



Spring 2008

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Recommended Citation

Martha C. Franks, *Water, Theology, and the New Mexico Water Code*, 48 NAT. RES. J. 227 (2008).
Available at: <https://digitalrepository.unm.edu/nrj/vol48/iss2/2>

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MARTHA C. FRANKS*

Water, Theology, and the New Mexico Water Code

INTRODUCTION: THREE WAYS OF THINKING ABOUT WATER

Water, according to Mircea Eliade, an historian of religions, is the “reservoir of all the possibilities of existence.”¹ Certainly in the book of Genesis water existed before creation. Before God spoke, when the earth was without form and void, the Spirit of God moved over the face of the waters.² Thus, Eliade observes, water is the symbol of the formlessness from which form arises. This is true not only of the moment of creation, but in all the changes of our lives. Water is the symbol of the formlessness in which the dissolutions and reformations of all kinds of birth and death occur. In the Judeo-Christian tradition, for example, the great flood first destroys the world and then gives way to God’s promise. The Hebrews walk through the Red Sea in going from slavery to freedom. In the waters of baptism people die to sin and are born to new life. Water dissolves old forms and gives place to the possibility of re-formed life. For this reason, says Eliade, water is not just one mythic symbol among others, but has a special place. It is by analyzing the religious value of water that one can understand the structure and function of all religious symbolism, and of the working of symbolism generally. Thus, he claims, no matter in what religious system one encounters it, the emergence of form from the pre-formal water is not only a vision of physical creation common to many religious traditions, it is also—not coincidentally—an essential metaphorical backdrop for the human experience of the emergence of a sense of order and meaning out of formlessness.

As with any good metaphor, these high-flown ideas match the matter-of-fact. There is no need to look to esoteric philosophies or symbolic systems to know that life emerged from water and that how we live in the

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1. MIRCEA ELIADE, *LE SACRÉ ET LE PROFANE* 112.

2. *Genesis* 1:2.

world is shaped by water. These things are true in a perfectly literal way. Water was in fact the pre-condition for the development of our global biological systems. Living bodies were formed in water both at the literal beginning of all life and the particular beginning of each human life. Even the symbolism of water as a dissolver of form to make room for new life has a perfectly literal analog. The property of water as a near universal solvent is an indispensable part of the various ecological cycles that support life, growth, and the continual evolutionary re-formation of life and growth. Whether approached through a spiritual tradition or as a practical and biological matter, water is the preliminary from which organization arises. The essentialness of water to life echoes all the way across human existence from the heights of spirituality to the fundamental level of material need.

There is a third way to talk about water that puts these vast perspectives in conversation, along with a great many more prosaic points of view. In my experience as an environmental lawyer specializing in southwestern water law, I have found that when people argue about water the whole range of spiritual and physical meanings for water are, at least in recent years, part of the fight. The physical aspect of the situation is obvious. People will of course legislate and litigate over practical material property issues concerning how any commodity is distributed. Equally obvious, the scarcity of water in a desert society like the American Southwest—a scarcity that also exists in the part of the world that gave us the Judeo-Christian scriptures—turns up the heat on all of that legislation and litigation in the same way that the rarity of diamonds increases their value. These practical realities are reflected in the earliest principles of water law in the Southwest. The absolute essentialness of water to all life, however, as well as the power that water carries as a symbol, seems to many to raise the stakes infinitely higher than diamonds. As scarcities grow increasingly severe, water fights are felt by more and more people to have moral and spiritual overtones. Some in the water fights argue such considerations squarely, claiming that it is not possible to treat water as one among many commodities. They claim a sacredness about water that places it outside the ordinary categories of ownership. Even when such claims are not raised explicitly, they may be implicit if there is anything to Eliade's observations about what water always seems to mean to people in the great religious traditions. Decisions about water, no matter how sordidly founded in greed and politics they might actually be, carry with them the echoes of the spiritual meaning of water in that the form of the society in which we live, literally as well as symbolically, arises out of these decisions. In a desert society, water measures what we value. Whether or not we talk about it out loud, how the society chooses to divide rivers, aquifers, and reservoirs shapes the possibilities of existence in the southwestern desert.

I. ABSTRACTIONS

I believe it is especially useful to talk about water in terms of theology. Theology is exactly the human discipline that brings questions of value and the possibility of sacredness into conversation with more mundane parts of our lives. Further, theology engages the intellect in the exploration of meaning and value. Its goal, at its best, is to give an account of what is in us, to make us more intelligible to ourselves and to others, precisely on the subjects that are hardest to talk about, that is, what people value. It is not necessary to have a personal faith to appreciate the importance of that undertaking.

In each of us, and certainly across any human society, there is likely to be a chaotic ocean of beliefs, opinions, thoughts, feelings, hopes, judgments, angers, affections, and wishes, all of varying degrees of clarity, consistency, and connection to evidence. It is the spirit of God that brings form out of these waters, even if we only use the word "God" very cautiously to mean the principle by which meaning and value are ordered. That is to say, to make a practical decision that reflects as much as possible of our full range of thoughts, beliefs, opinions, feelings, etc., all of these chaotic elements should, ideally, be talked through clearly, understood as a whole, and set in some sort of order, or at least in conversation with each other. The form of that order (or conversation), which will be the form of our selves or our society that emerges from that process, measures what we value. Theology deals explicitly with the ordering of lives with respect to God as an ultimate value, but, using that very cautious meaning for the word "God," the way we actually choose to order our lives is also, implicitly, a theology. I don't mean to say that everyone secretly believes in God, only that whatever form that we draw for ourselves from the chaotic ocean of our human experience stands in the shoes of God for practical purposes. Theology gives us ways to talk intelligibly about the ways in which people form their values and the ordered consequences of that formation. Thus, for me, theology—considered for the moment just as a discipline, without regard to the specific human experience of any particular faith—is at the opposite extreme from what some fear from it; it is not an unquestioning, emotion-based sense of personal righteousness that would ignore or condemn most of the huge array of chaotic elements that make up our human experience. Rather, theology, once known as the "queen of the sciences," is the science of setting all of our experience, understanding, and hope in order with respect to what we most deeply value.

The clearest example I have for that theological purpose is famous as probably the most obscure theological doctrine in the Christian canon. In my sophomore year at St. John's College I walked into seminar one night, brain seething with Thomas Aquinas, to find my friend Peter Buck holding

forth with placid confidence on the Christian doctrine of the Trinity. "I just don't understand why people find this so difficult," he said. "Three — one; One — three. What's the problem?" The doctrine of the Trinity asserts that, although there is only one God, there are three divine persons. There is God the Creator, vast, abstract, and unfathomable; then God the Son, with a down-to-earth eating and drinking physical body through whom we make compassionate connection with the divine and with each other; and finally, God the Holy Spirit, the community that proceeds from the two others.

Despite the clarity of Peter's explanation, this doctrine of the Trinity seemed both confusing and useless. After many years of practicing law, however, I have — quite apart from any personal belief — come to appreciate the perceptiveness of this form for ordering decisions about value. Law gives a kind of matter-of-fact body to the abstract insights of this doctrine that make it possible to see why people care about it and why it is a useful way to think. Beautifully idealistic or carefully vague abstractions are the kinds of things that lawmakers can actually agree on so that laws get passed. The haziness of these abstractions, however, is almost always found by experience to have left out a great many of the practical questions that need answering. Furthermore, the attitudes of a society change through time, and the policies that early lawmakers thought obvious can come to seem doubtful as well as incomplete. Thus, it is important that there be ways, even if they are as undignified as politics can sometime be, in which the abstractions that can distract our practical judgment with their detached loveliness get corrected by being sloshed about with every sort of reality, no matter how sordid or mundane. The result of that sloshing is that — slowly, sloppily, and argumentatively — something is formed out of the chaos that effectively embodies both ideas and practicality.

The water laws of the American Southwest, and of New Mexico, provide a particular, vivid illustration of how policies toward water have formed, dissolved, and reformed through this process, constantly reflecting what society values. Against a backdrop of relatively lawless chaos, abstract legal principles were created, embodying certain specific policy values with regard to water. These abstract principles then, in the course of experience, have encountered the physical and hydrological facts of how water actually behaves as well as the political facts of a changing society, sometimes fitting with these facts and sometimes not. The third type of voice is the human community struggling to make a coherent, liveable, working society that accommodates the full range of human experience, from spiritual abstractions to matters of physical fact. If water is the spiritual symbol of the reservoir of the possibilities of existence and physical water is the prosaic reality that shapes what is practically possible to a desert society, then politics, which is sometimes called the "art of the possible," will be the

means by which the whole array of these kinds of possibilities about water are made part of our lives.

Having spoken in an abstract, simplified way about the theological and legal pattern through which the values of a society are formed, dissolved, and reformed, I now want to talk about the incarnation of this pattern in the practical history of the last 100 years of water law in New Mexico. Through this practical history, I hope to trace what seems to me an increasing pressure for the broad community to talk out loud about what we value. There are both practical and theological reasons why water is at the center of this conversation on value. The practical urgency of making water decisions cannot be doubted. Water has always been scarce in New Mexico, but fresh water is getting scarcer everywhere. Our issues are becoming the world's issues. Whether as a matter of population growth only or through the added pressures of global warming, practical water issues are being raised more and more acutely around the world. Environmental emergencies are likely to be felt first in water issues as the oceans rise from arctic melting, storm events become more violent, and droughts deepen.

The theological reasons why water is at the center of a conversation about value seem to me to arise and be illustrated in a remarkable way through the practical history of water law. The unique nature of water forces that theological conversation in several ways. In the terms used above, water as a symbol of formlessness was bound to clash with a secular society's desire to package it in neat commodity form. But the precise way in which water has burst the various legal dams placed on it offers some insights into the kinds of conversations we have to have and the new forms that can arise from our present urgencies and chaos.

II. HOW WATER LAW IN NEW MEXICO HAS DEVELOPED AS A PRACTICAL, HISTORICAL MATTER

A. Form Called from Chaos—the New Mexico Water Code

Water law history began in New Mexico on March 19, 1907, when the Territorial Legislature passed the set of laws known collectively as the New Mexico Water Code.³ Water quarrels in New Mexico, however, were already old at that time. In the 1931 case of *El Paso & R.I. Railway v. District Court*,⁴ the New Mexico Supreme Court remarked of the pre-Water Code situation, "While water rights [were based on personal agreements], they had no certainty and little value. Disputes and feuds disturbed the public

3. NMSA ch. 72.

4. 8 P.2d 1064, 1071 (1931).

peace. They filled the courts with cases, civil and criminal. Dangerous and wasteful methods were employed. Development was retarded." In other words, there was chaos with regard to water, and form was needed.

This need was felt all the more strongly because of the founding in 1902 of a federal agency called the United States Reclamation Service. The Reclamation Service was created in order to "reclaim" the deserts of the West by putting the funding and expertise of the federal government behind the building of enormous irrigation dams to increase water supply. It was the technical arm of this country's sense of manifest destiny, designed to attract homesteading farmers to settle in what was known at the time as the Great American Desert. Increasing agriculture in the West was thought to be the key to prosperity. New Mexico was eager to have the new Reclamation Service build dams here. There was a condition on the federal largesse, however. The federal government was wary of the chaos of water law in the West, unwilling to risk large investments until there was more order and form in the laws that governed water. So the founding of the Bureau of Reclamation, promising all the reservoir of possibilities that an increased water supply could bring, triggered the adoption of legal water codes in a great many western states. The New Mexico Water Code has, for the last 100 years, supplied the abstract legal principles that underlie all of our water conversations.

The two most frequently cited of these abstract organizing principles are captured in two short sentences that became part of New Mexico's constitution when we entered the union as a state in 1912. With regard to water, the constitution states, "Priority of appropriation shall give the better right" and "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."⁵ Both of these legal principles are directly aimed at the goal of maximizing the development and use of water supplies in the desert. The concept of "priority" is that the person who started using the water earliest has the best right to whatever supply might exist in any given year, so that the earliest settlers can be the surest of getting a full supply of water even in a drought year when all the later-comers must go dry. When New Mexico rejected any thought of sharing shortages in favor of a straight priority principle, the practical effect was partly a protection of established water rights from the hoped-for new settlers, and partly an invitation to those settlers to hurry out here and get their piece of the water pie as soon as possible to beat out their future neighbors. New Mexico wanted to grow.

The principle that "beneficial use" is the basis, the measure and the limit of a water right means that water rights can be lost if they are not put to use. No one, no matter how wealthy, is allowed to hoard water unused

5. N.M. CONST. art. XVI, §§ 2, 3.

for a non-rainy day. If he fails to use the water to which he has a right, he loses that right, and the water becomes available for others to use. This principle too underscores how urgently New Mexico wanted to grow, as it strongly promotes the proposition that, in a desert, water should never be allowed to be idle, but must be made to provide benefits to the human community. The principle of "beneficial use" is curious, though, and seemingly at odds with our ordinary concepts of private property. Imagine if such a principle applied to land. If someone failed to build on her land, she would lose the right to it, and someone else could come along, lay claim to it, and build on it. This seems foreign to our usual ideas of ownership, but this is the rule that governs water in the West.

What is behind so odd a property principle is not just the urgent desire to develop, but also the peculiar nature of water. Water, unlike land or most any other resource, flows. Rivers go by, so that, by contrast to other types of resources that might be prudently saved for the future, failing to use water immediately does not seem to preserve the resource for later use. This is why, in those early days in the West, if anyone used the word "conservation," what they meant was *full, immediate use*. To use water in New Mexico was to conserve it for New Mexico. By contrast, to let water go rolling down the river to another state or to the sea without being used was, from New Mexico's point of view, to waste it. In the desert, nothing could be more offensive to the hopes of a growing society than to waste water. So the principle that "beneficial use is the basis, the measure and the limit of the right to use water" became enshrined in our constitution. Hidden in that principle, however, is an understanding of the word "conservation" that is very different than the understanding that we have of that word today.

In addition to these abstract organizing principles within the Code, there are some practical historical attitudes buried in the 1907 law that affect how the law developed, as well as how we see it now. The 1907 Water Code provides vast authority to an official known as the New Mexico Territorial Engineer, later the State Engineer. The historian Ira Clark, in his detailed work *Water in New Mexico*, begins his analysis of the 1907 Code by stating that its most "striking feature" was the expansion of the powers of the then Territorial Engineer, whose "overall responsibilities were covered by a sweeping statement: 'He shall have general supervision of the waters of the Territory and of the measurement, appropriation, and distribution thereof....'"⁶

This aspect of the Water Code reflects a belief common at the turn of the twentieth century and for many years thereafter that science was the triumphant means by which humanity would create its own earthly paradise, including making the desert bloom. It was a proud feature of the

6. IRA CLARK, *WATER IN NEW MEXICO* 119 (1987).

new law that the political officer in charge of water would not be just another politician, but a qualified scientist, a registered professional engineer. Political decisions by non-scientists—decisions that might even sometimes be based on primitive, pre-modern spiritualities—would be superseded under the new law by the work of a trained, modern, scientific mind in pursuit of the public good of re-fashioning the earth to serve human need and growth. New Mexico has a long history of strong State Engineers who took this attitude to heart. Steve Reynolds, for example, who was State Engineer in New Mexico from the mid-1950s until 1991, and with whom I worked for five years, was convinced that technological development was the key to addressing water questions in New Mexico. He had no patience with notions of water as spiritually valuable or with what he saw as the sentimentalities of environmentalism. As water got scarcer, he believed, science would provide the solution. There would be more dams to build or, if dam-sites were used up, beneficent scientists would figure out how to de-salinate seawater. I admired very much his disinterested commitment to science in pursuit of the public good, and many people still feel that this is the proper attitude toward our water problems. Others blame our present environmental crisis on what they would call Steve's technological hubris and say sadly that the failure to appreciate water's spiritual and symbolic dimension has cut us off from an essential part of how we understand ourselves.

The confident attitude that water matters could be dealt with thoroughly and scientifically makes itself felt in the 1907 Water Code in another way as well. Under the new Code, the Engineer's scientific approach was to be applied not only to his active, executive work in distributing water, but also to the work of the courts in settling water litigation. I have already quoted a New Mexico Supreme Court case remarking that prior to the Water Code water cases had filled the courts. The drafters of the Code had noticed this as part of the chaos of those times and noticed particularly the problem that there was nothing to ensure that the decisions of these scattered courts would fit together to make a realistic hydrology. Someone might bring a case on one part of the river and present evidence of a large water right that a court, having no other evidence, might accept. Meanwhile, at another place on the river, someone else might be doing the same thing in a different court and also get a large award of water that failed to take into account the award from the first court. The upshot was that, in many places in the West, the courts had accidentally awarded more water than existed in the river. Moreover, because of the principle of priority, somebody who quietly got a court to award the earliest priority to his or her water right had stolen a march on any neighbors that were not part of the lawsuit. That right would be fully supplied first in priority, even

if everybody else on the river had to go short. For that reason, it seemed unfair that the neighbors had had no say in the court award.

To address this problem, the 1907 law put in place a process called the "adjudication" of water rights. The idea was that, instead of having lawsuits brought piecemeal as particular quarrels arose, there would be one large single lawsuit for each water source, so that the amount and priority of every water right would be worked out in the same proceeding and before the same court as that of every other water right drawing from the same river. Not only that, but it would be the job of the State Engineer, as a sort of scientific officer of the court, to do a survey of all of the water uses from the water source that was the subject of the adjudication and submit that survey to the court as the first evidence of what the water rights were.⁷ Thus, the courts would not only have all the water rights claims before them at once, but would also have the benefit of the State Engineer's scientific expertise in sorting them out and putting them in relation to each other in terms of priority.

It was a grand scheme. The *El Paso Railway* case that I have already quoted remarked doubtfully of the adjudication idea that, although the system seemed logical, "[w]hether it is so ambitious as to be impractical remains to be determined."⁸ I will describe in a few minutes the practical working out of that ambition in the last 100 years, especially with regard to enormous water sources with many thousands of claimants, like the Rio Grande. But there is one thing I want to note about this principle in the abstract. The need for the process of adjudication comes about because of the very peculiar nature of water that I mentioned above: water flows. Because water flows, uses made at the headwaters of a river may affect water users at the mouth of the river, many miles away. That is why those two water rights owners, even if one is at the Colorado border and one is living near Texas, must be brought within the same, enormous, unwieldy, comprehensive adjudication lawsuit. Thus, the establishment of the process of adjudication in the 1907 Water Code was recognition that, because water flows and connects even distant neighbors, water questions can only be fully and finally addressed in the presence of the entire community of interested water users. This acknowledges a need for community involvement that seems somewhat at odds with traditional notions of sturdy frontier self-sufficiency. This may expose one of the unspoken spiritual dimensions of our water quarrels. Perhaps the reason we fight about water so bitterly in the West is not just because it is scarce. The fights may arise also from a conflict between the proud western myth of independence on the one hand and, on the other hand, the physical reality

7. NMSA §§ 72-4-13 to 72-4-19 (1978).

8. *El Paso Railway*, 8 P.2d at 102.

that the flowing nature of water makes undeniable interconnections among us, and even with the ecosystems that support us. The nature of water forces us to face the physical fact, no matter how grudgingly, that we are inescapably connected to each other.

B. Incarnation – Practical Challenges to the Principles of the Water Code

Thus, the 1907 Water Code reflected an overwhelming desire to bring more people to New Mexico and a deep faith in science to give us clear answers. In addition, however, because the law had to recognize the odd nature of water, it had some aspects that were potentially inconsistent with these attitudes. The realities of the last 100 years have exposed those inconsistencies. For example, New Mexico now relies on groundwater to an extent that the drafters of the 1907 Code would never have thought possible, and groundwater presents different physical issues than surface water, challenging the original understanding of the concepts of priority and beneficial use. These original understandings have been dissolved and re-formed to embrace definitions of priority and beneficial use that the writers of the Water Code probably could not have anticipated. Even more broadly, with respect to the faith in science as all-powerful and all-good, our society has become cautious, and the law has been changed, and may be further changed in the future, to include values other than scientific. Both of these developments, it seems to me, have become subsumed in the strongly emerging theme—a sideshow in the original law—of the interdependence that water issues force upon us.

1. The Practical Challenge of the Use of Groundwater in an Expanding Society

Groundwater has been an epic practical challenge to the principles of the New Mexico Water Code. In 1907 there was little use of groundwater, so the law did not cover it. The legislature got around to groundwater in the late twenties and early thirties, mostly applying to it the principles of the 1907 law. But groundwater challenges these principles in some ways. For example, if the groundwater is just a tub of water underground, not connected to a river, then it is very like any other resource safely contained under New Mexico territory—oil, for example, which even flows like water—and the special circumstances that gave rise to the principle of “beneficial use” no longer apply. In the case of a closed groundwater basin, therefore, maybe “conservation” should not mean full, immediate use, but instead mean the same thing it means with respect to every other resource; that is, saving it unused for the future. But the “beneficial use” principle in New Mexico’s Water Code and constitution does not allow water to be held unused. Thus, the practical reality of groundwater has called into question a basic legal principle.

The biggest historical battle over groundwater, however, arose because of the large amount of groundwater that is connected to a river. If groundwater is connected to a river, it massively increases the complications of applying the principles of the 1907 law. When turbine pumps were invented in the 1950s and groundwater pumping exploded, it became very clear that pumping groundwater eventually takes water out of the river. There could be a time lag – sometimes many years – between pumping the groundwater and reducing the river flow, but in the end, with a few exceptions, every drop that someone pumps from the ground will someday be one less drop in the river. Thus, latecomers to New Mexico, often in cities, were drilling wells that took water from the rights of the early-settling farmers, contrary to the legal principle that “priority of appropriation shall give the better right.”

In this situation, cities and farmers felt themselves to be at odds. Cities argued that their groundwater pumping should be left alone, no matter how dry the year, because it did no good to stop it and much harm to their citizens. Farmers argued that shutting down water uses by priority was the only way they had to protect their senior rights; that cities should not be exempt from the constitutional rule of priority, no matter how clumsy that rule proves in practice; and that cities certainly should not be allowed to pump the farmers’ senior water out from under them just because of this time lag.

Here was another awkwardness of the peculiar, formless nature of water. Because water insinuates itself into every crevice, flowing and finding connections across vast stretches of territory, above ground and underground, it is fiendishly complicated to figure out exactly how a water use is affecting other water uses and how to understand people’s legal rights. As we have come to understand hydrology better, we have found more and more connections that must be taken into account so that more and more people turn out to be affected by every water decision. In this particular horridly complicated situation, New Mexico patched things together with an elegantly simple principle to address the problem as a legal matter and leave it as a complicated practical matter in the State Engineer’s lap. The new legal principle is called “conjunctive management.” That means that the State Engineer must, contrary to what the cities wanted, manage groundwater and surface water together in one priority system.⁹ This solution to the problem was a renewed statement of faith about the State Engineer’s scientific power, as the principle of “conjunctive management” essentially directs the State Engineer to determine hydrologically what made sense in terms of priority management. This solution also, at one blow, hugely expanded the number of people who are considered by the

9. *City of Albuquerque v. Reynolds*, 379 P.2d 73 (1963).

law to be interested parties in water disputes. It was complicated and doubtfully practical enough when adjudication lawsuits had to include everybody using water from the river. Once the principle of "conjunctive management" was established, they must also join everybody with a well connected to the river.

2. *The Challenge of "Conservation" and "Public Welfare"*

The second major practical challenge to the 1907 Water Code over the last 100 years is addressed directly to the attitude that decisions about water should be made on a purely scientific basis. In the early 1980s, New Mexico amended the Water Code to provide that the State Engineer, in making all of his decisions about water, must, if he grants a request, first find that the water use he allows "is not contrary to the conservation of water within the state and is not detrimental to the public welfare of the state."¹⁰ It is not at all clear what this language means. As I have already mentioned, the word "conservation" seems to have contradictory meanings with respect to water, originally meaning "use it as quickly and completely as possible," but, at least with respect to groundwater, possibly having the meaning we are more used to in the modern world of "save it." The modern environmental movement strongly argues that the word "conservation" should always mean "save it," claiming that any other interpretation encourages the squandering of a scarce resource. Deciding among these claims about how to interpret the word "conservation" is not really a scientific problem.

The same sort of thing is true of the phrase "public welfare." It is not clear what it means, and whatever it means, it does not sound like a scientific inquiry. The only court to consider the subject found that water rights could not be transferred from an historic farming use because it was in the public welfare for those water rights to remain part of a "living museum" of ditch agriculture. The "public welfare" of the State of New Mexico in that court's mind included preserving and honoring the ways in which water had shaped New Mexico's past.¹¹ The case was overturned on a technicality, and no court since has ventured to offer an opinion on what "public welfare" means. If the courts are cautious, the State Engineer is as well. It is not a scientific question.

What it appears to be instead is an opening through which to think about water not in terms of science only, but in terms of policy and, thus, at least as some see it, in terms of morality and spirituality. The "public welfare" of the State, and the "conservation of water within the State" might be broader concerns than the narrowly economic and scientific

10. E.g., NMSA § 72-5-6 (1978).

11. *In Re Application of Sleeper*, 107 N.M. 494 (Ct. App. 1988).

benefits that seem to have been what was in the minds of the original writers of the Code. Considerations of conservation or public welfare might impel us, for example, to leave water in a stream unused so that New Mexicans can enjoy the beauties of a natural landscape. Or these words might include leaving water in a stream unused by humans so that endangered species of fish can survive. Such suggestions present a technical legal problem with respect to the original principles of the Water Code about whether those original principles can be stretched to accommodate what might be called the “beneficial non-use” of water. In addition, the broader conversation expands yet again, and also hugely, the number of interested parties in water disputes. Water has been recognized as central to the “public welfare” shape of our society. Thus, if the State Engineer is to make non-scientific policy decisions defining “conservation” and “public welfare” for the State of New Mexico, then people who care about all of the societal issues that might be part of those definitions – economic, historical, environmental, moral, and spiritual – must be heard in the making of those decisions.

3. The Practical Challenge of the Hugely Expanded Community

There has been one further vast expansion of interested parties to water disputes. Under the Endangered Species Act, federal law requires that animals and plants that are in danger of extinction must be protected.¹² There have been several cases in New Mexico in which environmentalists have fought to keep water flowing in a riverbed in order to protect the habitats of endangered fish and birds. Not only does this effort trigger the same technical legal questions about whether non-use of water can somehow be legal in New Mexico, it also, in effect, adds the entire non-human world to the community of interested parties in water disputes. Farmers and cities are competing against fish and birds and plants and animals for water too, and the claims of these creatures are not sentimentalities but are matter-of-factly represented in lawsuits. The addition of this whole new category of water claimants is easiest to appreciate in the context of the Endangered Species Act, but it is implicitly part of the conservation and public welfare questions too. Water is so fundamental and flows so ubiquitously that it connects not just every human who uses the water of a river, or who pumps the groundwater connected to a river, or who lives in a human community whose welfare depends on water decisions, but also the whole of creation.

In terms of the practical challenges that the last 100 years have posed to the principles of the 1907 Water Code, the increasing, now bewilderingly vast complications of all of this connectedness have shown

12. 16 U.S.C. § 1500 et seq. (2000)

up as a practical matter in adjudication lawsuits. The original idea, that every water right should be determined only in the presence of every other claimant to a water source, seemed logical, necessary, and fair. But the community of interested parties to water disputes has been shown to be so unwieldy and to embrace so many different types of interests that these lawsuits are bogged down and are now, in fact, the oldest lawsuits in the country. I was lead counsel for a while on a lawsuit that was filed the year I was born. Seventeen years after I left the case the lawsuit is still not done. The unique nature of water, flowing and connecting, seems to have defeated at least some of the simple forms we have tried to bring to it.

C. The Community in Conversation—Present Approaches

It is clear that we need new forms, this time including everybody. Because we are including everybody, however, the whole chaotic ocean of beliefs, opinions, thoughts, feelings, hopes, judgments, angers, affections, and wishes will be included in the conversation, all of varying degrees of clarity, consistency, and connection to evidence. At one extreme, for example, some propose to replace our practical Water Code with high abstract principles as the basis of water decisions. All the years of treating water rights as property only show, it is argued, that water is too precious and elusive to be successfully privatized and that an entirely new set of principles is needed that recognizes water as sacred, as part of the needs of the sacred earth. These voices are not yet strong within the legalistic clashes in which I work, but they make themselves felt. I am often surprised to find them hidden behind even the most hard-nosed of my fellow litigants. After fighting bitterly with someone about specific economic or political or other nitty-gritty aspects of a water quarrel, I will discover from an unguarded moment how deeply that person feels water to be connected to matters of ultimate meaning. Even the most secular-seeming people will show a theological underpinning for their positions sometimes. I once walked into the office of a state water official and found him fuming. He had spent the day arguing with an environmental group that wanted to shut down a dam because it would threaten an endangered species. "We have the right!" he said to me, angrily, then pulled open his desk drawer and took out a *King James Bible*. While I was busy being astonished that he kept such a thing there, he yanked it open to Genesis, found a place, and stabbed at it with his finger. "It says we have dominion over every living thing that moves upon the earth!" he told me.

As this example suggests, high theological principles can be offered at the same time—and from the same people, sometimes—as the other extreme. Perhaps wary of an effort to insert a notion of "sacredness" into our legal system, even some people who feel a sense of uniqueness or

reverence about water argue—in public—that the original scientific, commodity-oriented principles of the 1907 Water Code were entirely correct, and the only problem is that we have not been sufficiently stern-minded in applying them. Such a person might maintain that issues of conservation and public welfare and the environmental claims of endangered species can all be expressed and dealt with in scientific and economic terms. If there is a physical danger connected to losing biodiversity, that danger should be rationally addressed with government regulation supplemented by market forces. If people value holding water unused for aesthetic purposes, they should be willing to pay for it without getting into esoteric questions about moral and spiritual imperatives. These voices are fewer and fainter than their ancestors in 1907, but they are still very attractive in their assertion that, no matter how complicated and confused things might look, the best solution will be unsentimental and scientific. Sometimes, on some issues, they find such a solution, which is extremely valuable.

The third thing to be said about present approaches to the conversation has to do with a different organizing principle altogether. Perhaps, instead of either trying to agree on adopting new spiritual principles to govern water issues or, alternatively, insisting that they be rigorously excluded, we should make a fuller conversation more manageable in a highly practical way by having it at a local level rather than at a state level. The present New Mexico State Engineer in his recent regulations on water has encouraged this strategy. These regulations set out what must happen under present state law—in many ways unchanged since 1907—if water becomes so scarce that the government has to act. By setting out in detail those ugly and clumsy realities, the regulations demonstrate how much everyone should want to avoid them. The regulations then allow for the alternative of local groups sitting down to converse about how they can agree to manage their water, taking into account local circumstances including the spiritual and practical beliefs of the people involved. If those local groups can reach agreements and the State Engineer finds that the agreements will not hurt anybody else, he will enforce them.

The implied theology, so to speak, of this proposal for ordering decisions about water issues is that large principles and practical realities can be most effectively put together by members of a community working with each other in a human, local way in conversation. Because of this, we need to reorganize the conversation in such a way that it both includes the vast array of considerations and interested parties I have mentioned before and is also small enough to allow the human exchange and personal respect that makes agreement possible. I like this notion because, as a St. Johnnie, I believe very strongly in the power of genuine human conversation to move minds more effectively than either rarefied principle—even when right—or physical constraints—even when urgent. Water may be rightly

called sacred, as it is certainly essential to everything we are. Even so, to claim the sacredness of water as an abstract principle will not command agreement when it offends people's sense of what is their own. At the other end of the spectrum, the earth may be warming disastrously, creating practical water crises that threaten our survival. No matter how literally, provably true that is, that too will not command agreement when it offends people's sense of what is their own. Only in the course of conversation in community will people's sense of their own be expanded to include that community. That local achievement, repeated enough, may be very strong. We all need to talk about it.

III. WATER LAW AND THEOLOGY

This final suggestion about a new form for water law stands in an odd relationship to the arc of water law history in New Mexico. In 1907, against the backdrop of a formless chaos of local quarrels and lawsuits over water, New Mexico created form with a Water Code containing broad principles by which water should be governed. Now, having rung the changes of history over that law and having had it challenged by the unique physical nature of water, we return to a local approach with some differences based on what we now know. T.S. Eliot describes this kind of insight in its ultimate, theological language in one of his Four Quartets:

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.¹³

We are nowhere near the end of our historical exploring of water issues, of course, but we are, I think, at a moment in which the perceptiveness of Eliot's theological vision can be appreciated. We sought to create form out of chaos, found that the unique nature of water burst through that form, and now know for the first time some things that we did not know before about that original watery chaos. For example, we know from practical experience that, because it is the nature of water not only to be essential to all life but to flow and connect, the effects of a water decision will radiate ever more widely, like a rock dropped in a pool. This is true literally, as reflected in disputes between groundwater and surface water users, but also at a different level. That is, our historical experience was that, although in 1907 we set our sights as narrowly as we could on development and economic growth as our societal values, the unique nature of water

13. IV. *Little Gidding*, in T.S. ELIOT, *FOUR QUARTETS* (1943).

drowned those narrow goals and widened outward to include intangible issues of "public welfare" and then widened further to include questions about the value of all of the living creatures in creation. We know also, from practical experience, that this means that the full range of our experiences of water, from the highly spiritual to the crassly commercial, will be part of whatever new forms we create against the chaos of our present environmental crises. Perhaps we know — at least it seems likely — that this in turn means that we may not again achieve a broad, society-wide intellectual agreement on fundamental principles of the same kind that underlay the early water laws. Instead, people are now suggesting as a new way of organizing water decisions that we encourage the local approaches to water questions that in 1907 we thought chaotic. We have come back to the place where we began. One answer to this mild irony, though, is that we have retained at least one thing that we knew in 1907: Although the decisions about the values that will be put in place at a local level must be made by local people in human conversation, there must also be someone at the state level to ensure that all of these local agreements make sense with respect to each other. Individual voices really are chaotic, but the broad principles we chose in 1907, it turns out, got overtaken by the nature of water and are now faced with a looming chaos of a different kind. Both individual voices and broad principles are needed and need themselves to be put in conversation.

IV. CONCLUSION — HONORING OTHER ASPECTS

As I mentioned in the beginning, Mircea Eliade observes that, in most or all religious traditions, water is an essential metaphorical backdrop for the human experience of the emergence of a sense of order and meaning out of formlessness. Looking at water law history, I see that metaphor playing out in the constant flow among form, materiality, and community and law, practice, and politics. Principle is inadequate to deal with practical reality; physical reality is inadequate to accommodate the full range of possible meanings and values that water carries. The two need to be placed in conversation. I see in this the pattern of Trinitarian Doctrine, often symbolized by water.

The Trinitarian Doctrine is a useful pattern because it provides a picture of how spiritual and formal considerations arise from and flow back into physical and material considerations in one community. Not just law or social policy, but perhaps all creative work demonstrates this pattern. Idea, material, and the community of the two flow among each other and correct any excesses of each. This lecture, however, has been a formal affair, building a structure of dry analysis about a subject that resists dryness by nature. It needs to be balanced by words that are both practical and poetic.

I want to end by giving the materiality and beauty of water their due with something from James Joyce's *Ulysses*.

The exchange comes from a chapter near the end of the book when Leopold Bloom is making tea for Stephen Daedalus. The chapter is in the form of a catechism, and the questioner asks several questions about water. As Bloom fills the teakettle, the questioner asks of the water, "Does it flow?" In the answer, we learn, in a matter-of-fact way that appeals to my experience as a water lawyer, exactly how water gets to Bloom's tap, through what reservoirs and pipes and as a result of what engineer's decisions, water quarrels, and fights. Then, as Bloom takes the kettle across the kitchen to the range, the questioner asks, "What, in water, did Bloom, waterlover, drawer of water, watercarrier...admire?" Here is part of the response:

Its universality; its democratic equality and constancy to its nature in seeking its own level: its vastness in the ocean of Mercator's projection: its unplumbed profundity in the Sundam trench of the Pacific exceeding 8,000 fathoms: the restlessness of its waves and surface particles visiting in turn all points of its seaboard:...the variability of states of sea: its hydrostatic quiescence in calm: its hydrokinetic turgidity in neap and spring tides:...its sterility in the circumpolar ice-caps, arctic and antarctic: its climatic and commercial significance: its preponderance of 3 to 1 over the dry land of the globe: its indisputable hegemony extending in square leagues over all the region below the subequatorial tropic of Capricorn: the multiseccular stability of its primeval basin:...its capacity to dissolve and hold in solution all soluble substances including millions of tons of the most precious metals: its slow erosions of peninsulas and downwardtending promontories: its alluvial deposits:...its imperturbability in lagoons and highland tarns:...its violence in seaquakes, water spouts, artesian wells, eruptions, torrents, eddies, freshets, spates, groundswells, watersheds, waterpartings, geysers, cataracts, whirlpools, maelstroms, inundations, deluges, cloudbursts: its vast circumterrestrial ahorizontal curve:...the simplicity of its composition, two constituent parts of hydrogen with one constituent part of oxygen: its healing virtues: its buoyancy in the waters of the Dead Sea: its persevering penetrativeness in runnels, gullies, inadequate dams, leaks on shipboard: its properties of cleansing, quenching thirst and fire, nourishing vegetation: its infallibility as paradigm and paragon....¹⁴

14. Joyce, *Ulysses*, pp. 671-72.