Opinion No. 94-07

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OPINION OF: TOM UDALL, Attorney General

BY: Alletta Belin, Assistant Attorney General

TO: Honorable Max Coll, New Mexico House of Representatives, State Capitol; Santa Fe, New Mexico 87503. Honorable Elizabeth T. Stefanics, New Mexico Senate, State Capitol; Santa Fe, New Mexico 87503

QUESTIONS

Are the practice and procedure[1] employed by the office of the State Engineer[2] of approving applications for new appropriations of water on the condition that unspecified existing water rights be "retired" and "dedicated" at some time in the future lawful?

CONCLUSIONS

No. The State Engineer's water rights dedication practice and procedure are unlawful as practiced in the past because they preclude full consideration of public welfare, water conservation, and impairment to existing water rights at the time the new conditional water right is approved. In addition, there is no express or implied statutory authority for the practice an procedure. Finally, the practice and procedure violate procedural due process requirements.

FACTS

The "retirement/dedication" process, as we understand it, consists of the following. An applicant files an application for a new appropriation of groundwater in a groundwater basin that has not been determined to be fully appropriated. There is a hydrological connection between the groundwater basin and a fully appropriated stream system such that pumping from the new well would, at some point in the future, result in depletion of surface water from the stream system. In order to offset the anticipated depletion of surface water, the State Engineer imposes a condition on the groundwater permit that requires that at some time in the future, the applicant acquire and retire a specified amount of surface water rights in the related stream system. The amount of rights to be retired and the timing of the retirement are not identified until the State Engineer issues the well permit. The specific rights later identified for retirement are never the subject of public notice or an opportunity for public comment or protest.[3] The State Engineer has no written policies describing this process, but we understand that it has been in effect for approximately the last twenty years. The location where it has been most frequently invoked is the Rio Grande Stream System and Underground Water Basin.

On September 14, 1994, the State Engineer issued Proposed Order No. 152 of the Rules and Regulations of the State Engineer Governing the Drilling of Wells and Appropriation and Use of Ground Water in New Mexico. The proposed regulation would alter the dedication policy and practice in certain respects.

ANALYSIS

I. The State Engineer's water rights dedication practice and procedure are illegal because they preclude complete evaluation at the time the permit is approved of whether issuance of the permit will at any time in the future impair existing rights, be detrimental to public welfare, or be contrary to conservation.

The statutory provisions governing issuance of groundwater permits by the State Engineer are set forth in Section 72-12-1 **et seq.** NMSA 1978 (Repl. Pamp. 1985). New appropriations of groundwater are governed by Sections 72-12-1 and 72-12-3. Upon filing of an application, public notice must be given of the application, and protests may be filed objecting that the application will either impair existing rights, be contrary to the conservation of water within the state, or be detrimental to the public welfare. **Id.,** § 72-12-3 (D). The State Engineer can only grant permits to appropriate waters which are not already appropriated. **Templeton v. Pecos Valley Artesian Conservancy Dist.,** 65 N.M. 59, 332 P.2d 465 (1985). The owner of a groundwater right may change the location of a well or change the use of the water upon application to the State Engineer if he/she makes a showing that the change will not impair existing rights, will not be contrary to the conservation of water, and will not be detrimental to the public welfare. **Id.,** § 72-12-7; **see Application of Brown,** 65 N.M. 74, 78, 332 P.2d 475 (1958).

Appropriation and use of surface water are governed by separate code provisions. NMSA 1978, § 72-5-1 **et seg.** Although the administrative procedures governing permits, new appropriations, and changes differ slightly for surface and groundwater rights, the substantive characteristics of surface and groundwater rights are identical. **City of Albuquerque v. Reynolds,** 71 N.M. 428, 437 379 p.2d 73 (1963). New appropriations of surface water are governed by Sections 72-5-1 through 72-5-7. Section 72-5-23 and 72-5-24 address changes in place of use, purposes, and point of diversion of surface water rights. An application to change the place of use, purpose, and point of diversion of a surface water right is subject to the same requirements of public notice and opportunity to protest as applications for new appropriations. **Id.** The State Engineer will approve applications for change in surface water rights only upon a finding that such change will be without detriment to existing water rights, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state. **Id.**

An individual wishing to change a point of diversion must follow the specified statutory procedures; the statutory method of acquiring water rights is exclusive. **Honey Boy Haven, Inc. v. Roybal,** 92 N.M. 603, 604 592 P.2d 959 (1978); **State ex rel. Bliss v. Dority,** 55 N.M. 12, 19, 225 P.2d 1007 (1950). While the State Engineer has reasonable flexibility in performing his duties, his authority is limited to the authority granted by the

legislature, either expressly or by necessary implication. **Application of Brown,** 65 N.M. at 77. The State Engineer has authority to impose conditions on permits for new groundwater appropriations to ensure that the new permit will not impair existing surface water rights. **City of Albuquerque v. Reynolds,** 71 N.M. at 439-440.

There are two New Mexico supreme court cases of particular relevance to the questions at hand: **City of Albuquerque v. Reynolds,** 71 N.M. 428, 379 P.2d 73 (1962), and **City of Roswell v. Berry,** 80 N.M. 110, 452 P.2d 179 (1969). **City of Albuquerque** concerned Albuquerque's applications to drill four wells. Prior to ruling on Albuquerque's applications, the State Engineer required that Albuquerque retire a certain amount of surface water rights on the Rio Grande as a condition to approving the permit applications. The city refused to take the sets required by the State Engineer, who therefore denied the permit applications, finding that absent the retirement offset, granting the permits would impair existing surface water rights.

Albuquerque then challenged the State Engineer's actions, claiming, among other things, that the State Engineer had exceeded his jurisdiction by requiring the retirement of surface water rights as a condition to new appropriations of groundwater. 71 N.M. at 439. The court upheld the State Engineer's actions, finding that the had the power to impose reasonable conditions on groundwater permits to ensure no impairment of existing water rights. **Id.** at 439-440.

City of Albuquerque, therefore, stands for the general proposition that the State Engineer may require an applicant, as a condition of approval of a permit, to acquire and retire existing surface water rights to offset adverse impacts expected to result from the granting of the permit. The case does not, however, address the particular process at issue here.

City of Rosewell concerned not an application for a new groundwater appropriation but rather a water rights transfer application. The city of Roswell applied to change the location of wells and the place and purpose of use of water from the wells, thus turning irrigation wells in one location into a municipal well field in a new location. 80 N.M. at 112, 114. Carlsbad Irrigation District and H.C. Berry protested the application. At the beginning of the hearing before the State Engineer, Roswell stipulated with Carlsbad to retire 1500 acre-feet of surface water rights if the State Engineer granted its permit application. The purpose of the stipulation was to offset the effects of the proposed new well field on the flow of the Pecos River. **Id.** at 113.

The State Engineer approved the transfer but reduced the amount of water from 5,086.5 to 4,143.3 acre-feet. A condition of the State Engineer's partial approval was that Roswell retire 1500 acre-feet of water rights identified in the order. The State Engineer found that even if the original application had been approved for the full amount and absent the water rights retirement condition, that would have caused "an ultimate and total lowering of the artesian water level of 0.16 feet in [Berry's] artesian wells." **Id.** at 114. The State Engineer further found that granting the transfer under the conditions specified would result in accretions in both groundwater and conditions, any water level

decline in Berry's wells would have a "negligible effect" on the chemical quality of the well water. **Id.** at 115.

Protestant Berry argued that the stipulation between Roswell and Carlsbad constituted an amendment to Roswell's transfer application which required readvertisement before the State Engineer could act on the application. The court upheld the State Engineer's refusal to readvertise, finding that the stipulation "did not deprive the State Engineer of jurisdiction to proceed with the hearing." **Id.** at 113. The court noted that the stipulation did not require an amended application because it did not change what the city sought in the application. The court concluded that the State Engineer proceeded within his authority because that authority included the power to impose conditions in order to prevent impairment of water rights. **Id.** at 115.

Some people have argued that the **Roswell** case authorizes the State Engineer's dedication practice. We do not believe the case can be so interpreted. Rather, we believe that for several reasons, the case must be interpreted narrowly and not as a sweeping endorsement of the State Engineer's dedication practices, which differ in significant respects from the facts presented in the **Roswell** case. Most importantly, the court in **Roswell** was influenced by the key fact that even absent the retirement stipulation, there was no indicated that protestant's water rights would have been impaired by granting Roswell's application. By contrast, when well permits are granted for groundwater which is hydrologically connected to a fully apropriated stream system, by definition the permits will impair existing rights absent retirement or transfer of surface water rights.

Another important fact in the case was that Roswell's application was for a **transfer,** not a new appropriation, and that the evidence showed that the State Engineer's conditional approval of the application would result in **accretions** to all relevant water sources rather than a net depletion as would occur with a new appropriation. Furthermore, unlike the current practice, the specific water rights to be retired were indentified at the time that the application was approved. Finally, it is significant that both **City of Albuquerque** and **City of Roswell** were decided before the public welfare and water conservation provisions were added to the State Water Code.[4]

Under **City of Albuquerque, City of Roswell,** and the applicable statutory provisions cited above, the State Engineer has authority to condition a new water rights appropriation upon the retirement of water rights as long as the specific water rights to be retired have been identified in a public notice and there has been full opportunity for informed protest. The practice of conditioning new water appropriations on the future retirement of unidentified water rights in order to prevent impairment of existing water rights, however, is not lawful. Absent the critical information about the location and specifics of the water rights to be retired, it is impossible for the State Engineer to make a finding that the new appropriation-plus-retirement is not contrary to the conservation of water and will not be determined to the public welfare. NMSA 1978 § 72-12-3. Similarly, it is impossible for the State Engineer to find that the new appropriation-plus-retirement will not impair any existing rights because whether there will be impairment

depends upon the location and nature of he rights to be retired. **Id.** Moreover, since the public notice describes only the new permit application and not the surface water rights to be retired, the public is never notified of a key part of the transaction and cannot meaningfully participate in the process. In the absence of adequate public notice, comment, and opportunity to protest, the State Engineer cannot fully evaluate impacts on existing water rights, public welfare, and water conservation.

It is not sufficient for the State Engineer to assert that at the time the applicant submits the notice of retirement, he will ensure that all public welfare, water conservation, and rights impairment concerns are dealt with. It is even conceivable that it will not be possible or practical to retire sufficient surface rights to offset the impairment caused by the groundwater permit. The statutes require that a complete analysis occur **at the time** the new appropriation is approved so that the requisite findings can be made at the time the permit is issued.

II. The State Engineer's water rights dedication practice and procedure are illegal because they allow approval of changes in purpose, point of diversion, and place of use without compliance with the statutorily-mandated procedures.

Some people have argued that the State Engineer's water rights dedication practice is simply two separate actions, both of which are lawful. The first is a conditional appropriation of unappropriated water wherein notice and an opportunity to protest have been given to all concerned parties; the second is simply a notice of retirement, which does not require public notice because no one has the right to protest or interfere with water rights retirements. The fallacy in this argument is the proposition that the two actions can be viewed in isolation from one another. They cannot be viewed separately because they are simply two steps of a single action. That action is issuance of a water right which does not impair any existing rights and which is not detrimental to public welfare and not contrary to conservation of water. Because one cannot obtain the unappropriated groundwater without also simultaneously obtaining water from a fully appropriated stream system, the two actions are inextricably linked to one another.

When the two actions are viewed as one, it is clear that they constitute both a new appropriation of ground water and a change of purpose, point of diversion, and/or location of existing surface water rights. The fact that the priority date of the surface water rights is also changed does not alter these facts. Whether or not the change in surface water rights is labeled a "transfer," the fact remains that the current dedication procedure and the change in existing water rights it entails do not conform with either the surface water or the groundwater provisions of the State Water Code. If the two-step process is considered a water rights change under Section 72-5-23 and 72-5-24, it is improper because the procedures required in those sections were not followed. If the process is **not** considered a change under Sections 72-5-23 and 72-5-24, then it is a water right change neither expressly nor impliedly authorized by the State Water Code. Either way, the practice is unlawful because the statutory procedures specified for acquiring and changing water rights are exclusive. **Application of Brown,** 65 N.M. at 77; **Honey Boy Haven, Inc. v. Roybal,** 92 N.M. at 604. As discussed above, neither

City of Albuquerque nor **City of Roswell** authorize the current procedure used by the State Engineer because neither of those cases addresses the two-step process whereby the location and identity of the rights to be retired are not identified at the time a new water right is approved which is conditional on that retirement.

The practice violates the purposes and intent of the State Water Code by allowing a change in surface water rights without affording adequate notice and opportunity to comment and protest to those people whose rights could be adversely affected by the change. Published notice must contain the essential information relating to a water right application. **See** NMSA 1978, §§ 72-12-3, 72-5-4; **Eldorado at Santa Fe, Inc. v. Cook,** 113 N.M. 33, 822 P.2d 672 (Ct. App. 1991), citing **Nesbit v. City of Albuquerque,** 91 N.M. 455, 575 P.2d 1340 (1977). Under the current practice "essential facts" about the new appropriation-plus-retirement are omitted from the public notice. For example, if someone believed that the proposed retirement would not offset the impairment to their right caused by the new well, under the current practice, they would never have the opportunity to protest on those grounds and would never even receive public notice of the proposed retirement. Thus, the public notice given in connection with the permit-plus-retirement is invalid.

III. The dedication procedure used by the State Engineer violates the due process rights of water rights holders whose rights may be impaired by the permit-plus-retirement, depending on exactly which rights are selected for retirement.

Under the procedure used by the State Engineer prior to the Intel permit, no notice and opportunity to protest were ever afforded for people who might claim that the proposed retirement was not adequate to prevent impairment of existing rights. At the time the permit was issued, the particular rights to be retired were not identified, so that it would have been premature to argue that retirement would not prevent impairment. Yet at the time the retirment rights were identified and a notice of retirment was filed, it was too late to protest the permit and no one would have the right to protest the retirement.

This failure to provide adequate notice and an opportunity to protest for people whose rights might be impaired by the permit-plus-retirement is a violation of those people's rights to procedural due process. **Eldorado at Santa Fe, Inc. v. Cook,** 113 N.M. 33, 36, 822 P.2d 672 (Ct. App. 1991) (failure to follow statutory notice procedures violated water rights holders' due process rights); **Nesbit v. City of Albuquerque,** 91 N.M. 455, 458, 575 P.2d 1340 (1977) (due process requires notice of zoning change which changes fundamental character of property).

City of Roswell is not to the contrary. In **Roswell,** adequate notice of the applied-for permit was given. After notice of the application was given, a stipulation was entered into that altered the net result of the permit so as to reduce any potential adverse impacts of issuance of the permit. The court upheld the State Engineer's approval of the permit without requiring a revised public notice to be issued. There is no indication that the protestant or anyone else raised procedural due process concerns. The evidence apparently established that the original permit application, even absent the stipulation,

would not impair any existing water rights. Thus, there was no possibility in that case that anyone might have suffered impairment without receiving adequate notice and opportunity to comment.

By contrast, the dedication process discussed above concerns a process where retirement is contemplated from the beginning as a means of offsetting impairment which is certain to occur absent the offset. Under the holding in **Eldorado,** the process clearly constitutes a procedural due process violation.

ATTORNEY GENERAL

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GENERAL FOOTNOTES

n1 We assume that by "practice" you refer to the general concept of approving a new water right conditional upon future retirement of unidentified existing water rights, and by "procedure" you refer to the specific procedures followed by the State Engineer whereby public notice and opportunity for protest is afforded on the initial application, but no public notice and opportunity for protest are ever given in relation to specific identified water rights which are to be retired. In our view, the two issues and questions are interrelated such that answers to each of the questions apply to the other questions as well.

n2 On June 23, 1994, the State Engineer placed a moratorium on further implementation of this policy and practice. On September 14, 1994, the State Engineer lifted that portion of the moratorium relating to the processing of dedications pursuant to permits approved before June 23. For all applications not approved as of June 23, 1994, the moratorium on the dedication policy remains in effect.

n3 In the recent Intel permit, the State Engineer required that Intel apply for and obtain a second permit to retire the required amount of offset surface water rights. Under this procedure, there will be a second public notice and opportunity for protest at the time an application to retire rights is filed. As we understand it, prior to the Intel permit, the State Engineer did not require that a permit be obtained for the subsequent surface rights retirement, but merely that a notice of retirement be filled with and approved by the State Engineer. This opinion addresses the legality of the general practice that has been followed by the State Engineer in recent years rather that the unique procedure followed in the Intel case.

n4 The public welfare and water conservation provisions were codeified in 1983 and 1985. NMSA 1978, §§ 72-1-9, 72-5-5, 72-5-5.1, 72-5-6, 72-5-7, 72-5-23, 72-5-24, 72-12-3, 72-12-7, 72-12B-1, ((Repl. Pamp. 1985).