March 16, 2011 Advisory Letter---Lawfulness of Closing the High Plains Aquifer to New Appropriations

The Honorable Dennis Roch
New Mexico House of Representatives
P.O. Box 1391
Tucumcari, NM 88401

Re: Opinion Request - Lawfulness of Closing the High Plains Aquifer to New Appropriations

Dear Representative Roch:

You have requested an Attorney General Opinion on the following matter:

> Does the State Engineer's action in prohibiting the drilling of new water wells in Curry and Roosevelt Counties unlawfully abridge the water rights of those residents who hold land patents issued pursuant to the federal Homestead Act of May 20, 1862?

While it is not entirely clear from the press release you included with your request, it appears that you are asking about the November 13, 2009 Order Closing the High Plains Aquifer within the Curry County and Portales Underground Water Basins to New Appropriations under NMSA 1978, § 72-12-3 ("Order"),[1] a copy of which is attached. As discussed below, we conclude that the Order does not unlawfully abridge the water rights of any successors in interest to federal land patented lands or anyone else, and that the Order is otherwise within the authority of the State Engineer.

There are three primary bases for our conclusion. First, federal land patents issued under the homestead acts include no federal common law rights to water. That is, homestead act patentees, like any other landowner, must acquire their water rights in New Mexico through beneficial use under territorial and state law. Second, it is now settled under New Mexico law that, through his delegated authority from the legislature, the State Engineer may declare and administer groundwater basins in New Mexico on behalf of the public. His regulatory authority includes the authority to limit new appropriations based on his determination that no unappropriated water exists in the basin. Third, the November 13, 2009 Order, by its terms, has no effect on existing water rights.

1. Land patents issued under the federal homestead acts do not include any federal common law water rights.

Water rights for beneficial uses on lands acquired through federal homestead laws must be acquired and perfected in accordance with the local law of the territory or state. Land patents are "subject to" such prior rights, as expressly noted on the patent you provided us with your request. The patent expressly grants to the claimant the tract of land…

"*subject to* any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes…."

It is well settled as a matter of federal law that Congress severed any water rights interests from the public domain land and that lands ultimately granted to individuals through federal homestead acts did not include any water rights. Landowners were required to acquire water rights for those lands under the local law of the territory or state in which the lands were situated. *See California v. U.S.*, 438 U.S. 645 (1978); *Walker v. United States*, 142 N.M. 45, 2007 NMSC 38. Thus, landowners who hold property in New Mexico as patentees or their successors must acquire and perfect their water rights under the territorial or state laws of New Mexico.

Congress provided an incentive for citizens to settle the west in the federal homestead acts by promising a grant of lands to those who settled and claimed it under certain conditions. But the granted lands did not include any water rights, which remained subject to state and territorial laws. The United States Supreme Court held as early as 1935 that Congressional intent in the homestead acts was not to include any right to water, but instead to defer to the states (and territories) regarding water rights. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). The Court noted that as settlers had moved to the arid west, new customs of water use appropriate to that locale had evolved and been adopted into each state or territorial law. Congress therefore deferred to state and territorial laws, which were not uniform, and declined to claim that its homestead act patents included any water.

The Supreme Court subsequently reaffirmed these rules. In *California v. United States*, 438 U.S. at 653-657, the Court held that the homestead Act patent included no federal common law water rights because the state retained jurisdiction over any rights to water within the state's boundaries, even as to federal lands.

New Mexico case law has also recognized that federal patents to land in New Mexico do not include any federal common law rights to water and that any water right that could be perfected from beneficial use on such lands is governed exclusively by territorial and state law. In *Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950), the New Mexico Supreme Court held that public waters were reserved to the state as trustee for the people and subject to appropriation for beneficial use in accordance with state law; artesian waters lying below lands patented through federal homestead laws were public waters rather than waters belonging to the surface owners; and the state engineer had authority under state law to declare underground basins and assert jurisdiction to administer and regulate the use of such waters in accordance with state law.

In *Walker v. United States*, 142 N.M. 45, 2007 NMSC 38, the New Mexico Supreme Court answered two certified questions to the United States Court of Claims in an action for a taking of plaintiffs' private water rights and property rights under New Mexico law arising from the revocation of their permits allowing grazing on Forest Service lands. While there were significant questions about whether the plaintiffs actually had any state-recognized water rights, the New Mexico Supreme Court confirmed that water

rights in New Mexico are separate from land ownership rights and, from territorial days, were acquired through application of water to beneficial use, not the mere possession of property rights:

> Under the 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 water." N.M. Const. art. XVI, § 3. A water right is separate and distinct from a right to adjacent land because it is derived not from the rights in the land, but "from appropriation for beneficial use." Olson v. H & B Props., Inc., 118 N.M. 495, 498, 882 P.2d 536, 539 (1994).
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> *Walker*, 142 N.M., at 52.

2. The Office of the State Engineer was authorized to adopt the Order.

Another question arising from your inquiry about the lawfulness of the Order is whether the State Engineer is authorized to take the action he did in closing the High Plains Aquifer to new appropriations under most circumstances. The answer is that the State Engineer is fully authorized to take this action, which will not abridge any current water rights. All those with current water rights may continue to use those rights in accordance with their historic beneficial uses and New Mexico law.

The State Engineer's jurisdiction to administratively declare and assert jurisdiction over groundwater basins arises from the Groundwater Code of 1931. That code is the basis for NMSA 1978, Chapter 72, Article 12, and basically applied what had always been the law for surface water, i.e., prior appropriation, to groundwater. "The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, is declared to belong to the public and is subject to appropriation for beneficial use." NMSA 1978, § 72-12-1 (2003).

In order to assert jurisdiction, the State Engineer must declare that a groundwater basin has "reasonably ascertainable boundaries." The authority to make that determination administratively, and the State Engineer's broad authority to regulate new uses in the basin through the use of declarations, like the closure declaration you ask about, was challenged and upheld in *Bliss v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950).

Since *Bliss*, the administrative procedure of declaring basins has become settled law in New Mexico. *See New Mexico v. Myers*, 64 N.M. 186, 326 P.2d 1075 (1958) (the State Engineer's groundwater jurisdiction now covers the entire State, and includes broad authority to administer in the public interest the finite resource of groundwater in declared groundwater basins); *Mathers v. Texaco*, 77 N.M. 239, 421 P.2d 771 (1966) (State Engineer's administrative determination to manage a mined aquifer for a forty year economic life upheld).

Here, as referenced in the attached order, the State Engineer took the requisite prior actions of declaring the Curry County Underground Water Basin through Orders issued

in 1989. The Portales Underground Water Basin was validly declared in 1950 and amended in 1955. Through extensive expert scientific study, the State Engineer has now found that the water bearing formation called the High Plains Aquifer within the previously declared basins is being mined. For the protection of the public interest in sustaining New Mexico water resources and for the protection of the current water right holders with historic beneficial uses from this aquifer, he has closed the High Plains aquifer to new appropriations. These actions are within his broad authority. *See Mathers v. Texaco*, 77 N.M. 239, 421 P.2d 771 (1966) (upholding the State Engineer's authority in administratively deciding to regulate mined aquifers for a forty year economic life and determining how much appropriable water remained available under that standard for permit applicant).

3. The Order by its terms does not apply to existing water rights.

The Order by its own terms applies only prospectively. It cannot impair any existing rights of those who have already developed water rights under New Mexico law for use on their federal patented land. In other words, the regulation does not affect existing state-based water rights. The closing of the basin to new appropriations is a protective measure. Because of the Order, new applications which would otherwise deplete the limited supply cannot be accepted for filing. The New Mexico legislature has validly delegated to the State Engineer the authority to take this action. He validly exercised that jurisdiction in issuing the closure of the High Plains Aquifer.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

SARAH A. BOND
Assistant Attorney General

[1] Under NMSA 1978, § 72-12-3 (2001), a person who desires to appropriate water for beneficial use must apply to the State Engineer.