
NATURAL RESOURCES JOURNAL

Volume 57
Issue 1 *Water Governance, Winter 2017*

Winter 2017

Trial and Error: How Courts Have Shaped Prior Appropriation in New Mexico

Matthew G. Reynolds

Matthew G. Reynolds*

TRIAL AND ERROR: HOW COURTS HAVE SHAPED PRIOR APPROPRIATION IN NEW MEXICO

ABSTRACT

This systematic review of New Mexico prior appropriation case law from 1883 to the present employs a thematic chronology in four parts spanning approximately three decades each, including the following topics. Part One covers the initial conflict between prior appropriation and riparian common law and early interpretations of the 1907 Water Act. In Part Two, courts contrast the 1907 Act with the old arid region doctrine and justify the integration of groundwater into prior appropriation. Diminishing supplies and increasing usage drive Part Three's concentration on proceedings to change places of use and points of diversion, at times deferring issues of priority or subordinating prior appropriation to other systems of allocation. Part Four explores progress of general stream adjudications, affirmation of prior appropriation against equitable apportionment and common use, and the expansion of power for priority enforcement subject to political barriers. The conclusion distinguishes between prior appropriation's vitality in principle and in practice, with a call to the New Mexico Legislature to enact statutes and provide adequate funding to meet New Mexico's present and future water needs.

INTRODUCTION

Courts have shaped New Mexico's prior appropriation doctrine for over a century, uniquely combining an origin myth tracing the doctrine to time immemorial, an integration of surface and underground water, and interpretations of the doctrine's constitutional status. The doctrine itself—public ownership, beneficial use as the basis, measure and limit of a right to use water, and priority of appropriation giving the better right—seems straightforward, but the case law interpreting it can appear contradictory and confusing, especially when opposing attorneys skillfully use the cases to prove their points. I decided to analyze New Mexico's prior appropriation appellate decisions on their own merits rather than for any specific lawsuit I was hearing as a water judge. Through a chronological study,

*Chief Judge, Seventh Judicial District Court, State of New Mexico. I thank my wife Susan Reynolds for her encouragement in this project, my assistant Josie Gutierres for her help, and Prof. Em Hall for his comments.

themes emerged resulting in this history of judicial opinions from 1883 to the present. Trial and error represents the dynamism of water lawsuits, complex and demanding, with strong opinions firmly held, but where the ultimate goal, justice, is shared by all the judiciary. The devil is in the details of what justice means in any given case.

I. NEW WINE IN OLD WINESKINS (1883-1914)

> *They don't put new wine in old wineskins; otherwise, the skins would burst and the wine pour out.*[1]

When New Mexico jurists first faced allocating water among competing users, the judges relied on authorities where they could find them: treatises, congressional and local legislative acts, and cases from other states and the U.S. Supreme Court. Trained in the East, the judges knew well the law of riparian rights, with Latin terms justifying keeping the water in the river as the law of nature requires. But New Mexico's nature had another law requiring that water be used away from the stream. The old law of riparian rights and the new climate in which the judges now lived did not make for a good fit, with the doctrine of prior appropriation gaining general acceptance by the time of statehood. Yet the mechanics of how that doctrine would be applied faced challenges as modern concepts for water distribution, including large dams and reservoirs and a new comprehensive water code, clashed with the old ways of acequia laws and culture. The legislature adopted the Water Act of 1907 without coordinating it with the ancient acequia system, and the Supreme Court ensured that the Act of 1907 was not fully workable until after the completion of adjudications requiring every acequia member to be joined. While not bursting, the old wineskins were leaking.

A. A Mixed Bag: *Keeney v. Carillo*, *Trambley v. Luterman* and *Waddingham v. Robledo* (1883-1892)

The territorial Supreme Court case of *Keeney v. Carillo*[2] has been cited as the earliest precedent for the prior appropriation doctrine in New Mexico, together with its sub-doctrine of relation back, establishing the appropriator's priority date as the date of commencement of work on the condition of completing the work in a reasonable time with due diligence.[3] Yet the Supreme Court did not clearly rely on prior appropriation in *Keeney*. The case arose from competing groups of settlers near present-day Alamogordo that wanted to tap the waters in a "marsh or cienega" above Alamo Canyon to flow to the plains below for irrigation and cattle grazing. The Keeney group (Keeney) started a year earlier, but the Carillo group (Carillo) was more successful in its efforts in diverting the waters to a "ditch or acequia" before reaching Keeney's springs, one of which dried up as a result. From a review of evidence before a master, the district court found that it was impossible to determine how much water either side actually used, because their evidence was

1. *Matthew* 9:17.
2. Keeney v. Carillo, 1883-NMSC-005, 2 N.M. 480.
3. *See, e.g.,* State *ex rel.* Reynolds v. Mendenhall, 1961-NMSC-083, ¶ 13, 68 N.M. 467.

"so very loose and indefinite."[4] Nevertheless, citing prior appropriation decisions from California, the district court found that Carillo had expended four times the amount of work and had achieved four times the amount of water flow than Keeney had such that Carillo was entitled to three-fourths the amount of water.[5]

After restating the lower court's decision in full, the Supreme Court affirmed, but on different grounds than prior appropriation. Citing an Oregon case, the Court first determined that subterranean channels, as the one in *Keeney*, were protected for the owner of the stream the same as if the channels were above-ground.[6] Then the Court pointed out that Keeney went into the canyon, unoccupied public land, "of no value whatever, except as a natural water-course," and "did work by which their supply of water was increased to them."[7] Then Carillo, without any right whatever, interfered with their use of that increased water supply. Therefore, concluded the Court, Keeney was entitled to a court of equity's injunction, "to the continued use and enjoyment of at least so much of the water flowing through the said can[y]on, as they had previously enjoyed."[8]

While it could have cited prior appropriation cases in support of its ruling as the district court had done, the Supreme Court relied instead upon riparian-based common law to partially enjoin Carillo from diverting water for their irrigation. "We think," the Court wrote, citing a water law treatise, "the law is clear on the subject: 'A subterranean stream which supplies a spring with water, cannot be diverted by the proprietor above, for the mere purpose of appropriating the water to his own use.'"[9] The case cited in the treatise relied on an 1808 English case for this proposition, with neither supporting the legal protection of man-made changes to the natural flow of water. But that is exactly what the Supreme Court in *Keeney* did, because it protected Keeney's earlier diversion of water to the downstream springs, while implicitly acknowledging that Carillo was entitled to appropriate the remaining three-fourths of the canyon's waters that they had successfully diverted from the natural course of the stream above Keeney's springs.

Eight years after *Keeney*, the Supreme Court again decided issues of water allocation, mixing in prior appropriation, riparian common law, and the law of antecedent sovereigns to reach its decision. In *Trambley v. Luterman*,[10] an upstream user of an "artificial ditch or acequia" on the Gallinas River who was using the acequia for washing pelts and wool had diminished the ditch flow to a flour mill that at times could only grind three-fourths of its usual amount of flour. After an

4. *Keeney*, 1883-NMSC-005, ¶ 6.

5. *Id.* ¶ 6 (citing Weaver v. Eureka Lake Co., 15 Cal. 271 (Cal. 1860); Kimball v. Gearhart, 12 Cal. 27 (Cal.1859)). Four times the amount of effort and success would lead mathematically to a 4/5, 1/5 division of the waters.

6. *See Keeney,* 1883-NMSC-005, ¶ 8 (citing Taylor v. Welch, 6 Ore. 198, 1876 WL 1486 (1876)). The law of percolating waters (diffuse groundwater) has been interpreted by the New Mexico Supreme Court as having been the same whether it was Spanish/Mexican civil law or English common law. *See also* State *ex rel.* Martinez v. City of Las Vegas*,* 2004-NMSC-009, ¶ 29, 135 N.M. 387 (citing Yeo v. Tweedy, 1929-NMSC-033, 34 N.M. 611).

7. *Keeney*, 1883-NMSC-005, ¶ 8.

8. *Id*. ¶ 9.

9. *Id*. ¶ 8. *See* JOSEPH K. ANGELL, A TREATISE ON THE LAW OF WATERCOURSES § 112 (7th ed. 1877).

10. Trambley v. Luterman*,* 1891-NMSC-016, 6 N.M. 15.

evidentiary hearing before a master and review of evidence by the district court, the mill owners obtained an injunction during the seasons of low water in the river. The Supreme Court affirmed the injunctive relief with an analysis under the common law and under the law of prior appropriation. Riparian common law did not apply because "the ditch or acequia in controversy was made in the year 1846, before the acquisition of the territory by the United States. The rights of the parties to the use of the waters therein then attached according to the laws, customs, and usages in force in the republic of Mexico."[11]

Trambley did not explain Mexico's water laws, customs and usages,[12] but it did lift passages from the prior appropriation chapter in Gould's 1883 treatise on water law to explain New Mexico's law on the subject. According to Gould, the common law recognized riparian owners' equal rights to a stream bordering their lands as arising from the law of nature, *ex jure naturae*, with it being "wholly immaterial who was first in time."[13] But, because of the particular purposes in the far West for mining and farming apart from the natural water channels, Gould wrote that, "[i]n California, Nevada, and other Pacific States and Territories, the common-law rule upon this subject is modified."[14] *Trambley*, however, transformed Gould's modification language to an outright rejection of riparian common law: "But common law, as to rights of riparian owners, *is not in force* in this territory, nor in California, Nevada, and other Pacific states."[15]

The earliest territorial water statutes, Acts N.M. July 20, 1851 and Jan. 7, 1852, provided the sole New Mexico authority for *Trambley*'s rejection of riparian common law.[16] *Trambley* did not recite any particular sections of the acequia acts, but its readers would have been familiar with Section 8 of the July 20, 1851 Act: "The course of ditches (acequias) already established shall not be disturbed,"[17] and Section 9 of the Jan. 7, 1852 Act: "All rivers and streams of water in this Territory, formerly known as public ditches (acequias), are hereby established and declared to be public ditches (acequias)."[18] *Trambley* was recently recognized as precedent for non-consumptive use (flour mill waterwheel) as a beneficial use recognized under New Mexico water law.[19] One court credited *Trambley* as the first case to adopt the Colorado doctrine of prior appropriation, although not a single Colorado case was

11. *Id.* ¶ 3.

12. *See* JUAN E. ARELLANO, WISDOM OF THE LAND, KNOWLEDGE OF THE WATERS (2014); JOHN O. BAXTER, DIVIDING NEW MEXICO'S WATERS, 1700-1912 (1997).

13. JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS § 226 [286] (1st ed. 1883), *cited in Trambley*, 1891-NMSC-016, ¶ 3.

14. GOULD, *supra* note 13*,* § 228.

15. *Trambley*, 1891-NMSC-016, ¶ 4 (emphasis added).

16. *See* Browning v. Estate of Browning, 1886-NMSC-022, ¶ 12, 3 N.M. 659 (stating the New Mexico Territorial Organic Act "adopted the common law . . . applicable to our condition and circumstances.").

17. *See* Act of Jul. 20, 1851, 1880 N.M. Laws, art. 1, ch. 1, § 2 ("No inhabitant of said Territory shall have the right to construct any property to the impediment of the irrigation of lands or fields, such as mills or any other property that may obstruct the course of the water; as the irrigation of the fields should be preferable to all others.").

18. Act of Jan. 7, 1852, 1880 N.M. Laws, art. 1, ch. 1, § 9.

19. *See* Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth., 2014-NMCA-032, ¶ 38, *cert. denied*, Carangelo v. N.M. State Eng'r, 2014-NMCERT-002, 322 P.3d 1062.

mentioned in *Trambley*.[20] Half a century after *Trambley*, one Supreme Court justice argued from the decision's discussion of riparian common law that New Mexico did not completely reject riparian rights.[21]

A few months after *Trambley*, the Supreme Court decided *Waddingham v. Robledo*.[22] The Court reversed a decision by Chief Justice O'Brien sitting as trial judge, who had dismissed an equity case (against the master's recommendations) in favor of a suit at law to decide title to disputed lands. The defendant farmers were building a dam across the Gallinas River north of Las Vegas in order to expand irrigation via acequias and to increase settlements on a contested land grant. The farmers argued that the plaintiffs, who were cattle owners, including future U.S. Senator Thomas B. Catron, had "never used a single drop of water" from the Gallinas. The cattle owners successfully argued that "the Gallinas river was a natural water course, flowing through the grant, essential to its enjoyment, and that the defendants were diverting the water thereof without right."[23] The Court followed the common law allowing for injunctions "in a case of private nuisance by diverting or obstructing an ancient water course."[24] The Court did allow defendants, because of their claim of adverse possession that would have to be determined in a court of law, to continue irrigating the lands they had already been irrigating and remanded the case to district court to determine the amount of water used.[25]

After three water cases, the territorial Supreme Court had one decision in favor of prior appropriation (*Trambley*), one disregarding it entirely (*Waddingham*), and the first of them all (*Keeney*) with a clear reliance on the doctrine by the district court but not so much by the Supreme Court. Just a few years later a water dispute arose that has continued off and on for more than a century, with several trips to the United States Supreme Court. The dispute first came to publication in a New Mexico Supreme Court decision that included an eloquent justification for prior appropriation in New Mexico.

B. A Case for Prior Appropriation in One Man's Opinion: *United States v. Rio Grande Dam & Irrigation Co.* (1898)

In 1897, the United States sued the Rio Grande Dam & Irrigation Company to prevent construction of a dam at Elephant Butte on the lower Rio Grande, but the district court dismissed the case. In arguing for reversal before the New Mexico Supreme Court, the U.S. Attorney claimed that the Rio Grande in New Mexico was navigable or affected navigability downstream, and as such, the federal government had control over whether the dam could be built. The U.S.

---

20. Martinez v. Cook, 1952-NMSC-034, ¶ 14, 56 N.M. 343.

21. *See* State *ex rel.* State Game Comm'n v. Red River Valley Co., 1945-NMSC-034, ¶¶ 125–127, 51 N.M. 207 (Bickley, J., dissenting) (rehearing denied) (second motion for rehearing denied).

22. *See* Waddingham v. Robledo, 1892-NMSC-005, 6 N.M. 347.

23. *Id.* ¶ 9.

24. *Id.*

25. *Id.* ¶ 12. *See also* Walker v. New Mexico & S.P.R. Co., 165 U.S. 593 (1897), *aff'g*, Walker v. New Mexico & S.P.R. Co., 1893-NMSC-027, 7 N.M. 282 (involving too much rather than too little water, criticized by Martinez v. Cook, 1952-NMSC-034, ¶¶ 13–15, as incorrectly stating that New Mexico followed the common law regarding waters).

Attorney further argued that New Mexico followed the common law of riparian rights, rather than the law of appropriation.[26] On appeal, the New Mexico Supreme Court unanimously upheld the dismissal, with two of the three justices who heard the case concurring in the result only, meaning that the opinion of Chief Justice Smith did not have precedential authority.[27] While not technically precedent, this one-man opinion did lend support to the doctrine of prior appropriation in cases decided decades[28] and even a century later.[29]

Chief Justice Smith determined that the Rio Grande through New Mexico had never been and could not be used as a navigable stream for commercial purposes, but that the river had been, "from the earliest times of which we have any knowledge, used as a source of water for irrigation," and the population in the Rio Grande valley "has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops."[30] The Chief Justice criticized the federal government's plan to build a dam near El Paso "for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries, having equitable interests therein," because it preferred one locality's water use over that of another locality.[31] Without access to water in this arid region, which was of the "highest necessity" to its people, an "immeasurable public calamity" would befall them.[32]

Contrary to the federal government's argument, the United States surrendered by an act of Congress in 1866 all its riparian rights in the West.[33] "[I]t had become established that the common-law doctrine of riparian rights was unfitted to the conditions of the far West, and new rules had grown up, under local legislation and customs, more nearly analogous to the civil law," i.e., the rights of prior appropriation of waters, where "recognized and acknowledged by the local customs, laws and decisions of the courts."[34] Through acts of Congress in 1870,[35] 1877,[36] and later, the United States manifested its intent "to extend the largest liberty of use of waters in the reclamation of the arid region, under local regulative control," including Congress's recent approval of large private reservoirs in the West.[37]

---

26. United States v. Rio Grande Dam & Irrigation Co., 1898-NMSC-001, 9 N.M. 292, *rev'd*, 174 U.S. 690 (1899) (introductory case notes of U.S. attorney: "The common law as to water rights is in force in New Mexico. Walker v. Railroad Co., 165 U.S. 593.").

27. *See* Curtis v. Curtis, 1952-NMSC-082, ¶ 23, 56 N.M. 695 (concurring in result does not give precedential authority to the opinion, unless a majority favor the opinion).

28. *See Red River Valley Co.,* 1945-NMSC-034, ¶ 22.

29. Walker v. United States, 2007-NMSC-038, ¶ 24, 142 N.M. 45; *City of Las Vegas*, 2004-NMSC-009, ¶ 28.

30. *Rio Grande Dam & Irrigation Co.*, 1898-NMSC-001, ¶ 5.

31. *Id.*

32. *Id.* ¶ 7.

33. Mining Act of 1866, 14 Stat. 251, 253 (1866) (codified as 43 U.S.C. § 661 (2012)).

34. *Rio Grande Dam & Irrigation Co.*, 1898-NMSC-001, ¶ 8. *See also* Mining Act of 1866, 14 Stat. at 253.

35. Placer Act of 1870, 16 Stat. 217 (1870), (codified as 30 U.S.C. § 35 (2012)).

36. Desert Land Act of 1877, 19 Stat. 377 (1877) (codified as amended in 43 U.S.C. § 321 (2012)).

37. *Rio Grande Dam & Irrigation Co.*, 1898-NMSC-001, ¶¶ 8–9.

The land itself reveals the antiquity of artificial irrigation here: "Ruins of extensive irrigation systems, scattered all over New Mexico and Arizona, of a prehistoric people, show that conditions that have confronted the present age[38] were conditions encountered in the remote past, and apparently overcome." Accounts from early Spanish priests and explorers describe cultivation in the Rio Grande valley through acequias. When New Mexico was acquired by the United States, the law of prior appropriation existed under the Mexican republic, and as early as 1846, one of the first acts in New Mexico, through General Stephen Kearny, declared that "the laws heretofore in force concerning water courses . . . shall continue in force."[39] Finally, New Mexico statutes from 1852 through 1887[40] acknowledge the doctrine of prior appropriation confirmed and authorized by Congress with general characteristics common throughout the West that have been recognized. Therefore, "[t]he doctrine of prior appropriation has been the settled law of this territory by legislation, custom and judicial decision."[41]

On appeal, the U.S. Supreme Court reversed and remanded for an evidentiary hearing on whether the proposed dam in New Mexico would substantially impede the navigability of the Rio Grande in Texas. In its analysis of prior appropriation, the U.S. Supreme Court considered acts of Congress that had been reviewed by the New Mexico Supreme Court allowing for or requiring appropriative rights of waters on the public domain, as well as its own precedents and other authorities regarding the common law of riparian rights and appropriative rights common in western states. The Court acknowledged that states, and *arguendo* territories, could change the common law of riparian rights to suit their conditions, as long as the rules had only a local significance.[42]

C. From a Free Drink of Water to the Colorado Doctrine: *Millheiser v. Long* and *Albuquerque Land & Irrigation Co. v. Gutierrez* (1900)

Within a year after the U.S. Supreme Court issued its 1899 *Rio Grande Dam & Irrigation Co.* decision, the New Mexico Supreme Court decided two cases

38. *Id.* ¶ 9 (an extensive drought had gripped New Mexico, Texas and Mexico for more than a decade prior to this decision). *See also* United States v. Rio Grande Dam & Irrigation Co., 1900-NMSC-042, ¶ 4, 10 N.M. 617.

39. *Rio Grande Dam & Irrigation Co.*, 1898-NMSC-001, ¶ 9, (quoting Kearny Code of Laws, Water Courses, Stock Marks, etc., § 1 (1846)).

40. *Rio Grande Dam & Irrigation Co.*, 1898-NMSC-001, ¶ 9 ("One of the first acts of the local legislature (1852) after the organization of the territory provided that 'all rivers and streams of water in this territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias.' Comp. Laws, sec. 6. In 1874 it was provided that 'all of the inhabitants of the territory of New Mexico, shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose land said acequias have to pass, a just compensation for the land used.' Comp. Laws, sec. 17. In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. Sess. Acts 1886-87, chap. 12.").

41. *Id*. Given the fluctuating New Mexico opinions prior to *Rio Grande Dam & Irrigation Co.*, it is no wonder no cases were cited supporting prior appropriation as the settled law in the New Mexico territory.

42. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704 (1899).

on the same day relying in part on the higher court's opinion regarding appropriative rights. In *Millheiser v. Long*,[43] the Long-Truxton ditch had been completed in 1885 with capacity to carry the entire flow of the Hondo River when diverted by their dam. In 1888, the complainants (Millheiser) built their own ditch several miles downstream from the outflow of the Long-Truxton ditch. In 1896, the Millheisers and others using their ditch brought suit against Long, Truxton, and other persons using the Long-Truxton ditch, claiming that the defendants had interfered with their prior right of appropriation by taking all the available water. After trial, the district court dismissed the complaint.

The Supreme Court reversed and remanded for a new trial to determine more specific evidence regarding the rights of the parties.[44] The Court recognized the need to examine the record with care, because "if the complainants are denied the use of any of the water of that stream, cultivation of their lands . . . must cease, the lands become practically worthless, and rights formerly enjoyed by them, taken from them."[45] The lower court had misapplied the law of prior appropriation by granting priority to the person first diverting water rather than to the person first appropriating water to beneficial use, which could result in a monopoly by diverting the entire course of a stream. Quoting a water law treatise, the Court stated that "[u]nder the later decisions relative to the capacity of the ditch being the limit of the extent of the appropriator's rights in and to the waters of a stream, it is held to be against the general policy of the entire modern system of the doctrine of appropriation that the greatest good shall accrue to the greatest number," and that otherwise, "the way for speculation and monopoly [would] be opened and the main object of the law defeated."[46]

The Court stated that "[i]t is clear that the law of prior appropriation governs in this Territory, and water rights must be determined by it."[47] After quoting the recent U.S. Supreme Court decision and federal statutes authorizing prior appropriation, *Millheiser v. Long* named as its sole New Mexico authority for prior appropriation the declaration by territorial legislative act in 1876 that all natural waters in New Mexico were free: "All currents and sources of water, such as springs, rivers, ditches and currents of water flowing from natural sources in the Territory of New Mexico shall be and they are by this act declared free."[48] The Court did not recite the next part of the act, which explained its purpose as providing access to water for travelers and their animals. The Court saw the traveler's water access act as much broader than just a free drink: "By this act, private ownership of the public streams in New Mexico was prohibited, and a right

43. Millheiser v. Long, 1900-NMSC-012, ¶¶ 1–2, 10 N.M. 99.

44. *Id.* ¶¶ 3, 12, 34. Since the defendants had beneficially used water to cultivate only 200 acres before the Millheisers started cultivation, the Millheisers were second in line for water use ahead of anyone who started after them.

45. *Id.* ¶ 3.

46. *Id*. ¶¶ 8–10, 30–31 (quoting CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION 251–252 (1st ed. 1894)) (*Millheiser* also quoted Kinney's treatise regarding the elements of a water right).

47. *Millheiser*, 1900-NMSC-012, ¶ 3.

48. *Id.* (quoting N.M. STAT. ANN. § 72-1-6 (1876)).

to the use of such waters for beneficial purposes was given to those who appropriated and applied them to such uses."[49]

Justice McFie, the author of *Millheiser*, did not participate in *Albuquerque Land & Irrigation Co. v. Gutierrez*,[50] decided on the same day as *Millheiser*, because he had acted as the trial judge, but his opinion was incorporated by reference as the Supreme Court's, prefaced by the Court's statement that "the diversion and distribution of water for irrigation and other domestic purposes in New Mexico . . . is a public purpose."[51] An irrigation company sought to build a canal from San Felipe to Isleta Pueblo by authority of an 1887 act granting the right to such companies to enter upon, survey, and condemn lands by eminent domain for the use of surplus water.[52] The act was intended to promote private investment into water infrastructure for modernizing New Mexico's centuries-old ways of irrigating. "I do not underestimate the present ditch system," Justice McFie wrote, "for in some respects it is very good and so long as it is in existence its status and rights must be upheld by the courts; but that it is not an economical system, that it has no provision for storing water, and that there is an equal distribution of the water, is within the knowledge of this court, and is shown by the testimony."[53]

Justice McFie found the central question of the case to be whether there was any surplus water of the Rio Grande, that is, "all water running in the Rio Grande not subject to a valid appropriation."[54] Detailed testimony of the company's civil engineer showed from stream gauge measurements over several years that there were a number of months during most years when water was available in the river. Justice McFie himself knew there was surplus water in the Rio Grande: "The court takes judicial notice of the fact that from October until about the first of March in each year there is very little water used for any purpose by the farmers in the valley of the Rio Grande, and as a matter of law, it is not an invasion of his rights for a subsequent appropriator to use water after a prior appropriator has ceased to do so."[55] He rejected the irrigators' efforts to raise issues on behalf of the "many thousands" of other persons affected by the case, and he summarily rejected arguments from the Treaty of Guadalupe Hidalgo and Spanish-Mexican law, including the Plan of Pitic. The other irrigators below the new canal could raise claims as they arise, and U.S. laws created by necessity "are ample" for resolution of water appropriation.[56]

---

49. *Millheiser*, 1900-NMSC-012, ¶ 4. The only case quoting *Millheiser* in regard to this 1876 act is a dissenting opinion in *Red River Valley Co.*, 1945-NMSC- 034, ¶ 107 (Bickley, J., dissenting).

50. Albuquerque Land & Irrigation Co. v. Gutierrez, 1900-NMSC-017, 10 N.M. 177, *aff'd,* Gutierres v. Albuquerque Land & Irrigation Co., 188 U.S. 546, 557 (1903).

51. *Albuquerque Land & Irrigation Co.*, 1900-NMSC-017, ¶ 4 (citing Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896)).

52. N.M. STAT. ANN. §§ 62-2-1 to -22 (1887).

53. *Albuquerque Land & Irrigation Co.,* 1900-NMSC-017, ¶ 59.

54. *Id.* ¶¶ 2, 25. While the irrigation company won every legal battle, it never began construction on its ambitious plan. *See* Denise H. Damico, *Albuquerque Land and Irrigation Company*, NEW MEXICO OFFICE OF THE STATE HISTORIAN, http://newmexicohistory.org/people/albuquerque-land-and-irrigation-company [https://perma.cc/GGR8-TX3X].

55. *Albuquerque Land & Irrigation Co.,* 1900-NMSC-017, ¶ 55.

56. *Id.* ¶ 75.

Like he did in *Millheiser,* Justice McFie relied on the U.S. Supreme Court decision of *United States v. Rio Grande Dam & Irrigation Co.* for the proposition that the "doctrine of the Common Law no longer obtains in what is known as the arid and mountainous region of the west, and the doctrine of prior appropriation has been substituted for the Common Law as a matter of necessity, on account of the peculiar conditions existing in most, if not all, mountain States and Territories."[57]As in *Millheiser*, he quoted the free drinking water statute of 1876, but this time in order to tie in with Colorado decisions regarding prior appropriation and public ownership of water: "Water is declared free in the public streams of the State of Colorado, by express provision of the constitution of that State,[58] and the courts of that State apply the doctrine of prior appropriation in determining its water rights. The decisions of the courts of Colorado are, therefore, very instructive in similar litigation in this Territory,"[59] thereby laying the foundation for the "Colorado doctrine" in New Mexico.[60]

D. A New Act Hits the Stage: *Vanderwork v. Hewes* to *Snow v. Abalos* (1910-1914)

In 1910, Justice McFie authored the first opinion interpreting the new Water Act of 1907.[61] In *Vanderwork v. Hewes*,[62] seepage or spring water from an unknown source appeared on land owned by J. Hewes in Eddy County. Hewes used some of it, but the rest poured onto the public road until by agreement his neighbor, E. Dean, cut an embankment and ditch to have the water irrigate Dean's land. In 1908, Fred Vanderwork applied for a permit from the Territorial Engineer to construct a ditch from Hewes' property and carry the seepage/spring water a mile from Hewes' land to his own for irrigation. Over protests from Hewes and Dean, the Territorial Engineer granted the permit, but the newly-enacted Board of Water Commissioners, the district court, and the Supreme Court disagreed. The Territorial Engineer's jurisdiction was limited to natural public waters in New Mexico and seepage waters from constructed works.[63] If the percolating water in *Vanderwork* had covered a larger area, Justice McFie expressed interest in

57. *Id.* ¶ 27.

58. COLO. CONST. art. XVI, § 5.

59. *Albuquerque Land & Irrigation Co.*, 1900-NMSC-017, ¶ 31.

60. Hagerman Irrigation Co. v. McMurry, 1911-NMSC-021, ¶¶ 4–6, 16 N.M. 172 (the forfeiture statute in the 1907 Water Act was "merely declaratory" of the law decided by New Mexico cases following the "Colorado Doctrine," first appearing in Coffin v. Left Hand Ditch Co., 6 Colo. 443 (Colo. 1882), declaring that "on the ground of imperative necessity, no settler can claim any right aside from appropriation"). *See also* Mogollon Gold & Copper Co. v. Stout, 1907-NMSC-027, 14 N.M. 245 (New Mexico's first water pollution case, with an alternative theory of priority of appropriation).

61. Water Act of 1907, 1907 N.M. Laws ch. 49, art. 72 (codified at N.M. STAT. ANN. §§ 72-1-1 to -2 (1978)). *See generally* G. Emlen Hall, *The First 100 Years of the New Mexico Water Code*, 48 NAT. RESOURCES J. 245 (2008).

62. Vanderwork v. Hewes, 1910-NMSC-031, ¶ 1, 15 N.M. 439.

63. *Id.* ¶¶ 2–13. *See also,* Young & Norton v. Hinderlider, 1910-NMSC-061, ¶ 32, 15 N.M. 666 (remanding the case to district court for more facts regarding what "public interest" meant under the Act of 1907. The Territorial Engineer had preferred one application over another because one of the applicants would have provided cheaper water to the irrigators).

following the 1903 case of *Katz v. Walkinshaw*,[64] in which California adopted the doctrine of correlative rights for underground waters as distinguished from the English common law of ownership of underground waters by the overlying landowner.[65] While citing with approval a South Dakota case allowing for the practical equivalence of ownership of spring water for a landowner,[66] *Vanderwork*'s final comment suggested that although the spring/seepage water was not covered by the 1907 act, "it would be governed by the general law of prior appropriation."[67]

The next year, the Supreme Court for the first time cited earlier New Mexico water cases as precedent for prior appropriation, which it called the Colorado doctrine. In *Hagerman Irrigation Co. v. McMurry*,[68] a downstream irrigator on the Hondo River removed flashboards from an irrigation company's dam and stationed an armed man to keep the water flowing downstream. The district court granted a permanent injunction against the downstream irrigator, affirmed by the Supreme Court with the addition of $1.00 as nominal damages. The Court determined that the defendant had adequate water from sources downstream from the dam.

The defendant's claim of riparian rights did not impress the Court. "The assumption by the appellant that the title to real estate is involved, is not well founded. While water flowing in a natural stream is not the subject of private ownership any more than the fish in it, yet, when it is impounded and reduced to possession by artificial means, it becomes personal property, as the fish do when caught, or, as the common, ownerless air does, when it is liquefied and held in a vessel."[69] In rejecting riparian rights, the Court quoted from the Act of 1907 that "[b]eneficial use shall be the basis, the measure and the limit of all right to the use of water."[70] Citing U.S. Supreme Court cases approving New Mexico's water decisions, *Hagerman* determined that "riparian ownership, as known to the common law, has never, it would seem, been recognized in New Mexico."[71] Mexican law at the time of the United States' acquisition of New Mexico did not limit water use to riparian lands, but "extended to others, subject to regulation and control by the public authorities."[72] Based upon ruins of their irrigation systems, the "law of Indian tillers of the soil who preceded the Span[ish]" was also acknowledged.[73] All these laws, ancient and modern, "did but recognize the law of

64. Katz v. Walkinshaw, 141 Cal. 116, 74 P. 766 (Cal. 1903).

65. *Vanderwork,* 1910-NMSC-031, ¶¶ 11–13.

66. *Id.* ¶ 21 (quoting Metcalf v. Nelson, 8 S.D. 87, 65 N.W. 911 (1895)).

67. *Id.* ¶ 28. While not overruled (*In re* Town of Silver City, 2006-NMCA-009, ¶ 28, 138 N.M. 813), *Vanderwork*'s result was limited to the specific facts of the case. Reynolds v. City of Roswell, 1982-NMSC-133, ¶ 17, 99 N.M. 84.

68. *McMurry*, 1911-NMSC-021, 16 N.M. 172.

69. *Id.* ¶ 5.

70. *Id.* ¶¶ 5, 6. *See* N.M. STAT. ANN. § 72-1-2 (1907).

71. *McMurry*, 1911-NMSC-021, ¶ 6, 16 N.M. 172.

72. *Id.*

73. *Id.*

things as they are, declaring that such must, of necessity, be the use of the waters of streams in this arid region."[74]

Two years later in *Pueblo of Isleta v. Tondre*,[75] the Supreme Court decided how the Act of 1907 applied to those water users whose rights arose before March 19, 1907, the effective date of the act. An acequia had lost its headgate and parts of its ditch as the banks of the Rio Grande shifted. The irrigators of the acequia sought to condemn lands across the Isleta Pueblo for a new headgate and ditch. Both parties filed suit, with the Pueblo arguing that the irrigators had failed to apply for a permit to change their point of diversion of water under the Act of 1907. The question before the Supreme Court was "whether old, prior existing rights of the kind represented by the [acequia irrigators], are subject to regulations by the State Engineer."[76] In a two-to-one decision, with a district judge as tiebreaker between Justice Parker and Chief Justice Roberts, the Court in its initial opinion limited the scope of the Act of 1907 to those seeking water rights after its effective date. Justice Parker's majority opinion examined the act as a whole to interpret legislative intent, "there being some little obscurity in the same."[77] One section, at first glance, appeared to apply to all water users, "but a more careful examination [led] to the opposite conclusion."[78] The majority's short statutory analysis of the Act of 1907 resulted in a victory for the acequia users. In his conclusion, Justice Parker wrote that "the case is no longer of any importance except to the immediate parties," because of a 1912 act stating that no permit was required for an acequia to change its point of diversion.[79]

In a lengthy dissent, Chief Justice Roberts first considered the power of the legislature to regulate pre-existing water rights. Citing other state and federal cases, the Chief Justice argued that the state's police power authorized it to regulate all water users, regardless of when they acquired their rights. The act, remedial in nature, should be interpreted liberally to accomplish its purposes. He contrasted the modern and comprehensive code of 1907 with the less effective 1905 act that had initially created a Territorial Engineer, with the later act placing New Mexico among its sister states that had achieved economic success by modernizing their water laws. But the purposes of the act for an efficient and modern set of laws would be undermined by applying the act only prospectively. The majority opinion would place New Mexico "in the anomalous situation of having a complete, modern irrigation code . . . [but lacking] any supervision or control of rights theretofore acquired."[80] Such a construction would be absurd, with no more reason

74. *Id.*

75. Pueblo of Isleta v. Tondre, 1913-NMSC-067, 18 N.M. 388. *See also* Turley v. Furman, 1911-NMSC-030, 16 N.M. 253 (no extra-territorial State Engineer jurisdiction; water/ditch rights distinguished), *distinguished by* State Eng'r v. Diamond K Bar Ranch, LLC, 2016-NMSC-___, (No. 35,446, Sept. 22, 2016); Albuquerque v. Garcia, 1913-NMSC-006, 17 N.M. 445 (no condemnation of acequias, which have long history of public purpose); Farmers Dev. Co. v. Rayado Land & Irrigation Co., 1913-NMSC-035, 18 N.M. 1 (de novo authority of Board of Water Commissioners and district court over State Engineer decisions).

76. *Pueblo of Isleta*, 1913-NMSC-067, ¶ 8.

77. *Id.* ¶ 3.

78. *Id.* ¶ 6.

79. *Id.* ¶ 10.

80. *Id.* ¶ 24 (Roberts, C.J., dissenting.)

for state regulation of a 1907 water right than a 1906 water right. The dissent did recognize that the State Engineer had no authority to supervise the apportionment of waters of pre-1907 users until after a judicial tribunal had determined them, but that this fact should not curtail other responsibilities of the State Engineer over those older water-rights holders.[81]

The justices reached consensus on a motion for rehearing. Inspired by the dissent's distinction between a 1907 user and a 1906 user, the Pueblo of Isleta argued that the Act of 1907 had created two classes of water users, in violation of the state's constitutional guarantee of equal protection. Writing for the Court, Justice Parker dismissed the motion for rehearing on several grounds, one of which was that there would be State Engineer jurisdiction of old water users once a court determined all the users' rights. "The wisdom of postponing the jurisdiction of the State Engineer until after adjudication of the priorities, is at once apparent. Without adjudication, there is no evidence before the State Engineer, except such as he may gather ex-parte in his investigations. . . ."[82]

Following *Pueblo of Isleta v. Tondre*, all that would be left for the comprehensive and efficient code to be effective for all users, pre- and post-1907, would be stream adjudications to be initiated and completed. That is just what one irrigator in the lower Rio Grande tried to do in *Snow v. Abalos*,[83] before the completion of the Elephant Butte Dam. Oscar Snow, a resident of Dona Ana County, owned about 1000 acres of irrigated land. His predecessors in interest and others had diverted and beneficially used the water of the Rio Grande since 1850 through the Mesilla Valley Community Ditch. Some 7,000 claimants were made parties to Snow's general stream adjudication, including the Mesilla Valley Community Ditch and other community ditches. Through a demurrer (an early form of a motion to dismiss), some defendants argued that Snow was not a proper plaintiff, but the real party in interest was the Mesilla Valley Community Ditch as trustee for its users. The district court dismissed the case.

The Supreme Court framed the question this way: "[W]hether the appropriation of water was made by the community acequia, or the individual consumer."[84] To answer that question, the Court would need to examine the "history, nature, and character of community ditches," and the relations between the ditches and their members, as well as "the nature and character of the right to the use of the water of the public streams of New Mexico."[85] First, the Court noted that the acequia system "is an institution peculiar to the native people living in that portion of the Southwest which was acquired by the United States from Mexico. It was a part of their system of agriculture and community life long before the American occupation."[86] From 1852 until 1895, the legislature enacted laws governing acequias, and "doubtless incorporated into the written law of the

81. *Id.* ¶¶ 31, 33 (Roberts, C.J., dissenting). Chief Justice Roberts claimed that the title to the Act of 1907 resolved ambiguity as to the legislature's intent. *See also* Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039.

82. *Pueblo of Isleta*, 1913-NMSC-067, ¶ 63 (on motion for rehearing).

83. Snow v. Abalos, 1914-NMSC-022, 18 N.M. 681.

84. *Id.* ¶ 6.

85. *Id.*

86. *Id.* ¶ 7.

Territory the customs theretofore governing such communities," yet when the legislature enacted an 1895 law making acequias corporate bodies, it was purely administrative and did not confer on acequias "the right to acquire or hold title to water rights."[87] The Court then provided an overview of how settlements and acequias were formed in New Mexico and how the Colorado doctrine prevailed here as settled law. "Established or founded by the custom of the people, it grew out of the condition of the country and the necessities of its citizens," with the courts not making the law, but recognizing it "as it had been established and applied by the people, and as it had always existed from the first settlement of this portion of the country," with the legislature adhering to this construction of the law by the courts.[88]

Following Kinney's definition of appropriation of water,[89] the Court explained that the water in public streams belongs to the public and that no one owns a right to use any specific water but only a right to use a certain quantity for a given purpose; the Court identified the requirements of diversion and beneficial use, and the difference between co-tenancy ownership of ditches and ownership of water rights. As a result of its explanations, the Court concluded that since individuals were the water rights owners, they must be made parties to a general stream adjudication. Therefore, Oscar Snow was a proper plaintiff and the case must be remanded to the district court for the continuation of the adjudication. The general stream adjudication, however, did not proceed further on remand upon the opening of the Elephant Butte Dam in 1916.[90]

II. PLEASE, SIR, I WANT SOME MORE (1918-1950)

> '*What!' said the Master at length, in a faint voice. 'Please, sir,' replied Oliver, 'I want some more.*'[91]

Gnawing hunger prompted young Oliver Twist to ask for more gruel. The need for water, as basic as the need for food, can be satisfied by receiving permission to take it or by just taking it, sometimes as a claimed right. The dichotomy of "ask or take" appears in many New Mexico water cases in the decades leading up to the mid-twentieth century. The Supreme Court resolved these disputes by examining its case law and state statutes, in one instance describing the comprehensive 1907 Act as a wide departure from the court-created arid region

87. *Id.*

88. *Id.* ¶ 9.

89. *Snow*, 1914-NMSC-022, ¶ 10 (citing CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS, § 707 (2nd ed. 1912)).

90. *Id.* ¶ 29 (referring to Oscar Snow's transfer of his interest to the Elephant Butte Water Users' Association). *See also* Rio Puerco Irrigation Co. v. Jastro, 1914-NMSC-041, ¶ 10, 19 N.M. 149, 141 P. 874 ("On appeal the appellate court will presume, in the absence of anything in the record to the contrary, that there is unappropriated water available to supply the requirements under the permit."); State *ex rel.* Comm. Ditches v. Tularosa Comm. Ditch, 1914-NMSC-069, ¶ 7, 19 N.M. 352. Tularosa was not established by King of Spain, but settlers had statutorily preferred water rights for agriculture, "this being a branch of the greatest necessity."

91. CHARLES DICKENS, OLIVER TWIST 20–21 (Vintage Books 2013) (1846).

doctrine, and later, when the act expanded to groundwater, calling it a mere declaration of pre-existing law and custom going back to time immemorial. The Court described the uniqueness of water in national policy as an elemental necessity not to fall under private control and later split over public versus private rights. The Court optimistically predicted that vexatious and disastrous litigation would come to an end through permits or court decrees from general stream adjudications, but cautioned that the very ambition of New Mexico's system might be impracticable. Dismissing hydrologists' warnings of increasing demand for a decreasing supply, the Court opined that despite a few droughty years, water would remain available as long as water and snow falls—meaning forever. Under this static socio-hydrological philosophy, young Oliver might not get more, but if he follows the rules he will get his due.

A. Condemnation: *Young v. Dugger* and *Hagerman Irrigation Co. v. East Grand Plains Drainage Dist.* (1918-1920)

In *Young v. Dugger*,[92] two farmers sought to condemn another's land to reach Nogal Creek. The State Engineer had granted their application, but the riparian owner blocked their access to the stream. The district court dismissed the farmers' condemnation action because they had not alleged there was surplus water available, and as individual farmers, they were applying the water to a private, rather than public use. The Supreme Court stated that the sole question to resolve was "whether the right of condemnation exists in favor of private persons for the purpose of conveying water for irrigation purposes over the land of another."[93] It was the public purpose, irrigation, which gave the right of condemnation, not who the condemnor was. After resolving the "sole question," the Court distinguished *Albuquerque Land & Irrigation Co.*'s ruling that a condemnor for irrigation purposes must allege surplus water in the stream for new appropriation. The doctrine under that case no longer applied, because under the new system, the State Engineer's grant of the permit to the farmers made the right to appropriate clear.[94]

Two years later, another condemnation case pitted a quasi-public drainage district against an irrigation company. Before the district could complete a condemnation, the irrigation company filed an injunction suit, arguing unsuccessfully at trial that it had acquired an appropriative right to the drainage waters. The Supreme Court affirmed in *Hagerman Irrigation Dist. v. East Grand Plains Drainage Dist.*,[95] with a multi-layered rationale for its holding that rights of appropriation only apply to natural waters, discussing the Act of 1907 and the New Mexico Constitution, the common law, treatises, mid-19th century English cases and western state cases, concluding that creators of artificial waters retain their

92. Young v. Dugger, 1918-NMSC-018, 23 N.M. 613.

93. *Id.* ¶ 4.

94. *Id.*; *see also* Dugger v. Young, 1920-NMSC-012, 25 N.M.671.

95. *Hagerman Irrigation Co.*, 1920-NMSC-008, 25 N.M. 649.

rights until the waters return to a natural stream. Accordingly, the irrigation company's injunction suit would be dismissed and condemnation could continue.[96]

B. Departures: *Farmers Dev. Co. v. Rayado Land & Irrigation Co.* and *Harkey v. Smith* (1923–1926)

In 1923, a "most interesting and instructive" priority case, *Farmers Dev. Co. v. Rayado Land & Irrigation Co.*,[97] came before the Supreme Court for the second time,[98] presenting the question of who had rights prior to the May 27, 1907 permit of Rayado Colonization Company (Rayado). Like Rayado, Farmers' Development Co. (Farmers) had colonization plans for Colfax County that required water from the river. Rayado claimed priority because Farmers had filed its application under the "Irrigation Act of 1907" two weeks after Rayado's application, but the Territorial and State Engineer had treated Farmers' application as having been submitted on October 6, 1906, when Farmers had written a letter to the Territorial Engineer giving notice of intended appropriation under the law of 1905. In a careful tracing of the history from the "general law of appropriation" through statutory changes in 1897 (mandatory filing of claims) and 1905 (permissive filing) and finally to the mandatory filing of claims required under the Irrigation Act of 1907, the Supreme Court held that Farmers' October 6, 1906 letter of intent to appropriate and its June 10, 1907 application were of no effect. Instead, Farmers' priority was established by taking a "first step" in initiating its claim through surveys and ditch work that took place months before Rayado's May 27, 1907 application. The Irrigation Act of 1907 supported the Supreme Court's division of two kinds of relation back of claims, one before the act took effect, relating back to the first step in establishing the claim, and the other after its enactment, relating back to the date of application with the State Engineer.

As much as *Farmers Dev. Co.* showed a split between the new statute and the old law vis-à-vis the doctrine of relation, even more so did *Harkey v. Smith*[99] contrast the new and the old regarding seasonal and periodical appropriations in particular and appropriation law in general, calling the Act of 1907 a "wide departure" from the arid region doctrine. After summarizing key elements of the old law, including that "intent, diversion, and use must coincide,"[100] *Harkey* proclaimed that N.M. Const. art. XVI, § 3 "merely declares the basis of the right to the use of the water, and in no manner prohibits the regulation of the enjoyment of

96. *Id.* ¶ 15. Decades later, this decision was determined to be a rule of property and therefore not reviewable. *See* Langenegger v. State *ex rel.* Bliss, 1958-NMSC-073, ¶ 13, 64 N.M. 218; *see also City of Las Vegas*, 2004-NMSC-009, ¶¶ 44–45 (importance of stare decisis in property cases).

97. *Mendenhall,* 1961-NMSC-083, ¶ 17, 68 N.M. 467 (describing Farmers Dev. Co. v. Rayado Land & Irrigation Co., 1923-NMSC-004, 28 N.M. 357).

98. *See* Farmers' Dev. Co. v. Rayado Land & Irrigation Co., 1913-NMSC-035, ¶ 14, 18 N.M. 1 (upholding de novo review), *overruled by* Kelley v. Carlsbad Irrigation Dist., 1963-NMSC-049, ¶ 7, 71 N.M. 464. In 1923, the legislature abolished the Board of Water Commissioners, streamlining the appellate process from State Engineer decisions through direct appeal to the district court. *See* N.M. STAT. ANN. 72-2-11 (1923).

99. Harkey v. Smith, 1926-NMSC-011, 31 N.M. 521.

100. *Id.* ¶¶ 6–7.

that right."[101] Instead of following a doctrine based on case law, "[w]e have . . . a statute in this state regulating the acquisition, means, and manner of enjoyment of water rights which controls the whole matter, and which marks a wide departure from the doctrine above stated."[102]

Harkey v. Smith stemmed from the State Engineer's grant of an application by Julian Smith, a farmer with third priority, to increase ninefold his water rights awarded in a 1912 general stream decree of the Black River in Eddy County. Relying on the arid region doctrine,[103] Smith successfully argued to the State Engineer and the district court that D.R. Harkey's predecessors in interest, with first priority rights antedating the Act of 1907, had forfeited rights from October 15th through March 15th by nonuse for four years under the forfeiture statute. The forfeiture created unappropriated waters available for Smith's taking with lowest priority on the stream, and he spent considerable funds to increase his cultivated lands.[104]

The Supreme Court disagreed, noting that the decree of 1912 declared that the users could apply water "at such seasons and times as may be desired by said respective appropriators."[105] The Court also noted that seasonal appropriation limitations "are not well adapted to general agriculture . . . because agriculture is not an exact science and must be varied from year to year according to the results obtained and the knowledge acquired from experience."[106] *Harkey* followed *Pueblo of Isleta v. Tondre*'s rehearing holding that, post-adjudication, rights predating March 19, 1907 were to be treated the same as later rights. There was no forfeiture because the decree allowed for flexible water use, and despite the economic losses for Smith ("the facts here present a hard case"), he must cease using the extra waters he was awarded by permit. In the future, the Court stated optimistically, the serious questions leading so often to such "vexatious and disastrous litigation" would be avoided through the permit awarded by the State Engineer or through court decree.[107]

C. Merely Groundbreaking: *Yeo v. Tweedy* (1929)

In 1927, the New Mexico Legislature faced a challenge of too much success in Chaves and Eddy counties, because the agriculture boom resulting from artesian-well irrigation came with a price tag: "The original supply has been drawn upon in this manner to an extent that further draughts, in excess of the replacement from natural sources, will tend to the lowering and final depletion of the artesian pressure and of the water supply itself."[108] The legislature responded to the crisis

101. *Id.* ¶ 10.

102. *Id* ¶¶ 8–9.

103. *Id.* ¶ 17 ("[U]nder the old arid region doctrine it was necessary to hold that beneficial use, both as to volume and periods of time, was the evidence and measure of the right, and hence an irrigator might by conduct limit his right to certain periods of the year").

104. *Id.* ¶¶ 3, 14, 20.

105. *Id.* ¶ 4.

106. *Id.* ¶ 16.

107. *Id.* ¶ 11.

108. Yeo v. Tweedy, 1929-NMSC-033, ¶ 3, 34 N.M. 611. *See also*, First State Bank v. McNew, 1928-NMSC-040, 33 N.M. 414 (irrigation rights as personal property), *abrogated by* Walker v. United

by enacting Chapter 182, Laws 1927, which brought under the prior appropriation system all underground waters, the boundaries of which "may be reasonably ascertained by scientific investigations or surface indications."[109]

After enactment, State Engineer Herbert Yeo filed a suit in Eddy County and another in Chaves County to enjoin landowners from drilling wells without first obtaining a permit. With split decisions in the district courts, the losing parties appealed to the Supreme Court to decide the groundwater act's constitutionality. All the justices agreed that the act violated a technical provision of the New Mexico Constitution and was therefore unenforceable as written.[110] But the Court went beyond the technical issue to address "the most important constitutional objection" to the groundwater act, namely, "that it ignores and overrides vested property rights of those who, antedating the enactment, were private owners of lands overlying the basin."[111] The majority opinion agreed with the State Engineer that the groundwater act was "merely declaratory of existing law" and that the act "has neither created nor taken away a right."[112] The Court reasoned, "If [the legislature] has merely made new application of principles already established, without having changed any declared or settled rule, we fail to see how any vested right has been disturbed."[113]

The landowners argued that the Supreme Court in its decisions announcing prior appropriation for streams had arbitrarily defied the common law of riparian rights after 1876 when the legislature adopted the common law.[114] Approving the new groundwater act would again commit "a rape of the common law."[115] In response, the Court explained that there was no uniformity of the common law among the states and that New Mexico had long concurred in the Colorado doctrine starting in 1898 with *United States v. Rio Grande Dam & Irrigation Dist.*, New Mexico's first statement of the previously undeclared law of prior appropriation. New Mexico and other western states required adaptability because of "the peculiarities of climate and topography," as allowed by the common law of England. Further, New Mexico case law followed the Mexican law of prior appropriation, continuing after American acquisition and unaffected by the

States, 2007-NMSC-038, ¶¶ 35–40, 142 N.M. 45; La Luz Comm. Ditch Co. v. Alamogordo, 1929-NMSC-044, 34 N.M. 127 (proper measure, or duty, of water).

109. *Yeo*, 1929-NMSC-033, ¶ 4 (quoting 1927 N.M. Laws ch. 182, § 1. *But see* N.M. STAT. ANN § 72-12-1 (1931, as amended)).

110. N.M. CONST. art. IV, § 18 prohibits the extension of legislation by reference to its title only, which the groundwater act did, both procedurally, which is acceptable, and substantively, which is not. *See also Yeo*, 1929-NMSC-033, ¶¶ 36–40.

111. *Id.* ¶ 6.

112. *Id.* ¶ 8.

113. *Id.* ¶¶ 14, 52 (Parker, J., dissenting on rehearing). Justice Parker, in a dissenting opinion on rehearing, did not believe the Court "should, when unnecessary, indulge in a discussion and announcement of a doctrine which, to say the least, is of a very doubtful soundness and very far-reaching in its consequences."

114. N.M. STAT. ANN. § 38-1-3 (1876) ("In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision.").

115. *Id.* ¶ 14.

adoption of the common law in 1876, which did not impose "rules inapplicable to our condition."[116]

The Court surveyed other states' groundwater laws and turned the landowners' argument from absolute dominion, correlative rights, and reasonable use on its head, by demonstrating that those underground rights for overlying landowners stemmed from those courts' decisions upholding riparian rights.[117] That made sense, stated the Court, because "[n]ature having united the land and the water, man is not to put them asunder. That is the fundamental idea of riparian rights."[118] Under the same reasoning, a state that follows prior appropriation above ground should follow it for underground waters. The Court then opined on economic theory, proclaiming with no empirical support how prior appropriation for underground waters was more financially beneficial to a state than correlative rights, adopted by California in *Katz v. Walkinshaw*. Besides its importance in New Mexico's groundwater law, *Yeo v. Tweedy* explained why law in general does not always appear comprehensive: "The courts act only upon controversies requiring decision. Legislatures indeed adopt general laws for future application, but, practically, only as situations develop requiring legislative action."[119]

D. Let's Sue the Judge: *El Paso & R.I. Ry. Co. v. Dist. Court of Fifth Judicial Dist.* to *State ex rel. Red River Valley Co. v. Dist. Court of Fourth Judicial Dist.* (1931–1935)

In *El Paso & R.I. Ry. Co. v. Dist. Court of Fifth Judicial Dist.*,[120] a railroad company filed a suit of prohibition against a district judge and alternatively for a stay of injunction proceedings in Chaves County, because the district judge had denied the railroad's attempt to halt the suit in favor of a general stream adjudication underway in Lincoln County. The railroad had obtained a permit from the State Engineer for a dam and reservoir that would divert the water naturally flowing from the Bonito River to the Rio Hondo and thereafter through percolation (allegedly) to the Roswell Artesian Basin for use by the basin appropriators, plaintiffs in the Chaves County suit. Such diversion out-of-basin would injure plaintiffs.[121]

Finding in favor of the railroad and staying the Chaves County proceedings, the Supreme Court analyzed the general stream adjudication statutes and found that all users, whether surface or underground in a stream system, needed to be joined in an exclusive general adjudication. To hold otherwise "would greatly limit the beneficial purposes of the statute, strictly construe a highly

116. *Id.* ¶¶ 12, 48 (Parker, J., dissenting) (The majority opinion did not address Justice Parker's contention that "the civil law of Mexico has never been extended over the eastern part of New Mexico.").

117. For a survey of all 50 states' groundwater laws, including a discussion of New Mexico's pioneer groundwater act, *see generally* Joseph W. Dellapenna, *A Primer on Groundwater Law* (Villanova University School of Law Public Law and Legal Theory Working Paper No. 2013-3042, 2013).

118. *Yeo*, 1929-NMSC-033, ¶ 17.

119. *Id.* ¶¶ 16–27.

120. El Paso & R.I. Ry. Co. v. Dist. Court of Fifth Judicial Dist., 1931-NMSC-055, 36 N.M. 94.

121. *Id.* ¶¶ 4, 39.

remedial act, and weaken the efficiency of the system of state control of such waters devised by the legislature in the performance of its function of declaring public policy."[122] Without a general stream adjudication as an essential part of a prior appropriation system, there would continue to be disputes, feuds, criminal and civil cases clogging the court dockets, dangerous and wasteful methods of water use, and the retardation of development.[123]

The artesian-well users contended that the State Engineer would thereby have non-legislatively designated powers because the recently approved groundwater act[124] did not specifically provide for a general adjudication. Acknowledging the limitations on the State Engineer, the Court cited its precedent that "the scope of an adjudication may be and is broader in its subject-matter and in its parties than the existing jurisdiction of the state engineer to license appropriations or to regulate use."[125] The artesian-basin litigants asked the Court to follow Colorado law, to no avail. "It is true that Colorado adjudications are not so sweeping as ours, and that much more is left to the ordinary jurisdiction of equity. The adjudication determines priorities of ditches only. It is confined to the limits of a water district, which does not necessarily embrace a whole stream system."[126] Priorities among individual users must be settled elsewhere.[127] From Colorado's experience, according to the Court, New Mexico enacted a comprehensive act from a draft by Morris Bien of the Reclamation Service, as did North and South Dakota and Oklahoma. While acknowledging that a great difficulty arises in considering the relative rights and priorities between stream and groundwater appropriators, "[o]ur scheme seems more logical. Whether it is so ambitious as to be impracticable remains to be determined."[128]

In 1935, the Supreme Court in *State ex rel. Red River Valley Co. v. Dist. Court of Fourth Judicial Dist.*[129] declined to issue a writ of prohibition against a San Miguel district judge who was allowing the newly-created Interstate Stream

122. *Id.* ¶ 14.

123. *Id.* ¶ 15.

124. In 1931, the legislature corrected the constitutional infirmities of the 1927 act. The current codification is found in N.M. STAT. ANN. §§ 72-12-1 to -28 (1931, as amended).

125. *El Paso & R.I. Ry. Co*., 1931-NMSC-055, ¶ 20.

126. *Id.* ¶ 23.

127. *Id.*

128. *Id.* ¶ 24. Query whether the question remains to be determined nearly a century later, with only 20 percent of adjudications fully complete, 50 percent underway and 30 percent yet to begin, including the middle Rio Grande with the greatest number of users in the state. *Adjudications*, NEW MEXICO OFFICE OF THE STATE ENGINEER, http://www.ose.state.nm.us/Legal/adjudications.php [https://perma.cc/PA9V-CKLA]. For a state-by-state comparison of stream adjudications, *see* Michelle Bryan, *At the End of the Day: Are the West's General Stream Adjudications Relevant to Modern Water Rights Administration?*, 15 WYO. L. REV. 461 (2015). For Colorado, *see generally* Justice Gregory J. Hobbs, Jr., *Colorado Water Law: An Historical Overview*, 1 U. DEN. L. REV. 1 (1997).

129. State *ex rel.* Red River Valley Co. v. Dist. Court of Fourth Judicial Dist., 1935-NMSC-085, 39 N.M. 523. *See also,* Threlkeld v. Third Judicial Dist. Court, 1932-NMSC-041, 36 N.M. 350 (writ of prohibition rejecting lumber as a public use unlike water's unique status in national policy, "an elemental necessity, like air, which must not be allowed to fall under private control"). This echoes classical philosophy's necessary elements of air, water, land and fire. *See, e.g.,* ARISTOTLE, METAPHYSICS 17, 18 (Hugh Tredennick, trans., Harv. U. Press, 1989).

Commission (ISC)[130] to condemn 33,830 acres of the Red River Valley Co.'s land held in fee as successor to the Pablo Montoya Grant, for the purpose of building a dam and reservoir for irrigation and other public purposes. The Court traced the history of statutes from 1876 (declaring New Mexico's waters free) to the ISC's creation in 1935 and New Mexico case law, as well as constitutional provisions and federal statutes, in support of its holding that conservation of water through building reservoirs and dams is a public use and that the ISC was entitled to exercise eminent domain. In particular, *Pueblo of Isleta v. Tondre*'s liberal construction of the condemnation statute demonstrated that every person with a water right could condemn lands for the public purpose of delivering water. "The state of New Mexico is not only performing a governmental or public function in this matter, but is promoting its proprietary interests. It is a large landowner as well as holding title to the public waters of the state, subject only to vested rights in the use of them by those who have applied them to beneficial uses."[131]

E. A Creek Runs Through It: *New Mexico Prods. Co. v. New Mexico Power Co.* (1937)

In a water case depending in part on the history of Santa Fe, the Supreme Court quoted the complaint's allegation that "[b]etween the years 1603 and 1614 a Spanish settlement was established on the site now occupied by the city of Santa Fe through which ran, as through said city now runs, the Santa Fe creek, . . . the source of water supply for the inhabitants."[132] Santa Fe had grown from the early 1890s when its population was about 3,000 to 1935 when its summer population was more than four times that amount. To handle increased water consumption, the city contracted in 1925 with New Mexico Power Co. to provide water.[133] Although it had asked for all surplus water from the creek, the company received a State Engineer permit for 3,500 additional acre-feet per year (AFY) on the standard condition that the right not be exercised "to the detriment of any others having valid prior existing rights."[134] The power company then built a dam and reservoir that at times took the creek's entire flow, preventing one downstream irrigator from fully using the creek's water for its 80-acre farm, in operation since 1885.

The farm company's suit sought damages against the power company and the City of Santa Fe for its annual losses from the out-of-priority diversions, that in some years caused no water to reach the farm or in other years just enough to irrigate ten out of its 80 acres from the creek, requiring well water partially to supplant the loss. The district court dismissed the suit on the grounds that (1) Santa Fe had title to all the water in Santa Fe Creek through grant from the King of Spain, and that (2) without a general stream adjudication naming all parties using Santa Fe

130. *See* N.M. STAT. ANN. §§ 72-14-1 to -45 (1931).

131. State *ex rel.* Red River Valley Co. v. Dist. Court of Fourth Judicial Dist., 1935-NMSC-085, ¶ 21, 39 N.M. 523.

132. New Mexico Prods. Co. v. New Mexico Power Co., 1937-NMSC-048, ¶ 2, 42 N.M. 311.

133. *Id.* ¶¶ 2, 4.

134. *Id.* ¶ 4. The amount granted was based on a population of 10,000, with daily water consumption of 125 gallons per capita.

Creek, there was no jurisdiction in the court to allow a damages suit claiming prior rights.

Because the farm company's water rights predated the 1907 Act, the Supreme Court found in its favor regarding jurisdiction to bring *inter se* disputes absent a general adjudication, leaving open the question whether such right extended to holders of post-1907 rights. As for the issue of the city's claimed ownership of Santa Fe Creek, the Supreme Court did not determine whether there was such a thing in New Mexico as a pueblo right, which allowed for the expansion of water rights for a growing Spanish grant city, as California allowed through *Lux v. Haggin*[135] and progeny under the Treaty of Guadalupe Hidalgo. Instead, the New Mexico Supreme Court disposed of the question by declaring that there never had been a royal grant to Santa Fe. The Supreme Court found that far from receiving a pueblo grant from the King of Spain, Santa Fe was originally a "mere colony of 'squatters'" founded by, according to the United States Supreme Court, "deserters from the Spanish army . . . " in the midst of "the native Indians," whose insurrection in 1680 was later quelled; Santa Fe was established by "success of Spanish arms, rather than [by] the exercise of the power to induce settlements."[136] Therefore, Santa Fe had no pueblo rights, and the complaint for damages was reinstated for further proceedings on remand to district court.[137]

F. Confusion Worse Confounded: *State ex rel. State Game Comm'n v. Red River Valley Co.* (1945)

Ten years after approving the ISC's condemnation action to impound the Conchas River, the Supreme Court again addressed the issue of public use, this time in the context of the public's right to fish and recreate in the Conchas Dam reservoir. The trial court had ruled against the State Game Commission in its declaratory judgment action, finding that although the waters in the reservoir were in some sense public waters, the company owning much of the lake bed could exclude the public from fishing and recreating over its land.[138] In a 3-2 decision reversing the district court, the Supreme Court held that once water was considered public, it was public for all purposes, including the non-appropriative right of the public as its owners to fish and recreate.

The Court rejected the company's argument from common law that the company, as the owner of much of the lake bed, held exclusive fishing rights over its land, because, the Court opined, "the Common law doctrine of riparian right was not suited to the region, was never recognized, and did not obtain in this jurisdiction."[139] Prior to the United States acquiring it, the Pablo Montoya Grant

135. Lux v. Haggin, 69 Cal. 255, 4 P. 919 (Cal. 1886), *cited in New Mexico Power Co.*, 1937-NMSC-048, ¶ 9.

136. *New Mexico Power Co.*,1937-NMSC-048, ¶¶ 10–11, *quoting* United States v. Santa Fe, 165 U.S. 675 (1897).

137. *New Mexico Power Co.*, 1937-NMSC-048, ¶¶ 24–25. Another statement worthy of note: "A water right is property and in fact it is held to be real property by most authorities." *See also* Carlsbad Irrigation Dist. v. Ford, 1942-NMSC-042, 46 N.M. 335 (banning new irrigators' pumping for failure to obtain permit).

138. *Red River Valley Co*., 1945-NMSC-034, ¶¶ 1–2.

139. *Id.* ¶ 24.

had been subject to the law of Mexico, which followed the civil law of Spain granting rights to the public to fish in public waters.[140] The state constitutional provision establishing public ownership of unappropriated waters was merely declaratory of the preexisting law before American rule, including "the ancient law of the Indian" and "immemorial custom."[141] The doctrine of public ownership and the availability of such water "for specific appropriation to private use under some system of priority of right, perhaps crude enough at first, has obtained in the Southwest, certainly in the area now comprising this state, for some two or three centuries."[142]

The doctrine of prior appropriation superseded the common law, but even under the common law, the sovereign could not divest its citizens of a common right to fish in public waters, "consistently with the principles of the law of nature and the constitution of a well ordered society . . . It would be a grievance, which never could be borne by a free people."[143] The majority opinion rejected a divided Colorado Supreme Court decision in *Hartman v. Tresise* upholding riparian owners' exclusive right to fish in public streams. Instead, the New Mexico Supreme Court agreed with the Colorado dissent "showing the general expansion of the public water doctrine."[144] Overly confident, the Court disavowed its dissenters' "thoroughly unsound idea that the majority holding opens wide the opportunity for trespass upon the lands of all riparian owners."[145]

Justice Bickley's dissent included three cogent arguments. First, as Cicero wrote, law arises from the nature of things. The law of appropriation known as the Colorado doctrine arose necessarily from the scarcity of water for mining and raising of crops, but fishery rights depend upon neither aridity nor humidity. Second, for the common law to have been superseded by prior appropriation, the common law must have at one time controlled in New Mexico; thus, "whatever its origin, the appropriation doctrine has been superimposed upon an underlying riparian doctrine . . . modified to the extent and only to the extent which is necessary to give full force, application and effect to this superimposed appropriation doctrine."[146] Third, Colorado cases are persuasive in interpreting the Colorado doctrine, in particular, in interpreting Colorado's comparable "public waters" constitutional provision; hence, *Hartman v. Tresise* should have been followed. Justice Bickley concluded: "I am unable to comprehend any rational justification for the prevailing decision and believe it unjust and dangerous."[147]

---

140. *Id.* ¶¶ 24-32 (citing Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441 (1935), that relied in part on the Spanish code used in the Americas, *Las Siete Partidas*).

141. *Red River Valley Co*., 1945-NMSC-034, ¶¶ 33, 37.

142. *Id.* ¶ 50.

143. *Id.* ¶ 25 (citing Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57 (Me. 1854)).

144. *Id.* ¶¶ 38–40 (discussing Hartman v. Tresise, 36 Colo. 146, 84 P. 685 (1905)).

145. *Id.* ¶ 56. Whether wide or narrow, many years later *Red River Valley* did open an opportunity for expanding access to private lands over which public water flowed. *See* N.M. Att'y Gen. Op. No. 14-04 (2014). Narrowly rejecting the Attorney General's opinion, the legislature changed the law the next year to forbid such activity without the landowner's permission. N.M. STAT. ANN. § 17-4-6(C) (2015).

146. *Id.* ¶ 133 (Bickley, J., dissenting).

147. *Id.* ¶ 175 (Bickley, J., dissenting).

Justice Sadler's dissent expressed no less outrage. "Another birthright of Anglo-Saxon jurisprudence—the citizen's dominion over his own property—has been stricken down and laid low."[148] Taking away private fishing rights represents "a developing school of thought holding to the proposition that the great natural resources of mankind, so essential to human welfare, should not lie in private ownership," which "philosophy, of course, would create a communal state."[149] Justice Sadler's words were pointedly alarmist given his immediate historical context: the Allies had just won World War II, and now the great threat of the communist Soviet Union loomed large. "Naturally," wrote the dissenter, "such a philosophy is directly opposed to our system of privately owned property as the reward of free enterprise."[150]

On motion for rehearing concerning the historical and legal status of the Pablo Montoya Grant, the majority confirmed its earlier decision through a wide-ranging opinion finding that "the customs and laws of the Republic of Mexico are the basis for the public control of water in New Mexico."[151] The Court disapproved an overly broad statement from an earlier case that by statutory adoption in 1876 the common law "filled every crevice, nook and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment."[152] In a brief dissent, Justices Bickley and Sadler wrote that the majority's opinion "merely represents confusion worse confounded."[153]

G. Expanding Boundaries: *PVACD v. Peters* and *State ex rel. Bliss v. Dority* (1945–1950)

Shortly after *Red River Valley*, the Supreme Court considered a case brought by the Pecos Valley Artesian Conservancy District (PVACD) to enjoin an irrigator who had drilled an artesian well outside the district's and the declared basin's boundaries, which well was allegedly injuring PVACD users by drawing down the basin's waters. The district court had dismissed the case on the grounds that PVACD was not a proper party. In a 3-2 decision, the Supreme Court reversed and remanded, finding that an artesian conservancy district can sue in a representative capacity when its members have a common or general interest in the suit. The majority opinion, authored by Justice Sadler, reached its decision through a review of statutes governing underground waters and artesian conservancy districts.[154]

---

148. *Id.* ¶ 176 (Sadler, J., dissenting).

149. *Id.* ¶ 181 (Sadler, J., dissenting).

150. *Id*.

151. *Id.* ¶ 226 (motion for rehearing) (quoting Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339 (1909) ("Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that, in the state of Sonora, the doctrine of appropriation, as now recognized, was to some extent in force by custom.")).

152. *Id.* ¶ 230 (motion for rehearing) (criticizing Beals v. Ares, 1919-NMSC-067, 25 N.M. 459, as to New Mexico's water law).

153. *Id.* ¶ 248, (Bickley & Sadler, JJ., dissenting), referring to Milton's Paradise Lost, ii, l. 996.

154. Pecos Valley Artesian Conservancy Dist. v. Peters, 1945-NMSC-029, ¶ 42, 50 N.M. 165. *See* N.M. STAT. ANN. §§ 72-12-1 to -28 (1931, as amended) (groundwater act); N.M. STAT. ANN. §§ 73-1-1 to -27 (1931, as amended) (artesian conservancy act).

Three years later *PVACD v. Peters*[155] came back to the Supreme Court after a trial resulting in dismissal of the complaint on its merits. Among the district court's findings were that defendant Peters had drilled his artesian well in August 1942 to irrigate approximately 286 acres, that the State Engineer had extended the Roswell Artesian Basin to include Peters' land two months later, and that Peters thereupon filed a declaration of water rights. Further, Peters used such a comparatively small amount of water that he caused no injury to prior appropriators, although the basin's water table was generally downward except in times of flood. In addition, not a single appropriator testified that Peters' well diminished that appropriator's water use. Finally, there would be more than sufficient water for Peters to use his declared water rights fully if the numerous leaking wells in the basin were plugged and the waters of the basin thereby conserved.[156]

The Supreme Court affirmed on different grounds than the district court. Following a line of California cases, the Court held that PVACD failed to meet its initial burden to prove the quantity of beneficial use by prior appropriators, after which Peters would have had to prove there were surplus waters available for his use. In order to show that PVACD did not make a prima facie case by proving prior appropriators' amount of use, the Court summarized the trial testimony, including that of geologists and the famous hydrologist Charles V. Theis. From studies dating from 1925 and their own extensive observations, the experts testified that overall there was a decline in the basin's water table and that any additional tapping of the basin would affect all other users. As a result, no permits had been issued since 1931. Dr. Theis stated that the "rate of draft" in the basin "at the present time is alarming."[157] The Court disagreed with the expert witnesses: "The fact that the water table rises and falls is not so alarming to us as to some of the witnesses," despite the previous five "droughty" years. The Court was quite certain that there would always be water for irrigation and other uses "so long as water and snow falls" over the basin.[158] Besides which, in the future these types of proceedings would go through the State Engineer since the artesian basin's boundaries had been extended.[159]

Justice Sadler specially concurred in the result. While agreeing with the majority on the burden of proof, he argued that PVACD could have met its burden by relying on legislative statements that the basin was fully appropriated and on policies of the State Engineer closing the basin to further appropriation, as well as on the Fiedler hydrology reports completed in 1931 that justified the urgency for establishing artesian conservancy districts and enacting groundwater statutes. The special concurrence quoted Fiedler that "[g]round-water supplies, in common with other sources of water supply, are not inexhaustible," particularly where, as in the Roswell Artesian Basin, increased demand had exceeded the safe yield of the

155. *Peters*, 1948-NMSC-022, 52 N.M. 148.

156. *Id.* ¶ 5.

157. *Id.* ¶¶ 21, 28.

158. *Id.* ¶ 29.

159. *Id.*

artesian reservoir.[160] Justice Sadler opined that the burden of proof on an individual plaintiff to prove the amount of water used by all appropriators would be prohibitively expensive and time-consuming, with a general stream adjudication seeming "to furnish the only escape from an otherwise impossible burden," akin to proving oneself "a lineal descendant of Adam."[161]

In 1950, the Supreme Court again faced issues arising from the Roswell Artesian Basin, together with the shallow aquifer overlying it, in *State ex rel. Bliss v. Dority*.[162] Three irrigators refused to seek permits for extra acreage they were watering. In response to an injunction suit by the State Engineer and the Attorney General, the irrigators argued first that they owned the water beneath their soil and that the 1931 groundwater statute was an illegal taking of their property without just compensation and denied them equal protection under the law, in violation of the U.S. and New Mexico constitutions. Second, they argued that the State Engineer had no jurisdiction to declare basin boundaries prior to a general stream adjudication. On stipulated facts, the district court issued an injunction against the irrigators from using unappropriated waters for irrigation in violation of New Mexico statutes. The Supreme Court affirmed.

The principal issue of the case, the constitutionality of the 1931 groundwater act,[163] rested on the claimed ownership by the irrigators, whose predecessors in interest had obtained patents from the United States after the enactment of the Desert Land Act of 1877.[164] The Supreme Court quoted state and federal cases demonstrating that water and land ownership had been severed explicitly by the Desert Land Act, if not implicitly before, and that water was thereafter to be governed by state law of prior appropriation. *Bliss v. Dority* interpreted the Desert Land Act to include groundwater and distinguished the law of other states such as California and Arizona that did not follow prior appropriation for groundwater.[165] Therefore, title to the water beneath their soil never passed to the irrigators' predecessors in interest, but instead "belonged to the State as trustee for the public."[166]

---

160. *Id.* ¶ 35.

161. *Id.* ¶¶ 42, 43 (Sadler, J., specially concurring). *See* ALBERT G. FIEDLER & SELDEN S. NYE, GEOLOGY AND GROUND-WATER RESOURCES OF THE ROSWELL ARTESIAN BASIN, NEW MEXICO, USGS WATER SUPPLY PAPER 639 (1933).

162. State *ex rel.* Bliss v. Dority, 1950-NMSC-066, 55 N.M. 12. *See also* Bounds v. Carner, 1949-NMSC-008, 53 N.M. 234 (considering the effect of a federal general stream adjudication of the Pecos stream system, entitled The United States of America v. Hope Community Ditch et al.); Chavez v. Gutierrez, 1950-NMSC-004, 54 N.M. 76 (years of intermittent drought between 1913 and 1932 could not be used against a party to forfeit his rights for nonuser or abandonment).

163. The groundwater act is currently codified at N.M. STAT. ANN. §§ 72-12-1 to -28 (1931, as amended).

164. The Desert Land Act provides in pertinent part: "That the right to the use of water . . . shall depend upon bona fide prior appropriation . . . on or to any tract of desert land . . . and such right shall not exceed the amount of water actually appropriated, . . . and all surplus water . . . together with the water of all lakes, rivers, *and other sources of water supply upon the public lands* and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." Desert Land Act of 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (2012)) (emphasis added).

165. *Dority*, 1950-NMSC-066, ¶¶ 29–33.

166. *Id.* ¶ 47.

As for the State Engineer's authority to establish boundaries for groundwater basins, the Supreme Court held that the State Engineer had been given such authority implicitly by the groundwater statute and that no judicial determination was required beforehand.[167] The Court quoted with approval *Yeo v. Tweedy*: "Before he can assume jurisdiction over underground bodies he must find that they have boundaries reasonably ascertained by scientific investigations, or by surface indications."[168] *Yeo v. Tweedy* had been relied upon for nearly twenty years by numerous purchasers in the area, so *Bliss v. Dority* declared it a rule of property.[169] The public ownership of groundwater and its governance by prior appropriation in New Mexico thereby became a closed issue.

III. BLOWIN' IN THE WIND (1953–1978)

> *The answer, my friend, is blowin' in the wind. The answer is blowin' in the wind.*[170]

Bob Dylan's refrain of frustrated uncertainty would have resonated with senior appropriators who tried to make sense of a number of Supreme Court rulings in this turbulent era. Crippling drought and years of increased drilling of wells encouraged by the State Engineer, together with the expanding population of New Mexico, strained over-appropriated water supplies. Less water means more litigation, and the dryness begun in the 1950s spawned many lawsuits. The rules of prior appropriation, hammered out over many decades, took a back seat to statutory proceedings to drill new wells to replace dried-up streams and salty wells. Proceedings before the State Engineer were tried de novo by the district courts, but as early as 1955 the Supreme Court bemoaned the unfortunate day when district judges would second-guess the State Engineer. The Supreme Court itself gave up trying to understand why the State Engineer would rule one way on impairment of existing rights and then rule another way a short time later. The Court, however, generally trusted his findings and hung onto a standardless "case-by-case" analysis, confusing judges trying to follow the Court's decisions as binding precedent.

The Supreme Court modified prior appropriation for practically non-rechargeable basins based on the State Engineer's economic life-span calculations, finding it inevitable that irrigators would eventually have to stop growing crops and just use the lessened water domestically, while allowing new users to drill wells. Further, the Court accepted the California pueblo rights doctrine, authorizing a city that had been a royal Spanish grant to have super-priority over every other user in the stream system, to meet its expanding needs. While that municipal preference was eventually rejected decades later, a new one took its place in this era allowing municipalities to establish future water rights. The Court acknowledged that upstream appropriators had the better practical right over senior appropriators and gave the impression that there was hardly ever a proper place or proceeding to

167. *Id.* ¶ 18.

168. *Id.* ¶ 15 (quoting *Yeo*, 1929-NMSC-033, ¶ 32).

169. *Id.* ¶ 46.

170. BOB DYLAN, BLOWIN IN THE WIND (Columbia Records 1963).

assert priorities other than a generations-long general stream adjudication. As Bob Dylan asked, "How many years?"

A. A Time of Drought: *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.* to *Langenegger v. State ex rel. Bliss* (1953–1958)

At the beginning of New Mexico's worst drought of the 20th century, the state entered into a plan with the federal government to re-channel the Rio Grande with accompanying infrastructure for better drought and flood protection and reliability of supply, but the plan came with controversy. A group of water users challenged the validity of the contract between the Middle Rio Grande Conservancy District and the United States Bureau of Reclamation (BOR), in part based on the doctrine of prior appropriation. The United States required that particular crops be approved by the BOR and that individual users from the Middle Rio Grande project be limited to 160 irrigated acres, as set by an act of Congress.

Upheld by a three-judge conservancy court, the contract received mixed reviews from the New Mexico Supreme Court, which in a divided opinion in *Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist.*[171] generally confirmed the contract. Excess land with water rights was allowed to be sold to the government at fair market value, so there was no illegal taking by the federal government.[172] Aid from the United States required giving up some rights, including the right of unfettered choice of crop selection, with "the heretofore rugged and individualistic cattleman being the last to succumb and secure price supports."[173] The majority defended the contract in part based on the government's police power, that "salus populi est suprema lex" (the people's safety or health is the supreme law), because of the dire circumstances facing New Mexicans.[174]

In the 1955 groundwater case of *Spencer v. Bliss*,[175] the State Engineer denied two applications from a senior appropriator to change place and method of use in the Carlsbad Underground Water Basin because the applicant did not prove that there would be no impairment of existing uses. The district court reversed after a trial de novo, but the Supreme Court reassessed the evidence from the State Engineer's hydrologist. There had been dramatic declines generally in the water table, in large part because the State Engineer had encouraged the drilling of supplemental wells for users junior to the applicant to make up for the Pecos River's declining flows. But that was immaterial to the applicant's burden to prove no impairment to existing uses at his particular move-from and move-to locations. The Court noted that stream management is difficult enough, "but when the administration is turned to underground waters the engineer's troubles are multiplied a hundredfold," and that it would be "an unfortunate day and event" for

171. Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy Dist., 1953-NMSC-035, 57 N.M. 287.

172. *Id.* ¶ 53 (Sadler, J., dissenting in part). While styled as a dissent, Justice Sadler's opinion on this point represents the majority.

173. *Id.* ¶ 28 (quoting the U.S. Secretary of Agriculture).

174. *Id.* ¶ 58 (Sadler, J., dissenting in part). Justice Sadler's majority opinion on this point quotes a maxim first found in CICERO, DE LEGIBUS III cautioning the two consuls, executive officers of Rome with immense powers, to self-limit their power for the welfare of the people.

175. Spencer v. Bliss, 1955-NMSC-066, 60 N.M. 16.

the courts to substitute their judgment for that of the State Engineer hydrologists "in the administration of so complicated a subject as the underground waters of this state."[176]

In 1958, the Court traced the ups and downs of a water table in *Langenegger v. State ex rel. Bliss*.[177] At the beginning of the 20th century, the Court wrote, artesian wells in Chaves County raised the water table gradually to the point that by the late 1920s artificial drainage was necessary to keep lands from being waterlogged. A farmer had used artificial drainage for some years, as approved by the 1933 Hope Decree, but with no right for diversion from the river. The water table dropped from lack of rain and a surge of shallow groundwater wells encouraged by the State Engineer, such that by the late 1940s into the 1950s, the farm had a fraction of its original water supply. The State Engineer denied Langenegger's application to drill wells to replace his lost drainage water, with the district court and the Supreme Court affirming his decision on the grounds that drainage waters were private and could not give one a right to public waters.[178]

B. Chasing Water and the Torch of Priority: *Templeton v. Pecos Valley Artesian Conservancy Dist.* and *Cartwright v. Public Service Co.* (1958)

In 1952, flow from the Rio Felix, a tributary of the Pecos River, dropped significantly, caused by pumping of irrigation wells and a drought that had begun a few years earlier. Several irrigators sought to replace their lost water supply from the Rio Felix by drilling wells into a shallow groundwater basin.[179] The State Engineer denied their requests because the Roswell Underground Water Basin had been closed as fully appropriated by the State Engineer's order on August 31, 1937.[180] In a trial de novo,[181] the district court reversed, finding that the applicants were merely seeking new diversion places for the same water, shared by both the Rio Felix above ground and the shallow underground basin where the water sinks

176. *Id.* ¶¶ 23–25, 34–35.

177. *Langenegger*, 1958-NMSC-073, 64 N.M. 218. *See also* Elephant Butte Irrigation Dist. v. Gatlin, 1956-NMSC-030, 61 N.M. 58 (reversing on sovereign immunity grounds injunction against subordinate officials of the Department of Interior from diverting Rio Grande water to Bosque del Apache Refuge and Wild Life Reserve, citing New Mexico v. Backer, 199 F.2d 426 (10th Cir. 1952), which reversed injunction against federal employee from releasing water from Elephant Butte Dam); State *ex rel.* Erickson v. McLean, 1957-NMSC-012, 62 N.M. 264 (the first New Mexico case supporting forfeiture for failing to conserve water); State *ex rel.* Reynolds v. King, 1958-NMSC-016, 63 N.M. 425 (private waters may not be stored in public underground reservoirs); State v. Myers, 1958-NMSC-059, 64 N.M. 186 (the State Engineer's declaration of the Rio Grande underground basin from the Colorado border to the Elephant Butte dam was not "a scientific absurdity on its face").

178. *Langenegger*, 1958-NMSC-073, ¶¶ 3–11, 13, 64 N.M. 218 (the Court held that *Hagerman Irrigation Co.*, 1920-NMSC-008 (drainage waters are private), had become a rule of property and would not be disturbed). *See also In re* Brown, 1958-NMSC-113, 65 N.M. 74 (upholding a non-impairment finding although there would be a decline in the protestant's water table); *cf. In re* Hobson, 1958-NMSC-114, ¶ 4, 64 N.M. 462 ("All parties agree that the waters of the basin are over-appropriated and have been for many years; hence, it follows that further use of waters of the moved-to area would most certainly impair rights of prior appropriators, particularly those of that area.").

179. Templeton v. Pecos Valley Artesian Conservancy Dist., 1958-NMSC-131, ¶ 12, 65 N.M. 59.

180. *Id.* ¶ 15.

181. *Id.* ¶ 18 (during the appeal, the State Engineer and the PVACD abandoned their argument that the district court lacked jurisdiction to hear a trial de novo).

below the surface. But for the acts of subsequent appropriators, the applicants would have still received their full supply of water from the Rio Felix. Because the *Templeton* irrigators had older rights than those who had already been pumping water, their prior rights entitled them to drill supplemental wells. The court concluded that the supplemental wells would not impair existing rights, so the State Engineer's decision should be reversed.[182]

The Supreme Court affirmed but disregarded the lower court's priority analysis,[183] concluding that "[a]n appropriation when made follows the water to its original source, whether through surface or subterranean streams or through percolations,"[184] and that the *Templeton* applicants were merely seeking "to follow the course of their original appropriation."[185] The applications for change of point of diversion would not impair existing rights,[186] as shown by a hydrologist's testimony denying that the new well would affect the neighbors any more than the old well when it had full irrigation.[187] In sum, *Templeton* simply applied facts to established law of surface water connectivity to percolating waters and underground streams, coupled with a factual analysis of the statutory requirement not to impair existing rights.[188]

In *Cartwright v. Pub. Serv. Co.*,[189] a large number of irrigators sought damages and injunctive relief against Public Service Co. for using more water from the Gallinas River than had been awarded to the Las Vegas water provider in the 1933 Hope Decree. After the Town of Las Vegas intervened as a defendant, trial was held, with the district court finding that Las Vegas had not been a party to the Hope Community Ditch case and thus was not bound by that decree. Further, as successor to a colonization pueblo with an 1835 royal grant from the King of Spain, Las Vegas had the right to use all the water in the river as needed, with paramount rights over private users.[190]

In a 3-2 split, the Supreme Court affirmed. Justice Sadler wrote for the majority that the Court "has long recognized that we have followed the Mexican

182. *Id.* ¶¶ 14–17.

183. *Id.* ¶ 48 ("It appears to this Court, that if the lower court exceeded its jurisdiction in making findings concerning priorities, it is immaterial, since the question in this case was whether or not the appellees were entitled to waters of the Valley Fill. In passing on the question, the Court set up the appropriations made by the protestants. It was incidental that the Court made these findings to show that the appellees were entitled to pursue their waters to the ultimate source").

184. *Id.* ¶¶ 34–38, *quoting* 93 C.J.S. Waters § 170, at 909.

185. *Templeton*, 1958-NMSC-131, ¶ 38. *Cf.* Brantley v. Carlsbad Irrigation Dist., 1978-NMSC-082, ¶ 10, 1492 N.M. 280 (reversing district court's de novo findings and distinguishing *Templeton* because Brantley was seeking a new well below his original point of diversion).

186. *See* N.M. STAT. ANN. § 72-12-7(A) (1978) (effective 1931, as amended 1985) ("The owner of a water right may change the location of his well or change the use of the water, but only upon application to the state engineer and upon showing that the change will not impair existing rights").

187. *Templeton*, 1958-NMSC-131, ¶ 28.

188. Templeton has been interpreted to have an underlying theme of fairness, not apparent on its face. *See* Herrington v. State *ex rel.* Office of State Eng'r, 2006-NMSC-014, ¶ 28, 139 N.M. 368.

189. Cartwright v. Pub. Serv. Co., 1958-NMSC-134, 66 N.M. 64, *overruled by City of Las Vegas,* 2004-NMSC-009.

190. *Id.* ¶¶ 1–2.

law of water rights rather than the common law,"[191] and that "we see nothing in the theory of Pueblo Rights inconsistent with the doctrine of prior appropriation and beneficial use."[192] The King of Spain had granted to the Town of Pitic in Sonora, New Spain "preferred rights to all available water from which evolved the doctrine of Pueblo Rights."[193] The two doctrines, pueblo rights and prior appropriation, were not inconsistent because there was no use prior to that of the pueblos. "Water formed the life blood of the community or settlement, not only in its origin but as it grew and expanded."[194] The settlers carried with them "the torch of priority" as long as there was enough water to supply the expanded community's life blood. Underpinning royal grant settlements' priority over other users, not only of time, but of continuing and expanding right, was lex suprema, the police power of the state that "elevate[s] . . . the public good over . . . a private right."[195] Justice Sadler concluded his opinion dramatically: "Water is as essential to the life of a community as are air and water to the life of an individual . . . Without it we perish."[196]

In a passionate dissent, District Judge Federici challenged the bases for the pueblo rights doctrine in New Mexico. Far from recognizing pueblo rights, "just the opposite has been expressed by legislative acts, the state constitution, and court decisions adhering strictly to what is known among all writers of water law to be the true Colorado Doctrine of prior appropriation."[197] The dissent quoted the Plan of Pitic,[198] concluding that the plan called for equal use by residents and natives alike, both within and outside the boundaries of the settlement. More than any other state, New Mexico has followed Mexican law and customs, particularly concerning its acequias, but pursuant to precedent, New Mexico acequias do not own water rights. Private irrigators using those acequias do. Judge Federici opined that this private ownership was more in line with Spanish and Mexican law than California's communal theory. Municipalities can acquire older rights by eminent domain, but "let us also protect the rights of the rural water users with older and prior rights which are just as vital to them as they may be to a growing metropolis that would snuff them out without reasonable compensation."[199] His stirring theme of dissent, that the pueblo rights doctrine was "as antithetical to prior appropriation as day is to night,"[200] resonated for nearly a half-century before the New Mexico

191. *Id.* ¶ 37 ("In Martinez v. Cook, 56 N.M. 343, 244 P.2d 134, 138, we said: 'Particularly, we have never followed it in connection with our waters, but, on the contrary, have followed the Mexican or civil law, and what is called the Colorado doctrine of prior appropriation and beneficial use'").

192. *Id.* ¶ 38.

193. *Id*. ¶ 47 (citing 1 CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS § 581, at 996 (2nd ed. 1912)).

194. *Id.* ¶ 50.

195. *Cartwright*, 1958-NMSC-134, ¶ 51.

196. *Id.* ¶ 54 (emphasis in original).

197. *Id.* ¶ 81 (Federici, J., dissenting).

198. *Id.* ¶¶ 90–91.

199. *Id.* ¶¶ 90, 106–07 (Federici, J., dissenting).

200. *Id.* ¶ 143 (Federici, J., dissenting) (on motion for rehearing).

Supreme Court finally rejected the pueblo rights doctrine and overruled *Cartwright*.[201]

C. I Declare: *Pub. Serv. Co. v. Reynolds/Clodfelter v. Reynolds* and *State ex rel. Reynolds v. Mendenhall* (1960–1961)

Over a short period of time, three Supreme Court decisions considered the legal effects of basin declarations by the State Engineer. The companion cases of *Pub. Serv. Co. v. Reynolds*[202] and *Clodfelter v. Reynolds*[203] came before the Court after a joint trial. Public Service Co., the water supplier for the City of Santa Fe, applied to the State Engineer for a partial change in the point of diversion from the Santa Fe Creek to a new well because of drought and increasing demand by the growing city. The water company had two surface rights, one perfected prior to the enactment of the 1907 Act and the other granted through a permit from the State Engineer, for a total of 5,040 AFY. The company also had six supplemental wells, with a combined declared pumping capacity of 4,964 AFY, initially put to beneficial use from 1949 through 1951 but which recently lost nearly a third of their capacity. On November 29, 1956, the State Engineer declared the boundaries of the Rio Grande Underground Water Basin.[204]

After a protested hearing, the State Engineer granted the company's application, limiting the company's use per year to a total of 5,040 AFY. Public Service Co. appealed to district court to remove the limit imposed by the State Engineer, but lost. The Supreme Court reversed, holding that the State Engineer had exceeded his jurisdiction by attempting to adjudicate the water rights of the six wells that had been perfected before the basin declaration. The Court rejected the State Engineer's argument that an applicant for change of diversion point must prove the nature and extent of all the applicant's rights to ensure no impairment to other users. Instead, the Court found that Public Service Co.'s wells were not involved in the stream-to-well diversion application, and the question as to the well rights "will have to be passed upon in a proper proceeding [e.g., general stream adjudication] before a court of competent jurisdiction,"[205] which has yet to occur nearly 60 years later.

In *Clodfelter*, under the same facts as *Pub. Serv. Co. v. Reynolds*, protestants argued that "statutory authority is necessary for a change of the point of diversion from surface waters to underground waters."[206] The Court disagreed that a specific statute was required. There are general statutes that establish procedures for change of point of diversion[207] and location of wells,[208] but no statutes are

201. State *ex rel.* Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375. The losing irrigators argued again in Cartwright v. Pub. Serv. Co., 1961-NMSC-074, ¶ 4, 68 N.M. 418, that the original royal grant was to the Town of Las Vegas Grant, not to the Town of Las Vegas. They lost on res judicata grounds.

202. Pub. Serv. Co. v. Reynolds, 1960-NMSC-137, 68 N.M. 54.

203. Clodfelter v. Reynolds, 1961-NMSC-003, 68 N.M. 61.

204. Pub. Serv. Co. v. Reynolds, 1960-NMSC-137, ¶¶ 9–11, 15, 68 N.M. 54.

205. *Id.* ¶¶ 21–22, 28, 30.

206. *Clodfelter*, 1961-NMSC-003, ¶ 13, 68 N.M. 61.

207. N.M. STAT. ANN. § 72-5-24 (1978).

208. N.M. STAT. ANN. § 72-12-7 (1978).

specifically required for change from stream to underground, because the right to change point of diversion is inherent in a water right. Quoting from a recent New Mexico case, *In re Brown*, the Court held that "[s]tatutes governing a change in point of diversion or change in well location do not grant; rather, they restrict the right of an appropriator to change his point of diversion or well location."[209] The 1907 Water Act was not a grant of any rights; it codified the Colorado doctrine, "prescribing the procedure for effecting appropriations through applications for permits made to and granted by the state engineer," as well as the procedure for issuance of State Engineer licenses.[210] Just as in Colorado, the right to change point of diversion or place of use "is one of the incidents of ownership."[211]

In 1961, the Supreme Court faced this question: When someone drills a well before a basin is declared or extended but begins beneficial use of the well after the declaration or extension, what law applies? In *State ex rel. Reynolds v. Mendenhall*,[212] the Court resorted to the doctrine of relation to answer that question. While the 1907 Water Act specifically incorporated the doctrine of relation, the groundwater statutes did not. The State Engineer argued that meant that there was no relation back to the initiation of the claim before the right vested by beneficial use because the legislature could have easily included such a provision as it had with the 1907 Act. But the Court determined that the doctrine of relation in the surface water act was "only a recognition of rights existing under the existent law of appropriation,"[213] starting with *Keeney v. Carillo*.[214] Quoting *PVACD v. Peters*, "ground water in its use, appropriation and administration is affected with all the incidents of surface waters, except for differences necessarily resulting from the fact that it is found below the surface."[215]

The State Engineer next argued that the Roswell Artesian Basin was over-appropriated by 1950. Since Mendenhall had first appropriated water in that year, there was no water available for legal use by him. The Supreme Court countered that the State Engineer confused two rights: the first being the right to use water

209. *Clodfelter*, 1961-NMSC-003, ¶ 14, 68 N.M. 61 (quoting In re Brown, 1958-NMSC-113, ¶ 21, 65 N.M. 74).

210. *Id.* (quoting Lindsey v. McClure, 136 F.2d 65, 69 (10th Cir. 1943) (examining limitations of New Mexico's State Engineer and Colorado courts regarding disputed diversions and storage of an interstate stream).

211. *Id. See also* State *ex rel.* Reynolds v. Fanning, 1961-NMSC-058, 68 N.M. 313 (reaffirming doctrine in State *ex rel.* Reynolds v. Mitchell, 1959-NMSC-073, 66 N.M. 212, that once a basin is declared, every water user has to follow the statutory procedures or risk forfeiture of their water right).

212. *Mendenhall*, 1961-NMSC-083. *See also* State *ex rel.* Reynolds v. Rio Rancho Estates, Inc., 1981-NMSC-017, 95 N.M. 560 (affirming district court's reversal of State Engineer denial of well application, based on *Mendenhall*).

213. *Mendenhall*, 1961-NMSC-083, ¶ 19.

214. *Keeney,* 1883-NMSC-005.

215. *Mendenhall*, 1961-NMSC-083, ¶ 19 (citing *Peters*, 1945-NMSC-029). In 1959, the legislature applied the doctrine of relation to underground waters and provided a procedure for those wells initiated prior to a basin declaration but completed afterward. *Id*. ¶ 10 (citing Chapter 251, N.M.S.L.1959 (N.M. STAT. ANN. §§ 75-11-26 to -36, (1953) incl., Pocket Supp.)). *See* McBee v. Reynolds, 1965-NMSC-007, ¶ 11, 74 N.M. 783 (stating the relation back amendments are "not entirely clear to us"). Those statutes did not survive the 1978 codification of the groundwater statutes in N.M. STAT. ANN. §§ 72-12-1 to -28.

and the second being a water right's priority in relation to others still to be determined in the general adjudication.[216]

D. Thou Shall Not Impair Existing Water Rights . . . Subject to Rights of Prior Appropriators: *City of Albuquerque v. Reynolds* to *Tevis v. McCrary* (1962–1963)

Two cases decided a few months apart examined similar-sounding concepts from the same statute that are sometimes confused.[217] The first, that applications for water shall not impair existing uses of the same source, came into play in a unique way in *City of Albuquerque v. Reynolds*.[218] The city had applied for four groundwater permits in the Rio Grande Underground Water Basin, accompanied by letters of transmittal claiming pueblo rights. The State Engineer found that the applications would impair existing rights to the fully-appropriated Rio Grande River but granted the permits subject to the condition that the city retire surface rights to the Rio Grande in the same amount the new wells are pumped. The city appealed to district court, and after a trial de novo on the issue of pueblo rights (which the State Engineer had refused to consider), the district court determined that Albuquerque was absolutely entitled to use the four wells without limitation. The State Engineer appealed, and the Supreme Court reversed the pueblo rights determinations on jurisdictional and due process grounds.[219] The city presented another argument, though, based on the predecessor statute to NMSA 1978, § 72-12-3(E) (1931), that there can be no impairment to existing water rights "from such source."[220]

According to the city, the State Engineer had no jurisdiction to require retirement of surface rights to the Rio Grande, since he was limited to determining impairment to the other users of the source of the underground water to be pumped by the four wells, i.e., the Rio Grande Underground Water Basin. Users of the underground water basin, which had plenty of water available for appropriation, would not be adversely affected by the wells; therefore, the State Engineer was required to approve the applications with no restrictions. The Supreme Court noted that while this narrow interpretation of the statute would not offend the constitutional rights of Rio Grande surface appropriators, it would "lend legislative sanction to a wrongful act on the part of a subsequent appropriator."[221] In giving a broader meaning to the statute to protect surface appropriators who derive their water from the same interrelated underground source, the Court created a corollary

216. *Mendenhall*, 1961-NMSC-083, ¶ 28. *See also* Heine v. Reynolds, 1962-NMSC-002, ¶¶ 8–9, 69 N.M. 398 (while there was no substantial impairment there was enough to justify the State Engineer to deny the application, because of the danger of salt intrusion, no matter how small, into the basin, due to increased pumping, which could prove to be "disastrous to the entire Basin").

217. *Compare* N.M. STAT. ANN. § 72-12-3(E) (1978) *with* N.M. STAT. ANN. § 72-5-7 (1978) ("if, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application").

218. City of Albuquerque v. Reynolds, 1962-NMSC-173, 71 N.M. 428.

219. *Id.* ¶¶ 1–6.

220. *Id.* ¶¶ 14, 29 (quoting the prior compilation of N.M. STAT. ANN. § 72-12-3(E) (2011) known as N.M. STAT. ANN. 1953 § 75-11-3 (1943)).

221. *Id.* ¶ 30.

to *Templeton*'s same-source rule allowing a prior appropriator to follow his surface rights underground without concern for subsequent underground water users. The Court also determined that the State Engineer came up with the only known plan that would protect the flow of the Rio Grande from more wells by requiring retirement of surface rights as a condition to new well permits. He had inherent authority to create this condition and implicit authority because the statute authorized him to deny the application *in toto*.[222]

In *Tevis v. McCrary* (*Tevis I*),[223] the Court decided that a well owner had confused two parts of the same statute analyzed in *City of Albuquerque v. Reynolds*. Tevis had not protested McCrary's application to drill a replacement irrigation well just 150 feet away from Tevis's domestic well, but when his well "went bad" immediately upon the new well drawing water, Tevis sued McCrary.[224] In *Tevis I*, McCrary successfully argued to the district court that Tevis' failure to protest his application required dismissal for failure to exhaust administrative remedies. The Supreme Court reversed, holding that the permit process required the applicant to show no impairment to existing water rights, which McCrary proved by default because no one protested, but that did not mean the non-protest barred a prior appropriator from seeking damages in district court caused by the exercise of that permitted junior right.[225] The Court held that the "determination of priority of water rights and whether a junior appropriation does in fact impair a prior existing right is a judicial function, not administrative."[226] The statute subjected the well permit to "the rights of all prior appropriators."[227] At jury trial upon remand, Tevis won a monetary damages award, upheld on appeal in *Tevis II*.[228]

Just a month before deciding *Tevis I*, the Supreme Court had decided the companion cases of *Kelley v. Carlsbad Irrigation Dist*. (*Kelley I*)[229] and *Durand v. Carlsbad Irrigation Dist.* (*Durand I*),[230] in which the Court reversed a district court that heard appeals from the State Engineer as true trials de novo. The Court ruled that review de novo in the 1907 Water Act[231] did not actually mean a new trial but should be interpreted as meaning a paper review as from other state agency

222. *Id.* ¶¶ 24–28, 30–34. The Court cited New Mexico precedent on the unity of surface/groundwater substantive law as support for the State Engineer's powers being identical over the two types of waters, a purposeful conflation of substantive law with the State Engineer's statutory authority.

223. Tevis v. McCrary, 1963-NMSC-084, ¶ 3, 72 N.M. 134.

224. *Id.* ¶ 1; *See* Tevis v. McCrary, 1965-NMSC-051, ¶ 3, 75 N.M. 165.

225. *McCrary*, 1963-NMSC-084, ¶ 3.

226. *Id.* ¶¶ 4–5. The Court rejected wholesale out-of-state cases McCrary cited, because those cases were not "from states applying the doctrine of prior appropriation and application to beneficial use as the measure of a water right."

227. N.M. STAT. ANN. § 75-11-3 (1953).

228. Tevis v. McCrary, 1965-NMSC-051, ¶¶ 10–11, 75 N.M. 165.

229. Kelley v. Carlsbad Irrigation Dist., 1963-NMSC-049, 71 N.M. 464.

230. Durand v. Carlsbad Irrigation Dist., 1963-NMSC-050, 71 N.M. 479.

231. N.M. STAT. ANN. § 72-7-1(E) (1907).

decisions, overruling the 1913 case of *Farmers Dev. Co. v. Rayado Land & Irrigation Co.*[232]

E. The Old Priorities Just Ain't What They Used to Be: *Mathers v. Texaco*, *Worley v. United States Borax & Chem. Corp.* and *State ex rel. State Eng'r v. Crider* (1966–1967)

In *Mathers v. Texaco*,[233] the Supreme Court ruled that long-recognized prior appropriation principles did not cover all public underground waters in the state. Texaco applied for permits to drill wells for 700 AFY in the Lea Underground Water Basin. A number of water users protested, with the State Engineer finding no impairment but limiting Texaco to 350 AFY.[234] The district court, constrained from examining the matter in a trial de novo, determined as a matter of law that there was per se impairment by Texaco. First, the evidence was uncontroverted that the basin was non-rechargeable. Second, taking water from a non-rechargeable basin by a subsequent appropriator was a mining operation, which necessarily caused a "decline in the water level, higher pumping costs, and lower pumping yields," thus impairing existing rights.[235]

The Supreme Court saw things differently. "The very nature of the finite stock of water in a non-rechargeable basin compels modification of the traditional concept of appropriable supply under the appropriation doctrine."[236] The Court confirmed the State Engineer's plan to set an economic life for the basin of forty years, which would reduce its 1952 supply by two-thirds, leaving water usable for domestic but not for agriculture and most other purposes. This was the only known plan to "secure to the public the maximum beneficial use of the waters in this basin;"[237] otherwise, anyone using after the first appropriator would be infringing on the senior's rights. The adverse effects to protestants were "inevitable results of the beneficial use by the public of these waters," a rejection of prior appropriation in the face of a diminishing supply.[238]

---

232. Farmers Dev. Co. v. Rayado Land & Irrigation Co., 1913-NMSC-035, 18 N.M. 1, *overruled by* Kelley v. Carlsbad Irrigation Dist., (Kelly I) 1963-NMSC-049, ¶ 7, 71 N.M. 466. *See also,* Reynolds v. Wiggins*,* 1964-NMSC-252, 74 N.M. 670 (State Engineer reversed as a matter of law: new application to exchange private waters injected into groundwater reservoir for public water allowed in a fully-appropriated basin); Kelley v. Carlsbad Irrigation Dist. (Kelley II), 1966-NMSC-121, 76 N.M. 466 (application for supplemental well denied in a fully appropriated basin because surface water lost through percolation loses its identity).

233. Mathers v. Texaco, Inc., 1966-NMSC-226, 77 N.M. 239. *See* State *ex rel.* Bliss v. Alexander*,* 1955-NMSC-061, 59 N.M. 478 (State Engineer declared the Lea Underground Water Basin closed, then opened it and sought declaratory judgment to determine priorities; case remanded on technical grounds).

234. *Cf. City of Albuquerque*, 1962-NMSC-173, 71 N.M. 428 (the State Engineer chose not to employ the condition of retiring or buying water rights for Texaco to obtain 350 AFY).

235. *Mathers*, 1966-NMSC-226, ¶ 13.

236. *Id.* ¶ 10.

237. *Id.* ¶ 18.

238. *Id.* ¶19. *See* U.S. DEPT. OF THE INTERIOR, RECLAMATION: MANAGING WATER IN THE WEST (2003), www.usbr.gov/watersmart/wcra/reports/urgia.html (diminishing supplies of the Rio Grande).

In *Worley v. United States Borax & Chem. Corp.*,[239] the Court affirmed summary judgment for subsequent appropriators who used water to the detriment of a downstream senior appropriator. As a new requirement, senior appropriators must give notice to junior users that they are impairing or likely to impair the senior's rights. It is not enough that the junior users knew or should have known of the impairment. The Court left open the proper parties to notify before commencing suit.[240]

State ex rel. State Eng'r v. Crider[241] also added a twist to prior appropriation principles. Many parties objected to the district court "adjudicating the rights of the cities [Roswell and Artesia] on the capacity of wells while adjudicating appellants' rights on the amount of water they had applied to beneficial use."[242] In affirming the district court, the Supreme Court noted that application to beneficial use is essential to a completed use for all appropriations, including agriculture, but that irrigation for agriculture may take some years to develop fully. By analogy, "we see no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase in population within a reasonable time."[243]

F. Post-decree Advantage and Limitation: *W.S. Ranch Co. v. Kaiser Steel Corp.* and *State ex rel. Reynolds v. South Springs Co.* (1968–1969)

W.S. Ranch Co. v. Kaiser Steel Corp.[244] addressed the effect of a judicial decree on a later application for change of use or place of use. Kaiser Steel Corp. was allowed to move its predecessor's place of use upstream and change the use from agriculture to coal washing. W.S. Ranch objected to the State Engineer and appealed on several grounds, one of which was that Kaiser had not proven the amount of water it was applying to beneficial use in order to transfer any amount upstream. In affirming the district court and the State Engineer, the Supreme Court noted that Kaiser's rights had been determined by a 1941 adjudication decree of the Vermejo stream system. "It is our considered judgment," wrote the Court, "that the adjudication decree is proof of the nature and extent of the rights sought to be transferred."[245] The Court found no impairment to W.S. Ranch, a senior user, which became a downstream appropriator to Kaiser once Kaiser's application for change of use upstream was granted. The Vermejo River is a losing stream, with less water available as it flows downstream. The Court acknowledged that theoretically "at first blush" W.S Ranch had a good argument for impairment and that irrigators prefer "a diversion point as high up on the stream system as possible,

239. Worley v. United States Borax & Chem. Corp., 1967-NMSC-129, 78 N.M. 112. *See also* State *ex rel.* Reynolds v. Allman, 1967-NMSC-078, 78 N.M. 1 (due process required the same relation-back analysis for priority dates in each of the Roswell Basin consolidated cases).

240. *Worley*, 1967-NMSC-129, ¶ 20.

241. State *ex rel.* State Eng'r v. Crider, 1967-NMSC-133, 78 N.M. 312.

242. *Id*. ¶ 20.

243. *Id.* ¶¶ 20, 25–26. *See* N.M. STAT. ANN. § 72-1-9(B) (1985) (40-year timeframe for municipalities and some other governmental entities to establish water rights).

244. W.S. Ranch Co. v. Kaiser Steel Corp., 1968-NMSC-041, 79 N.M. 65.

245. *Id*. ¶ 4.

and we are not unmindful that, in irrigation practice, a higher diversion point is frequently preferred to a higher downstream priority."[246]

The Court addressed abandonment or forfeiture of a post-decree right in *State ex rel. Reynolds v. South Springs Co.*[247] South Springs Co. had obtained a decree of water rights for 317 acres in the 1933 federal Hope Decree. In 1967, the State Engineer received a declaratory judgment that the company had abandoned and forfeited its rights by nonuse. The Supreme Court affirmed, with a thoughtful analysis of the difference between forfeiture and abandonment. Forfeiture is a punitive statute with no intent required; all that is necessary to lose a right through forfeiture is nonuse for four years unless there are circumstances beyond the control of the user preventing the use, which may excuse nonuse.[248] Abandonment, on the other hand, requires intent, which can be presumed, if not rebutted, by an unreasonable time of nonuse. South Spring Co.'s nonuse from 1933 on created that rebuttable presumption.[249]

G. Change Alone Does Not Equate With Impairment, But It Can: *In re Langenegger v. Carlsbad Irrigation Dist.* and *City of Roswell v. Reynolds* (1971-1974)

Even while reciting the "case-by-case" standard for reviewing State Engineer decisions on impairment to existing rights, some Supreme Court decisions did appear to provide guidance for future impairment cases. *In re Durand v. Reynolds* (*Durand II*) implicitly limited the reach of the *Templeton* doctrine by upholding the State Engineer's rejection of a supplemental well application because the water "did not flow evenly" from the move-from site to the move-to site and that "certain amounts of water [from the move-to location] never contributed to the water taken in [the move-from location]."[250]

In re Langenegger v. Carlsbad Irrigation Dist.[251] was one of the first cases after the 1967 constitutional amendment requiring de novo review by the district court.[252] The district court found that Langenegger's applications to use the artesian aquifer for his wells were not justified because the artesian aquifer did not contribute to his surface appropriations. The Supreme Court determined from the evidence that there was an indirect relationship between the surface and the artesian

246. *Id.* ¶¶ 4, 9, 10.

247. State *ex rel.* Reynolds v. South Springs Co., 1969-NMSC-023, 80 N.M. 144.

248. *Id.* ¶ 3, *quoting* N.M. STAT. ANN. § 75-5-26 (1953). In 1965, the legislature required notice to be given by the State Engineer and time (one-year minimum) to resume water use before forfeiture. *See* N.M. STAT. ANN. § 72-5-28 (1978) (1907, as amended).

249. State *ex rel.* Reynolds v. South Springs Co., 1969-NMSC-023, ¶¶ 4–23. *See* City of Roswell v. Berry, 1969-NMSC-033, 80 N.M. 110 (negligible effect of chemical quality of water from 0.16 feet of water table lowering not an impairment of existing rights); *see also* Fellows v. Shultz, 1970-NMSC-071, 81 N.M. 496 (discussing new statute giving district courts original jurisdiction over State Engineer decisions held unconstitutional as violating separation of powers, and new constitutional amendment granting district court's de novo appellate review did not save the statute from its constitutional infirmity).

250. Durand v. Reynolds (Durand II), 1965-NMSC-118, ¶ 4, 75 N.M. 497.

251. Langenegger v. Carlsbad Irrigation Dist., 1971-NMSC-038, 82 N.M. 416.

252. N.M. CONST., art. XVI, § 5.

basin,[253] rejecting the district court's reliance on *Durand II* because the "administration of the waters of the river under such a system would be practically impossible."[254] Acknowledging that the basin was over-appropriated, the Court stated that "[i]t is true the granting of the applications would effect some changes in the waters of the aquifer and also of the river, but change alone is not to be equated with impairment of the rights of others."[255] The Court did offer cold comfort to the downstream senior protestant, Carlsbad Irrigation District, that it could sue Langenegger based on priorities in a "proper manner" and "in a proper proceeding," if "the diversions of waters from the basin, or from the river, become so great, in relation to the supply of these waters, that priorities must be asserted in order to protect the rights of senior appropriators."[256]

When the City of Roswell argued that change to a water table does not mean impairment, it was met with resistance from the State Engineer, the district court, and the Supreme Court. In *City of Roswell v. Reynolds*,[257] the city sought to change the location of wells from the Roswell Underground Water Basin because the current wells were experiencing increased salinity from over-appropriation having lowered the water table. If Roswell were allowed to transfer the full amount at the pumping rate of its current wells, the water table at the new wells would lower, causing increasing salinity and damage to nearby agriculture.[258] The State Engineer did allow the transfer, but only in part, limiting significantly the amount and rate of pumping by Roswell to avoid increasing salinity. The district court approved the limitations, finding that granting the application *in toto* would impair other rights.

The Supreme Court agreed with the city "that the lowering of the water table does not necessarily constitute an impairment" of adjoining appropriators, but "it does not follow that the lowering of the water table may never in itself constitute an impairment of existing rights."[259] The Court was concerned about impairment through increasing salinity, as a function of a lowering of the water table. Roswell argued that since junior appropriators had been allowed to transfer their well locations in full, so should the City as senior-rights holder be allowed to transfer all of its water rights to the new wells. The Court, however, distinguished a

253. *Langenegger*, 1971-NMSC-038, ¶¶ 17–18.

254. *Id*. ¶ 16.

255. *Id.* ¶¶ 16–18, 29. The Supreme Court also rejected the trial court's "division into two sources of the waters from the artesian aquifer which reach the Pecos River." *Id.* ¶ 23.

256. *Id.* 1971-NMSC-038, ¶ 30. *See also* State *ex rel.* Reynolds v. Miranda, 1972-NMSC-003, 83 N.M. 443 (mere cutting of grasses not appropriation of water for beneficial use, and man-made diversion required for obtaining water right for agricultural purposes); State *ex rel.* Reynolds v. Lewis, 1973-NMSC-035, 84 N.M. 768 (parties to consolidated Roswell Artesian Basin adjudication denied due process to prove measure of determining duty of water by the same standards); May v. Torres, 1974-NMSC-018, 86 N.M. 62 (stating the district court prematurely dismissed case between adjoining landowners seeking adjudication of priorities *inter se*).

257. City of Roswell v. Reynolds, 1974-NMSC-044, 86 N.M. 249.

258. *Id.* ¶ 3.

259. *Id*. ¶ 11.

statutory procedure from a priority battle: "This was not a proceeding in which the City was asserting its priority over the rights of other water users."[260]

H. Prior Appropriation and the Feds: *Holguin v. Elephant Butte Irrigation Dist.* and *United States v. New Mexico* (1977–1978)

For more than four decades, a feud simmered between the Elephant Butte Irrigation District (EBID) and irrigators who refused to join EBID or to seek permission from the State Engineer for their water use. They claimed water use prior to the EBID reclamation project. The irrigators sued EBID, which successfully argued for dismissal for failure to join the United States Bureau of Reclamation (BOR) as a defendant because the water at issue was a reclamation project administered by the BOR.[261] On appeal, the Supreme Court in *Holguin v. Elephant Butte Irrigation Dist.* affirmed summary judgment in favor of EBID, on the grounds that the United States was an indispensable party but was immune from suit in state court.[262] Not satisfied with a dismissal of the landowners' claims against EBID, the State Engineer sued the lead irrigator, David Holguin, for declaratory and injunctive relief. At a jury trial, the State Engineer lost, and Holguin was declared the owner of the water rights he had claimed at trial, with a priority date prior to 1907. The Supreme Court affirmed in *State ex rel. Reynolds v. Holguin*, but remanded for a determination of the specific tracts with water rights that Holguin owned.[263]

The federal government generally has immunity from suit in state court, except for general stream adjudications, among other limited situations.[264] In 1970, the State of New Mexico, on relation of the State Engineer, intervened to expand into a general stream adjudication a private action between diverters of the Rio Mimbres, which flows through the Gila National Forest. The United States, one of the defendants, claimed reserved water rights for minimum instream flows and recreational purposes. The special master found in favor of the federal government, but the district court reversed, and the Supreme Court affirmed the lower court in *Mimbres Valley Irrigation Co. v. Salopek*.[265]

The U.S. Supreme Court, through a 5-4 decision in *United States v. New Mexico*,[266] affirmed the New Mexico Supreme Court. The Court noted that "the quantification of reserved water rights for the national forests is of critical

260. *Id.* ¶ 15. *See also* Ft. Sumner Irrigation Dist. v. Carlsbad Irrigation Dist., 1974-NMSC-082, 87 N.M. 149 (allowing transfer of storage rights over objection that appeal de novo was not actually held).

261. Holguin v. Elephant Butte Irrigation Dist., 1977-NMSC-073, ¶¶ 1, 10–12, 91 N.M. 398, *overruled on other grounds by* C.E. Alexander & Sons, Inc. v. DEC Int'l, 1991-NMSC-049, 112 N.M. 89 (failure to join indispensable party not a jurisdictional defect; instead, a balancing test should be used).

262. *Holguin*, 1977-NMSC-073, ¶ 45.

263. State *ex rel.* Reynolds v. Holguin, 1980-NMSC-110, ¶ 10, 95 N.M. 15 (on remand, the parties stipulated to the tracts with water rights, according to Sierra County district court records).

264. 43 U.S.C. § 666 (1952) (commonly known as the McCarran Amendment), *cited in* Mimbres Valley Irrigation Co. v. Salopek, 1977-NMSC-039, ¶ 1, 90 N.M. 410, *aff'd by* United States v. New Mexico, 438 U.S. 696 (1978).

265. *Salopek*, 1977-NMSC-039, ¶ 2.

266. United States v. New Mexico, 438 U.S. 696 (1978).

importance in the West, where . . . water is scarce and where more than 50% of the available water either originates in or flows through national forests."[267] Further, when "a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators."[268] Only primary purposes of a federal reservation can trigger implied reserved water rights, yet instream flows for fish and wildlife and recreational purposes were not primary purposes for creating national forests. To the contrary, "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West."[269] Thus, without reserved rights, an implied exception to Congress's explicit deference to state water laws, the United States must defer to the state law of prior appropriation.[270]

IV. SURELY TOMORROW (1983-2013)

> *Mr. Godot told me to tell you he won't come this evening but surely tomorrow.*[271]

Samuel Beckett's play, *Waiting for Godot*, follows two characters who stand in a park talking about weighty issues and other nonsense in their expectation of a gentleman who never shows. Likewise, New Mexico's water community awaited large-scale priority enforcement with either anticipation or anxiety for many years, knowing it would only show after never-ending general stream adjudications. Even so, priority enforcement has almost arrived, starting with pre-decree enforcement authority for the State Engineer in general stream adjudications granted by the courts more than thirty years ago for the Pecos, but yet to be exercised. State Engineer priority determination and enforcement outside adjudications was recently held to be authorized by the legislature, after big buyouts to junior appropriators seemed impossible statewide. Just as Godot, priority enforcement will surely come tomorrow, but it may mean cutting off junior domestic wells (among other junior uses), a political difficulty for the office entrusted with this power. Meanwhile, like a tangent to dialogue in Beckett's play, the State Engineer argued that prior appropriation had no deep history in New Mexico and that water should be apportioned equitably, but the Supreme Court countered that history did not really matter because while historical theories change, prior appropriation remains.

A. Priority Calls and the Last Dissent: *State ex rel. Reynolds v. PVACD*, *City of Raton v. Vermejo Conservancy Dist.*, and *Stokes v. Morgan* (1983–1984)

In 1982, six years after formally requesting priority administration of the Pecos that resulted in an expansion of the stream adjudication, the Carlsbad

267. *Id.* at 705.
268. *Id.*
269. *Id.* at 713.
270. *Id.* at 705, 713, 715.
271. SAMUEL BECKETT, WAITING FOR GODOT, ACT I (English version, 1954).

Irrigation District (CID) won a victory: The district court granted the State of New Mexico's motion for an interim decree on priorities affecting CID.[272] In general adjudications, *inter se* disputes had awaited the end of the court's determination of all individual rights, but for CID, the court was prepared to "enjoin water users with priorities junior to January 1, 1947 to show cause in individual proceedings why their uses should not be enjoined pursuant to Article XVI, Section 2 of the New Mexico Constitution."[273] In affirming, the Supreme Court interpreted the injunctive relief to be permanent, requiring post-1946 users to show cause why their uses "should not be terminated to satisfy the senior rights adjudicated for use through the Carlsbad project," which senior rights included CID, the United States, and a number of private irrigators. Rejecting a due process argument by the Pecos Valley Artesian Conservancy District, the Court held that "[w]hile expediting priority administration, the procedure affords each defendant the opportunity to establish his priority and to contest" CID's priority.[274] The lowest priorities would be terminated first and the remainder would be adjudicated in reverse priority. This new process was neither required nor forbidden by statute and was both reasonable and practical.[275] Whether this newly-approved priority process would actually be implemented to shut down junior users remained to be seen.

The following year saw perhaps the high-water mark for a modern priority call, in *City of Raton v. Vermejo Conservancy Dist.*[276] In 1980, the Vermejo Conservancy District made a priority call on the Chico Rico (Sugarite) stream system against the City of Raton, which had junior rights to the district as determined by a 1935 general stream adjudication final decree. The City filed a declaratory judgment action, and the District counterclaimed. The trial court ordered "Raton to release water to the District upon demand in accordance with the senior rights established in the 1935 decree, so long as the water could be put to beneficial use by the District," and further ordered damages of a one-time water release for Raton's failure to respond to the priority call.[277]

The Supreme Court affirmed on appeal. First, the Court held that the district did not lose its water rights by failing to apply to the State Engineer for a change in method of storage after the Hebron Dam broke in 1942, because federal reclamation projects were exempt from such requirements.[278] Second, the claim of abandonment must fail because conservancy districts are protected by statute from such claims.[279] The Court noted that in "a prior appropriation system the right to use a certain quantity of water is inextricably linked to the priority date of that

272. State *ex rel.* Reynolds v. Pecos Valley Artesian Conservancy Dist., 1983-NMSC-044, ¶ 1, 99 N.M. 699.

273. *Id.* ¶ 4.

274. *Id.* ¶¶ 4, 8.

275. *Id.* ¶¶ 1–4, 8–10.

276. City of Raton v. Vermejo Conservancy Dist., 1984-NMSC-037, 101 N.M. 95.

277. *Id.* ¶ 1.

278. *Id.* ¶¶ 8–10 (citing N.M. STAT. ANN. § 72-9-4 (1941)).

279. *Id.* ¶¶ 11–14 (citing N.M. STAT. ANN. § 73-17-21 (1927)). This statute modifies the prior appropriation doctrine by inoculating conservancy districts from abandonment and forfeiture claims, thus giving rise to the argument that perhaps *City of Raton* reflects less a high-water mark for prior appropriation than an exception undercutting the rule of "use it or lose it."

right. Loss of the priority date is often tantamount to loss of the water right."[280] The Court confirmed that "[t]he priority date is of paramount importance since it gives an appropriation its chief value."[281] Third, the Court rejected Raton's laches and estoppel argument that the district had waited decades to make its first priority call: "The priority right is too important and the variables which enter into determining whether to make a call on a junior user are too many to declare forfeiture" when the senior failed to assert priority on three previous occasions.[282] The first time would have been a futile call "because released water would have been used by upstream appropriators."[283] The second time the State Engineer instructed the district to clean out its ditches before making a call, and the third time was out of mercy "because Raton was rationing water at the time."[284]

While *City of Raton* may represent a high-water mark for senior appropriators, a case decided the previous week represents a low-water mark for the protection of existing uses. In *Stokes v. Morgan*,[285] two applications for a change of point of diversion and place of use in the Portales Underground Water Basin came before the State Engineer, who granted the applications over protest. After a trial de novo of the consolidated cases, the district court reversed. On appeal, the Supreme Court described in detail scientific terminology and processes for examining increasing salinity of groundwater. While admitting that there was a "strong inference of impairment" in the cases before it, "there must also be evidence that the grant of a permit would result in a reasonable scientific probability of a significant increase in the rate of intrusion of lower quality water into the fresh water aquifer."[286] Also, there must be a causal connection between the drilling of the new well and "increased movement of the water quality interface."[287]

Boiling the opinion down to its essence hidden in scientific discussion, *Stokes v. Morgan* rests upon deference to the State Engineer's finding of no impairment: "Testimony that the State Engineer has made a finding of no impairment pursuant to a valid hearing is considered strong evidence of no impairment," citing *Spencer v. Bliss*.[288] In a brief dissent, the last in a Supreme

280. City of Raton v. Vermejo Conservancy Dist., 1984-NMSC-037, ¶ 13, 101 N.M. 95.

281. *Id.* (quoting 5 R. Clark, WATER AND WATER RIGHTS, § 410.1 at 119 (1972)).

282. *Id.* ¶ 2.

283. *Id.*

284. *Id.* ¶ 18. *But see* Colorado v. New Mexico, 459 U.S. 176 (1982). In *Colorado v. New Mexico*, the U.S. Supreme Court rejected New Mexico's reliance on prior appropriation against Colorado users, instead applying the law of equitable apportionment to determine interstate rights. As the farthest downstream New Mexico user, Vermejo Conservancy District, which the Special Master had found was never an economically feasible operation, would be the only party to suffer by the application of equitable apportionment over prior appropriation.

285. Stokes v. Morgan, 1984-NMSC-032, 101 N.M. 195.

286. *Id.* ¶ 22.

287. *Id.*

288. *Id.* ¶ 24, *citing Spencer,* 1955-NMSC-066 (its reasoning and progeny giving rise to the constitutional amendment requiring district court de novo review).

Court water allocation case, Justice Stowers pointed out to his colleagues that district court findings are to be upheld if supported by substantial evidence.[289]

B. All Quiet on the Western Front: *State ex rel. Reynolds v. Aamodt* to *Brantley Farms v. Carlsbad Irrigation Dist.* (1990–1998)

Trench warfare is marked less by its battles than by the slow passage of time. So it has been for New Mexico's general stream adjudications. *State ex rel. Reynolds v. Aamodt*, begun in 1966 in federal court on the Pojoaque stream system, a tributary of the Rio Grande above Santa Fe, is often considered the longest-running case in the federal system.[290] In 1990, the New Mexico Supreme Court answered in the negative a technical question certified by the U.S. district court as to whether "the failure to file an application for extension of time to put water to beneficial use prior to the expiration of the last extension granted automatically terminated the permit."[291] The Court thereby confirmed the discretionary authority of the State Engineer: "By our action today we continue a long tradition of upholding the State Engineer's authority to take reasonable and appropriate action to protect and administer the water laws of New Mexico."[292]

The *Aamodt* adjudication came to the fore a few years later in *State ex rel. Martinez v. Kerr-McGee*,[293] a state-court adjudication of the San Jose stream system in west-central New Mexico begun in 1982, including the Navajo reservation and pueblos.[294] The Court of Appeals affirmed summary judgment that the Laguna and Acoma Pueblos did not have federally reserved water rights under the *Winters* doctrine[295] because there was no grant of reservation by the federal government. Examining *Aamodt* decisions from the U.S. district court and the Tenth Circuit Court of Appeals, *Kerr-McGee* stated, "Recognition of a right is different from reservation of that right. Recognition merely acknowledges the existence of an already extant right, while reservation creates the right in the first

289. *Id.* ¶¶ 32–33 (Stowers, J., dissenting). Whether because the 1980s and 1990s were comparatively wet decades in New Mexico, thereby creating less demand for new water cases, or whether because the Court of Appeals, created by N.M. CONST. art. VI, § 28 (1965), handled many more water cases in this period, twenty years elapsed before the Supreme Court decided its next major water case. *See* David S. Gutzler, *Drought in New Mexico: History, Causes, and Future Prospects*, DECISION MAKERS FIELD GUIDE 103 (2003) ("The 1980s and 1990s were just as anomalously wet as the 1950s were anomalously dry.").

290. John W. Utton, *Struggle Over Pueblo Water Rights: The Aamodt Case*, ONE HUNDRED YEARS OF WATER WARS IN NEW MEXICO: 1912-2012, 141 (ed. by Catherine T. Ortega Klett, 2012).

291. State *ex rel.* Reynolds v. Aamodt*,* 1990-NMSC-099, ¶ 4, 111 N.M. 4.

292. *Id.* ¶ 10.

293. State *ex rel.* Martinez v. Kerr-McGee, 1995-NMCA-041, 120 N.M. 118.

294. *Rio San Jose Adjudication Boundary*, OFFICE OF THE STATE ENGINEER, http://www.ose.state.nm.us/Legal/Adjudication/SanJose/PDF/SanJoseAdjudicationMap.pdf [https://perma.cc/YRJ3-Z44K].

295. *Kerr-McGee*, 1995-NMCA-041, ¶ 28, 120 N.M. 118; *see* Winters v. United States, 207 U.S. 564 (1908) (recognizing that when federal government reserved land for an Indian reservation, it implicitly reserved sufficient water rights for reservation needs).

instance."[296] The pueblos' rights arose earlier than any government action, hence there was nothing for the government to give them.[297]

More than seventy years after the first failed attempt in *Snow v. Abalos*[298] at a general stream adjudication on the lower Rio Grande, the Elephant Butte Irrigation District in 1986 initiated an adjudication from the Elephant Butte Dam to the Texas state line, with both the State Engineer and the United States seeking its dismissal. In *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*,[299] the Court of Appeals held that the unique circumstances of the Rio Grande Compact[300] allowed for less than the full stretch of the Rio Grande and its tributaries to be included in the adjudication, meeting the spirit of the McCarran Amendment, which waives sovereign immunity of the United States for general stream adjudications.[301] Having been approved by the Court of Appeals, the Lower Rio Grande adjudication moves forward into its fourth decade.[302]

The Pecos general stream adjudication, a follow-up to the 1921 state Gallinas Decree and the 1933 federal Hope Decree,[303] accounted for many water decisions by the Court of Appeals in the 1990s, frustrating the optimistic estimate given to the Supreme Court a decade earlier that the whole case would be completed by 1995.[304] In companion cases, the Court of Appeals in 1992 ruled upon the effect of unrebutted prima facie evidence of a subfile order[305] and the

296. *Id.* ¶¶ 30–31, *citing* State v. Aamodt, 537 F.2d 1102 (10th Cir. 1976) (*Aamodt I*), *cert. denied*, 429 U.S. 1121 (1977); State *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D.N.M. 1985) (*Aamodt II*).

297. While the Court established what kind of rights the pueblos had, more than thirty years after the initiation of the adjudication zero percent of acreage had been adjudicated on the Rio San Jose. Brigette Buynak, *Adjudications*, *in* UTTON TRANSBOUNDARY RES. CTR. & UNIV. OF NEW MEXICO SCH. OF LAW, WATER MATTERS! 3-1 (2015), http://uttoncenter.unm.edu/pdfs/water-matters-2015/2015-water-matters.pdf [https://perma.cc/9XM3-E2WW]. There is currently an expedited sub-proceeding to determine the Acoma and Laguna Pueblo rights. *See Rio San Jose Water Rights Adjudication Process*, NEW MEXICO OFFICE OF THE STATE ENGINEER, http://www.ose.state.nm.us/Legal/Adjudication/SanJose/adj_sj.php [https://perma.cc/K3AL-LEBR].

298. *Snow*, 1914-NMSC-022, 18 N.M. 681.

299. Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ., 1993-NMCA-009, 115 N.M. 229.

300. N.M. STAT. ANN. § 72-15-23 (1945).

301. *Elephant Butte Irrigation Dist.*, 1993-NMCA-009, ¶ 16 (quoting the McCarran Amendment, 43 U.S.C. § 666(a)).

302. *But see In re* Snake River Basin Water System, 115 Idaho 1, 764 P.2d 78 (1988), *cert. denied*, 490 U.S. 1005 (1989), *cited in* EBID v. Regents of N.M. State Univ., 1993-NMCA-009, ¶ 20, 115 N.M. 229. The adjudication of the entire Snake River and its tributaries, begun in 1987, with nearly 160,000 claimants, was completed in less than thirty years. *See* Betsy Z. Russell, *Scalia Praises Idaho's Snake River Basin Water Rights Adjudication*, THE SPOKESMAN-REV. (Aug. 26, 2014), http://www.spokesman.com/blogs/boise/2014/aug/26/scalia-praises-idahos-snake-river-basin-water-rights-adjudication/ [https://perma.cc/74QY-XXQL].

303. *City of Las Vegas*, 2004-NMSC-009, ¶ 5.

304. *Pecos Valley Artesian Conservancy Dist.*, 1983-NMSC-044, ¶ 3, 99 N.M. 699 ("By the time the suit is completed (estimated to occur by 1995), the claims of 5,790 defendants will have been adjudicated."); *see generally*, G. EMLEN HALL, HIGH AND DRY: THE TEXAS, NEW MEXICO STRUGGLE FOR THE PECOS RIVER (2002).

305. State *ex rel.* Martinez v. Parker Townsend Ranch Co., 1992-NMCA-135, 118 N.M. 787, *aff'd*, State *ex rel.* State Eng'r. v. Parker Townsend Ranch Co., 1994-NMSC-125, 118 N.M. 780 (in a 2-1

hydrogeologic relationship between surface and groundwater sufficient to invoke the *Templeton* doctrine.[306] Two years later, the Court again addressed *Templeton* issues, finding that flood flows could not be considered base flows for relation-back purposes.[307] In 1995, the Court of Appeals highlighted the "complex and lengthy legal history" of a single tract of land that had been the subject of three appeals to the New Mexico Supreme Court decades earlier, with the Court of Appeals finally finding that beneficial use of water was limited to only a portion of the tract.[308]

In *Brantley Farms v. Carlsbad Irrigation Dist.*,[309] the Court of Appeals heard an appeal by CID and others from a writ of mandamus requiring it to release three acre-feet of water to CID members during the wet year of 1996 since there was surplus water in its reservoirs. The district court had ruled that the writ "would remain in effect for future use and consideration by the district court should 'the feds decide to get out of the water business.'"[310] The Court of Appeals ruled that the petitioners were collaterally estopped as a result of the *Lewis* adjudication from arguing that they were water rights owners legally entitled to mandamus.[311] Further, the United States was an indispensable party to the proceedings and immune from suit since this case was heard apart from the *Lewis* adjudication.

C. As Day is to Night: *State ex rel. Martinez v. City of Las Vegas* (2004)

The Supreme Court revisited *Cartwright*'s pueblo rights doctrine during New Mexico's second year of a lengthy drought.[312] In a subfile proceeding of the *Lewis* adjudication, the State Engineer had challenged Las Vegas's pueblo right. On appeal from summary judgment, the Court of Appeals in *City of Las Vegas v. Oman* sent the case back to district court for a trial on the merits.[313] At trial, a number of historians testified on behalf of the State Engineer, but the city relied on *Cartwright* and California cases with their Spanish/Mexican authorities. At the conclusion of trial, the court found in favor of the city because of stare decisis. On appeal, the Court of Appeals issued an anticipatory overruling of *Cartwright* based upon the doctrine's historical invalidity, reversing the district court, with Judge Hartz dissenting in part. The Court of Appeals described what the overwhelming historical evidence demonstrated—there was not a paramount right of a pueblo over other water users. Instead, "each time water was to be reallocated in New Spain: the priorities among users, their needs, their legal rights, and the government purposes served by their continued usage of water were weighed against the harm

---

decision, the Court of Appeals upheld summary judgment in favor of water users against the State Engineer based on the unrebutted prima facie evidence of a subfile order determining their water rights).

306. State *ex rel.* Martinez v. City of Roswell, 1992-NMCA-102, ¶ 2, 114 N.M. 581.

307. State *ex rel.* Martinez v. Lewis, 1994-NMCA-100, 118 N.M. 446.

308. State *ex rel.* Martinez v. McDermett, 1995-NMCA-060, 120 N.M. 327.

309. Brantley Farms v. Carlsbad Irrigation Dist., 1998-NMCA-023, 124 N.M. 698.

310. *Id.* ¶ 6.

311. *Id.* ¶¶ 1, 10.

312. Zack Guido, *Drought on the Rio Grande*, CLIMATEWATCH MAG. (Oct. 5, 2012), https://www.climate.gov/news-features/features/drought-rio-grande [https://perma.cc/Z8JL-KLG7].

313. City of Las Vegas v. Oman, 1990-NMCA-069, 110 N.M. 425.

their use caused others and against a broad view of the common good to be achieved by a wise and equitable distribution of the available waters."[314]

As predicted by the Court of Appeals, the Supreme Court did indeed overrule the pueblo rights doctrine, remanding the case to the district court with detailed instructions for an equitable remedy to Las Vegas's reliance on *Cartwright*.[315] In rejecting pueblo rights, the Supreme Court quoted Judge Federici's dissent that "the ever-expanding quality of the pueblo water right 'is as antithetical to the doctrine of prior appropriation as day is to night.'"[316] The Supreme Court, however, did not reject the historical validity of the pueblo rights doctrine as the Court of Appeals had done.[317] To have done so would have undermined the doctrine of prior appropriation because the State Engineer sought to use the historical evidence of Spain and Mexico's water administration to change New Mexico's entire system of prior appropriation to one of equitable apportionment and common use.[318]

The Court refused to follow the State Engineer's lead, citing *Yeo v. Tweedy*'*s* rejection many decades earlier of correlative rights for underground waters. The Court recognized that equitable apportionment was the law rather than prior appropriation in interstate disputes, yet New Mexico's constitution and the Court's precedent have followed the doctrine of prior appropriation within the state since its inception. "We will not, in the limited context of the pueblo rights doctrine, reevaluate the entire historical basis for water law in this State. We thus reject the State Engineer's arguments relating to common use."[319] Besides, the Court noted, scholarly opinions can change based on new information or novel theories, following Judge Hartz's dissent that historians could "flip-flop" on their opinions. "Unlike history as a matter of theory, however, the law, as reflected by the doctrine of stare decisis, requires a greater degree of certainty and predictability."[320] A lesson from *State ex rel. Martinez v. City of Las Vegas* is that,

---

314. State *ex rel.* Martinez v. City of Las Vegas, 1994-NMCA-095, ¶ 21, 118 N.M. 257.

315. *City of Las Vegas*, 2004-NMSC-009, ¶¶ 63–68, 135 N.M. 375.

316. *Id.* ¶ 38 (quoting Cartwright v. Pub. Serv. Co., 1958-NMSC-134, ¶ 143, 66 N.M. 64 (Federici, D.J., dissenting)). While rejecting an ever-expanding right for Las Vegas, the Supreme Court cited with approval authority granting all municipalities forty years of expanding rights.

317. *Id.* ¶¶ 26–30 (citing State *ex rel.* State Eng'r v. Crider, 1967-NMSC-133, 78 N.M. 312 and N.M. STAT. ANN. § 72-1-9(B) (2006) (providing for "[m]unicipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties . . . a water use planning period not to exceed forty years")).

318. *Id.* ¶¶ 26–30. This was not the first State Engineer who wanted a system other than prior appropriation. "State Engineer Steve Reynolds believed in the first principle (beneficial use) and disliked the second (prior appropriation) so much that he disregarded it. Priority of appropriation struck Reynolds as a silly way of apportioning short supplies in New Mexico." *See* A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 769 (2001) (citing G. EMLEN HALL, HIGH AND DRY: THE TEXAS-NEW MEXICO STRUGGLE FOR THE PECOS RIVER 138 (2002)).

319. *City of Las Vegas*, 2004-NMSC-009, ¶ 30.

320. *Id.* ¶ 31. *See generally* Martha E. Mulvany, *State* ex rel. *Martinez v. City of Las Vegas: The Misuse of History and Precedent in the Abolition of the Pueblo Water Rights Doctrine in New Mexico*, 45 NAT. RESOURCES J. 1089, 1094–96 (2005) (discussing the New Mexico Supreme Court's reliance on principles of *stare decisis*).

like pueblo rights, the doctrine of equitable apportionment and common use is as antithetical to prior appropriation as day is to night.

D. A Change is Gonna Come: *Herrington v. State ex rel. Office of State Eng'r* (2006)

Long delays in applying New Mexico's prior appropriation law have come not only from seemingly interminable adjudications, but also from administrative hearings. Case in point: *Herrington v. State ex rel. Office of State Eng'r*.[321] Over the State Engineer's objection in the Mimbres general stream adjudication, the district court awarded the Herringtons an irrigation right on the Rio de Arenas, a tributary of the Rio Mimbres. The State Engineer had argued unsuccessfully that the *Templeton* doctrine required the Herringtons to drill a supplemental well or lose their rights by abandonment. Post-adjudication, the Herringtons sought to drill a supplemental *Templeton* well. "Nonetheless, the State Engineer opposed the well, despite having suggested just such a well during the earlier stream adjudication."[322] In 1983, the State Engineer denied the uncontested application, and the Herringtons asked for a hearing. "Inexplicably," eighteen years passed before they were granted a hearing, where they lost, and then lost before the district court and the Court of Appeals.[323]

In a decision written by Justice Bosson, the Supreme Court reversed the Court of Appeals and remanded the case to the district court for another hearing and decision consistent with the Court's clarification of the *Templeton* doctrine and its progeny.[324] The Court overturned the Court of Appeals' holding that statutory transfers had to meet the requirements of *Templeton* as well, a reversal the State Engineer endorsed although he had earlier argued for just such a requirement.[325] The core requirements for a successful, narrowly defined *Templeton* application include: "(1) a valid surface water right; (2) surface water fed in part by groundwater (baseflow); (3) junior appropriators intercepting that groundwater by pumping; and (4) a proposed well that taps the same groundwater that was the source of the applicant's original application."[326]

Herrington's requirements stem in part from the *Templeton* district court's priority analysis because the Supreme Court in *Templeton* had disregarded priorities.[327] At the conclusion of *Herrington*, the Court noted parenthetically that the domestic well statute complicated "the State Engineer's efforts to manage a limited water supply in a sustainable way. Furthermore, we recognize the practical difficulty of terminating continued use of existing junior domestic wells when they

321. Herrington v. State *ex rel.* Office of State Eng'r, 2006-NMSC-014, 139 N.M. 368.

322. *Id.* ¶ 5.

323. *Id.*

324. *Id.* ¶ 51. *See also* Cassandra Malone, *Herrington v. State: Straightening Out the Tangled Doctrines of Surface Water to Groundwater Transfers in New Mexico*, 48 NAT. RESOURCES J. 697 (2008) (discussing the implications of the *Herrington* court's clarification of the *Templeton* doctrine).

325. *Herrington*, 2006-NMSC-014, ¶ 2.

326. *Id.* ¶ 23.

327. *See Templeton*, 1958-NMSC-131, ¶ 48.

result in a shortfall to senior appropriators."[328] The Court predicted that it would be difficult to protect senior appropriators "when many domestic wells draw from the same basin."[329]

For the first time in the *Templeton* doctrine's history, the Court saw "principles of fairness that underscore the doctrine," yet *Templeton* made no mention of fairness, but rather the right of appropriators to "follow the source of their original appropriation."[330] *Herrington* may have opened the door to equitable distribution and common use that just closed with *State ex rel. Martinez v. City of Las Vegas*: "Although the New Mexico prior appropriation doctrine theoretically does not allow for sharing of water shortages, the *Templeton* doctrine permits both the aggrieved senior surface appropriator and the junior to divert their full share of water."[331]

E. Making His Mark: *Montgomery v. Lomos Altos, Inc.*, *Walker v. United States* and *Hydro Resources Corp. v. Gray* (2007)

By authoring three opinions on prior appropriation in one year, right after his *Herrington* opinion, Justice Bosson made his mark on the development of prior appropriation in New Mexico. The Supreme Court's first published 2007 water decision, *Montgomery v. Lomos Altos, Inc.*,[332] considered a split Court of Appeals decision affirming summary judgment in favor of developers' applications to move points of diversion and place and purpose of use on the Rio Grande from stream flow in Valencia County to groundwater in Sandoval County. In a thoughtful dissent to the majority's deference to the State Engineer, Court of Appeals Judge Kennedy had argued that it was improper for the State Engineer to have disregarded non-party senior declarations of rights in his determination that there would be no impairment to existing uses. Furthermore, the district court should have conducted a true trial de novo of the State Engineer's decision.[333] Agreeing with the dissent, the Supreme Court required on remand to district court that the State Engineer "either include the total amount of water rights contained in these non-party declarations or formally extinguish them."[334]

Walker v. United States[335] came to the Supreme Court on a certified question from the U.S. Court of Claims. The Walkers owned a 40-acre ranch abutting the Gila National Forest, with grazing allotments in the forest for nearly 18,000 acres administered by the U.S. Forest Service. After complaints about sick and dying cattle, the Forest Service inspected the allotted acres and determined that because of drought and overgrazing, the Walkers must reduce the number of cattle

328. *Herrington*, 2006-NMSC-014, ¶ 50; *see also* N.M. STAT. ANN. § 72-12-1.1 (2003).

329. *Id.*

330. *Id.* ¶ 1; *see Templeton*, 1948-NMSC-131, ¶ 38.

331. *Herrington*, 2006-NMSC-014, ¶¶ 1, 11, 14.

332. Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, 141 N.M. 21.

333. Montgomery v. N.M. State Eng'r, 2005-NMCA-071, ¶¶ 44–58, 137 N.M. 659 (Kennedy, J., concurring in part and dissenting in part).

334. *Montgomery*, 2007-NMSC-002, ¶ 31. After the Supreme Court's decision, the developers chose not to pursue their applications on retrial.

335. Walker v. United States, 2007-NMSC-038, ¶ 1, 142 N.M. 45.

in the forest.[336] The Walkers eventually refused, resulting in their permits being canceled and the Walkers and their cattle ordered off the federal lands. The federal claims court certified to the New Mexico Supreme Court the question of whether the Walkers had forage rights viable under state law.[337]

The Supreme Court rejected any claimed forage rights of the Walkers and used the certified question to give a history lesson on prior appropriation in New Mexico. First, the Court noted that ranching on the public domain gave no right, merely a license, to use public lands, rejecting the Walkers' claim that such a right arose from the law of antecedent sovereigns. Citing *State ex rel. Martinez v. City of Las Vegas*, the Court wrote that "customary practice is irrelevant when inconsistent with New Mexico law," but the Court went on to examine customary practice, which just like New Mexico law, did not "support the Walkers' claim to an implicit 'possessory' right to graze on the public domain that attaches to their water right."[338]

In reaching its holding, the Court discussed the "Foundational Principles and Historical Development of New Mexico Water Law," with the opening statement that the "prior appropriation doctrine governs water law in New Mexico, . . . established and exercised by beneficial use, which forms 'the basis, the measure and the limit of the right to use of the water.' N.M. Const. art. XVI, § 3."[339] Water rights are usufructuary, separate and distinct from adjacent land, with the sole exception being water used for irrigation. With those foundational principles in mind, the Court then traced the "prior appropriation tradition, as it exists in New Mexico today . . . to the convergence of practices followed in northern Mexico prior to the cession in 1848 with practices developed in connection with Anglo western settlement."[340] *Walker* re-focused on this combined Anglo-Hispanic heritage, perhaps because of the difficulties the Court had recently faced in *State ex rel. Martinez v. City of Las Vegas* when Spanish/Mexican legal history ran afoul of precedent and the New Mexico Constitution. *Walker* cited other treatises and law review articles regarding general western development of water rights' "mobility and transferability . . . to meet changing social goals."[341] *Walker* also abrogated case law that differed from its distinction between water and land rights.[342]

Hydro Resources Corp. v. Gray,[343] a corollary to *Walker v. United States*, involved a water rights dispute arising from a mining lease. The Court of Appeals affirmed summary judgment in favor of the lessor, who had not specifically reserved the water rights in the lease.[344] The Court of Appeals discussed the

336. *Id.* ¶ 3.

337. *Id.* ¶ 1.

338. *Id.* ¶¶ 46–47. There was a question as to whether the Walkers had *any* water rights. *See id.* 2007-NMSC-038, fn. 3 (citing authority for cattle grazing not being a beneficial use).

339. *Id.* ¶¶ 20–22 (citing N.M. CONST. art. XVI, § 3).

340. *Id.* ¶ 24.

341. *Id.* ¶ 26.

342. *Id.* ¶¶ 20–28.

343. Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142.

344. Hydro Resources Corp. v. Gray, 2006-NMCA-108, 140 N.M. 363 (rev'd by *Gray*, 2007-NMSC-061).

principles and history of prior appropriation, citing *State ex rel. Martinez v. City of Las Vegas* and noting that "[t]he law of prior appropriation has its roots in mining and evolved from mining customs that developed in the American West during the nineteenth century."[345] Once more, reference to the recent *Las Vegas* case preceded a new twist on New Mexico water law, because no other court had stated that New Mexico's prior appropriation history had its roots solely in mining customs. The Supreme Court rejected the lower court's decision, following the holding of *Walker* and determining that water rights are not appurtenant to mining claims, regardless of the necessity of water for mining. Again calling upon fairness as a contributing factor in his opinion, Justice Bosson wrote that it was "not unfair to require" the lessor to have explicitly included a provision regarding retention of water rights, nor was it "in the interests of fairness and equity to take away the water rights" acquired by the lessee at its own expense.[346]

F. It's Raining Cash: *State ex rel. Office of State Eng'r v. Lewis* (2007)

"The Pecos River . . . has challenged water experts for well over a hundred years, without meaningful resolution of the issues of rampant usage with attendant shortages."[347] So begins *State ex rel. Office of State Eng'r v. Lewis,* an erudite Court of Appeals opinion authored by Judge Sutin. The question before the Court was whether the "bedrock doctrine of prior appropriation would be offended" by a cash buyout of junior appropriators upstream rather than by the enforcement of a priority call.[348] The district court had approved a settlement agreement among the State of New Mexico, the Carlsbad Irrigation District (CID), the Pecos Valley Artesian Conservancy District (PVACD) and the United States, which included in its provisions an adjudication of CID's (and the United States') rights to 50,000 AFY, as well as payments recently authorized by state statute to buy junior upstream lands and retire their water rights and to augment through wells the flow of the Pecos to Texas as required by the Pecos River Compact and a U.S. Supreme Court decree enforcing the Compact.[349]

The State Engineer had not alleviated the water shortages for senior downstream New Mexico users and the State of Texas through priority administration as authorized more than two decades earlier by *State ex rel. Reynolds v. PVACD.* He had chosen not to enforce priorities "apparently based at least in part" on his inconsistent positions in state and federal court. While he was granted priority enforcement authority in the state action, he argued in federal court against Texas that New Mexico was in compliance with the Compact and that therefore priority enforcement was unnecessary.[350]

---

345. *Id.* ¶ 9.

346. *Gray*, 2007-NMSC-061, ¶ 46.

347. State *ex rel.* Office of State Eng'r v. Lewis, 2007-NMCA-008, ¶ 1, 141 N.M. 1.

348. *Id.* ¶¶ 2, 26.

349. *Id.* ¶¶ 5–12, 28 (citing the Pecos River Compact, N.M. STAT. ANN. § 72-15-19 (1949)); Texas v. New Mexico, 485 U.S. 388 (1988) (per curiam) (the Amended Decree); N.M. STAT. ANN. § 72-1-2.4 (2002) (the compliance statute)).

350. *Lewis*, 2007-NMCA-008, ¶ 11.

Following Colorado's example of augmentation substituting for priority enforcement, the Court of Appeals approved the settlement over objections that the "new river management machinery (the Settlement Agreement) . . . not only ignores priority enforcement but explicitly waives and prohibits it."[351] The objectors, who included some members of CID, argued against the limitations of CID to 50,000 AFY for distribution to its members from the Avalon Dam when it had been entitled to more than 75,000 AFY under the Hope Decree, foreclosing a priority call unless CID received less than 50,000 AFY in a single year. Objectors also argued unsuccessfully that the buyout of the "influential upstream farmers" was an unnecessary expense to state taxpayers when priority enforcement would have shut those upstream users down.[352]

G. Prior Appropriation's Gatekeeper: *Lion's Gate Water v. D'Antonio* (2009)

While New Mexico rarely enforces priorities among users, at times it keeps latecomers from joining the water table after a State Engineer declaration of full appropriation. Like many other water cases, *Lion's Gate Water v. D'Antonio* came to the Supreme Court "through a long and tortuous route."[353] Lion's Gate filed an application for a new appropriation on the Gila River, which had been declared to be over-appropriated for a half-century.[354] Like he had with dozens of applicants since 1969, the State Engineer summarily denied Lion's Gate's application without a hearing based upon NMSA 1978, Section 72-5-7, providing that "[i]f, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application."[355] In district court, Lion's Gate successfully argued that all issues pertinent to the application should be heard, but the State Engineer argued that only the issue actually decided by him should be heard on appeal de novo to district court. Unlike the Court of Appeals, the Supreme Court agreed to the State Engineer's request for an interlocutory appeal.

Tracing the legal history of appellate review of State Engineer decisions, the Supreme Court found in favor of the State Engineer, holding that the constitutional amendment and the statute governing de novo appeals from the State Engineer limited the district court's jurisdiction to only the issues decided by the State Engineer. One of the legislature's purposes in enacting the water code was to "creat[e] an administrative agency to efficiently handle the complex and esoteric process of water rights applications."[356] To construe the water code provisions as Lion's Gate suggested would upset the balance between the "administrative and judicial resources . . . , shifting the burden of the administrative process to the judiciary and diminishing the gatekeeper role of the State Engineer."[357] The Court noted that the "general purpose of the water code's grant of broad powers to the

351. *Id.* ¶ 28.

352. *Id.* 2007-NMCA-008, ¶¶ 6, 28, 38–44, 50.

353. Lion's Gate Water v. D'Antonio, 2009-NMSC-057, ¶ 1, 147 N.M. 523.

354. *Id.* ¶ 4 (citing Special Master Report, Simon H. Rifkind at 325, 337 (Dec. 5, 1960) *in* Arizona v. California, 376 U.S. 340 (1964)).

355. *Id.* ¶ 7, (citing N.M. STAT. ANN. § 72-5-7 (1907, as amended)).

356. *Id.* ¶ 31.

357. *Id.* ¶ 36.

State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process," maximizing resources through efficiency and balancing the interests of applicants and prior appropriators, as well as the public.[358]

H. Forever Less a Day: *Tri-State Generation & Transmission Ass'n, Inc.* and *Bounds v. State ex rel. D'Antonio* (2012–2013)

In 2003, New Mexico legislators sought priority enforcement as a remedy to the complexities of drought, over-usage, and interstate demands.[359] Just the year before, they had authorized a payout to junior appropriators on the Pecos to alleviate that stream system's problems,[360] but the state coffers could not afford prohibitively expensive payouts on all its basins, so they called upon the State Engineer to enforce priorities. The legislature enacted NMSA 1978, Section 72-2-9.1, ordering the State Engineer to make rules for priority determinations because "[t]he legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer."[361]

Based upon this directive, the State Engineer created the Active Water Resource Management regulations (AWRM).[362] A key provision in AWRM was the administration date the State Engineer could declare in a basin, meaning that any water right junior to that date must be curtailed, much like the power the State Engineer was granted in *State ex rel. Reynolds v. PVACD* to curtail junior users during an adjudication, except that under AWRM the State Engineer's power could be exercised "outside of the adjudication process."[363]

The district court and the Court of Appeals determined that the statute did not create new authority for the State Engineer for priority administration and declared some parts of AWRM unconstitutional,[364] but the Supreme Court disagreed in *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*.[365] The legislature created new authority for the State Engineer to exercise priority administration because the enacting legislation was entitled, "An Act Relating to Water; *Providing Authority for* State Engineer Priority Administration and

358. *Id.* ¶ 24.

359. N.M. STAT. ANN. § 72-2-9.1 (2003).

360. N.M. STAT. ANN. § 72-1-2.4 (2002).

361. N.M. STAT. ANN. § 72-2-9.1 (2003).

362. 19.25.13.1–.50 NMAC (2004).

363. Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, ¶ 31. *See also* 19.25.13.7(3)(b) NMAC (definition of administration date); 19.25.13.24 NMAC (authority of water master to curtail junior users).

364. Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2011-NMCA-015, 149 N.M. 394 (affirming in part and reversing in part).

365. *Tri-State Generation & Transmission Ass'n, Inc.*, 2012-NMSC-039. *See also* Ashley N. Minton, *Tension in the Waters: How Tri-State Generation v. D'Antonio Creates Tension with the Takings Clause and the Prior Appropriation Doctrine*, 45 N.M. L. Rev. 371, 377 (2014).

Expedited Water Marketing and Leasing," and the dictionary meaning of "provide" is to "make available for use; supply."[366] After a century of courts limiting the State Engineer's priority administrative authority until after or at least during adjudications, beginning with *Pueblo of Isleta v. Tondre*,[367] the Supreme Court through its interpretation of Section 73-2-9.1 gave the State Engineer full authority to determine and enforce interim priorities until an adjudication decree is entered, which in New Mexico could mean forever less a day.

The following year, the State Engineer's newly granted power to enforce priorities was made more difficult to exercise. In *Bounds v. State ex rel. D'Antonio*,[368] the Court considered whether domestic wells fell under the prior appropriation doctrine, and if so, whether the New Mexico Domestic Well Statute (DWS)[369] was constitutional. The district court had determined on stipulated facts that there was not enough evidence that junior domestic wells had impaired a senior irrigator in the fully-appropriated and adjudicated Rio Mimbres. The district court did find, however, that the DWS was facially unconstitutional as violating the prior appropriation doctrine, over the objection by the State Engineer that the legislative action could constitutionally treat domestic wells "outside the scope of the general scheme of appropriations."[370] The Court of Appeals reversed the district court, finding that Article XVI, Sections 1-3 stated "a broad priority principle, nothing more."[371]

Acknowledging the "consternation among New Mexico's water community," the Supreme Court granted certiorari to address the Court of Appeals' holding and reasoning "in light of [the opinion's] broad policy implications."[372] While affirming the Court of Appeals, the Supreme Court discouraged future litigants from using the lower Court's "nothing more" language, because it could wrongly be interpreted "to mean that priority water rights are nothing more than an aspiration, subject to legislative whim and administrative discretion."[373] *Bounds* distinguished between the legislative mandate to the State Engineer to permit domestic wells regardless of water availability and the State Engineer's authority to administer those rights once permitted. Like other water rights, domestic well permits are "inherently conditional" and subject to "priority administration for the protection of senior users,"[374] either through the State Engineer or the courts, which thereby avoids a conflict with prior appropriation, embedded in the New Mexico Constitution. *Bounds* recognized the practical and political challenges facing the

366. *Id.* ¶¶ 19–20 (citing 2003 N.M. Laws, ch. 63, § 1 (emphasis added) and NEW OXFORD AMERICAN DICTIONARY 1406 (3d. ed. 2010)).

367. *Tondre*, 1913-NMSC-067, ¶ 63 (on motion for rehearing).

368. Bounds v. State *ex rel.* D'Antonio, 2013-NMSC-037, ¶¶ 1–2.

369. N.M. STAT. ANN. § 72-12-1.1 (2003). The legislature had passed the predecessor to the current DWS in 1953. *See*, *e.g.,* 1953 N.M. Laws, ch. 61, § 1; *Bounds*, 2013-NMSC-037, ¶ 20.

370. *Bounds*, 2013-NMSC-037, ¶¶ 6–7.

371. Bounds v. State, 2011-NMCA-011, ¶¶ 37, 42, 149 N.M. 484 *quoted in Bounds*, 2013-NMSC-037, ¶ 8. *See* Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 702 (2012) (quoting Bounds v. State, 2011-NMCA-011, ¶ 37, 149 N.M. 484).

372. *Bounds*, 2013-NMSC-037, ¶ 8.

373. *Bounds*, 2011-NMCA-011, ¶ 47.

374. *Bounds*, 2013-NMSC-037, ¶¶ 31, 44.

State Engineer as to whether he would ever cut off junior domestic wells. Like the Court of Appeals, the Supreme Court agreed that "aggrieved citizens must look to the legislature and the State Engineer for relief from many of these problems, seemingly so intractable," but promised that our "courts remain available, based upon sufficient evidence, to intervene in appropriate cases to ensure that 'priority of appropriation shall give the better right.'"[375]

CONCLUSION

After 130 years of shaping by the courts, the principles of prior appropriation are still intact in New Mexico, with some changes such as expanding a water right to include future rather than actual use for some governmental entities and modifying prior appropriation in non-rechargeable basins. Thanks to the judiciary (and the New Mexico Constitution), the theory of prior appropriation has withstood the common law of riparian rights, the civil law of equitable apportionment and common use, and conflicting legal theories for groundwater such as correlative rights and private ownership.

In theory, prior appropriation is alive and well in New Mexico, but in practice it is on life support. A key component to New Mexico's system of water law is general stream adjudications, yet the pace is glacial. Even that analogy fails because glaciers are melting faster than cases are completed, and some have not even begun. The climate change happening in New Mexico may catch us all unprepared if the status quo continues, where the most basic questions like "who is using our water, how much are they using, when did they start using it, and is that use beneficial" remain unanswered in many thousands of instances. With those questions remaining unanswered, New Mexico is in the anomalous position of having a complete system for water management on the books, but not in reality. For years, priorities have been ignored, but now they can be enforced before there is clarity regarding beneficial use. Rowing on only one side of a boat takes you in a circle.

When a state cannot manage its interstate waters, the federal government will step in to manage them. That would be a sad day for New Mexico, because so much progress has been made in the development of water law in our state, such as the early recognition of the interrelation between surface and underground water. While the courts are ready to handle disputes as they arise by relying on our state and federal constitutions, statutes, and legal authorities, including the case law described in this article, the legislature must ensure that our statutes and funding for their implementation match the urgency of New Mexico's critical water needs, not just for the present, but also for a more arid New Mexico that our children and grandchildren will soon face. Anything less will result in confusion worse confounded.

---

375. *Id.* ¶ 46. The following year, the Court of Appeals dusted off the bookshelves for authority that a water right does not require a consumptive use to be a beneficial use. *See* Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth., 2014-NMCA-032, ¶ 38 (citing Trambley v. Luterman, 1891-NMSC-016). *Trambley* had not been cited for more than 60 years, and never for the proposition accepted by the Court of Appeals, demonstrating the point that until overruled, an old case can still be a good case.