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## Herrington v. State Eng'r, 133 P.3d 259 (N.M. 2006)

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## NEW MEXICO

**Herrington v. State Eng'r, 133 P.3d 259 (N.M. 2006)** (holding that senior appropriators who have their groundwater intercepted by junior appropriators are entitled to use a supplemental well under the Templeton doctrine if the well draws from the same groundwater source that feeds the baseflow; that a supplemental well does not have to be positioned upstream of a surface point of diversion to comply with Templeton; and that statutory transfers of water rights do not have to meet the Templeton requirements).

Ellis B. and Laverne Herrington (collectively "Herrington"), long time irrigators in the Rio de Arenas Valley, applied with the state engineer to change their point of surface diversion from its original point to a 100-foot-deep well. Herrington sought this alternative means of drawing water from the Rio de Arenas because junior appropriators were diminishing the surface water at their point of diversion by pumping water upstream. They relied on the Templeton doctrine, which allows a senior appropriator to use the full amount of their appropriation by tapping into groundwater sources using a well if junior appropriators are intercepting water previously discharged to the surface. The state engineer and the hearing examiner denied the Herrington application holding that the proposed well would draw from a different source of water and create a new appropriation that would impair other water rights owners.

Herrington appealed the denial to the Grant County, New Mexico, District Court. The district court examined several issues regarding the effects of the proposed well, and ultimately held that the well would violate the Templeton doctrine because it would allow access to a new water source. The district court also held that moving the point of diversion to a downstream location would conflict with the understood principles established by the Templeton doctrine.

The New Mexico Court of Appeals affirmed the district court, agreeing that both the topographic location and the depth of the proposed well would result in Herrington accessing a new source of water. The court also concluded that the Herringtons did not have a right to change their point of diversion based on the Templeton doctrine.

Herrington appealed to the New Mexico Supreme Court. The court looked at the facts in question to determine whether Herrington was requesting a new appropriation in the underground water basin or just requesting to follow the source of their appropriations. Specifically, the issue in dispute was whether the proposed well would tap one aquifer or two aquifers separated by an impermeable or semi permeable boundary. If the well taps just one aquifer, the Templeton doctrine may not prohibit it. If the well taps a second, deeper aquifer, the Templeton doctrine would prohibit it.

The court also reviewed the district court's determination that if the Herringtons did place the proposed well downstream of the original point of determination, then the Templeton doctrine could not apply because all downstream wells result in a new appropriation. After reviewing the facts, and noting that the Templeton well itself was a downstream well, the court determined that while a downstream location may be an indicator of whether the new well draws from a new source, it is not an absolute determination. Therefore, an upstream requirement cannot be a universal requirement and must instead be case specific.

In addition to reviewing Herrington's Templeton doctrine claim, the court reviewed the issue of statutory transfer. The court of appeals concluded that statutory transfers must meet the Templeton requirement, and thus Herrington did not qualify. Both Herrington and the state engineer sought reversal of this decision because the right to change the point of diversion is a right that was previously determined to be one of the incidents of ownership as long as the proposed transfer only allows the applicant to draw from the same hydrologic unit. Ensuring that a transfer occurs within the same hydrologic unit is different than applying the narrow Templeton same source requirement, as statutory transfers may apply for new uses for the water over significant distances. The court therefore rejected the Templeton doctrine in statutory transfers, as it would make transfer requirements too specific, curtail the state engineer's discretion, and threaten sound water policy.

After clarifying specific aspects of the Templeton doctrine, the court reversed the court of appeals decision and remanded to the district court for further proceedings.

*Carrie Stanley*

## OHIO

**Portage County Bd. of Comm'rs v. City of Akron, 846 N.E.2d 478 (Ohio 2006)** (holding Akron's use and sale of water from Cuyahoga River reasonable insofar as it maintains a release of between 8.1 and 9.5 million gallons per day ("MGD") to protect downstream riparian rights).

After a devastating fire in 1909, the City of Akron ("Akron") sought to develop a new source of water, ultimately deciding to construct a large water reservoir. In 1911, the legislature passed a statute conferring a right to divert the Cuyahoga River, and the Governor deeded a right of use to Akron. The deed purported to convey Akron all water rights to the Cuyahoga not used by the state for the maintenance of the Ohio Canal. Shortly thereafter, Akron began construction of the reservoir in Portage County, now known as Lake Rockwell, along the