

WATER PLANNING FOR STATE TRUST LAND:  
PROTECTING THE AVAILABILITY OF WATER RESOURCES

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## INTRODUCTION

The New Mexico State Land Office has recently been active in water resource planning activities throughout the state. This activity is representative of the commitment of the commissioner of Public Lands to a broadened scope of potential uses of state trust land resources.

The State Land Office's historic dependence on oil and gas lease revenues has provided a Permanent Fund asset amounting to \$2.7 billion. These assets produce investment earnings that provide approximately one-fourth of the public school appropriations and significant contributions to the appropriations made to other beneficiary institutions.

Recognizing the volatility of petroleum markets, as well as the finite nature of oil and gas resources associated with state trust lands, recent commissioners have sought to develop more fully the valuable attributes of the trust. It has always been the case that land resource values in New Mexico are tied to the availability of water resources. As the State Land Office moves to a greater breadth of potential trust land use, the commissioner must seek to insure the availability of water resources necessary to allow the development of the trust.

Thus, water resource planning has become a prominent issue for the commissioner. The commissioner's constitutional responsibility for managing approximately 9 million surface acres and 13 million acres of mineral rights (N.M. Const. Art. XIII, Section 2) provides a large range of water resource issues which could potentially affect the

value of trust lands. Careful planning for the water resource needs of the trust lands provides the basis upon which the full development potential of these lands can be realized.

Water planning for state trust lands must seek to assure that sufficient water resources will be available for current and future development needs. The need to assure the availability of water for trust resource development is general with a statewide scope, but requires concern for local or hydrologic basin-specific water resource issues. Recent experiences with several proposed developments of trust land resources have highlighted the need for aggressive water planning relating to trust lands. These development experiences, combined with pending legal conflicts relating to competing claims to water resources under New Mexico water law, are largely responsible for bringing water resource planning activities to the attention of the State Land Office in recent years.

An understanding of the Land Office's position requires the historical perspective relating to the responsibilities of the commissioner. The Land Office's current policies must also be understood from the perspective of recent efforts to develop trust land resources.

Water planning for state trust lands is premised on a presumption that water availability is critical to realizing the current and future development of the trust resources. There are several threats to the availability of water in New Mexico, which in turn threaten the planning process for state trust lands. Two of these threats, the exportation of water and

claims of federal reserved water rights, will be discussed here.

### Historical Foundation for State Trust Land Water Planning

Before discussing specific water planning issues now being addressed, a little background about the State Land Office is necessary. State trust lands were granted by the United States Congress to New Mexico for the support of public education and all of the major state universities and other major state institutions. It is clear from the wording of New Mexico's Enabling Act (Act of June 20, 1910, ch. 310, 36 Stat. 557) that the trust land grant imposes upon the state, the commissioner of Public Lands and the employees of the State Land Office, fiduciary standards in their management of that land. Such standards impose two concomitant duties -- maximization of revenue from the land and protection of the land's value from waste and degradation.

Although fiduciary principles require state trust lands to be managed exclusively in the interests of the beneficiaries, proper execution of the trust by the commissioner of Public Lands and his staff is of vital importance to all New Mexico citizens. Legislative history makes it clear that Congress intended that every dollar earned from state trust lands be a dollar less in taxes the state need raise. Thus, every New Mexico citizen, even if she or he has no direct connection with one of the beneficiaries, is affected by what the State Land Office does.

Water will always be a necessary adjunct to the use and development of state trust lands in New Mexico. Whether for livestock watering, developing the commercial attributes of trust lands or injection for secondary oil and gas recovery, the commissioner's ability to maximize revenue from and protect the value of state trust lands depends on sufficient, long term sources of water for use with the land. This need exists now and must be considered perpetual, as is the trust. Therefore, water planning for state trust lands must focus on preservation of water resources for future use.

In the past, the Land Office has allowed state trust land users to acquire vested water rights, as private property rights, in conjunction with their use of trust land resources. Recent commissioners have recognized that private water rights vesting from use of trust lands is an inappropriate policy for resource management due to the loss of control over the use of a valuable property right. The State Land Office now requires that all new appropriations from state

trust land vest title to water rights in the name of the commissioner.

Because the State Land Office manages a perpetual trust, it engages in what economists describe as "intergenerational resource allocation." This resource allocation principle requires that, in managing the trust resources today, consideration must be given to both contemporaneous and future needs of the trust's beneficiaries. Thus, water planning by the State Land Office must seek to assure that water resources will be available many years from now such that the commissioner will be able to fulfill the trust purposes.

One of the problems of intergenerational resource allocation is that specific future needs may be uncertain, although the need to plan for these future resource use requirements is in no way diminished by that uncertainty. With respect to water planning requirements faced by the State Land Office, quantification of future needs and current acquisition of that quantity is unnecessary so long as there will be water and water rights available for appropriation, market acquisition or condemnation. The intergenerational resource management responsibilities of the commissioner motivates the Land Office's opposition to applications for water export and claims of federal reserved water rights. In the context of water resource planning, either water export or perfection of additional reserved water rights claims results in the elimination of water resources in New Mexico available for appropriation and beneficial use, or market acquisition, or subject to the exercise of eminent domain power, as the future development of the trust land requires access to this vital resource.

### Water as a Development Constraint

The need for adequate water resources to allow development of trust land resources has been brought into focus as the result of several recent urban land development efforts by the Land Office. The Land Office is actively involved in several large scale commercial and residential land development projects. The significance of water resource planning to achieve the full market potential of these properties has been clearly demonstrated by these projects. The long-term water resource planning responsibility of the Land Office with respect to these urban land resources can be simply stated as an assurance that adequate water resources will be available for provision of reliable and cost-efficient water service to these properties.

## Water Planning for State Trust Land: Protecting the Availability of Water Resources

Several years ago, a master plan was developed for a large tract of trust land near Albuquerque, a tract of more than 10,000 acres located south of the Albuquerque Airport and known as Mesa del Sol. The development of a marketing strategy for this raw land required consideration of infrastructure requirements, including provision for water and wastewater services. Water resource use constraints, among other development issues, eventually required that the property be brought to market subject to annexation by the city of Albuquerque.

Clearly, had the water resource requirements been independently satisfied, additional value could have attached to the Mesa del Sol property, corresponding to the additional development opportunities which could be associated with the property.

The sale of this property became subject to a dispute which was unrelated to water issues, and the sale was cancelled in 1987. The property, or parcels of the property, will likely be re-offered in the next several years, subject to favorable Albuquerque real estate market conditions. At the time of the future sale, the water resource constraints are likely to be issues of greater significance, and their resolution will be a matter of increased magnitude as related to the potential value of the property. Current planning activities of the Land Office with respect to the Mesa del Sol parcel are addressing the water resource constraints.

At the present time, the Land Office is also in the process of planning for the development of a large tract (approximately 10,000 acres) northeast of Las Cruces. This property is similarly situated to municipal boundaries as is Mesa del Sol; however, water resource constraints in the Lower Rio Grande Basin require the city to insist that annexed property possess adequate water rights, or be subject to a monetary charge at time of annexation to cover the city's cost of necessary water right acquisition. The value of this property will be directly impacted by the Land Office's ability to plan carefully for water resource needs, and assure that water rights are available to satisfy these needs.

Several alternatives are being actively considered in this planning process. The Land Office has sought to keep as many options open as possible, and allow the planning process to direct the water policy according to specific needs and hydrologic facts associated with the Las Cruces parcel. The planning for water resource needs has itself become a significant activity in this project. The Land Office remains open to private parties who wish to provide water resources to the development, with the caveat

that the private interest will not gain *de facto* control over the value of the project's other attributes. Until the specific water resource needs are known, and a plan for satisfaction of water resource requirements of the development are factually and legally demonstrated, the commissioner's strategy will be simply to retain the greatest flexibility in satisfying the water requirements of the property.

Several observations can be made with respect to these two commercial development planning efforts as relates to water resources. Clearly the need for careful water resource planning is most acute where available water resources are nearly fully appropriated. Determination of water availability, under the administrative jurisdiction of the State Engineer Office, guides the allocation of water rights. The Land Office has aggressively pursued protection of its interests in water rights in recent years to assure water availability at the time of development of trust land resources.

Critical to the planning for water resource requirements is the determination of the development potential for the trust lands. Unfortunately, the trust lands with the greatest development potential are also found in areas which (generally) are also facing the greatest water scarcity constraints. The scarcity conditions require a degree of creativity in planning for the satisfaction of the water resource requirements for the future development of trust land resources. The factual bases relating to the Land Office's intervention in litigation over exportation and reserved water rights demonstrate the commissioner's effort to assure the future availability of necessary water resource requirements. Participation in the litigation described in the following section is an integral part of the State Land Office's water resource planning activities.

### Litigation Impacting Water Resource Planning for State Trust Lands

The water resource planning activities of the State Land Office are inextricably linked to current litigation in New Mexico relating to exportation of water resources and federal reserved water rights claims. Exportation of water results in the physical removal of water from New Mexico; federal reserved water rights claims raise the possibility of the removal of water resources from the state's sovereign jurisdiction. In both situations, the availability of water to be used with state trust lands may be reduced or eliminated.

Because the consequences of unfavorable rulings in the litigation of these two issues could endanger the ability of the State Land Office to manage effectively state trust lands, it is necessary that the State Land Office aggressively pursue ways of countering such threats. The commissioner of Public Lands has been doing so in a legal context and believes there are sound arguments allowing the State Land Office to protect state trust lands from these threats.

## EXPORTATION

Prior to 1982, New Mexico had an embargo law which simply did not permit New Mexico water to be transferred beyond our state border. In that year, however, the United States Supreme Court ruled that water was a commodity in interstate commerce and that, therefore, under the Commerce Clause of the United States Constitution, states were not allowed to prevent the transfer of water movement across state lines. Sporhase v. Nebraska, 458 U.S. 941 (1982). The New Mexico embargo law thus became unconstitutional and unenforceable. The result was that water resources once believed to be preserved for use in New Mexico became subject to transfer out-of-state.

The Supreme Court did establish, however, that a state may, in times of critical shortage, prefer and limit water use to its own citizens, thus preventing water from being exported out-of-state. Exercise of the preference and limitation is possible if a state can show that exportation would be contrary to the conservation of water within the state or detrimental to the public welfare of that state's citizens. Unfortunately, the meaning of "conservation" and "public welfare" in a water shortage context is not yet defined. Only after extensive litigation and judicial review might some standard or guideline emerge that could provide some certainty. The incomplete definition of these critical terms causes significant distortions in a current planning context, where certainty is desirable, if not necessary.

There are, however, at least three exceptions to the Supreme Court's ruling that would allow New Mexico to limit exportation of water without having to show particularized facts regarding critical shortage. These exceptions are (1) a "close means-end relationship," (2) "congressional authorization," and (3) the "market-participant doctrine."

The "close means-end relationship" exception was referred to by the Supreme Court in Sporhase:

A demonstrably arid state conceivably might be able to marshal evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water.

Sporhase v. Nebraska, 458 U.S. 941, 958 (1982).

The "congressional authorization" exception is a matter of judicial interpretation of congressional intent. Congress has full power over interstate commerce. If Congress authorizes a state to burden or even prevent interstate commerce in a certain commodity, then such state action is constitutionally permissible. Such congressional intent has been found where a) Congress, in legislation, "expressly stated" the state's authority, b) the court has determined from federal legislation that Congress "clearly intended" that a state be so authorized, c) legislation or legislative history indicates that Congress "affirmatively contemplated" that a state could prevent interstate commerce, or d) the courts determine that a state action interfering with interstate commerce sounds a "harmonious note" with federal legislation. As to these first two exceptions to the Sporhase ruling, they are applicable to the trust land grant based on the purpose of the trust grant and the legislative history behind it. Selected quotations from that legislative history demonstrate a close connection between water and state trust lands, and a recognition by Congress that water was necessary to any productive use of that trust land. Expressed within that recognition is the conclusion that water was necessary for fulfillment of the trust land grant purpose. The following four quotes clearly illustrate that Congress understood the necessary relationship between land and water in New Mexico:

"These lands are at present without value, and uninhabitable in consequences of the absence of water, and will never be settled up and made valuable unless by [irrigation projects]."

H. Rep. No. 3934, 50th Cong. 2nd Sess. 2 (1889).

"No subject is of greater importance to New Mexico than [irrigation]. The future of the territory depends very largely on the increase of its area of cultivated land throughout comprehensive systems of irrigation."

S. Rep. No. 1023, 52nd Cong. 1st Sess. 4 (1892).

"The arid lands are of no value to the United States; nothing can be raised upon the same; if they were offered for sale by the Government they would not bring ten cents an acre; yet they are in fact the most

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world if water is only supplied for their cultivation."

H. Rep. No. 1161, 55th Cong. 2nd Sess. 3 (1898).

"It is recognized by the committee...that practically none of these lands are worth now anything like the minimum price fixed. It is believed, however, that the advance of science, the extension of public and private irrigation projects, and the tendency toward the higher development of smaller holdings will, in the case of Arizona and New Mexico, as is the case of other States, result in a sure, although possibly slow, increase of land values."

H. Rep. No. 152, 61st Cong. 2nd Sess. 2 (1910).

The next quote, although not specifically dealing with water, but rather with prior mismanagement of trust lands, expresses the intent that the trust lands were to be protected in order to achieve their purpose:

"In view of this, as well as other circumstances, your committee believes that the grants of land made in this bill cannot be too carefully safeguarded for the purpose for which they are appropriated."

S. Rep. No. 454, 61st Cong. 2nd Sess. 20 (1910).

Although again not dealing with water, the following quote clearly indicates that Congress was desirous of having the trust grant achieve its intended goals:

"[T]he measure reported herewith remedies to a large extent the existing conditions which jeopardize and cloud the state's title to these lands, and which prevent to a large extent the realization of the purposes intended by the grant itself."

H. Rep. No. 1761, 69th Cong. 2nd Sess. 3 (1927).

In regard to the Supreme Court's "close means-end relationship" exception, there can be little argument from the legislative history that New Mexico is a "demonstrably arid state." If the purpose of a ban by New Mexico on the exportation of water was to conserve and preserve water so that the land trust purpose can be realized, the means (ban on export of water) are not just closely related, but absolutely necessary to that end result (fulfillment of trust purpose) and would therefore fall within the exception.

The second exception to the Sporhase rule, "congressional authorization," is dependent upon a clear indication that Congress intended, and thus authorized, a state to keep water within its boundaries. If such authority can be found, New Mexico

would be free from Commerce Clause restrictions. While there does not appear to be any "express statements" by Congress addressing the restriction of water exportation in order to assure water availability for state trust lands, it seems unlikely that exportation of water was a manifest notion in 1910 at the time of New Mexico's Enabling Act. But the quotes cited above easily indicate that Congress "clearly intended" or "affirmatively contemplated" that the state would be able to preserve water availability to carry out the trust land grant mandate. Undoubtedly, state action to preserve and conserve water resources for ultimate use with state trust lands strikes a "harmonious note" with the sentiments of Congress about the arid nature of New Mexico and protection of the trust land grant.

There is a third exception from the general rule prohibiting the restriction on water export that was not involved in Sporhase. This is the judicially created "market participant doctrine." It applies when the state action that might otherwise be invalid under the Commerce Clause is taken as a "market participant" rather than as a "market regulator." There have been only three United States Supreme Court cases finding this exception valid, so the precise contours of the doctrine have not yet been established. A classic case, however, approvingly applied the exception to a state action limiting sales of concrete from a state owned concrete plant, that competed in the interstate market, to instate customers during times of concrete shortage. Essentially, the Court ruled that in this capacity, the state like any other business, could decide with whom it would prefer to do business.

With state trust lands, the state of New Mexico is in the land and resource management business. It does not regulate development but, rather, competes with other land owners for the development dollar. When water resources are limited, and do not constitute enough supply for both instate and out-of-state needs, as in the case of cement, could not New Mexico restrict the transfer of water in preference for the development of its own state trust lands?

#### FEDERAL RESERVED WATER RIGHTS

The second threat to water planning for state trust lands is the assertion of federal reserved water rights. Very simply, those rights have been recognized by the courts as existing when Congress reserves federal public land for a specific federal

purpose. Without express language, it is implied that Congress also intended to reserve for those lands a sufficient quantity of unappropriated water, with a priority date of the date of reservation, to achieve the primary purpose of that reservation.

This presents a problem for water resource planning because priority dates and quantities claimed for such federal reserved rights may upset all established expectations. For example, an Indian federal reserved water right claim made today may include an assertion of "time immemorial" as the priority date and seek quantification based on all practicable irrigatable acres over which the tribe or Pueblo at one time asserted aboriginal title. If and when such claims are successful, changes in existing water right titles and water market scarcity conditions upset not only planning activities, but the water resource availability itself may be constrained due to the acquired control of the federal interest.

Federal reserved water rights are grounded in the recognition by Congress that land grants in the arid west were meaningless without the water necessary to achieve the grant purposes. There is an obvious parallel between this recognition and the understanding of Congress about the arid nature of New Mexico's trust lands. Indeed, certain lands ultimately transferred as trust land to the state of New Mexico may be entitled to support a federal reserved rights claim. Sections 16 and 36 in every township were originally reserved, in the Organic Act for the Territory of New Mexico, (Act of September 9, 1850, ch. 49 9 Stat 446) from the public domain for educational purposes in the Territory and later the state of New Mexico.

The importance of water to successful management of state trust lands requires further research into the relationship the New Mexico Enabling Act creates between the federal government and the state. At the very least, however, where federal reserved water rights claims may be in conflict with the proper administration of state trust lands, there is presented a conflict of implications from congressional intent. That should necessitate, at the very least, some balancing of the state trust lands' interests with those of the federal right claimants.

## CONCLUSION

Water resource planning for state trust lands is now occurring in two interrelated forums. The explicit planning for trust land water requirements must address specific development opportunities, water demands and available supplies, while simul-

taneously responding to the potentially dramatic implications of judicial decisions in pending litigation. The broad intergenerational fiduciary responsibilities of the New Mexico State Land Office demand a greatly expanded scope of water resource planning consideration than is contemplated by the majority of current water planning efforts within the state. The principles of law protecting the exportation of water, as announced in Sporhase, and those establishing federal reserved water rights, are the legal doctrines which serve as the vehicle to implement important federal governmental goals set by Congress. State trust lands also serve an important congressional goal to provide New Mexico with the means of supporting public education and institutions. Considering the sincere and dedicated efforts Congress made to assure protection of the New Mexico land trust, it is unreasonable to believe that it could or should be defeated without being balanced against competing federal interests.

Trust land development is dependent upon a mirage of raw land attributes, the availability of other requisite resources (e.g., water), and an entrepreneur who can develop the available resources. Both Congress and the courts dramatically impact the potential for the trust in their guidance and resolution of competing claimed rights to water resources. The decisions affecting resolution of these issues require balancing of many concerns, while specific water resource planning must account for the dynamic legal environment. Hopefully, a balancing of these diverse interests will occur and prove successful in maintaining water resources for use with state trust lands.