THE UNCERTAIN PRESENT AND FUTURE
OF DEDICATED RETIREMENTS

by
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for
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The Uncertain Present and Future of Dedicated Retirements

Over 30 years ago the New Mexico State Engineer Office first instituted the practice and procedure of conditioning new groundwater permits on the future dedication and retirement of surface water rights. The State Engineer proposed to modify this practice in 1994 with Proposed Article 1-19 to the Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Groundwater in New Mexico. The regulation was never adopted. Instead, the State Engineer promulgated temporary guidelines for administering permits granted under the old policy, and instituted a moratorium on the granting of any future dedications. These temporary guidelines are still in effect. Unfortunately, the interim guidelines do little to clarify the administration of existing permits granted under the old policy and leave unanswered the many questions raised by a 1994 Attorney General Opinion that asserts the old practice and procedure is illegal. This comment analyzes the Attorney General Opinion, discusses the conflicts over the dedications policy, and argues that adopting the regulation would restore predictability to the process of conjunctive management of surface and groundwater in New Mexico.

INTRODUCTION

Because some underground aquifers are hydraulically connected to surface waters, water pumped from those aquifers eventually will diminish in-stream flows.¹

Consequently, if the waters of a stream are already fully appropriated, pumping water from a connected underground aquifer will impair existing surface water rights. Exactly when and how much impairment will occur is dependent on the geohydrology of the basin and distance of the well from the affected stream. 2 "The rate at which groundwater storage converts to dependence on surface water depletions is highly variable and is peculiar to each case. . . . All groundwater developments initially mine water, and finally do not." 3 The central concern for water policy managers, then, is determining the rate of transition from initial groundwater mining to induced recharge of the aquifer. In other words, how much water in a well is coming from surface flows at any point in time. The rate of transition is important because it determines when and how much a groundwater appropriator must compensate senior surface water appropriators for a well’s depletion effects on surface flows.

New Mexico statutes require the State Engineer to consider impairment of existing water rights, along with public welfare of the state and conservation of water, as determining factors in granting permits for unappropriated underground water. 4 Therefore, even if there is unappropriated water in a connected aquifer, the State Engineer

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2 See id. at 274.
3 Id. at 279-80. As used here ‘mining water’ is essentially the first stage of pumping water from an aquifer, where the effects of pumping have not yet induced recharge from connected surface waters. Balleau defines this mining stage as the period in which 98% of the water pumped is derived solely from the aquifer. Id.
4 N.M. STAT. ANN. §72-12-3 (Michie Repl. Pamp. 1997). Subsection E of the statute states that "... the state engineer shall, if he finds that there are in the underground stream, channel, artesian basin, reservoir or lake unappropriated waters or that the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state, grant the application and issue a permit to the applicant to appropriate all or part of the waters applied for, subject to the rights of all prior
may not grant a permit to use that water if existing surface rights will be impaired. In order to avoid impairment of existing water rights and allow the use of unappropriated underground water, the State Engineer instituted the practice of conditioning new groundwater permits on applicants' future purchase and retirement of existing surface rights. These 'dedications' work to offset anticipated depletions as they occur, and prevent impairment of existing surface rights.

The dedications process offered several benefits to permit applicants. First, it allowed the appropriation of groundwater that would otherwise be unavailable due to the impairment issue. Second, it allowed permittees to purchase and retire surface rights when pumping actually affected stream flow. Thus, the permittee did not have to purchase or control surface rights for dedications purposes years or decades before needed to offset depletions. Third, the permittee was subject to statutory public notice and hearing requirements only for the initial permit application and not for subsequent dedications. Thus, once the State Engineer granted the new permit, the permittee did not face the prospect of public hearings each time it purchased and dedicated a water right to meet permit conditions. Finally, the policy offered flexibility for tailoring permit conditions to each applicant's particular situation, and continuity in the administration of all permits issued under the policy.

The dedications process also served the State Engineer's interests. Dedicated appropriators from the source.” Id.

5 As the court noted in City of Albuquerque v. Reynolds, 71 N.M. 428, 440 (1962), "[T]he state engineer adopted the only known plan to avoid impairment to existing rights and [ ] his requirement, that surface rights be retired to the extent necessary to protect prior stream appropriators as a condition of the granting of an application to appropriate from the basin, is within the lawful power and authority of the state engineer."
water rights revert to the public waters of the state. In effect, a dedication is a voluntary, contractual, abandonment of an existing water right.\(^6\) The permittee maintains no proprietary interest in the water returned to the river (since it replaces water taken from the river, to which the permittee does retain rights), and the priority date and place of use of that right is lost. Consequently, the State Engineer saves the time and litigation expenses involved in any future adjudication of those rights. Secondly, the new well has one priority date, the date of the permit application, instead of the numerous priority dates possible if water rights were actually transferred to a single well site.\(^7\)

In sum, the dedications practice can be viewed as an early attempt at conjunctive management of ground and surface waters of the state. It recognized the hydrologic connection between streams systems and underlying aquifers, and was designed to efficiently allocate the public waters of the state without impairing the rights of prior appropriators. However, as one observer has noted, “everything is in the process of changing or becoming” in water law, and the dedications practice is no exception.

Water is a scarce commodity in the desert Southwest, and many river basins, such

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\(^6\) Abandonment is a common law concept whereby the owner of a water right is deemed to have intentionally given up the use of the water right. Normally, the owner of the right will deny abandonment, since a water right is a valuable commodity. In the case of dedications, however, the owner intends to give up the right in order to meet permit conditions. Since intent is the essence of abandonment, dedications are essentially contractual abandonments. See People v. City of Thornton, 775 P.2d 11 (Col. 1989), for the requisite standards for showing abandonment.

\(^7\) This is a theoretical advantage only, in that there has never been an actual 'call on the river' to enforce the priority of senior appropriators in New Mexico. The point is probably moot anyway since, whether the well has one priority date or many, it is next to impossible to enforce priority dates on wells over the short term. The cessation of pumping would not immediately leave more water in the river for the same reason that initiating pumping from the aquifer does not immediately affect streamflows. See David L. Harrison & Gustave Sandstrom, Jr., *The Groundwater-Surface Water Conflict and*
as the Rio Grande’s, are fully appropriated.\textsuperscript{8} Thus, most new development requires the transfer of water from traditional users to municipal and industrial users,\textsuperscript{9} though pumping from the aquifer postpones the day of transfer.\textsuperscript{10} The dedications policy allowed the use of otherwise unappropriable groundwater without the administrative hassle of formally transferring surface rights. In the end, however, much, if not most, of the water comes from the river, and this means reallocating water from irrigation to municipal and industrial uses.\textsuperscript{11} Thus, even though there are administrative differences between retiring water rights and transferring\textsuperscript{12} water rights, the effect on the river is the same. It was only a matter of time before some observers labeled this difference as a distinction without a difference.

One catalyst for this change in perception was a permit application made by Intel in 1993.\textsuperscript{13} Intel wanted to pump approximately 4500 a/f/y from the aquifer underlying...
the Rio Grande.\textsuperscript{14} The permit was bitterly contested by the city of Corrales and environmentalists.\textsuperscript{15} The upshot was a reevaluation of the dedications policy,\textsuperscript{16} a moratorium on any further dedications pending approval of new regulations governing their use,\textsuperscript{17} and an Attorney General opinion declaring the old policy illegal.\textsuperscript{18} The dedications policy, while promoting commercial development and urban growth, was threatening traditional users of water, and promoting what some critics saw as an unrealistic optimism about the supply of water in New Mexico.\textsuperscript{19} And while the subsequent proposed regulation governing dedications\textsuperscript{20} addressed many of the concerns of the critics, opposition to the regulation and a change in administration effectively halted the momentum to adopt a written procedure.

Consequently, the rather unwieldy temporary policy is still in place, creating uncertainty in how existing permits will be handled, a virtual halt to any new appropriations from aquifers connected to the Rio Grande, and a lingering question as to whether the Attorney General was correct in asserting that the old dedications practice

\textsuperscript{14} \textit{In re} Application of Intel Corp., Findings and Order of the New Mexico State Engineer, 1 (June 10, 1994).
\textsuperscript{15} See Moshe Noble, \textit{Intel Getting More Heat in New Mexico}, \textit{Business Journal}, May 2, 1994, at 3;
\textsuperscript{16}See Memorandum from the State Engineer Office Rio Grande Task Force to Eluid Martinez, State Engineer, Recommendation Regarding the Issue of Water Rights Dedications (Aug. 5, 1994)(on file with the Office of the State Engineer of New Mexico)[hereinafter Task Force Memo].
\textsuperscript{17}See Untitled memorandum from the N.M. State Engineer setting forth temporary guidelines for the administration of dedications 1 (December 29, 1994)(on file with author)[hereinafter Guidelines].
\textsuperscript{20} Order No. 152, \textit{In re} the Promulgation of Article 1-19 Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, 5 N.M. Reg. 1131 (Sept. 30,1994)[hereinafter Order No. 152].
and procedure was illegal. By neither continuing with the old dedications policy nor instituting a new regulatory replacement, the State Engineer has effectively decided not to decide. With the City of Rio Rancho's pending permit to appropriate some 12,000-acre feet from the Rio Grande Basin,\textsuperscript{21} sooner or later a decision must be made. Without some way to offset river depletions, the permit cannot be issued. The question that must be answered is whether or not the dedications practice and procedure is legal. Was the Attorney General right? If it is illegal, and the temporary policy unworkable, then the rational solution is to adopt Order No. 152.

\textbf{The Attorney General Opinion}

In 1994 the Attorney General released an opinion labeling unlawful "the practice and procedure of approving applications for new appropriations of water on the condition that unspecified existing water rights be 'retired' and 'dedicated' at some time in the future."\textsuperscript{22} The Attorney General concluded first, that the State Engineer cannot fully evaluate whether a new appropriation will impair existing rights or be detrimental to the public welfare and conservation of water without first specifying what rights are being retired before issuing the permit. "The statutes require that a complete analysis occur \textit{at the time} the new appropriation is approved so that the requisite findings can be made at the time the permit is issued."\textsuperscript{23}

Second, the Attorney General opined that dedicated retirements are actually a

\textsuperscript{23} \textit{Id.}, at 7.
“change of purpose, point of diversion, and/or location of existing surface rights” which are governed by statute. If so, the State Engineer did not follow statutory procedure when he approved retirements without requiring public notice or opportunity for hearing to those people in the area of the retirements whose rights could be adversely affected by the change. Conversely, if the dedications process is not considered a change under existing statutes, then “it is a water right change neither expressly nor impliedly authorized by the State Water Code.”

Third, the opinion concluded that this failure to follow statutory procedures providing for notice and opportunity for hearing violates procedural due process. Likewise, if the State Engineer is operating outside of statutory authority in granting permits, then he is without jurisdiction. Either way, the permits granted under the dedications policy are invalid, according to the Attorney General.

The Attorney General raised serious concerns about the legality of the dedications practice, and though some of these criticisms are arguable propositions, others point to fatal flaws in the old dedications practice and procedure.

The Opinion rests on two arguments. The first is that dedicated retirements are de facto changes in place or purpose of use. The second is that relevant case law does not support the dedications practice and procedure whereby the State Engineer issues permits before the proposed water rights to be retired are identified, and no notice or opportunity for hearing is given before those rights are retired. Proponents of the old dedications practice point to two New Mexico Supreme Court cases for support of the practice, but

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24 Id. at 8.
25 Id. at 9.
depend on a broad reading one of the cases to support their view. The Attorney General takes a narrower view.

**Analysis of the Attorney General's Opinion & City of Roswell v. Berry.**

Both defenders of dedications and the Attorney General agree that the decision in *City of Albuquerque v. Reynolds* supports the proposition that the State Engineer has the power and jurisdiction to condition permits for the appropriation of water. However, there is disagreement on whether the case validates the exact procedure by which the State Engineer may condition permits. Proponents of the procedure claim that the court was affirming not only the legality of conditioning permits, but also the procedure by which the permits were conditioned. Such an interpretation is directly counter to the Attorney General's contention that the procedure itself was not at issue in the case. The Attorney General has the better argument.

In *Albuquerque v. Reynolds*, the court confronted the question of whether the State Engineer could require the "retirement of surface water rights as a condition precedent to the appropriation of underground water."(emphasis added). The district court had held that the State Engineer had exceeded his lawful jurisdiction and authority

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28 *Id.* at 81; Comments and Recommendations of the Albuquerque Academy with Respect to Proposed Dedication Regulations, Hearing on Order No. 152, letter to John Hernandez, Hearing Officer, New Mexico State Engineer Office, from Tim De Young, attorney for Albuquerque Academy (Dec. 23, 1994) (on file with author).
29 *Id.* at 3.
30 379 P.2d 73, 78 (N.M. 1962).
in doing so.\textsuperscript{31} The supreme court reversed the district court, holding that the State
Engineer’s requirement “... that surface rights be retired to the extent necessary to
protect prior stream appropriators as a condition of the granting of an application to
appropriate from the basin, is within the lawful power and authority of the state
engineer.”\textsuperscript{32} Read in the proper context of the issue before the court, \textit{i.e.}, whether the
State Engineer could require retirements as a condition precedent to appropriation, the
holding at best validates the State Engineer’s authority to require that surface rights be
retired \textit{before} issuing a permit.

The New Mexico Supreme Court, in \textit{City of Roswell v. Berry},\textsuperscript{33} arguably endorsed
the State Engineer’s dedication practice and procedure. Roswell had applied for a permit
to change the location of an existing wellfield and the place and purpose of use of the
water.\textsuperscript{34} Carlsbad Irrigation District and Mr. H.C. Berry protested the application, but
Carlsbad dropped its protest when Roswell stipulated to retire 1500-acre feet of water
rights to offset depletions on the Pecos River.\textsuperscript{35} Mr. Berry objected that the stipulation
was an amendment to the original application which therefore had to be readvertised,
with the specific character, nature and location of the proposed rights to be retired
identified in that notice.\textsuperscript{36} The court rejected Mr. Berry’s argument, and stated that the
issue under the relevant statute was whether approval of the permit would impair existing
rights, noting that “[t]he principle underlying the statutory requirement of application,

\textsuperscript{31} Id.
\textsuperscript{32} Id. at 81.
\textsuperscript{33} City of Roswell v. Berry, 452 P.2d 179 (N.M. 1969).
\textsuperscript{34} Id. at 181.
\textsuperscript{35} Id. at 181, 182.
\textsuperscript{36} Id. at 181.
notice and hearing is to insure that the change proposed in the application will not impair
the rights of the appropriators.\textsuperscript{37}

The Attorney General, however, concludes that \textit{Berry} does \textit{not} validate the
procedure of conditioning permits on the condition that the applicant retire existing rights
sometime in the future without first giving public notice and opportunity for hearing of
the proposed retirement.\textsuperscript{38} Rather, the opinion attempts to distinguish the facts in \textit{Berry}
from situations in which the State Engineer normally utilizes the dedications practice and
procedure in conditioning permits.

The Attorney General first notes that \textit{Berry} involved a transfer of existing rights
instead of a new appropriation.\textsuperscript{39} Second, the specific water rights to be retired were
identified before the application was approved.\textsuperscript{40} Third, there was no indication that the
protestant’s water rights would have been impaired by granting Roswell’s application.\textsuperscript{41}

The Attorney General’s first point implies that because \textit{Berry} involved an
application for a transfer of water rights instead of an application for a new appropriation
of water, the case is not on point. This point is shaky however, since transfers are subject
to the same notice and hearing requirement as are new appropriations.\textsuperscript{42} The notice and
hearing requirements serve the same purpose, which is to insure that existing rights are
not impaired by any new or different use of water. Because the issue here is whether
notice and opportunity for public comment are required in the case of dedicated

\textsuperscript{37} \textit{Id.}
\textsuperscript{38} 94-07 Op. N.M. Att’y Gen. 7 (1994)
\textsuperscript{39} \textit{Id.} at 6.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
retirements, it is irrelevant as to whether or not the application was for a new appropriation or a transfer. The dedicated retirements in this case were to "offset the effects of [the] proposed new well field on the flow of the Pecos River." Moving the well field would have impaired existing surface rights without the proposed retirements. This is the same problem addressed in applications for new underground water permits. Over time, impairment is a certainty when the aquifer is hydraulically connected to a fully appropriated stream, regardless of whether the groundwater appropriation is permitted under the transfer statute or the new appropriation statute. The only questions are when and how much the appropriation will affect the flow of the river. The State Engineer may condition either type of permit to avoid impairing existing rights.

In City Roswell v. Berry, protestant Berry's rights were underground rights, not surface rights. Consequently, as the Attorney General notes, his rights were not necessarily impaired by the new well location appropriation. This fact does differ from the situation where an appropriation will undoubtedly impair an existing surface right. Berry contended that the State Engineer should not have considered the 1500-acre feet in his calculations of whether Berry’s rights would be impaired. However, the court focused on the impairment issue, and found that since there would have been an insignificant effect on Berry’s wells even without the retirement, Berry’s claim was groundless. The purposes of the statute were met.

The Attorney General opines that Berry also is not on point because the specific

44 Balleau, supra note 1.
46 452 P.2d at 184.
water rights to be retired were identified at the time the application was approved. As with the customary dedications practice, however, those rights were not identified in the public notice of Roswell’s application. Thus, though Berry did protest that his wells would be impaired by the transfer, he also protested that “notice should have been given that Roswell proposed to retire 1500 acre feet of water rights” and the “notice should have specified the particular rights to be retired, and the character, specific nature and location of the particular rights.” This protest well reflects the Attorney General’s concern that the applicant must give notice of the particular rights to be retired for offsetting. The Court held that the relevant statutes “...do not require the notice to include a proposed condition to the application nor to state evidentiary details which may be considered on the issue of impairment.” “Neither the proposed retirement of rights nor the details of those rights was required to be published.” At first glance, this would seem to be an explicit confirmation of the State Engineer’s dedications practice and procedure whereby no notice is given, and particular rights to be retired are not identified, before permits are granted.

However, the fact that the rights targeted for retirement were specified in the course of the hearing on the application, and before the State Engineer granted Roswell’s permit, is a key difference between the procedure utilized in the Berry case and the procedure normally utilized by the State Engineer in granting permits conditioned on

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47 Id.
49 452 P.2d at 181.
50 Id. at 181.
51 Id.
52 Id.
future retirements. Typically, the State Engineer conditioned such permits without requiring the applicant to specify exactly which rights would be retired. Rather, the State Engineer only specified the amount of rights needed for offsets. Consequently, neither the State Engineer nor interested parties could fully evaluate whether or not the permit conditions would be met before the permit was issued. The court in *Berry* did not have to address this process.

Rather, since the rights to be retired were specified before the permit was approved, the court treated Roswell’s proposed retirements simply as evidence on the issue of impairment. As the court noted, “[t]he issue . . . is whether approval of the application would impair existing rights.” The court could focus its analysis on impairment because all the evidence indicated Berry’s water rights would not be impaired, and thus his protest seemed pointless. The court stated that the proposed retirements were “evidentiary details which may be considered on the issue of impairment.” Without that evidence neither Roswell, the State Engineer, nor the Court could have fully evaluated the impairment issue. Instead the court would have had to have addressed the question of whether the “evidentiary detail” of identifiable water rights was a necessary requisite for determining the impairment issue. The court effectively avoided that question because the purpose of the statute, nonimpairment, was fulfilled in the *Berry* case. Consequently, the holding in *Berry*, that evidentiary details on the issue of impairment do not have to be published, only relates to cases where the applicant has already identified the specific rights that will be retired. Thus, the Attorney

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54 452 P.2d at 182.
General is correct in saying that *Berry* did not validate the State Engineer’s dedications practice and procedure. This leaves open the question of whether a separate notice is required for proposed retirements when those rights are *not* identified during the initial permit hearing.

Of course, one may assume that impairment is an impossibility when it comes to retirements, and therefore it doesn’t matter when an applicant identifies proposed retirements. After all, not using water surely leaves more water for others. Unfortunately, the hydrology is not so simple. Where a particular water right is located on a stream in relation to another is a key factor in determining if retiring the former will offset a withdrawal at some other point on the stream. For instance, retiring a water right downstream from a new appropriation may not protect the water rights lying between the retired right and the new upstream diversion point. Public notice and an opportunity for protest better insures that existing water rights holders may express their concerns about changing use patterns of water.

The 1985 addition of public welfare and conservation of water requirements to relevant statutes governing water rights applications\(^56\) casts further doubt on the legality of the dedications practice and procedure. If we follow the rationale of Judge Encinias’ holding in *In re Application of Sleeper*, public welfare of the state may entail considerations that require a balancing of factors beyond a simple economic calculus.\(^57\)

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\(^55\) *Id.* at 184.


Parties interested in protesting dedications have no notice or an opportunity of having an administrative hearing to do so. Thus, even if one takes an extremely broad reading of the holding in *Berry*, it cannot be stretched to automatically cover dedications made after 1985.

From this perspective, the most that can be said of the *Berry* holding is that it validated the dedications practice and procedure whereby the rights proposed to be retired are identified during the hearing on the original permit. The court’s finding that the proposed retirements were evidentiary items on the issue of impairment logically requires that those rights must be identified before the State Engineer or protestants can make a full evaluation of the impairment issue, as well as issues of public welfare and conservation of water in the state.

*The transfer/retirement distinction*

The rest of the Attorney General’s opinion is based on the conclusion that there is no effective difference between dedicated retirements and transfers of water rights.\(^{58}\) If so, the State Engineer would have violated statutory procedure in granting permits without requiring public notice of the specific water rights being retired for dedication. This would also mean that all permits issued under the dedications policy would be invalid because the State Engineer lacked authority to issue those permits contra the transfer statutes.\(^{59}\)

Broadly read, the holding in *Berry* implicitly confirms that dedicated retirements


are not legally equivalent to transfers or changes of place and purpose of use. Rather, the Court treated conditioned retirements as if they were outside the scope of statutory notice and hearing requirements, despite the fact that the statute governing changes in location or purpose of use mandates such advertisement and hearing as are prescribed in the case of original applications. However, the protestant, Berry, did not claim that retirements were equivalent to changes in place or purpose of use, and thus the court did not directly address the issue.

Proponents of dedications also argue that the distinction between dedicated retirements and transfers is based on administrative practice and hydrologic reality. A basic distinction between retirements and transfers is that transfers have a priority date attached to the water right, whereas retirements do not. When surface rights are transferred from one place of use to another, the priority date attached to those rights travels with the water right, and the permittee retains ownership of those rights. In contrast, once a water right is dedicated and retired, the owner no longer owns those rights. These administrative differences are real, and they have legal effects. They also reflect a concern about the hydrology of wells and aquifers.

Maintaining the legal fiction of transferring a surface right with a priority date to an underground well ignores a hydrologic reality. Senior appropriators may ask the court to enforce their priority date by enjoining junior appropriators from diverting water in

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60 See N.M. STAT. ANN. §§ 75-11-7, 75-11-3 (Repl. Vol. 1968)(renumbered as 72-12-7 and 72-12-3).
times of shortage, thus leaving more water in the river for the senior users.\textsuperscript{63} However, unlike stopping surface diversions, cutting off well pumping does not simultaneously put more water back in the river; rather, gravity continues filling the cone of depression created by the well.\textsuperscript{64} Just as it may be months, or even years, before a well has its full effects on surface flows, it may take months or years for those effects to abate after pumping has ceased. The priority of the transferred right is therefore unenforceable because requiring cessation of pumping would not remedy the senior appropriator’s lack of water.\textsuperscript{65} The fact that dedicated retirements lack a priority date recognizes this fact and does not create the expectation of enforcement attendant to priority dates for surface rights. Of course, it also ignores the priority system, in that junior appropriators, well owners, are assured of their full appropriation even in water short years.

As noted above, there are administrative differences in how the State Engineer treats retirements and transfers. But the Attorney General opinion is correct in asserting there is no real effective difference between the two. Whether one ‘retires’ a water right or ‘transfers’ a water right, the effect on the river is the same; both result in water not being used at the ‘move from’ or ‘retirement’ site. Neither practice involves actually moving water from point A to point B. Rather, not using water at point A leaves more

\textsuperscript{63} N.M. STAT. ANN. § 72-1-2 (Michie Repl. Pamp. 1997).
\textsuperscript{65} See Harrison & Sandstrom, \textit{supra} note 7. The authors note that Colorado has recognized this time lag problem by recognizing the 'futile call' concept, whereby senior appropriators may not shut down junior appropriators if it will not have the effect of delivering water at the time and place of need. \textit{id.} Thus, well owners, whose rights are junior to most surface appropriators, have the distinct advantage of having a reliable source of water that is often not susceptible to the vagaries of weather, or the priority
water in the river at point A. Thus, if point B is in close proximity to, or downstream from A, there should be more water available at B, and detriment to existing surface rights shouldn’t be an issue.

The statutes nonetheless require that notice and opportunity for hearing be given for "transferring" a water right, the purpose being to insure that the change in place or purpose of use is not detrimental to existing water rights. Since a water right retirement may have exactly the same effect on the river as does a transfer, it logically follows that notice and hearing requirements should apply to retirements. After all, the statute assumes the possibility of impairment or detriment to prior existing rights, even though there may be no chance of impairment in any given case.

An opportunity for hearing provides potentially affected parties a forum in which to protect their interests. And while those parties do have the option of protecting their interests in court, litigation may impose an unconscionable burden of time and expense on prior stream appropriators, a consequence easily avoided by a broad reading of the statute. A case in point is *Albuquerque v. Reynolds*. The court was confronted the question of whether to narrowly construe the term “impairment from the source” to mean that the only appropriators protected by the statute were those that had wells in the basin system.

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66 N.M. STAT. ANN. §§ 72-5-22, -5-23, -5-24, -12-3, -12-7 (Michie Repl. Pamp. 1997). I use the term "transfer" interchangeably with "change of place or purpose of use." Technically speaking, a transfer is simply a change in ownership of a water right, which would mean that retirements are definitely the same as transfers. See N.M. STAT. ANN. §§ 72-5-22 (Michie Repl. Pamp. 1997) (transfer of water rights). See Gould, *supra* note 9, at 457.

where the new applicant for a new groundwater appropriation was located. If so, existing surface water rights would not be considered in determining if a new groundwater appropriation impaired existing water rights. The court stated that it would not “lend legislative sanction to wrongful act on the part of a subsequent appropriator,” and held that the statute should be read broadly to protect all appropriators from the streams fed by waters from the same basin or source. Likewise, prior appropriators should be protected from the potential effects of retirements, and the statutes governing changes in place and purpose of use should be read to include such retirements.

Statutory authority for dedications

The Attorney General also concludes that if the dedications process is not considered a change of purpose, point of diversion, and/or location of existing surface rights, then “it is a water right change neither expressly nor impliedly authorized by the State Water Code.” If so, then the State Engineer is operating outside of statutory authority in granting permits, and therefore without jurisdiction. Does the state engineer have the authority to interpret statutes in such a manner? He clearly has authority to interpret the statutes in such a manner as to condition permits, and clearly has authority to manage the public waters of the state. There is no case law that specifically addresses the legal definition of a dedicated retirement and whether it is a

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68 Id. at 80.
69 Id.
“water right change” in the legal sense.\textsuperscript{74} However, the State Engineer has utilized dedicated retirements for more than 30 years, and granted hundreds of permits under the practice and procedure, without any objection from the legislature. As the court notes in \textit{Ensenada Land and Water Ass’n v. Sleeper}, \textsuperscript{75} "long-standing administrative constructions of statutes by the agency charged with administering them are to be given persuasive weight, and should not be lightly overturned."\textsuperscript{75} Moreover, "[t]he more long-standing the state engineer’s interpretation of construction of the statutes without amendment by the legislature, the more likely [his] interpretation reflects the legislature’s intent.\textsuperscript{76}

Though the courts give agency interpretation of statutes great deference,\textsuperscript{77} it is a small hook upon which to hang the distinction between transfers and retirements. This is especially so when the State Engineer has questioned the previous acceptance of the distinction by proposing to change the rules. If we grant that agency interpretation of statutes must be given great deference, then the rule must apply to present interpretations as well as the past interpretations. Changing circumstances and changed law may force the State Engineer to alter the procedures governing dedications. Promulgating rules and regulations is within the State Engineer’s power,\textsuperscript{78} and a reasonable interpretation of terms must be part of that power. Consequently, we may accept former State Engineer interpretations of retirements as being within his statutory discretion; but this also means that putting more procedural requirements on their use is also within his discretion.

\textsuperscript{74} Though as mentioned above, the N.M. Supreme Court in \textit{Berry} did not treat dedicated retirements as water rights changes or transfers.


\textsuperscript{76} \textit{Id}.

\textsuperscript{77} \textit{See} State v. Meyers, 326 P.2d 1075, 1080 (N.M. 1958).
Constitutional Due Process

The Attorney General’s final point, that the dedications practice and procedure violate due process, hinges on the characterization of retirements as de facto transfers. As noted above, this is a meritorious characterization. To trigger a procedural due process claim, a party’s fundamental right to life, liberty or property must be at risk.\textsuperscript{79} As vested property rights, water rights may not be taken, or significantly impaired, without due process. Admittedly, it is difficult to make the argument that neighbors to a proposed water retirement are entitled to process when no one is depriving them of a water right. One may propose that the private act of not using a water right is sanctioned by a state action, and that the retirement may affect the cost of using neighboring water rights; but this does not qualify constitutionally as a deprivation of property because no water right is being taken away. New Mexico courts have ruled that neither increased ditch maintenance costs\textsuperscript{80} nor increased pumping costs\textsuperscript{81} due to the transfers of neighboring water rights even constitute impairment of water rights as a matter of law, let alone a deprivation of those rights.

However, the statutes governing transfers assume that impairment is a possibility, and this is enough to require notice and hearing. In \textit{El Dorado at Santa Fe, Inc. v. Cook}, lack of notice was enough to trigger a due process claim, a claim that resulted in the

\textsuperscript{79} Board of Regents v. Roth, 408 U.S. 564 (1972); State v. Hines, 432 P.2d 827 (N.M. 1967).
invalidation of the challenged permit. If retirements are de facto transfers, then the administrative appellation of ‘retirement’ cannot protect the dedications procedure from the constitutional claim.

The Interim Policy and Order No. 152

In light of the Attorney General’s Opinion, the State Engineer, in consultation with the Attorney General, set forth temporary guidelines for administering approved permits and pending applications for new appropriations of groundwater that involve existing and future dedications of water rights. The guidelines ban “any new dedications or permits conditioned on dedication pending final adoption of a regulation concerning retirement of water rights.” However, the guidelines provide for two exceptions to the ban. For any pending applications that propose the future dedication of water rights, the permit holder must statutorily transfer all water rights necessary for offsetting before any water is diverted under the permit. For previously approved permits which require dedications that have yet to be accepted by the State Engineer, the permit holder may apply for a permit to transfer water, or dedicate water rights on a temporary basis if the State Engineer finds the offset is necessary to prevent detriment to existing rights. In effect, the guidelines place a moratorium on any new groundwater

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83 Guidelines, supra note 14, at 2.
84 Id.
85 Those applications accepted before the moratorium of June 23, 1994. Id. at 1-2. Both Rio Rancho and Albuquerque have pending applications requesting a total of 35,000 acre-feet of water. See Andrew Padilla, City’s Water Use Down Sharply, ALBUQUERQUE JOURNAL, Jan. 3, 1997, at 1.
86 Id. at 2.
87 Id. at 3. The temporary period runs until the "permit holder can comply with any State
withdrawals and require transfers for all existing permits and pending applications until the State Engineer issues a regulation governing the retirement of water rights. This is a very conservative policy designed to effectively avoid any questions of legality in the short term. However, it was written as a temporary policy, and as such, it provides no indication of how dedications are to be administered in the long term. Until a regulation is adopted, there is no policy upon which either applicants or permit holders may depend.88

Assuming that inefficiency is not the goal of the State Engineer, the issuance of a regulation governing water rights retirements would be a logical next step in improving the administration of water in the State of New Mexico. Proposed Order No. 152 is the logical starting point for such a regulation.89 Incorporating the recommendations of the hearing examiner and suggestions from the Rio Grande Task Force would result in a policy that adequately addresses the concerns of critics of the old dedications practice. It would also lend needed predictability to the water rights market.

From the preceding analysis we know that the supreme court held that the State Engineer has the power and authority to require applicants to retire surface rights in order to protect prior stream appropriations.90 In Berry the court validated the dedications practice and procedure whereby rights proposed to be retired are identified during the hearing on the original permit. The court’s finding that the proposed retirements were

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88 Presumably the State Engineer also could lift the temporary guidelines, however this would not increase predictability since the legality issue would remain unaddressed.  
89 Order No. 152, supra note 20.  
evidentiary items on the issue of impairment logically requires that those rights must be
identified before the State Engineer or protestants can make a full evaluation of the
impairment issue. The subsequent addition of the public welfare and conservation
clauses to the statutes governing applications for new appropriations and changes in place
and purpose of use also argue for a more open process for evaluating changes in water
use.91

Proposed Order No. 152 significantly modifies the procedures by which
applicants may acquire and retire offset rights to meet permit conditions. Article 1-19.3
of the regulation requires applicants to estimate the maximum amount of water rights
needed for offsets, the annual schedule of retirements, and the identity of the area(s) from
which the retirements will be made.92 Article 1-19.5 requires applicants to own or
contractually control the water rights necessary for dedication for the first ten-year
pumping period.93 In the initial application, notice and an opportunity for hearing must
be given for both the new appropriation and the proposed retirements.94 For the second
ten year pumping period, the applicant must submit an amendment to the application and
dedicate the needed offsets by the end of the seventh year of the first pumping period,
again with the same notice and hearing provisions as required in the first period.95 If
dedications and retirements are needed after twenty years, the above process is repeated
in the seventeenth year, and all remaining rights necessary for the life of the permit must
be dedicated. Protests or objections to the amended applications are limited to the water

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92 Order No. 152, supra note 20, at 1131-1132.
93 Id. at 1132.
94 Id.
rights identified in the amendments and do not extend to the original application.96

By providing for notice and opportunity for hearing on dedications, the proposed regulation insures that the dedications procedure is in line with the statutes and case law of New Mexico. By allowing applicants to purchase or control water rights slated for retirement in ten-year increments, the regulation maintains some of the flexibility of the old practice, while guaranteeing that applicants will not be able to run out on their permit obligations. By simply allowing the practice of dedications, the regulation allows the use of millions of acre-feet of otherwise unusable groundwater. Finally, by instituting a regulation governing the dedications process, the State Engineer would inject a measure of predictability into water rights administration that is sorely lacking at present.

95 Id.
96 Id.