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# Water Law—The Rise And Fall Of New Mexico's Templeton Doctrine

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# WATER LAW—THE RISE AND FALL OF NEW MEXICO'S TEMPLETON DOCTRINE*

The interrelationship of surface and ground waters has long been an axiomatic concept in hydrology.[1] In 1932 the Supreme Court of New Mexico legally recognized this fact in *El Paso & R. I. Ry. v. District Court*.[2] However, notwithstanding this official recognition of a fact of nature, the public waters of the state of New Mexico at that time and at present are regulated under two outdated classifications—ground waters[3] and surface waters. The ground-surface distinction, easily defined in theory but often difficult to apply in practice, has recently presented New Mexico surface-right holders with a serious problem.

If a surface-right holder owning the right to the use of a certain amount of public water from a given source is faced with a situation where there is an inadequate supply of surface water at his point of diversion, what rights does he possess through his surface water right by which he may reobtain his proportionate share of the public waters? The ground-surface classification of waters has long been an insurmountable obstacle preventing such an owner of a surface right from tapping an interrelated body of ground water as a means of replenishing his depleted surface supply.[4]

In the past two decades this problem has received some recognition from the New Mexico State Engineer.[5] As a result, in certain

* Templeton v. Pecos Valley Artesian Conservancy Dist., 65 N.M. 59, 332 P.2d 465 (1958).

1. See generally Davis, Handbook of Applied Hydraulics (2d ed. 1952); Ackerman & Lof, Technology in American Water Development (1959).

2. 36 N.M. 94, 8 P.2d 1064 (1931).

3. Not all ground waters in New Mexico are public. N.M. Stat. Ann. § 75-11-1 (Supp. 1965) defines public ground waters as follows:

> The water of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are . . . public waters . . . and . . . subject to appropriation for beneficial use.

4. In Clark, *New Mexico Water Law Since 1955*, 2 Natural Resources J. 484 (1962), a short explanation of the problems created by the ground-surface classification is concluded with the following statement:

> Adherence to an unscientific and outmoded method of *surface-ground* water classification will not aid in the establishment of sound legal measures for interrelating an increasingly more valuable water supply.

*Id.* at 539-40. (Emphasis by Professor Clark.)

5. In Spencer v. Bliss, 60 N.M. 16, 25, 287 P.2d 221, 226 (1955), the court noted that the state engineer had published the following notice at the opening of the Carlsbad Underground Water Basin:

> 'Carlsbad Basin is presently open to filing of applications for appropriation of underground waters for supplemental use on lands with *existing surface right.*' [Emphasis the court's.]

areas of the state, efforts have been made to provide for supplementing surface rights through the granting of ground water appropriations. Unfortunately, the scarcity or non-existence of unappropriated ground waters in all ground water basins today[6] has severely limited the success of these efforts. Until 1958, surface waters generally were considered as one source of water, while ground waters were held to be a distinct and separate source. Two unrelated systems of priority governed these two legally created classifications of water. A holder of a water right in one system had no rights regarding any appropriations he might desire to make from an interrelated body of water classified in the other system. In the past, the ground-surface classification and the legal separation of the corresponding holders of these water rights proved to be a workable system of water administration.[7] Within recent years, however, the gradual diminution of New Mexico's surface water supply, as well as the continual decrease in the level of its ground waters, has brought the two classes of right holders into direct conflict on numerous occasions.

In 1958 such a conflict arose in *Applications of Langenegger*.[8] In *Langenegger*, the owner of certain drainage water rights applied to change his point of diversion from an inadequate artificial drainage system to several shallow wells. In the words of the New Mexico Supreme Court,

> [T]he waters it [the drainage system] intercepted and gathered have been beneficially applied on the farm by applicant and his predecessors. The *source* of the waters as found by the trial court is the *public underground waters*.[9]

Thus, the applicant was doing nothing more than attempting to use a different type of diversion as a means of obtaining water from the valley fill, conceded by the court to be the source of his drainage waters. The application was denied by the state engineer and again denied by the supreme court. The court held that because his water right was applicable only to drainage waters, and because drainage waters are classified as private waters "as a rule of property,"[10]

6. Discussions with the state engineer reveal that not only are all basins closed to new appropriators but also that many of the basins are *over*-appropriated.

7. For a general analysis of the merits of New Mexico water law see Hutchins, The New Mexico Law of Water Rights (N.M. State Engineer Tech. Rep. No. 4, 1955).

8. 64 N.M. 218, 326 P.2d 1098 (1958).

9. *Id.* at 220, 326 P.2d at 1099. (Emphasis added.)

10. The fact that drainage waters are *private* was established in Hagerman Irrigation Co. v. East Grand Plains Drainage Dist., 25 N.M. 649, 187 Pac. 555 (1920).

Langenegger was not entitled to change his point of diversion to a public water source.

Drainage waters were originally classified as *private* waters in New Mexico because they originated from ground waters which were then considered to be *private*. When ground waters in New Mexico were reclassified as *public* waters,[11] drainage waters retained their *private* classification. Thus, the *Langenegger* case was decided according to the ground-surface classification of waters. The case represents a perfect example of a denial of a point of diversion transfer solely on the basis of the classification of the involved waters.

Five months after *Langenegger*,[12] the Supreme Court of New Mexico took its first step toward discarding the obsolete method of regulating public waters according to their classification. In 1954, several parties, including W. H. Templeton, filed applications with the New Mexico State Engineer to drill wells in the Roswell Artesian Basin. The applicants were seeking to appropriate the shallow groundwaters of the basin to supplement their surface rights to Rio Felix water. The state engineer conducted a hearing and ultimately denied the applications. On appeal to the District Court of Chaves County, judgment was entered in favor of the applicants. The district court found that

> the granting of applicants' applications will only restore the flow of water to the amount appropriated, and is in effect a change of place of diversion; the drilling of such wells, and the use of water therefrom, will not impair existing rights. . . .[13]

A subsequent appeal by the state engineer to the Supreme Court of New Mexico resulted in an affirmance of the lower court's decision. The supreme court found that the Rio Felix surface waters originated in part from the valley fill or ground waters of the Roswell Shallow Water Basin.[14] The supreme court held that Templeton was

11. The first declaration of ground waters as being *public* waters occurred in 1927. This statute was found to be invalid in Yeo v. Tweedy, 34 N.M. 611, 286 Pac. 970 (1930). In 1931, the predecessor of the current statute, N.M. Stat. Ann. § 75-11-1 (Supp. 1965), was enacted. See note 3 *supra*.

12. 64 N.M. 218, 326 P.2d 1098 (1958).

13. Templeton v. Pecos Valley Artesian Conservancy Dist., 65 N.M. 59, 63, 332 P.2d 465, 467 (1958).

14. *Id.* at 67, 332 P.2d at 470. The court said:

> The next contention of the appellants is that the proposed change of point of diversion amounts to a new appropriation in an underground basin that is fully appropriated. This proposition is based on the assumption that there is no connection between the surface flow of the Rio Felix and the underground water basin. The findings of the lower court do not support this assumption.

entitled to follow his surface right to its source by changing his point of diversion from a surface appropriation on the Rio Felix to a ground appropriation in the valley fill. This change in the point of diversion, which the court found would not impair existing rights,[15] was deemed not to be a new appropriation from the basin, and for that reason[16] the state engineer's denial of the application to drill the shallow wells was found to be erroneous.

The *Templeton* decision appeared to represent a long-awaited breakthrough in New Mexico water law. If surface rights could be followed to their source by a surface-right holder, then the troublesome ground-surface classification of waters could be eliminated. Surface and ground waters might come to be treated as one source and regulated according to an ideal system involving only one set of priorities.[17] However, subsequent cases in this area revealed that such a solution for New Mexico's problems was not at hand, primarily because of problems involving the impairment of existing rights.

In New Mexico, the problem of impairment of existing rights[18] has two distinct branches. First, there is no existing authority defining in exact terms the word "impairment" as used in a legal sense.[19] A party desiring to transfer a point of diversion has no statute and very little case law on which to rely in determining whether or not he will impair another right through his transfer. Additionally, those cases which do offer some assistance are occasionally in conflict. In *In re Hobson*,[20] the New Mexico Supreme Court affirmed decisions by the state engineer and the district court denying an application for a transfer on a well from one location to another within the Roswell Ground Water Basin. The court held that impairment would

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The lower court found that the headwaters of the Rio Felix sank into the ground and became a part of the Valley Fill and then rose again into the river and that the appropriations made by the appellees amounted to appropriations out of the Valley Fill.

15. *Id.* at 68, 332 P.2d at 469.

16. *Ibid.*

17. Even if the priority system were abandoned in New Mexico for a pro rata system of water allocation, one system taking all waters into account would be far superior to the present system which involves two sets of priorities.

18. N.M. Stat. Ann. § 75-11-7 (1953), which governs the transfer of a ground water point of diversion, says in part:

> The owner of a water right may change the location of his well or change the use of the water, but *only* upon application to the state engineer and *upon showing that such change or changes will not impair existing rights*. . . . [Emphasis added.]

19. For the New Mexico Supreme Court's position on the problem of impairment, see note 29 *infra* and accompanying text.

20. 64 N.M. 462, 330 P.2d 547 (1958).

take place in the move-to area simply because the waters of the basin were already over-appropriated and because waters in the basin did not "fluctuate evenly"[21] throughout the basin. The "even fluctuation" argument was used successfully again by the state engineer in *Durand v. Reynolds*.[22] In *Durand*, the lower court record indicated that water located at the move-from diversion point did not flow evenly to the move-to location and thus an impairment of existing rights would result from the proposed change in location. The court also held that the transfer to the new location would result in the impairment of nearby surface rights on the Pecos River.[23] These two potential impairments of existing rights were found sufficient to sustain denial of the application. On the other hand, in *Application of Brown*,[24] the supreme court found that the lowering of a ground water basin water table did not constitute impairment per se. The court said:

> 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.[25]

Some cases offer a strict interpretation of certain types of impairments. Any increase in the salt content of the water in a basin was found in *Heine v. Reynolds*[26] to be a possible impairment of existing rights. The supreme court said:

> The gradual increase of the salt content of the water in the Basin, due to increased pumping, could well prove to be disastrous to the entire Basin, even though the increase of the salt content attributable to one well would be very small.[27]

In essence, the court in *Heine* held that *any* impairment, even though it might be "very small," was sufficient to prevent the transfer of a point of diversion.[28]

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21. *Id.* at 463, 330 P.2d at 548.
22. 406 P.2d 817 (N.M. 1965).
23. *Id.* at 819.
24. 65 N.M. 74, 332 P.2d 475 (1958).
25. *Id.* at 80, 332 P.2d at 479.
26. 69 N.M. 398, 367 P.2d 708 (1962).
27. *Id.* at 402, 367 P.2d at 710.
28. Heine's entire appeal to the supreme court was based on the contention that "substantial" impairment was necessary to allow the denial of an application under N.M. Stat. Ann. § 75-11-7 (1953).

The *Heine* opinion summarized the court's position on what is and what is not impairment:

> We are of the view that the question of impairment of existing rights is a matter which must generally depend upon each application, and to attempt to define the same would lead to severe limitations.[29]

The second branch of the impairment problem is that in cases involving an application to change a point of diversion the New Mexico Supreme Court has held that the burden of proof is on the applicant to show that the change will not impair existing rights.[30] This burden of proof, coupled with a lack of guidelines regarding what will or will not be an "impairment," as well as the supreme court's position that each case will be decided on its own facts, has had the overall effect of severely limiting point of diversion transfers.

The *Templeton* doctrine injected a third factor into the impairment problem. For the doctrine to be applied equitably, the priority system governing one water classification had to be reconciled with the priority system of the other. In the *Templeton* case the supreme court found that existing ground and surface rights would not be impaired by the transfer.[31] However, the court completely avoided any decision regarding the method to be employed in reconciling surface priorities with ground priorities in *Templeton* transfers.

The 1962 case of *City of Albuquerque v. Reynolds*[32] provided an interpretation of what the *Templeton* decision held concerning this vital problem of reconciling surface and ground priorities. District Judge Reese, writing for the supreme court, said:

> [W]e did there hold [in *Templeton*] that a prior appropriator of stream water had the right to follow the stream water to its underground source and the right to drill wells and take the underground water necessary to fill his prior stream right, regardless of detriment to other underground water appropriators whose rights were subsequent in time to the stream right.[33]

This interpretation of the *Templeton* doctrine was obviously a significant factor contributing to the eventual rejection of the doctrine by the court as an effective rule in New Mexico water law. This in-

29. 69 N.M. at 402, 367 P.2d at 711.
30. See Spencer v. Bliss, 60 N.M. 16, 287 P.2d 221 (1955).
31. 65 N.M. at 68, 332 P.2d at 469.
32. 71 N.M. 428, 379 P.2d 73 (1962).
33. *Id.* at 438, 379 P.2d at 80.

terpretation of the doctrine placed surface-right holders in a superior position to existing junior ground-right holders, producing a result in direct conflict with comparable law regarding ground-to-ground transfers.[34] The protection of junior appropriators is commonly recognized as an essential element of the law governing water right transfers. However, instead of curing this minor defect in the *Templeton* doctrine, the supreme court apparently has decided to overrule the entire doctrine.

The first steps toward eliminating the *Templeton* doctrine were taken in two recent water transfer decisions. The 1964 case of *Reynolds v. Wiggins*[35] involved an application to inject drainage water into an underground basin, and then to pump an equal amount of water out at the point of injection at a later date. The application was denied by the state engineer but was subsequently granted on appeal to the district court and affirmed by the supreme court. The supreme court found that the state engineer had based his decision on an error of law in finding that the Wiggins transfer would "impair existing rights."[36] The fact that Wiggins argued his case on the basis of a new appropriation, which would not impair existing rights,[37] and not on the basis of a surface-to-ground transfer, provided the court with the steppingstone needed to return to the strict ground-surface classification of waters. This steppingstone was used in the 1965 case of *Kelley v. Carlsbad Irrigation Dist.*[38] In this case,

34. See note 18 *supra*.

35. 74 N.M. 670, 397 P.2d 469 (1964).

36. *Id.* at 672, 397 P.2d at 470. The court conceded that the non-existence of unappropriated water does not alone defeat an application for a transfer. The court said:

> An examination of § 75-11-3, N.M.S.A. 1953, convinces us that it requires the state engineer to issue a permit to appropriate from an underground source if *either*, (1) there is unappropriated water, *or* (2) the proposed appropriation will not impair existing rights from such source. [Emphasis added.]

37. *Id.* at 672, 397 P.2d at 469:

> The Wiggins proposal, however, is not one to deliver his private water into the underground basin to supply appropriations therefrom and to take in exchange an equivalent quantity of water from that basin. . . . [H]e readily concedes that he has applied for a new appropriation from the underground basin.

38. 71 N.M. 464, 379 P.2d 763 (1963). Three opinions have been written by the New Mexico Supreme Court for the *Kelley* case. The first opinion, *supra*, was the landmark decision in which the court held that appeals from the state engineer to a district court were not to be de novo. See Comment, 3 Natural Resources J. 340 (1963); Clark, *A Note of Two Decisions*, 1 N.M. Bar Bull. 134 (1963). The second opinion appeared on December 20, 1965. 4 N.M. Bar Bull. 227 (1965). The second opinion was withdrawn and replaced by a third opinion on March 10th, 1966. 4 N.M. Bar Bull. 321 (1966).

Kelley had filed an application to change his surface point of diversion from the Hondo River to a ground appropriation from the Roswell Artesian Basin. The application was ultimately denied by the supreme court "because there can be no change of point of diversion which would permit a transfer of a surface water right to one to take water from an underground basin."[39] In the 1965 *Kelley* opinion the court used the *Wiggins* steppingstone to reach this decision when it said:

> [T]here can be no transfer of a surface right to an underground right as a matter of law, Reynolds v. Wiggins, 74 N.M. 670, 397 P.2d 469 . . .[40]

This broad statement was changed in *Kelley* by a 1966 substituted opinion rendered upon a motion for rehearing. The substituted *Kelley* opinion says:

> [T]here can be neither a transfer of a surface right to one in an underground basin nor a change of a point of diversion from the surface appropriation to one from an underground basin. The right to take water from the underground basin must be initiated by an application for a new appropriation therefrom. Reynolds v. Wiggins. . . . [W]e find nothing in the language of § 75-11-7, N.M.S.A., 1953 Comp., showing an intent of the legislature to permit a change from surface diversion to a taking by well from an underground basin. Such a transfer is not authorized as a change of point of diversion. An application for such 'transfer' could only be considered as an application for a new appropriation from the underground basin as in Reynolds v. Wiggins. . . .[41]

Although the *Templeton* case is not expressly overruled in *Kelley*[42] or in *Wiggins*, even the most narrow reading of the preceding quotation leads to the conclusion that the *Templeton* doctrine has been rejected as contrary to existing law.

The decision of the supreme court to discard the *Templeton* doctrine and to retain the outdated concept of public water regulation through the use of two distinct priority systems based on the vague ground-surface classification of water is unfortunate. Impairment

39. 4 N.M. Bar Bull. 227, 229 (1965); 4 N.M. Bar Bull. 321, 323 (1966).
40. 4 N.M. Bar Bull. 227, 229 (1965).
41. 4 N.M. Bar Bull. 321, 323 (1966).
42. The supreme court did not mention the *Templeton* case in the 1965 or 1966 *Kelley* opinions.

problems created by transfers must be faced squarely rather than avoided by eliminating the possibility of transfers. The *Kelley* decision has abrogated the *Templeton* doctine, thereby defeating the possibility of having a surface-to-ground transfer of a point of diversion even when no impairment whatever would result.

If, as the supreme court states in *Kelley,* there is "nothing . . . showing an intent of the legislature to permit a change from surface diversion to a taking by well from an underground basin,"[43] then the legislature should recognize that such transfers are necessary and possible under certain circumstances and should express such an intent by amending the applicable statute.[44] Creating the possibility of a *Templeton* transfer, however remote it may be under the most stringent rules of impairment, is the least the legislature can do for New Mexico's surface-right holders. In addition, the legislature would contribute materially to abandonment of the obsolete method of classifying New Mexico's public waters as either ground or surface waters. Taking this vital step is necessary to solve the many problems existing at the present time in the regulation of these waters.

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43. 4 N.M. Bar Bull. 321, 323 (1966).
44. The statutes primarily concerned are N.M. Stat. Ann. §§ 75-5-23, -11-7 (1953).