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THE NEW MEXICO DOCTRINE OF PRIOR APPROPRIATION: ITS HISTORICAL UNDERPINNINGS

The "prior appropriation" system of water law was adopted in the West as a result of the carryover of the Mexican civil law in the western territories ceded to the United States by Mexico in 1848,¹ the Mormon influence in the state of Utah,² and federal policy during the expansion of the western United States from the mid-nineteenth century on.³ Although stated differently in the various western states, the prior appropriation system has always contained two essential principles:

1. The first user (appropriator) in time has the right to take and use water; and
2. that right continues as against subsequent users as long as the appropriator puts the water to beneficial use.⁴

At least ten western state constitutions acknowledge the appropriation system based upon beneficial use,⁵ as do numerous western state laws⁶ and the Federal Reclamation Act.⁷

Debate has taken place concerning what physical acts are sufficient to constitute an appropriation⁸ and what is a beneficial use. Most prior appropriation jurisdictions recognize beneficial use as the basis, the measure, and the limit of the right to use water. The common theme in all these states is that beneficial use means application of water to a lawful purpose which is useful to the appropriator and at the same time is a use consistent with the general public interest in having water utilized to its maximum.

Beneficial use refers to the amount of water actually used, not to water appropriated to be used. If an appropriator ceases using water beneficially for long enough, the water becomes available to other appropriators.

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¹. R. Clark, Waters and Water Rights 74, 76 (1967).
². Id. at 75.
³. Id. at 78.
⁴. Id. at 79.
⁵. Id. at 86.
⁶. Id. at 86 n.97.
⁸. R. Clark, supra note 1, §19.3, at 88.

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As this summary indicates, the prior appropriation doctrine is tailored to fit the geography and climate in the western United States. Water is a precious commodity in scarce supply. The basic principle behind the prior appropriation doctrine is that if it is no longer economically or geographically feasible for an individual to use his water rights, persons who will use the water in a profitable manner should be allowed to do so.9

An example of how this system operates may be helpful. The day a person diverts water from a stream or from the ground becomes his "priority date." More priority dates are assigned as more people use the water source until it is fully "appropriated"—all of the water available is taken—or even until it is "over-appropriated"—a circumstance where people wish to use more water than is available for distribution. When there is insufficient water in a stream to meet the demand, the person with the oldest water right is entitled to his full amount irrespective of his geographical location. When he is finished, the next person in time is allocated his amount, and so on, until the entire supply is exhausted. Thus, persons with the newest rights on an over-appropriated stream get no water in times of scarcity. In terms of economic theory, those newest right holders, if they are willing to pay the price, will go to the older water user and buy his water right. In this manner, water will, at least theoretically, be continually transferred to the use that will generate the most revenue. As one can imagine, whether this system actually functions this way is the subject of unending debate, especially among economists.

The western states' prior appropriation treatment of groundwater has not been as consistent as their treatment of surface water. For example, many courts and legislatures steadfastly deny the hydrological relationship between water in the ground and water flowing on the surface in stream beds.10 New Mexico, on the other hand, is a state that acknowledges this relationship.

**ALLOCATION OF GROUNDWATER IN NEW MEXICO**

New Mexico is a prior appropriation state,11 even with respect to its groundwater. The riparian doctrine has never been the law.12 The legislature has declared water in underground streams, channels, artesian basins, lakes and reservoirs having reasonably ascertainable boundaries to be public waters subject to appropriation for beneficial use.13 Since all of the water in New Mexico running in natural streams and underground

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9. Id. at 87.
12. N.M. Const. art. 16. This general principle predated the New Mexico Constitution, having been recognized under Mexican law and the Kearny Code as well as territorial legislation.
belongs in effect to the state as trustee for the people, no individual owns the water. However, one may acquire a real property right to divert water consistent with the procedures under state law, up to the amount which can be put to a beneficial use.

New Mexico has not statutorily limited what constitutes a "beneficial use." The term has been construed to include irrigation and recreational fishing as well as other traditional western uses such as stock watering if the water is actually diverted.

Irrigation rights are appurtenant to the irrigated land, but an important feature is that these rights can be severed from the land and transferred to another purpose if done in the manner described below.

Although an individual can assign his water rights to another, such an assignment is binding only between those two parties unless the procedures of the State Engineer are followed.

THE CHIEF WATER ADMINISTRATOR—THE STATE ENGINEER

New Mexico law charges the State Engineer with the duty of administering all matters relating to the appropriation, transfer, and distribution of water. The State Engineer must approve all new appropriations of water for beneficial use as well as changes in the place or manner of existing uses. Water rights that were acquired prior to the creation of State Engineer jurisdiction, while governed by the law of prior appropriation, are free of the State Engineer's control. If they are transferred, they become subject to the State Engineer's jurisdiction.

He has the power to appoint water masters, to apportion water consistent with priorities, and to install headgates and meters for measuring the quantity of water being used.

As noted above, one water right owner can sell his water right to

17. See N.M. Const. art. 16 § 2; Keeney v. Carillo, 2 N.M. 480, 493 (1883), which recognize that even though beneficial use is the measure of one's water rights, if one uses reasonable diligence in developing his water right, he is entitled to the expanded flow resulting from his efforts when his works are completed.
19. First State Bank v. McNew, 33 N.M. 414, 269 P. 56 (1928). See also Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357 (1900) (holding that a corporation could appropriate water for a third party).
20. N.M. STAT. ANN. § 72-5-23 (Repl. 1968).
21. Id. § 75-5-22.
22. Id. § 75-2-1.
23. Id. §§ 72-2-9, 72-5-1 to -39.
24. Id. §§ 72-3-2, 72-5-20.
another who may elect to change the point of diversion, storage or use without losing his priority date. This can only be done, however, with approval of the State Engineer. The State Engineer must publish the proposed changes and, before allowing such a transfer, determine that no foreseeable detriment exists to other present right holders.\textsuperscript{25}

One aspect of New Mexico case law which serves to facilitate transfers is that one who has been party to a court proceeding where his rights were adjudicated, and who later wants to transfer that right, can rely on the previous adjudication as the measure of his water right. He need not prove that he has put this amount of water to beneficial use. The existence of the previous adjudication will sustain his claim absent evidence to the contrary.\textsuperscript{26} The State Engineer has very expansive jurisdiction over water if he chooses to exercise it. Certain nominal types of "captured" waters are, however, exempt from State Engineer jurisdiction, but are not worthy of discussion in this paper.\textsuperscript{27}

New Mexico first regulated groundwater in 1931. As amended, the law now makes all water in an underground water basin, \textit{declared to be such by the State Engineer}, the property of the public subject to appropriation for beneficial use.\textsuperscript{28} The State Engineer has no jurisdiction, however, even in an underground water basin, to prohibit wells for nominal personal domestic use.\textsuperscript{29} Most areas of the state have been declared to constitute underground water basins. In the remaining open areas, however, the State Engineer has no jurisdiction. Map 1 is a map of current declared underground water basins. Maps 2 and 3 are the recently declared Lower Rio Grande and Hueco basins.

If one wishes to appropriate groundwater in a declared underground water basin he must apply to the State Engineer,\textsuperscript{30} who may grant a permit after determining that unappropriated water exists and that the proposed appropriation will not impair the existing water rights of others.\textsuperscript{31} While the potential appropriator has the burden of proving the absence of impairment, the State Engineer must make his own independent investi-

\textsuperscript{25} Id. §§ 72-5-22, 75-5-24, 72-5-25. A few community ditches that were actually operating prior to 1907 are not governed by State Engineer jurisdiction when changing uses. \textit{Id.} § 75-14-60.


\textsuperscript{27} A silt retention dam or a stock pond created on a stream by erecting a dam less than ten feet in height and a pond holding less than ten acre-feet of water is exempt. N.M. STAT. ANN. § 72-5-32. Springs which do not have a well-defined channel and which sink back into the ground are likewise exempt. Burgett v. Calentine, 56 N.M. 194, 242 P.2d 276 (1956). Finally, diffused surface waters as well as other "artificial surface waters" such as seepage, drainage, and wastewater may be captured by the landowner. N.M. STAT. ANN. § 72-5-27 (1978).

\textsuperscript{28} N.M. STAT. ANN. § 72-12-18, 72-12-20 (1978).

\textsuperscript{29} \textit{Id.} § 72-12-1.

\textsuperscript{30} \textit{Id.} § 72-12-3.

\textsuperscript{31} \textit{Id.} § 72-12-3(E).
DECLARED UNDERGROUND WATER BASINS IN NEW MEXICO

MAP 1

DECLARED UNDERGROUND WATER BASINS IN NEW MEXICO

Change 16, September 12, 1980

State Engineer of the State of New Mexico
Rule No. 2, Amendment No. 16
MAP 2
LOWER RIO GRANDE UNDERGROUND WATER BASIN
DOÑA ANA COUNTY

September 11, 1980

State Engineer of the State of New Mexico
Rule No. 2, Amendment No. 16
MAP 3
HUECO UNDERGROUND WATER BASIN
WITHIN DOÑA ANA AND OTERO COUNTIES

September 12, 1980
State Engineer of the State of New Mexico
Rule No. 2, Amendment No. 16
The difficulty of determining what constitutes "impairment" is discussed below.

Groundwater rights can be sold or transferred. The transfer can be of both location and purpose. Also, the State Engineer has allowed transfers from surface appropriations to groundwater appropriations on a limited basis. To make such a transfer, the transferor has the burden of showing that other users' water rights will not be impaired. The statute imposes an independent obligation on the State Engineer to make a similar determination before granting the application. Exhibit 1 is a sample plan for changing the point of underground diversion in a water rights transfer.

By statute, an owner forfeits his water right if he fails to apply water to beneficial use for a period of four years and he continues not to use the water for one year after notice of proposed forfeiture is given him by the State Engineer. In addition to statutory forfeiture, water rights can also be abandoned in New Mexico if both the intent to abandon as well as nonuse occur. Intent to abandon is extremely difficult to prove. The law is unclear concerning whether one can lose his water right due to adverse possession, but this result seems extremely unlikely. The doctrine of estoppel may exist as against private litigants providing that one person cannot knowingly let another develop a system of utilizing a water source and then deny that person's water right. An underlying principle that runs through the New Mexico cases is that the courts traditionally have not favored forfeiture of water rights and where a court can find a reason or legitimate excuse for the nonuse, the original holder's rights generally will be upheld.

Other State Agencies Administering Water Rights

The State Engineer is not alone in governing the allocation of water rights. Over the years, the legislature has spawned numerous other entities with overlapping and undefined jurisdiction. For example, the Interstate

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33. N.M. STAT. ANN. § 72-12-7 (1978).
35. N.M. STAT. ANN. § 72-12-7 (1978).
36. Id. § 72-5-28, 72-118. These statutes do not allow forfeiture when a reasonable cause has brought about the nonuse. Prior to 1965, there was no requirement of notice from the State Engineer and the additional one-year waiting period.
39. La Luz Community Ditch Co. v. Town of Alamogordo, 34 N.M. 127, 279 P. 72 (1929). Estoppel will not run against the State Engineer, however.
The water right is controlled by natural or artificial boundaries which limit cropping practice and include all water-using areas created by irrigation structures and works adjoining the cropped area. Storage reservoirs where isolated from the cropped area shall be shown as part of the water right.

EXHIBIT 1

SAMPLE PLAT—WATER RIGHT FILING MAP
Stream Commission is given the authority to investigate, develop and conserve the waters of New Mexico both intra-state and inter-state. At the local level numerous entities such as conservancy districts share the State Engineer's jurisdiction.

THE STATE ENGINEER'S ROLE AS WATER MANAGER AND PLANNER

The role of the State Engineer as water manager and planner is illustrated best by two New Mexico cases: Mathers v. Texaco and City of Albuquerque v. Reynolds. Mathers reflects his role vis-a-vis a mined aquifer; i.e., one where recharge is less than the rate of withdrawal. City of Albuquerque v. Reynolds demonstrates this management function in a non-"mining" circumstance.

The case of Mathers v. Texaco arose in connection with an essentially nonrecharging aquifer in eastern New Mexico which was being mined by groundwater users.

In 1952, the New Mexico State Engineer made a determination of the amount of water in each township in the Lea County Basin (see Map 4), the amount of water that had been appropriated in each township, and the amount of water that would be drawn from the stock or supply in each township into the surrounding townships after the waters in the surrounding townships would be fully appropriated. He then calculated the amount of water that could be withdrawn from each township and still leave one-third of the water in storage at the end of forty years. It was determined that at the end of the forty-year period, some of the remaining water could be economically withdrawn from domestic and perhaps other uses, but that it would no longer be economically feasible to withdraw water for agricultural and most other purposes.

Persons desiring to pump water from this declared basin had to receive a permit from the State Engineer. Texaco received a permit from the New Mexico State Engineer to appropriate 350 acre-feet of water per year for oil production from the Lea County Basin. Mathers, who had acquired prior rights to appropriate water from the basin, sued Texaco for impairing his water right and attacked the validity of the method of administering the Basin adopted by the State Engineer. He argued that any appropriation from the aquifer subsequent to his necessarily impaired his right because the amount of water in the aquifer was finite.

42. See, e.g., id. §§ 73-2-1 to -20, 73-2-22 to -64 (providing for community ditches and acequias), §§ 73-1-1 to -26 (artesian conservancy ditches), and § 73-14-1--88 (providing for conservancy districts) to list just a few.
43. 77 N.M. 239, 421 P.2d 771 (1966).
44. 71 N.M. 428, 379 P.2d 73 (1962).
45. Id. n.43.
MAP 4

LEA COUNTY UNDERGROUND WATER BASIN

August 1966

N. Mex. State Engineer
The court of appeals upheld the State Engineer's method of managing the basin as valid. In addition, in discussing the issue of impairment of prior rights, the court said that the lowering of a water table does not necessarily constitute an impairment of water rights of adjoining appropriators, and went on to add: "This must, of necessity, be true in a nonrechargeable basin, such as the one here involved, if the water is to be put to beneficial use, and if the use is to be made available to more than the initial appropriator."  

In ruling in favor of Texaco, the court ratified the following principles followed by the State Engineer.

1. The New Mexico State Engineer can and does have the power to determine the useful life of an underground water basin and allow water to be mined from that basin until agricultural and industrial use of the water is no longer economically feasible, thus practically terminating all industrial and agricultural water rights stemming from the basin on that day.

2. He can and does allow mining of that basin for the specified number of years even though this results in higher pumping costs for earlier appropriators.

The case of City of Albuquerque v. Reynolds described and defined his duties in a nonmining circumstance involving possible impairment of an interstate compact.

There, the City of Albuquerque filed applications for permission to drill four wells within the declared Rio Grande underground water basin. The facts at the hearing established that the wells would directly affect the base flow of the Rio Grande River, which was fully appropriated and had previously been apportioned by the Rio Grande Compact of 1938 and the Mexican Water Treaty of 1906. Before the State Engineer would allow these wells, he ruled that new well users would have to retire surface rights equal to the amount of the drawdown on the base flow of the river. This meant that a substantial amount of groundwater could not be mined until all surface rights were retired. On appeal, the New Mexico Supreme Court upheld the State Engineer's three conditions on the withdrawal of groundwater:

1. That the amount of water pumped be measured.
2. That the amount of return flow be measured, and
3. That existing rights to the consumptive use of surface water would

46. 77 N.M. 239, 421 P.2d 771, 776 (1976).
47. 71 N.M. 428, 379 P.2d 73 (1962).
be retired to the extent necessary to offset the effects of the appropriation on the Rio Grande.\textsuperscript{50}

Thus, the State Engineer's managerial functions in New Mexico encompass two basic areas. The first is calculating a reasonable rate of groundwater mining for mined aquifers and, second, in rechargeable aquifers, coordinating the interrelationships between the groundwater withdrawals and prior surface commitments in the form of prior appropriative rights, interstate compacts and treaties. In the following section, three specific pressure points are discussed, all of which impact on his capacity to manage groundwater withdrawals. These are (1) the problem of interstate competition for groundwater from states that have no clear groundwater management policy, (2) the uncertainty created by unquantified Indian federal reserved water rights, and (3) the dilemma posed by the duty to protect capital investments in a means of groundwater diversion while at the same time promoting maximum utilization of water resources for present and future generations.\textsuperscript{51}

A. The Problem of Interstate Competition

The Mesilla Bolson aquifer in southern New Mexico borders Texas and Mexico and contains a substantial amount of largely untapped groundwater.\textsuperscript{52} It is literally just across the border from the cities of El Paso, Texas, and Juarez, Mexico, which are rapidly exhausting their groundwater stocks. To gain access to this New Mexico groundwater, on September 5, 1980, El Paso filed suit alleging that a New Mexico statute, N.M. Stat. Ann. §72-12-19 (1978), which prohibits out-of-state transportation of groundwater, violates the United States Constitution.\textsuperscript{53} On September 11 and 12, 1980, the State Engineer of New Mexico declared the area where El Paso sought to drill wells to be under his jurisdiction, thereby creating the Rio Grande and Hueco underground water basins. This action obligated El Paso to obtain permits before drilling wells.\textsuperscript{54} On September 12 and 16, 1980, El Paso filed 326 applications to appropriate approximately 300,000 acre-feet per year of New Mexico groundwater within the declared underground water basin. El Paso is now seeking injunctive relief against other well drilling in the area until their well

\textsuperscript{50} 71 N.M. 428, 435, 379 P.2d 73, 78 (1962).

\textsuperscript{51} The problem of determining what is an acceptable "safe yield" of an aquifer has been much discussed in the literature. For a good discussion of the position of the experts in the field, such as Professors Clark and Corker, see International Groundwater Management: The Case of the Mexico–United States Frontier 61-97 (1978) (Natural Resources Center/Water Resources Research Institute, UNM).

\textsuperscript{52} Id. at 2–42.

\textsuperscript{53} El Paso v. S. E. Reynolds, No. 80-270 (D.N.M. Sept. 5, 1980).

\textsuperscript{54} N.M. STAT. ANN. § 7-11-3 (1978); see Maps 2, 3.
The legal issue between El Paso and New Mexico is now joined as follows:

El Paso argues that the only thing that precludes them from appropriating New Mexico groundwater for municipal use is the state line. If New Mexico is allowed to keep its water solely for New Mexico residents, then other states could do the same not only with water, but other resources such as timber, coal, and oil and gas. Texas argues that this anti-exportation policy would constitute the Balkanization the United States Constitution was designed to prohibit. Therefore, the state statute must be ruled inconsistent with the "commerce clause" of the United States Constitution.

New Mexico argues that water is a totally unique resource that requires special constitutional treatment. Further, its use by El Paso would violate the Rio Grande Compact. Because the State Engineer cannot regulate water consumption in Texas and insure that it is being beneficially used, New Mexico argues that its use in Texas would be illegal.

In addition to the above legal objections, there are some very serious policy arguments advanced by New Mexico. If Texas does not regulate the withdrawal of groundwater in Texas and yet can take New Mexico groundwater, can New Mexico realistically be expected to regulate and plan for its future? Can the New Mexico State Engineer manage a resource on a state basis if the demand for water is potentially nationwide and there is no ability to regulate that out-of-state demand? The task would be a formidable, if not an impossible, one. Obviously, the outcome of the El Paso litigation will have a very significant impact on the continued viability of New Mexico plans for management of its groundwater. A second related question raised by the case is whether New Mexico has any "equity" in its water resources. Stated another way, it is suffering a loss when a sister state uses water in another area for production of revenue in that other area. If so, can New Mexico assert that "equity" interest and prefer its own citizens in the allocation of this state resource? The courts may soon provide answers to these difficult questions.

B. The Uncertainty of Federal Indian Reserved Rights

A second groundwater management question related to the matter of undefined potential out-of-state demand is the problem of uncertainty of the entitlement of Indian water users within New Mexico. On the Rio Grande River, this uncertainty is reflected in the lack of knowledge of the extent of the rights of the Pueblo Indians. Map 5 shows the approximate locations of these pueblos. Since they all lie along the Rio Grande, their legal rights to both surface and tributary groundwater greatly affect the State Engineer's determinations as water planner.
MAP 5
NEW MEXICO UPPER RIO GRANDE BASIN PUEBLOS
In 1848, in the Treaty of Guadalupe Hidalgo, the United States pledged itself to protect the property rights, including water rights, of Mexican citizens. The Indians were citizens and were given a somewhat unique status under Mexican law. However, for much of the late nineteenth century, during the first part of the United States sovereignty, they were not so treated. It was not until 1913 that the United States Supreme Court returned the Pueblos to a fully protected federal status. During the period when the Indians were not protected, non-Indians encroached on their lands.

To remedy this situation, in 1924 and in 1933, Congress took action to compensate the Pueblos for their losses of land. At no time, however, was Congress willing to clarify the extent of Indian water rights that the Pueblo Indians held under the Treaty of Guadalupe Hidalgo. As a result, the Pueblos and the state are involved in extensive litigation which has generated varying amounts of speculation as to the extent of the Indian water rights. Some pueblos claim first priority to sufficient surface and groundwater to irrigate every "practically irrigable acre" on the reservation, while the state argues for an amount equal only to pueblo historic use. An expansive ruling on the pueblo water rights issue in favor of the Pueblo Indians may greatly increase the demand on groundwater stocks in the Rio Grande underground water basin.

Thus, in addition to the uncertainty of out-of-state demand, the uncertainty of the extent of the Pueblos' historical water rights further complicates the task of groundwater management.

Finally, assuming the State Engineer knew there could be no out-of-state demand and knew the Pueblos' quantity entitlement, there remains the problem of balancing: (1) the rights of present capital investors, (2) the needs for better current utilization of the resource, and (3) the needs of future generations. The following hypothetical illustrates the difficulty of selecting one group over another.

Assume an aquifer that will be exhausted at its present rate of withdrawal by agriculture in 150 years. At the well at location #1 a farmer has been pumping in place on his marginal farm on the shallow side of

56. New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976).
59. An Act to quiet the title to lands within Pueblo Indian land grants, and for other purposes. June 7, 1924, 43 STAT. 636 (1924).
60. An Act to authorize appropriations to pay in part the liability of the United States to the Indian Pueblos. May 31, 1933, 48 STAT. 108 (1933).
61. See, e.g., New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976).
the aquifer since 1911. He just made a substantial capital investment in a new pump and sprinkler irrigation system. A large mining company seeks to drill a well and support a substantial mining and coal washing operation at location #2. Pumping as planned by the mine would exhaust the aquifer in 40 years and within two years would dry up well #1, so that the farmer would get no more water. Finally, a municipality nearby has just attracted several major industries, all of whom will provide a stable employment level for the next 75 years. They will need groundwater stocks for the projected population growth from location #3. Their planned rates of withdrawal cannot be carried out if the mining operation is in place.

How does the State Engineer decide who to protect? Should he protect the prior appropriator and leave the water untapped? Should he protect the mine because it represents maximum current utilization of the resource? Should he protect future residents of the municipality?

If he precludes both the mining well, #2, and the municipality’s well, #3, the water will last longer but at what cost to employment and population growth? If the mining well, #2, is allowed to deplete the farming well, #1, shouldn’t the farmer be compensated for his loss? Would the marketplace do the compensating if wells #2 and #3 were not allowed because of well #1? Isn’t well #1 going to collect a substantial “economic rent” if he can monopolize the whole basin merely because he was there first? These are terribly difficult questions that make the role of manager much more difficult as the demand for groundwater increases.

A great deal has been written on this subject by many experts, but those who attempt resolution occasionally wind up articulating tautologies. For example, “The practical sustained yield [of a groundwater aquifer] is the amount of water which can be withdrawn annually without producing undesirable effects.” What is “desirable” for #1 may be very

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63. The notes to International Groundwater Management: The Case of the Mexico–United States Frontier, supra note 51, provide an excellent bibliography of the research of the experts in this field.

64. WALTON, GROUNDWATER RESOURCE VALUATION 608–09 (1970).
"undesirable" for #3. To tell us that a "desirable" rate of drawdown is one that is not "undesirable" does not advance the inquiry very far. In a state such as New Mexico, what is a desirable rate of drawdown must be determined fairly soon.

**SUMMARY**

New Mexico has traditionally managed its groundwater both in mined and recharging aquifers.

This regime is currently under stress from three main areas: (1) the possibility of competition from unrestricted out-of-state demand from sister states, (2) the problem of unquantified Indian entitlement within the state, and (3) the increasing difficulty of making hard choices of allocating water resources between (a) prior appropriators who have invested capital, (b) current developers who can make maximum current economic utilization of the water, and (c) water uses that preserve water for future generations.

While resolving the problems of these water competitors at the state level is difficult enough, at least there is a common political, or legal, forum for their resolution. The international problem of groundwater competition lacks even that common ingredient. Both sides of the Mexico–United States border share the difficult value questions discussed in the above hypothetical. Both sides are competitors with a position of historical and political equity, but a forum for resolution has thus far not become a reality. Hopefully, the discussion at the upcoming conference will move us all in that direction.

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**EL DERECHO DE AGUAS DE NUEVO MEXICO PERSPECTIVA Y DISCUSION DE LOS PROBLEMAS ACTUALES**

Nuevo México ha administrado tradicionalmente sus aguas subterráneas en mantos acuíferos tanto estáticos como alimentados, de acuerdo con la doctrina de los usos previos. Este régimen se encuentra comúnmente bajo tensión, principalmente en tres áreas: 1) la posibilidad de competencia que resulta de la demanda irrestricta de fuera del estado, 2) el problema de los títulos indígenas no cuantificados dentro del estado y 3) la dificultad cada vez más grande de escoger a quién asignar el agua entre: a) usuarios originales, quienes han invertido capital; b) promotores quienes pueden lograr la máxima utilización del agua y c) usos del agua que la preserven para las generaciones futuras.

**La Doctrina del Uso Previo**

La doctrina del uso previo se ha expedido para ir de acuerdo con la geografía y el clima de los estados occidentales de los Estados Unidos. El agua es un preciado artículo de primera necesidad
de escaso abastecimiento. El sistema opera para dar a las personas una “fecha de prioridad” en el día en que ellas desvían el agua. Se asignan más fechas de prioridad en la medida en que mayor número de personas utilizan la fuente de agua que está totalmente “apropiada” —utilización de toda el agua disponible— o hasta que está “sobre-apropiada” una circunstancia en la que las personas desean utilizar más aguas de la disponible para distribución. Cuando hay insuficiencia de agua en la corriente para suplir la demanda, la persona con derechos de agua más antiguos tiene derecho a su cantidad total sin tener en cuenta su localización geográfica. Así, las personas que tienen derechos más nuevos sobre una corriente sobre-apropiada no tienen agua en épocas de escasez. Esos nuevos propietarios de derechos de agua irán con los usuarios de agua antiguos y les comprarán sus derechos si están dispuestos a pagar el precio. De esta manera, el agua será transferida continuamente, por los menos en teoría, para el uso que genere mayor ganancia.

Distribución de aguas del subsuelo en Nuevo México

Nuevo México es un estado de apropiación prioritaria, hasta en lo que se refiere a sus aguas subterráneas. La legislatura ha declarado como públicas las aguas del subsuelo, estando sujetas a apropiación para uso benéfico. Ningún individuo es propietario del agua; no obstante uno puede adquirir un derecho de propiedad real para desvíar el agua en su provecho.

El derecho del estado de Nuevo México encarga a su Ingeniero Estatal la obligación de administrar todos los asuntos relacionados con la apropiación, transferencia y distribución del agua. En lo que se refiere a los mantos acuíferos estacionarios, tiene el poder para determinar la vida útil de las cuencas acuíferas subterráneas. Esta determinación permite al agua ser extraída de la cuenca hasta que el agua de uso agrícola o industrial ya no sea económicamente viable. Y en cuanto a los mantos acuíferos alimentados, puede coordinar la relación entre los retiros del agua subterránea y los compromisos superficiales previos.

El problema de la competencia entre los Estados

El manto acuífero de La Mesilla Bolsón, al sur de Nuevo México, en la frontera de Tejas y México, contiene una cantidad importante de agua subterránea sin extraer. Para tener acceso a esta agua de Nuevo México, El Paso entabló un juicio, alegando que el estatuto de Nuevo México que prohíbe la transportación fuera del estado de aguas subterráneas viola la constitución de los Estados Unidos. El Paso argumenta, que si a Nuevo México se le permite conservar el agua exclusivamente para sus residentes, entonces otros estados podrían hacer lo mismo no sólo con el agua, sino también con otros recursos, como madera, carbón, petróleo y gas. Por su parte, Nuevo México argumenta que el agua es un recurso único que requiere un trato constitucional especial. Además, el uso de este recurso por El Paso sería una violación al Compacto del Río Grande. Como el equipo estatal de ingenieros no puede controlar el consumo de agua en Tejas para asegurarse de que está siendo usada de manera sostenible, Nuevo México sostiene que su uso en Tejas sería ilegal.

Además de las objeciones legales anteriores, existen algunos argumentos políticos serios propuestos por Nuevo México. Si Tejas no controla el retiro de sus aguas subterráneas y sin embargo, puede tomar el agua subterránea de Nuevo México, ¿Podrá realmente este último regular y planear su futuro? ¿Podrá el Ingeniero del Estado de Nuevo México administrar dicho recurso en una base estatal, si existe potencialmente una demanda a lo largo de la nación y no se cuenta con un control de la demanda fuera del estado? El resultado del litigio de El Paso tendrá un impacto importante en la continua responsabilidad de los planes de Nuevo México para administrar sus aguas subterráneas.

Indeterminación de la Reserva Federal de Derechos Indios

La indeterminación de la titulación de los indios usuarios de agua en Nuevo México, presenta un segundo problema para la administración de las aguas subterráneas.

En el litigio que están llevando con el estado, algunos Indios Pueblos reclaman prioridad para aguas superficiales y aguas subterráneas suficientes para irrigar cada “acre, prácticamente irrigable,” en la reservación. El estado argumenta una cantidad igual, para el uso histórico de los pueblos. Una reglamentación excesiva sobre los derechos de las aguas del pueblo a favor de los Indios Pueblos, puede incrementar en forma elevada la demanda en las reservas de las aguas subterráneas en la cuenca acuífera subterránea del Río Grande.
El problema de Equilibrar

El Ingeniero del Estado debe evaluar: 1) los derechos de los actuales inversionistas de capital, 2) la necesidad para una mejor utilización del recurso, y 3) las necesidades para las generaciones futuras. Considérese, por ejemplo, un agricultor que ha estado bombeando el agua a su granja desde 1911. Una compañía minera busca perforar un pozo en el mismo manto acuífero. Un municipio cercano ha atraído a varias grandes industrias, las que proveerán un nivel de empleo estable por los siguientes setenta y cinco años. ¿Cómo decide el Ingeniero del Estado a quien proteger?, ¿Debe proteger al usuario original, prioritario y dejar el agua sin extraer?, ¿Debe proteger el yacimiento, porque representa la utilización máxima del recurso?, ¿Deberían protegerse los residentes futuros del municipio?. El Ingeniero del Estado debe considerar el crecimiento del empleo y de la población, la compensación en caso de pérdidas, y el provecho en obtener una tasa económica substancial. A medida que se aumenta la demanda de aguas del subsuelo, el Estado de Nuevo México debe determinar a la brevedad, cual es el ritmo deseable de extracción.