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## **Brantley v. Carlsbad Irrigation District: Limits of the Templeton Doctrine Affirmed**

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## NOTES

### BRANTLEY v. CARLSBAD IRRIGATION DISTRICT: LIMITS OF THE TEMPLETON DOCTRINE AFFIRMED

WATER LAW—TEMPLETON DOCTRINE—Application to change a water right from a surface to an underground point of diversion denied where the groundwater came from the same source as the surface supply, but was not itself a source of the surface supply at the point of surface diversion. *Brantley v. Carlsbad Irrigation District*, \_\_\_\_ N.M. \_\_\_\_, 587 P.2d 427 (1978).

It is well-established that surface waters and groundwaters are often physically interrelated.<sup>1</sup> Where underground water contributes to a source of surface water, production of the underground water can result in a lowering of the water table and a subsequent impairment of the surface water supply.<sup>2</sup> Under the doctrine of prior appropriation, the owners of senior water rights can enjoin the appropriation of any public waters, including groundwaters, whenever these appropriations would impair their superior rights.<sup>3</sup> And, because in New Mexico, as in most western states, surface water rights tend to be older than adjacent ground water rights,<sup>4</sup> serious conflicts between surface water users and users of tributary groundwaters arise. Surface diversions require maintenance of high water tables and the production of underground water must therefore, necessarily be restricted if production from surface sources is to continue. Unless the owners of surface water rights are allowed to change from a surface to an underground point of diversion, the exercise of their prior rights can impede the development of entire underground water basins.

New Mexico draws a statutory distinction between surface and ground waters and essentially treats them as separate sources.<sup>5</sup> Until 1958, the owner of a surface right could not change to an underground point of diversion without applying for a new water right.

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1. TREWARTHA, et al., FUNDAMENTALS OF PHYSICAL GEOGRAPHY 174 (3rd ed. 1977).

2. The New Mexico Supreme Court recognized this effect in the case of *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 65-66, 332 P.2d 465, 469 (1958).

3. N.M. Const., art. 16. See also *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73, 80-81 (1963).

4. CHANDLER, ELEMENTS OF WESTERN WATER LAW 28 (1913).

5. See generally N.M. STAT. ANN. Ch. 72 (1953).

With the case of *Templeton v. Pecos Valley Artesian Conservancy*,<sup>6</sup> the New Mexico Supreme Court attempted to effect a partial solution to this problem. The *Templeton* case involved an application to change the point of diversion of a surface water right on the Rio Felix to a shallow well in the surrounding alluvium, or Valley Fill. The State Engineer denied the application because the waters of the Valley Fill were entirely appropriated. The court, however, granted the application after finding that the waters of the Rio Felix were supplied almost entirely by percolations from the Valley Fill and that the Rio Felix was diminishing due to increased pumping from the Valley Fill. The court concluded that an appropriation of water from the Rio Felix was in fact an appropriation of Valley Fill water. In such a case a surface water appropriator whose water fails at his point of surface diversion is entitled to follow his water to its source in a related aquifer.<sup>7</sup>

The Templeton Doctrine has been applied in a variety of situations. It has been used to impose on senior appropriators the burden of drilling supplemental wells before they could be granted the traditional benefits of a priority call.<sup>8</sup> And, it has been the basis for a finding of forfeiture where no applications for supplemental wells were filed after the surface water supply failed.<sup>9</sup> The Doctrine has been interpreted to allow appropriators to rely on any sources of their water at the surface point of diversion, even if those sources contributed only a portion of the original appropriation.<sup>10</sup> But a number of questions still remain regarding the extent of the Templeton Doctrine's applicability.<sup>11</sup> The case of *Brantley v. Carlsbad Irrigation District*<sup>12</sup> is the latest New Mexico interpretation of this important doctrine.

George Brantley, the applicant in this case, had rights to irrigate 445 acres of land with 3 acre-feet of water per acre per annum from the Pecos River. His rights were acquired from the United States and had a priority date of 1887. Since 1932, Brantley's water had been supplied through an irrigation ditch maintained by the Carlsbad Irrigation District which diverted his appropriation from a site on the Pecos River. Because of seepage and evaporation along the twenty-

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6. 65 N.M. 59, 332 P.2d 465 (1958).

7. *Id.* at 68-69, 332 P.2d at 471.

8. Flint, *Groundwater Law and Administration: a New Mexico Viewpoint*, 14 ROCKY MT. MIN. L. INST. 545, 562 (1968).

9. State ex rel. Reynolds v. South Springs Co., 80 N.M. 144, 452 P.2d 478 (1969).

10. Langenegger v. Carlsbad Irrigation District, 82 N.M. 416, 483 P.2d 297 (1971).

11. Flint, *supra* at 560-61.

12. \_\_\_\_\_ N.M. \_\_\_\_\_, 587 P.2d 427 (1978).

eight mile ditch, however, only 2.1 acre feet per acre were delivered to Brantley's farm. In 1976, Brantley applied for a permit to withdraw groundwater to supplement his surface water. The entire amount from both diversions was not to exceed his 3 acre-feet entitlement. The State Engineer denied the application because the proposed diversion would constitute a new diversion from a fully appropriated source. Brantley appealed the State Engineer's decision to the District Court of Eddy County. Following a trial de novo, his application was effectively granted. The State Engineer and the Carlsbad Irrigation District appealed to the New Mexico Supreme Court which reversed the trial court's decision.

Brantley's application for a change of point of diversion was similar to an application denied in the case of *Kelley v. Carlsbad Irrigation District*.<sup>13</sup> In *Kelley*, the applicant had asked to have his water diverted into an abandoned reservoir which, because of holes in its base, allowed water to percolate rapidly into the underground basin. He then sought to change his point of diversion to this underground basin. The New Mexico Supreme Court denied his application, holding that when surface water in which rights existed reached an underground basin, through percolation, seepage or otherwise, it immediately lost its identity as water subject to existing rights and became public water, subject to appropriation.<sup>14</sup>

Brantley, however, attempted to bring his case under the Templeton Doctrine. He relied on language in *Templeton* stating that "an appropriation when made follows the water to its source whether through surface or subterranean streams or through percolations."<sup>15</sup> He argued that the source of his water was the Pecos River, and that under the Doctrine it did not matter whether he took his water from the ditch or from the shallow aquifer into which the water had seeped. The issue was, therefore, whether the Templeton Doctrine allows a supplemental point of diversion from an aquifer which receives water from the same source as the original surface right, even though the aquifer itself never contributed to the water right at its point of surface diversion.

The New Mexico Supreme Court held that the Templeton Doctrine did not apply here because the groundwater that Brantley wanted to divert was not a source of his surface right. The court found that Brantley was actually seeking to recapture water lost to a

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13. 76 N.M. 466, 415 P.2d 849 (1966).

14. *Id.* at 472, 415 P.2d at 853.

15. 93 C.J.S. *Waters* §170 (1956), *quoted in* *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. at 67 n. 16, 332 P.2d at 470.

declared underground basin<sup>16</sup> which was also a source of a fully appropriated surface flow. Under these circumstances, the ruling in the *Kelley* case controlled:

One having a right in a surface flow, which has . . . been lost to the underground reservoir, can neither transfer his surface right nor change his point of diversion to the underground reservoir.<sup>17</sup>

#### CONCLUSION

The court's holding in *Brantley* is consistent, not only with its holding in the *Kelley* case, but with the very purpose for which the Templeton Doctrine was created. The *Templeton* decision was intended to facilitate the full development of tributary groundwaters by allowing appropriators of surface waters, whose volumes have diminished, to supplement their appropriations by drilling wells upstream into the underground sources of their surface water.<sup>18</sup> As such, the Doctrine has proven to be a useful tool in managing groundwater basins and their related surface sources.<sup>19</sup> But extending the Templeton Doctrine to include the recapture of water which has seeped back into a public groundwater basin would in no way have furthered the Doctrine's basic purpose. The seepage which *Brantley* sought to recover too closely resembles the return flows on which so many western water rights wholly or partly depend.<sup>20</sup> If the recovery of this water had been allowed, water rights along the downstream segments of every watercourse in New Mexico could conceivably have been impaired.

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16. In New Mexico, only groundwater in declared underground basins with reasonably ascertainable boundaries is considered to be public water. See N.M. STAT. ANN. §72-12-1 (1978).

17. 76 N.M. at 472, 415 P.2d at 853.

18. \_\_\_\_\_ N.M. at \_\_\_\_\_, 587 P.2d at 429.

19. Flint, *supra* at 562-63.

20. W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 331 (1942).