Protection of the Means of Groundwater Diversion

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The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property. ... And vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. ... Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed.\(^1\)

**INTRODUCTION**

As reflected in the words of Judge Helm in 1882, in *Coffin v. Left Hand Ditch Co.*,\(^2\) water in the west is a vital component of the economic existence of the western states. Without water, the desert remains barren and unproductive. With water, development, progress, and prosperity are assured.

In Judge Helm's statement there lies an inherent conflict which was, however, dormant in 1882. On the one hand was the need to protect the rights of the individual and his "vast expenditures of time and money" in developing the land. Underlying this need to protect the rights of the individual was an apparently more fundamental goal: the development of the state and its resources by encouraging such investment. In 1882, the goal of development was served best by protecting the individual right. Maximum development, however, would necessarily require a curtailment of the individual right.

Future development of the economies of the western states would eventually demand full utilization of water resources; without full utilization, the future development of the state and its economy would be limited to a level below its potential. But in the early days of the west, full utilization of the resource was not the major concern. Of greater importance was the idea that individual rights in

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2. 6 Colo. 443 (1882).
water should be protected to encourage investment and hence development. Although contrary to established principles of water law, this idea represented a reality of public policy in the west. Thus, the pendulum of public policy had swung from the common law riparian extreme to its complete opposite, the right of the appropriator to the water—first in time, first in right. Having reached this extreme, the pendulum could swing back only toward the middle. Acute demand for water since has attracted the pendulum of public policy back to the point where the rights of the individual, while still recognized, are balanced against the present objective of maximizing water resources. The individual right must at times be sacrificed in order that the beneficial use of a state's waters can be maximized.

MESTAS v. ELEPHANT BUTTE IRRIGATION DISTRICT: A CASE STUDY OF A CONFLICT RESULTING FROM A SHORTAGE OF WATER CREATED BY INCREASING DEMAND

Along the Rio Grande in southern New Mexico, below Elephant Butte Dam, is an apparently large fresh water aquifer. Although farmers and others drilled wells as early as 1900, there was no significant development of the groundwater resource until the 1950s because, until that time, the Elephant Butte Irrigation District (EBID) was able to meet demands with surface waters from the Rio Grande.

EBID was established under state law to cooperate with the United States Bureau of Reclamation in developing the waters of the Rio Grande in order to encourage agricultural development. Until 1971, EBID, through the assessment of fees on its member-users, was responsible to the United States for repayment of the construction costs of the entire Rio Grande project. In 1971, the debt having been retired, EBID assumed full control over the irrigation system.

During the 1950s, New Mexico encountered a water shortage and many farmers drilled irrigation wells to supplement the surface waters delivered by EBID. When surface water again became plentiful, most of these wells were no longer used. In the 1970s, however, farmers were hit with another shortage of water and many were again forced to rely on groundwater to meet their needs. Meanwhile, EBID

6. Id. at 5. In addition, many wells were drilled by persons owning farms larger than 160 acres as they apparently feared enforcement of 43 U.S.C. § 431 (1976) limiting the availability of project water to farms less than or equal to 160 acres. Id. at 5, n.2.
began studying the possibility of drilling wells to supplement project surface water in times of shortage.

In 1973, EBID drilled its first well and within approximately one year four others were drilled, all clustered together in the southern part of the district in an area where water was in relatively high demand. The Bureau of Reclamation held fee simple title to the rights of way on this land. The initial expenditure in drilling these wells was made from the reserve fund of the district, to be paid back from sales of the groundwater to member-users who desired to supplement their normal surface water delivery. The wells were operational in 1975, but it was not until 1977 when a shortage of water meant that surface water deliveries would not meet demand, that EBID began to use the wells and sell the groundwater. During the 1977 and most of the 1978 growing season, EBID pumped all of its wells 24 hours a day.

During those years, farmers in the vicinity of the EBID wells who had themselves drilled wells and had been relying upon the water, began to discover that their wells were not performing as before; both the quantity and quality of the water had diminished. As a result, the 1977 and 1978 growing seasons were more expensive for these farmers. Their wells, most drilled to depths below 200 feet, performed less efficiently than before and allegedly were producing more saline water. The reason for the higher salt content in the water was that saline water from shallower regions of the aquifer (above 200 feet) was now being forced into lower stratas of the permeable aquifer. This resulted from a pressure gradient7 caused by the EBID drilling.

Suit was brought by these farmers, who were member-users of EBID, against EBID and the United States in 1978 in Mestas v. Elephant Butte Irrigation District.8 Plaintiffs asked that EBID be enjoined from operating the existing 5 wells and from constructing new wells. In the alternative, they asked that EBID be compelled to apportion the water derived from its wells pro rata within the district, should the court conclude that EBID had the authority to use its excess funds to drill the wells on Bureau of Reclamation property. Plaintiffs asked also that the court order the U.S. Bureau of Reclamation to cease to cooperate with EBID because the Bureau had acted outside of its authority in allowing the wells to be drilled on its own property.

7. As water was withdrawn from EBID's deep wells, a gradient developed between the deep and shallow sections of the aquifer causing the more saline water from the shallow section to be drawn downward and to mix with the less saline deep water. Mestas v. Elephant Butte Irrigation Dist., No. 78-138B, at 4 (D.N.M. May 11, 1979).
The substance of plaintiff's case was that, as a result of the drilling of the 5 EBID wells, their prior appropriative right to the groundwater had been impaired. In that connection, the argument was made that EBID had no authority to drill the wells and that the U.S. Bureau of Reclamation was without authority to allow the wells to be drilled on its rights of way.

On cross motions for summary judgment, the United States District Court for the District of New Mexico granted partial summary judgment for EBID on one issue, holding that it did have authority to drill the wells. All other matters were reserved for trial. The trial was held in January, 1979. The court concluded that the wells drilled by EBID did not impair the water rights of the prior appropriators (plaintiffs) because the EBID wells did not relate to the integrity of the water right, but only to the functioning of the wells. The court apparently ignored any concept that concomitant to the appropriative right itself was a right to an historical means of diversion, i.e., the right to a properly functioning well.

This comment will address the troublesome problems presented by the *Mestas* case. Of concern is how society, when required to decide among conflicting demands for the use of water, balances the rights of the individual to his appropriative right and his concurrent right to his means of diversion against the demands of a growing economy that requires maximum development of water resources. The author will discuss where New Mexico, in light of or in spite of *Mestas*, should strike this balance.

THE LAW OF GROUNDWATER IN THE WEST

Prior to a discussion of the *Mestas* decision in more detail, and before analyzing the case law concerning the right to a means of diversion, it is necessary to examine the law of groundwater in the west, with emphasis on New Mexico's groundwater law. This will provide a setting in which to consider the *Mestas* holding and its ramifications.

In the United States, rights to the use of water arise within the context of one of two doctrines, riparian rights or prior appropriation. Under the common law riparian doctrine, water rights arise from and are incident to the ownership of land adjoining a stream or watercourse. Under prior appropriation, the water right is not incident to the ownership of land and does not arise by means of land

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9. *Id.* at 2.
10. *Id.* at 15.
ownership. Rather, water rights are acquired by appropriation under
a "‘first-in-time, first-in-right’ system.’”

Development of the economies of the western states and territo-
ries necessitated that investments in time and money be protected,
encouraging such investments in order to develop the land. The law
of prior appropriation suited these purposes ideally. Today nine
western states follow the Colorado Doctrine of prior appropriation as
espoused in the Coffin case and have completely repudiated riparian
rights. Other states follow pure riparian notions, while others
have adopted the California Doctrine, a combination of prior
appropriative law and riparian rights.

New Mexico has adopted the Colorado Doctrine, initially by case
law and subsequently in its Constitution and Statutes. New
Mexico never has recognized riparian ownership in water rights,
and has retained the prior appropriation system with respect to both
groundwater and surface water. Not all prior appropriation states
have done likewise. In the area of groundwater law, the western
states have followed four doctrinal paths: the common law or abso-
lute ownership rule; correlative rights; reasonable use; and prior
appropriation.

Under the common law rule, the owner of the soil enjoys the right
“to divert, appropriate, and use percolating waters as he sees fit,”
the right being one “of property attached to the ownership of the
soil, and enforced as such.” Under the pure common law rule, the
owner of the land has an absolute right to withdraw the water from
below his land, regardless both of the purpose to which he puts the
water and the effect of the withdrawal on his neighbors’ water sup-
ply. Texas still adheres to the common law rule, with the limitation

12. A-B Cattle Co. v. United States, Colo., 589 P.2d 57, 64 (1979), (ERICK-
SON, J., dissenting).
13. The states following the “Colorado Doctrine” are Alaska, Arizona, Colorado, Idaho,
Montana, Nevada, New Mexico, Utah, and Wyoming. 5 R. CLARK, WATERS AND WATER
RIGHTS § 400 n.21 (1972).
15. The states following the “California Doctrine” are California, Kansas, Nebraska,
North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. 5 R. CLARK,
WATERS AND WATER RIGHTS § 400 n.22 (1972).
17. N.M. CONST. art. XVI, § 2.
20. Yea v. Tweedy, 34 N.M. 611, 620-24, 286 P. 970, 974-76 (1929); N.M. STAT. ANN.
§ 72-12-18 (1978).
21. 5 R. CLARK, WATERS AND WATER RIGHTS § 441 (1972).
23. Id.
"... that the owner may not maliciously take water for the sole purpose of injuring his neighbor." 24

The correlative rights doctrine and the reasonable use doctrine are modifications of the common law rule of absolute ownership. The reasonable use doctrine is essentially identical to the common law doctrine, with the additional requirement that the water withdrawn be applied to a beneficial use on the land from which it is taken. "If it is diverted for the purpose of making reasonable use of the land from which it is taken, there is no liability incurred to an adjoining owner for a resulting damage." 25 The correlative rights doctrine differs from the reasonable use scheme in that the taking of water is limited "when there is scarcity thereof, to only the landowner's proportionate share thereof." 26 The doctrine of correlative rights demands an analysis of the effect of the reasonable use of water on other lands, adjoining or affected by such use. 27

In the area of groundwater, the doctrines of absolute ownership, correlative rights, and reasonable use stand juxtaposed in relation to the prior appropriation doctrine.

THE LAW OF GROUNDWATER IN NEW MEXICO: THE DECLARED BASIN/ NON-DECLARED BASIN DISTINCTION

Because water is a scarce commodity in New Mexico, in times of shortage or in areas where surface flow is minimal or non-existent, the available groundwater must supply that need. In New Mexico, no permit or license is required to appropriate groundwater unless the well is located in a declared basin as designated by the State Engineer. 28 But 59 percent of the state has been declared to be located within one of 27 basins. 29 Relatively few areas remain beyond the reach and influence of the New Mexico State Engineer.


26. Id., 255 P.2d at 178. The court therein specifically rejected the correlative rights doctrine in Arizona and adopted the reasonable use doctrine.

27. See the definition of correlative rights contained within N.M. STAT. ANN. § 71-5-3(c) (1978), as it pertains to the rights of an owner of property in a geothermal field. New Mexico adopts the correlative rights concept as to geothermal resources and empowers the Oil Conservation Commission to protect correlative rights. N.M. STAT. ANN. § 71-5-7 (1978).


29. STATE ENGINEER, RULES AND REGULATIONS GOVERNING DRILLING OF WELLS AND APPROPRIATION AND USE OF GROUNDWATER IN NEW MEXICO iv.
One area not located within one of the 27 declared basins is the watershed below Elephant Butte Dam along the Rio Grande in southern New Mexico. For several reasons, the State Engineer has taken no steps to declare the boundaries of the basin so as to bring it within his reach. Therefore, in Mestas v. EBID, the State Engineer was not a party to the lawsuit. Normally, in a declared basin, the State Engineer would not be at liberty to grant an application to drill until notice had been published, and until he had determined either that there existed unappropriated water in the basin or that any new appropriation would not impair existing rights. Had the area in Mestas been within a declared basin, plaintiffs claiming impairment of their wells would have brought suit against the State Engineer directly, challenging his finding of no impairment, had such been the case.

New Mexico Case Law on Impairment: Declared Basins and the Involvement of the State Engineer

New Mexico case law concerning impairment deals with situations where the State Engineer had declared the basins to be within his jurisdiction. Such cases stand in contrast with the Mestas scenario. The issue in Mestas was the existence rel non of impairment and the decision reached by the court was predicated upon the New Mexico (1966), listing 26 declared underground water basins. Subsequently, on March 4, 1980 the State Engineer declared a 27th basin, the Gallup Underground Water Basin. STATE ENGINEER, ORDER No. 125 (1980).

30. The predominant reason is that the delivery point of New Mexico's Rio Grande water commitment to Texas is Elephant Butte Dam. Below that point, the State Engineer is apparently unconcerned with the taking of groundwater despite the interrelationship between surface and subsurface waters along the Rio Grande, as New Mexico's obligation to Texas has already been met. Another reason is that the area, until recently, has not made substantial use of the groundwater.

32. N.M. STAT. ANN. § 72-12-3(D) (1978).
33. N.M. STAT. ANN. § 72-12-3(E) (1978). Note that the impairment of existing rights criteria limiting the State Engineer from granting an application to appropriate also applies where application has been made to change the location of existing wells. N.M. STAT. ANN. § 72-12-7 (1978). Note also, that any decision of the State Engineer can be appealed to the District Court, N.M. STAT. ANN. § 72-12-10 (1978), the proceeding upon appeal being de novo. N.M. CONST., art. XVI, § 5. At one point in New Mexico, the district court, on appeal, would not overturn the findings of the State Engineer unless it could be proved that the findings were arbitrary, capricious or unreasonable. Spencer v. Bliss, 60 N.M. 16, 287 P.2d 221 (1955); In Re Hobson, 64 N.M. 462, 330 P.2d 547 (1958); Heine v. Reynolds, 69 N.M. 398, 367 P.2d 708 (1962); Kelley v. Carlsbad Irrigation Dist., 71 N.M. 464, 379 P.2d 763 (1963). That rule was overturned, however, in Application of Carlsbad Irrigation Dist., 87 N.M. 149, 530 P.2d 943 (1974), in which the court held that the district court on appeal could hear additional evidence, could form its own conclusion based upon the additional evidence and would not be limited by the fraudulent, capricious, or arbitrary standard.
law of impairment within the context of declared basins where the State Engineer is involved. In addition, most of the New Mexico case law on impairment involves applications for changes in well locations, rather than applications for new appropriations.

The four pertinent cases are Application of Brown,\textsuperscript{34} Heine v. Reynolds,\textsuperscript{35} Roswell v. Reynolds\textsuperscript{36} and Mathers v. Texaco.\textsuperscript{37} In Application of Brown,\textsuperscript{38} the New Mexico Supreme Court upheld a decision by the State Engineer granting a change in well location based upon the State Engineer’s determination that there would be no impairment, despite the fact that the well had been drilled prior to the State Engineer’s approval of the application for the well. In its decision on a motion for rehearing,\textsuperscript{39} the Brown court enunciated the rule on impairment in New Mexico:

\begin{quote}
The lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators. The amount that the water table is lowered is an important factor, but in addition all characteristics of the particular aquifer must be considered along with well locations.\textsuperscript{40}
\end{quote}

In Heine v. Reynolds,\textsuperscript{41} the State Engineer denied an application for a change in well location based upon his finding that the proposed change would impair existing groundwater rights due to an increase in salinity that would have resulted. At issue was the degree of impairment which must result to justify denial of an application to change a well location. The New Mexico Supreme Court concluded that because the applicable statute\textsuperscript{42} did not read substantial impairment, but merely impairment, the State Engineer was correct in finding that sufficient impairment would result to justify rejecting the application. The court specifically refused, however, to define impairment, stating that a decision as to the existence of impairment had to be made on a case by case basis, and that any attempt to

\textsuperscript{34} 65 N.M. 74, 332 P.2d 475 (1958).
\textsuperscript{35} 69 N.M. 398, 367 P.2d 708 (1962).
\textsuperscript{36} 86 N.M. 249, 522 P.2d 796 (1974).
\textsuperscript{37} 77 N.M. 239, 421 P.2d 771 (1966).
\textsuperscript{38} 65 N.M. 74, 332 P.2d 475 (1958).
\textsuperscript{39} Motion for Rehearing, Application of Brown, 65 N.M. 74, 80, 332 P.2d 475, 478 (1958).
\textsuperscript{40} Id. at 479. In so doing, the court upheld Application of Brown, 65 N.M. 74, 80, 332 P.2d 475, 478 (1958), which held that numerous factors concerning the aquifer had to be examined by the court, including but not limited to a decline in the water table, in order to decide if impairment would result from granting a change in well locations to an appropriator.
\textsuperscript{41} 69 N.M. 398, 367 P.2d 708 (1962).
\textsuperscript{42} N.M. STAT. ANN. § 72-12-7 (1978).
define impairment "would lead to severe complications." Implicit in the Heine decision was a recognition that a change in water quality, as well as in quantity, was a valid consideration in deciding whether existing water rights would be impaired.

Mathers v. Texaco involved an attempt by the Texaco Oil Company to appropriate groundwater for use in secondary recovery operations at one of its oil fields. Texaco sought to appropriate the water from the Lea County Artesian Underground Basin, a non-recharging basin replenished only by minimal surface precipitation. The New Mexico Supreme Court upheld the decision of the State Engineer that there would be no impairment of the rights of prior appropriators if Texaco's application were granted. The court rejected plaintiff's argument that there would be per se impairment resulting from Texaco's use, given the nature of the non-rechargeable basin. The Mathers opinion stated that if that were the appropriate analysis, any use subsequent to the original user in a non-rechargeable basin would amount to an impairment of that initial appropriator's right. The court reiterated its holding in Application of Brown that a lowering of the water table does not, as a matter of law, constitute an impairment of existing rights. The Mathers court concluded that the lowering of the water table was the inevitable result of the beneficial use by the public of underground waters.

In City of Roswell v. Reynolds, the New Mexico Supreme Court considered an appeal by the City of Roswell from a decision by the State Engineer which placed conditions upon approval of the city's application to change its well locations. The proviso was that the city decrease the quantity and rate of withdrawal from its new well locations. It was the conclusion of the State Engineer, affirmed by the district court on appeal, that no impairment of existing rights would result from a change in well locations restricted by such conditions. The city contended that no impairment would result even without the imposition of the conditions. The Supreme Court agreed with Roswell that under the rule enunciated by Mathers and Application of Brown a "lowering of the water table does not necessarily

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44. 77 N.M. 239, 421 P.2d 771 (1966).
45. Id. at 246, 421 P.2d at 777 (1966). The State Engineer, however, in reaching that decision limited the quantity of water which Texaco could withdraw to just under one half that originally requested by Texaco.
46. Id. at 244-45, 421 P.2d at 775.
47. 65 N.M. 74, 332 P.2d 475 (1958).
49. 86 N.M. 249, 522 P.2d 796 (1974).
50. 65 N.M. 74, 332 P.2d 475 (1958).
constitute an impairment of ... water rights ...,” but went on to say that “it does not follow that the lowering of the water table may never in itself constitute an impairment of existing rights.”\textsuperscript{5} The decision of the State Engineer was affirmed, and the conditions to the application to change well locations were held valid. Implicit in the decision was the notion that without the conditions imposed by the State Engineer, the resulting lowering of the water table and potential increase in the salinity of the water could amount to an impairment of existing rights.

Of significance in the above cases is the fact that they all concerned declared basins and involved the State Engineer. Additionally, in Mathers, the aquifer was non-recharging. In Mestas, however, the basin in question was neither a declared basin nor a non-rechargeable basin. It is therefore arguable, ceterus paribus, that the above cases are of little significance in deciding whether impairment exists under the facts in Mestas.

\textit{Burdens of Proof in New Mexico Impairment Cases: Declared and Non-Declared Basins}

Another difference between declared basin cases and non-declared basin cases is that the burdens of proof imposed by the courts on those claiming to be impaired differ. In cases involving the State Engineer and a declared basin, the burden is on the subsequent appropriator to show that there is unappropriated water in the basin.\textsuperscript{52} In non-declared basin cases, however, the rule is that announced in Pecos Valley Artesian Conservancy District v. Peters.\textsuperscript{53}

In Pecos Valley,\textsuperscript{54} the court stated that while normally the bur-
den would be placed on the person asserting impairment in his pleading, in cases involving impairment by subsequent appropriators the burden of proof is on the subsequent appropriator. The Pecos Valley opinion, citing a number of California cases,\(^5\)\(^6\) embraced a rule placing the burden of proof on the subsequent appropriator to show the existence of unappropriated water, but only after the party claiming injury has proved "the quantity of water that they have been using, and that such amount is necessary for their reasonable beneficial purposes."\(^5\)\(^6\) This apparently is the current rule as to burdens of proof imposed in non-declared basin cases in New Mexico. In a specially concurring opinion, Justice Sadler noted that such a rule had the effect of precluding injunctive relief against unlawful raids on the existing water supply . . . because of the sheer expense to a plaintiff of making the hydrographic survey and furnishing the proof essential in establishing the prima facie case necessary to shift the burden to subsequent appropriator [sic] of showing there is a surplus.\(^5\)\(^7\)

In none of the above cases, or in any New Mexico case, has a right to a means of diversion been addressed. Because New Mexico is a prior appropriation state, and since the right to a means of diversion is merely an element of the appropriative right, it is axiomatic to conclude that such a right exists in New Mexico. New Mexico courts simply have never been presented with a case in which a right to a means of diversion was asserted. It is, therefore, necessary to look to the law of other prior appropriation states to examine the right to, and the extent of, a means of groundwater diversion.

PROTECTION OF THE MEANS OF GROUNDWATER DIVERSION: PRIVATE RIGHTS v. PUBLIC POLICY

Establishment of the Concept

The first four American cases addressing the right of an appropriator to his means of groundwater diversion were *Pima Farms v. Proc-


\(^6\) Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N.M. at 153, 193 P.2d at 421, quoting from Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal.2d 489, 45 P.2d 972, 991 (1935). The rule applied to the facts of the Pecos case meant that although the Defendant, Peters (the subsequent appropriator) had the burden of showing that unappropriated water existed, the Plaintiff Conservancy District first had to show the quantity of water that they had been using and that that amount was necessary for their reasonable beneficial purposes. Since Plaintiffs, however, did not meet their burden, they were unsuccessful in their attempt to enjoin the Defendant's use of the water.

\(^7\) Pecos Valley Artesian Conservancy Dist. v. Peters, 52 N.M. at 162, 193 P.2d at 427 (SADLER, J., concurring).
tor. Noh v. Stoner, Faden v. Hubbell, and Lodi v. East Bay Municipal Utility District. These cases provided the foundation for the modern rule, the Doctrine of Reasonable Diversion.

In Pima Farms v. Proctor, plaintiff's wells were no longer able to meet his water needs due to the lowering of the water table by a subsequent appropriator. Having once adjusted his well depth to compensate for the declining water table, plaintiff brought suit when this adjustment proved inadequate. There was no question that there was an ample water supply. The issue centered around the fact that it would take additional equipment at "substantial cost" for plaintiff to maintain his wells. Plaintiff argued that, as prior appropriator, he was entitled to a level of water sufficient to allow him to capture the water with the equipment he had originally installed. In lieu thereof, plaintiff asked that the court order defendant to supply him with a quantity of water sufficient to make up the loss. Defendant's response, not unlike that of the defendant in Mestas, was that only the water right itself was entitled to protection and so long as water existed, that right remained unimpaired, regardless of the depth to which plaintiff eventually would have to drill to find water.

The Pima court agreed with plaintiff that a prior appropriator's rights are superior and that to hold for defendant would render the senior appropriator's rights subservient to the junior's rights. The court further observed that to allow a junior appropriator to impair the senior appropriator's means of diversion would not "comport with justice and equity, nor . . . [be] in conformity with the spirit of the rules adopted by the courts for the adjustment of disputes over water and its use in the arid regions of the West." Recognizing the importance of maximizing the beneficial use of water, the court granted an injunction restraining defendant from pumping groundwater until a plan acceptable to the court was drawn up whereby defendant would furnish plaintiff with his water, at reasonable rates. The Pima court distinguished its facts from the classic case

58. 30 Ariz. 96, 245 P. 369 (1926).
59. 53 Idaho 651, 26 P.2d 1112 (1933).
60. 93 Colo. 358, 28 P.2d 247 (1933).
61. 7 Cal.2d 316, 60 P.2d 439 (1936).
62. 30 Ariz. 96, 245 P. 369 (1926).
64. Id.
65. Id., 245 P. at 371.
66. Id., 245 P. at 373.
67. Note that since the decision in Pima Farms Co. v. Proctor, 30 Ariz. 96, 245 P. 369 (1926), Arizona has rejected the prior appropriation system as to groundwater, in favor of the doctrine of reasonable use. See, Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953). The effect of that decision renders inapplicable the decision in Pima Farms giving a senior appropriator a right of action against subsequent appropriators for maintenance of the water table.
of Schodde v. Twin Falls Land & Water Co.\textsuperscript{68} While protecting plaintiff’s rights to water by compelling the junior appropriator to supply plaintiff with a quantity sufficient to meet his needs, the Pima court also allowed for development of the water resource beyond its first appropriation.

In Noh v. Stoner,\textsuperscript{69} plaintiffs were prior appropriators of water in an artesian basin and sued for injunctive relief when subsequent appropriation by defendants impaired their right. Defendants contended that it was plaintiff’s duty to provide adequately for his own pumping system, as there existed ample water from which to satisfy his prior right. The Idaho Supreme Court disagreed, observing that such a policy would serve only to encourage a race to the bottom of the aquifer, and held that if defendants desired to instigate such a race, “the financial burden must rest on them and with no injury to the prior appropriators or loss of their water.”\textsuperscript{70} Thus, regardless of the reasonableness of the prior appropriator’s means of diversion and its impact on future development, the Noh court held that a prior appropriator had an absolute right to his historical means and level of diversion.\textsuperscript{71}

The 1933 Colorado case of Faden v. Hubbell\textsuperscript{72} involved a suit for an injunction against defendants’ actions which had forced plaintiffs to change their manner of diversion. The defendants’ change in their diversion amounted to an interference with plaintiff’s prior right to the water. The court upheld the injunction granted below, stating such a remedy lies to prevent the wrongful diversion of water from those otherwise entitled to he groundwater.\textsuperscript{73}

In Lodi v. East Bay Municipal Utility District,\textsuperscript{74} the city of Lodi, prior appropriator of groundwater for municipal water purposes, sought injunctive relief from defendants’ diversion of river flow. Plaintiff contended that defendants’ diversion would interfere with

\textsuperscript{68} 224 U.S. 107 (1912). In the case, the United States Supreme Court decided that an appropriator of water was not entitled to maintenance of the current of the stream, upon which he depended to run his water wheel used to divert waters for his beneficial use. The decision apparently rested on the unreasonableness of the means of diversion which required the entire current and flow of the stream to effectuate the diversion. The diversion, which the court ruled unreasonable, would have prevented subsequent appropriations which would have affected the current. Note that no state court has followed the Schodde view that pressure can’t be appropriated. Comment, South Dakota Artesian Pressure, 16 S.D.L. REV. 481, 490 (1971).

\textsuperscript{69} 53 Idaho 651, 26 P.2d 1112 (1933).

\textsuperscript{70} Noh v. Stoner, 53 Idaho 651, 26 P.2d 1112, 1114 (1933).

\textsuperscript{71} Note that Noh v. Stoner, 53 Idaho 651, 26 P.2d 1112 (1933), to the extent that it held that a prior appropriator was entitled to maintenance of historical pumping levels, regardless of the reasonableness of that level of diversion, was over-ruled by Baker v. Ore-Ida Foods, Inc., 95 Idaho 575, 513 P.2d 627 (1973).

\textsuperscript{72} 93 Colo. 358, 28 P.2d 247 (1933).

\textsuperscript{73} Id., 28 P.2d at 251.

\textsuperscript{74} 7 Cal.2d 316, 60 P.2d 439 (1936).
recharge of the underground strata upon which it depended for municipal water. The California Supreme Court held that a prior appropriator could not be "compelled to incur any material expense in order to accommodate the subsequent appropriator" although it "may be required to make minor changes in its method of appropriation in order to render available water for subsequent appropriators."  

The California Supreme Court thereby enunciated the requirement that the means of diversion, while entitled to protection, also must be reasonable. The case was remanded for consideration by the trial court of the question as to whether physical solutions, rather than an injunction, could be imposed whereby the city would receive the water to which it was entitled without mandating a less than maximum use of the water resource. In other words, the court was suggesting a remedy not unlike that in *Pima Farms* whereby defendant would be forced to help make up plaintiff's water needs. Hutchins  concluded that the above decisions uniformly gave the prior appropriator rights in the quantity of groundwater that historically had been diverted, and enjoined any interference causing a lowering of the water table.  

*Evolution of the Modern Rule*

The next three cases of significance in this area all are Utah cases. These cases are of interest because they demonstrate the change in emphasis which time and the ever-increasing demand for water have brought to this area of the law.

In *Hanson v. Salt Lake City*, plaintiffs, who had relied upon the natural flow of water from an artesian well, brought suit for an injunction and damages against Salt Lake City. The city had drilled wells which were interfering with the natural flow of plaintiffs' well. As a result of the interference, plaintiffs had to install pumps. It was the contention of the city that plaintiffs had no right which had been impaired. The Utah Supreme Court held, however, that the subsequent appropriator must bear the expense of the prior appropriator in bringing to the surface water which otherwise flowed naturally, in order to comport with "the well established rule as to surface

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75. *Id.*, 60 P.2d at 450.
76. *Id.*, 60 P.2d at 450-51.
77. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER IN THE WEST 175 (1942).
78. *Id.* at 176-79.
79. 115 Utah 404, 205 P.2d 255 (1949).

The Hanson court went on to hold that the prior appropriator’s water right includes his means of diversion “as long as such means are reasonably efficient and do not unreasonably waste water.” It was stated that this rule would not unreasonably inhibit the fullest development of water resources, countering Hutchins’ criticism of the principle. The court also noted that it believed that such a rule was mandated by legislative policy. In concurring opinions, several justices stressed the “reasonableness” requirement of the Hanson precedent and cautioned against a broad application of it.

Current Creek Irrigation Co. v. Andrews applied the rule developed by Hanson v. Salt Lake City broadly, however, to the point of ignoring any requirement that the means of diversion be reasonable. The Andrews court held that prior appropriators using the natural flow of an artesian spring were “entitled to have the subsequent appropriators restrained from . . . lowering the static head pressure . . . unless they replace the quantity and quality of the water by pumping or other means to the prior appropriators at the sole cost of the subsequent appropriators.” The court relied on a Utah statute which stated that “replacement shall be at the sole cost of the applicant . . . whose appropriation may diminish the quality or injuriously affect the quality of (prior) appropriated underground water.”

In a vigorous dissent, Justice Crockett, who was to write the majority opinion in the third Utah case, Wayman v. Murray City Corporation, criticized the majority opinion, contending that it assumed the existence “of an absolute right in a prior user of underground water to have not only the water, but also to have the pressure and the means of diversion preserved inviolate.” He added that it was “an illusion to regard any right as absolute,” and stated that such an application of the rule was to ignore the fundamental purpose of western water law: the maximum development and use of

80. Id., 205 P.2d at 263.
81. Id., 205 P.2d at 263.
82. Id., 205 P.2d at 262 citing supra note 77, at 174-77.
83. Id., 205 P.2d at 264-75 (concurring opinions).
84. 9 Utah2d 324, 344 P.2d 528 (1959).
85. Id., 344 P.2d at 531.
86. UTAH CODE ANN. § 73-3-23 (1953).
87. Id.
90. Id., 344 P.2d at 533.
water. Conceding the influence of the statute, Judge Crockett noted that the reasonableness of diversion analysis, as set out in Hanson, did not interfere with the statute. In his dissenting opinion, he observed:

The effect of the view represented by the majority opinion is that the pendulum of the law relating to underground waters has by a somewhat tortuous process swung from the pristine view that the landowner had absolute right to the waters in his soil to the opposite extreme that the prior user has absolute and inviolable rights in the water. I subscribe to neither of these extremes, but believe the principals upon which a fair and practicable method of allocating and administering rights in underground waters is to be found somewhere in between them.

It is in Wayman v. Murray City Corporation that the Rule of Reasonableness is enunciated clearly in the majority opinion of Justice Crockett. In Wayman, plaintiffs sued the Murray City Corporation and the State Engineer, contending that a change in the city's well locations had diminished the flow of water from their domestic wells. The trial court found for plaintiffs, and ordered defendants to replace, at their sole cost, the water to plaintiffs in a quality and quantity equal to that existing prior to the change in well locations.

On appeal to the Utah Supreme Court, that court first examined the geology of the aquifer, concluding that there was not a water shortage, but merely a decline in pressure affecting plaintiff's ability to withdraw water. Expressing the important role of water in arid states and the need to maximize the development of that resource, the court cited the apparent conflict between that goal and the Utah statute, which mandated that an individual appropriator's rights be protected. To resolve that conflict, the court stated that it was necessary to analyze the total situation and balance the competing interests; that is, the concerns of the individual appropriator would be compared with those of the public which demand full beneficial use of water, so as to best serve the overall objectives of Utah water law.

The court then noted the emergence of a new principle in groundwater allocation law, the Rule of Reasonableness. It stated that the rule:

91. UTAH CODE ANN. § 73-3-23 (1953).
94. UTAH CODE ANN. § 73-3-23 (1953).
95. Wayman v. Murray City Corp., 458 P.2d at 864.
GROUNDWATER DIVERSION

involves an analysis of the total situation: the quantity of water available, the average annual recharge in the basin, the existing rights and their priorities. All users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and the greatest amount of available water is put to beneficial use.\(^9\)\(^6\)

*Colorado Springs v. Bender*\(^9\)\(^7\) and Hutchins\(^9\)\(^8\) were cited as authorities for taking an approach similar to that encompassed by the *Rule of Reasonableness*. The rule, while seemingly in conflict with the Utah statute,\(^9\)\(^9\) was nevertheless in harmony with the major objectives of the law. "*[T]he means of diversion must be reasonable and consistent with the state of development of water in the area and not such as to abort the declared purpose of the law of putting all of available water to use.*"\(^1\)\(^0\)\(^0\)

**The Rule of Reasonableness Further Clarified**

There are two other cases of importance in this area, both clearly applying and enunciating the *Rule of Reasonableness*: *Colorado Springs v. Bender*\(^1\)\(^0\)\(^1\) and *Baker v. Ore-Ida Foods, Inc.*\(^1\)\(^0\)\(^2\) In *Colorado Springs v. Bender*, suit was brought by a senior appropriator against a junior appropriator to enjoin the junior appropriator's use of water. A prayer for damages was included. On appeal, the Colorado Supreme Court reversed the trial court's decision granting an injunction.

The *Bender* opinion first cited the case *Shodde v. Twin Falls Land & Water Company*\(^1\)\(^0\)\(^3\) for the proposition that, when applied to a groundwater situation, a prior appropriator's means of diversion must be reasonable and efficient. Otherwise, the court reasoned, even though adequate quantities of water exist at greater depths, a well at a shallow depth would prevent others from using the water. The court recognized another fundamental principle applicable equally to ground as well as to surface water, "*that a junior appropriator may not divert the water to which he is entitled by any method or means the result of which will be to diminish or interfere with the right of a senior appropriator to full use of his appropriation.*"\(^1\)\(^0\)\(^4\)

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96. Id., 458 P.2d at 865.
98. Supra note 77, at 179.
99. UTAH CODE ANN. § 73-3-23 (1953).
100. Wayman v. Murray City Corp., 458 P.2d at 866.
103. 224 U.S. 107 (1912).
Bender was remanded to the trial court with instructions to obtain new evidence as to the rate of flow of the competing junior and senior appropriators, their dates of priority, and the elevations of water within the aquifer at which the junior appropriators would have to cease their diversions in order to meet the demands of the senior appropriator. The Colorado Supreme Court stated that in determining the elevation at which the subsequent appropriator should be required to cease diversion, the method and conditions surrounding the senior appropriator's diversion must be examined. Of import was "whether he [the prior appropriator] has created a means of diversion from the aquifer which is reasonably adequate for the use to which he has historically put the water of his appropriation" (emphasis added). The court added that when the senior's means of diversion fails because of actions of a junior appropriator, the junior appropriator should be made to pay for the change in the senior appropriator's method of diversion, if it is possible to reach a supply adequate to meet the senior appropriator's needs. The court added that it is "unreasonable to require the senior to supply such means out of his own financial resources."

The Bender court, however, stated that consideration must be given to whether the prior appropriator should first be required to make his own means of diversion more efficient with due regard being given to the purposes of the diversion and his "economic reach." It added,

The plaintiffs cannot reasonably "command the whole" source of supply merely to facilitate the taking by them of a fraction of the entire flow to which their senior appropriation entitles them. On the other hand, plaintiffs cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved.

The Bender decision is significant in that it calls for an economic balancing, counseling that while a senior appropriator's right of diversion is not absolute, it is nevertheless substantial. While the senior right will never forestall development of water resources, the individual appropriator's rights are protected. The extent to which the prior appropriator will be compensated, if at all, depends in part upon his financial ability to keep pace with the technology which would be required to adequately supply his appropriative right. Thus, the prior

105. Id., 366 P.2d at 556.
106. Id., 366 P.2d at 556.
107. Id., 366 P.2d at 556.
108. Id., 366 P.2d at 556.
appropriator cannot always demand maintenance of his historical means or level of diversion but, if necessary due to financial inability, he can apparently demand compensation from a junior appropriator enabling him to drill deeper to protect his prior appropriative right.

The Doctrine of Reasonable Diversion as espoused in Bender subsequently was codified in Colorado.109 The "statutory doctrine" apparently also adopts the principle that a junior appropriator must pay for the cost of improving the senior appropriator's means of diversion.110

Also of note is the recent Colorado decision in A-B Cattle Company v. United States,111 which suggests that Colorado courts perhaps would not, in the future, apply the Doctrine of Reasonable Diversion as liberally as it was applied in Bender. In A-B Cattle Company, the Colorado Supreme Court held that the owner of a water right does not have a right to a historical quality of his water supply, at least with respect to the silt content of the water. As pointed out in the dissent,112 A-B Cattle Company ignores the economic reach analysis set out in Bender and other Colorado cases.113 Arguably, A-B Cattle Company indicates that the Supreme Court of Colorado is retreatting from its broad holding on the rights of a prior appropriator in his means of diversion. The exact effects that A-B Cattle Company will have on the Doctrine of Reasonable Diversion are unknown although one can conclude that Colorado courts may be less inclined to adhere strictly to the Bender decision in the future.

Baker v. Ore-Ida Foods Inc.114 represented a reversal of the broad holding of Noh v. Stoner,115 to the extent that Noh gave the prior appropriator an absolute right to his historical means of diversion. The Idaho Supreme Court stated that such a rule was inconsistent with the policy set forth in its Constitution and statutes that the water resources of the state be optimally developed. The new rule, as spelled out by the Baker court, will still protect the senior appropriator's right to a means of diversion but only to the extent that his pumping levels are reasonable. The court stated that "[a] senior appropriator is not absolutely protected in either his historic water

111. ___Colo. ___, 589 P.2d 57 (1979).
112. Id., 589 P.2d at 67-69 (1979) (ERICKSON, J., dissenting). Note that the decision was 4-3 and thus extremely close. See, Note, 20 NAT. RES. J. 179 (1980), for a discussion and criticism of the case.
115. 55 Idaho 651, 26 P.2d 1112 (1933).
level or his historic means of diversion. Our Groundwater Act contemplates that in some situations senior appropriators may have to accept some modification of their rights in order to achieve the goal of full economic development.116

The decision in Baker is not conceptually dissimilar to the rule announced in Bender, although less emphasis was placed on economic factors to determine the reasonableness of the technology employed by the senior appropriator in his diversion with regard to his economic reach.

MESTAS v. ELEPHANT BUTTE IRRIGATION DISTRICT

It is now worthwhile to discuss Mestas and its holding in more detail. To reiterate, five issues were presented to the court: 1) whether the federal defendants had authority to allow the wells to be drilled on their rights of way; 2) whether EBID had authority to construct the wells, and if EBID and the Bureau of Reclamation had authority to drill the wells; 3) whether the prior appropriative right of plaintiffs was impaired as a result of the wells; 4) whether the use of the groundwater by pumping it into irrigation ditches constituted waste which would then bar such a use; and 5) whether the water could be sold or had to be apportioned pro rata to all lands within the district.117

The issue involving EBID's authority to drill was decided by granting partial summary judgment in EBID's favor. The court also decided that the Bureau of Reclamation had the authority to allow construction of the wells on its rights of way.118

Impairment Issues

Having decided these preliminary issues, the court turned to a consideration of whether plaintiffs' rights had been impaired. EBID argued that first, plaintiffs lacked standing under the rule of Pecos Valley Artesian Conservancy District v. Peters119 and therefore, could not without proof of the date of their original appropriation and the amount and continuity of their beneficial use, assert impairment and shift the burden of proof to defendants. The second argument that EBID advanced was that no water right impairment had

118. Id. at 11.
119. 52 N.M. 148, 193 P.2d 418 (1948).
taken place; i.e., that if there was any impairment, it was to the wells, and not to the water rights per se.

**Standing**

Judge Bratton answered EBID's first argument by concluding that to use the word *standing* was misleading because there was no question regarding a preliminary jurisdictional requirement. The court further stated that the *Pecos* rule applied only to the question of the burdens of proof in a claim involving a limited amount of water. Concluding that the facts of *Mestas* gave no indication but that there existed ample amounts of water, the court decided that the *Pecos* rule was inapplicable and therefore was not a bar to consideration of the impairment question.

It is arguable whether *Pecos* and *Mestas* are distinguishable. For *impairment* to exist in any event there must be some question whether the allegedly impaired parties are receiving their historically defined quantity and/or quality of water, limited by the condition that the water has been put to a beneficial use. The *Pecos* rule merely requires proof of the extent of the senior right before placing upon the subsequent appropriators the burden of showing that a surplus exists from which they can draw without impairment to the prior appropriators.

The argument against the *Pecos* principle is twofold. First, it appears to completely ignore the concept of a right to a means of diversion. Instead, the *Pecos* rule concerns itself solely with the issue of quantity of a water right. Ignoring a qualitative problem, it virtually forecloses consideration of water quality without having addressed the question itself—specifically, whether such a right of diversion, judicially recognized in many parts of the western United States, exists and should be protected in New Mexico. Secondly, the rule in *Pecos*, as pointed out in the concurring opinion of that case, may effectively foreclose any impairment litigation because the costs of meeting the evidentiary burden far exceed the possible benefits to be derived from bringing the case. Such a standard is unreasonable and could serve to deprive water rights holders in non-declared basins of New Mexico of the ability to protect their constitutionally guaranteed rights in that water. The *Pecos* rule is so manifestly burdensome and inequitable that it only invites subsequent courts to finely, and perhaps artificially, distinguish the cases upon their facts in order to do justice.

Having decided the "standing" issue, the *Mestas* court then turned to the question of whether the lowering of the water table, in combination with the increasing quality degradation due to the advancing salinity, amounted to an impairment of plaintiffs' rights.
Impairment From Lowering of the Water Table

In resolving the question as to whether lowering of the water table in itself constitutes impairment, Judge Bratton cited *Heine v. Reynolds*;\(^{120}\) *Mathers v. Texaco*;\(^{121}\) and *City of Roswell v. Reynolds*.\(^{122}\) The *Mestas* opinion placed primary emphasis on *Mathers*, construing *Mathers* as supporting the proposition that the "water right does not include the element of perpetuity and [that a] ... lowering of the water table does not constitute impairment in a limited water situation."\(^{123}\) In light of the fact that *Mestas* did not involve a limited water supply, Judge Bratton's opinion stated that the *Mathers* rule would be equally, if not more, applicable to the *Mestas* facts than to the *Mathers* situation.\(^{124}\) The court therefore applied the *Mathers* rationale and concluded that a simple lowering of a water table does not constitute impairment, especially where the basin apparently is a recharging basin.

The court's holding can be criticized on two grounds. First, in addition to misreading *Mathers*,\(^{125}\) it chose to ignore the language of *City of Roswell v. Reynolds*\(^ {126}\) which, in construing *Mathers*, stated that "[i]t does not follow that the lowering of the water table may never in itself constitute an impairment of existing rights."\(^ {127}\) Thus, it is not a general rule, although stated as such by the court in *Mestas*, that a lowering of the water table never constitutes impairment. In order to reach a determination that the lowering of a water table does not per se amount to impairment, the facts of the particular case must be analyzed, all characteristics of the particular aquifer being considered.\(^ {128}\)

It should be noted that the theory of a right to a means of diver-

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120. 69 N.M. 398, 367 P.2d 708 (1962).
121. 77 N.M. 239, 421 P.2d 771 (1966).
123. Mestas v. Elephant Butte Irrigation Dist., No. 78-138B, at 14 (D.N.M. May 11, 1979). It should be noted that the *Mathers* court did not state that the "lowering of the water table does not constitute impairment," rather it merely reiterated Application of Brown, which stated, "the lowering of a water table... does not necessarily constitute an impairment..." (emphasis added), 65 N.M. at 80, 332 P.2d at 479. The court in *Mathers* did conclude, however, that the lowering of the water table did not constitute impairment under the facts of the particular case. This is not to say that a lowering of the water table may never constitute impairment; that determination can only be made after examination of the facts of the particular case.
125. See note 123 supra.
127. Id. at 253, 522 P.2d at 800.
128. Motion for rehearing, Application of Brown, 65 N.M. 74, 80, 332 P.2d 475, 479 (1958).
sion assumes that a lowering of the water table in itself could impair that right. The determination as to whether any particular lowering of a water table amounts to an impairment of a groundwater right would rest on the extent of the right to a means of diversion. In its past analyses, the New Mexico Supreme Court has completely ignored such a concept in spite of the fact that it has discussed and decided cases involving questions of impairment caused by a lowering of the water table. Seemingly, the two issues are inseparable and one cannot be addressed without addressing the other.

The answer to this puzzle lies in the fact that in every case involving these issues, rights within a declared basin were in dispute, and hence the State Engineer was involved. According to Hutchins, the case law protecting a right to a means of diversion has arisen in situations where the groundwaters are essentially unregulated rather than in cases involving appropriations under an administrative procedure and a State Engineer. Hutchins argues that a right to a means of diversion has no place in groundwater law where the groundwater is regulated by the state because, in such a situation, all those who are granted permits to drill are on notice, from the first appropriator on down, that there exists an implied condition on their appropriation that the water table necessarily will go down. Hence, there can be no right in such situations to a diversion at historical levels.

Therefore, in basin cases, it is arguable that there is no right to a means of diversion. Because in New Mexico all cases concerning a lowering of the water table apparently have arisen within the context of a declared basin, it is understandable that New Mexico courts have not addressed the issue of a right to a means of diversion.

A second criticism of the decision in Mestas is that the court cited case law dealing with declared basins in deciding a non-declared basin case. The situations are fundamentally different, and the rules applicable to one should not be extended to the other. The rules and regulations of the State Engineer have, to a large extent, superceded the common law. But, in the non-declared basins, the State Engineer has no jurisdiction and hence the only protections a prior appropriator has for his water are his common law remedies under the western water law doctrine of prior appropriation and an application of that doctrine, the right to a means of diversion. A decision in non-declared basin cases cannot be logically rendered by construing opinions in which statutory law and the regulations of the State

129. Supra note 77.
130. Supra note 77 at 176-79.
131. Supra note 77 at 179.
Engineer have been determinative. The *Mestas* court concluded, nevertheless, that such cases were applicable.\textsuperscript{132}

**Impairment by an Increase in Salt Content of Groundwater**

In resolving the question as to whether decreasing water quality constitutes impairment, the *Mestas* court again cited *Heine v. Reynolds*\textsuperscript{133} and *Roswell v. Reynolds*,\textsuperscript{134} both of which cases involved situations of increasing salinity within an aquifer. The court pointed out the fact that those cases concerned non-recharging basins. Noting that there was no information regarding the impact of gradual mineralization of the water in the aquifer, Judge Bratton concluded that there existed no means by which the court could determine whether the increased salinity claimed by plaintiffs amounted to an impairment of their rights.\textsuperscript{135}

The *Mestas* court stated that “the effects . . . observed [by the farmers in the area] relate only to the functioning of their wells and not to the integrity of their water rights.”\textsuperscript{136} However, it was observed that at some future point “the interference with performance of their wells might become, for all practical purposes, a question of water right impairment.”\textsuperscript{137} The court decided that impairment had not yet been established, but that jurisdiction would be continued over the case in order that, if necessary, the impairment question could be considered in the future.

**Waste and Pro Rata Apportionment**

Referring to regulations\textsuperscript{138} of the State Engineer, the court held that all water pumped from any EBID well must be used within a maximum of 1½ miles from the well.\textsuperscript{139} The court also held that all water pumped from the wells “be apportioned to each landowner pro rata to the lands assessed.”\textsuperscript{140}

\textsuperscript{133} 69 N.M. 398, 367 P.2d 708 (1962).
\textsuperscript{134} 86 N.M. 249, 522 P.2d 796 (1974).
\textsuperscript{135} Mestas v. Elephant Butte Irrigation Dist., No. 78-138B, at 16 (D.N.M. May 11, 1979).
\textsuperscript{136} Id. at 15.
\textsuperscript{137} Id. at 16.
\textsuperscript{138} STATE ENGINEER, RULES AND REGULATIONS GOVERNING DRILLING OF WELLS AND APPROPRIATION AND USE OF GROUNDWATER IN NEW MEXICO § 1-11 (1966).
\textsuperscript{139} Mestas v. Elephant Butte Irrigation Dist., No. 78-138B, at 18 (D.N.M. May 11, 1979).
\textsuperscript{140} Id. at 20.
Thus, EBID's victory on the impairment issues was a hollow one. The practical effect of the decision was to enjoin EBID's use of the wells since it no longer would be economical for EBID to continue to use the wells, given the restrictions.141

CONCLUSION

Although New Mexico courts have not yet addressed the issue of a right to a means of diversion, there is little doubt that such a right would be recognized, given a suitable case. Clearly, situations involving declared basins are not appropriate for acknowledgement of such a right. In non-declared groundwater basins, however, where the senior appropriator is without the protection of the State Engineer, the New Mexico courts should recognize the right to a means of diversion as an integral part of the prior appropriative right. To hold that there exists no right to a means of diversion would deny the appropriative groundwater right holder the full extent of his distinct usufructory right.

Even if a right to a means of diversion exists in New Mexico, the extent of such a right is unknown. The extent of the right is necessarily a decision which the courts of each state must make based upon their perception of the relevant public policies.

If a state seeks a maximum level of economic development, new sources of water must be found and developed. Strict assertion of senior appropriators' rights to their means of diversion, however, prevents significant expansion of the water supply. It is for this reason that the Doctrine of Reasonable Diversion arose, as a limitation on the private right to further a public policy of maximum economic development.

The Doctrine of Reasonable Diversion, however, does not completely eliminate the individual's prior appropriative right to his means of diversion. It merely demands that the means chosen be reasonable in light of the desire to attain optimal water use. It is in the Bender case that the doctrine is most clearly enunciated, with the court having engaged in an economic analysis to decide reasonableness. This analysis would extend not only to the technology of well drilling and pumping, but also to the economic reach of the prior appropriator as opposed to the economic benefits of maximization of the resource. Under the Doctrine of Reasonable Diversion, the historical water table level apparently would no longer be protected,

141. The court denied a Motion to Reconsider by Defendant EBID and consequently EBID has appealed the decision on the waste and pro rata issues to the Tenth Circuit Court of Appeals.
but would instead, depending on the reasonableness of the diversion, afford the prior appropriator compensatory relief enabling him to continue to satisfy his water right while at the same time ensuring maximum development of water resources.

The Doctrine of Reasonable Diversion is an equitable solution to the conflict between individual rights and a public policy demanding maximum development of water resources. It is apparent, however, that when one views the manner in which society presently is handling groundwater resources, not to mention other non-renewable resources, little if any value is being placed on groundwater resources with respect to any generation but the present. To quote Nicholas Georgescu-Roegen, it is a complete "monopoly of the present over future generations." 142 The goal of maximization of groundwater use and development necessarily means the eventual depletion of the resource, apparently with the presupposition that the value of groundwater to the present generation exceeds the value to future generations. Does the present generation owe anything more to the future generation? The Doctrine of Reasonable Diversion presumably answers that question in the negative. If, however, a state were to place a value on groundwater for the use of future generations, no tool would better serve that purpose than the recognition of a near-absolute right of the prior appropriator to his means of diversion. 143 By protecting the prior appropriator's right to his historical means of diversion, water use and development will be substantially limited because a junior appropriator will not be allowed to use groundwater when such use will interfere with the senior's diversion. As a result, unused water will remain in the depths of the underground basins, waiting to be tapped by future generations.

Thus, any state that addresses the issue of the impairment of the rights of prior appropriators, specifically with respect to their rights to means of diversion, must decide what goals it is seeking to further through its water laws. If maximization of water use and development is the end sought, then the Doctrine of Reasonable Diversion would be the appropriate means to that end. If, however, the state perceives a need or obligation to preserve its water resources, enforcement of a prior right to a means of diversion, unbridled by a reasonableness limitation, might best serve that goal.

In Mestas, the United States District Court did not discuss either the issue of a right to a means of diversion nor the possible limitation

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143. Professor Charles T. DuMars of the University of New Mexico School of Law has greatly aided the author in developing this concept.
of that right through application of the *Doctrine of Reasonable Diversion*. The court did, though, leave the door open for reconsideration of the question of whether the performance of a well might become a question of water right impairment. It is precisely this question which has been decided by those courts that have recognized a right to a means of groundwater diversion.

It is urged that the *Mestas* court re-think the impairment issue and acknowledge a right on the part of the prior appropriators to a reasonable means of diversion, concomitant to their appropriative right. The extent of such a right would depend upon the court's perception of the New Mexico public policy. On the basis of New Mexico Constitutional and statutory pronouncements that water be put to beneficial use, it is a fair conclusion that New Mexico favors a policy of maximum development of its groundwater resources, as opposed to a policy of preservation for future generations. Consequently, the *Doctrine of Reasonable Diversion* would seem to serve New Mexico's purposes.

KEVIN J. BLISS

145. *N.M. CONST.*, art. XVI, § 3.