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Herrington v. State: Straightening Out the Tangled Doctrines of Surface Water to Groundwater Transfers in New Mexico

ABSTRACT

Water in New Mexico is a public resource, but the right to use water is a private property right. As with most private property rights, inherent in the right to use water is the right to transfer that use, either to a new point of diversion, place of use, or purpose of use. Because New Mexico manages surface water and groundwater resources conjunctively, the point of diversion of a surface water right may be transferred to a groundwater well. There are two doctrines under which surface water rights may be transferred to a groundwater point of diversion in New Mexico: the Clodfelter doctrine and the Templeton doctrine. Until 2006, it was unclear exactly what elements distinguished Clodfelter from Templeton transfers or which type of transfer applied in any given case. This article discusses Herrington v. State, the case that clarified the Templeton doctrine, and its relationship to the Clodfelter doctrine.

I. INTRODUCTION

The State of New Mexico uses the doctrine of prior appropriation to allocate rights to use water. Further, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." Thus, in "New Mexico...prior appropriation...has [two] essential principles: (1) the first user ([senior] appropriator) in time has the right to take as much water as he can beneficially use; and (2) that right [may be enforced] against..."
subsequent users as long as the appropriator puts the water to beneficial use.”

Water in New Mexico is a public resource. However, rights to use water are real property rights, making them inherently transferable. Three elements of a water right may be transferred: the purpose of use, the place of use, and the point of diversion. In New Mexico, in order to change the point of diversion of a surface water right to a groundwater right, there are two recognized methods of transference: Clodfelter transfers (also known as statutory transfers) and Templeton transfers. The transfer of water rights in New Mexico is administered by the State Engineer.

New Mexico manages surface water and groundwater conjunctively, treating them as a single, hydrologically-connected resource. As a result, the same rules govern both surface water and groundwater rights. Surface water is water above the surface of the earth. Groundwater is “water moving or residing beneath the earth’s surface.” There are special concerns regarding transfers from surface water to groundwater because of the complex interactions between surface water and groundwater. “It generally takes years for the first effects of groundwater pumping to reach a river, and the impacts slowly accumulate after the first minimal effects occur. However, the instant pumping commences, the groundwater system is affected and an impact to the surface flows of the river, albeit delayed, is certain.” The bottom line is that “[p]umping ground water from a geological formation that is hydrologically connected to a river will eventually deplete the river.”

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3. Ulton, supra note 1 at 2 (citing N.M. CONST. art. XVI, § 2; N.M. STAT. § 72-12-1 (1978)).
4. N.M. STAT. § 72-1-1 (1978). (“All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use.”); See Sporhase v. Nebraska, 458 U.S. 941, 950 (N.M. 1982) (No individual owns the water.).
7. Id. at 65, 358 P.2d at 628.
8. See Yeo v. Tweedy, 34 N.M. 611, 628, 286 P. 970, 977 (1929) (held that prior appropriation applied to both surface water and groundwater).
11. Id. ¶ 2 n.2, 139 N.M. at 370, 133 P.3d at 260.
12. Celina A. Jones, The Administration of the Middle Rio Grande Basin: 1956-2002, 42 Nat. Resources J. 939, 944 (2002); City of Albuquerque v. Reynolds, 71 N.M. 428, 439, 379 P.2d 73, 81 (1962) (“the effects of ground-water withdrawals on a nearby stream arise gradually and...if the well is some distance from the stream many years elapse before the effects of the withdrawal are fully reflected in the stream-flows. The relationships show, however, that ultimately the annual stream-flow is reduced by an amount equal to the annual ground-water appropriation.”) (citing N.M. STAT. § 75-11-3 (1953)).
water appropriation is made, and continued for a period of time, the effects on surface water flows are not terminated at the time that the ground-water appropriation is terminated but continue, gradually diminishing, for many years after the ground-water appropriation is ended." Thus, groundwater pumping always impacts connected surface water, but because there is a delay between the time groundwater pumping begins and the time it begins to affect the connected surface water resource, determining the amount of detriment is difficult.

II. DEVELOPMENT OF THE CLODFELTER AND TEMPLETON DOCTRINES

A. The Clodfelter Doctrine

A transfer from surface water to groundwater that complies with standard statutory procedures is known as a Clodfelter transfer.

[NMSA] Sections 72-5-23 and 72-12-7(A) govern surface water and groundwater transfers, respectively, and allow water rights to be transferred from one location to another, without losing priority, if such transfer (1) can be made without detriment or impairment to existing water rights, (2) is not contrary to conservation of water within the state, and (3) is not detrimental to the public welfare of the state. These statutes recognize, rather than grant the right to transfer water, and "merely lay down a procedure whereby it may be determined whether such changes can be effected without injuriously affecting the rights of other users." Significantly, a Clodfelter transfer may not occur where there is detriment to any existing water right, regardless of priority.

Clodfelter v. Reynolds is the foundational case holding that the owner of a water right could change the point of diversion where there was no detriment to other water rights. There, the applicant for a change of diversion, the Public Service Company, had surface water rights and was under franchise to the city of Santa Fe to furnish an adequate supply of water. The Public Service Company applied to change the point of diversion from a surface water reservoir to a groundwater well because the

14. Reynolds, 71 N.M. at 440, 379 P.2d at 81 (citing N.M. STAT. § 75-11-3 (1953)).
19. Id. at 64, 358 P.2d at 628.
surface right was insufficient in times of drought. The diversion would not impair the rights of other water users. In approving the transfer, the Clodfelter court clarified that generally, one may change a point of diversion so long as that change will not impair other water rights, and that inherent in a surface water right is the right to transfer, not just from surface water to surface water, but from surface water to groundwater.

B. The Templeton Doctrine

In contrast to the Clodfelter doctrine, the Templeton doctrine evolved as a departure from the standard statutory requirements. The Templeton doctrine was first developed in 1958. In Templeton v. Pecos Valley Artesian Conservancy District, the plaintiffs had water rights to irrigate from the Rio Felix, a stream that heads in the foothills of the Sacramento Mountains and is not continuous except in flood times. “The headwaters of the Rio Felix sink and become part of the Valley Fill [, a relatively shallow underground body of water,] except for times when the stream is in a flood stage.” As a result, whenever the river was flowing, the “Valley Fill [groundwater] was a source of the flow of the river.” The water in the Rio Felix had decreased in recent years to a point where it was insufficient to irrigate the applicant’s land. This decrease was due primarily to the pumping of the water by irrigation wells that had recently been drilled into the shallow Valley Fill water basin. The water shortage was “aggravated by several years of drouth.” The plaintiffs applied to the State Engineer to change the point of diversion of their water right from the surface water of the Rio Felix to groundwater wells in the Valley Fill.

The Templeton court approved the application, finding that the change in diversion did not constitute a new appropriation. The court reasoned that “[a]n appropriation when made follows water to its original source, whether through surface or subterranean streams or through

20. Id. at 62, 358 P.2d at 627.
21. Id. at 66, 358 P.2d at 629.
23. Id.
24. Id. at 62, 332 P.2d at 467.
25. Id. at 61–62, 332 P.2d at 471.
26. Id. at 61, 332 P.2d at 466.
28. Id.
29. Id. at 61, 332 P.2d at 466.
30. Id. at 69, 332 P.2d at 471.
percolations."31 That is, the surface water appropriations made by the plaintiffs in the Rio Felix amounted to appropriations out of the groundwater Valley Fill.32 The Templeton court determined that the plaintiffs were not seeking a new appropriation because the water from the Valley Fill flowed into the Rio Felix, and since the plaintiffs were seeking to lift the water directly out of the Valley Fill, they were "merely...request[ing] to follow the source of their original appropriation."33 Thus, it did not matter that the Valley Fill was closed to further appropriation, because this was not a new appropriation.34

What was most significant about this decision was that, unlike in Clodfelter, the priority of the applicant's rights was an essential part of the basis for permitting the transfer. Because the Valley Fill groundwater was fully appropriated, it was an absolute certainty that the applicant's supplemental well would impact the existing wells in that groundwater basin. Before the transfer, the applicant was not receiving his full water right from the surface, but once he drilled a well in the Valley Fill, he would be able to increase his withdrawals from this connected system, up to the limit of his water right. This increase in withdrawals would inevitably affect the other users of the system. However, the Templeton court affirmed the lower court's determination that "the restoration to the appellees of the quantity of water originally appropriated...cannot and does not impair any other water right."35 The inevitable impact of the new well and the court's finding that there could be no impairment seems to be contradictory. However, the court appears to have based its conclusion that the transfer would not impair existing water rights primarily on the grounds that the right being transferred was senior to the rights that would be impacted by the transfer. Since the senior right had priority to take its full allotment, any means that allowed it to do so could not by definition impair junior users. This is a significant departure from the Clodfelter rule that a water right transfer may not impair any other right, senior or junior.

31. Id. at 67, 332 P.2d at 470 (quoting 93 C.J.S. Waters § 170, p. 909).
33. Id. at 68, 332 P.2d at 471.
34. Id. at 68-69, 332 P.2d at 470-71. A groundwater basin is "closed" when the State Engineer determines that it is fully appropriated and no further withdrawals can be permitted without impairing existing water rights. See id. at 63, 332 P.2d at 467.
35. Id. at 63, 332 P.2d at 467.
III. MUDDYING THE WATERS: CONFUSION IN THE WAKE OF TEMPLETON

Following Templeton, a series of cases examined when a Templeton transfer would be granted. City of Albuquerque v. Reynolds, while primarily a statutory construction case, explained that under Templeton, "a prior appropriator of stream water had the right to follow the stream water to its underground source and the right to drill wells and take the underground water necessary to fill his prior stream right, regardless of detriment to other underground water appropriators whose rights were subsequent in time to the stream right." This language clearly articulated what had been implicit in Templeton: that when a senior surface water right was impacted by the pumping of junior groundwater users, that senior surface right could be transferred to a supplemental well even if doing so would impair the junior groundwater users—something that would not be permitted under Clodfelter.

Both Durand v. Reynolds and Kelley v. Carlsbad Irrigation District discussed the required connection between the surface water right and baseflow. Durand held that applicants could not obtain a Templeton transfer unless the surface water right was fed by baseflow. There, applicants attempted to change their point of diversion from surface water to shallow groundwater. However, there was evidence that the water that would be "taken by the proposed wells never contributed" to the surface water. Thus, any transfer would result in a new appropriation of water, rather than following it to its source as in Templeton.

Kelley provided another situation in which an applicant could not change his point of diversion from surface water to groundwater. The applicant had a water right in the Hondo River and sought to change his point of diversion from the Hondo River to an underground reservoir. However, that groundwater did not feed the Hondo River; instead, the

36. Reynolds, 71 N.M. 428, 379 P.2d 73.
37. Id. at 438, 379 P.2d at 80.
38. Baseflow is "the sustained low flow of a stream, usually groundwater inflow to the stream channel." Herrington, 2006-NMSC-014, ¶ 2 n.2, 139 N.M. at 370, 133 P.3d at 270. Langenegger also defines baseflow as the "waters which have passed through an aquifer before entering the river and its tributaries." Langenegger v. Carlsbad Irr. Dist., 82 N.M. 416, 417, 483 P.2d 297, 298 (1971).
40. Id. at 498, 406 P.2d at 817.
41. Id. at 500, 406 P.2d at 819.
42. Id.
43. See Herrington, 2006-NMSC-014, ¶ 21, 139 N.M. at 374, 133 P.3d at 264.
45. Id. at 472, 415 P.2d at 853.
applicant's surface water fed into the underground basin. The court stated that "one having a water right in a surface flow, which has thus been lost to the underground reservoir, can neither transfer his surface right nor change his point of diversion to the underground reservoir." This is because "[w]hen an artificial or natural flow of surface water, through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public." Thus, a water right in surface flow, which is lost to an underground reservoir, cannot be transferred to the underground reservoir.

In *Langenegger v. Carlsbad Irrigation District*, the court held that the owners of surface water rights could have a *Templeton* transfer and drill a supplemental well. There the court focused on the source requirement of *Templeton*. In *Langenegger*, the plaintiffs owned water rights in the Pecos River. The water of the Pecos River, at the points of the plaintiffs' diversions, consisted of both base flow and flood flows. There had been a substantial reduction of the base flow into the Pecos River because of withdrawals from the basin by junior groundwater users, occurring largely during the irrigation season, and this reduction in base flow resulted in shortages of water for irrigation of the plaintiffs' land. Because the record showed that the surface water right was fed by the groundwater base flow, unlike in *Durand* and *Kelley*, here the supplemental well would constitute following the surface water right to its source as permitted by *Templeton*.

However, although the *Langenegger* court based its decision on *Templeton*, it did not provide a clear analysis of the role priorities played in its decision to allow the supplemental well. On the one hand, all parties to the suit claimed priority was immaterial to the question of impairment, just as it would be in a *Clodfelter* transfer, where no impairment of existing rights is permitted regardless of their priority. This position would seem to be supported by the statement of the *Langenegger* court that the plaintiffs were entitled, "subject to the rights of other appropriators, to rely and depend upon

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46. *Id.* at 473, 415 P.2d at 853.
47. *Id.* at 472, 415 P.2d at 853.
48. *Id.* (citing N.M. STAT. § 75-11-1 (1953)).
50. *See Langenegger*, 82 N.M. at 422, 483 P.2d at 303.
51. *Id.* at 417, 483 P.2d at 298.
52. *Id.* While base flow is surface water that has come from a groundwater source, flood flow is water that falls as precipitation and then flows into the surface water body. *Herrington*, 2006-NMSC-014, ¶ 18 n.2, 139 N.M. at 373, 133 P.3d at 263 (Flood flow is the "portion of precipitation that flows over the land surface."); *Langenegger*, 82 N.M. at 418, 483 P.2d at 299 (Flood flow is "waters resulting from falls of precipitation within the river drainage and which flow over the surface area thereof until their entry into the river.").
53. *Langenegger*, 82 N.M. at 419, 483 P.2d at 300.
54. *See id.*
all the sources which feed the main stream above their points of diversion, all the way back to the farthest limits of the water shed.”

On the other hand, the Langenegger court, like Templeton, acknowledged that granting the application would inevitably effect some changes in the waters of the underground aquifer and the Pecos river, but the court argued that those changes alone would not impair the other rights in the basin since the transfer was necessitated by the reduction in base flow created by those existing junior rights. This reasoning seems to imply that it mattered that the surface water right was senior to those of the groundwater users who would be affected by the transfer. The Langenegger court concluded by stating that if the diversions were to become so great that priorities would have to be asserted in order to protect the rights of senior appropriators, then those senior appropriators could bring such a claim, which again indicates that the court knew the transfer would impact existing water rights.

In the years after Langenegger, Brantley v. Carlsbad Irrigation District and State v. City of Roswell added further confusion to the Templeton doctrine by focusing on whether the proposed supplemental wells were upstream or downstream of the surface water diversion. In Brantley, the court emphasized the narrowness of the Templeton doctrine and reiterated the conclusions of Durand and Kelley that an applicant could not drill a Templeton supplemental well where the surface flow was a source of the groundflow. There, the applicant owned surface water rights, and lost a portion of this water due to seepage from a leaky ditch. The applicant sought to "recapture the loss by drilling a well in a declared underground basin into which the seepage has gone," about 25 miles downstream from his surface water diversion, and the court held that Templeton could not apply in such a situation.

Similarly, the Roswell court held that the "factual showing must demonstrate that the water sought or captured by the supplemental well is water that would otherwise reach the main channel of the surface source and that such water is a source of flow at the point of diversion." There, the case concerned the general adjudication of water rights of the Rio Hondo

55. Id. (emphasis added).
56. See id.
57. Id. at 422, 483 P.2d at 303.
59. Id. at 281, 587 P.2d at 428.
60. Id.
61. State v. Roswell, 114 N.M. 581, 589, 844 P.2d 831, 839 (1992) (The Roswell court also held that "[a] supplemental well priority date may properly 'relate back' to the priority date of the antecedent surface right to which it is supplemental only upon a showing of the Templeton factual predicates.") (emphasis added).
system. The Roswell court rejected the argument that an appropriator of surface water may "'rely' and 'depend' on 'all the sources which feed the main stream above his own diversion point, clear back to the farthest limits of the watershed.'" Instead, a supplemental well must capture groundwater that would otherwise be flowing into the surface water source, or it would otherwise be appropriating water that belonged to another.

As a result, the Roswell court concluded that, under Brantley, the supplemental well must be "located above the point of surface diversion on the stream system." Thus, both Brantley and State v. City of Roswell found that the Templeton doctrine did not apply where the proposed well was below the point of diversion of the surface right. The Brantley court stated that under the Templeton doctrine, "appropriators of surface waters, whose volumes have diminished, have been allowed to supplement their appropriations by drilling wells upstream into underground waters which are a source of the surface waters in which they have rights." The Roswell court similarly reasoned that because the elevation of the stream bed was greater than the elevation of the local water table, groundwater could not contribute directly or indirectly to the river at or above the point of diversion.

The cases following Templeton provided little guidance for practitioners attempting to determine whether the doctrine would apply in future cases. Templeton had set forth the idea that a change in point of diversion from surface water to groundwater where the groundwater baseflow was the source of the surface water was permissible because it was not a new appropriation. Thus, it did not matter if the groundwater basin had been closed, because there was no new appropriation from that source. Under the cases that followed Templeton, it appeared that there were three necessary elements for the Templeton doctrine to apply: (1) an applicant must have a surface water right, (2) the proposed Templeton well must be located in groundwater that was a source of water for the surface water right, and (3) the proposed Templeton well must be above the point of diversion of the surface water.

However, the case law following Templeton left it unclear whether Templeton transfers were permitted to impact junior appropriators, and whether they were limited to senior surface water rights that had been

62. Id. at 583, 844 P.2d at 833.
63. Id. at 585, 844 P.2d at 835.
64. Id. at 586, 844 P.2d at 836.
65. Id. at 587, 844 P.2d at 837 (citing Brantley, 92 N.M. at 282, 587 P.2d at 429).
66. See Brantley, 92 N.M. at 282, 587 P.2d at 429; See also Roswell, 114 N.M. at 588-89, 844 P.2d at 839–40.
68. Id.
affected by junior groundwater users. Under City of Albuquerque v. Reynolds, it appeared that detriment to other underground water appropriators was acceptable so long as those rights were subsequent in time to the appropriator’s surface water right. However, Langenegger included the contradictory language to the effect that the right to follow the sources of water is subject to the rights of other appropriators, while also stating that if the transfer caused an impact to senior appropriators, then the senior appropriators could bring a claim. By only mentioning senior appropriators, Langenegger implied that an impact to junior appropriators was acceptable, but the court never said so directly.

IV. CLARIFYING THE CASELAW: HERRINGTON V. STATE

In Herrington, the New Mexico Supreme Court set out to clarify the Templeton doctrine and distinguish it from the Clodfelter transfer. The court ultimately found that that:

The Core requirements for a successful Templeton supplemental well include: (1) a valid surface water right; (2) surface water fed in part by groundwater (baseflow); (3) junior appropriators intercepting that groundwater by pumping; and (4) a proposed well that taps the same groundwater that was the source of the applicant’s original appropriation.69

The court rejected the requirement that the supplemental well be upstream of the surface water diversion, as stated in Brantley and Roswell.70 The Herrington court also emphasized that the Templeton requirements are to be construed narrowly.71 However, the court never directly addressed the difficult question of whether a Templeton supplemental well is permitted to immediately impair junior groundwater rights, although it provided some direction as to how the court might address that issue in the future.

The Herringtons are irrigators in the Rio de Arenas Valley. The Rio de Arenas is a tributary of the Mimbres River in southwestern New Mexico, originating in the mountains northeast of Silver City.72 The Herringtons had a pre-1907 right to “divert a total of 49.73 acre-feet of water per year from the Rio de Arenas, or 2.7 acre-feet per year per acre on their 18.42 acres of land.”73

69. Herrington, 2006-NMSC-014, ¶ 23, 139 N.M. at 374, 133 P.3d at 264.
70. Id.
71. Id. ¶ 17, 139 N.M. at 373, 133 P.3d at 263.
72. Id. ¶ 3, 139 N.M. at 370, 133 P.3d at 260.
73. Id. ¶ 4, 139 N.M. at 370, 133 P.3d at 260.
In 1982, the Herringtons filed an application to change the point of surface diversion from their original point at the Frazier-Bateman Ditch to a supplemental well.\textsuperscript{74} The Herringtons claimed that their surface right had been diminished by groundwater pumping by upstream junior appropriators.\textsuperscript{75} "The proposed well was to be located roughly a quarter-mile downstream of the original diversion point, and would reach a depth of 100 feet. At this depth, the well would tap fractured sandstone and shale, or the fractured bedrock aquifer, which underlies the alluvium."\textsuperscript{76} In 1983, the State Engineer denied the Herringtons' application.\textsuperscript{77} The Herringtons appealed, and in 2001, the State Engineer's hearing examiner agreed with the decision of the State Engineer and denied the application.\textsuperscript{78}

The district court heard the case de novo, and again denied the Herringtons' application.\textsuperscript{79} The court of appeals affirmed the district court and agreed that both the topographic location and the depth of the proposed well would result in the Herringtons' gaining access to a new source of water, contrary to the Templeton doctrine.\textsuperscript{80} The New Mexico Supreme Court disagreed and held that the Herringtons appeared to be entitled to a Templeton well, but ultimately remanded for a factual determination.\textsuperscript{81}

The heart of the New Mexico Supreme Court's decision in Herrington was its articulation and application of the four requirements for the Templeton doctrine. The first and third elements were not in dispute in Herrington because the validity and seniority of the Herringtons' water right was not in question and the record was clear that the groundwater pumping of junior appropriators was intercepting the surface water of the Rio de Arenas and diminishing the Herringtons' surface flow.\textsuperscript{82} Instead, the decision in Herrington hinged on the second and fourth Templeton requirements of "[2] whether the Herringtons' surface diversion was fed by baseflow, and if so, [4] whether the Herringtons' proposed well would draw from the same source that fed the baseflow."\textsuperscript{83}

\textsuperscript{74} Herrington v. State, 2006-NMSC-014, ¶ 5, 139 N.M. 368, 371, 133 P.3d 258, 261.
\textsuperscript{75} Id. ¶ 1, 139 N.M. at 370, 133 P.3d at 260.
\textsuperscript{76} Id. ¶ 5, 139 N.M. at 371, 133 P.3d at 261.
\textsuperscript{77} Id. ¶ 6, 139 N.M. at 371, 133 P.3d at 261.
\textsuperscript{78} Id.
\textsuperscript{79} Herrington v. State, 2006-NMSC-014, ¶ 8, 139 N.M. 368, 371, 133 P.3d 258, 261.
\textsuperscript{80} Id. ¶ 9, 139 N.M. at 371–72, 133 P.3d at 261–62 (citing Herrington v. State, 2004-NMCA-062, ¶¶ 13–14, 135 N.M. 585, 589, 92 P.3d 31, 35).
\textsuperscript{81} Id. ¶ 36, 139 N.M. at 377, 133 P.3d at 267.
\textsuperscript{82} Id. ¶¶ 24–26, 139 N.M. at 375, 133 P.3d at 265.
\textsuperscript{83} Id. ¶ 24, 139 N.M. at 375, 133 P.3d at 265.
A. The Second *Templeton* Requirement: Surface Water Fed by Groundwater

The *Herrington* court found that the second requirement, that the surface diversion be fed by baseflow from the groundwater, was met.\(^7\) This was based on findings of fact from the district court, which found that:

- **[Finding of Fact 16:]** The Rio de Arenas is naturally an interrupted perennial stream with dry and flowing reaches that vary in length depending on climate and usage conditions. Groundwater above elevation 6,200 feet converges onto the Rio de Arenas watercourse and is the source of baseflow and discharge by riparian vegetation.

- **[Finding of Fact 17:]** The Rio de Arenas at [the] Herrington’s property previously was an interrupted perennial stream, and is now an interrupted intermittent stream. The frequency of surface flow in the Rio de Arenas has declined in more recent years due to numerous upstream junior diversions of water by well.

- **[Finding of Fact 19:]** Rio de Arenas moves down gradient from north to south. As the stream flows, at times and places it falls below the surface. At other times and places, it may resurface when it confronts various dikes that form underground barriers to the underground flow. As the water moves to the surface, it creates surface flow for a time, and will then sink back below the ground surface.\(^8\)

These facts established that the Herringtons had a "valid surface water right...consist[ing] of surface water fed in part by groundwater...and] [j]unior appropriators have intercepted groundwater that fed the surface, thereby diminishing the Herringtons' surface flows."\(^9\) Thus, it appeared that the Herringtons were not seeking a "'new appropriation in the underground water basin, but merely a request to follow the source of their original appropriation."\(^\)\(^\)\(^7\)
B. The Fourth *Templeton* Requirement: Proposed Well Tapping the Same Groundwater Source as the Original Appropriation

1. Source Requirement and Well Depth

The district court had found that the Herringtons' proposed well did not satisfy the source requirements of *Templeton*.88 Despite finding that the Herringtons' surface appropriation consisted of baseflow intercepted by junior wells, the district court [determined] that both the [placement] of the well in the fractured bedrock aquifer and its location downstream from the surface diversion would grant the Herringtons access to a new source of water, [precluding application of *Templeton*].89

In denying the Herringtons' application, both the district court and the court of appeals relied upon the following findings of fact and conclusions of law:

[Finding of Fact 27:] There is no evidence that the groundwater from the deep bedrock aquifer underlying [the] Rio de Arenas contributes to the flow of the Rio de Arenas at Herringtons' point of diversion on the Frazier-Bateman Ditch.

[Finding of Fact 31:] A well this deep will not capture the water that would be available to [the] Herringtons as surface water, or surface water that has seeped into the ground, because the depth of the well will extend into the deep bedrock aquifer which does not contribute to the flow of the Rio de Arenas.

[Conclusion of Law 10:] The proposed well sought by [the] Herringtons goes into the deep bedrock aquifer and there is no evidence of an upward leakage from the aquifer that contributes to the flow of surface water at [the] Herringtons' current point of diversion on the Frazier-Bateman Ditch.90

These findings of fact and conclusion of law were disputed by the Herringtons.91

There were conflicting findings of fact about the underground water system, such that the New Mexico Supreme Court, by remanding the case, could not ultimately resolve whether the Herringtons were entitled to a *Templeton* well.92 Both parties "agree[d] that the proposed well is to extend 100 feet into fractured shale and sandstone (the fractured bedrock

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88. *Id.* ¶ 29, 139 N.M. at 376, 133 P.3d at 265.
90. *Id.* ¶ 31, 139 N.M. at 376, 133 P.3d at 266.
91. *Id.*
92. *Id.* ¶ 51, 139 N.M. at 380, 133 P.3d at 270.
aquifer) which underlie the alluvial sediments." However, the parties disagreed as to the nature of the underground water system. The State Engineer characterized the underlying system as, "consisting of two aquifers: the shallow aquifer, and deeper fractured bedrock aquifer." Such a system would be analogous to Langenegger, where a deep aquifer was separated from a higher, shallow aquifer, yet contributed water to it via upward leakage. Thus, assuming that there are two aquifers, consistent with the application of Templeton in Langenegger, "the Herringtons would have to show that the deep bedrock aquifer contributes water...to the shallow aquifer and ultimately to the Rio de Arenas."

Unlike the State Engineer, the Herringtons claimed that the groundwater was a single aquifer, as in Templeton, not two as in Langenegger. The Herringtons argued that there was no semi-confining or impermeable layer separating the alluvium from the fractured bedrock aquifer where they proposed to complete their well. "As a result, the Herringtons maintain[ed] that both the alluvium and fractured sandstone [were] parts of the same continuous, hydrologically connected aquifer that feeds [the] Rio De Arenas baseflow." The Herringtons concluded that a well that pumps water from the fractured sandstone would therefore draw from the same single source of baseflow, as in Templeton.

It is unclear whether the district court analyzed the scenario as a single aquifer or two potentially interconnected aquifers. That court may have treated the Rio de Arenas aquifer system as consisting of two separate aquifers, since it included a finding that there was no leakage from the fractured sandstone up to the shallow alluvium and surface flow. However, "[o]ther findings of the district court appear[ed] to assume that the underlying alluvium and fractured sandstone [were] all part of the same continuous aquifer, as in Templeton." For example, the district court specifically found that there was no subsurface, impermeable separation within the underlying aquifer. "The district court also suggest[ed] that there was a direct hydrologic connection between the surface water right

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93. Id. ¶ 32, 139 N.M. at 376, 133 P.3d at 266.
95. Id. (discussing Langenegger, 82 N.M. 416, 483 P.2d 297).
96. Id. ¶ 32, 139 N.M. at 377, 133 P.3d at 266 (discussing Langenegger, 82 N.M. 416, 483 P.2d 297).
97. Id. ¶¶ 32-33, 139 N.M. at 377, 133 P.3d at 266.
98. Id.
100. Id. ¶ 34, 139 N.M. at 377, 133 P.3d at 266.
101. Id.
102. Id. ¶ 35, 139 N.M. at 377, 133 P.3d at 267.
103. Id.
and the proposed well depth...stating that the Rio de Arenas had experienced depletion from wells specifically from the 'pumping and depletion of pockets of water in the fractured bedrock aquifer.' This appeared to match the depth at which the Herringtons sought to put their well. This finding was significant because if junior domestic wells completed in fractured sandstone intercepted water that fed the Rio de Arenas, and the Herringtons sought to drill a well to the same depth, they [would tap] the same source that fed the surface stream—satisfying the Templeton requirement as articulated by the New Mexico Supreme Court. Also, there were indications that of 73 local wells where the depth information was known, eight were less than 100 feet deep and 52 were 150 feet or greater. The Herringtons' proposed well was 100 feet deep. "[T]his finding [was] at odds with other findings that the groundwater from the deep bedrock aquifer does not contribute to the Rio de Arenas flow, and that the Herringtons' well would capture surface water that had seeped into the ground."

The New Mexico Supreme Court ultimately held that there were "irreconcilable and conflicting findings and conclusions that only the district court could resolve." The Herringtons met the first three Templeton requirements, and therefore appeared to be entitled to a supplemental well of some depth, but to determine whether the 100-foot-deep well would satisfy the fourth requirement, the court concluded the fairest solution was to remand to the district court to clarify the findings and conclusions. "Specifically, the [district] court [wa]s to determine whether the proposed well...tapped one aquifer, or two aquifers separated by an impermeable or semipermeable boundary. If the proposed well tapped the same, hydrologically continuous aquifer that feeds baseflow to the Rio de Arenas and provides water to the offending [junior] wells," then the proposed well would be permissible under Templeton. However, "[i]f the well taps a second deeper aquifer," that well would be prohibited under Templeton and Langenegger, because the district court

105. Id.
106. Id.
107. Id. ¶ 35 n.5, 139 N.M. at 377, 133 P.3d at 267.
108. Id.
110. Id. ¶ 36, 139 N.M. at 377, 133 P.3d at 267.
111. Id.
112. Id.
113. Id.
had "established that there [wa]s no upward leakage at a depth of 100 feet."\textsuperscript{114}

2. Source Requirement and Location of Templeton Wells

In addressing the source requirement of Templeton transfers, the Herrington court also clarified that the location of a proposed supplemental well need not be upstream; therefore, it did not matter that the location of the Herringtons' proposed well was downstream from their point of diversion.\textsuperscript{115} "The district court concluded that because the Herringtons propose[d] to place their supplemental well roughly 1,500 feet downstream of the original point of diversion, Templeton could not apply."\textsuperscript{116} The court of appeals affirmed, relying on Brantley and Roswell for the proposition that a Templeton supplemental well must be located upstream.\textsuperscript{117} The court of appeals had concluded that since the water in a downstream well would never have flowed to the upstream point of diversion, such a well would necessarily draw upon a different source than that of the original diversion, resulting in a new appropriation.\textsuperscript{118}

The Herrington court disagreed, holding that a Templeton transfer could occur upstream or downstream. The Herrington court explained that, as described in Templeton and in specific facts in the Herrington case, "water may often recharge an aquifer in the mountainous portion of the basin, and migrate downward through the aquifer to discharge as baseflow at the lower elevations of the valley."\textsuperscript{119} The Herrington court noted that, in this instance, "very little rainfall and runoff across the Mimbres basin floor actually recharges the groundwater. In the Mimbres basin, less than two percent of rainfall recharges the groundwater."\textsuperscript{120} As a result, "if the water table in an aquifer is lowered by wells, the same water that formerly discharged at one surface location may now discharge to the surface downstream, at a point of lower elevation."\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{114} Herrington v. State, 2006-NMSC-014, ¶ 36, 139 N.M. 368, 377, 133 P.3d 258, 267.
\item \textsuperscript{115} Id. ¶¶ 41-43, 139 N.M. at 379, 133 P.3d at 268–69.
\item \textsuperscript{116} Id. ¶ 37, 139 N.M. at 377, 133 P.3d at 268.
\item \textsuperscript{117} Id. ¶¶ 37, 39, 139 N.M. at 377–78, 133 P.3d at 268 ("Mr. Templeton's supplemental well was actually located downstream of his original point of diversion" and if the court were to "apply the upstream requirement, Mr. Templeton would not be entitled to a supplemental well today, under the very doctrine that bears his name." (emphasis in original)).
\item \textsuperscript{118} Id. ¶¶ 41-42, 139 N.M. at 378, 133 P.3d at 268 (citing Herrington, 2004-NMCA-062, ¶ 13, 135 N.M. at 585, 92 P.3d at 31).
\item \textsuperscript{119} Herrington, 2006-NMSC-014, ¶ 42, 139 N.M. at 379, 133 P.3d at 268 (citing Templeton, 65 N.M. at 62, 332 P.2d at 466-67).
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Id. ¶ 42, 139 N.M. at 379, 133 P.3d at 268.
\end{itemize}
Therefore, the Herrington court held that a Templeton well does not have to be located upstream.\textsuperscript{122} While the downstream location of a proposed well may be an indicator of whether that well draws from groundwater that is the same source as the surface right, the determination of the source of water for a well is always case-specific.\textsuperscript{122} The question is whether the applicant’s proposed point of diversion will “‘tap into waters which are not a source of his surface right.”’\textsuperscript{124} While a downstream location may properly be cause for concern, it merely places the “burden on the applicant to demonstrate that their proposed well draws water from the same source that fed the baseflow at the original point of diversion.”\textsuperscript{125} A downstream location, particularly if only a short distance from the point of diversion, does not invalidate an otherwise valid Templeton application.\textsuperscript{126}

The Herrington court also took the opportunity to clarify some of the confusion created by the Brantley decision. The Brantley court had stated that the “‘Templeton Doctrine does not apply since Brantley seeks to drill below his point of diversion into waters which are not a source of his surface right.”’\textsuperscript{127} The Herrington court explained that the issue in Brantley was not the particular location of the well, but whether, at that location, the proposed well would draw from the same source as the surface right.\textsuperscript{128}

3. Seepage Losses

In addition to clarifying the requirements that the surface water must be fed by groundwater and that the proposed well must tap the same source of the original appropriation, the Herrington court addressed seepage loss. The Herrington court stated that the Herringtons could not use a supplemental well to eliminate seepage losses.\textsuperscript{129} “If it were otherwise, every irrigator with surface rights could drill supplemental wells seeking to capture their own irrigation water return flow, upon which downstream surface appropriators rely.”\textsuperscript{130} Additionally, because the Mimbres Basin is fully appropriated, the Herringtons’ ditch seepage is part of a fully appropriated system.\textsuperscript{131} Thus, “if, on remand, the district court determine[d] that the proposed well location w[ould] result in a greater appropriation to

\begin{itemize}
  \item \textsuperscript{122} Id. ¶ 43, 139 N.M. at 379, 133 P.3d at 269.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Herrington v. State, 2006-NMSC-014, ¶ 43, 139 N.M. 368, 379, 133 P.3d 258, 269 (citing Brantley, 92 N.M. at 282, 587 P.2d at 429).
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Brantley, 92 N.M. at 282, 587 P.2d at 429 (emphasis in original).
  \item \textsuperscript{128} Herrington, 2006-NMSC-014, ¶ 40, 139 N.M. at 378, 133 P.3d at 268.
  \item \textsuperscript{129} Id. ¶ 44, 139 N.M. at 379, 133 P.3d at 269.
  \item \textsuperscript{130} Id. (quoting Roswell, 114 N.M. at 586, 844 P.2d at 836).
  \item \textsuperscript{131} Id.
\end{itemize}
the Herringtons, the Herringtons’ pumpage would have to be reduced accordingly.”

C. The Clodfelter Doctrine and the Templeton Doctrine

The Herrington decision clarified much of the difference between the Clodfelter doctrine and the Templeton doctrine. The Herringtons had argued that they could change their point of diversion to a groundwater well independent of the requirements of Templeton by completing a Clodfelter transfer under N.M. Stat. § 72-5-23 (1985) and N.M. Stat. § 72-5-24 (1959). The court of appeals concluded that the Herringtons did not qualify, stating that even statutory transfers must meet the Templeton source requirements and that the Templeton source requirements were not met in this case.

The Herrington court disagreed and held that statutory surface water to groundwater transfers are not bound by the Templeton same-source requirements, reasoning that neither the transfer or supplemental well statutes, nor Clodfelter, require that such a transfer be to the source of the surface water. While the requirement that a statutory transfer not result in a new appropriation does mandate the condition that the water at a new location be hydrologically connected to water from the original location, the court noted that ensuring that a statutory transfer occurs within a continuous hydrologic unit is different from applying the narrow Templeton same-source requirements. This is because “Templeton supplemental wells service the original parcel, while statutory transfers may apply to new uses for the water, over significant distances.”

Further, “[i]mposing Templeton same-source requirements would greatly restrict such transfers, curtailing State Engineer administrative discretion, and threatening sound water policy.” This is because “[h]olding that all surface water to groundwater transfers are bound by Templeton same-source requirements would unduly restrict the administrative authority of the State Engineer to evaluate the facts in each specific case, and determine the propriety of a proposed supplemental well or

132. Id. (citing Roswell, 86 N.M. at 251, 844 P.2d at 798).
134. Id. ¶¶ 17–20, 135 N.M. at 590–91, 92 P.3d at 37.
135. Herrington, 2006-NMSC-014, ¶ 45, 139 N.M. at 380, 133 P.3d at 269.
136. Id. (citing Clodfelter, 68 N.M. at 66, 358 P.2d at 630 (1991); N.M. Stat. § 72-5-23 (1985); N.M. Stat. § 72-5-24 (1959)).
137. Id. ¶ 46, 139 N.M. at 380, 133 P.3d at 269.
138. Id. ¶ 47, 139 N.M. at 380, 133 P.3d at 270.
139. Id. ¶ 47, 139 N.M. at 380, 133 P.3d at 270.
transfer."\textsuperscript{141} It would also significantly reduce the inherent transferability of water rights.

The "district court has already determined that a supplemental well pumping at a maximum rate of 24.86 acre-feet per year would not impair existing rights and would not exceed the drawdown profiles established for the basin."\textsuperscript{142} Thus, "at some depth within the aquifer feeding the Rio de Arenas stream, a supplemental well drawing at no more than 24.86 acre-feet per year would be permissible [under §§] 72-5-23 and 72-5-24."\textsuperscript{143} However, according to the Herrington court, as with the Templeton analysis, "the question remain[ed] whether at [a depth of] 100 feet a supplemental well w[ould] draw from a different aquifer altogether, hydrologically unrelated to the Rio de Arenas, rendering the well a new, and impermissible, appropriation."\textsuperscript{144} The Herrington court remanded this to the district court for clarification.\textsuperscript{145}

D. Other Options

The Herringtons had other options aside from pursuing a Clodfelter or a Templeton transfer. The Herringtons could have enforced their senior priority by putting a call on the river basin in accordance with the Mimbres Adjudication decree.\textsuperscript{146} The Herringtons' stated reasoning for not enforcing priority was that it was not feasible and would not make economic sense.\textsuperscript{147} "The Herringtons, now in their eighties, having waited 20 years for a decision, cannot be asked to file an action in an adjudication court, join 132 new domestic well users and seek a priority call to deprive all of these new users of their sole source of domestic water."\textsuperscript{148} Furthermore, there is no need to seek priority enforcement when one can simply transfer the water right.

The Herringtons could also have sought monetary damages. Where a person is no longer able to make use of his water right, he may seek remedy in damages, without exhausting his administrative remedies.\textsuperscript{149}

\textsuperscript{141.} Id. ¶ 48, 139 N.M. at 380, 133 P.3d at 270.
\textsuperscript{142.} Id. ¶ 49, 139 N.M. at 380, 133 P.3d at 270.
\textsuperscript{143.} Id.
\textsuperscript{144.} Id.
\textsuperscript{145.} Herrington, 2006-NMSC-014, ¶ 49, 139 N.M. at 380, 133 P.3d at 270.
\textsuperscript{148.} Id.
\textsuperscript{149.} Tevis v. McCrary, 75 N.M. 165, 166, 402 P.2d 150, 150-51 (1965).
However, this would defeat the purpose of seeking a supplemental well, because monetary remedies would not solve the immediate problem of diminished water.

V. THE TEMPLETON DOCTRINE AFTER HERRINGTON

The Herrington court clarified that the Templeton doctrine is an equitable remedy designed “to allow senior surface water appropriators, impacted by junior wells, to timely reassert their priority by drilling a supplemental well.” As such, Templeton is an exception to the statutory transfers of the Clodfelter doctrine. Under Clodfelter, a transfer is not permitted if it will impair any existing water rights, regardless of priority. The Templeton doctrine, by contrast, has more stringent source requirements, is based on priority, and appears to allow a senior user to detrimentally impact junior groundwater appropriators.

The Templeton doctrine is based on priority because it is justified by the premise that the “holder of a senior water right is generally entitled to protection in our courts of law from the effects of junior interceptors.” One of the requirements for a Templeton supplemental well is that junior appropriators are intercepting the applicant’s groundwater. Templeton thus satisfies the two essential principles of prior appropriation: the senior appropriator’s right to water is recognized, and that right can be enforced against subsequent users. However, Templeton provides an alternative to the immediate enforcement of priority through a call on the river; instead, at least for a while, every appropriator receives their full water allotment.

This feature of the Templeton doctrine highlights one of the most important ways in which the doctrine differs from the traditional enforcement of prior appropriation: it allows the sharing of water shortages. “Although the New Mexico prior appropriation doctrine theoretically does not allow for the sharing of water shortages, the Templeton doctrine permits both the aggrieved senior surface appropriator and the junior to divert their full share of water.” This is because under Templeton, a senior appropriator holding a water right may follow that right to the original source of the appropriation.

The second major way in which the Templeton doctrine departs from traditional priority administration and Clodfelter transfers is that under the Templeton doctrine, the transfer of a senior surface water right to a supplemental groundwater point of diversion is allowed even though it will inevitably impair existing junior wells. For a while, both the junior and the senior water-rights holders will receive 100 percent of their water-right

150. Herrington, 2006-NMSC-014, ¶ 11, 139 N.M. at 372, 133 P.3d at 262.
151. Id. ¶ 28, 139 N.M. at 376, 133 P.3d at 265.
152. Id. ¶ 11, 139 N.M. at 372, 133 P.3d at 262 (citing N.M. STAT. § 72-1-2 (1978)).
supply. However, impairment will eventually occur, and once that happens, water rights will be subjected to prior appropriation and the senior water right will prevail. The Templeton doctrine is equitable in that it protects the senior right without impairing the junior water right in the present time. However, it cuts short the lifespan of all the wells in the system because all users are allowed to receive their full water rights as long as possible.

Whether a senior appropriator could immediately impair a junior appropriator through the use of a Templeton supplemental well has yet to be determined by New Mexico courts, and Herrington did not address this issue. One reading of the case law could hold that Templeton does not allow immediate impairment to any existing rights, regardless of priority. This can be inferred by the statement in Langenegger that “[i]nherent in a water right is the right to change the place of diversion, subject only to the requirement that the rights of other water users not be injured or impaired thereby,” and the fact that all three cases that have permitted Templeton wells found that there would be no immediate impairment of existing junior rights, although long-term impairment was inevitable.

However, the case law could also be read to hold that a Templeton transfer may immediately impair junior rights. The Langenegger court reasoned that if a Templeton transfer infringed on the rights of senior appropriators, then they should enforce their rights with a priority call. This indicates that it would be acceptable for the transfer to impact the rights of junior appropriators, just not senior appropriators. Such a reading of the case law would reinforce the idea of Templeton transfers as essentially a type of “self-help” priority enforcement.

It also appears that under the Templeton doctrine, the court might simply hold that an impact to junior appropriators does not constitute an impairment. The reasoning would be that, because Templeton supplemental wells draw water that is considered to be the same water as the surface flow, a Templeton transfer would not impair junior appropriators because the Templeton well is not a new appropriation. At least in theory, the amount of water being withdrawn has not increased, it is just that the senior appropriator has been allowed to take its full water right, which may mean that the juniors have less water available to them. This would again make the Templeton transfer serve as a sort of priority call.

Templeton transfers have a number of desirable benefits for water-rights holders. One such advantage is speed. The Herringtons specifically stated that they were not seeking to enforce priority or sue for damages because of the delay involved. A Templeton transfer also has the added benefit that the water-right owner does not have to prove that a Templeton transfer will not eventually impair existing water rights. Under a Templeton

153. Langenegger, 82 N.M. at 421, 483 P.2d at 302.
transfer, both the appropriator and the other water users are able to withdraw their full water rights. This will ultimately impact other water rights, but so long as this impairment is not immediate, the person requesting the Templeton transfer can go forward despite the fact that there will be an impairment in the long term.

Although it greatly clarified the law of surface water to groundwater transfers in New Mexico, Herrington did not address the ultimate conundrum posed by Templeton transfers: Templeton transfers drain the system faster than Clodfelter transfers. A Templeton transfer allows each appropriator to receive their full water allotment, whereas a Clodfelter transfer is not permitted if there will be any impairment. Under Clodfelter and traditional priority administration, the junior water rights are shut down while the senior water right is allowed to continue. Although Templeton transfers are intended to be an equitable solution, they may create future problems. All groundwater pumping is ultimately detrimental to connected surface water, but the Templeton doctrine does not take this into consideration. Instead, the solution offered by the courts is to wait until an impact is actually shown. This strategy of delaying the reckoning ignores the fact that there will be a certain detriment in the future to both groundwater and surface water supplies, and this impact will not be easily fixed. Templeton, then, is ultimately a short-term solution. The only long-term solution is to reduce water usage.

VI. CONCLUSION

There are two methods of transferring the point of diversion of a surface water right to a groundwater well in New Mexico: under the Clodfelter doctrine and the Templeton doctrine. Under Clodfelter, the standard statutory procedure, transfers may not impair any other water rights, regardless of priority. In contrast, Templeton is an equitable exception to the Clodfelter doctrine that applies only when four elements are present: "(1) a valid surface water right; (2) surface water fed in part by groundwater (baseflow); (3) junior appropriators intercepting that groundwater by pumping; and (4) a proposed well that taps the same water that was the source of the applicant's original appropriation." The Templeton doctrine is essentially an alternative to priority enforcement that allows both senior and junior appropriators to receive their full water allotments, at least for a time. However, the application of Templeton raises serious implications for the future because Templeton supplemental wells allow a connected surface water and groundwater system to be depleted faster than would be permitted under traditional priority administration and enforcement.

154. Herrington, 2006-NMSC-014, ¶ 23, 139 N.M. at 374, 133 P.3d at 264.