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## Hanson v. Turney, 94 P.3d 1 (N.M. Ct. App. 2004)

Sean R. Biddle

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to the stipulations of the order, the DNR proportionally reduced NPPD's allocation of incidental underground water.

NPPD appealed the DNR's decision, arguing the cancellation of 0.65 cfs violated Nebraska's constitution and state law. However, the court concluded, because NPPD failed to appeal the order, the order became binding. Thus, NPPD's argument was a collateral attack on a final agency decision and the court accordingly had no authority to review whether the order violated the state constitution or state law.

NPPD also argued the DNR improperly applied the order's proportional reduction condition by interpreting the term "service" contrary to the court's interpretation in *In re Application U-2*. Specifically, NPPD claimed water from the canals that provided water for NPPD's direct irrigation service naturally seeped into, and mixed with, groundwater, thereby recharging Crawford's wells. NPPD thus argued that because the water that filled Crawford's wells originated from the same source that provided NPPD's direct irrigation water, Crawford's land remained part of NPPD's service.

The court, however, determined it did not need to interpret the term "service," but needed to interpret the order's use of the entire phrase "direct irrigation service." Because the DNR relied on a Nebraska statute when calculating the original grant of water rights, the court concluded the statute's definition of "direct irrigation service" was dispositive. The statute defined "direct irrigation service" as irrigation from the natural flow of streams, which referred only to surface water irrigation, not underground water storage. Thus, pursuant to the Nebraska statute, when Crawford ceased using direct irrigation service and began using well water, such nonuse reduced NPPD's service. Based on the language of the order and the statutory definition of "direct irrigation service," the court upheld the DNR's decision to cancel 0.65 cfs of the NPPD's groundwater rights as a result of the reduction in NPPD's direct irrigation service.

Kathryn Garner

## NEW MEXICO

**Hanson v. Turney, 94 P.3d 1 (N.M. Ct. App. 2004)** (holding the New Mexico statute distinguished between a vested water right and a permit to appropriate waters, a vested water right arose only after the application of waters to a beneficial use and only vested water rights could be transferred).

Mabel Hanson ("Hanson"), the holder of two permits for the appropriation of groundwater, appealed the New Mexico State Engineer's ("State Engineer") decision denying Hanson's application that requested a transfer of the type of the use designated in the permit from irrigation to subdivision use. Pursuant to state law, the holder of the water right can file an application with the State Engineer request-

ing a transfer of either the type or place of use for all water rights under the administrative control of the State Engineer's office. The State Engineer determined that a permit to appropriate water only constituted the first step toward securing the water right and a water right vested only after beneficial use occurred. Hanson never placed the allocated water to beneficial use; therefore, the State Engineer denied the transfer application due to the lack of any transferable water right. A State Engineer Hearing Officer agreed with the State Engineer and upheld the denial of the transfer application. On appeal for review of the agency decision, the district court granted summary judgment in favor of the State Engineer dismissing Hanson's action for relief. The New Mexico Court of Appeals affirmed the decision of the district court.

In upholding the denial of the transfer application, the appellate court looked at the relevant state statutes for a definition of a water right. The statutes and legislative history provided no explicit definition of a water right; however, over a century of common-law precedent held a water right vested only after the application of the water to beneficial use. Additionally, the court reasoned the legislature intended to differentiate between a water right and a permit to appropriate water by the statutory language that provided for the forfeiture of both water rights and permits to appropriate where the specified waters were not placed to a beneficial use in a reasonable time. Further, a prior decision of the New Mexico Supreme Court limited the ability of a water right holder to transfer that right only within the limits of the amount of water the water right holder historically used. The appellate court agreed with the State Engineer in that Hanson possessed no valid water right eligible for transfer.

Alternatively, Hanson claimed that prior inconsistent application of the above listed rule estopped the State Engineer from now denying the transfer application in question. Hanson presented evidence that the State Engineer's office in the past approved applications for the transfer of type or location of use for certain permittees while rejecting similar applications for a lack of previous beneficial use. The appellate court determined that the state policy strongly discouraged the application of equitable estoppel to State Engineer decisions concerning the allocation of the state's water resources. The court further limited estoppel claims as nonrecoverable where the correct application of state law directly contradicted the desired relief. Finally, Hanson never claimed a deliberate misrepresentation by the State Engineer or detrimental reliance on the part of Hanson as required for a valid estoppel claim. The appellate court stated the prior inconsistent treatment of transfer applications for permittees by the State Engineer could not alone establish the pattern of shocking behavior by a state agency needed to support an estoppel claim against the state government.

The appellate court determined that neither a stay in discovery granted by the district court nor the extensive delays by both the State Engineer and the district court in ruling on the transfer application, resulted in a due process violation, as Hanson claimed. Further, the court noted Hanson presented no authority to demonstrate the possibility of prevailing on the merits had the court found a due process violation.

In affirming the district court's ruling, the appellate court agreed with the lower court's decision that permits to appropriate water were only the first step in securing a water right and therefore not eligible for a transfer in place or type of intended use.

*Sean R. Biddle*

**Herrington v. Office of the State Eng'r, 92 P.3d 31 (N.M. Ct. App. 2004)** (holding application to change point of diversion for a surface water right from an aboveground water location to well did not satisfy two-pronged requirement pursuant to state law).

Ellis and Laverne Herrington ("Herringtons") owned a right to divert 49.73 acre feet of water per year from the Rio de Arenas. The Herringtons' historical point of diversion was the Frazier-Bateman Ditch ("Frazier"). In 1982, the Herringtons filed an application to change their point of diversion to a downstream 100-foot-deep well, arguing that upstream groundwater pumped by junior appropriators diminished the available surface water at Frazier. Following a denial from the Office of the State Engineer, the district court denied the Herringtons' application as well. The Herringtons appealed to the Court of Appeals of New Mexico.

New Mexico law allows an individual with surface water rights to change the water right's point of diversion to a well in times of shortage provided: (1) the groundwater is a source of the surface flow at the point of surface diversion, and (2) the change in point of diversion does not impair existing water rights. The first prong hinges on whether the water drawn from the proposed well would, if not drawn, reach the historical point of diversion. As a matter of logic, a downstream well, as proposed by the Herringtons, would not meet this requirement. A downstream groundwater well, by design, draws on seepage and percolation occurring after the original surface water diversion. Thus, the seepage and percolation was not a source of the surface water that the Herringtons had a right. Therefore, the court affirmed the denial of the well. Because the Herringtons did not satisfy the first prong of the test, the court did not consider the second prong.

Additionally, the Herringtons argued they had an independent right to change their point of diversion to a groundwater well even if they did not satisfy the aforementioned two-prong test. The Herringtons claimed the right to change the point of diversion was an incident