Climate Change in NM Water Law (1)

2 cases citing "climate change"

Aquifer Science, LLC v. Verhines, No. A-1-CA-39080, 2022 WL 18356471 (N.M. Ct. App. Dec. 15, 2022)
The applicant, a company formed to obtain water for a planned multi-use development, brought de novo appeal of the State Engineer's denial of application to appropriate groundwater from a declared basin. The trial judge denied the application and the Court of Appeals held that the trial court's use of the phrase "not consistent with conservation," as opposed to statutorily-employed phrase "not contrary to conservation of water," did not render erroneous court's bench-trial conclusion that proposed appropriation of water from declared basin was "not consistent with conservation"; the trial court correctly quoted statutory language in other conclusion of law and thus was clearly aware of statute's requirements, and parties themselves did not use the statutory phrase.

Involving Article 12 of Underground Waters, N.M. Stat. Ann. Section 72-12-3, Application for use of underground water; publication of notice; permit, A. Any person, firm or corporation or any other entity desiring to appropriate for beneficial use any of the waters described in Chapter 72, Article 12 NMSA 1978 shall apply to the state engineer in a form prescribed by the state engineer. In the application, the applicant shall designate: ... [place, use, beneficial amount,etc]. Upon filing the application, any person objecting to that the granting of the application "will be contrary to the conservation of water within the state or detrimental to the public welfare of the state" as well as showing substantial and specific affect by the granting of the application, shall have standing to object or protest in addition to any state subdivision or agency. Section 72-12-3D. Assuming a timely objection, if the State Engineer is of the opinion that the permit should not be issued, the State Engineer may deny the application without a hearing or may order a hearing to be held. Section 72-12-3F.

As to underground waters, until a basin was declared by state engineer, he could not exercise jurisdiction in connection therewith. 1953 Comp. §§ 75-11-26 to 75-11-36. McBee v. Reynolds, 1965, 74 N.M. 783, 399 P.2d 110.

<u>Shot Off the Saddle: 63 Years into a 40-year Plan.</u>

Mathers v. Texaco, Inc., 1966-NMSC-226, 77 N.M. 239, 421 P.2d 771

The State Engineer determined that applications should be granted for the appropriation by Texaco of 350-acre feet per year for the purpose of water flooding 1,360 acres of oil-bearing formation in a producing oil field. By this water flooding operation, which has been approved by the New Mexico Oil Conservation *242 Commission, it is contemplated that slightly in excess of one million barrels of oil will be recovered.

Finding by the trial court: 'The undisputed evidence in the case supports the premise that the taking of any water from the basin depletes the basin to the extent of the amount of water taken, and this can never be replaced. The undisputed evidence clearly shows impairment to existing rights would result from the granting of the Texaco applications.'

{12} Protestants take the position that an application for a permit to withdraw waters from an underground basin must be denied if the evidence establishes that such withdrawal will cause a decline in the water table leading to impairment of prior appropriators

If the position of protestants be correct, then Texaco, as stated in its brief in chief, '* * * 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'.'

{14} In fact, 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 *245 withdrawal, to some degree, has caused a lowering of the water level, by lowering the water table.

In the case of Application of Brown, 65 N.M. 74, 332 P.2d 47 5, we recognized that '* * * The lowering of a water table in any particular amount does not necessarily constitute an impairment of water rights of adjoining appropriators. * * *' This must, of necessity, be true in a non-rechargeable basin such as the one here involved, if the water is to be put to a beneficial use, and if the use is to be made available to more that the initial appropriator.

As above stated, 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. In the case of the Lea County Underground Water Basin, that time limitation was fixed by the State Engineer in 1952 at forty years, after having first made extensive studies and calculations. There is nothing before us to prompt a feeling that this method of administration *246 and operation does not secure to the public the maximum beneficial use of the waters in this basin.

"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.

Sixty-three years later, 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." 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 (December 6, 2018) OSE, Sec ___, Fig 3-9.

While the 40-year plan of the State Engineer in Mathers may have succeeded in a resulting one-third residual of water left in the aquifer by 1992, thirty-one years after, the aquifer is left with a ten to five-year life with other areas already having been completely mined out.

Transfer of water rights: water /s conservation

Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, 141 N.M. 21, 150 P.3d 971

Applications to move diversion point and use of surface water rights to groundwater rights in "move-to" location was a transfer of existing water rights rather than an application for new water appropriations, given that "move-from" and move-to locations were hydrologically connected, and groundwater pumping would be offset by retirement of surface rights. West's NMSA §§ 72–5–23, 72–12–7(A).

Water rights transfer applicants' motion for summary judgment on approval of transfer failed to provide protesters with reasonable notice that it sought summary judgment on statutory criteria of applications being non-detrimental to public welfare or contrary to conservation of water, and thus, summary judgment on those criteria was improper, given that motion failed to include any facts or explain how applicants were entitled to summary judgment on those issues other than impairment. West's NMSA §§ 72–5–23, 72–12–7(A).

Applicants applied for permits from the State Engineer to change the point of diversion and the place and purpose of use of surface water rights in Valencia County (move-from location) to groundwater rights in Sandoval County (move-to location). Both the move-from location and move-to location are within the Rio Grande Underground Water Basin. Applicants, developers, sought the transfer to provide water to the Overlook Subdivision, a 106–lot residential development. Protestants, existing surface water users at the move-to location, objected to the applications based on three statutory grounds: the transfer would (1) impair existing water rights at the move-to location, (2) be contrary to conservation of water within the state, and (3) be detrimental to the public welfare of the state. See NMSA 1978, §§ 72–5–23, 72–12–7(A) (1985).