National Audubon Society v. Superior Court of Alpine County, 189 Cal. Rptr. 346, 658 P.2d 709 (1983) and U.S. v. State Water Resources Control Board, 227 Cal. Rptr. 161 (Cal. Appeals, First District 1986). These cases have held that water rights are granted, subject to a public trust which may allow a governmental agency, at a date subsequent to the permit and after long-standing application of given quantities of water has been maintained, to invoke the public trust and diminish or otherwise alter the existing usage in order to provide water flow and quality levels to protect public interest. These cases obviously walk the cutting edge between the taking of private property by a governmental entity and legitimate government regulation and control of public resources. New Mexico has not adopted nor rejected these specific public trust arguments. However, the public welfare provisions in the appropriation, transfer, and change of location permit procedure discussed supra, closely resemble the public trust language. A governmental entity could easily promote public trust-like values within the existing New Mexico statutory framework on permit applications.

The critical question is whether an existing use may actually be curtailed or otherwise circumscribed when the existing user does not apply for a permit but merely desires to maintain a continuing use. The California decisions indicate that the state administrative body may infringe upon and curtail existing usages outside of the permit process. There is no New Mexico authority which would allow governmental bodies to accomplish this type of public trust curtailment. Nonetheless, amendments such as the recent amendments to the federal Clean Water Act, come very close to allowing, or forcing, state regulatory bodies to accomplish what is the equivalent of a public trust doctrine: that is, imposing restrictions upon existing usages in terms of diversion, cumulative non-point source discharge and return of flow. Thus, it is critical that federal and state statutes which require administrators to provide

or meet water quality standards be recognized as potential actions which may curtail or limit existing usages in order that flow and discharge rates may be controlled to meet downstream standards.

4. Federal Reserved Water Rights and the So-called Secondary Federal Reserved Water Rights.

The landmark case of U.S. v. New Mexico, 57 L. Ed. 2nd 1052, 438 U.S. 698 (1978) firmly concluded that federal acts establishing federal reserves must clearly indicate the desire to reserve water for given usages. Otherwise, such water rights will not be implied nor granted to the federal government. This decision affirmed the New Mexico Supreme Court decision of Mimbres Valley Irr. Company v. Salopek, 90 N.M. 410 (1977). The Mimbres decision held that the original purposes for the Gila National Forest did not include recreational purposes and minimum instream flows.

The U.S. v. New Mexico decision has been followed in numerous cases to limit federal reserve water rights. However, the strength of U.S. v. New Mexico has been called into question by the decision in Sierra Club v. Block, 622 F. Supp. 842 (D.C. Colo. 1985) which found that where wilderness area is designated by the Wilderness Act, unappropriated water rights are reserved by the Federal Act. This decision threatens to enlarge greatly the scope of federal reserved rights for, at least, the lands reserved by the Wilderness Act.

In the one New Mexico decision since Sierra Club v. Block, the Special Master in State of New Mexico v. Molycorp of America, C79780C (Red River) (March 27, 1987) firmly rejected the rationale of Sierra Club v. Block. The U.S. claimed rights reserved under the Wild River and Wilderness Act for waters being adjudicated in the Red River Adjudication. The court relied upon the language of the federal acts to deny the claims.

> "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal government as to exemptions from state water laws." The Wilderness Act in 16 U.S.C. 1133 has identical language. This disclaimer negates any intent by Congress to make a reservation of water rights in derogation of state water laws.

The court noted that authorities have held that Congressional intent is not to be implied to declare reserve rights even where there is no express disclaimer, as is in the Rivers and Wilderness Acts. The court relied upon these authorities to "give(s) support to the wisdom of ignoring the implications

of Sierra v. Ling (Block)." Thus, the Special Master in the Red River Adjudication squarely rejected the Sierra v. Block rationale and decision. As such, New Mexico is, for the time being, without a strong decision implying a reservation of water rights for federal reservations. The implications of a decision like Sierra Club v. Block on existing water rights threaten not only the quantity of existing uses if a priority date of the time of the reservation is given to the federal reserved right; but, in addition, the federal reserve right, particularly if it includes an instream flow, may curtail and circumscribe existing uses so that the instream flow, perhaps of a required quality, may be maintained to satisfy the prior federal reserve right. While this problem has not arisen to a great degree yet in New Mexico, it may, particularly with the pending review of Sierra v. Block.

5. State Legislation.

The New Mexico Legislature has adopted an El Rio Chama Scenic and Pastoral River Statute. The state legislature has not established instream flow of protections under the El Rio Chama Scenic and Pastoral River. This statute requires that certain sections of the Chama River and its tributaries be managed in a cooperative effort with federal agencies to "protect the River's natural values." The statute specifically states that, "nothing in the El Rio Chama Scenic and Pastoral Act shall be construed as being incompatible with existing state property laws. Nothing shall be construed to be incompatible with regulation of river flow for flood control or beneficial uses of water." Thus, the statute clearly attempts to safeguard existing beneficial uses. The potential for state legislation to infringe upon existing uses has been demonstrated in other Western states where minimum instream flow statutes or state versions of Wilderness and Wild and Scenic River designations have been enacted. These include reservation of unappropriated water rights, and, perhaps, a circumscription of existing water rights, to provide instream flow to satisfy the uses of the river systems. New Mexico has not gone this far yet, but it should be noted that if it does, or if water quality protection for water flowing in New Mexico Scenic Rivers is adopted, existing beneficial uses may be impaired.

6. What Does the Growing Interrelationship Between Quality and Quantity Mean to Persons and Entities Involved with Water Distributors and Allocation?

A. Technical support.

Technical support includes hydrologists, environmental, civil, and waste water treatment engineers, and other water technicians. Sound knowledge and expertise of the interrelationship between water quality and quantity is absolutely required when preparing to advise parties on the impacts of water projects, changing water uses, and new appropriations. In addition, technological understanding is required in the evaluation of the impact of permit applications, legislation, and of case decisions.

B. Water administrators and policy makers.

Quality concerns within water quantity distribution and allocation will become increasingly sensitive. Balancing the constitutional protections against taking of private property with the traditional lack of concern of water users with meeting water quality concerns will prove challenging for water managers. As with water technicians, an understanding of the technical interrelationship between water quality and quantity will be critical. Also, understanding the various rights, responsibilities, and interests of private water users, as well as environmental, recreational, and aesthetic concerns, will be required. Mandated state, federal, and local guidelines may prove to be extremely difficult and complicated to follow.

Understanding water rights in terms of the consideration of all various parties' claims to the resource as opposed to the traditional, narrower view of water rights as a right to a quantity from a distribution system may prove to be the wave of the future. It should be noted that one of the new case books that previously may have been called a water rights case book or the like, is now entitled "Legal Control of the Water Resources." Sax, Legal Control of Water Resources: Cases and Materials, 1986.

C. Private water owners.

Private water owners should be increasingly concerned with the impact on their traditional private property rights, of state, federal, and local regulations, as well as statutory changes that allow other parties to become involved in the permit procedure. Some of this regulation is

clearly allowable, but there may come a point where this regulation constitutes the taking of a given, existing property right. For example, in California, persons are required by the public trust to change their existing water uses and, in effect, to buy more water rights to cover existing water uses. This may constitute the taking of an existing property right. Two recent U.S. Supreme Court decisions have narrowed the allowable impact of government regulation which will survive a takings test. The decisions may provide guidelines which will further delineate the proper parameters for government regulation that concern infringement of private water rights. First Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. ___, 96 L. Ed. 2d 250 (June 9, 1987); Nollan v. California Coastal Commission, 438 U.S. ___, 97 L. Ed. 2d 677 (June 26, 1987). On the other side of the issue, private water owners may want to start considering ways in which they can protect their rights to a quantity of water given certain quality standards. The New Mexico stream system adjudication procedures allow for rights to be defined "by any other means which are necessary to properly identify the right." Section 72-4-19 N.M.S.A. 1978.

Perhaps, as water users go through costly, lengthy adjudications to protect and quantify their existing water rights, they might want to consider providing a water quality element. This will require other users on the system not to interfere with their right to receive a given quality of water, satisfactory to their traditional water use. For example, growers involved in sensitive agricultural operations may want to have a guarantee of a water free of high salt content. This is particularly true if they have been receiving water free of salt and have relied upon and invested in operations which depend upon salt-free water. This scenario may provide an example where the private water user may actually want to use some of the doctrines pointed out in this paper in attempting to protect a given quality of water for an existing use.

CONCLUSION

The interaction between water quality and water quantity means that water allocation and distribution will be subject to water quality controls. This will impact upon traditional

water rights. The increased and well-defined role given to Indian tribes under the recent amendments to the Clean Water Act to set downstream NPDES water quality standards is one example of quality controls which could impact upon traditional water rights.

Permit No.

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C... 1251 et. seq; the "Act"),

is authorized to discharge from a facility located near Farmington, San Juan County, New Mexico

to receiving waters named the Animas River; then to the San Juan River in Segment No. 2-403 of the San Juan River Basin

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I (5 pages), II (14 pages), and III (1 page) hereof.

This permit shall become effective on October 13, 1986

This permit and the authorization to discharge shall expire at midnight, October 12, 1991.

Signed this 12thday of September 1986

for Oscar Cabra, Jr.
Myron O. Knudson, P.E.
Director, Water Management Division (6W)

PART III
OTHER CONDITIONS

A. Salinity (TDS) is determined by the "calculation method" (sum of constituents) as described in the latest edition of "Techniques of Water Resources Investigations of the United States Geological Survey - Methods for Collection and Analysis of Water Samples for Dissolved Minerals and Gases."

B. This permit shall be reopened and modified to comply with the Colorado River Salinity Standards if the TDS monitoring indicates that these standards are being violated.