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## First 100 Years of the New Mexico Water Code, The

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## The First 100 Years of the New Mexico Water Code

After eight years as editor-in-chief of the *Natural Resources Journal* and 25 years as a law professor at the University of New Mexico School of Law, I am retiring. I don't necessarily want to celebrate that step, but I do think it's appropriate to say something as I leave about another ancient institution that is still alive and well and very much a part of our current resource lives, the 1907 New Mexico water code. When I think about that code, I think about the continuity and change, the wisdom and restraint embodied in New Mexico's basic water law, now 101 years old and still alive and well in a water world its authors never could have imagined.

There are many venerable figures in New Mexico's water world. The late Al Utton was editor of this *Journal* for almost as long as Steve Reynolds was New Mexico's State Engineer. The long list of those others who have devoted their professional lives to New Mexico's pinched, high-desert resources would fill a book. The naming of these long-standing, cantankerous, devoted leaders would honor the fundamental fact that water in New Mexico is equal parts law, science, policy, and history. Their naming would emphasize that the mix of these factors is at bottom a profoundly human enterprise and that these are the movers and shakers who do the mixing. I want to return at the end of this essay to the importance of naming natural things as a way, the only way really, of respecting them.

But let me begin this essay with another venerable New Mexico water institution that deserves to be named and recognized: the water code adopted by the Territorial legislature in 1907 and still basically with us today. In 1907, that "Water Code," so-called, consisted of 73 separate sections. Like the European codes on which it was based, it aimed to be comprehensive and exclusive. The last section of the 1907 Code repealed "all other acts and parts of acts in conflict with this act" and thus tried to sweep away, unsuccessfully of course, more than 400 years of complex, contradictory water history in New Mexico. At least, the 1907 Code clearly swept away the immediate target of its cleansing, a previous 1905 law with a similar, but much more limited, scope.

The new, broader 1907 Code emphasized once again the basic principals of western prior appropriation doctrine. The 1907 Code explicitly

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recognized beneficial use as the basis, measure, and limit of a water right. The code established priority in time as the sole explicit means of apportioning varying supplies among existing water rights. These two principles partially embodied less formal, existing water law in New Mexico. They would become the explicit centerpieces of Article XVI of the first state constitution of 1912. The really new, radical heart of the 1907 Code was the creation of the Office of the State Engineer, a non-constitutional executive given the broad power to make fundamental water decisions for the states where they sat.

We are so used to the mythic figure of the State Engineer in our resource lives that we tend to forget who brought him and the changes that he wrought. The 1907 Water Code brought him in the form that we know the office today. Before he came, New Mexicans could simply take water they wanted and hope that they wouldn't get sued after the fact and as a result. After he came, New Mexicans could take water only if the State Engineer said that they could and only if the State Engineer determined in advance that the new right would not impair existing claims to a common source. From this fundamental reversal of basic powers, created by the 1907 Water Code, there emerged the mythic water engineers of the west. We in New Mexico tend to resurrect Steve Reynolds as the archetypical, all powerful State Engineer. But before him there was Elwood Mead in Wyoming and Delph Carpenter in Colorado, two predecessors who could match Reynolds, story for story, myth for myth. And after them came really substantial people like Eluid Martines, Tom Turney, and our own "John D." Men like this came because of the power conferred by basic laws like the 1907 Code.

The progenitor of these icons was Morris Bean and we are still apt to call the 1907 Water Code the "Bean code." Morris Bean was an engineer trained in the great early programs in water resources at the University of California. He was also a lawyer, trained at that other Columbia University, this one in Washington, D.C. Many years later, State Engineer Reynolds, trained as a mechanical engineer, would joke about practicing law, which he certainly did, without a license, which he certainly never had. (Reynolds' father-in-law, himself a leading New Mexico attorney, encouraged his son-in-law to go to law school. Reynolds declined on the grounds that he didn't need to.) Governor and U.S. District Judge Edwin Mechem called people like Reynolds "engineoirs," hybrid creatures, part engineers and part lawyers, no matter what their formal training. The father of the 1907 Water Code was literally both. The great water administrators, then and now, were multi-disciplinary wizards.

Ironically, the father of the state-based water laws was a federal employee of what would become the Bureau of Reclamation, Morris Bean. Engineoir Bean led the early Bureau of Reclamation projects across the west, including the Hondo, the Carlsbad, and the Rio Grande in New Mexico.

Section 8 of the 1902 Reclamation Act required that these federal projects proceed under state law and Bean drew the job of guaranteeing that the state laws of the various western states would support the massive federal investments. In 1897 the International Boundary Commission's W.J. Follett surveyed New Mexico water law and found none. When in 1903 Bean and his Reclamation cohorts surveyed the field of western water, it didn't look much better. "The laws of many of the States and Territories relating to water are in a more or less chaotic condition," wrote F.H. Newell, the chief engineer in the Second Annual Report of the Reclamation Service in 1903, and Bean proceeded to straighten them out. At the Second Conference of Engineers of the Reclamation Service that met in El Paso in late 1904 and Washington in early 1905, Bean presented his proposed irrigation code. It was immediately adopted, he reported, "without material change" by the legislatures of North Dakota, South Dakota, and Oklahoma.

I've never found a draft of the Bean code itself, but you can see it in the 1905 session laws of these three territories, places that did not have much of an existing tradition of water use and places that could easily lay down a fundamental water law because there was so little underlying it. These identical manifestations of the Bean code show its central concerns: the declaration that water was public and subject to appropriation for private use; a more formal process for the creation of new rights than the old notice-by-posting system used across the west; a scientific determination of the availability of water for new appropriations; and, most important, the creation of a new, powerful water czar, the State Engineer, to supervise all of this.

In 1905, the Territory of New Mexico joined the two Dakotas and Oklahoma, among other western states, in adopting a fundamental code, but New Mexico's 1905 version certainly was not a carbon copy of the Bean code. There were many stylistic and editorial differences. The role of the New Mexico Territorial Engineer was much diminished and less defined than his state counterparts elsewhere under true copies of the Bean code. The New Mexico Territory was divided into six hydrographic districts and the leaders of these decentralized units had at least as important a role in water determinations as did the Territorial Engineer. Had the matter ended there, New Mexico would have joined its fellow western territories as a much weaker and slightly behind prior-appropriation sibling.

At the first opportunity, two years later, in the 1907 amended Water Code, the New Mexico Territorial Legislature made one mighty effort to catch up. The basic principles—public ownership, beneficial use, and priority—remained the same, but the power of the State Engineer was greatly increased. He was not subservient to regional water districts in the same way. His formal power to make fundamental determinations—the existence and amount of "unappropriated" water, for example—grew. He still served a two-year term, but he could continue "until a successor was

appointed," an obscure phrase that Steve Reynolds, among others, exploited to hang on year after year. When, in 1913, the now New Mexico State Legislature added in one of the few early additions to the 1907 Code the requirement that private appropriators secure first a permit and then a license from the State Engineer to perfect rights to water, his considerable powers were complete.

In 2008, we in New Mexico have lived for more than 100 years under the basic system created by the 1907 Code. Even though the structure is the same, it is worth pointing out how the impetuses and drives have changed. For one, a 100 years ago, the basic drive to create a state water code came from federal insistence on the formalization of local New Mexico water law. These days we are used to constant claims that the federal government is infringing on state-based water systems. Ironically, the basic system that we now try to protect against the federal government was forced on New Mexico in the first place by the federal government. The ghost of Reclamation original engineer Morris Bean still stalks the Round House halls.

In another sense, the venerable 1907 Water Code with which we still live is covering a water world that it never could have imagined. The drive to create the Bean code came from a world primarily fixed on agricultural uses of water. The early Reclamation projects, which the code was designed to shore up and protect, all involved expanded agricultural acreage, at Elephant Butte, on the San Juan, on the Hondo, and at Carlsbad. These days expanded agricultural uses aren't much on the screen, unless you are talking about the other-worldly plans of the Middle Rio Grande Conservancy District to open the new Machenbier acreage west of the Interstate near Belen. What is more important today are the so-called "M&I uses," the water needed for our growing businesses and our exploding cities. These water needs were not even in Morris Bean's ken, yet the principles of his code were broad and flexible enough to include them when the time came. Like the Rio Grande and Pecos River Compacts of the 1930s and 40s, the 1907 Water Code was essentially an agricultural instrument, sufficiently wise and flexible to govern a very changed world.

In a parallel development, the 1907 Water Code focused explicitly on the need for the western water system to define "unappropriated water," partially as a way of protecting existing rights to a common supply but also, and more importantly, as a way of guaranteeing that new applicants would have access to wet water from that source. That may have made sense in the Dakotas and Oklahoma where the Bean code first took root and where there had not been a long history of short supplies for long existing uses. (The oldest Montana water right dates from 1855; in New Mexico priorities start before 1540.) But from the start of administration under the 1907 Water Code in New Mexico there may have been no "unappropriated water" in the state's major surface waters. Today, of course, we look almost

exclusively to transfers of existing rights, rather than creation of new ones, and spend most of our time debating whether these transfers of existing rights would be "detrimental to" or "impair" existing rights. While the Bean code saw new water as its most important focus, it also recognized the transfer of existing rights as a possibility and provided for the basic machinery to accomplish these much more visible transactions today than they ever were in 1907. Although Morris Bean never would have used the terminology, the prior appropriation system that he brought with his 1907 Code was the original cap and trade scheme. After all, what was a determination that a system was "fully appropriated" if not a cap? And what was dependence on water transfers to their most efficient economic uses if not a trade?

The fundamental shift over the last 100 years from new appropriations to transfers of existing ones wasn't the only fundamental shift that pushed at the edges of the 1907 Water Code but couldn't break its boundaries. The other fundamental change was the shift from surface to groundwater. This new source of water was brought within the Bean code in a different way than was the switch from new appropriations to transfers. Instead of bringing groundwater to the 1907 surface-water code, New Mexico brought the surface water code to groundwater.

In 1927 and then again in 1930, the New Mexico State Legislature created a parallel groundwater code. With recognition for the differences between the two resources, the Legislature extended the basic principles of the 1907 code to groundwater resources and that basic scheme, for the management of both surface water and groundwater, is still with us today. Among other birthdays that we ought to be celebrating, publically and noisily, is State Engineer D'Antonio's 2005 final closing of all New Mexico in one declared basin or another. His jurisdiction over groundwater is now as complete as it was over surface water in 1907 and the circle of conjunctive management of all interrelated water resources finally has really closed and we can move forward.

There is one final measure of the flexibility of the Bean code conception of things that continues today and that is one whose flexibility arises not out of a wise definition of an essential term in 1907 so much as an even wiser decision not to define it at all. I'm talking, of course, of "beneficial use" as the basis, measure, and limit of a New Mexico water right. The term had been kicking around the west before Morris Bean ever got hold of it, but Bean had the good sense to insert it in every state code he ever helped draft and New Mexico had the good sense to make it the centerpiece of Article XVI of New Mexico's 1912 constitution.

As important as its assertion, however, is that Bean had the equally good sense, unlike Colorado, not to define "beneficial use" or rank "beneficial uses." Under the 1907 Water Code, "beneficial uses" could expand and change in importance. Sometimes the changes strained the

outlines of the broad doctrine. For example, 30 years ago, mine dewatering, which from one perspective looked more like waste than it did any form of beneficial use, still was crammed into the mold. And these days, when water for instream flows for Endangered Species Act purposes claims a place as a beneficial use, the term is probably still flexible enough to fit even though it takes a lot of words by a lot of lawyers to keep it so confined. The point, I think, is that the fundamental concept of beneficial use as the basis, the measure and the limit of a New Mexico water right, encased in the 1907 Code, is still with us and still means something even though beneficial use now encompasses values that could not have been foreseen 100 years ago when it entered our basic law.

Napoleon threw up his hands the first time his eternal code of 1808 was amended and was supposed to have said, "Mon code, c'est perdu," because any formal change to a code contradicts its timeless elegance. Nobody has made that claim for the 1907 Code. It has been supplemented, supplanted, interpreted, changed, and otherwise altered over the last 100 years but never in such a way as to really alter its fundamental design.

The courts have had some role in bringing the 1907 Code into more contemporary line, although I defy any lawyer to find any catalogue of water cases, so diffused and badly indexed are they in our case logs. It takes 30 years of practicing water law just to find the court decisions, let alone figure out what they mean. Still, Steve Reynolds used to say that in his time the courts had done a pretty good job of helping with water law, mostly by staying the hell out of it. In more modern times, the state supreme court has shown a very recent trend toward re-anchoring water law in the basic principles of the 1907 Water Code and the complex mix of history, science, and policy from which it springs. I want to return to this point at the end of this essay. For the moment, just let me say that the courts themselves have played some role in bringing the 1907 Code into contemporary New Mexico.

So has the legislature. By and large, the legislature has wisely not tinkered too much with the specifics of the 1907 Water Code and hardly at all with its basic principles. You can count on both hands the number of provisions in the basic surface water code that do not originate in the 1907 surface-water code. Instead, the basic code has been surrounded in our state law by the groundwater code, by the conservancy and irrigation district laws, and by the laws governing mine dewatering and community ditches. None of these laws surrounding the relatively unchanged surface-water code have changed the 1907 Code's basic tenets.

Instead, if amendments to the 1907 Code, which are relatively infrequent, have done anything, they have amplified its terms. I think that the most amplified provision of New Mexico's basic code has come in the area of the law of forfeiture. Some form of forfeiture – the losing of a right to use water – is an essential part of the law of prior appropriation.

Otherwise, the bedrock requirement of beneficial use would lose all meaning. But over the last century the legislature has added a few pieces to the basic notion of forfeiture and subtracted a couple more until today the law of forfeiture bears the shape of the original doctrine, but not much of its content.

The 1907 surface-water code simply said that four years of non-use would forfeit the underlying right and that was something of a specification of the 1905 code that said that non-use for an unreasonable amount of time would forfeit the right. The 2008 version of the forfeiture provision is 10 times as long, the result, by my count, of legislative and even constitutional changes in 1915, 1925, 1941, 1957, 1967, 1978, and 1987. That's a lot of changes. Some were minor. Some were so major that they made Steve Reynolds say that he was not enforcing what was left of the forfeiture statute because it had become such a joke that it made him the laughing stock of western state engineers. In any case, and despite the legislative changes, the basic principle for the 1907 Code remains.

The same, I think, can be said for the judicial interpretations of the basic 1907 Code philosophy. New Mexico courts always have played an important role in construing and giving meaning to the basic code structure. In some areas our courts have played a more important role than others in re-shaping the contours of New Mexico's basic law. I'm thinking here of the basic role our courts have played in creating a *de facto* preference for municipal use of water.

You will remember that the basic New Mexico 1907 Code made beneficial use, undefined, as the basis, the measure, and the limit of a New Mexico water right. Our neighbor to the north, mother of the Colorado doctrine that we are supposed to follow but don't, made the mistake of ranking beneficial uses according to relative importance and apportioned access to water according to that ranking. For those of you who think that this is a good idea, consider that at the time Colorado determined that domestic use was the most important water use, categorically more beneficial than agricultural and mining use of water. Try telling that to west-slope irrigators as Colorado Springs, Denver, Ft. Collins, and the sprawling suburbs in-between search for domestic supplies. Here in New Mexico, at least since the 1907 Code and probably before, we avoided the problem that ranking uses created by treating them all equally and making priority the sole basis for apportioning short supplies.

The problem is that we know intuitively that all people have got to have water to drink first and that is where the New Mexico courts have helped municipalities over the years despite the fact that the rigid contours of the 1907 Code and its progeny would not allow any categorical preference for drinking water. By and large the courts have done this quietly and judiciously and without a lot of fanfare. They have expanded the Mendenhall doctrine for cities, for example. They have created special

rules for municipalities when it comes to rights to return flows. With the legislature, the courts have exempted municipalities from the law of forfeiture even further than the rest of us.

However, the courts have still hewed to the basic tenets of the 1907 Code when it comes to municipal rights to water. Much to their chagrin, the cities still have to deal with the State Engineer. They must get their water according to the basic rules of the 1907 Water Code without much special treatment and without any superior claim to water. The West, of which New Mexico is a part, is growing, changing, and urbanizing. Ten years ago, looking out across the west from the rarefied air of Boulder, Colorado, law professor and resource guru Charles Wilkinson declared the law of prior appropriation dead. Clearly it has not died, however, proving once again the wisdom of Mark Twain's quip that notice of his death was, as usual, exaggerated. The basic system is still in place on the 100th anniversary of the 1907 Water Code and we would do well to honor its roots.

Any law, like the law of prior appropriation, comes out of a basic human need to name things—beneficial use, for example—and to honor them in that naming. A good law simply brings language into connection with the reality that it describes. This honoring of the natural world and human interaction with it has been a part of New Mexico tradition for hundreds of years so there is nothing new about this centennial celebration.

For centuries the Zuni Pueblo has spoken a language all its own, a language completely unique to itself. We all know the annual Shalako dances because the Pueblo has been gracious enough to invite us. We are used to thinking that the ceremonies begin at dusk when the tall dancers on stilts approach the Pueblo plaza from the four cardinal directions. I'm told, however, that the celebration really begins earlier when a religious figure approaches the Pueblo on his return from a long, isolated retreat in the Zuni Mountains.

On that retreat, the Zuni mystic has spent his time learning once again the unique Zuni words for all living things: the animals, the fish, the bugs, the insects, the plants and trees, everything that is a part of the Zuni world. On his annual return to the Pueblo, the learner goes to the center of the Plaza and recites the names he has learned. This ritual has a religious meaning that is none of our business. But from a resource management point of view, it is a way of annually reaffirming their connection to the natural world by doing what is fundamentally human: naming them.

There is a parallel in the Hispanic world with which I am much more familiar. Those of you who know me or may have read one of my books know that I spend a lot of time trying to raise irrigated crops here in Albuquerque's North Valley and near a small village in northern New Mexico. In Cundiyo, that small village, I have planted perhaps a half-acre of native chile for the last 15 years. The chile is delicious and I cherish it. But when I think of the real pleasure of that operation, I think of all that I have

learned from the *Cundiyosos* who generously have taught me everything that they know about managing water. They know a lot. They know the seasons. They know the frosts. They know the hails. They know how to irrigate on the side of a hill. They know those “sonofagunnes,” the raccoons. But when I think of them and water, I think of what they know about weeds.

Like the Zunis, the *Cundiyosos* have ancient Spanish names for every weed that ever invaded a northern New Mexico chile patch. Over the last 20 years I have walked those fields with people like 83-year-old Sabino Samuel Vigil, asking him the names of different plants invading the chile, which can't defend itself against much. I learned what “canutillos” and “canamo” are. I know that “verdolagas” and “quelites” will squeeze chile out but can be eaten. I now know the long list of non-chiles from “aniles” to “zorgas” and everything in-between. And as I yank them out of the rows of fragile chile plants and name them as I do, I remind myself that this is beneficial use and this is what it means to apply human intelligence to a chaotic natural world.

The doctrine of prior appropriation as embodied in the 1907 Water Code and the names and their meanings that go with it serves the same function as Sam Vigil's list of weeds or the Zunis' list of all living things. They all remind us of where we came from and what we are doing in this desert world.

I'm a lawyer and this is a legal essay. I guess that it is appropriate to end with a recent water law case. But I would like to talk about the 2005 *Herrington* case in a new way, as the modern lawyer's use of legal terms to define basic natural processes in the same way that the Zunis and the *Cundiyosos* do. *Herrington* represented the latest effort of the New Mexico Supreme Court to sort out the basic law of surface to groundwater transfers when junior groundwater development had reduced the senior surface water right source of supply. There are a lot of claims to laws that apply to the area. There is the statute that allows supplemental groundwater wells. There is the case, *Clodfelter*, that says that the right to transfer from surface to ground is part of the general power that goes with a surface water right. There is that mother of all confusion, the *Templeton* doctrine, created by the supreme court in 1961 and a plague on the system of prior appropriation ever since.

In its struggle, the court decisions had come unmoored from any real basis in the basic elements of New Mexico water law. *Templeton* was based on questionable policy because to save senior and junior appropriators it guaranteed increased depletions on streams. It represented suspicious law because it was not related to all of New Mexico's basic tenets. It disregarded water history because it swept in out of nowhere. But most importantly here, *Templeton* was based on a peculiar definition of

surface-ground geo-physical inter-relations that hardly amounted to good science.

The original *Templeton* case said that a water-short surface water appropriator could drill a well "clear back to the farthest reaches of the water shed" feeding his point of diversion. Subsequent cases hammered away at the reach of that right in the language of lawyers, not geologists. By 2005, the cases were completely confused about whether the *Templeton* doctrine only applied to wells drilled into an aquifer directly feeding the surface water right and upstream of the surface water point of diversion.

You could measure the confusion by the breadth of positions taken in briefs before the supreme court in *Herrington*. Some said there was no such thing as a *Templeton* transfer. Others said that all surface-to-ground transfers were *Templeton* transfers. Still others said that some transfers were *Templeton* transfers and others were not without being able to definitively say what the difference between them was. In the face of that confusion among the state's most distinguished water lawyers, what was the New Mexico supreme court supposed to do?

It did what Morris Bean, the Zuni elders, and the New Mexico Hispanics had been doing for a century. It went back to the first physical principles of New Mexico water and named them accurately. Say what you will about the *Herrington* decision, but there has never been in the annals of New Mexico's supreme court such a respectful, such a restrained, such an accurate description of the hydrological inter-relationship between surface water and ground water. The opinion's author, Chief Justice Richard Bosson, had the benefit of a clerk who had a Bachelor of Science in geology and a Master's Degree in groundwater hydrology; Justice Bosson had the good sense to use her expertise and the opinion reflects it. The *Templeton* doctrine may not be so important in and of itself, but the *Herrington* decision reconnecting the esoteric doctrine to the real physical world to which it applies is a great triumph.

The 1907 Water Code, now 100 years old, represents the same kind of triumph. The Code's age, its flexibility, and its continuity remind me of a couple of important lessons about water and life and their connection in New Mexico. One was brought home by Winston Churchill who knew nothing about the Southwest, nothing about desert rivers, nothing about prior appropriation, but who carried himself in the world exactly as a good New Mexico State Engineer should. On the subject of the passage of political man from youth to old age, Churchill remarked that "if at the age of twenty, you are not a liberal, you have no heart. And if at the age of 50, you are not a conservative, you have no brain."

Churchill died at 76. I'm pushing 66 and Churchill didn't tell us what to do with the later, post-50 stages of life. But I do know that the arc of my water life in New Mexico has followed the arc described by Churchill. I came here 35 years ago long on indignation, short on wisdom, fascinated

by New Mexico, and haunted by water. As every young writer and lawyer should, I began by attacking the Office of the State Engineer in print and suing the office in court. A bemused Steve Reynolds responded once at length to one of my articles because, as he said, I seemed to be “a little constrained by concern for the truth.” Within 10 years I found myself working for Reynolds and the State Engineer Office, where I stayed for another 10 years and learned about the wisdom and restraint of the 1907 Water Code on Saturday mornings when Reynolds would hold court. After those 10 years, I went to the School of Law at the University of New Mexico and began to speak at water conferences. By my count, and by the number of proceeding notebooks that line my bookshelves, I’ve made 21 presentations. I’m pleased to end with this entirely appropriate anthem to the ancient 1907 Water Code.

When I think of how the Code has survived for so long, I think of old age in general. When I think of living well in old age, I think of wisdom and flexibility as central components. And when I think about other institutions that have survived for 100 years, I think of my Cundiyo neighbor, Esquipula Vigil.

At 100, Pula still rode horses and still irrigated his fields. Moderate exercise kept him going. His neighbors, mostly related Vigils, kept an eye on him as he worked. From the top of the *barranca* overlooking the irrigated fields where Pula worked, they would watch and make sure he was o.k. Pula would open the *compuerta* to his fields, let the water flow in, and then lie down on the ditch bank, shovel at his side, and let the water do its work. His cousins and nephews and great nephews would watch as he lay there, wondering whether he was alive or dead. Pula’s hand would go up to wave a fly away from his face and everyone would know everything was o.k.

I like to think of the 1907 Water Code in the same way. It certainly gets its exercise as the Endangered Species Act, instream flows, river restoration, water quality, and other new claims push at its boundaries. It has certainly demonstrated its continued wisdom and flexibility in its efforts to incorporate these new ideas. And, like me, the 1907 Water Code is still swatting away the late fall flies.