Opinion No. 59-60

June 11, 1959

BY: FRANK B. ZINN, Attorney General

TO: Mr. S. E. Reynolds State Engineer P. O. Box 1079 Santa Fe, New Mexico

The State Engineer may permit the transfer of an appropriation from the artesian basin to the shallow underground basin provided the applicant satisfies his burden of proof that such transfer will not impair existing rights.

The State Engineer may permit the commingling of waters under valid appropriations from both the shallow underground and artesian basins.

OPINION

*{*94}* In a recent letter you requested *{*95}* the opinion of this office on the following two questions:

1. Where the artesian source of water supply in the Roswell Artesian Basin has become contaminated by salt water encroachment and where certain appropriators having valid rights for the appropriation of artesian waters for the irrigation of lands in this area have made application to change their source of appropriation from the artesian aquifer to the shallow aquifer, may a permit for such change be issued under such terms and conditions as the State Engineer may impose?

2. Where an appropriator has a valid right for the appropriation of artesian water for certain portions of his farm and has a valid right for appropriation of water from the shallow underground basin for other portions of his farm, may a permit be issued for the commingling of these waters subject to such terms and conditions as the State Engineer may impose?

I am of the opinion that the State Engineer may permit a change of diversion from the artesian basin to the shallow underground basin in the Roswell area subject to such terms and conditions as he may reasonably impose if the applicant for the change sustains his burden of proof that the proposed change will not impair existing rights.

I am of the further opinion that an appropriator of valid rights from both the artesian basin and the shallow underground basin may be permitted by the State Engineer to commingle the rights of the two basins subject to such conditions as he may impose.

Your first question appears to have been precipitated by certain findings and conclusions made by the District Court in the case entitled **The State of New Mexico, on the relation of John H. Bliss, State Engineer, v. Bert Troy Dority, et al.,** No. 5296 in the District Court for Chaves County, which case was appealed to the Supreme

Court of the State of New Mexico and decision found at 55 N.M. 12. This case is commonly referred to as the **Dority** case and will be so designated hereafter. The pertinent finding is No. 9 found at page 106 of Volume 1 of the Transcript on appeal and reads as follows:

"Since the original proclamation of 1931, the State Engineer has administered the waters of the Roswell Artesian Basin, both artesian water and shallow ground water, under the 1931 Act. At all times, the waters of the artesian basin and the shallow ground water in the valley fill have been administered as separate water sources. The granting of licenses for the appropriation of artesian water for irrigation purposes was discontinued in the year 1931 upon determination by the State Engineer that no additional unappropriated waters were available from that source; licenses for the appropriation of shallow ground continued to [be] granted by the State Engineer upon application until the year 1937, at which time the granting of such licenses was discontinued by reason of the determination by the State Engineer that no unappropriated shallow ground water was available from that source."

This finding was largely based upon testimony of the then State Engineer. See particularly page 156 of the Transcript.

The Court's conclusions in that case were based upon the said findings and this would indicate that a transfer of diversion from the artesian to the shallow underground would not be permissible so long as the two basins remained closed and not subject to further appropriation.

To form an opinion on the above *{*96}* question at this date, recognition must be given to the further studies which have been made and information collected relative to the basin. The Roswell declared basins are described in the **Dority** case as follows:

"Defendants' lands are situated in Chaves County, New Mexico, and are located within the external boundaries of two underground water sources, one of which is an artesian basin lying between confining strata, the waters of which are commonly referred to as artesian water; and the other, plaintiff asserts, is an underground reservoir or lake in the valley fill overlaying such artesian basin, the waters of which are commonly referred to as shallow ground water." Supra, p. 15.

This opinion is based upon the above description and on the assumption that the sources of water for the shallow aquifer are natural leakage and upward percolation from the artesian aquifer, leaky artesian wells, precipitation and return flow from irrigation, and upon the opinions of hydrologists, who have made studies of the Roswell Artesian Basin, that the principal source of water in the shallow aquifer is from the artesian basin. (Hantush, Mahdi S., **Preliminary Quantitative Study of the Roswell Ground-Water Reservoir,** New Mexico, 1955; Morgan, Arthur M., **The Geology and Shallow-Water Resources of the Roswell Artesian Basin,** New Mexico, 1938; Fiedler & Nye, **Geology and Ground-Water Resources of the Roswell Artesian Basin,** New Mexico, Water Supply Paper 639, 1933.) If these assumptions and opinions

are correct, it can be seen that there is a direct relationship between the artesian and shallow aquifers and that pumping from one source will have an effect upon another source.

Even though it may be assumed that the waters of the artesian aquifer and the shallow aquifer are interrelated, there are certain legal considerations which mitigate against a change from a point of diversion in the artesian aquifer to one in a shallow aquifer. The first of these legal considerations is the legislative enactments. The first legislative enactment concerning underground water is found under Laws of 1912, Chapter 81. These earlier legislative enactments referred solely to artesian water. The first legislative enactment concerning ground water generally was in 1927 with the enactment of Chapter 182 of the Laws of 1927. This act was declared unconstitutional for technical reasons in **Yeo v Tweedy,** 34 N.M. 611, 286 P. 970. The general ground water law was repassed in 1931, being Laws of 1931, Chapter 131. This law, in the case of **State v. Dority,** supra, was held to apply to both ground water and shallow water but note that a separate statute was enacted concerning artesian wells by Laws of 1935, Chapter 43. It therefore may be contended that the legislature intended for the two sources of water to be administered separately. The case of **State v. Dority,** supra, also describes the two sources of water separately and it might well be argued that the Supreme Court felt that they should be separately administered. In view of the legislative history and the **Dority** decision, it may further be argued that a rule of property has been created which would require that the two sources of water be administered separately. However, as far as we have been able to determine, no court has ruled upon this point.

However, accepting that the two basins are interrelated as has hereinbefore been discussed, it appears that the recent opinion of the Supreme Court of the State of New Mexico, rendered in the **Applications of Templeton, Greer and Bogle v. Pecos Valley Artesian Conservancy District and S. E. Reynolds, State Engineer,** 65 N.M. 59, 332 P. 2d 465, becomes material. The Court therein quotes with approval from 93 C.J.S., Waters, Section 170, page 909, as follows at page 470:

*{*97}* "An appropriation when made follows the water to its original source, whether through surface or subterranean streams or through percolations."

The defendants in that case contended that the transfer of a diversion from the surface flow of the Rio Felix to the underground basin of the Valley Fill would amount to a new appropriation in an underground basin that is fully appropriated. The proposition was based on the assumption that there was no connection between the surface flow of the Rio Felix and the underground water basin. The lower court, in its findings, did not support the assumption and permitted the applicants to perfect their transfer. The Supreme Court, in affirming the decision of the lower court said as follows at 332 P. 2d, supra, page 471:

". . . would lead to the conclusion that the apellees were entitled to the waters of the Valley Fill that flowed into the Rio Felix at the time of their appropriation. It seems that

there is nothing in the law that would prevent them from following this water through an application for a change of point of diversion, provided that it does not impair any other existing rights. In other words, their applications do not amount to a request for a new appropriation in the underground water basin, but merely a request to follow the source of their original appropriation."

Applying the principles as enunciated in the **Templeton** decision and accepting that the two basins are interrelated, it appears that there may be a legal basis for making the proposed transfer.

The pertinent statute here involved is Section 75-11-7, which reads, in part, as follows:

"The owner of a water right may change the location of his well or change the use of the water, but only upon application to the state engineer and upon showing that such change or changes will not impair existing rights and to be granted only after such advertisement and hearing as are prescribed in the case of original applications."

Under the ruling of the court in **Spencer v. Bliss,** 60 N.M. 16, 287 P. 2d 221, the applicant has the burden of proof of showing that the proposed change will not impair existing rights. In addition, he will have to overcome the previous administrative policy of the State Engineer in administering the waters separately.

In conclusion, it is our opinion that the State Engineer does have the authority under the laws of the State of New Mexico to consider such an application and to approve it if the applicant sustains the burdens placed upon him.

The answer to your second question is primarily answered in our response to the first question above, that is, if the commingling is considered a change from one aquifer to the other, the same reasoning would apply as in the first question. However, if the applicant merely desires to use the same amount of water from each aquifer as he has previously used, which we presume is the intent of the question asked, then we have a separate situation which is still controlled by the provisions of Section 75-11-7 quoted above. In order to commingle waters, the applicant would have to file an application for a change of place of use of both his artesian well and his shallow well and the State Engineer could approve such application subject to such conditions as reasonably may be necessary to insure that there will not be an increased use of water from either aquifer. Although these conditions would be primarily of an administrative nature, it appears to us that the permit or permits could only be approved subject to such conditions as the State Engineer may deem advisable as to measuring *{*98}* the amount of water from the respective sources.

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