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Len Stokes

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THE TRANSFER OF AGRICULTURAL WATER TO MUNICIPAL AND INDUSTRIAL USE IN SOUTHERN NEW MEXICO
LEN STOKES*

INTRODUCTION: WATER TRANSFERS IN THE WESTERN UNITED STATES

Transfers of water from agricultural use to municipal and industrial use (hereinafter Ag/M&I) have been a tradition in New Mexico and in all of the western states that employ the doctrine of prior appropriation. In Texas and other capture states, there is no such thing. In capture states, if you own the land, you can control the water underneath it. The transfer process in New Mexico is very simple. Transfers affect the consumptive part of a vested right. If you change the place and purpose of use from Ag to M&I usage, you calculate the consumptive use and that is all you are allowed to transfer. In New Mexico, the transfer is usually ground water to ground water, or to surface water to offset ground water depletions, with some early surface water transfers based on rate and time diversions. For example, one of my clients is the City of Alamogordo, New Mexico, and about 80% of their water comes from the Sacramento Mountains, and all of those rights were based on 1,2,3 cubic feet per second from 7:00 a.m. until 7:00 p.m.

This article will cover Rio Grande Project water and the conversion of that water in New Mexico, which is a new, untried process. First, a history of the Rio Grande Project is in order.

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* Len Stokes is President of Progressive Environmental Systems, Inc. He consults in the areas of water, wastewater, and environmental issues. He has managed the design, permitting, and construction of four major solid waste landfills in southern New Mexico. He has also served as project manager on three wastewater treatment plants in the State. For the past six years, he has focused primarily on water supply and water rights issues. Mr. Stokes serves as consultant, facilitator, project manager, and as a legislative lobbyist for his clients on those issues. At the current time his clients include the City of Las Cruces, the City of Alamogordo, the Lea County Water Users Association, and the Village of Ruidoso. Mr. Stokes attended New Mexico Military Institute and New Mexico State University.

1. "The prior appropriation doctrine is more common in the western United States, where competition for scarce water resources is greater. In contrast to riparian law, which is based on land ownership, appropriative law is fundamentally a usufructuary right. The appropriative right defines the time and place of water diversion, the place where the water is to be used, and the type of use. If the appropriator wishes to change any dimension of the right, he must apply for a permit change with the state. Under the prior appropriation doctrine, senior rights are granted to the first person or party to put water to 'beneficial use' regardless of whether the land on which the water is used is contiguous to a stream. This is expressed as 'first in time, first in right.' The definition of beneficial use varies from state to state; however, traditional beneficial uses have included irrigation, livestock watering, industrial, and domestic uses. Only recently have state legislatures included recreational uses and fish and wildlife habitat protection in the definition of beneficial use." Janis M. Carey and David L. Sunding, Emerging Markets in Water: A Comparative Institutional Analysis of the Central Valley and Colorado-Big Thompson Projects, 41 Nat. Resources J. 283, 308 (2001).

2. Water found below the surface. See NMSA 1978, § 73-12-1 (1931) et. seq.

3. Water found above the surface. See NMSA 1978, § 72-5-1 (1907) et. seq.

4. New Mexico Office of the State Engineer File Nos. 0919 & 01115 Amended; 01110; 01111-01114; 01118; 01119: 01120; 01121; 01342-01346; 01383; 01411; 01412; 01455; 01456; 01562 & 2886 Combined; 2176; 0637; Subfiles 13-B; B.2; B.16; B.26; B.61 and B.83 Combined in State ex rel. Reynolds v. LT. Lewis, (Chavez County Cause No. 20294 and 22600 Consolidated). These are surface rights from the La Luz, Maruchi, Fresnal, and Alamo Largo streams, and the Rio Bonito.

5. Cubic feet per second is a method of measuring water deliveries.
The Rio Grande Project

The Rio Grande Project was authorized for several reasons. One was to ensure development of the lower Rio Grande Valley in New Mexico and the upper Rio Grande in Texas and to settle some claims and debts with the Republic of Mexico dealing with the Juarez Valley. The project was conceived through tri-state, bi-national negotiations. The water allocations were based on irrigable acreage on all three sides: New Mexico, Texas, and Mexico. New Mexico received approximately 90,000 arable acres, which is its base. Texas received approximately 70,000. The Juarez Valley was allocated 20,000. Thus, the division of project water was based on those irrigable acres at that period in time. It was a single-purpose project aimed at agriculture only. There was no consideration given to any future differing needs for the water. The Project dealt only with surface water at that time and left ground water to be administered in each independent jurisdiction.

When the Project was established, each individual farmer had a contract with the federal government in New Mexico and Texas, and they paid their assessments to the government. It was convenient because if a farmer was successful and wanted to expand his operations to buy equipment, the government had first lien on everything that he owned. So irrigation districts were formed to hold that right in trust. They are contracting agencies with the Bureau of Reclamation. They have assessment authority over their members and can transfer water rights away from members who do not pay their assessments for a period of three years. So they can move water around within the district and still maintain their acreage base.

The Elephant Butte Irrigation District ("EBID" or "District") has been successful. The farmers must put water from the district to a beneficial use. While the farmers own the water rights, the district holds those rights in trust and can use them to collect their assessments. Also, the delivery of water is determined on an annual basis. The Bureau of Reclamation will look at storage and other conditions and will tell the districts how much water it will distribute to them. Each acre in that allotment is entitled to a pro rata share of the total amount.

Transfer of Water Rights and the City of Las Cruces

Now, a little background on the transfer. The City of Las Cruces ("City") realizes the need to transition to surface water from sole reliance on ground water to meet future growth needs. There are two reasons: sustainability and seniority of the right. There are many ground water rights in the valley; most of them are from the

7. Id.
8. Id.
10. See N.M. CONST. Art XVI, § 3; NMSA 1978, § 72-1-2 (1907). This is a legal conclusion or argument made by the irrigation districts.
The City wanted to deal in an open market, not a monopolistic situation where the irrigation district could hold water users hostage. At the same time it wanted to proceed. Beginning in 1998, Las Cruces wanted to have all statutory and regulatory hurdles cleared within five to seven years. I believe that we will finalize negotiations on regulatory issues with the State Engineer this summer. Then, we will start dealing with the federal government and its Bureau of Reclamation.

The City wanted to have 5,000 acre-feet\(^\text{13}\) of project rights in place by the year 2010. We collected 1,000 acre-feet last year, and we have funding mechanisms and reserve funds in place to meet the goal of 5,000 by 2008. We are ahead of schedule in that respect.

I do not advocate that everyone take water from the Mesilla Bolsón\(^\text{14}\) and the lower Rio Grande. The agricultural industry in the valley is what makes it beautiful. That is why the City of Las Cruces has worked to develop a good relationship with EBID, which was my first assignment. Because I come from a ranching and a farming family, it was easier for me to talk to farmers than it was for the City fathers, utility directors, and City staff.

The City of Las Cruces set out to form a relationship with EBID. We continue to work with the District to make statutory and regulatory changes to make the transfer process work. The District, the State Engineer, and the City have made several statutory changes to facilitate this process.\(^\text{15}\) We changed the leasing statute to extend the lease period from 10 to 40 years, which a city would need in securing rights and financing for surface water treatment plants.\(^\text{16}\) Las Cruces formed a municipal water users' association in the state of New Mexico, which is an entity allowed under state statute now to contract with the irrigation districts and to consolidate assessments. Most of our blocks will be small: three, five, or ten acres at a time. This causes a bookkeeping nightmare on an individual assessment basis. In consolidating assessments, we have cut the District's work and our work substantially.

**INTER-STATE AND INTERNATIONAL ISSUES IN WATER TRANSFERS**

In working with the District, part of our responsibility is to protect New Mexico water for use in New Mexico while not impairing delivery obligations to Texas or to Mexico. We wanted to create zero new net depletions of water. In New Mexico, the municipality can utilize private water, such as effluent, over and over until it reaches a public watercourse. One of the agreements we reached is that those return

\(^{12}\) See NMSA 1978, § 72-12-1 (1931). The State Engineer acquires jurisdiction over groundwater only when he asserts or "declares" jurisdiction over an underground basin having "reasonably ascertainable boundaries."

\(^{13}\) Acre-feet are units of volume used to measure the capacity of reservoirs. One acre-foot is a volume one foot deep covering an area of one acre.

\(^{14}\) The Mesilla Bolsón is a large, defined underground water basin underlying the New Mexico/Texas border with Mexico.

\(^{15}\) NMSA 1978, § 73-10-48 (2000) was amended in the legislative session of 2003 to provide for "special water users' associations, which could lease water in irrigation districts organized pursuant to Chapter 73, Article 10, NMSA 1978.

\(^{16}\) See NMSA 1978, § 72-6-3 (2000).
flows will continue into the system so that there are no new net depletions. We will not deplete any more water in municipal use than was depleted in agricultural use.

The other agreement we made is not fallow farmland. We acquire the water rights when land takes a natural course of development. For example, a farmer may decide that he does not want to farm, which happens in generations when the pieces of land get smaller and what was once a 160-acre viable farm is now eight 20-acre parcels. In that case, if the farmer decides that he cannot make a living on that, but can do better selling or leasing the use of his water, then the City moves in and acquires those rights. We do not buy farms and fallow land. That is one of the key differences between Las Cruces and our sister city, El Paso.

The City pays a fair market value for the water rights. We do not want to set or break the market. We examined the value of water to a pecan farmer. That sets the price. It is an appraised value. Thus far, this system of purchasing and leasing water rights has been successful.

The other issue that is very different in New Mexico, Texas, and Mexico is the value of uses of water. In New Mexico, no beneficial use is more beneficial than another. There is no priority given to municipal use over agricultural use. Agriculture and mining uses are equal. When the City of Las Cruces realized that, the City fathers and the staff began dealing with the District on a more level basis and negotiations proceeded more smoothly.

The last phase, which will start very shortly, is to deal with the United States Bureau of Reclamation. Opinions differ on whether a third party contract is necessary. Negotiations will begin before such litigation concludes.

**CONCLUSION**

In closing, wherever municipalities transfer water from agricultural projects into municipal usage, the hurdles are easy to identify. First, the jurisdictions are layered. A federal project may invoke federal jurisdiction. The state of New Mexico has its own water laws. The Board of Directors at the Irrigation District have their own set of covenants. All of these must be considered. The best way to ensure a smooth transfer is to work in concert with irrigation districts or farmers.