

SHOT OFF THE SADDLE: NEW MEXICO WATER LAW MEETS CLIMATE CHANGE

New Mexico is not unlike most Western states in its evolution of water law and the doctrinal perspective of its underlying foundation, the right of prior appropriation and beneficial use. Neither is New Mexico alone in its failure to anticipate the existence of climate change and adapt its body of water law and the use of its water to that change.

What sets New Mexico apart from other Western States is that it has a clear historical record of its efforts - or lack of efforts - to understand that changes in climatic events would someday alter the hydrology of this State in a manner that would likely place its foundation in question. [See e.g., Trial and Error: How Courts Have Shaped Prior Appropriation in New Mexico, 57 Nat. Resources Journal, Winter, 2017, Hon. Matthew G. Reynolds; “In theory, prior appropriation is alive and well in New Mexico, but in practice it is on life support. ... The climate change happening in New Mexico may catch us all unprepared if the status quo continues...”, Conclusion]. That any form of presentiment was lacking in New Mexico water law history, was clearly evident in the words of Chief Justice Brice in 1948:

“The fact that the water table rises and falls is not so alarming to us as to some of the witnesses. It is public knowledge that for five years precipitation has been subnormal, and the last three years can be classed as ‘drouthy years’ ... It is quite certain that there will always be water for irrigation from these wells so long as water or snow falls from the clouds ...”.

[Chief Justice Brice in Pecos Valley Artesian Conservancy Dist. v. Peters, 1948-NMSC-022, 52 N.M. 148, 159, 193 P.2d 418, at page 425.]

The time of “drouthy years” for New Mexico and the Western States has long passed us by. The resultantly imprecise words of the Chief Justice were set at a time when ever-present droughts in the arid West were not only periodic, but predictable. As of the writing of this article, the West has found itself in a 22-year megadrought with major reservoirs at historic lows and the Colorado River predictably failing to supply the water needs of a burgeoning population and a thirsty agri-business.

While the words of the Chief Justice in 1948 seemed overly optimistic about the source and permanence of water in the southeast quadrant of New Mexico, the Office of the State Engineer did not subscribe to such optimism. This was apparent with the Lea County Underground Water Basin, where the State Engineer in 1952 had placed a time limitation of forty years before the basin would be depleted, based on extensive studies and calculations. [See Mathers v. Texaco, Inc., 1966-NMSC-226, 77 N.M. 239, 421 P.2d 771, at pages 242, 245, below]

“Beneficial Use”: 66 Years into a 40-year Plan

In Mathers v. Texaco, Inc., 1966-NMSC-226, 77 N.M. 239, 421 P.2d 771, the State Engineer had determined that applications be granted for the appropriation of 350-acre feet per year of underground waters by Texaco for the purpose of water flooding 1,360 acres of oil-bearing formation in a producing oil field. By this water flooding operation, it was contemplated that slightly in excess of one million barrels of oil would be recovered from the area. The protestants to the applications took the position that an application for a permit to withdraw waters from an underground basin should be denied if the evidence establishes that such withdrawal would cause a decline in the water table and thereby, cause impairment to prior appropriators. [Id., pages 242-243]

The findings of the trial court noted that the undisputed evidence supported the premise that the taking of any water from the basin depletes the basin of water which can never be replaced. The undisputed evidence clearly showed impairment to existing rights would result from the granting of the Texaco applications. The district court overruled the State Engineer and determined that if the applications were granted, the Lea County township would be left without one-third of water storage after 40 years as calculated by the State Engineer and thus, water could not be appropriated without impairing existing rights. [Id., pages 242-243]

In its Brief in Chief on appeal, Texaco took the position that if the protestants be correct, then Texaco,

‘* * * shot itself out of the saddle with its own undisputed evidence that the Lea County basin is a non-rechargeable basin, that the taking of any water from it constitutes a mining operation, and that its appropriation for what the court found was a reasonable and beneficial use could ‘never be replaced’.’ [Id., at page 244).

In its review, the Supreme Court agreed with Texaco. It pointed out that if “... the position of protestants be correct, then each and all of the many permits to withdraw waters from this basin issued by the State Engineer, subsequent to the initial permit, have been issued wrongfully and unlawfully, because each withdrawal, to some degree, has caused a lowering of the water level, by lowering the water table.” [Id., at page 244-245)

The Supreme Court went on to point out that in the case of Application of Brown, 65 N.M. 74, 332 P.2d 475, the Court recognized that the lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators. Therefore, the Mathers Court equated that “[t]his must, of necessity, be true in a non-rechargeable basin such as the one here involved ...”. [Mathers at page 245]

It is interesting that the Supreme Court relied on Application of Brown to equate the effect of the lowering of a water table in a rechargeable basin to the lowering of the water table in a non-rechargeable basin. A non-rechargeable basin is limited by a non-recharging aquifer system that has accumulated and stored water over a period of several thousand years; the aquifer has a finite life expectancy. [Stokes v. Morgan, 1984-NMSC-032, 101 N.M. 195, 298, 680 P.2d 335, 338]. In the rehearing decision annexed to the opinion in Application of Brown,

the Supreme Court further noted that “The lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators. The amount that the water table is lowered is an important factor, *but in addition all characteristics of the particular aquifer (sic) must be considered along with well locations.*” [Application of Brown, 65 N.M. 74, 332 P.2d 475, 479]. It should seem that the non-rechargeability of an aquifer would have been a significant characteristic to consider for the Supreme Court in Mathers.

The Supreme Court in Mathers, focused on beneficial use as opposed to impairment from depletion. The Mathers Court noted that the beneficial use by the public of the waters in a closed or non-rechargeable basin requires giving to the use of such waters a time limitation and further noted the State Engineer’s report giving the basin a fixed time of forty years. “There is nothing before us to prompt a feeling that this method of administration and operation does not secure to the public the maximum beneficial use of the waters in this basin.” [Mathers, at page 245-246]. The Court went on to state:

“The rights of the protestants to appropriate water from this basin are subject to this time limitation, just as are the rights of all other appropriators. A lowering of the water level in the wells of protestants, together with the resulting increase in pumping costs and the lowering of pumping yields, does not constitute an impairment of the rights of protestants as a matter of law. These are inevitable results of the beneficial use by the public of these waters.”
[Id. at page 246].

Under the governing doctrine of prior appropriation, water rights are both established and exercised by beneficial use, which forms ‘the basis, the measure and the limit of the right to use of the water.’ [N.M. Const. art. XVI, § 3]. Beneficial use is “the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken.” [State ex rel. Martinez v. McDermott, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct.App.1995)]. Absent the application of water to beneficial use, the claimed water right is not perfected. [Hanson v. Turney, 2004-NMCA-069, 136 N.M. 1, 4, 94 P.3d 1, 4; NMSA 1978, Section 72-12-5, declaration of beneficial use]. Neither economics nor the storage of water is relevant to the beneficial use concept under the New Mexico permit system of prior appropriation. [Jicarilla Apache Tribe v. U.S., 1981, 657 F.2d 1126 (except that storage of municipal water is necessary for beneficial use).]

In the West, the lack of water is a central fact of our existence, and a whole culture and set of values have grown up around it. Under a majority of the water laws established in the West including in New Mexico, the placement of water to beneficial use is not only protected but, it is a required factor in preserving one’s water rights. [State ex rel. Off. of the State Eng’r v. Romero, 2022-NMSC-022, 521 P.3d 56 (Forfeiture is an important component of the beneficial use doctrine: it is an essential punitive tool by which the policy of the constitution and statutes is fostered, and the waters made to do the greatest good to the greatest number, and prevents the waste of water); NMSA 1978, Section 72-5-28, failure to use water, forfeiture]. In the East, to

“waste” water is to consume it needlessly or excessively. In the West, to waste water is not to consume it – to let it flow unimpeded and undiverted down rivers. The use of water is by definition “beneficial”. [Cadillac Desert, The American West and its Disappearing Water, Marc Reisner, copyright 1986, page 12].

So it was by the application of beneficial use that the Mathers Court was to term the depletion of a non-rechargeable aquifer as an “inevitable result” achieved through the exercise of the constitutional policy of such use. Sixty-six years after the State Engineer’s report on the 40-year life span of Lea County Underground Water Basin, and related southeastern basins, a subsequent State Engineer assessed a more current situation:

“The most dramatic and problematic groundwater mining is occurring in eastern New Mexico where the Northeast New Mexico and Lea County planning regions are dependent on the Ogallala/High Plains aquifer. Water level declines are greater than 5 feet per year (ft/yr) in the most heavily pumped areas, and the saturated aquifer thickness ranges less than 50 to 150 ft thick. A recent study on the lifetime projections for the Ogallala/High Plains aquifer in east-central New Mexico (Rawling and Rinehart, 2018) concludes that many areas, particularly in southeast Curry and northeast Roosevelt counties, are below the 30-ft threshold of saturated thickness necessary for a viable aquifer, and most of the remaining area has a projected lifetime of less than 10 years. The communities of Clovis and Portales and surrounding areas have fewer than 5 years of remaining supply.” [2018 NM State Water Plan Part II; Technical Report, Fig. 3-9 (December 6, 2018)]

Even considering the effect of climate change, a future in which warmer conditions across the West would likely contribute to reductions in snowpack, an earlier peak in spring snowmelt, reduced stream flows and higher rates of evapotranspiration, the application of beneficial use as the preferred policy of the West, would lead to the inevitable depletion of our aquifers. [Science be Dammed, Eric Kuhn and John Fleck, copyright 2019, Chapt 17, page190-191; National Research Council, Colorado River Basin, 91]. Indeed, this has become the inevitable result of what we knew was the “inevitable result”.

The phrase “shot off the saddle” in Western lore is not specifically defined by any established dictionary of idioms. It is however, a metaphor typically used to describe a hard charging cowboy being shot off of his saddle just before he enters the heat of the battle and becomes a factor. It is a description of someone, or something that fails before they can even gain relevance. Such was the demise of any effort to conserve water in the Western states, let alone, to prepare New Mexico for the inevitable of depletion of its aquifers, now compounded by the onslaught of climate change.

Conservation: The Antihero

An “antihero” is a protagonist that conspicuously lacks in heroic qualities. The rules of drama often dictate that the audience becomes invested in either the hero or the antihero, but not both at once. (Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/antihero>. Accessed 28 Jul. 2023). While the concept of conserving water as a scarce resource for the preservation of society has been accepted in many circles as much as protecting animals on the endangered species list, that acceptance has not been without conflict. In fact, the body of New Mexico's water laws are “intended to encourage use and discourage nonuse or waste.” [*Aquifer Sci., LLC v. Verhines*, 2023-NMCA-020, 527 P.3d 667, 677 *cert. denied* (Jan. 30, 2023)].

It wasn't until *Aquifer Science*, that the appellate courts were able to focus on what had been lacking in the body of water law: conservation. Up until *Aquifer Science*, there had been little precedent available to provide guidance as to how conservation should be assessed under the statutes. This is particularly true given that the language making conservation part of the calculus for approving applications to divert groundwater did not appear in New Mexico's water law statutes until 1983. [*Id.*; NMSA 1978, Section 72-12-3(E), Application for use of underground water; publication of notice; permit].

Aquifer Sciences, a company that was formed to obtain water for planned multi-use residential development, appealed the State Engineer's denial of an application to appropriate groundwater from *[a]* declared basin. The denial was based on the statutory language of NMSA 1978, Section 72-12-3(E) which prohibited proposed appropriations where existing water rights could be impaired, where the application could be contrary to conservation of water within the state, and would detrimental to public welfare.

Recognizing that the word “conserve” is context dependent, the *Aquifer Science* court looked for a fuller definition beyond the concepts of minimal use and prevention of waste, but one reflecting the broader concerns for planned management of, and caring for resources to prevent exploitation, destruction, and depletion. [*Aquifer Science*, at page 678]. *Aquifer Science* had sought to interpret the statutory phrase of “not contrary to conservation” to simply mean “beneficial use”, however, the court felt it would make the conservation provision superfluous and contrary to the rules of statutory construction. [*Id.*]. In part, the appellate court looked to Black's Law Dictionary for the fuller definition of “conservation”: “The supervision, management, and maintenance of natural resources such as animals, plants, forests, etc., to prevent them from being spoiled or destroyed; the protection, improvement, and use of natural resources in a way that ensures the highest social as well as economic benefits.” (See, Conservation, Black's Law Dictionary (11th ed. 2019).” [*Id.*, at page 678].

Despite looking for a fuller definition of conservation, the appellate court declined to adopt a specific definition. Rather than attempt to formulate a definition of “conservation”, the court concluded that such an effort could lead to severe complications. It felt that the assessment of conservation “... is of necessity *[a]* matter best dealt with on a case-by-case basis, applying the various features of the concept of conservation as needed under the set of facts presented in each case. [*Id.*, at page 679].

The appellate court further noted the findings of the trial court that the predicted higher temperatures and severe droughts were likely to have a negative effect on the supply of water in the next fifty years. The district court also found that Aquifer Science did not consider the impacts of climate change in its analysis. Stepping back from providing a definitive meaning to “conservation”, the appellate court commented about climate change as follows:

“Despite this, as a matter of judicial caution, we opt not to rely on the finding regarding climate change as a basis for affirming the district court's decision regarding conservation. Our decision provides the State Engineer and the Legislature the opportunity to provide guidance regarding climate change and conservation before it is judicially imposed. Further, we can affirm the conclusion that the Application is contrary to conservation of water without relying on this evidence.” [Aquifer Science, at page 679].

In essence, the appellate court extended an invitation to the Legislature and State Engineer to enact the changes necessary in our statutes and regulations to address climate change “before it is judicially imposed.” [Id.]. In a state where the doctrine of priority rights and beneficial use reign constitutionally, the appellate courts are correct to defer to a legislative fix of a statutory scheme.

Conservation v. Beneficial Use; One but not Both.

While Aquifer Science considered the element of conservation in the statutory language of Section 72-12-3(E), other cases have not been so deferential to the concept of conservation for the public interest. In Application of Sleeper, 1988-NMCA-030, 107 N.M. 494, 760 P.2d 787, *writ quashed sub nom. Ensenada Land & Water Ass'n v. Sleeper*, 107 N.M. 413, 759 P.2d 200 (1988), [NEW MATERIAL]

Random thought:

As long as water rights are established and conditioned by the exercise of beneficial use, untethered to any element of use efficiency, conservation or alternative efficiencies, the....