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Back to the Future: Regional Differences in New Mexico Water Rights

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**New Mexico Water:
Past, Present, and Future *or*
Guns, Lawyers, and Money**

PROCEEDINGS

50th Annual New Mexico Water Conference

**October 19-20, 2005
Corbett Center, New Mexico State University
Las Cruces**

New Mexico Water Resources Research Institute

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BACK TO THE FUTURE: REGIONAL DIFFERENCES IN NEW MEXICO WATER RIGHTS

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Thank you very much. One of the pleasures of coming from Albuquerque to Las Cruces is the chance to see so many people from Albuquerque. In Northern New Mexico, I hardly see them except when I come to Doña Ana County. I am reminded what a pleasure it is to see people I have worked with in a variety of capacities and to think about the generosity of spirit that people who deal with water in New Mexico over long periods of time have shown to each other, even though we have significant differences and even though we say things about each other that might not pass in public conversation. There is a sense that we are all involved in a common business. We all do it because we love water and we love New Mexico. I am pleased

to be here, and thank you for the opportunity to talk to you for just a little bit this morning.

I had understood that Joe Stell and I were going to speak together about different aspects of New Mexico water history, and I think Joe Stell will follow me shortly. Joe Stell and I are history in New Mexico. You are getting the old folks to come talk to you about ancient institutions. I am pleased to be paired with someone like Joe. I am reminded, with respect to Joe Stell, that I thought that priority in time gave the better right. Joe Stell is older than I, so I thought he would go first, but we all know there is no such thing as priority in courts in New Mexico. I am here as the junior historian and the junior among senior presenters here this morning.

You could say that I am here this morning as an advance man of tomorrow's detailed talks on the active water rights management regulations that were recently adopted by the Office of the State Engineer, because I am going to talk about those a little bit in a historical context. You could also say that I am here to warm you up to that topic, so that you are ready for tomorrow's detailed controversial discussion of those. My job as the warmer up may be simply to inform you about the acronym that people are using in my world to describe those new active water rights management regulations, because no body can manage that. The people with whom I work and who are concentrating on them call these the AW(O)RM regulations. The AWRM regulations are sort of what happen to a third base-man like A-Rod when he gets reduced to a garden byproduct. But these are the AWRM regulations that I would like to talk to you about this morning. I said I would like to talk about them in context, and I don't want to talk about them specifically. Instead, I want to point out one general feature of those in an administrative scheme, and I want to set the feature I am going to focus on in the history of water law in New Mexico. Believe or not, I would also like to set it in the context of the development of an analogous public land law that is going on in a related field, and that is the use of the Antiquities Act in the 21st century to establish new controls over federal public lands. That is my plan.

Let me begin today by setting up the general AWRM scheme obviously to understand where I am coming from in respect to that. As I said, I am not interested in the details of it, but I am interested in the two levels of administration it proposes to adopt in New Mexico. First, there is the set of general regulations that will apply to all basins administered under AWRM as I understand it. These general regulations have been promulgated, and they have drawn the ire that their controversial nature probably deserves. The issue and validity of those is now pending up the Rio Grande in the district court in Socorro. If we can find a district judge who could stick with it long enough, we might get a decision with respect to the validity of those general regulations that would apply statewide to all basins subject to that administration. The judges in Socorro willing and probably the New Mexico Supreme Court, those universal regulations will be followed by specific regulations geared at a special problem within particular areas to be administered. I take it that implementing these on the ground AWRM regulations

will differ from place to place, depending on the local situation. At the top of the regulatory hierarchy that we are about to see in New Mexico, there will be one regulatory water law. At the bottom where the rubber hits the road, or I guess more accurately where the shovel hits the water, there will be many regulatory schemes differing from region to region and tied to different local conditions.

I am interested in this two-tiered structure – general regulations and specific implementing regulations in different basins – because it parallels the Clinton jurisdictional grab of large areas of the West between 1996 and 2001 using the 1906 Antiquities Act and building a new federal scheme of new federal management using that Act. I'll come back to that at the end of the talk today.

At the moment, let me take you back to history, a history that precedes both myself and Joe Stell. Let me take you back to 1898 at a time when the territory of New Mexico was looking down the business end of Dr. Nathan Boyd's plans for the private development of the Elephant Butte Reservoir. Scott Boyd is here today, so some things never change. And I am pleased to see that the Boyds are still as aggressive in New Mexico water as they ever were. But in 1898, the problem was the proposed private development of the Elephant Butte Dam and the private development of land between Elephant Butte Dam and the Texas border. They were looking down that problem in 1898, and they were looking down the problem of Francis Tracy's extravagant vision of what was possible in the Lower Pecos, partially in Roswell using surface water, but primarily in Carlsbad irrigation using the flows from the Pecos River to be stored in a series of dams upstream from Carlsbad, beginning with Avalon Dam. It was the Boyd private plans and the Tracy private plans that provide the backdrop to the 1898 scenario that I want to describe for you.

New Mexico territorial officials worried at the time that New Mexico water law was not up to the scope and the drive and the nature of those vastly expanded proposed private developments. The territorial legislature in 1897 did what all great legislatures do when they are stuck with a problem that looks like it could be really serious. They appointed a committee. On March 19, 1897, the legislative assembly of the territory of New Mexico created a commission, among other things, to "examine the laws upon the subject of irrigation that existed in 1897 and water rights enforcement in this territory and to recommend to the

next legislative assembly [Legislative assemblies met in alternative years at that time, as they did up until very recently] such legislation as in the opinion of the commission shall meet all requirements on the subject.”

The commission members included a couple whose names you might recognize or that will give you an indication of the prominence of these people. One was Antonio Joseph, who was an Ojo Caliente and Taos area Hispanic politician. He was very powerful and very astute. He was one member of the commission. The other was W.S. Hawkins, who was really the first great water lawyer in New Mexico. He cut his teeth in the Tracy visions for the Lower Pecos trying to organize the water rights on the Lower Pecos to support his vision for huge, private irrigation below Carlsbad. Hawkins then went from the Tracy's over to South Central New Mexico and began to organize for the new railroads the water rights that they would require in order to push the railroads through. Hawkins was really the first great New Mexico water lawyer, and you almost never hear his name. He is worth following as well. He was connected with A.B. Fall, and Fall was another famous water lawyer. Hawkins and Joseph were on that committee along with three others.

I think the federal officials thought at the time that the committee would recommend a complete overhaul of New Mexico water law. As they saw it, New Mexico water law was at best fragmentary in 1898, in the words of the commission. And if not fragmentary, then nonexistent in the words of W.W. Follett, a federal official who came out and looked at New Mexico's water institutions and water law in particular as of 1898. I think they were banking on the fact that this commission would recommend a centralized overhaul of the fragmentary water law in New Mexico and the establishment of a single set of water law for the whole territory of New Mexico, and thereafter for the state. And if you watch, in 1905 and then in 1907, you've got from the territorial legislature what were essentially centralized water codes culminating in the 1907 water code, with some basis for the belief that this was what this commission would recommend.

The commission surprisingly filed its report in 1899, and it found that no such radical step, no comprehensive legislation, was needed for New Mexico nor would it serve New Mexico's interests. True enough, the commission reported in 1899, there was no one body of water law for the whole territory of New Mexico. The acequia laws of Northern New Mexico bore little relationship to the situation in Carlsbad and below

Elephant Butte. The water needs of the ranching country in northeastern New Mexico bore almost no relationship to the water needs of developments in southwestern New Mexico where the mining industry was about to come online.

New Mexicans agreed, the commission reported on the very basic principles. These were the principles that New Mexicans could agree to in 1898: “The right to appropriation of surplus waters of all streams is recognized and upheld, qualified only by the doctrine that priority in time is priority of right, that rights claimed unperfected with new energy, that the appropriation must be made for beneficial use and is limited to the amount of water needed for such purposes.” This is what the commission said New Mexicans could agree on in all the different parts of the state.

Now if you take that language and straighten it out just a little bit, not much, what you end up with is Article 16 of the New Mexico state constitution which is the most general statement of

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what the basic water law in New Mexico is. In 1898, the commission said we can agree with just less than a page description of the fundamental attributes of New Mexico water rights. But beyond that, the 1899 commission recommended there was no need for more comprehensive legislation. New Mexico differed from other western states, it said, and it would be inappropriate to “engraft,” as the commission described it, the law of any other western state in New Mexico. That is, when you read the law report, they say we follow the Colorado doctrine in New Mexico, and they always put that in quotes.

In fact the water law in the 1907 code comes from the Wyoming statute that set up the state engineer system and a system of permits, and it was drafted by Morris Bean from the Bureau of Reclamation. They had a powerful influence in New Mexico. They gave us our basic water code in 1907. This commission said don't follow Colorado doctrine, don't follow Wyoming, don't follow Utah, don't follow any other western state because New Mexico is fundamentally different from those states. They are all prior appropriation states,

but this commission said that New Mexico was different. Indeed, the commission said, “it is the varying condition of nearly every section of this territory as to these essentials which render the works of your commission in determining what laws should be made applicable a difficult one. General principles, of course, can be made to apply all over the territory. But when it comes to the regulation of water rights upon which irrigation is dependent in detail, those regulations which

The community ditches of New Mexico had a long history that set them apart in terms of how they administered and dealt with the water rights of the other regions of the state.

would be highly beneficial in one section of the territory would doubtless be found detrimental to other sections thereof, depending upon altitude, climate, different character of the soil, and the

different necessities of the New Mexico people.” If this sounds to you like the AW(O)RM advocates pushing and touting their two-tiered administrative scheme in 2005, remember that this was a commission in 1899 pleading for the same kind of very general base law at the top and very different local implementation at the bottom.

The fundamental differences that the commission found in the New Mexico conditions led the 1899 commissioners to recommend that the territorial legislature attempt no comprehensive overhaul of New Mexico water. As I said before, they went against that advice in 1905. Then they really went against that advice in 1907. The territory went the other way, and New Mexico adopted a water code. Among lawyers, what a code means is that this is a closely integrated, comprehensive single body of law that will govern water resources across New Mexico. By 1907, they had gone the other way in a code that did not recognize on its face the differences in regional applications that the commission had found to be so essential to New Mexicans.

For awhile after 1907, the legislatures and the courts followed for the most part the course set by the 1907 water code. What I mean by that is that they essentially treated as homogenous all the water rights in New Mexico and tried to get it going on a single path toward the future. A couple of examples of this will suffice.

One example is the community ditches. The community ditches of New Mexico had a long history that set them apart in terms of how they administered and dealt with the water rights of the other regions of the state. What first the territory legislature, then the courts, and then the state legislature did was to try and get them back on track, mostly by reducing the powers that they had. This is complicated, but they started out by doing it in 1891, when they involuntarily incorporated New Mexico’s community ditches. That gave them a legal status. It allowed them to sue, but it also allowed them to be sued. They were dragged into the centralized legal system in that way.

It is a complicated matter, but let me give you a few other examples of how the community acequias quickly lost, under the homogenous doctrine of the 1907 water code, a couple of independent powers that were crucial to their special status. First, they lost the power to the state engineer to determine when and where there was unappropriated water in the systems which they shared. Historically and prior to the water code, the power to determine who to let on to a community irrigation ditch in a common source system primarily belonged to the local acequias. They lost that power when the state engineer, not the local acequias, got the power to determine unappropriated water. Then the community ditches lost to their own parciantes, as they are called, their own people who are irrigating under their ditches, the legal ownership of the water that was delivered to those separate tracks. Historically, in New Mexico and prior to this process that I am describing for you, it was assumed that the community ditches owned the water rights, not the owners of the tracts underneath. The owners of the tracts underneath had a communal interest in those tracks of land, but it couldn’t be conveyed or sold. It belonged to the community. They lost that power very quickly under this new uniform territorial system. And as a result, the community irrigation ditches became hollow versions of what they had been prior to 1890 under this homogenous water law.

The 1907 water code noted a judge in the New Mexico Supreme Court, had “nationalized” New Mexico water, in the sense that it had control over it, it had been centralized and sent to Santa Fe. In a world like that, there was not much room for the rich diversity that characterized different community ditches and other basic institutions. Of course, there were always cracks in the face of this nationalized system. Most

appeared in the state's relatively late treatment of groundwater.

For example, the highly esoteric question of when a new groundwater appropriation impaired existing appropriations quickly showed regional variations, if you knew where to look for them. The prohibition against impairment applied across the state, but the method of determining it varied from region to region. In the Lea County underground basin, how a new water right would impair another water right was determined by time. If a new water right would reduce your 40 year supply that was impairment. On the other hand, in the Mimbres underground basin, it was not time that determined impairment, but lift. What you are guaranteed as an existing water right holder is that no new appropriator could force you to lift water higher than was economically possible at the time. Those are two different systems for defining what impairment is. It is a highly technical term, but there were regional differences always in the water law. I don't mean to suggest to you this morning that these variations in impairment definitions are manifestations of truly local differences. They just happen to be differences in how really smart people at the state engineer's office thought that it would be appropriate to define impairment.

The Mimbres underground basin regulation which defined lift, that is, you couldn't be forced to lift water more than 230 feet or drill a new well that would cause you to lift water higher than 230 feet, impaired that right. That wasn't the invention of Luna County farmers, but that was the invention of Gene Gray who was a very smart and astute employee of the state engineer's office who drafted the Mimbres regulations. He got the 230-foot figure from a study by a New Mexico state economist in 1981 estimating using farm budgets at the time and the cost of generating electricity, and how much you could afford to lift it and continue that way. You'd be glad to know that they are still following that definition still based on 1981 studies of the economics of farming in Luna County.

But I use those examples to suggest to you with at least in respect to groundwater, there always were big regional differences in New Mexico when it came to the actual definition on the ground of what impairment was. If AW(O)RM works right, we are likely to see the same regional differences in New Mexico water rights that the 1897-99 commission saw when it surveyed the turn of the 20th century scene.

The prior appropriation doctrine is much more flexible than anyone in 1907 ever thought was possible. It has had the capacity to incorporate claims under the Endangered Species Act. It has had the capacity in a back door way to acknowledge that instream rights might be worthy of the status of a water right in New Mexico and might deserve the legal protection, though this is slowly coming to the surface. The 1907 code showed a lot of flexibility. And in fact the 1907 code was never envisioned as being a general statement of law where the particular application would vary region to region depending on people's own definition of what impairment was, their own definition of what unappropriated water was, their own definition of these things.

Something like the same thing is emerging in the area of executive control of federal lands. First of all, I have been around this business for thirty years, and we generally think that water is one thing and land is another. There is a growing sense that these things need to be treated together, that land use and water use are inextricably tied together and that they need to be treated, especially in a prior appropriation state, as the single resource that they are. I am particularly encouraged to note that the City of Santa Fe has done precisely that, for the first time, in using land use controls to genuinely control water accessibility and vice versa, treating them as interchangeable resources. I am glad to see that happen, and I think it is appropriate to end today by talking to you a little bit about land use controls under the 1906 Antiquities Act.

I like the 1906 Antiquities Act for a couple of reasons. One is that it falls right in between the 1905 and the 1907 water codes. So you have the 1905 water code, the 1906 Antiquities Act, and the 1907 water code. They come out of the same sense about what it meant to manage resources in the 20th century. It is worth our paying attention to at the turn of the 21st.

The federal Antiquities Act, like the 1907 water code, was enacted to bring some order out of the chaos of the treatment of the Southwest's archeological resources. The Act was the work of Santa Fe's Edgar L. Hewitt, one of the leading archeologists there. It aimed to protect the magnificent resources of the Pecos Pueblo ruins, Bandolier, and the Four Corners Area. It aimed to protect those ruins by securing control of

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the land around them. This act could have been simply directed at the ruins themselves, but instead it was a land based act. The 1906 Antiquities Act authorized the president unilaterally to set aside the smallest amount of land necessary to protect ruins and other natural curiosities. That is what the Act said in 1906. You have to take that Act in 1906 and transport it to the 21st century. The reason you need to do that is that the 1906 Antiquities Act is the last act to authorize the president to unilaterally designate lands for particular and reserved federal uses.

The Federal Land Policy Management Act of 1976 took the power away from the executive branch and assigned a much more active role to Congress, except for the 1906 Antiquities Act. It was the only one that survived giving unilateral power to the president to make special reservations of federal land.

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between 1996 and 2001 used the remaining power to him with a vengeance, beginning in

1996 with the presidential reservation of the Grants Staircase Escalante National Monument in southwest Arizona and continuing right up to the day he left office when he reserved unilaterally the Tent Rocks, beloved to all of us, just north of Albuquerque as national monuments because he had the power to do so.

Now you can imagine the local interests who said, "Is this the smallest amount of land necessary?" The Grants Staircase Escalante National Monument was over 1 million acres, and some of the other reservations he made were equally grand. It was that problem of the language. Is it the smallest necessary? What does it have to do with ruins, which was the purpose of this? A lot of western interests screamed about the elevation of environmental protectionism, because they assumed that the newly created national monuments would be administered by the National Park Service, surely one of the least locally sensitive federal agencies of all the federal land management entities.

Now I need to tell you the rest of the story about the national monuments, because instead of giving the National Park Service control of those large areas, and they justified them on the grounds that the landscapes themselves were other natural curiosities

and that to protect the landscapes you had to preserve large, large areas of land. That was the way they justified it, and everybody was terrified that it would go to the National Park Service and that there would be no local control of it at all.

There was another half of the Clinton plan. He assigned control over those to the Bureau of Land Management. He didn't give it to the states, which the states probably would have loved more than anything. To give it to the Bureau of Land Management was to give it to the federal agency that was most susceptible to local input with respect to the management of those resources. So what you have in the 1906 Antiquities Act as it is brought to the 21st century is the same thing I think you are seeing with respect to the AW(O)RM regulations. That is the assertion of very general broad jurisdiction, and then implementing that with regional definitions of what is important in the different areas of a place like New Mexico.

I began thinking about this because Bruce Babbitt, the ex-governor of Arizona, the ex-Secretary of Interior, and now author of a recent book that has been well reviewed, has been crisscrossing the West hawking the book and hawking this plan for a new model of federal regulation of land which builds in both federal power and local control.

I think that may be the direction that the AW(O)RM regulations are heading in New Mexico. I do not mean to pair John D'Antonio with Babbitt, because he might not like that comparison, but I think they are doing something of the same thing. It may measure something of the trajectory of natural resource management that we may see in the west both with respect to water and with respect to land. With that, I leave you to the senior member of the history team, Joe Stell.