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Constitutional Revision - Water Rights

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CONSTITUTIONAL REVISION—WATER RIGHTS

Expanding growth pressures and scarce water combine to foretell an upcoming water crisis for the State of New Mexico. This situation only appears worse when it is realized that our national consumption of water is expanding faster than population.[1]

The drafting of a new constitution for New Mexico comes at a time when the role played by water in the state's growth is of critical importance. Decisions as to how this resource will be employed in future years will be made pursuant to statutory law, judicial decisions and constitutional provisions. Delegates to the convention will be faced with the question of what the constitution should contain with regard to water resources law in New Mexico.

In answering this question delegates will be considering two documents: the present constitution and the proposed constitutional revision.[2] Similarly, these two documents will be used as a framework around which the following discussion will be built.[3]

Before relevant provisions of the constitution are examined, however, a brief description of the basic water law system in New Mexico is in order. For purposes of orientation, it should be pointed out that two water law systems exist in the United States, the riparian and the prior appropriation. Riparian law states that a water right is incident to ownership of land which is physically adjacent to a public water source. All rights along a stream have an equal claim and the number of holders of such rights is subject to increase or decrease as ownership of the land changes hands.[4] Prior appropriation is the system adopted in most western states, including New Mexico, and is quite different from riparian law. Under a prior appropriation scheme a water right is not incident to land ownership adjacent to a stream and may be conveyed separately from title to the land. Each right along a stream is given a priority, and in theory, when a shortage occurs the last drop is taken from the lowest priority before any water is denied the next to last priority. With these basic tenets of the prior appropriation system in mind we can proceed to examine both the existing and proposed constitutional water law provisions.

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1. N. Wollman, The Value of Water in Alternative Uses xi (1962).

2. Report of New Mexico Constitutional Revision Commission (1967) [hereinafter cited as Commission Report].

3. It is beyond the scope of this Comment to present a complete review of New Mexico water law. The existing and proposed constitutions will be contrasted and the significance of changes in the latter, along with issues raised, will be briefly analyzed.

4. Ellis, *Water Rights: What They Are and How They Are Created,* 13 Rocky Mt. Mineral L. Rev. 451, 453 (1967). This article provides a concise description of the two American water law systems with emphasis on the prior appropriation system which New Mexico purports to follow.

Presently, water law provisions consist of four sections which are found in article XVI of the constitution. The proposed provisions consist of three sections and make up article XII of the suggested constitution.

Section one of the existing constitution states that "[a]ll existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed."[5] The Constitutional Revision Commission's proposed section one leaves this provision basically unchanged.[6] All that is suggested is the deletion of the words "hereby recognized and" which add very little to the meaning of section one. In the interest of brevity this seems a desirable deletion. The proposed section will still clearly protect existing water rights in the state.

In contrast to the minor change in section one, proposed section two offers several changes, at least two of which are significant.

Existing section two provides:

> The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

Proposed section two provides:

> *All natural waters,* surface or *subsurface,* within the state belong to the public and are subject to appropriation for beneficial use, *except as otherwise may be provided by the legislature pursuant to section three of this article.* Priority of appropriation shall give the better right, *except as otherwise provided by law.* (emphasis supplied)

The first change in section two is found in the initial wording where the proposed section states that all natural waters belong to the public. This contrasts with the existing wording which subjects "the unappropriated water of every natural stream. . . ." to public ownership. A review of New Mexico water law reveals that there would be no change in substance here since the existing constitution has been taken in practice to mean that all water is owned by the public and is controlled by the state. The existing section two does not mean that water already appropriated is privately owned in the common usage of that term. Another, and more accurate way to view a water right is to think of it as a usufructory right or a usufruct which is defined as:

5. N.M. Const. art. XVI, § 1.
6. Commission Report 182.

> The right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.[7]

In *State ex rel. State Game Comm'n v. Red River Valley Co.*[8] the New Mexico supreme court, in construing the present section two, said ". . . that this constitutional provision is only 'declaratory of prior existing law', always the rule and practice under Spanish and Mexican dominion."[9] The court further said that the practice, begun under Mexican sovereignty and continued after American acquisition, was that under the doctrine of prior appropration all waters subject to appropriation are public.

In reality then, water rights are rights to the use of public waters and are subject to control by the state. This was made explicit by the New Mexico supreme court even before *Red Viver Valley Co.* was decided. In *Harkey v. Smith*[10] it was said that the New Mexico Constitution ". . . merely declares the basis of the right to the use of water, and in no manner prohibits the regulation of the enjoyment of that right."[11] The proposed wording therefore merely updates the constitution by accurately describing what the law in fact is with regard to the status of water rights.

The second change in section two is the specific inclusion of all natural subsurface waters in the category of water resources belonging to the public. No direct reference to the status of subsurface water is found in existing section two. A review of New Mexico water law reveals that there would be no change in substance here, for in practice, all natural subsurface waters are treated as belonging to the public. As was the case with surface waters in the previous discussion, subsurface water rights are subject to state control.

The inclusion in proposed section two of the word "subsurface" would constitutionally confirm what is already statutory law in the form of New Mexico Statutes section 75-11-19. This section, entitled "Underground waters declared to be public" provides:[12]

> For the purposes of this act (75-11-19 to 75-11-22) all underground waters of the state of New Mexico are hereby declared to be public

7. Black's Law Dictionary 1712 (4th ed. 1957).

8. 51 N.M. 207, 182 P.2d 421 (1947).

9. *Id.* at 217, 182 P.2d at 427. This case was not the first to so hold as the long list of cases cited indicates. Red River Valley Co. is the most recent case, however, to put to rest the argument that appropriated waters are a matter of private right.

10. 31 N.M. 521, 247 P. 550 (1926).

11. *Id.* at 527, 247 P. at 552.

12. N.M. Stat. Ann. § 75-11-19 (Repl. 1968). Almost identical wording appears in § 75-11-1 which is the initial section in article 11, Underground Waters.

> waters and to belong to the public of the state of New Mexico and to be subject to appropriation for beneficial use within the state of New Mexico. All existing rights to the beneficial use of such waters are hereby recognized.

Similar provisions in earlier statutes[13] declaring underground water to be public have been held constitutional in *Yeo v. Tweedy*[14] and *State ex rel. Bliss v. Dority*.[15] Although public ownership of all underground water is the law under the existing constitution, consistency would seem to require that specific mention of it be made in a future constitution.

It has been said that in its purest form the prior appropriation system is comprised of three elements or requirements: a natural stream, an appropriation and its application to a beneficial use.[16] The third change in section two deals with the beneficial use requirement necessary to establish a water right. Under the proposed constitution, the legislature could set aside certain waters for scenic and recreational uses. This proposed wording in section two specifically refers to section three; consequently further discussion on this provision will be held until later.

The most far-reaching provision of the proposed constitution is found in the last six words of the final sentence of section two which reads: "[p]riority of appropriation shall give the better right, except as otherwise provided by law." Controversy over this suggested addition is likely because a number of different interpretations of it can be made and opinions will differ over the extent to which the provision will be applied.

It is stated in the comment to proposed section two that the addition of the last six words "will not change existing law in any way."[17] The inclusion of the words themselves will not change the law but they do leave the way clear for possible significant changes in the future. It might be argued by opponents of the change that the addition destroys the prior appropriation system for New Mexico—a system which has been constitutionally recognized since statehood. This argument is not totally without merit. Taking the last six words of proposed section two in their usual and ordinary sense, strict enforcement of priorities could be avoided when water resources are allocated at some time in the future. Presumably this power to avoid strict enforcement would reside in the legislature, but whether this

13. *See* N.M. Laws 1927, ch. 182; N.M. Laws 1931, ch. 131.
14. 34 N.M. 611, 286 P. 970 (1930).
15. 55 N.M. 12, 225 P.2d 1007 (1950).
16. *See* J. Sax, Water Law, Planning and Policy 218 (1968).
17. Commission Report 185.

would be an exclusive power is not clear. If the convention adopts this exception and intends that the courts and the state engineer not have the authority, it might be wise to so specify.

In discussing proposed section two the Commission states that its purpose is to give "the legislature greater elasticity to adapt to changing circumstances."[18] As the Commission further asserts, water rights are not currently being enforced in the state because most streams have not been adjudicated and without an adjudication enforcement is all but impossible.[19] In practice, therefore, it might be argued that New Mexico is not really a functioning prior appropriation state. On the other hand, it might be said that New Mexico is still a prior appropriation state and that priorities are not being enforced along some adjudicated streams because such enforcement has not yet been neccessary.[20]

The exact status of water rights in New Mexico varies from stream to stream. Along some water courses upstream users take what water they need, and downstream users do without, regardless of whether they might have senior rights if the stream were adjudicated.[21] Along other streams, some of which have been adjudicated (*e.g.*, the Pecos River), surface rights are being supplemented by ground water pumping so that critical shortages, and hence strict enforcement, have been avoided.[22] Along a few streams, users have established proration agreements as to the allocation of water.[23] These agreements are referred to by the Commission as "long standing agreements" and the "status quo." The decision that the state must face therefore is whether to adjudicate all streams and strictly enforce priorities, thereby voiding "long standing" proration agree-

18. *Id.*

19. An adjudication is a device that is used to enable a water commissioner (in New Mexico the State Engineer) to administer appropriated rights. Sax, in Water Law, Planning and Policy, states at page 231: "[i]n essence, it [an adjudication proceeding] is a statutory class action in which all the users on a given stream are brought into a judicial proceeding, in which each putative appropriator proves his claim, and thereupon receives a decree describing his water right."

20. Basically, this is the situation as the state engineer views it. According to the chief legal counsel in the state engineer's office, essentially all streams in New Mexico are fully appropriated and no new permits for surface rights are being issued. So far, shortages along adjudicated streams have not been so critical as to require the strict enforcement of rights.

21. An example of this situation is offered by the status quo along some tributaries of the Rio Grande in northern New Mexico. In some of these cases, what would be very senior rights of Indian pueblos suffer at the hands of upstream users.

22. This ground water supplementation of a surface right is made possible by the New Mexico case of Templeton v. Pecos Valley Artesian Conservancy Dist., 65 N.M. 59, 332 P.2d 465 (1958). There it was held that a water right holder could follow his appropriated water to its original source and there sink a well to draw water which once flowed in the stream bed.

23. This practice is used along some streams in the southern part of the state.

ments, or whether to adjudicate streams in such a way that these proration agreements are not upset. As the Commission points out, under the present constitution the first alternative is the only course available. Under a more flexible provision, such as proposed section two, the legislature has the option either to remain silent and let prior appropriation prevail or to act and allow proration agreements to stand along streams where they now exist. Proposed section two, by granting the legislature this broad power, has the attractive feature of giving the voting public a more immediate voice in the decision-making process.

Opponents of the additional wording in proposed section two may well argue that the change will tend to hinder the marketability of water rights in the state. This argument, for example, alleges that investors who might be eager to buy up senior rights and locate industry in the state will be reluctant to commit their capital if the constitution contains even a hint of any policy other than strict enforcement of water rights within the state. Not only would new investors be dissuaded, but all water rights in the state would be clouded by the lack of definition, thereby adversely affecting marketability.[24]

Another opposition argument, and a persuasive one, is that such a far-reaching constitutional change as proposed section two would put in doubt the holdings in a whole series of water law cases decided by New Mexico courts. It might be argued that this disruptive effect could be avoided by deleting the last six words of proposed section two.

If proposed section two was adopted and subsequently water rights were not strictly enforced, the issue of eminent domain could be raised as a result of claims by senior right holders. This argument states that if a user is not getting all his appropriated water because of state law passed pursuant to proposed section two, his property is being taken without due process of law in violation of the United States and New Mexico constitutions.[25] Governmental authority to take private property under its police power is broad but not unlimited. This broad power was expressed by the United States Supreme Court in *Williamson v. Lee Optical* where it was said, "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[26] If a state has a legitimate aim there seems

24. For a brief discussion of the marketability of water rights in a prior appropriation system, see Ellis, *supra* note 4, especially at 451-53.

25. U.S. Const. amend. V; and N.M. Const. art. II, § 20 which provides: "Private property shall not be taken or damaged for public use without just compensation."

26. 348 U.S. 483, 488 (1955). The United States Supreme Court has spoken often on

to be little doubt that it can exercise its constitutional powers to regulate the use of public waters, and the real question becomes whether the owner of the water right must be compensated for the taking.[27] This question is especially important to this discussion because if the state is required to compensate the owner, the costs would be prohibitive.[28]

On the issue of compensation, the cases reveal a tendency to require it in those situations where the government action is direct and aimed at a specific party or piece of property. Where, however, an injury results indirectly from government action, the courts have been less likely to allow compensation.[29] This ill-defined distinction is at best a general rule for the courts, which must weigh the public benefit achieved by the state's action against the severity of the injury.[30] In applying this test to compensation for loss of a water right, a great deal will turn on the facts in the case. Cases involving a claim of compensation for the loss of a water right have not reached uniform results before the United States Supreme Court.[31]

The claim that property was denied without compensation would probably be answered with the contention that a water right is not property in the usual sense of the term, but is only a right to the use of water which belongs to, and is regulated by, the state for public benefit. An even more persuasive counter argument is that the right claimed is not perfected because the stream has neither been adjudicated nor have priorities been enforced.

Since the question of compensation has not yet arisen as to water rights in New Mexico it would be speculative to predict how the state courts would hold. Suffice it to say that in passing on proposed section two the convention should consider the possibility that the

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questions of eminent domain, but a thorough review of its holdings is not necessary for the purposes of this discussion. A recent and comprehensive study of these decisions however, may be found in Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 Supreme Ct. Rev. 63.

27. *See* Hines, *A Decade of Experience Under the Iowa Permit System—Part Two,* 8 Natural Resources J. 23, 46 (1968). Professor Hines in this article deals with this constitutional issue, and although his discussion concerns Iowa's riparian water law, much of it is applicable to the discussion of proposed section two.

28. The range of purchase prices for water rights in a prior appropriation system is broad, and the upper limits can run into to hundreds of thousands of dollars. For example, it has been estimated that to enter the water market can require from $10,000 to a quarter million dollars. Ellis, *supra* note 4, especially at 452-53.

29. Hines, *supra* note 27, at 46-48.

30. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

31. In United States v. Commodore Park, Inc., 324 U.S. 386 (1945), government action changing the course of a stream to improve navigation and thereby denying a water right was upheld. While in United States v. Lynah, 188 U.S. 445 (1903), compensation was awarded for the loss of property as a result of changes in a stream after the government built a dam.

state might have to compensate users for the loss of water rights if strict enforcement is not adopted and the status quo preserved.

The Revision Commission suggests finally that present section three be deleted and that a new provision be adopted. Existing section three provides:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

As the Commission's comment to section three points out, the content of the present section is repetitive, regardless of whether sections one and two are retained or proposed sections one and two are adopted in the new constitution.[32] In the interest of avoiding redundancy it seems desirable to omit entirely the present section three.

The proposed section three provides:

> The legislature may provide by law for the acquisition and preservation of all or specific portions of natural streams, bodies of water, lakes or water falls in their natural conditions, in order to encourage and protect scenic and recreational areas.

The Revision Commission's comment to section three states that a weakness of present law is "its inability to provide water rights for the recreational use of natural bodies of water."[33] The Commission then lists two reasons why this is the case: first, that there is case authority questioning the validity of recreation as a beneficial use, and second, that some courts have held that a diversion from a stream is necessary to establish an appropriation of a water right. Proposed section three has the effect of neutralizing these two unfortunate doctrines in New Mexico.

It might be argued, however, that proposed section three is unnecessary because neither of these two doctrines would be followed in New Mexico. The Commission hints at this possibility by observing that the foundation case of the first doctrine, *Lake Shore Duck Club v. Lake View Duck Club*,[34] has not been cited often by other courts and by stating that the holding on the second doctrine is "questionable."[35] Arguing that the first doctrine should not be followed in New Mexico, it would be urged that *Lake Shore Duck Club* is a legal anachronism, not reflective of current judicial recognition of the need for water recreation areas. To support this claim, note the New

32. Commission Report 186.
33. *Id.*
34. 50 Utah 76, 166 P. 309 (1917).
35. Commission Report 187.

Mexico case of *State ex. rel. State Game Comm'n v. Red River Valley Co.*[36] There it was held that beneficial use of water includes its application for recreation and fishing. As to the second doctrine, which requires a diversion from the stream for a valid appropriation, it might be argued that New Mexico statutes do not require such a diversion, and a court faced squarely with the question should not read the requirement into the statutes.

Although a New Mexico court very likely would not follow the two doctrines, an opposite result is not inconceivable under present section two. Proposed section three would erase this doubt if, and only if, the legislature acts in accordance with it to set aside specific portions of streams or other waters in order to encourage and protect scenic and recreational areas.

It might also be said that a constitutional provision of this nature is not necessary because the legislature now has the power to declare that recreation is a beneficial use and that a diversion from a stream is not required.[37] This contention may indeed be true, but the adoption of proposed section three would simply make it clear that (1) appropriations for recreational uses are sanctioned, and (2) the legislature would make the decisions as to which waters to save and which to leave open to full exploitation. This second accomplishment of proposed section three would seem desirable, because as the Commission argues in its comment, decisions of this type involve planning, and the legislature is best suited for this job.[38]

There are two related questions raised by proposed section three which should be considered by the constitutional convention. The proposed section states that the legislature may provide for the acquisition and preservation of water sources to encourage and protect scenic and recreational areas. But it is unclear as to who may accomplish this acquisition or preservation. It might be desirable to spell out in section three whether this power applies only to the state or whether private parties may acquire and preserve water sources.

The second question raised is whether areas set aside pursuant to proposed section three must be designated for public use or whether such areas can be used exclusively by private parties or associations. The convention might give some thought to a distinction in section three which makes any acquisitions by the state open for use by the public, while limiting state action for the benefit of private owners to preservations of a use for recreation. In other words, the state can

36. State *ex rel.* State Game Comm'n v. Red River Valley Co., *supra* note 8, at 218, 182 P.2d at 428.

37. Statutes of this type are in effect in Idaho and Oregon. Idaho Code Ann. § 67-4301 (1949); Ore. Rev. Stat. § 536.300 (1963, Supp. 1965).

38. Commission Report 187.

preserve private recreational uses but it cannot use its police powers to *acquire* waters for private recreational users.

Proposed section three, like proposed section two, is an imaginative provision which has no counterpart in other western states. It is hoped that delegates to the constitutional convention will give careful consideration to the proposed sections and make a decision which gives the state an article on water rights that will best meet the needs of the future.

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