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Water Rights—Failure to Use—Forfeiture

Walter R. Parr

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WATER RIGHTS—FAILURE TO USE—FORFEITURE*—In an arid state like New Mexico, the shortage of water requires maximum use of all water available. Maximum use of water is thought to be promoted by imposing forfeiture of water rights when the water is not used beneficially, thus making it available to a party who will use this critical resource. In the past, New Mexico statutes have provided that non-use extending through four consecutive years will result in forfeiture of water rights.¹ The 1965 session of the New Mexico legislature has materially relaxed the forfeiture provisions of water right statutes. The 1965 amendments provide that the water right will not be forfeited unless the state engineer first gives notice of non-use to the owner of the water right, and that after notice the owner fails to beneficially use the water for one year.²

Other ways for a non-user to avoid forfeiture had been provided

* N.M. Stat. Ann. §§ 75-5-26, -11-8 (Supp. 1965).

1. New Mexico has two water rights forfeiture statutes. N.M. Stat. Ann. § 75-5-26 (Supp. 1965) is the surface water forfeiture statute. N.M. Stat. Ann. § 75-11-8 (Supp. 1965) is the ground water forfeiture statute. Both statutes contain essentially the same provisions. *E.g.*, N.M. Stat. Ann. § 75-5-26 (Supp. 1965):

A. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of non-user given by the state engineer, revert to the public and shall be regarded as unappropriated public water; provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused non-use, such that the water could not be placed to beneficial use by diligent efforts of the owner; and Provided that periods of non-use, when irrigated farm lands are placed under the acreage reserve program or conservation program provided by the Soil Bank Act shall not be computed as part of the four-year forfeiture period. Provided further that the condition of notice and declaration of non-user shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965.

B. Upon application to the state engineer at any time and a proper showing of reasonable cause for delay or for non-use, or upon the state engineer finding that it is in the public interest, the state engineer may grant extensions of time, not to exceed a term of one year for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a water right has vested, was appropriated or has been adjudicated.

C. Periods of non-use when water rights are acquired by incorporated municipalities for implementation of their water development plans or for preservation of municipal water supplies shall not be computed as part of the four-year forfeiture statute.

D. A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the four-year period for the period of the exemption, and the period of exemption shall not be included in computing the four-year period.

2. N.M. Stat. Ann. §§ 75-5-26(a), -11-8(a) (Supp. 1965).

by earlier amendments.³ One exemption from forfeiture involves conditions beyond the control of the owner that prevent use of the water right.⁴ Also, lands placed under the acreage reserve program or conservation program of the Soil Bank Act⁵ are excepted from the forfeiture statute.⁶ The forfeiture statute allows the state engineer to grant extensions of time to prevent forfeiture upon a showing of reasonable cause, or in those cases in which forfeiture would not serve the public interest.⁷

The amendment requiring the state engineer to give one-year notice to the non-user thus gives the non-user another year to resume the beneficial use of the water and materially moderates the effect of the forfeiture statute.⁸ Consequently, the water right owner can

3. The amendment trend has been toward moderating application of the forfeiture statute. Compare the present statute, set forth in note 1 *supra*, with the first surface water forfeiture statute:

When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except the water for storage reservoirs, for a period of four years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

N.M. Laws 1907, ch. 49, §42. The first ground water forfeiture statute, N.M. Laws 1931, ch. 131, § 8, was articulated in essentially the same manner. See Clark, *New Mexico Water Law Since 1955*, 2 *Natural Resources J.* 484, 493-94, 504 (1962).

4. N.M. Stat. Ann. § 75-5-26 (Supp. 1965). The amendment to the surface water statute allowing this exemption was added by N.M. Laws 1941, ch. 126, § 16. Curiously, the ground water statute makes no such provision. In *Chavez v. Gutierrez*, 54 N.M. 76, 82, 213 P.2d 597, 600 (1950), the supreme court, in applying the surface water forfeiture statute, said: "Our statutes recognize the unfairness in loss of a water right through non-use where conditions beyond the control of the owner of such right prevent [its] use."

5. 70 Stat. 188 (1956), 7 U.S.C. §§ 1801 to 1837 (1964).

6. N.M. Stat. Ann. §§ 75-5-26, -11-8 (Supp. 1965). The exception of the Soil Bank Act lands was added to the surface water statute by N.M. Laws 1957, ch. 91, § 1, and was added to the groundwater statute by N.M. Laws 1961, ch. 32, § 1.

7. N.M. Stat. Ann. §§ 75-5-26, -11-8 (Supp. 1965). The amendment allowing the state engineer to grant extensions of time on a showing of good cause was added to the surface water statute by N.M. Laws 1965, ch. 250, § 1, and was added to the ground water statute by N.M. Laws 1959, ch. 7, § 1.

8. The language of the forfeiture statute permits the interpretation that the statute is self-executing. The statute provides that the unused water shall revert to the public after four years of non-use and when such non-use persists one year after notice by the state engineer to the non-user. In other words, as soon as the conditions to forfeiture are met, the water by operation of law reverts to the public. However, until the courts declare a forfeiture, the loss of the water right is not a final determination. Prior to the "notice amendment," the courts could declare a forfeiture on the running of the four consecutive years non-use. The "notice amendment" requires, in addition to four consecutive years of non-use, that the non-use persist for one year after notice by the state engineer. When the notice year had passed, the courts could then declare a forfeiture.

The forfeiture statute might be construed to give the state engineer authority

refrain from using water indefinitely. His water right cannot be forfeited until notice is given, and after notice he has a full year to resume beneficial use of the water. Unless the water right owner chooses to ignore the notice, forfeiture could never occur.

Several problems of statutory interpretation are created by the amendment. It is uncertain when the state engineer can give effective notice of non-use.⁹ If the state engineer must wait to give notice until the end of the fourth year of non-use, the legislature has created a five-year limitation before forfeiture can occur. A better construction of the notice amendment is that notice and declaration of non-use could be given by the state engineer at the end of the third year of non-use.¹⁰ This construction would preserve the essential purpose of the statute, that forfeiture will result from a failure to use water for four consecutive years.¹¹

A third uncertainty created by the amendment arises when, after four years of non-use, the non-user beneficially uses water during the year he receives notice from the state engineer to avoid forfeiture, but at some future time ceases to make beneficial use of the

to adjudicate a forfeiture by administrative action. However, the state engineer has indicated to the legislature that he lacks that authority because it would be an unconstitutional delegation of judicial powers. In practice, as a result of hydrologic surveys, the state engineer submits evidence to the court in an action to declare forfeiture. This evidence may show that certain rights have been forfeited, and the court considers the state engineer's evidence with all other evidence to determine whether the right has been forfeited. If the state engineer, acting on an application to change the point of diversion or place or purpose of use of a water right, has discovered forfeiture of that water right from the record, and the granting of the permit to change the water would impair existing rights, he will seek a declaratory judgment on the question of forfeiture. N.M. State Engineer Memorandum on House Bill 144, Feb. 1, 1965; N.M. State Engineer Memorandum on House Judiciary Comm. Substitute for House Bill 144, March 1, 1965. These memoranda, presented to the New Mexico legislature, relate to proposed acts of the legislature pertaining to reinstatement of reverted water rights in certain circumstances. See note 14 *infra* and accompanying text.

A question arises if the state engineer does not seek a declaratory judgment in this situation. What is the validity of the state engineer's distinction between finding facts conclusive of forfeiture rather than adjudicating forfeiture? Because the state engineer's findings of fact are binding on the district court, the distinction of finding facts conclusive of forfeiture is not very useful. See N.M. Stat. Ann. § 75-6-1 (1953), interpreted in *Kelly v. Carlsbad Irr. Dist.*, 71 N.M. 464, 467, 379 P.2d 763, 764 (1963).

A noted author on New Mexico water law suggests that "there should be statutory recognition of the State Engineer's power to make initial determination of rights as the first step in the adjudicatory process." Clark, *supra* note 3, at 559. See also Clark, New Mexico Water Resources Law 87 (Study No. 67, Div. of Gov't Research, Univ. of N.M. 1964).

9. N.M. State Engineer Memorandum on House Judiciary Comm. Substitute for House Bill 144, March 1, 1965.

10. Giving notice after the third year of non-use may not be the most desirable procedure. See note 12 *infra* and accompanying text.

11. N.M. Stat. Ann. §§ 75-5-26, -11-8 (Supp. 1965).

water.¹² Should the four-year period start anew after the owner has once used the water to escape forfeiture? Or should forfeiture result from any subsequent failure to use the water? The intent of the legislature is defeated by permitting the water right owner to use water only once in every five years. Conversely, allowing any subsequent non-use to cause forfeiture would be extremely harsh. A solution to this problem would be to consider subsequent non-use sufficient to cause forfeiture unless the water right owner can show that he had not re-used the water temporarily simply to avoid forfeiture, rather than for a bona fide beneficial use. Placing the burden of proof on the water right owner is preferable to placing it on the state. Intent is difficult to prove, and the water right owner is the one most likely to possess evidence supporting his reasons for resuming beneficial use during the "notice" year and subsequently ceasing beneficial use. Moreover, placing the burden on the water right owner emphasizes the legislative policy disfavoring the non-use of a critical resource.

Although the New Mexico statutory provisions for forfeiture have been relaxed, perhaps the result is not a serious burden on the state's water policy. Two reasons prompt this suggestion: (1) the statute is probably not retroactive, and (2) owners of water rights are increasingly conscious of the value of these rights.

A literal interpretation of the statute lends support to its non-retroactive application. The forfeiture statute seems to be self-executing¹³—the water right reverts to the public by operation of law when the conditions to forfeiture are met. The statute explicitly relieves the state engineer of the duty to give one-year notice to non-users whose water rights have so reverted prior to June 1, 1965. One may conclude, therefore, that when four consecutive years of non-use have occurred prior to June 1, 1965, the state engineer would not have to give notice as a condition to forfeiture.

The significance of a non-retroactive application is illustrated when the state engineer, seeking a determination of water rights in a basin, claims that the water right owner has forfeited his right

12. For this problem to arise, four consecutive years of non-use must have passed prior to resuming beneficial use during the fifth ("notice") year and a later non-use. If the state engineer gives notice to the non-user after the third year and the non-user uses water beneficially during the notice year, a subsequent failure to use water would not cause forfeiture because there would not then be four *consecutive* years of non-use. On the other hand, if notice were given after four years of consecutive non-use and the non-user used water beneficially in the notice year to avoid forfeiture, a subsequent failure to use water would cause forfeiture.

13. See note 8 *supra*.

through non-use in some four-year period prior to June 1, 1965. For example, in *State ex rel. Reynolds v. Mitchell*,¹⁴ the water right owner, without following the statutory procedure, had discontinued irrigating from an authorized well and irrigated from an unauthorized new well for four consecutive years. The supreme court held that the unauthorized change in well location and the subsequent irrigation from the new well for four consecutive years resulted in a legal forfeiture. If the notice amendment to the forfeiture statute were retroactive, the state engineer could be required to give the one-year notice in cases like *Mitchell*, even though the water right had reverted to the public by four consecutive years of non-use occurring before June 1, 1965.

Forfeiture by non-use will occur less frequently as water right owners recognize the market value of their water right.¹⁵ Reducing non-use of water rights depends to a large degree on whether an owner can sell his water right for fair price. If a water appropriator is not in a position to use his water right, and cannot sell it, does the state water policy justify declaring forfeiture? To answer this question, the concept of forfeiture must be analyzed by balancing the objectives of the state's water policy against the effects of forfeiture in different fact situations.

New Mexico water policy is set forth by the state constitution, which provides that unappropriated water belongs to the public and will be subject to appropriation for beneficial use.¹⁶ "Beneficial use is the basis, the measure and the limit of the right to the use of water."¹⁷ Therefore, New Mexico¹⁸ and other states¹⁹ have adopted the policy of forfeiting water rights for the failure to use water beneficially. The purpose of a water law has been defined as follows:

Water law should provide for maximum benefits from the use of the resource, and this end should be reached by means of granting private property rights in water, secure enough to encourage development and flexible enough for economic forces to change them to better

14. 66 N.M. 212, 345 P.2d 744 (1959). See also *Durand v. Reynolds*, 406 P.2d 817 (N.M. 1965).

15. Letter From S. E. Reynolds, New Mexico State Engineer, to Walter R. Parr, Oct. 5, 1965.

16. N.M. Const. art 16, §§ 1, 2.

17. N.M. Const. art 16, § 3.

18. See 2 Kinney, *Irrigation and Water Rights* § 1118 (2d ed. 1912); Clark, *New Mexico Water Resources Law*, *op. cit. supra* note 8, at 1-10.

19. *E.g.*, Cal. Water Code § 1241; Ariz. Rev. Stat. Ann. § 45-101 (1956); Ore. Rev. Stat. § 540.610 (Supp. 1964).

uses, and subject to public regulation only when private economic action does not protect the public interest.²⁰

The purpose of the forfeiture statute is to provide for maximum use of available water.²¹

To determine how it achieves the objectives of maximum use, forfeiture must be analyzed in terms of the extent to which the basin is appropriated and the efficiency of the market for water rights. An efficient market for water rights is one in which there are buyers offering prices which sellers are willing to accept. Conversely, an inefficient water rights market is one in which buyers are not offering prices which the seller is willing to accept. First, consider the effect of forfeiture in an under-appropriated basin with an inefficient water right market.²² An under-appropriated basin has more water available for use than is presently appropriated. If all existing appropriators are using their water rights, additional appropriations may be made without fear of over-appropriating the basin. If, however, some appropriators are not beneficially using their water, there is a danger of allowing more appropriators in the basin than there is water to meet these appropriations. For example, *X* has a valid water right in an under-appropriated basin but is not using the water, and *Y* applies for and obtains a water right. Under existing water supplies the appropriation to *Y*, with *X* not using his share, brings the basin to almost full capacity. If *X* begins to take his share after the appropriation to *Y*, the basin would be over-appropriated, and the most junior users would have their headgates closed.²³ Forfeiture of *X*'s paper water right prevents over-appropriation of the basin and favors the interest of the new appropriator who relied on the availability of water to meet his appropriation.²⁴

A second consideration is the effect of forfeiture in a fully appropriated basin with an inefficient water right market. When a non-

20. Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 *Natural Resources J.* 1, 2 (1965).

21. 2 Kinney, *op. cit. supra* note 18, at § 1118.

22. See Note, *Forfeiture of Water Rights in Wyoming*, 14 *Wyo. L.J.* 51 (1959). The author of the note argues that the Wyoming forfeiture statute should be strengthened because the present interpretation has resulted in non-use of approximately one-third of the existing rights. The present Wyoming interpretation is that forfeiture can only be initiated by a junior appropriator who can show clearly that he will get the water forfeited.

23. In unadjudicated basins in New Mexico, *every* user would suffer a proportionate reduction in his appropriation because the state engineer cannot enforce priorities until water rights in the basin are authoritatively determined.

24. See *Young & Norton v. Hinderlider*, 15 N.M. 666, 110 Pac. 1045 (1910).

use occurs, the water to which the non-user is legally entitled flows in small increments to other appropriators on the stream who may or may not make the most beneficial use of the additional water. Because the basin is purportedly fully appropriated, any new application for water rights would be denied.²⁵ For example, *X* has water rights in the basin for 150 acres and has failed to use the water for the statutory four-year period. The water he should have been using is flowing in small increments to 300 other farms, some of which will use the water more efficiently than others. Rather than allow this additional water to flow to some inefficient use, the policy of maximum use requires that it be given to a new appropriator who will use the water more beneficially. Forfeiture then prevents the inefficient use of the additional water.

A third consideration is the effect of forfeiture in an over-appropriated basin with an inefficient water right market.²⁶ That is, a basin in which there are more appropriators than there is water, and the prospect of the non-user reviving his right threatens the security of the water supply to the junior appropriators in the basin with existing uses. A declaration of forfeiture makes the right more secure because it prevents the reactivation of the paper water right.²⁷

A final consideration is the effect of forfeiture when the water right market is efficient. If a water right market is efficient, the degree of appropriation of the basin, the amount of water in the appropriation, and the priority of the appropriation are reflected in the price of the water right. For example, *X* has an adjudicated water right with a 1934 priority which gives him two acre-feet for 150 acres. If *X* is trying to sell his water right and forfeiture occurs while he is waiting for the market to ripen, the valuable water right is destroyed and the water is made available at virtually no cost to other appropriators. Forfeiture also deprives *X* of the sale price of his water right, and the would-be buyer of *X*'s water right is deprived of the 1934 priority. But if no forfeiture occurs, the water right would go to the most beneficial user because he would pay the

25. N.M. Stat. Ann. § 75-5-6 (1953). Section 75-5-6 requires the state engineer to reject an application to appropriate water if there is no unappropriated water available for the benefit of the applicant. The statute also provides that the state engineer may refuse to consider or approve an application if in his opinion the approval would be contrary to the public interest.

26. See Bagley, *Some Economic Considerations in Water Use Policy*, 5 Kan. L. Rev. 499, 515 (1957): "[F]orfeiture procedures may result in actually encouraging water users to actually exercise their rights to the fullest whether they need it or not, in order to protect this right."

27. Trelease, *supra* note 20, at 47.

highest price. The argument against forfeiture in this situation can be expressed as follows:

From the standpoint of economic logic there appears to be little reason for stipulating that non-use of a water right may be the basis for losing the right. To assert that water is scarce and valuable and that therefore it should be used is no real reason for taking away a water right for non-use. The solution is economic, not legislative or judicial. If water is scarce and if the right is clearly defined, the water right will have a money value so that the owner of the right should have the opportunity to sell his right or water to other users.²⁸

Forfeiture accomplishes its objective of maximum use in an inefficient water right market. However, in an efficient water right market it is an economic solution that obtains the maximum use of the available water²⁹—the non-user owner will have the opportunity to sell his right, rather than suffer needless forfeiture. In New Mexico the water rights system has not had an opportunity to operate in a climate of fully adjudicated water rights. Without adjudication of water rights, an economic solution to the problem is complicated: The water right is not defined clearly enough for the seller to know what he is selling, nor can the buyer know the exact nature of the right he is buying. Until private economic decisions can operate with certainty, New Mexico's water policy is best served by an effective forfeiture statute.

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28. Milliman, *Water Law and Private Decision Making*, 2 J. Law & Econ. 41, 49 (1959).

29. An economic solution to non-use provides more than maximum use of available water. It allows the water to be transferred to a more efficient use, because the most efficient user will pay a higher price for the water right. Conversely, forfeiture is limited to a quantitative approach rather than a qualitative approach. In other words, forfeiture can only prevent non-use.