Denver Law Review

Volume 31 | Issue 2 Article 1

January 1954

New Mexico's Role in the Development of the Law of Underground Water

Charles D. Harris

NEW MEXICO'S ROLE IN THE DEVELOPMENT OF THE LAW OF UNDERGROUND WATER

CHARLES D. HARRIS, *of The Roswell, New Mexico Bar*

As I see it, the principle guiding the western lawmakers is how best to utilize our water resources and at the same time give a reasonable protection to those who have property rights based upon the use of water. In addition to the protection afforded the water user, the community and the state also have an interest in the most efficient use of water. Whereas the landowner may be concerned with the problem of getting sufficient water for this year's crop and for crops for the next few years, the community and the state should be vitally interested in what will happen to our irrigation economy 50 or 100 years hence.

The New Mexico ground water law, together with its administration, are of particular interest for all those concerned with the ground water problem in the West. As was pointed out in the report of the President's Water Resources Policy Commission,[1] "New Mexico, while not the first state to enact ground water legislation, has pioneered in this field in that its ground water administrative statute, after having been declared unconstitutional and subsequently re-enacted in correct form, was the first of the western state ground water statutes to be put into active operation and has set the pattern for much of the subsequent legislation in that field in the West." This is one field of law where the New Mexico lawyer cannot go to other jurisdictions to get court decisions to uphold his contention. With 21 years of experience under the 1931 ground water code, New Mexico has as many court decisions on ground water as any other state.

The first New Mexico statute, enacted in 1927, was declared invalid by the New Mexico Supreme Court in the celebrated case of *Yeo v. Tweedy*.[2] While the court held the statute invalid because it violated a constitutional prohibition against legislation by mere reference to pre-existing legislation, the Court went on to hold that the statute, while objectionable in form, was declaratory of existing law, was not subversive of vested rights of owners of lands overlying the waters of an artesian basin, the boundaries of which have been ascertained, and that the statute was fundamentally sound. In arriving at the decision in this case, the Court stated:

> We are here considering artesian basins, reservoirs or lakes, the boundaries of which may be reasonably ascertained by surface investigations or surface indications. Such boundaries of subterranean waters are the principal

[1] The Report of the President's Water Resources Policy Commission, *Water Resources Law*, 1950, Vol. 3, p. 746.

[2] 34 NM 611, 286 Pac. 970 (1930).

> resources of the localities where they occur. Their employment to the best economy advantage is important to the state. According to the correlative rights doctrine, each overlying owner would have the same right—the right to use whatever he saw fit. The right does not arise from an appropriation to beneficial use, which develops the resources of the state; it is not lost nor impaired by non-use. Regardless of the improvements and investments of the pioneers, later-comers or later-developers may claim their rights. The exercise of those rights which have been in abeyance will frequently destroy or impair existing improvements and may so reduce the rights of all that none are longer of practical value and that the whole district is reduced to a condition of non-productiveness. The preventive for such unfortunate and uneconomic results is found in the recognition of the superior rights of prior appropriators. Invested capital and improvements are thus protected. New appropriations may thus be made only from supply not already in beneficial use. Non-use involves forfeiture. A great natural public resource is thus both utilized and conserved.

At the 1931 session the present law was enacted.[3] The pertinent statutes are short and to the point and are contained in three pages of the Annotated Statutes. Section 77-1101, provides that bodies of ground water with reasonable ascertainable boundaries belong to the public and are subject to appropriation. The following section states: "Beneficial use is the basis, the measure and the limit to the right to the use of the water described in this action." The statute goes on to provide: "Existing water rights based upon application to beneficial use are hereby recognized." There was also a provision for forfeiture of rights after four years' non-use. The administrative provisions of the act provide that an applicant for a permit to appropriate must apply to the State Engineer and that the State Engineer should cause to be published a notice of such application in order that the public and prior appropriators will be advised. Protestants have an opportunity to file objections and in such event the State Engineer conducts a hearing. Whether any protests have been filed or not, the State Engineer shall grant the application unless he finds that there is no unappropriated water or that the appropriation will impair existing rights. Under the law as it has been administered all appropriations, changes of water rights, changes of method of use and changes in location or construction of the well are allowed only after application to and permit from the State Engineer. By this method the State has in one office all records affecting the method and use of underground waters.

Until 1949, the State was hampered in its administration of

[3] *New Mexico Laws*, 1931, 131 Stats. 1941 Ann. §§ 77-1101 to 77-111.

ground water law since there was no prohibition upon the well drillers as such. Before 1949, an unscrupulous landowner could drill or have drilled illegal wells and in the absence of a large police force, the State and the prior appropriators had no effective way to check on violators. The 1949 session of the Legislature passed a well drillers law which provided that well drillers drilling in the basins with ascertainable boundaries must have a license issued by the State Engineer and post a bond with that official in the sum of $5,000.00.[4] This law made it unlawful for an owner to permit drilling except by a licensed driller and by rules and regulations the State Engineer has prohibited the well driller from drilling unless the landowner has a permit issued by the State Engineer. This statute has proved to be of immeasurable value in curbing illegal drilling.

For almost 20 years after the passage of the ground water law of New Mexico, there was no serious court challenge to its constitutionality. But in 1949 the entire act was again challenged in the case of *State v. Dority.*[5] The defendants claimed that they acquired title to their land through patents from the United States Government, that said patents did not reserve the water and that, therefore, the defendants were owners of the land and the water underlying the land conveyed. However, the Court held that since the passage of the Desert Land Act of 1877, Federal patents of land did not carry with them any title to the water. The Court stated:

> The Desert Land Act provided that all waters upon the public lands except navigable waters were to remain free for the appropriation and use of the public. It was not intended to be taken literally that such water must be upon the surface of the earth to be of such use. The waters of underground rivers with defined banks have always been subject to appropriation. We conclude that all water that may be used for irrigation was reserved by the Desert Land Act to be used beneficially by the public as provided by the laws of the arid states. No interest in such waters was conveyed by United States patent. The United States Supreme Court has always looked to the laws and decisions of the state courts to determine the extent to which the authority of the state over such water has been exercised.

The Court also stated, "No right to the use of water from such sources was obtained by its use by defendants in violation of law nor can it be. The statutory method of securing such rights is exclusive."

This has been a short summary of the ground water law in New Mexico as set out in the cases and statutes. However, because

[4] *New Mexico Laws*, 1949, Ch. 178; Stats. 1949 Ann. §§ 77-1116 to 77-1121.
[5] 55 N.M. 12, 232 Pac. 2d 140.

of the fact that ground water law is of recent origin, there are many problems facing the water administrators for which there are little or no precedents in the cases or statutes. The first question that comes to mind in New Mexico is the status of underground waters which are not within basins as declared by the State Engineer. The State Engineer in New Mexico has declared certain areas as underground water basins. In many of these cases the boundaries as declared by the State Engineer have not been the same as the geological or hydrological boundaries of such basins. What is the property status of such waters that are within the hydrologic boundaries but are without the boundaries as declared by the State Engineer? In New Mexico we have assumed that such waters belong to the public and are subject to appropriation but since the State Engineer has not assumed jurisdiction, the statutory method of appropriation does not apply. This proposition is inferred in the two cases of *Pecos Valley Artesian Conservancy District v. Peters.*[6] In this instance the defendant, Peters, drilled a well within the hydrologic boundaries of the Roswell Artesian Basin but outside the boundaries of the basin as declared by the State Engineer. The defendant did not apply for a permit under the statutory provisions of Section 77-1103. After the well was drilled the Pecos Valley Artesian Conservancy District brought suit to enjoin the use of the well. At the first hearing before the New Mexico Supreme Court, the Court held that the Conservancy District was a proper party plaintiff and sent the case back to the District Court for a new trial. On appeal from the second trial the New Mexico Supreme Court held that the burden of proof was upon the Conservancy District to establish the amount of water which owners of wells, existing at the time the Peters well tapped the basin were legally entitled to use.

The Court went on to hold for the defendant on the grounds that the plaintiff had not made a *prima facie* case. Two years later the same court held in the Dority case [7] that rights to the use of waters from such sources were not obtained by its use by defendants in violation of law nor can it be. The statutory method of securing such rights is exclusive. Yet in the Peters case it was conceded that the waters in question were public waters within reasonably ascertainable boundaries and it was also conceded that the defendants had not followed the statutory method of securing such rights. In the Peters case the Court did not discuss whether the defendant could acquire rights to appropriate public waters without following the statutory procedure. The only distinction between the Peters case and the Dority case is that the lands involved in the latter case were within a basin as declared by the State Engineer. Even though there is nothing in the statutes which gives the State Engineer authority to declare underground basins, it must be inferred that until the State Engineer assumes juris-

[6] 50 NM 165, 173 Pac. 2d 490 (1945); 52 NM 148, 193 Pac. 2d 418 (1948).
[7] *Ob. cit.*

diction, the appropriator is not required to follow statutory procedure and may appropriate water by application to beneficial use.

Property status of other ground water within the State is also open to question from a strictly scientific point of view. I understand that any water found under the surface of the land must be in some sort of basin. If this concept were followed, then for all practical purposes all the waters in New Mexico would be owned by the public. In *Yeo v. Tweedy,*[8] the Court held that the statutes were merely declaratory of existing law insofar as waters in basins with reasonably ascertainable boundaries. If such waters have always belonged to the public, it would be just as reasonable to assume that all waters in the State belong to the public.

In the *Dority* case,[9] the Court said, "The Desert Land Act provided that all waters upon the public lands were to remain free for appropriation and use of the public. We conclude that all water that may be used for irrigation was reserved by the Desert Land Act to be used beneficially by the public as provided by the laws of the arid states." From this dicta it may be concluded the Desert Land Act included all waters of the State.

The contrary view was expressed in the early case of *Vanderwork v. Hughes.*[10] The water controversy in that case was called seepage water or spring water from unknown sources. The Court held that the waters were not subject to statutory appropriation and that the territorial engineer's jurisdiction was limited to the public unappropriated waters named in the statute and did not relate to waters held in private ownership. From this decision it can be inferred that it is still possible to have private ownership of water in New Mexico. In Hutchins' book on water rights in the West,[11] he states with reference to New Mexico, "There appears to be little basis for assuming that the rule of absolute ownership of such other percolating water has been changed." In the writer's opinion, all water within the State are public waters and are subject to appropriation.

Another related problem is the status of ground waters that constitute part of the base flow or are tributary to a surface stream. In Colorado, in the case of *Nevins v. Smith* [12] and *Comstock v. Ramsey* [13] the Supreme Court of that state established the doctrine that rights to the use of ground water tributary to a water course are correlated with the right to the use of waters flowing in the water course itself. The doctrine of prior appropriation governs these several rights. This means that the first appropriator,

---

[8] *Ob. cit.*
[9] *Ob. cit.*
[10] 15 NM 439, 110 Pac. 567 (1910).
[11] *Selected Problems in the Law of Water Rights in the West,* Miscellaneous Publication No. 418 of U.S. Dept. of Agriculture, p. 237.
[12] 86 Colo. 178, 279 Pac. 44 (1929).
[13] 55 Colo. 244, 133 Pac. 1107.

whether he diverts from the stream itself or whether he intercepts tributary ground water on its way to the stream, has the first right and subsequent appropriators, whether they intercept the ground water or divert from the surface stream, are junior in order of priority. In other words, in the logical application of this rule, the location of the point of diversion has no more bearing upon the priority of tributary ground water than it has in the case of priorities among appropriators who divert directly from the stream.

The State Engineer of New Mexico has evidently adopted this theory of correlation of surface and ground water insofar as the waters of the Carlsbad Underground Basin are concerned.[14] In that area he has closed the basin to further appropriation except to owners of water rights to the waters of the Pecos River who may obtain permits to supplement their surface rights with ground water. The rationale of this procedure is based upon the idea that these waters are part of the base flow of the Pecos River and that all of the water of the Pecos River has been appropriated.

The only New Mexico decision touching upon the inter-relationship between ground and surface water was in the case of the *El Paso and Rock Island Railroad Company v. District Court of the Fifth Judicial District.*[15] The railway company instituted suit in Lincoln County. In their complaint they set up their water rights, alleged their validity and prayed for a general adjudication of all water rights in the Benito stream system. The adjudication suit was instituted under the New Mexico Adjudication Statute [16] which provided that "in any suit for the determination of a right to use the water of any stream system, all those whose claim to the use of such water is of record and all other claimants as can be ascertained with reasonable diligence shall be made parties." This section also provides "the court in which any suit involving adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved."

During the pendency of the adjudication suit in Lincoln County, appropriators from the Roswell Artesian Basin sought to enjoin the railroad company's diversion of water on the grounds that the surface waters that the railroad company was appropriating were subversive of the superior rights of the artesian appropriators and that the surface waters of the Benito watershed contributed to the recharge of the Roswell Artesian Basin. The Supreme Court of New Mexico issued a Writ of Prohibition against

---

[14] *Manual of Rules and Regulations Governing the Drilling of Wells and the Appropriation and Use of Underground Waters in Declared Basins of the State of New Mexico* (1951), Sec. IX, § F, p. 29.

[15] 36 NM 94, 8 Pac. 2d 1064.

[16] *Laws of 1919*, Ch. 131 § 3 amending *Laws of 1917*, Ch. 31 § 1.

the Chaves County District Court on the grounds that the Lincoln County District Court had exclusive jurisdiction over the adjudication of the stream system of Benito River and that the Roswell Artesian Basin appropriators were proper parties to that adjudication suit since they claimed some right in the water involved. Since the Lincoln County court had exclusive jurisdiction and the artesian appropriators were proper parties, the Chaves County court was without jurisdiction to grant injunctive relief.

Along the valley fill of the Rio Grande there is a considerable amount of underground water that may be obtained. In 1948, about 15,000 acre feet of water was pumped for municipal and industrial use. Records show that there has been little lowering of water levels and that pumping has not reduced significantly the flood plain evapo-transpiration losses. Unless the pumped water is salvaged from that waste, it is inevitable that the flow of the river must be depleted.[17] The conclusions of a study conducted by the United States Geological Survey in the Elephant Butte district are: "The ground water and surface water supplies are interdependent and ground water pumped in the Rincon and Mesilla valleys does not represent an additional supply or new source of water but rather a change in method, time and place of diversion of the supplies already utilized." [18] As is pointed out, all of the pumping of the lower Rio Grande comes from ground water that is a part of the base flow of the Rio Grande. No ground water basin along the Rio Grande has been declared by the State Engineer. Most of the wells that have been drilled into the valley fill have been used to supplement Rio Grande surface water. A question that may be the basis for future court battles is the status of the water rights of the appropriators of this water from the valley fill who do not have basic surface rights. If it is assumed that this water is a part of the base flow of the river and if we further assume that all of the surface water in the Rio Grande has been appropriated, then it would appear that these junior appropriators who do not have surface water rights are subject to injunction suits. This again illustrates the fact that the law makers and the courts have not realized the inter-relationship between surface and ground water. The law has considered each of these types of water as being separate compartments whereas the hydrologists know that each is only part of the hydrologic cycle. The critical condition of our water supplies in the West may well cause the time lag between science and law to be fatal.

A recent court case in Chaves County raised the question of the relationship between surface and ground water. In the case of *State v. Lillard Owen*,[19] the State sought to enjoin the use of

[17] Thomas, *The Conservation of Ground Water*. p. 153.

[18] Conover, C. S., *Ground-water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico*. U. S. Geol. Survey, Typed Sept., October 1950.

[19] Chaves County Cause No. 17109.

ground water without permit from the State Engineer. The defendant claimed that he had a surface right from the Hondo River and that junior appropriators of artesian water had caused his surface supply to be diminished or dried up entirely. He further contended that it was necessary for him to drill a well to protect his rights. The District Court granted a temporary injunction on the grounds that even though the defendant might change his point of diversion from a surface to an underground source, he would still have to have a permit from the State Engineer to affect the change and, at the time of the hearing, the defendant did not have such a permit. It is the State's position that the facts of that particular case will not bear out the defendant's contention that the artesian appropriators have impaired his surface rights. However, there are some streams whose flows have been affected by ground water diversions. If prior appropriators along such streams can prove that their rights have been impaired by junior artesian diversions, then this could be the basis for some interesting water law controversies and certainly would be the making of new water law.

The biggest problem in the administration of ground water law in New Mexico, at the present time, is that of applying the doctrine of prior appropriation to ground water basins under storage conditions. For example, in the Lea County Basin, the hydrologists tell us that if the underground reservoir there were emptied, it would take some 30 centuries to refill at present estimated rates of natural recharge.[20] The best estimate of the amount of annual recharge to that basin is in the neighborhood of ¼" per year. The hydrologists also point out that under natural conditions the amount of recharge and discharge were the same. The program of irrigation in the High Plains area of New Mexico and Texas has had negligible effect on the amount of discharge so that for all practicable purposes the recharge and discharge in that area have remained constant. Such areas are called storage reservoirs and some hydrologists have pointed out that the appropriation of water from such basins amounts to the same thing as mining water.

New Mexico law provides that the State Engineer shall, if he finds that there is unappropriated water or that further appropriation will not impair existing rights, grant new permits.[21] The question that I ask you to consider is how do we determine there is unappropriated water under such conditions? Our ground water laws have been based upon surface water concepts. On a surface stream it would be easy to say that all the water is appropriated when there is no water left to flow down the stream or, in other words, we might say that a stream is fully appropriated when the appropriation equals the amount of annual recharge, but in a storage basin like Lea County, we could not utilize any of the

[20] Theis, C. V., *Progress Report on the Ground Water Supply of Lea County, New Mexico*, New Mexico St. Engineer 11th Bien. Rept. (1935), p. 151.

[21] Laws of 1931, Ch. 131; Stats. 1941 Ann. § 77-1103 as amended 1943.

water if we say that the basin is fully appropriated when the appropriation equals the amount of recharge.

In two recent cases in Lea County, now pending before the District Court of Lea County, *Cooper v. John H. Bliss, State Engineer,*[22] and *Lawrence v. John H. Bliss, State Engineer,*[23] this problem was squarely before the District Court. In both cases the plaintiffs filed applications with the State Engineer to appropriate ground water of the Lea County Underground Basin. The State Engineer denied their applications on the grounds that there was no unappropriated water and that additional appropriations would impair existing rights. At the time of the trials the State Engineer testified to the effect that he considered that a basin such as Lea County was fully appropriated when there was enough water remaining in storage to allow the prior appropriators a reasonable amount of water for a reasonable length of time. He explained to the Court that there is no way that the water of a storage basin can be utilized so that the appropriators will have a right to the use of that water in perpetuity.

This problem is indeed a perplexing one. As a lawyer, I can't say that I know the answer. It is one wherein the law makers and the courts need the fullest cooperation from those who are specialists in the science of ground water. Many of us who have studied the problem feel that an irrigation economy should last for at least 40 years. Forty years is usually considered as the longest time for all farm loans. REA loans are amortized over this period and this period of time has been commonly used for payment under reclamation projects. It would appear that a lesser period of time would not enable a farmer to make a substantial investment and get a fair return on same. Also, the community and the State should be considered with their investment in roads, banks, schools, trading centers, gins, etc. I am wondering, and I throw out for consideration, whether or not these economic factors should be considered when the hydrologists talk about optimum development. In any calculations involving the question of what should be done with our tremendous ground water resources, we should consider the aquifer characteristics so that we can utilize the maximum amount of water over the maximum period of time. In the High Plains area there is no problem of salt encroachment and it appears to be a case where we can take the water out within a relatively short time or extend the life of the basin over a greater period of years. The hydrologists point out that under an ideal program we would have spacings of wells and spacings of irrigated lands. Under actual conditions this is hard to achieve because of the variation in soil conditions and the variations in the landowner's desire to go in for irrigation projects.

An additional question raised by the Lea County cases in-

[22] Lea County Cause No. 9565.
[23] Lea County Cause No. 9979.

volves the scope of review of the decisions of the State Engineer. Section 77-601, related to appeal from the decision of the State Enginer, states: " * * * The proceeding upon appeal shall be *de novo* except evidence taken in hearing before the State Engineer may be considered as original evidence subject to legal objection, the same as if said evidence was originally offered in such District Court * * * ". As far as this writer can determine, there has been no case in this jurisdiction or in any other jurisdiction involving the judicial scope of the review of a decision of any state engineer. Can Section 77-601 be reconciled with Section 1 Article 3 of the Constitution of New Mexico which provides, "the powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercises of the powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this Constitution or otherwise expressly directed or permitted."

Although the New Mexico Supreme Court has not ruled upon the scope of review of the decisions of the State Engineer, it has ruled many times on this question with regard to other administrative agencies. From a review of the cases on this point it would appear that the New Mexico Court is committed to the doctrine that the courts may not overrule the acts of administrative officers on matters committed to their discretion unless their actions are unlawful, unreasonable, arbitrary, capricious or not supported by evidence.[24]

EMPLOYMENT OPPORTUNITIES

The Federal Bureau of Investigation is again employing Special Agents, who are law graduates, at a starting salary of $5,500 per annum. These are investigative positions with career opportunities and excellent retirement benefits at age fifty. Applicants must be American citizens between the ages of twenty-five and forty inclusive, with no physical defects and available for assignment anywhere in the United States or its territorial possessions. Additional information may be obtained from the Denver office of the FBI, Room 254, New Custom House, telephone AComa 5981.

A vacancy has been created by the resignation of Terry J. O'Neill, secretary of the Denver and Colorado Bar Associations and Editor of Dicta. Lawyers with energy and administrative ability are invited to apply at the bar association office if interested in filling this position.

[24] Seward v. D.&R.G., 17 N. M. 557; Seaberg v. Raton Public Service Company, 36 N. M. 59; Harris v. State Corporation Commission, 46 N. M. 352; Transportation Company, Inc. vs. State Corporation Commission, 51 N. M. 59; Yarbrough v. Montoya, 214 Pac. 2d 769.