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Walter R. Parr

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## Water Law—Legal Impediments to Transfers of Water Rights\*

In New Mexico, as in all Western States, the scarcity of water creates many problems. One such problem is the need for the ease of transferring a water right<sup>1</sup> from one use to a more productive use.<sup>2</sup> This Comment is not concerned so much with the economic aspects of the problem, but with the legal obstacles a person is likely to face when seeking to transfer a water right.<sup>3</sup>

Generally speaking, New Mexico has a broad statutory framework allowing transfers of water rights. Aside from the scarcity of water, the statutes contemplate no serious obstacle to the transfer of a water right.

Section 75-5-21 of the New Mexico statutes<sup>4</sup> permits, as a matter of right, the assignment of any permit or license to appropriate water. To be binding, however, the assignment of the water right must be filed in the office of the State Engineer. The State Engineer requires that the filing be made out in duplicate on a change of ownership form, or a certified copy of the assignment and a one dollar filing fee.<sup>5</sup>

Section 75-5-22 of the New Mexico statutes<sup>6</sup> provides that water used for irrigation is appurtenant to the land which it irrigates. Sensibly, however, the statutes make no provision for appurtenance to land for water not used for irrigation of lands. This section allows the transfer of the use of the water to other lands without losing the priority of the water right. It does not provide, however, that the transfer can be made without detriment to existing rights. The State Engineer makes this determination. Before the State Engineer will

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\* Mathers v. Texaco, Inc., 421 P.2d 771 (N.M. 1966).

1. For purposes of this Comment a transfer of a water right means either the sale or assignment of a water right, the change of place of use, the change of purpose of use, or change of point diversion.

2. N. Wollman, *The Value of Water in Alternative Uses* (1962).

3. See Trelease & Lee, *Priority and Progress—Case Studies in Transfer of Water Rights*, 1 Land and Water L. Rev. 1 (1966), in which the authors examine the Wyoming rule limiting transfers and changes of water to new users and uses, and the many exceptions that have resulted from pressure for certain types of changes.

4. N.M. Stat. Ann. § 75-5-21 (1953).

5. State Engineer, *Manual of Rules and Regulations Governing the Appropriation and Use of Surface Waters of the State of New Mexico* 17 (1953).

6. N.M. Stat. Ann. § 75-5-22 (1953).

act upon an application to change a place of use, he requires that filing maps and any necessary plans and specifications accompany the application.<sup>7</sup> Further, before approval can be given for the transfer, the applicant must give notice by publication.

Section 75-5-23 of the New Mexico statutes<sup>8</sup> permits an appropriator, with the approval of the State Engineer, to change the purpose of use, or change the point of diversion of his water right. As above, the State Engineer, subject to his rules, will approve the application for transfer provided it does not impair existing rights.<sup>9</sup> Section 75-14-60 of the New Mexico statutes<sup>10</sup> creates an exception to this section by allowing an appropriator within a community ditch in operation prior to March 19, 1907, to change his point of diversion without a permit from the State Engineer.

Similarly, under the groundwater code, section 75-11-7 of the New Mexico statutes,<sup>11</sup> a well-owner may change the location of his well or change the use of water, upon the approval of the State Engineer, if the changes will not impair existing rights.

Existing with this broad statutory permissiveness are at least two legal obstacles to the ease of transferring a water right in New Mexico. These obstacles are: (1) the possibility of a judicial finding that the State Engineer's order granting a transfer was the adjudication of private water rights, therefore invalid, and (2) the refusal of the Middle Rio Grande Conservancy District to allow the transfer of water rights from within the District to outside the District.

Stated simply, the New Mexico Supreme Court has consistently held that the State Engineer cannot adjudicate a water right.<sup>12</sup> However, the significance of the criticism of a judicial finding that a State Engineer order is an adjudication of water rights lies in the possibility of it happening rather than the probability of it happening. Its infrequent occurrence, in addition to causing an obstacle to free transferability of water rights, causes unequal treatment under the statutes.<sup>13</sup>

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7. State Engineer, *supra* note 5, at 16.

8. N.M. Stat. Ann. § 75-5-23 (1953).

9. State Engineer, *supra* note 5, at 16.

10. N.M. Stat. Ann. § 75-14-60 (1953).

11. N.M. Stat. Ann. § 75-11-7 (1953).

12. *Public Service Co. v. Reynolds*, 68 N.M. 54, 358 P.2d 621 (1960); *Reynolds v. Wiggins*, 74 N.M. 670, 397 P.2d 469 (1964); *c.f. Durand v. Reynolds*, 75 N.M. 497, 406 P.2d 817 (1965).

13. See note 19 *infra*, and accompanying text.

The mechanics of the system of the State Engineer approving the transfer applications indicate that such a finding of adjudication is an inaccurate label. It is impossible to determine the effects of a proposed transfer unless the State Engineer knows the extent of the water right.<sup>14</sup> It is, therefore, necessary for the State Engineer to administratively find the extent of the right that is the subject of the proposed transfer. Further, as stated by Professor Clark:

While there can be no question about the actual and final adjudicatory function being one for the courts, it is also clear that the State Engineer is charged with making the *initial and factual determinations* upon which, in large part, any adjudication will rest.<sup>15</sup>

An illustration is helpful to appreciate the extent to which the State Engineer makes such determinations. In an application for a supplemental well to a surface water right, the State Engineer made the necessary determinations to protect existing rights.<sup>16</sup> The surface filing map indicated that 208 acres were irrigated. All available water supply data indicated that, historically, the irrigating ditch delivered essentially a full supply of water to the acreage. Nevertheless, the application for the supplemental well was approved upon the condition that appropriation of water from all sources combined would not exceed the average historical water supply.

Professor Clark further states that as a practical matter water rights are being decided by the State Engineer every day.<sup>17</sup> Ordinarily, unless there is a protest hearing and unless there is an appeal from that protest hearing, the issue of the State Engineer adjudicating a water right is never reached.<sup>18</sup>

Here is the appropriate point to reinterject the criticism of un-

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14. Interview with M. B. Compton, Chief, Surface Water Rights Division, State Engineer's Office.

15. Clark, *New Mexico Water Law Since 1955*, 2 Natural Resources Journal 484, 540-41 (1962). (Emphasis in original). Professor Clark maintains that the significance of a judicial adjudication is the fixing of priorities of water rights. The question of priorities is only raised in time of short supply.

16. File Nos. R.G. 10344, 01793, State Engineer's Office, Santa Fe, New Mexico.

17. Clark, *supra* note 15, at 541-42.

18. Section 75-5-5 of the New Mexico statutes assumes a hearing and the State Engineer in his manual of Rules and Regulations specifically provides for a protest hearing. The State Engineer provides:

Any person, firm, association, corporation, the State of New Mexico or the United States, deeming that the granting of a proposed application would be truly detrimental to its prior valid and existing rights in the waters of said

equal application of the laws. In the Pecos Valley, the Carlsbad Irrigation District has a standing policy to protest every proposed transfer.<sup>19</sup> In the Rio Grande Valley, however, there is no such opponent to protest every transfer.<sup>20</sup> As a consequence, there are far more possibilities for the State Engineer orders to be found an adjudication of water rights in appeals from applications in the Pecos Valley than in the Rio Grande Valley. The State Engineer has more latitude in acting upon transfer applications in the Rio Grande Valley.

In addition to the mechanical reasons, there are several court made inroads to lessen the probability of a judicial finding that the State Engineer adjudicated a water right. The district court has a limited scope of judicial review of the State Engineer's decision. In *Kelly v. Carlsbad Irrigation District*,<sup>21</sup> the New Mexico Supreme Court established the district court's scope of review of the State Engineer's decisions. The scope is to determine whether the State Engineer: (1) acted arbitrarily, fraudulently, or capriciously; (2) based his decision on substantial evidence; (3) acted within the scope of his authority; and (4) made any error of law. In other words, the factual findings of the State Engineer are not reviewed by the court, adding considerably to his functions. Further, the New Mexico Supreme Court has been more reluctant to find that the State Engineer was adjudicating water rights in recent decisions.

The recent case of *Mathers v. Texaco, Inc.*,<sup>22</sup> illustrates the extent of the court's reluctance. Texaco filed applications with the State Engineer to appropriate water from the Lea County underground basin, which is essentially a non-rechargeable basin. The State Engineer concluded that water was available for appropriation and granted a permit. The State Engineer made the determination in the following manner:

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stream system, may protest in writing the State Engineer's approval of such application.

State Engineer, Manual of Rules and Regulations Governing the Appropriation and Use of the Surface Water of the State of New Mexico 9 (1953). Although the rules provide for an appeal to the district court from the State Engineer's decision, appeals have ordinarily only been taken from protest hearings. *Id.* at 10.

19. Interview M. B. Compton, Chief, Surface Water Rights Division, State Engineer's Office.

20. *Id.*

21. 76 N.M. 466, 415 P.2d 849. See Comment, 6 Natural Resources J. 325, 331, n.38 (1966) for a description of the circuitous route of *Kelly v. Carlsbad Irrigation District*.

22. 421 P.2d 771 (N.M. 1966).

In 1952 the State Engineer made a determination of the amount of water in each township in the basin, the amount of water that had been appropriated in each township, and the amount of water that would be drawn from the stock or supply in each township into the surrounding townships, when the waters in the surrounding townships were fully appropriated.

In determining what constitutes full appropriation in each township, and thus in the basin as a whole, he calculated the amount of water that could be withdrawn from each township and still leave one-third of the water in storage at the end of forty years. At that time it was contemplated that some of the remaining water could be economically withdrawn for domestic, and perhaps some other uses, but that it would no longer be economically feasible to withdraw the water for agricultural and most other purposes.<sup>23</sup>

The court affirmed the decision of the State Engineer saying in part that the mere fact that the State Engineer had determined and fixed a time estimated as the economic life of the basin did not take away the powers of the State Engineer to administrate the basin.<sup>24</sup> In other words, the State Engineer was not exceeding his statutory powers by adjudicating a water right, even though his action affected the life of water rights of the entire Lea County underground water basin.

The possibility of the New Mexico Supreme Court ruling that the State Engineer's decision was the adjudication of water rights can be demonstrated by contrasting *Public Service Co. v. Reynolds*<sup>25</sup> with *City of Albuquerque v. Reynolds*.<sup>26</sup> Although the difference between the two cases might easily be explained by the fact that *City of Albuquerque* is a later case, other attempts at reconciliation seem fruitless.

*Public Service Co.*<sup>27</sup> involved an application to change a point of diversion of surface water by drilling a well within the declared boundaries of the Rio Grande Underground Water Basin. The State Engineer approved the application, provided that the maximum water appropriated in any year under all listed claims of right of Public Service Co. did not exceed 5,040 acre feet. Conditioned on this limitation, the state proposed that the change would not impair

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23. *Id.* at 774.

24. *Id.* at 775.

25. 68 N.M. 54, 358 P.2d 621 (1960).

26. 71 N.M. 428, 379 P.2d 73 (1963).

27. 68 N.M. 54, 358 P.2d 621 (1960).

existing rights. The district court affirmed the decision of the State Engineer. The New Mexico Supreme Court reversed, insofar as the decision affected Public Service Company water rights. The court said:

It appears to us that in holding that the total amount of water appropriated in any year under all of appellant's [Public Service Company] claims of right shall not exceed 5,040 acre feet, that appellee [State Engineer] did, in effect, adjudicate, or attempt to adjudicate, appellant's claimed water rights under [the well permits]. . . .<sup>28</sup>

In *City of Albuquerque v. Reynolds*,<sup>29</sup> the city applied to the State Engineer for permits to appropriate underground waters from the Rio Grande Underground Water Basin. The state found that underground waters from the Rio Grande underground reservoir constituted a major source of the fully appropriated surface water supply of the Rio Grande. These considerations also showed that over a seventy-five year period about one-half would be taken from underground storage. Much of the water in storage in the Rio Grande underground reservoir is unappropriated and may be taken for beneficial use under an application properly formed to insure against impairment of existing surface rights. The State Engineer found that the permits could be granted without danger of any impairment of existing rights under the following conditions: (1) that the amount of water pumped be measured; (2) that the amount of return flow be measured; and (3) that existing rights to the consumptive use of surface water be retired to the extent necessary to offset the effect of appropriation on the Rio Grande. The New Mexico Supreme Court held, among other things, that the State Engineer can impose suitable conditions so as to permit the taking of unappropriated waters from the Rio Grande underwater basin as would not result in impairment of rights of river appropriations.<sup>30</sup>

Although in *Public Service Co.* the application was for a change in point of diversion, and in *City of Albuquerque* the application was for appropriation, the difference has no analytical significance, because in both cases the State Engineer was charged with protecting existing rights.<sup>31</sup> In *Public Service Co.* the court said the State En-

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28. 68 N.M. at 60, 358 P.2d at 626.

29. 71 N.M. 428, 379 P.2d 73 (1963).

30. 71 N.M. at 439, 379 P.2d at 81.

31. N.M. Stat. Ann. § 75-5-1, -23 (1953) require the protection of valid existing rights.

gineer could not condition the granting of an application by limiting the amount of water appropriated in one year. In *City of Albuquerque*, however, the court said that the State Engineer could condition the application even to the extent of retiring existing rights. The point is that in both cases the State Engineer was in fact passing on water rights and that the result reached in *Public Service Co.* could be reasonably reached in any similar situation.

The proper role of judicial power in transfer cases is reviewing the decision of the State Engineer. More stability in the water right market and better law would result if the judiciary would recognize that the State Engineer exercises adjudicatory functions which are subject to the review of the judicial power of the courts.<sup>32</sup>

The second major legal obstacle to the transferability of water rights, in the Rio Grande Valley at least, has been the refusal of the Middle Rio Grande Conservancy District to permit transfers of water rights from within the District to points outside the District.<sup>33</sup> This obstacle presents two aspects: those persons who have derived their rights through the organization of the District and those persons who have valid rights which predate (1907) the organization of the District.

Those persons who have derived their water rights through the organization of the District are absolutely barred from making such a transfer.<sup>34</sup>

Those persons who have valid rights which predate the organization of the District are permitted to transfer with or without the concurrence of the District. The approval of such a transfer by the State Engineer would be conditioned so that use from the new point of diversion would be terminated if any person applied water to lands from which the rights had been severed.<sup>35</sup>

The board of directors of the District takes the position that it will neither approve nor disapprove such transfers.<sup>36</sup> The board of directors contends that the transfers are in violation of the laws of the District because the drying up of the lands would impair the District's ability to meet its financial obligation to the Secretary of

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32. Utton, Report to Legislature, Constitutional Revision Committee 22 (1966).

33. Steve E. Reynolds, State Engineer, Statement of Policy, August 24, 1959. There is, however, no problem with transfers of water rights within the district boundary.

34. *Id.*

35. *Id.*

36. Letter from Oscar M. Love, President Board of Directors of Middle Rio Grande Conservancy District, to Dean Fite, head of Albuquerque District, State Engineer's Office, September 14, 1961.

the Interior.<sup>37</sup> Furthermore, the board of directors contends that the State Engineer's has no jurisdiction over the water within the benefited area of the Middle Rio Grande Conservancy District, and any purported transfer of water rights or the use of water outside the District is void.<sup>38</sup>

Prior to 1959, the State Engineer conditioned the approval of applications for such transfers upon the board of directors' approval of the proposed change.<sup>39</sup> Beginning in 1959, in view of the continued refusal of the District directors to approve such transfers, the State Engineer no longer conditioned his approval of the transfers on the consent of the District directors.<sup>40</sup> The primary reason for the State Engineer is change of policy was that the District's refusal to allow these transfers created a large block of water rights which were unavailable at any price, creating an artificial scarcity for the water rights in the Middle Rio Grande area. New enterprises seeking water in the Albuquerque area outside the District boundaries are forced to pay inflated prices. Further, since a restrictive policy on the part of the District director would tend to keep new ground water appropriations within the District, withdrawals from the groundwater would be poorly distributed and severely limit the usefulness of the groundwater reservoir.<sup>41</sup>

The State Engineer discounts the District's primary reason for refusing these transfers, that is, that such transfers diminish the ability of the District to meet its financial obligations.<sup>42</sup> First, the drying of land will develop slowly. Moreover, development on this dried-up land will tend to be urban and industrial. The ad valorem tax on urban and industrial land will produce greater revenue than that on irrigated land.

While the State Engineer's argument has considerable force, the position of the Middle Rio Grande Conservancy District is not without merit. Although the State Engineer's speculation about the type and rate of development might be valid for the Albuquerque area, it is by no means certain that the same will be true near Socorro. Land taken out of irrigation in the Socorro area may become waste land, and consequently, its ability to pay taxes to the District taken away.

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37. *Id.*

38. *Id.*

39. Steve E. Reynolds, *supra* note 33.

40. *Id.*

41. *Id.*

42. *Id.*

It is apparent that the relative position of the two state agencies does little to facilitate the ease of transfer of water rights in the Rio Grande basin. It is also apparent that without legislative intervention the situation will remain at a stalemate. The legislature should consider both aspects of the problem—that is, develop a solution that will allow transfers of rights that have originated both prior to and after the formation of the District. One such solution would be to allow the tax liability of the water right within the District to follow the water right to the new place of use outside the District.<sup>43</sup> In other words, when the water right is transferred outside the District, allow the District to tax the new place of use.

While this suggestion solves many problems involved with a transfer of a water right located within the District, there are conceptual difficulties with the jurisdiction of the District to tax lands outside the District. The suggestion alleviates the problem of the District meeting its financial obligation to the Secretary of the Interior because the transferee of the water right assumes the tax obligation that the water right had within the District.

The solution, however, runs into the question of jurisdiction. Jurisdiction over groundwater, even within the conservancy district, has been with the State Engineer<sup>44</sup> although a logical argument could be made, that the groundwater of Rio Grande base flow should be under the jurisdiction of the conservancy district, since the base flow of the river directly relates to the surface flow. A sensible solution, however, while allowing the District to tax at the new place of use, would still require the State Engineer to approve the transfer, since he alone is charged with protecting the existing valid rights in the stream system, and since he has the personnel capable of making such a determination.

In conclusion, although there are serious obstacles to water right transfers in New Mexico, these obstacles can be removed with relative ease. Regarding the possibility of the district court finding the State Engineer's decision an adjudication of a water right, a candid recognition of the proper function of each branch, executive and judiciary, solves the problem. As to the second obstacle, legislative intervention can solve the problem.

WALTER R. PARR†

43. This is not an unreasonable tax liability, since the groundwater reservoir directly benefits from the Middle Rio Grande Conservancy District's conservation efforts conducted on the surface of the Rio Grande. See *infra* note 44 and accompanying text.

44. N.M. Stat. Ann. § 75-2-1 (1953).

† Member, Board of Editors, *Natural Resources Journal*, 1966-1967.