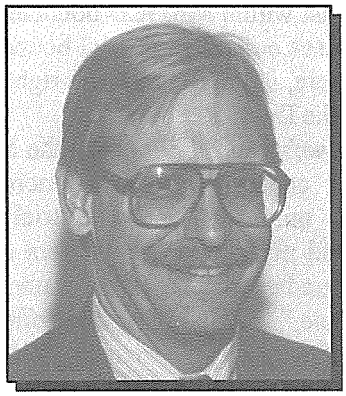
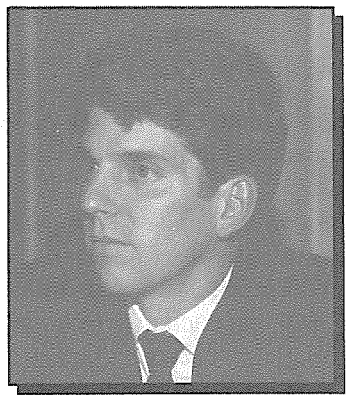
*Maria Lurie is a third-year law student at the UNM School of Law. She has clerked for the Las Cruces firm of Hubert and Hernandez, P.A., as well as Modrall, Sperling, Roehl, Harris and Sisk, P.A. in Albuquerque. At UNM, Maria served on the editorial board of the Natural Resources Journal as Notes and Comments/Processing Editor, and has received an Am Jur Award in Criminal Law. Maria graduated from Beloit College in 1990 with high honors. She will begin working for the Solicitor Office of the Department of the Interior in Washington, D.C. in fall 1995.*



*Tim De Young is an attorney in the Natural Resources Department of the Modrall, Sperling, Roehl, Harris & Sisk, P.A. law firm in Albuquerque, where he practices primarily in the areas of water law, public lands, and oil and gas law. Tim holds a J.D. from the University of New Mexico and a Ph.D. in government from the Claremont Graduate School. His recent publications include Water of Enchantment: A Citizen's Guide to New Mexico Water Law (1994) and "Protecting New Mexico's Instream Flows" in Instream Flow Protection in the West (revised ed. 1993).*



*Greg Ridgley is an attorney in the Natural Resources Department of the Modrall, Sperling, Roehl, Harris and Sisk, P.A. law firm in Albuquerque, where he practices in the areas of environmental law, water law, mining law, and commercial litigation. Greg graduated with high honors from Harvard University, and received his J.D. degree with honors from Hastings College of Law.*

# REALLOCATION OF MIDDLE RIO GRANDE CONSERVANCY DISTRICT WATER: A LEGAL-INSTITUTIONAL ANALYSIS

Maria Lurie
Tim De Young
and
Gregory C. Ridgley
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
PO Box 2168
Albuquerque, NM 87103-2168

## TIM DE YOUNG

I'm glad that Senator Domenici placed the issue of water rights reallocation on the table yesterday. Our focus is on existing legal and institutional restraints upon the lease or sale of water rights that exist within MRGCD boundaries to non-agricultural uses outside of district boundaries. Our paper, therefore, is limited to water rights transfers from within the District to outside.

I think we're all familiar with the context. As Albuquerque continues to grow, more water is required for municipal and industrial purposes. Municipal and private industrial users depend entirely on groundwater for potable water. To "keep the river whole," the State Engineer often requires that the groundwater appropriator acquire, dedicate, and retire water rights. Alternatively, it is possible to transfer water rights from one location to another. Water rights available for dedication or transfer are becoming increasingly scarce. There is stiff competition among municipalities and private users for so-called pre-1907 water rights and prices have escalated, if you can find valid rights for sale. If a client came and asked us, "Can we buy or lease MRGCD water rights?" we would answer as follows.

Non-agricultural use in the MRGCD was minimal in the Middle Rio Grande Valley in 1954. By 1986-1987, agricultural use of water had significantly declined and continues to do so. The logical conclusion is that unless irrigation water rights have been sold or abandoned, there must be a surplus of such rights. If Tim Sheehan is correct and there's 298,000 acre-feet of consumptive use water rights available in the District, then there must be available water rights within the District no longer needed for irrigation.

Preliminarily, we know that in New Mexico water rights are private property rights. We recognize that there are federal reserved rights, Indian reserved rights, and Indian aboriginal water rights claims, but the McCarran Amendment requires adjudication in state courts and the end result of these claims, if successful, is a state-recognized water right. Federal agencies own water rights under state law. Most importantly, our clients need state recognized water rights for dedications or transfers. So, our perspective is to locate and acquire state-recognized water rights.

It is often said that the questions you ask are as important as the answers you get. We've been struggling and trying to come up with the right questions. We've come up with two simple questions that have very difficult answers. Our two questions are: (1) who owns the water rights within the MRGCD boundaries; and (2) what restraints exist on the reallocation of those rights? I'm going to quickly answer, or try to answer, who owns the water rights. I think Tim Sheehan's presentation provides the basic answer, so I just want to underline some of the things that he was forced to rush through. Greg Ridgley will talk about federal restraints, and then Maria Lurie will talk about state law restraints on the reallocation of water rights.

There's a limited number of possibilities in answer to the question, "who owns the water rights?" It could be the farmers and others who apply water to beneficial use. It could be the District itself. I'm talking about who owns title, because from a legal perspective that's incredibly important. I can't go buy water from somebody who doesn't own it. So, it could be the farmers, the District, the federal government, or the Pueblos. The answer appears to be "all of the above."

There are pre-District rights, Tim Sheehan's first two categories, pre-1907 and other surface rights that were perfected by individuals before the MRGCD was formed in 1927. The State statutes for conservancy districts in fact recognize and define these pre-District rights. To paraphrase, these are water rights in existence prior to the District even if the District works enhanced the delivery of water to serve those rights.

There is a legal argument that all water rights are owned by individual property owners within the District. In Snow v. Abalos, 18 N.M. 681 (1914), for example, it was held that in an *acequia* the individual farmers own the water rights and not the *acequia*. Arguably, the people who apply water to beneficial use own the water rights in the MRGCD. *See, e.g.*, Holguin v. Elephant Butte Irrigation District, 91 N.M. 398, 401-402, 575 P.2d 88 (1977) (in reclamation districts, irrigation water is appurtenant to the land which is being irrigated. The government is only a carrier or trustee for the landowners); Nebraska v. Wyoming, 325 U.S. 589, 614 (1945) ("the property right in the water right is separate and distinct from the property right in the reservoirs, ditches, or canals. The water rights is appurtenant to the land, the owner of which is the appropriator"). New Mexico courts similarly have held that irrigation water rights are appurtenant or attached to the land and that the public irrigation company or district only stores and delivers water to the users. Middle Rio Grande Water Users Association v. Middle Rio Grande Conservancy District, 57 N.M. 687, 258 P.2d 391 (1953). However, the MRGCD statutes would appear to allow the MRGCD to own water rights. In fact, surface rights are owned, at least nominally, by the MRGCD. MRGCD Permit 1690 covering about 42,000 acres is a case in point. Regardless, water rights owned by the MRGCD or its irrigators are subject to the repayment lien of the United States. Therefore, we concur with Tim's view that the United States is a lienholder.

Let me focus on the 1951 Repayment Contract. The Contract states: "The District has made certain water filings . . . and it shall cause any and all such filings made in the name of the District to be assigned to the United States for beneficial use in the project." Based on our research and interviews, that assignment apparently has not been made. Reclamation arguably could come in and say, "wait a minute, in 1951 you said you would assign the water rights to us," and the District could say, "Sorry, it's been 40 years, you're too late. You had that right but you lost it."

Unfortunately, the 1951 Contract and similar provisions create uncertainty and there will be significant delay if litigation results. We're cognizant of the fact that litigation is ongoing between the Bureau and several districts concerning the ownership of water rights. The closest litigation is by the Elephant Butte Irrigation District where ongoing litigation will address, either directly or indirectly, who owns the water rights as between the district and the federal government.

Third, the federal government at least nominally owns the San Juan-Chama water rights. The 1963 Reclamation/MRGCD Repayment Contract gives MRGCD a contract right to receive 20,900 acre-feet from the San Juan-Chama project but the United States holds title. Once the District repays the government, they are entitled to "a permanent right to water." This right could be construed as a water right, or it could be construed as a contractual right to water, similar to the rights of a water rights lessee.

The final category is Pueblo water rights. The Pueblos collectively own water rights within the District. However, the Pueblos' willingness or ability to sell these rights to users outside of district boundaries has not been determined.

That's a quick thumbnail answer to the question, "who owns the water rights within the MRGCD?" Now Greg Ridgley will look at some of the federal restraints on reallocation of those rights.

## GREG RIDGLEY

Thanks, Tim. I will try to address briefly some federal restraints upon the transfer or lease of water rights held within the Middle Rio Grande Conservancy District. Specifically, I will look at the 1951 Contract between the Bureau and the District, the federal authorizing legislation for the Middle Rio Grande Project, and if I have enough time, some

aspects of local Bureau policies. My discussion will focus primarily on the second category of water rights that Tim De Young just spoke about, the water rights held by the District that are perhaps subject to the lien of the United States.

Before I get to that, however, I would like to comment on what collectively can be called "pre-District" rights, the majority of which are the pre-1907 rights held within the District. These water rights, of course, are not subject directly to the terms of any contract between the Bureau and the District. We have observed, however, that Bureau policies regarding the allocation of water within the District operate in practice as an indirect restraint upon the transfer of those rights to users outside of the District. This indirect restraint works something like this: a farmer irrigating land within the District with a pre-1907 right desires to sell that water right to someone for use outside the District, but the farmer also desires to continue irrigating her land and would like to do so by applying District water to her land. In such a situation, the Bureau of Reclamation has exercised its right to control the allocation of water within District boundaries by declining to approve the delivery of District water to the farmer's tract unless an equivalently sized parcel of property somewhere else within District boundaries is or has been taken out of irrigation. The effect of this policy, whether intended or not, is to indirectly restrain the dedication or transfer of pre-District rights, which otherwise are the most freely transferable types of water rights.

I now would like to focus on the water rights presumably held by the District itself. In contrast to the "big picture" discussions you've heard so far, I will engage in a bit of microanalysis here. Specifically, we took a look at the 1951 Contract between the Bureau and the District. In that contract, the District agreed to repay the United States for the cost of the Middle Rio Grande Project, which rehabilitated the District's project works. We also looked at the federal authorizing legislation for the Middle Rio Grande Project. Those statutes are part of the general body of federal Reclamation law. Based on our review of those materials, our preliminary conclusion is that neither the 1951 Contract nor the project authorizing legislation contain express prohibitions on either the place of use or the purpose of use of District water rights. In fact, the District contract expressly allows the District to lease its water rights subject to the approval of the Bureau of Reclamation. So at a minimum, we conclude that the Bureau could allow leases of District rights outside the District if the District desired to do so. A slightly more complicated question would be if the District decided it wanted to sell some of its water rights, and I'll touch on that briefly in a moment.

What potential restraints does the 1951 Contract contain? As I said, the 1951 Contract expressly allows the District to lease District water to third parties but also requires the Bureau of Reclamation to approve such third party leases. (It makes no mention, however, of the sale or outright transfer of District water rights.) The 1951 Contract lists three criteria for evaluating a lease proposal. First, it provides that third party leases shall not have adverse effects on Indian irrigators within the District. Second, it requires that a proposed lease shall not be detrimental to the "primary uses" specified in the Contract, and third, it provides that all payments from third party leases must be paid to the U.S. as credit to the District's repayment obligation. As Tim Sheehan's presentation made clear, the third requirement is a controversial topic right now, but the dispute over repayment crediting is beyond the scope of this presentation.

The 1951 Contract contains no express prohibitions on the **purpose of use** of District water rights that could limit the transfer of those rights to users outside the District. The primary uses specified in the Contract are domestic, irrigation, and municipal uses. The Contract also mentions beneficial uses. As I mentioned earlier, the third party lease provision in the Contract allows the District to contract to supply its water for "any use not detrimental to the primary uses." So, it seems fairly clear that there's no restriction on type of use or purpose of use of water subject to the 1951 Contract.

As for provisions regarding **place of use** in the Contract, that same provision that discusses third party leasing also provides that the District water rights "shall be held primarily for use in the Project and for Indian lands in the Project area." That could be interpreted to mean that District water rights only can be used within the project boundaries. However, that word "primarily" suggests that some

District water rights could be used outside the Project area. Such a use might be considered a secondary use, but it's certainly allowed by that language. I think that the better interpretation is that the 1951 Contract contains no express prohibition on the place of use of District water outside of District boundaries.

We also reviewed the Middle Rio Grande Project federal authorizing legislation for restraints on purpose of use or place of use. We found no express prohibition in those two Acts of Congress on the type or purpose of use of District water. When I say those two Acts, I refer to the Flood Control Act of 1948, 62 Stat. 1179 (1948), the initial authorization of the Middle Rio Grande Project, and the Flood Control Act of 1950, 64 Stat. 176 (1950), which provided additional funds to complete the Project. These Acts of Congress provide that all water in the Middle Rio Grande Valley shall be used primarily for domestic, municipal and irrigation purposes. This broad language does not present any significant restriction on the purpose of use of the District's water.

We also found in those Acts of Congress no express limitation on the place of use of District water. In fact, I found no discussion at all on the place of use of District water in those two particular Acts.

To wrap up my discussion of the 1951 Contract and the project authorizing legislation, we found no express prohibitions regarding the lease or reallocation of the District's water rights for use outside District boundaries. So, at a minimum, the Bureau is not constrained by the Contract and those Acts to authorize leases of District water. Sale or transfer of the District's water rights is a much trickier question, however. An argument could be made that the Bureau, again, can allow the sale of some of the District's water rights as long as the criteria in the 1951 Contract are met—that is, no detriment to the primary uses of the Project water, no detriment to Indian irrigators within the District, and all payments are paid to the U.S. But there are arguments on the other side as well.

Let me briefly make a few comments about the policies of the Bureau of Reclamation as they may operate as a potential restraint on the transfer or lease of District water rights to users outside the District. We have been told that generally the Bureau will consider transfer or lease applications on a case-by-case basis, and the Bureau has plenty of legitimate concerns. First and foremost, they need to be worried about repayment of the District's obligations for the Middle Rio Grande Project. They also have a trust responsibility to the Indian irrigators within the District, and they have to be concerned about their responsibilities under environmental and other federal statutes.

In the dispute between the Bureau and the District over repayment crediting, the Bureau has cited in support for some of its positions a couple of federal Reclamation statutes. The Bureau has relied upon the Sale of Water for Miscellaneous Purposes Act of 1920, 43 U.S.C. § 521, and the 1939 Reclamation Project Act, 43 U.S.C. § 485h. The Bureau cites those statutes as authority for the Bureau's position that the Bureau must set the conditions for delivery, use, and payment for District water transferred to municipal and industrial uses. Aside from the crediting question, those statutes have some bearing on the criteria that the Bureau should use in evaluating applications or proposals to reallocate water outside of the District. Both of those statutes contain language that a water supply contract shall not be made "unless in the judgment of the Secretary it will not impair the efficiency of the project for irrigation purposes." 43 U.S.C. § 485h(c). Consequently, it seems to me that the primary criterion that should be guiding the Bureau in evaluating a transfer proposed by the District is whether the proposed transfer will affect the irrigation efficiency of the Project. Courts have interpreted this language in a restrictive manner, and have held that the Bureau's consideration is limited to impacts on the irrigation efficiency of the particular project, and that the Bureau is not authorized, by those statutes at least, to consider impacts downstream on water users outside of the project boundaries. See Environmental Defense Fund, Inc. v. Morton, 420 F. Supp. 1037, 1045 (D. Mont. 1976), aff'd in part and rev'd in part, 596 F.2d 848 (9th Cir. 1979).

With that, I'll turn the podium over to Maria Lurie, who will talk a little bit about the impact of

state conservancy district statutes on the potential reallocation of District water rights.

## MARIA LURIE

This portion of the presentation focuses on the constraints placed upon the transfer of water by state conservancy district statutes. While I recognize the fact that such transfers require the approval of the State Engineer Office, time constraints dictate that my remarks focus solely upon the constraints imposed by the language of state conservancy statutes.

With respect to pre-District water rights, the New Mexico conservancy statutes do not impose any particular constraints upon the transfer of such water. Basically, the same transfer process is involved in the New Mexico conservancy statutes' treatment of pre-District rights as would be the case with any other type of transfer. Traditionally, the Middle Rio Grande District has not been in favor of transferring pre-District rights located within the District to uses outside of District boundaries. In response, the State Engineer developed the dedication/retirement procedure. Lately, however, the MRGCD seems to have taken a more hands-off approach. The MRGCD currently does not receive notice about dedications but new rules have been proposed by the State Engineer which would provide public notice for future dedications.

The New Mexico conservancy statutes do not place any particular restraint upon federally owned water rights either. In fact, the New Mexico statutes defer directly to the federal law. Specifically, New Mexico Conservancy District Statute NMSA § 73-18-15, provides that all water, the right to the use of which is acquired by a District under reclamation contract, shall be distributed and apportioned by the District in accordance with (a) federal law, (b) federal regulation, and (c) within the confines of the federal contract itself.

My main focus today is the constraints placed upon District water rights by the New Mexico conservancy district statutes. We surveyed the conservancy statutes of New Mexico and the fellow western states of Utah, Colorado, and Wyoming, for the purpose of determining how liberal the transfer process is in each state. We examined whether the conservancy district statutes would prevent water from being used for municipal and industrial (M & I) purposes, as well as whether the state laws permit the sale of conservancy district water outside of District boundaries. It is important to examine whether the sale of water outside of District boundaries is permitted because such a provision would increase the supply of marketable water rights.

We found that all of the states surveyed permit water to be used for M & I purposes. There were limitations, however, concerning whether the M & I use could occur outside of District boundaries. We also found limitations with respect to whether the conservancy district could sell its water rights.

Of the states surveyed, New Mexico alone prohibits the sale of water rights by conservancy districts. Under our conservancy district statutes, a conservancy district cannot permanently alienate its water rights. New Mexico does, however, permit a conservancy district to lease or rent its water rights. Generally, these leases can be for a period of up to ten years.

Utah possesses what some might consider to be a model statute. In Utah, a conservancy district has the power to sell its water rights for any beneficial use either within or without district boundaries. Utah passed this provision in 1988. Colorado also provides for the sale of water rights by a conservancy district. Colorado, however, restricts the sale of conservancy district rights to uses that occur within District boundaries. Wyoming, like Colorado, also permits the sale of conservancy district water. The Wyoming statutes limit such sales to uses within the confines of the District.

In conclusion, if changes were to be made to the New Mexico conservancy statutes, Utah provides the model for providing the greatest amount of surface water to non-agricultural uses outside of District boundaries.

## TIM DE YOUNG

My only concluding remarks are that we have tried to make sense of a very complex panoply of laws and regulations, perhaps at the risk of over simplification. We don't have any recommendations, we have tried only to describe the situation as we see it. Tim Sheehan gave a very controversial and excellent presentation, I'd just like to open the floor up to your questions at this point.