

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

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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

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<sup>2</sup> See e.g., Hon. Matthew G. Reynolds, *Trial and Error: How Courts Have Shaped Prior Appropriation in New Mexico*, 57 Nat. Resources Journal 263, Winter, 2017; "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, at page 317.

question.<sup>2</sup> 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 ... .<sup>3</sup>

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 start of 2022), the West has found itself in a 22-year mega drought 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.<sup>4</sup>

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<sup>2</sup> See e.g., Hon. Matthew G. Reynolds, *Trial and Error: How Courts Have Shaped Prior Appropriation in New Mexico*, 57 Nat. Resources Journal 263, Winter, 2017; “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, at page 317.

<sup>3</sup> Chief Justice Brice in Pecos Valley Artesian Conservancy Dist. v. Peters, 1948-NMSC-022, 52 N.M. 148, 193 P.2d 418, 425.

<sup>4</sup> Mankin JS, Simpson I, Hoell A, Fu R, Lisonbee J, Sheffield A, Barrie D. (2021) *NOAA Drought Task Force Report on the 2020–2021 Southwestern U.S. Drought*. At pages 4-6, NOAA Drought Task Force, MAPP, and NIDIS.

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.<sup>5</sup>

**“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.<sup>6</sup>

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

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<sup>5</sup> Mathers v. Texaco, Inc., 1966-NMSC-226, 77 N.M. 239, 421 P.2d 771, 774, 776.

<sup>6</sup> Id. at pages 773-774.

one-third of water storage after 40 years as calculated by the State Engineer in 1952, and thus, water could not be appropriated without impairing existing rights.<sup>7</sup>

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.’<sup>8</sup>

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 ... .”<sup>9</sup>

The Supreme Court went on to point out that in the case of Application of Brown, 1958-NMSC-113, 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 ... .”<sup>10</sup>

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<sup>7</sup> Id., page 774.

<sup>8</sup> Mathers, *supra*, at page 775.

<sup>9</sup> Id., at pages 775.

<sup>10</sup> Id. at page 776.

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.<sup>11</sup> In the rehearing decision annexed to the opinion in Application of Brown, the Supreme Court further noted that “[t]he 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.*”<sup>12</sup> 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 of water rights 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.”<sup>13</sup>

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

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<sup>11</sup> Stokes v. Morgan, 1984-NMSC-032, 101 N.M. 195, 680 P.2d 335, 338.

<sup>12</sup> Application of Brown, *supra*, at page 479.

<sup>13</sup> Mathers, *supra*, at page 776.

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.<sup>14</sup>

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.’<sup>15</sup> 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.”<sup>16</sup> Absent the application of water to beneficial use, the claimed water right is not perfected.<sup>17</sup> Neither economics nor the storage of water is relevant to the beneficial use concept under the New Mexico permit system of prior appropriation.<sup>18</sup>

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.<sup>19</sup> In the East, to “waste” water is to

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<sup>14</sup> Id. at page 776.

<sup>15</sup> N.M. Const. art. XVI, § 3.

<sup>16</sup> State ex rel. Martinez v. McDermott, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct.App.1995).

<sup>17</sup> Hanson v. Turney, 2004-NMCA-069, 136 N.M. 1, 4, 94 P.3d 1, 4; N.M. Stat. Ann., Section 72-12-5 (1978), declaration of beneficial use.

<sup>18</sup> Jicarilla Apache Tribe v. U.S., 657 F.2d 1126, 1135 (10<sup>th</sup> Cir. 1981) (except that storage of municipal water is necessary for beneficial use).

<sup>19</sup> State ex rel. Off. of the State Eng'r v. Romero, 2022-NMSC-022, 521 P.3d 56 (Forfeiture is an

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”.<sup>20</sup>

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 the 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.<sup>21</sup>

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

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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); *See also*, N.M. Stat. Ann., Section 72-5-28 (1978), failure to use water, forfeiture.

<sup>20</sup> Marc Reisner, *Cadillac Desert, The American West and its Disappearing Water*, page 12, (1986).

<sup>21</sup> 2018 NM State Water Plan Part II; Technical Report, Fig. 3-9 (December 6, 2018).

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.<sup>22</sup> Indeed, this has become the inevitable result of what we knew was the “inevitable result”.<sup>23</sup>

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 depletion of its aquifers, now compounded by the onslaught of climate change.

### **Conservation: The Antihero**

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<sup>22</sup> Eric Kuhn and John Fleck, *Science be Dammed: How Ignoring Inconvenient Science Drained the Colorado River*, (2019), Chapt 17, page190-191; National Research Council, *Colorado River Basin*, 91.

<sup>23</sup>Oliver Uyttebrouck, *Suit Seeks to Block Part of Ute Lake Pipeline*, Albuquerque Journal, December 10, 2024 (“We’re doing it because we are literally running out of water,” [Clovis Mayor Mike] Morris said recently in a phone interview. “We have a sole source of water and it’s finite, and its going away. The pipeline gives us a second source and it’s a renewable source of water for our community. We must have this, and it’s why we’ve hung in for so many years – so many decades.” *Id.*, at section A-1).

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.<sup>24</sup> 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.”<sup>25</sup>

It wasn't until Aquifer Science, LLC v. Verhines, 2023-NMCA-020, 527 P.3d 667, *cert. denied* (Jan. 30, 2023), 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.<sup>26</sup>

Aquifer Science, LLC, 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 N.M.

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<sup>24</sup> Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/antihero>. Accessed 28 Jul. 2023.

<sup>25</sup> Aquifer Science, *supra*, at page 677.

<sup>26</sup> Id. at page 677; N.M. Stat. Ann., Section 72-12-3(E) (1983), Application for use of underground water; publication of notice; permit.

Stat. Ann., Section 72-12-3(E) (1983) which prohibited proposed appropriations where existing water rights could be impaired, or where the application could be contrary to conservation of water within the state and would be 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, to one reflecting the broader concerns for planned management of, and caring for resources to prevent exploitation, destruction, and depletion.<sup>27</sup> Aquifer Science, LLC, 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.<sup>28</sup> In part, the 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.”<sup>29</sup>

Despite looking for a fuller definition of conservation, the Aquifer Science 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-

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<sup>27</sup> Aquifer Science, at page 678.

<sup>28</sup> Id. at page 678.

<sup>29</sup> Id. at page 678; *See also*, ‘conservation’, Black's Law Dictionary (11th ed. 2019) at page 678.

case basis, applying the various features of the concept of conservation as needed under the set of facts presented in each case.”<sup>30</sup>

The appellate court 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 had also found that Aquifer Science, LLC, did not consider the impacts of climate change in its analysis. Stepping back from providing a definitive meaning to “conservation”, the appellate court addressed the issue of 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.<sup>31</sup>

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.”<sup>32</sup> In a state where the doctrine of priority rights and beneficial use reign constitutionally, the appellate courts are correct to preliminarily 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

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<sup>30</sup> Aquifer Science, at page 679.

<sup>31</sup> Aquifer Science, at page 679.

<sup>32</sup> Id. at page 679.

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), the district court reversed the state engineer's decision granting the plaintiff association's modified application to transfer surface water rights. The district court denied the application on the grounds that the requested transfer would impair existing water rights on the Rio Brazos stream system and that it would be contrary to the public interest. On the issue of public interest, the district court concluded that, as a public official charged with supervising an important resource belonging to the public, the state engineer must consider the public interest in ruling on applications for transfer or change of water rights, whether or not articulated in the statutes, and that the applicants' requested transfer was contrary to the public interest. On review the appellate court found that the district court had erred as a matter of law.<sup>33</sup>

For that point in time (shortly after the 1983 legislative amendments, discussed below), Sleeper became instructive as to the interpretative relevance of “conservation” and “public interest” vis a vis the statutory and constitutional concepts of beneficial use and priority rights. (For purposes of this paper and in explaining the holding in Sleeper, “conservation” and “public interest” are interchangeable). The protestors in Sleeper contested the transfer of water rights from irrigation to a use or purpose of filling an artificial lake and maintaining it. On appeal, the protestants principally relied on the language of N.M. Stat. Ann. Section 72-5-7 (1978)<sup>34</sup>, which provided: “[i]f, in the opinion of the state engineer, there is no unappropriated water available, he shall reject such application ... if, in his opinion, approval would be contrary to the conservation

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<sup>33</sup> Sleeper, at page 790.

<sup>34</sup> N.M. Stat. Ann., Section 72-5-7 (1978); Application; rejection; noncompliance with rules, conservation and public welfare.

of water within the state or detrimental to the public welfare of the state.”<sup>35</sup>

The applicant association contended that Section 72–5–7 applied only to applications for unappropriated surface water, and not to transfers of rights to waters already appropriated. The applicant association further contended that pursuant to the plain language of NMSA 1978, Sections 72–5–23 and –24, once there has been proper application to the state engineer, detriment to existing water rights is the only basis on which their application can lawfully be denied.<sup>36</sup> The appellate court found the applicant association’s arguments persuasive.

The appellate court in Sleeper, *supra*, reviewed two recent cases and the legislative history to determine the relevance of the public interest in interpreting the statutes in question including after the 1983 legislative amendments incorporating “conservation” and “public welfare” into the water statutes.<sup>37</sup> The appellate court noted that City of El Paso v. Reynolds, 563 F.Supp. 379 (D.N.M.1983) (“El Paso I”) held that New Mexico could not constitutionally

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<sup>35</sup> Sleeper, at page 790; N.M. Stat. Ann, Section 72-5-7.

<sup>36</sup> N.M. Stat. Ann., Section 72–5–23 (1978) provided: “All water used in this state for irrigation purposes, \* \* \* may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing rights \* \* \*”, and Section 72–5–24 provided: “An appropriator of water may, ... change the place of diversion, storage or use, ... provided that no such change shall be allowed to the detriment of the rights of others having valid and existing rights to the use of the waters of said stream system.” Sleeper, at page 791.

<sup>37</sup> S.B. 295, amending N.M. Stat. Ann., Section 72-12-3E (1978); enacting N.M. Stat. Ann., Section 72-12B-1 (1978); and repealing N.M. Stat. Ann., Section 72-12-19 (1978).

embargo the export of water out-of-state as it violated the commerce clause of the United States constitution. The city of El Paso, Texas, being an owner of a tract of land straddling the New Mexico-Texas border had sought 326 applications from the State Engineer to transfer ground water from New Mexico to meet El Paso's future needs.<sup>38</sup> In response to El Paso I, the legislature immediately passed Laws 1983, Chapter 2, amending groundwater statutes to allow new appropriations and transfers of groundwater for out-of-state use, if not contrary to the conservation of water or otherwise detrimental to the public welfare.<sup>39</sup> In subsequent litigation, City of El Paso v. Reynolds, 597 F.Supp. 694 (D.N.M.1984) ("El Paso II"), the federal court ruled certain amendments unconstitutional because the conservation and public welfare criteria were applicable to transfers out-of-state, but not to in-state transfers.<sup>40</sup>

Because of its review of the El Paso I and El Paso II history, the appellate court in Sleeper concluded that "[w]e will not distort the plain geography of a statutory scheme to find Protestants' construction. *The statutes in force at the time of the Application* did not allow denial of the requested transfer on the basis of general "public interest" considerations."<sup>41</sup> In view of its disposition, the appellate court did not feel it needed to reach the public interest issues listed as "the state engineer acknowledged at oral argument, the public interest is relevant in considering certain aspects of an application to transfer existing surface water rights, such as whether the transfer is to a beneficial use."<sup>42</sup>

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<sup>38</sup> El Paso I, at page 381.

<sup>39</sup> Sleeper, at page 791.

<sup>40</sup> El Paso II, at page 704.

<sup>41</sup> Sleeper, at pages 791-792 (*emphasis added*).

<sup>42</sup> Sleeper, at pages 791-792.

While Sleeper is instructive to demonstrate that the pre-1983 statutory language of the Water Code did include conservation or public welfare/interest as a consideration to transfer appropriated water rights, the case also pointed out that any pre-1983 administrative interpretation by the state engineer would have considered public interest is relevant in considering certain aspects of an application “such as whether the transfer is to a beneficial use”.<sup>43</sup> Along these lines, its review of El Paso II demonstrates that even post-1983 legislative changes, the parties to the litigation including the state engineer, considered the relevance of conservation and public welfare secondary to, or equating to, beneficial use:

“El Paso is correct that New Mexico's general policy has been to put as much water to use within the State as soon as possible, the converse of conservation, at least as to underground waters. In addition, prior to the passage of S.B. 295 [1983 legislative amendments], the constitution and laws of New Mexico have not been construed to authorize prioritization of uses of underground waters. All uses have been considered beneficial uses, equally beneficial to the public welfare, with the first in time having the better right. N.M. Const. art. XVI, Sections 2 and 3. ***Both parties take the position that S.B. 295 does not change these principles insofar as they apply to in-state water uses.*** Therefore, that issue need not now be addressed.”<sup>44</sup>

Although conceding that under New Mexico law, all uses including “conservation”, are considered beneficial uses that are equally beneficial to the public welfare consistent with the holding in Sleeper, El Paso II was still concerned as to how New Mexico would apply its recently enacted conservation and public welfare criteria to in-state appropriations.

### **Well, Maybe Conservation and Public Interest; El Paso II.**

El Paso I addressed the constitutionality of New Mexico’s prohibition of ground water export to other states through what was referred as a “ground water embargo”.<sup>45</sup> On January 17,

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<sup>43</sup> Id.

<sup>44</sup> El Paso II, at page 699 (*emphasis added*).

<sup>45</sup> City of El Paso, By & Through its Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379, 380 (D.N.M.

1983, the El Paso I court held that N.M. Stat. Ann., Section 72-12-19 (1978), which expressly prohibited the transport of ground water for use in another state, violated the Commerce Clause. Shortly after that decision, on February 22, 1983, the New Mexico legislature enacted S.B. 295 which repealed Section 72-12-19, enacted provisions dealing with out-of-state use of water,<sup>46</sup> and amended other statutes within the Water Code.<sup>47</sup> Specifically, N.M. Stat. Ann., Section 72-12B-1 (Cum.Supp.1984) was enacted to permit and regulate out-of-state use of ground water. In addition, the legislature also enacted H.B. 12 which imposed a two year moratorium on new appropriations of ground water hydrologically connected to the Rio Grande below the Elephant Butte dam.<sup>48</sup>

In El Paso II, the city challenged the export statute (72-12B-1) as unconstitutional because it facially discriminated against water exportation in several respects. The parties reserved for future proceedings all issues regarding the constitutionality of the statute as applied.<sup>49</sup> In its initial argument, the city argued that the “conservation within the state” criterion prohibited interstate use of water since transported water is neither conserved nor kept within the state.<sup>50</sup> The El Paso II court noted that Section 72-12B-1A contained a statement that “under appropriate conditions the out-of-state transportation and use of [New Mexico’s] public

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1983).

<sup>46</sup> N.M. Stat. Ann., Section 72-12B-1 (2019).

<sup>47</sup> El Paso II, at page 696, 697; amending N.M. Stat. Ann. Sections 72-12-18 (Cum. Supp. 1984) and 72-12-3E (Cum. Supp. 1984)

<sup>48</sup> El Paso II, at pages 696-697.

<sup>49</sup> Id., at page 698.

<sup>50</sup> El Paso II, at page 698.

waters is not in conflict with ... the conservation of its waters.”<sup>51</sup> The language purports to allow the exportation of water and the court refused to construe the language as inconsistent with the rest of the statute or to find the language superfluous.<sup>52</sup>

### **Shooting Blanks with Conservation.**

The court in El Paso II noted that, “[o]n its face, S.B. 295 appears to apply the conservation and public welfare criteria evenhandedly, *at least as to new appropriations.*”<sup>53</sup> The court further noted that as amended, Section 72-12-3E (dealing with new in-state appropriations of ground water from declared basins) “now mirrors the requirements for approval of out-of-state appropriations in Section 72-12B-1C [the export statute]” in that, under both statutes the State Engineer must deny applications, “... for *new* in-state and out-of-state appropriations if the proposed use is ‘contrary to the conservation of water within the state [or] detrimental to the public welfare of the state.’”<sup>54</sup> The export statute however, does not contain any specific reference to “appropriations” as the sole source available to export water.<sup>55</sup>

In order to “appropriate” water, “new water” must be found and diverted, applying it to beneficial use before a right of claim can be made. It is an established fact that most of the water, surface and subsurface sources in New Mexico, has been fully appropriated.<sup>56</sup> If the water

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<sup>51</sup> Id.

<sup>52</sup> Id.

<sup>53</sup> Id.; *emphasis added.*

<sup>54</sup> Id., at pages 698-699; *emphasis added.*

<sup>55</sup> N.M. Stat. Ann., Section 72-12B-1 (Cum. Supp. 1984) attached as Appendix A to El Paso II.

<sup>56</sup> See: State v. Myers, 1958-NMSC-059, 64 N.M. 186, 188, 326 P.2d 1075, 1076 (The waters of the Rio Grande Stream System are fully appropriated); City of Albuquerque v. Reynolds, 1962-

for which the El Paso II court construes Section 72-12B-1C (the export statute) related only to new appropriations, this would render the language of “conservation of water within the state” equivalent to shooting blanks at the issue of climate change. The conservation criteria cannot be applied if there are no new waters to appropriate. Fortunately in a later discussion, El Paso II extended the source of water to be available to export to include “interstate transfers and domestic wells”<sup>57</sup> of already permitted and appropriated waters.

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NMSC-173, 71 N.M. 428, 434, 379 P.2d 73, 76 (“All admit that the water of the Rio Grande Stream are now fully appropriated... .”); Application of Hobson, 1958-NMSC-114, 64 N.M. 462, 330 P.2d 547, 459 (“All parties agree that the waters of the [Roswell Artesian Basin] basin are over-appropriated and have been for many years ...”); City of Roswell v. Reynolds, 1974-NMSC-044, 86 N.M. 249, 254, 522 P.2d 796 (Roswell Underground Water Basin); In re Waterfall Cmty. Water Users Ass'n, 2009-NMCA-101, 147 N.M. 20, 22, 216 P.3d 270, 272 (Recognizing the administrative decision that the Pecos River stream system is fully appropriated); New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1187 (D.N.M. 2004) (“Defendants submit, the Middle Rio Grande Basin groundwater has already been fully appropriated,... .”); Herrington v. State of N.M. ex rel. Off. of State Eng'r, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258, 269 (“[N]oted by the State Engineer, the Mimbres Basin is fully appropriated,... .”); United States v. Abouselman, 976 F.3d 1146, 1163 (10th Cir. 2020) (The Jemez River is fully appropriated); Bliss, State ex rel., v. Alexander, 1955-NMSC-061, 59 N.M. 478, 286 P.2d 322, 323 (“[I]t is the belief of the State Engineer that the entire waters of this basin [Lea County Underground Basin] within which said lands are situated are fully appropriated.”); and Office of the State Engineer, “2018 New Mexico State Water Plan, Part II: Technical Report”, Section 3.2, page 17 (Surface water in the state is fully appropriated).

<sup>57</sup> El Paso II, at page 703.

In addressing an argument that New Mexico would apply “contrary to the conservation of water within the state [or] detrimental to the public welfare of the state” criteria unevenly so as to render its application to in-state use meaningless, the El Paso II court noted that it was “unclear at this time how the conservation and public welfare criteria will be applied to in-state appropriations.”<sup>58</sup> However, the court went on to note that NMSA 1978, Section 72-5-7, would allow the State Engineer to deny permits if in his opinion it “would be contrary to public interest” under Young & Norton v. Hinderlider, 1910-NMSC-061, 15 NM 666, 110 P. 1045. In Hinderlider, the New Mexico Supreme Court found that the prior appropriation doctrine did not prevent the Territorial Engineer from preferring a later application to appropriate surface water rights if the first application in time was contrary to the “public interest”.<sup>59</sup> The court in El Paso II posited that “[t]he State Engineer and state courts may consider the conservation and public welfare criteria equivalent to the “public interest” criteria ...”, and so it cannot be concluded that conservation and the public welfare criteria are on their face meaningless as applied to in-state uses.<sup>60</sup>

El Paso then contended that “the public welfare of the citizens of New Mexico” language found in NMSA 1978, Section 72-12-B-1(C), was an intrinsically discriminatory criterion precluding the evenhanded regulation of water usage as it favored its own citizens.<sup>61</sup> In response to this contention, the court in El Paso II examined the public welfare criteria considered under Sporhase v. Nebraska, 458 U.S. 941, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982) which was very

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<sup>58</sup> El Paso II, at page 699.

<sup>59</sup> Id.; Young & Norton v. Hinderlider, at page 1050.

<sup>60</sup> El Paso II, at page 699.

<sup>61</sup> El Paso II, *supra*, at page 699.

similar to the statutory language of New Mexico. The court noted that on its face, Section 72-12B-1(C) did not direct the State Engineer to deny applications for exports that would be detrimental only to the local economic interests, but that “public welfare” is a broad term that includes health and safety, recreational, aesthetic, environmental and economic interests.<sup>62</sup> If a state wishes to assert the public welfare criterion to effectuate simple economic protectionism, a per se rule of invalidity would be applied as it would violate interstate commerce.<sup>63</sup>

El Paso II went on to hold that a state may favor its own citizens in times and places of shortages.<sup>64</sup> However, this does not mean that a state can limit or bar exports simply because it anticipates there will not be enough water to meet all future uses. On the other hand, it would be unreasonable to require a state to wait until a dire shortage before it can prefer its own citizens’ use over out-of-state usages. “If the limited preference is to be meaningful the state must be permitted to prefer local usage while there is still water to conserve.”<sup>65</sup> In short, New Mexico may enact a law to provide for future contingencies but that law must be facially valid to survive a constitutional attack for violating the Commerce Clause and not be contrary to the factors outlined in Sporhase.<sup>66</sup>

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<sup>62</sup> Id. at page 700.

<sup>63</sup> Id. at page 701.

<sup>64</sup> Id. at page 701; citing to Sporhase, *supra*.

<sup>65</sup> El Paso II, at page 701.

<sup>66</sup> Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, (1982) (The Supreme Court laid out various factors to determine whether a state statute restricting the withdrawal of water for use in an adjoining state was consistent with interstate commerce: limiting uncontrolled transfers, reciprocity, evenhanded regulation to effectuate a legitimate public interest, incidental effect on

El Paso II was decided forty years ago. The New Mexico legislature has still not defined “public welfare” or “conservation” within the Water Code. It is currently left to state water officials and the courts to define public welfare criteria on a case by case basis. There is little New Mexico case law dealing with the public welfare and conservation criterion.<sup>67</sup>

By characterizing state water rights as a form of a commercially tradable property right subject to the Commerce Clause, the relevant federal cases have narrowed the states’ path toward conserving water within their respective boundaries. Aside from this impediment, will New Mexico endow the term of “conservation” with a fuller definition beyond the concepts of minimal use and prevention of waste, to one reflecting broader concerns for planned management of, and caring for resources to prevent exploitation, destruction, and depletion as contemplated by Aquifer Sciences?<sup>68</sup> Or will New Mexico continue with the principal recognized in Mathers v. Texaco, that as long as there is an economic life to the supply of water, the withdrawal of said waters secures to the public the maximum beneficial use of the waters?<sup>69</sup> As the state (and other Western states) delays in articulating and solidifying its water planning to include environmental, public welfare and conservation concerns, the face of the “new

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interstate commerce, etc. While important, an analysis of Sporhase and its guidance on non-violating efforts to ensure compliance with the Commerce Clause is beyond the scope of this paper.)

<sup>67</sup> Susanne Hoffman-Dooley, “Determining What Is in the Public Welfare in Water Appropriations and Transfers: The Intel Example”, 36 Nat. Resources J. 103, 104 (1996); Aquifer Science, at page 679.

<sup>68</sup> Aquifer Science, at page 678.

<sup>69</sup> Mathers, *supra*, at page 776.

federalism” in the form of interstate commerce and federal jurisdiction will eventually override the traditional areas of state choice and priority over its sovereign water.<sup>70</sup>

### **Ambush from Above the Canyon Walls: Sporhase and Interstate Commerce**

When used as a noun, an ambush represents a trap in which one or more concealed attackers lie in wait to attack by surprise.<sup>71</sup> In Western lore, the ambush is often from above where a passage narrowly runs between two canyon walls.<sup>72</sup> The ambush presents a classic “Hobson’s choice”: either risk complete losses at the stricture, or somehow, manage to have a residual of the main parties survive the passage between the canyon walls. As used in this paper, the “ambush” does not involve concealed attackers that lie in wait to attack by surprise, but rather there exists federal jurisprudence from above which waits to critically review any effort by a state to retain its own waters as it navigates through the narrow strictures of interstate commerce. Such is the role of Sporhase, *supra*.

El Paso I and El Paso II analyzed and applied Sporhase and other Supreme Court cases to interpret the Commerce Clause and its effect on interstate commerce in ground water.<sup>73</sup> Lost and obscured in the analysis of its application however, is the states’ larger perspective of how

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<sup>70</sup> Charles T. DuMars A., “Symposium Introduction: New Challenges to State Water Allocation Sovereignty”, 29 Nat. Resources J. 331, 336 (1989).

<sup>71</sup> “Ambush.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/ambush>. Accessed 9 Dec. 2024.

<sup>72</sup> *See for example*, Ambush at Dark Canyon (Team 2 Entertainment 2013); Canyon Ambush (Silvermine Productions 1952).

<sup>73</sup> El Paso II, *supra*, at page 697.

this form of “new federalism” will effect and eventually change the body of state law that favors state sovereignty and priority over its own water.<sup>74</sup>

One of the main issues in Sporhase, was whether Congress had granted the states permission to engage in ground water regulation that otherwise would be impermissible.<sup>75</sup>

While it is clear that surface water is more amendable to a Commerce Clause analysis since many rivers run across the several states, the issue in Sporhase related to ground water which can be enclosed within the state. The state of Nebraska suggested that Congress had authorized the states to impose otherwise impermissible burdens on interstate commerce in ground water based on 37 statutes containing language that Congress deferred to state water law.<sup>76</sup> The Supreme Court reviewed the various abstracts of the 37 statutes and noted language that nothing in the Act could be construed as affecting or intending to affect “the laws of any State or Territory relating to control, appropriation, use or distribution of water used in irrigation”.<sup>77</sup> Although noting that the 37 statutes and interstate compacts demonstrated Congress’ deference to state water law, the Supreme Court held that this did not indicate that Congress wished to remove federal constitutional constraints on such state laws. It was only when Congress expressly stated that it was its “intent and policy” would the Court sustain state legislation from attack under the Commerce Clause.<sup>78</sup>

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<sup>74</sup> Charles T. DuMars A., “Symposium Introduction: New Challenges to State Water Allocation Sovereignty”, 29 Nat. Resources J. 331, 336 (1989).

<sup>75</sup> Sporhase, *supra*, at page 943.

<sup>76</sup> Id., at page 958.

<sup>77</sup> Sporhase, *supra*, at page 959.

<sup>78</sup> Id., at pages 959-960.

In other parts of its opinion, the Supreme Court in Sporhase, cited further factual grounds for its conclusion that the states' ground waters are subject to regulation as interstate commerce. The Court noted that since ground water, once withdrawn, may be freely bought and sold among the various states, it is appropriately regarded as an article of commerce.<sup>79</sup> The Court pointed out that 80% of our water supplies are used for agricultural purposes, and that agricultural markets supplied by irrigated farms are worldwide.<sup>80</sup> Finally, in recognizing the multistate character of the Ogallala aquifer – underlying land in Colorado, Nebraska, Texas, New Mexico, Oklahoma and Kansas – the Court confirmed the “view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource.”<sup>81</sup> As to the argument that Nebraska retained a degree of ownership interest in its waters, the Court characterized the argument as “still based on the legal fiction of state ownership.”<sup>82</sup>

The Sporhase Court did not completely discount the Western State's asserted superior competence in conserving and preserving scarce water resources or in its claim to public ownership, but rather, they would be regarded as “factors to inform the determination [of] whether the burdens on commerce imposed by state ground regulations are reasonable or unreasonable”, concluding that “[g]round water overdraft is a national problem and Congress has

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<sup>79</sup> Id., at pages 949-950.

<sup>80</sup> Id., at page 953; *citing to* Soil Conservation Service, U. S. Dept. of Agriculture, *America's Soil and Water: Conditions and Trends* 21 (1980).

<sup>81</sup> Id., at pages 951 – 952.

<sup>82</sup> Sporhase, *supra*, at page 951; *citing* Hughes v. Oklahoma, 441 U.S. 322, 334, 99 S.Ct. 1727, 1735, 60 L.Ed.2d 250 (1979) (quoting Toomer v. Witsell, 334 U.S. 385, 402, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460 (1948)).

the power to deal with it on that scale.”<sup>83</sup>

### **Equitable Apportionment.**

Under the prior appropriation doctrine, recognized in most of the Western states, water rights are acquired by diverting water and applying it for a beneficial purpose; a distinctive feature of the prior-appropriation doctrine is the rule of priority under which relative rights of water users are ranked in the order of their seniority.<sup>84</sup> Water rights are established and exercised by “beneficial use” which forms ‘the basis, the measure and the limit of the right to use of the water.’<sup>85</sup> From the perspective of New Mexico water law, water rights are determined under state law, not federal law.<sup>86</sup> All water within the state, whether above or beneath the surface of the ground belongs to the state which authorizes its use. The appropriator does not acquire a right to specific water but only the right to appropriate and use a given quantity of water, for a specific purpose.<sup>87</sup> New Mexico does not recognize equitable distribution as the system of water law; rather, doctrine of prior appropriation prevails.<sup>88</sup>

While New Mexico and other Western states may not recognize equitable distribution as a system of water law, equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream.<sup>89</sup>

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<sup>83</sup> Id., at pages 953-954.

<sup>84</sup> Colorado v. New Mexico, 459 U.S. 176, 184 (1982).

<sup>85</sup> *See* N.M. Const. art. XVI, § 2.

<sup>86</sup> Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, 289 P.3d 1232, 1242.

<sup>87</sup> Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, *supra* at page 1242; Snow v. Abalos, 140 P. 1044, 1048 (N.M. 1914).

<sup>88</sup> State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47, 57.

<sup>89</sup> Colorado v. New Mexico, *supra*; see also State ex rel. Martinez v. City of Las Vegas, *supra*, at

It is a flexible doctrine which calls for the exercise of informed judgment on consideration of many factors to secure a just and equitable allocation “without quibbling over formulas”.<sup>90</sup> State law is not controlling, rather, the just apportionment of interstate waters is a question of federal law that depends “upon a consideration of the pertinent laws of the contending States and all other relevant facts.”<sup>91</sup> The laws of the contending states are an important consideration but the just apportionment of interstate water is a question of federal law.

Equitable apportionment may be invoked not only to require the reasonably efficient use of water, but also to impose on states an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream.<sup>92</sup> While equities supporting the protection of established senior users are substantial, it is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both states and balance of harm and benefit that might result from the diversion.<sup>93</sup> Where states have failed to account for the conservation and protection of its water, equitable apportionment may serve as a safeguard to protect the diminishing resource. On the other hand, the invocation of equitable apportionment will counter any state’s claim to sovereign control over its waters.<sup>94</sup>

### **Expanding Federal Jurisdiction.**

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page 57.

<sup>90</sup> Colorado v. New Mexico, *supra*, at pages 183 – 185.

<sup>91</sup> Id., *supra*, at pages 183 - 185.

<sup>92</sup> Id., *supra*, at pages 183 - 185.

<sup>93</sup> Colorado v. New Mexico, *supra*, at pages 185-187.

<sup>94</sup> Charles T. DuMars A., “Symposium Introduction: New Challenges to State Water Allocation Sovereignty”, 29 Nat. Resources J. 331, 336 (1989).

Separate and apart from interstate stream disputes between states, jurisdiction that include federal entities may be invoked by other issues in the case. See for example, Elephant Butte Irr. Dist. v. Regents of New Mexico State Univ., 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372 (Because of the huge federal presence in prior appropriation states, attempts to fully adjudicate water rights require federal participation in state water adjudications). In Elephant Butte Irr. Dist. v. Regents of New Mexico State Univ., a question arose as to whether under the McCarran Amendment<sup>95</sup> federal immunity was waived as the lower Rio Grande did not qualify as a defined “river system”. In that case, the court found that since the state compact delivery obligation of New Mexico is superior to the rights of the claimants along the Rio Grande upstream from Elephant Butte Dam and because the compact requires a specific amount of water to be delivered to the dam which is not apportioned between Texas and New Mexico, there was a statutorily-mandated exception to the relationship that may otherwise exist between users upstream and downstream from the dam. In this context, the delivered but unapportioned water could be considered a separate “river system” for purposes of the McCarran Amendment and thus allowing for the joinder of the United States to a state adjudication case.<sup>96</sup>

More recently, in Texas v. New Mexico, 602 U.S. 943, 144 S. Ct. 1756, 219 L. Ed. 2d 539 (2024), the federal government sought to intervene in a suit between Texas, New Mexico and Colorado. The federal government like Texas, took issue with New Mexico’s groundwater pumping alleging that it interfered with the United States’ ability to deliver water to Mexico under a separate treaty in addition to its obligation under the Rio Grande Compact between the party states. During the litigation there was a proposed consent decreed agreed to by Texas and

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<sup>95</sup>43 U.S.C.A. Section 666(a)(2) (1952).

<sup>96</sup> Elephant Butt Irr. Dist., *supra*, at pages 377 - 379.

New Mexico but it excluded the federal government which objected to the consent decree. The U.S. Supreme Court held that it could not approve the interstate consent decree without the United States' consent, holding that the United States held "distinctively federal interests" to defend, namely its contract obligations to Mexico.<sup>97</sup> Those interests included an obligation to enforce the Rio Grande Compact between the states whose purpose was to "effect[t] an equitable apportionment" of the Rio Grande's waters between the signatory States.<sup>98</sup> Ultimately, the Supreme Court could not approve the States' consent decree over the United States' objection.

The still pending case of Texas v. New Mexico is rich in water law issues and potential implications for this state however, the focus of this paper is on the impact of climate change on New Mexico's water law. As can be seen from the above, there is a new front arising from the potential invocation of equitable apportionment under expanding federal jurisdiction. There does not need to be a classic interstate stream dispute to invoke federal jurisdiction, but if the issues involve or draw upon "distinctively federal issues" then equitable apportionment may control over the right of prior appropriation.<sup>99</sup> While there are notable dissents on both sides,<sup>100</sup>

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<sup>97</sup>Texas v. New Mexico, 602 U.S. 943, 955 (2024).

<sup>98</sup>Id., at page 955.

<sup>99</sup> Sporhase, *supra*, at page 954 ("Ground water overdraft is a national problem and Congress has the power to deal with it on that scale"); Texas v. New Mexico, 602 U.S. 943, 958-960) (In addition to having duties and roles under various Project, Compact and treaty obligations, the U.S. had "distinctively federal interests" in seeing that water deposited in the reservoir was not siphoned off by downstream ground water pumping in ways that the Compact did not contemplate).

<sup>100</sup>Texas v. New Mexico, 602 U.S. 943 (2024), Justice Gorsuch dissenting, at pages 966-967 (

any water law case since Sporhase and Texas v. New Mexico, may invoke equitable apportionment if distinctive federal issues arise, regardless of whether it is a ground water or surface water dispute. The question remains however, whether the onset of climate change will favor the application of federal equitable apportionment since the doctrine requires the reasonably efficient use of water and imposes on the states an affirmative duty to take reasonable steps to conserve and augment the water supply.<sup>101</sup>

### Final Thoughts

As early as 1984, the legislature has been provided with judicial guidance that it not need to wait until there a dire shortage of water before it can prefer its own citizens' use over others,

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“The Court’s decision is inconsistent with how original jurisdiction cases normally proceed. It defies 100 years of this Court’s water law jurisprudence. And it represents a serious assault on the power of States to govern, as they always have, the water rights of users in their jurisdictions.”); and State ex rel. v. U.S., 2018-NMCA-053, 425 P.3d 723, 729-730 (a retired federal judge sitting on New Mexico Court of Appeals noted that a state has no power to control the water within its boundaries because water “can move in interstate commerce,” it is “ultimately subject to the control of the federal, not the state, government.”) In the State Engineer’s Motion to Reconsider, at page 3, filed 4/13/2021 in State ex rel. v. U.S., *supra*, S-1-SC-37068 (2021), the State Engineer responded that the statement is erroneous and flies in the face of one hundred and fifty years of federal and state precedence, as it “fails to follow this Court’s long-established water law precedents regarding the State’s ownership or and regulatory control over all surface and groundwater within New Mexico.”).

<sup>101</sup>Colorado v. New Mexico, *supra*, at page 184.

but it has to be a limited preference that does not violate the Commerce Clause. For this effort to be meaningful the state must be permitted to prefer local usage while there is still water to conserve.<sup>102</sup> As directed by Aquifer Science in 2023 however, any effort to conserve New Mexico's water for its future, necessarily requires that the legislature formulate a definition of "conservation" in the Water Code to provide a fuller definition beyond the concepts of minimal use and prevention of waste under a beneficial use doctrine --- to one reflecting the broader concerns for planned management of, and caring for resources to prevent exploitation, destruction, and depletion.<sup>103</sup> 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 murky status of our water law will remain the same. Fortunately, the legislature has already taken a number of steps in amending the Water Code to reflect the need for conservation and efficiencies.<sup>104</sup> Additional steps must be taken however, as the definition of conservation and its purpose or intent needs to be clarified, and the constitutionally embedded doctrines of priority rights and beneficial use, should be reconciled with conservation and the implications of climate change. Perhaps then, New Mexico can get back on the saddle and lead the charge against climate change.

If New Mexico and the other Western states fail to enact real conservation efforts within their own laws and regulations, then one can anticipate and expect that the far reaching powers of the federal government will one day mandate equitable apportionment and impose upon the

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<sup>102</sup>El Paso II, *supra*, at page 701.

<sup>103</sup>Aquifer Science, *supra*, at page 678.

<sup>104</sup>*See for example*: N.M. Stat. Ann., Sections 72-4A-2(A)(3) (1978); 72-5-5.1 (1985); 72-5-23 (1985); 72-12-3(E); 72-12-7(A) (1985); 72-12B-1(C); 72-14-3.2; and others.

various states an affirmative duty to conserve and augment the water supply. Should this development come to fruition, than the doctrine of prior appropriation will no longer be on life support, but it will be laid to rest on the grounds of equitable apportionment.<sup>105</sup>

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<sup>105</sup> See *supra*, Hon. Matthew G. Reynolds, *Trial and Error: How Courts Have Shaped Prior Appropriation in New Mexico*, 57 Nat. Resources Journal 263, Winter, 2017 (“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, at page 317.