

OUTLINE OF COMMENTS BEFORE THE WATER AND NATURAL RESOURCES COMMITTEE  
David Benavides, Attorney, New Mexico Legal Aid

Water law has always been premised on protecting and enforcing water rights

The person or the entity does the necessary acts, without the need for government permission, to **create the water right** (before 1907).

The role of government was to protect the rights, under prior appropriation:

- (1) by not allowing people to exceed their water rights;
- (2) by not allowing new water rights when a stream is already fully appropriated;
- (3) by curtailing junior water rights when downstream senior water right owners are not getting enough water; and
- (4) by not allowing people to change their water rights in a way that is detrimental to other water rights (a constant refrain in the Water Code)

The State as benefactor: policing against people who would negatively affect the exercise of existing water rights.

This perception has changed dramatically in the last several decades and the State is often viewed as having compromised its core policing role in several of the areas mentioned above.

Much of this has come about because there is one aspect of water policy about which we are we are torn, and as a result we have a policy that is contradictory and confusing: regarding **transfers of water rights**.

We have been forced to develop a policy re: water right transfers as we used up all our existing water supplies, including water created from reclamation projects and reservoir construction – we moved from an era of allocation to an **era of reallocation**.

What is our philosophy about transferring water? Do we as a state really believe in the absolute transferability of water rights? The best illustration is the way we in New Mexico feel about **transfers of water rights out of state**. You will never hear a leader in NM say, "It's OK if water rights from our share of the Colorado River get transferred to San Diego, as long as the buyer and seller agree on a price." Or if our share of the Rio Grande gets transferred to Texas. As far as we are concerned, interstate compacts establish our share of interstate waters and we are not in favor of opening up those agreements to allow for interstate marketing of water rights by farmers here in N.M.

Former State Engineer Steve Reynolds felt more strongly about this than anyone. Babbitt – Reynolds exchange.

The **City of El Paso cases** in the 1980s seemed to bring some consistent guidelines to this issue: (1) You can't have an outright anti-export law that prohibits export of water rights to other states; (2) You have to have established criteria to review proposed transfers out-of-state.

So we in New Mexico established our criteria: **impairment, conservation, public welfare**. Broad criteria that go beyond simply hydrologic impairment but allow the decision-maker to delve into broader interests that New Mexico might have in maintaining water in-state.

But the El Paso court went further: (3) You can't have different or stricter criteria for out of state transfers than you do for in-state transfers

So we in New Mexico enacted the same additional criteria for in-state transfers: conservation, public welfare.

We also invested in water planning, so that in the event of an out-of-state application, there is data regarding the current and future needs here in New Mexico that might be important in deciding the potential effects of an out-of-state transfer

Why did we go through all that? Because we all know that water is not just any product, we know that water in this part of the country is one of the most critical resources for the survival of a state or a community.

The reality is that this is equally true for regions within the state as it is for the state itself, and this is where our policy sends mixed messages. Local communities believe the transfer criteria that were enacted in the 1980s should allow them to make the same types of points in the case of an in-state transfer proposal that the State of New Mexico would make in the case of an out-of-state application. The same points about the need for the water rights base to be maintained within the region or locality to sustain the community into the future.

In reality, in both interstate and intrastate transfer situations, there are costs that are not reflected in a typical transaction between a buyer and seller of water rights. There are invariably **third-party costs**. Now we have a framework since the 1980s for delving into these issues and looking at the various costs and benefits to a wide range of interested parties, but are we using it?

Rather than acknowledge that local people have similar interests to the state in these different contexts, the whole process of water transfers has turned into a huge **cat and mouse game**, in a number of ways.

The only notice of a proposed water transfer is by publication. For years, applicants sought to publish in the lowest circulation paper they felt would meet the statutory criteria

1990s bills – direct notice to nearby water right owners and entities (constitutional issue) (OSE opposition/assurances)

Skepticism that the public welfare is given meaningful analysis

“Dedications” – practiced by OSE, determined in the 1990s to be unlawful by AG, Op. 94-07 (1994)

Lincoln Co. – allowing of water-leases by OSE before hearing – contrary to existing law?

Las Vegas & Lincoln Co. – upstream transfers

It is this more recent history that has created skepticism and frustration by water right owners who see a compromising of the core mission of the OSE to be the protector of people’s water rights, actively so, and who see more things taking place in a non-transparent manner. The **dialogue** also seems to have narrowed and has focused on discrete nuances in the law and less on the pressing policy questions of how we reconcile some of these differing approaches to different types of transfers

In response to people are looking for ways to protect their communities without involving the state

Taos Co. Ordinance, 2010

Acequia water transfer statute, 2003. NMSA 1978, §§ 73-2-21 (E), 73-3-4.1 & 72-5-24.1

Santa Fe Resolution, 1997

# THE EFFECTS OF DEVELOPMENT ON INDIAN WATER RIGHTS: OBSTACLES AND DISINCENTIVES TO DEVELOPMENT OF INDIAN WATER RIGHTS

by Jerilyn DeCoteau

*Water...symbolizes such values as opportunity, security, and self-determination....Strong communities are able to hold on to their water and put it to work. Communities that lose control over water probably will fail in trying to control much else of importance.*

Helen Ingram: *Water Policies: Continuity and Change*,  
quoted in Bates, Getches, MacDonnell, Wilkinson,  
Searching Out the Headwaters, p. 182 (Island Press 1993)  
(copyrighted 1993 Natural Resources Law Center,  
University of Colorado, School of Law).

## I. Introduction

The United States' assimilationist policy embodied in the General Allotment Act of 1887 resulted in reducing the Indians' land base from 138 million to 52 million acres and transferring the resulting 86 million acres to non-Indian hands in less than 50 years. The devastation wrought upon Indians by this misguided effort to individualize Indian lands cannot be measured. A tragedy of this proportion is thought not to be possible in these more modern, more aware times. The government's trust responsibility for Indian resources and involvement of the Indian people themselves in decisions affecting their resources surely will prevent another such occurrence. But even as we look with eyes wide open, something of similar magnitude is happening with Indian water rights. However, it is happening much more insidiously because, while the United States has discarded its assimilationist policy and replaced it with a policy of self-determination, the effects of past policies continue, and new, seemingly neutral laws overlaid on these effects, effectively continue those discarded policies.

This paper identifies some of the effects on Indian water rights of the development of non-Indian water resources. Examined, in particular, are the effects of historical water policy, the Endangered Species Act, the economic standard for quantifying Practicably Irrigable Acres (PIA) and the Sensitivity Doctrine. Not addressed here are water leasing or

## City of Santa Fe Supports Rural-Urban Connections

The City of Santa Fe strongly supports initiatives and programs which recognize and promote the social and economic links between the city and the surrounding rural communities. Santa Fe has historically served as a political, social and economic center for the region, and will continue to do so in the future. The Community Economic Development Plan, adopted by the City Council in 1996, promotes a regional approach to community based development, specifically citing agricultural products and furniture makers as target industries.

The challenges facing the rural communities of northern New Mexico are complex and often inter-related. Loss of agricultural lands and access to forest resources impact the ability of communities to support their social ties and cultural identities. Poverty rates are unacceptably high, and a great many residents rely on traditional agricultural resource based activities to support their families. Preservation of water rights, acequia systems, small scale sustainable farming and forest based activities are crucial to the health of the rural communities. More modern activities such as arts, crafts and tourism (in appropriate scope and scale) offer opportunities for both rural and urban residents. The health of Santa Fe is intrinsically tied to the health of its' rural relatives.

The City encourages efforts to obtain funding for efforts to protect water rights and acequias. We support efforts to protect and encourage sustainable agriculture, both through programs at the farm level and in developing markets for the farmers' production. We support sustainable forestry operations and developing value added products from the forest resources such as furniture and architectural products. We support sustainable livestock production, both for market and for personal consumption. We believe that these efforts need to be undertaken in a broad context which recognizes and supports related endeavors. Wherever possible, these efforts should be collaborative rather than competitive. This does not mean that there should be a central coordinating body to direct all efforts. It does mean that people need to talk to each other about what they are doing and support each others efforts.

Developing links to the urban markets are crucial to the success of rural development efforts. Forestry programs must have a market for their furniture and vigas. Farmers cannot increase or sustain production without urban customers willing and able to pay a fair price for their produce and farm crafts. Rural studio and farm tours need urban visitors to patronize their activities. Sustaining and strengthening these links requires the development of an infrastructure to support their activities. A Water Bank is needed to protect rural and urban water rights. The farmers' markets of the region need improved facilities if they are to achieve their potentials. Production, storage and distribution facilities for agricultural, livestock and forestry endeavors are inadequate in the rural communities throughout the region. Tourism is over-concentrated in Santa Fe, but regional collaboration could spread the benefits and opportunities throughout the region if the facilities to accommodate visitors are adequate. In each case, careful attention to maintaining an appropriate scale is crucial to obtaining a balanced development effort.

Funding proposals, whether to government, foundation or other sources, should clearly show how the particular proposal fits into a comprehensive, regional approach. Every proposal cannot (and shouldn't) attempt to address every issue, but they should clearly recognize their connections and show that they are linked to the other steps from production to final marketing. For example, a milling operation must have a sustainable source of trees and a demonstrated market for its products. An enlarged farmers' market must have enough farmers to fill its stalls, enough related year-round users to justify the capital investment and a marketing program to bring in customers for its vendors. The farmers must have reliable water in their acequias in order to increase production to take advantage of the improved marketing opportunities. Feasibility studies, financial projections and budgets must be realistic, with assumptions clearly stated and defensible.

The City of Santa Fe has demonstrated a policy of supporting sustainable community based, regionally oriented development efforts through the adoption and implementation of the Community Economic Development Plan. We look forward to working collaboratively with all others who share these values.