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WATER LAW

WATER LAW—The New Mexico State Engineer, in granting a permit for change of place of use of water and after determining that the change of place of use will not impair existing water rights, may not apply conditions which require that treated sewage effluent resulting from the use of the water must be returned to a natural stream or underground reservoir because the effluent is private and not "public" water. *Reynolds v. City of Roswell*, 99 N.M. 84, 654 P.2d 537 (1982).

FACTS

In 1968 the City of Roswell acquired Walker Air Force Base from the United States Government and later incorporated it within the municipal boundaries of the city. The Air Base, subsequently renamed Roswell Industrial Air Center (RIAC), had underground water rights for 2500 acre feet per annum. These water rights were also acquired by the city to be used for municipal purposes at the site of the RIAC. Treated sewage effluent was used to water the RIAC golf course or was sold to nearby farms.[1]

In 1974 the city abandoned the RIAC sewage plant, which it had maintained since 1968, and pumped the untreated sewage effluent to the municipal sewage plant. From there the treated effluent was sold to local farmers and to a country club for fairway watering purposes, or was discharged into the nearby Hondo River.[2]

When existing RIAC wells began to weaken, the city applied to the New Mexico State Engineer for a permit to drill supplemental wells so that it could continue to pump 2500 acre feet of water. In addition, because RIAC had become part of the municipality, the city sought by its application to incorporate the RIAC water rights into the municipal system, simply changing the place of use of the water from the RIAC sector to the entire city.[3] The Roswell-Artesian Water Users Association (Association) protested the application because they feared that it would interfere with their water rights.[4] The matter was heard by the State Engineer who granted the city's application, finding that the granting would not impair or detrimentally affect any existing water rights.[5] However, the State Engineer attached conditions to the permit which required the city either to continue selling the treated sewage effluent or discharging it into the Hondo River.[6]

1. Reynolds v. City of Roswell, 99 N.M. 84, ___, 654 P.2d 537, 538 (1982).
2. *Id.*
3. *Id.*
4. *Id.* at ___, 654 P.2d at 537.
5. *Id.* at ___, 654 P.2d at 538.
6. *Id.*

The city objected to the conditions imposed on it and appealed to the Chavez County District Court. Trial De Novo[7] found that the city's proposed change of place of use would not detrimentally affect existing water rights; that the city, in some future time, could reuse all effluent and could cease selling the effluent and discharging the effluent into the Hondo River; and, most importantly, the State Engineer could not impose any conditions in approving this application. The Association and the State Engineer appealed this decision to the New Mexico Supreme Court.

HOLDING

The New Mexico Supreme Court upheld the decision of the Chavez County District Court, holding that the State Engineer, in granting a permit for change of place of use of water and after determining that the change will not impair existing water rights, may not apply conditions which require the sewage effluent resulting from the water use to be returned to natural streams or underground reservoirs. The Court found that the effluent is private and not "public" water.

BACKGROUND

The New Mexico State Engineer has the authority to impose conditions on the approval of a change of location of wells or the change of the place of use of water from those wells.[8] When applying, the applicant must show that the change will not impair existing water rights, and applications will be granted only after notice and opportunity for a hearing is given to any party affected by the application.[9] The principle underlying the requirements of application, notice, and hearing is to insure that the proposed change will not impair the rights of other water appropriators.[10] Thus, the State Engineer has authority to impose conditions on an application for change of location of wells or the change of place of use of the water if the change, as stated on the application, will impair the water rights of others.[11]

To the extent that treated sewage effluent is discharged into natural streams or underground reservoirs, the effluent may be classified as ar-

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7. N.M. STAT. ANN. § 72-7-1 (1978) provides for a trial de novo in district court when a party appeals a decision by the New Mexico State Engineer.

8. N.M. STAT. ANN. § 72-12-7(A) (1978) provides, in part, "that the owner of a water right may change the location of his well or change the place of use of the water, but only upon application to the state engineer and upon showing that the change will not impair existing rights. The application may be granted only after such advertising and hearing as are presented in the case of original applications."

9. *Id.*

10. City of Roswell v. Berry, 80 N.M. 110, 112, 452 P.2d 179, 181 (1969).

11. 99 N.M. at ___, 654 P.2d at 539.

tificial water within the meaning of New Mexico law.[12] Treated sewage effluent is in the same category as waters which drain, seep, or percolate from a treatment plant and which depend for their continuance upon the acts of man.[13] Under New Mexico law, this artificial water is subject to appropriation, if it continues to seep, drain, percolate, etc., and continues to go unused for a period of more than four years.[14] Once the effluent actually reaches a natural stream or underground reservoir, the city has lost control of the water and cannot recapture it. The important issue in this case, however, is not whether a municipality can recapture effluent which has become comingled with stream or ground water, but whether a municipality may reuse its sewage effluent for municipal purposes before it is discharged.

Wyoming and Montana recognize the right of an appropriator to reuse its waste water.[15] A Wyoming court found that,

> no appropriator can compel another appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain.[16]

Hence, it is recognized that, regardless of prior seepage or drainage, if an appropriator by other means or under different circumstances can utilize his waste waters, he cannot be said to impair the water rights of others. Similarly, when a municipality uses all of its sewage effluent, which had previously been discharged into a natural stream or underground reservoir, it is not impairing water rights of others.

Since sewage has been traditionally viewed as a nuisance, a health hazard, and a problem for municipalities, policy considerations support

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12. N.M. STAT. ANN. § 72-5-27 (1978) provides that "artificial waters, as distinguished from natural surface waters, are hearby defined for the purpose of this act as waters whose appearance or accumulation is due to escape, seepage, loss, waste, drainage or percolation from construction works, either directly or indirectly, and which depend for their continuance upon acts of man. Such artificial waters are primarily private and subject to beneficial use by the owner or developer thereof; provided, that when such waters pass unused beyond the domain of the owner or developer and are deposited in a natural stream or watercourse and have not been applied to beneficial use by said owner or developer for a period of four years from the first appearance thereof, they shall be subject to appropriation and use; provided, that no appropriator can acquire a right, excepting by contract, grant, dedication or condemnation, as against the owner or developer compelling him to continue such water supply."

13. Reynolds v. Wiggins, 74 N.M. 670, 397 P.2d 469 (1964); Hagerman Irr. Co. v. E. Grand Plain D.D., 25 N.M. 649, 187 P. 555 (1920).

14. N.M. STAT. ANN. § 72-5-27 (1978).

15. Rock Creek Ditch & Flume Co. v. Miller, 17 p.2d 1074 (Mont. 1933); Thayer v. City of Rawlins, 594 P.2d 951 (Wyo. 1979); Binning v. Miller, 102 P.2d 54 (Wyo. 1940).

16. Bower v. Big Horn Canal Association, 307 P.2d 593, 601 (Wyo. 1957).

the consumption of sewage effluent by the municipalities which produce it.[17] If a municipality has developed a method by which it can treat the effluent, then it should be entitled to reuse the effluent if it so desires.

ADDRESSING THE PROBLEM

The problem is a narrow one and the Court limits its holding to the facts of this particular case. The Court is determining whether the State Engineer can impose conditions in approving an application which is asking for a change of the place of use of water, particularly when the municipality already owns the water.

The Court acknowledges that the State Engineer has the authority to place conditions on approving applications for change of the place of use of water.[18] These conditions are applicable only when the change would interfere with another's water rights. In this case, however, the conditions prescribed by the State Engineer were not imposed to protect other water rights, nor were the conditions directly related to the purpose for which the city filed its application. The fact that the city had previously used its water right in one part of the city and later desired to use the same right in another part of the city did not impair the water rights of others. The purpose of the city's application was solely to redistribute, within the municipal water system, 2500 acre feet of water it already possessed. The State Engineer and the Association contended that the change of place of use of water, along with an increased consumption by the city of treated sewage effluent would increase the "actual" use of the city beyond the 2500 acre feet. The Court did not follow this reasoning and stated that the fact that the city reuses its treated sewage effluent does not increase its water appropriation.[19]

The Court agreed with the State Engineer's statement that sewage effluent had historically been returned to the public surface or underground water of the state.[20] However, the question here was not whether the City had released its effluent into the natural surface or groundwater, hence, relinquishing it, but whether the city could use its sewage effluent before any of it was discharged into the nearby stream. In answering this question the Court sought guidance from similar cases in other jurisdictions and found that the city could use as much of its sewage effluent as it desired.[21] The Court held that, if a city has a current or future need for is sewage effluent it cannot be restrained from using it just because in the past it

17. Wyoming Hereford Ranch v. Hammond Packing Co., 236 P. 764 (Wyo. 1925).
18. 99 N.M. at ___, 654 P.2d at 539.
19. *Id.* at ___, 654 P.2d at 540.
20. N.M. STAT. ANN. § 75-2-27 (1978).
21. 17 P.2d 1074; 594 P.2d 951; 102 P.2d 54; 307 P.2d 593.

has released the sewage effluent into a natural stream. The State Engineer was not allowed to place the conditions on the city's application without proof that the change of place of use and the increased use by the city of its treated sewage effluent would affect the water rights of others.

ANALYSIS

Two problems were presented in this case and, as the Court correctly noted, the two are not related. The first is whether an owner of water rights can change the place of use of these rights without restrictions. The second is whether a municipality can reuse its sewage effluent to the extent it desires. The State Engineer intertwined these two problems when he imposed the condition on his approval of the City of Roswell's application for change of place of use of its water rights.

The first problem is easy to address. There is no question that if an owner has certain acre feet of water at its disposal it may use it as long as the use is "beneficial."[22] Under New Mexico law, an owner who wants to change well location or place of use of water must file an application with the State Engineer.[23] As noted earlier, the purpose of the application is to provide notice or hearings for anyone who would be affected by the change. The State Engineer may impose conditions on the approval if the change will adversely affect the rights of others. The New Mexico Supreme Court found that the change in place of use and change of location of well in this instance did not affect the rights of other water users. It is difficult to understand how the State Engineer could conclude that the redistribution of Roswell's use of its 2500 acre feet of water could affect the water rights of others when the amount of water being consumed remained the same.

The second problem is more difficult to resolve because the State Engineer concluded that reuse of sewage effluent would affect water rights of other users who were situated downstream from Roswell. The State Engineer wanted to restrict Roswell's consumption of its own effluent as a condition to approving Roswell's change of place of use application. The Court wisely decided, however, that the reuse of treated effluent would not affect other water rights because the City would simply be using water already acquired and incorporating it into the municipal system which serves the entire community. In addition, the Court approved the District Court's finding that unreleased effluent is private water. The Court thus ruled the State Engineer could not limit the use of treated effluent by the municipality.

22. N.M. STAT. ANN. § 72-1-1 (1978) provides, in part, that "all natural waters flowing in streams and watercourses, whether be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use."

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

The most important finding in this case is that a municipality retains the right to reuse its sewage effluent even if it has not used the effluent previously. The State Engineer argued that if the City of Roswell was to reuse the effluent produced by the use of the 2500 acre feet of water, Roswell's actual use of the 2500 acre feet would increase. If the city has the means to treat the effluent, then it should have the right to reuse the effluent and should not be forced to release it into natural streams or underground reservoirs. Using the treated effluent would be the most efficient way for the city to use its allocated water.

The State Engineer also argued the sewage effluent that the city had been releasing was part of the state's natural stream or underground water and any appropriation of this sewage effluent by the city would, in effect, impair the water rights of other users. Under New Mexico law, once the sewage effluent is released by the city it becomes part of the public surface or underground water of the state and is subject to appropriation just like any other artificial water which has not been used for four years.[24] However, a municipality has the right to use any or all of its sewage effluent before it is released if the use is beneficial and any drainage is only incidental to this municipal use. Hence, the Court wisely decided that if a municipality has the means of treating its sewage effluent and desires to use it, it cannot be deterred from doing so.

The question resolved in the treated effluent use problem was how a municipality may use its water. The change of place of use of water, contrarily, presented the question of where the water may be used. The State Engineer's "use" condition was not related to the City's change of place request.

CONCLUSION

The State Engineer should condition the change of place of use only when other water rights are affected and should not condition the change on whether a municipality will continue to discharge its treated sewage effluents into natural streams or underground reservoirs.

It is important that the Court held that municipalities are not required to discharge any of their treated sewage effluent because allowing municipalities to reuse their own sewage effluent provides for the most efficient use of the water which is apportioned to the municipality. In light of environmental concerns related to sewage effluents and the ever increasing struggle for water in the arid Southwest, this case gives municipalities and other water owners "additional" water from their own sewage without affecting the water interests of others.

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24. N.M. STAT. ANN. § 72-5-27 (1978).