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Subject Water Law

Date 2-10-03

Number 569

Write your number, title of course and date above
and in each blue book.
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Part I: 55
Part II: 57
Part III: 53
165

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Part II

National forests

Nat'l forests have a federal reserve water right that flows from Winters while Winters dealt with and being reserved for Native Americans the case has been applied to a Federal Reservation of and Winters states that there is an implied reservation of water based on an express declaration of and use the property for his waters

the date of the reservation
of the land, while the quantity
✓ is the amount that is needed
for the designated land use
Now unlike the Endangered
Species Act (ESA) Federal
Reserve Water Rights are
not paramount Federal law These
rights actually fit into the
State appropriation scheme
with their ^{own} ~~their~~ priority & quantity,
which is listed above

While Federal Reserve
Water Rights for Nat'l

Forester generally make the
Nat'l Forest ^{now quite} another appropriator
under State law, there are
a number of special limits
which effect ~~this~~ this
water right

~~First of all, you need
an express reservation of land
to imp~~

First of all, the courts
have placed limits on both
✓ priority and quantity of
Nat'l forest rights In
U.S. v. NM the Supreme

different unit than
state law

Court stated that Nat'l
Forests were created by
Congress for the preservation
of water ~~flows~~ flow
and the furnishing of timber
therefore, only the amount
of water necessary for these
uses is the quantity of water
✓ that Nat'l forests are
entitled ~~while subsequent~~
also while subsequent
acts of Congress may ~~expand~~
broaden the purposes of Nat'l
Forest uses, they have generally

not expanded ~~to~~ their
reserved water rights

herefore, cattle grazing and
recreation ~~do not entitle Nat'l~~
~~forests~~ are not ~~see~~ that
entire Nat'l Forests to Reserved
water Rights Furthermore
any subsequent act of Congress
viewed as reserving more
water to Nat'l Forests for
additional uses would be
~~very~~ significant to the
Nat'l Forests initial reservation
of water, and probably to

to most other users as well

Natl Fore to get their water from Fed Reserve water rights. Generally these rights fit into state schemes of appropriation with priority stemming from the date of federal reservation and quantity being limited to the designated and use. The courts have defined quantity for Natl Forester and have limited their further claims to water

and, ^{in fact} expanded federal rights
through subsequent legislation
Generally, the subsequent legislation
has not increased the water
Right of Nat'l Forests

- ✓ The ESA fits differently
state as appropriation
fact unlike the rights of
Nat'l Forests, the ESA does
✓ not fit a State scheme +
is an outside constraint
The
ESA pursuant to the Supremacy
Clause of the US Const, is
paramount to all State

aw user

As the ESA is paramount to state law, ~~the~~ water to meet its purpose comes first. For example, in NM, if water is needed downstream in the Rio Grande for the silvery minnow then water must be sent downstream ~~regardless~~ irregardless of the effect on appropriators under state law. In effect, the ESA protects in-stream flows necessary to sustain the silvery minnow's habitat at the expense of appropriators

Subject Water Law

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1-BB-8
16 PAGE

2
using water under state
law

While water rights for
wild forests are incorporated
~~into state law~~, into the state
scheme making them another
appropriator with a priority and
a quantity, the same is not
✓ §15 for the ESA. The ESA
is a equitable water right in
the sense that it regulates
the uses of other users (e
appropriators under state law)
as the ESA is ~~is~~ paramount

to State w, it has a more
disruptive effect on the state
aw of prior appropriation ~~the~~ than
the Nat'l Forests Federal
Reserve Water Rights
accommodating the ESA a system
such as ours with limited
water will be difficult, esp
considering that while the
ESA seeks to use instream flow
to protect ~~the~~ silvery minnow
D.M. aw does not necessarily
✓ seek to promote instream flow
traditionally here's an option

of leasing water to the Fed
~~to~~ for ESA purposes such
action has been taken here

However this is just a temporary

ix to ~~some~~ long term
✓ problem as such waters ~~may~~
will one day be needed for
human consumption household
purposes and ~~to~~ to generally
offset shortages under
the state law of prior
appropriation I believe that
when there will be a
real conflict between the

ESA and the state law
of prior appropriation

A - Very clear
complete hit question
well

Subject Water Law

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16 PAGE

Past III

There are a number of
issues this problem. First, etc
consider the validity of the
1,000 acre/foot pre-basin water rights
from the existing test well. Any
well can be freely drilled outside
of a declared basin as was
the case here. However pursuant
to State v. Fanning, when
a prebasin well is in an area
that becomes a basin, one ~~is~~ must
get approval to change the
use of the well. Metropolis (Met

will probably say that the s

irrelevant as they are not

not really an issue 25

proposing to change the use the

well was intended to supply

✓ 1000 gallons of municipal water

also, Met would probably argue

that the holding of Rancho

relevant as it is not trying

to change the size or location of

✓ the well However, met ~~was~~

would probably claim that

from a policy standpoint, Rio

Rancho Estates favors the

✓ needs of developers in

at 2mg underground water

However, 955 mg that this well, though never really used is valid, etc continue and consider the possibility of not dring another well

For the SE to approve this well, ~~not must show~~ he or she must consider 1) impairment of existing rights 2) Public welfare and 3) Conservation of water Generally ~~for~~ the SE has broad authority to determine what impairment is not being

said if any impairment of
existing rights found an
applicant has failed to meet his
burden of showing no impairment

This is where the proposed
transfer of water rights from
Milagro comes in. The SE
can condition well permits on the
retirement of surface water rights
in this case if my math is
correct, Met is only proposing
to buy 500 acre feet of
surface water to offset
the wells. ~~While~~ Because the impact

of the other well has not
se fault as it has never been
used + appears that not is st
looking at taking 500 acre feet
from the supply while the original
well may not alter for state
law as it was per ban ~~there~~ there
may be some compact problems
which are discussed below

regarding the permit, here
is a good chance the SF may
require that to store ^{transfer} more
water than it is currently
possessing as there is no

guarantee that there will be
any water to return in the
future (see Abey v Reynolds)

As there is not a statute
in place, public ^{well, how its place} welfare may
not be an issue, nor water
course variation. However even

if the SE was to allow
this new well with condition
it is explore the ability of
Met to transfer water
upon first looking there
may be an agreement that
these rights in Niagro have

perhaps

been abandoned. If so, they
are already back in the public
supply and ~~cannot~~ cannot be
purchased by Mel for retirees &
to offset their wells if
the former appropriator have
left to move ~~off~~ to the city
with the intent of staying there
and have been gone for close
to 40 years, it seems as if
the rights ~~they~~ here been abandoned.

However, for the sake of argument
let's consider what happens if
Mel can in fact buy them

Now the farmers between

↓
~~the rights~~
~~to the city~~
~~with the intent~~
~~of staying there~~
~~and have been gone~~
~~for close to 40 years~~
~~it seems as if~~
~~the rights~~
~~they here been~~
~~abandoned.~~

Magro & Mel are going to protest they will argue that if the proposed well is allowed, notwithstanding the Magro transfer they will suffer detriment as they may ~~not get~~ ^{lose} the water. ✓ They are entitled to Potentially follow W.S. Ranch v. Kaiser, the SE could allow this transfer & then ~~force~~ ^{Force} these farmers to ✓ call priority when necessary. However unlike Kaiser, we are not dealing with a fully adjudicated stream. Therefore the SE may just

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have to weigh the potential
detriment to these surface
water users and see if
there are any other conditions
✓ that can be placed on the wells
to ensure protection to these users.

Regarding the landowners east
of net they have concerns pertaining
to both surface and well usage.

Regarding surface water, these
fields are irrigated by a very
old aqueduct if they have a local
community ditch ordinance that
defines public interest

then they may be able
object to the wells as
violation of public ~~interest~~^{welfare}
however, ~~if not they~~ this
case does not involve selling
rights out of their association
herefore, detriment is probably
still Key. Furthermore, these
guys would probably claim that
the proposed transfer would
not benefit them due to their
location

Wow, re their ^{domestic} wells
these guys will probably

can impairment Basically
this will be up to the SE
could say we should
to decide (see Mathers v. Texas)

the Pueblo may be claiming
some sort of ha as well
Clearly their water rights re
going to be paramount to met's
Pueblos are generally entitled to
their historic irrigable acres, which
is as much and as they ever
irrigated between 848 & 1924
they can claim this amount of
water before ~~that~~ met
can claim any while +

appears to be based on 600 acres,
+ is potentially more depending
on what the total amt they
ever irrigated (as mentioned
above) is

- here is also the issue
of the effect of the
wells on compact obligations
Once we see the effect of these
wells may not be felt
for up to 20 yrs. Because
of the interrelation between
ground and surface water
the wells + seems, will

definitely impact the surface
flows of the river if this
happens, it may be hard
to NM to meet its compact
obligations

Considering all of these
factors I believe that ~~the~~ the
SE should condition the granting
of the new well on the Met's
upfront ability to retire at
east 1000 acre/feet of surface
water. Because the proposed
transfer by Met appears to
have been abandoned and

probably already in the river
this ~~pro~~ specific proposal may
not work as they would
not really be putting any
new water back in the river
Even if it is a valid test
does not take into consideration
an additional 500 acre/feet
which would be needed to
equal the amount being
extracted through the proposed well
Furthermore allowing for this
proposed transfer may not
protect other upstream users

and would put them in a position of having to call priority when they would not have to otherwise

Rega impairment to other groundwater users, while this is up to the SE on a case by case basis, ~~is~~ considering the potential detriment to other users, ~~they~~ the SE may find ~~detriment~~ impairment under the current proposal

∴ In sum, to protect compact obligations as well as other users I believe

that the SF ~~should~~^{may}
only ~~condition~~ go out this
new well under the condition
that net ~~flow~~ transfer
the surface water rights
of upstream users of
000 acre feet of water up cont

50

WATER LAW EXAM--574

**December 10 or 20, 2003
9A.M.-12 Noon
Professor Em Hall**

INSTRUCTIONS

This three hour exam consists of three equal parts totaling 14 pages. Part I includes ten equal multiple choice questions, presented on separate pages. Please select the best answer from among the listed alternatives, mark your choice on this exam sheet and explain your choice on the same sheet. Use the back side of the sheet if necessary. Be sure to put your exam number on each page. Correct answers and explanations garner six points; correct answers without explanations are worth five; correct answers with incorrect explanations are worth four; and so on. This is an open-book examination. You may bring course materials with you and outline materials you have prepared or prepared in a study group. No other materials are permitted. Be sure to turn in this examination with your answers and explanations.

Answer Parts II and III in standard Blue Books. Part II consists of a broadly framed general question about western water law about which you are asked to comment. Part III consists of a story whose water law implications you are asked to analyze.

Good luck.

Part II: General Essay

One hundred and fifty years ago, Congress severed water and land, inviting settlers and miners to get rights to land from the federal government and rights to water from the states where the land was located. In the last fifty years the federal government has reasserted its federal rights to water for a variety of federal interests---national forests, Native Americans, Pueblos and Endangered Species. The fit between the pre-existing state regimes and the re-emergent federal interests often has not been comfortable. Take two of those federal interests, analyze how each fits with the state system of prior appropriation and discuss the basis for and prospects of accommodation between the two in the apportionment of state and federal claims to a common source.

Part III: A Simple Story in Search of Basic Water Law

The New Mexico City of Metropolis sits just on the western edge of the flood plain of the Rio POCO, an inter-state stream that heads in the adjoining state to the north ("North") and runs down to an adjoining state on the south ("South"). Some years ago, never mind how long precisely, the three states entered into a simple compact, apportioning the waters of the Rio POCO between them. Under the Compact, the state of North must allow two-thirds of the water originating there to flow into New Mexico and New Mexico must allow one-third of the water reaching it to flow into South. Congress approved. For decades, if not longer, New Mexicans have fully appropriated their share of the Rio POCO surface flows. No new surface water appropriations have been allowed for a long time.

flow base

Metropolis began in the late 1960s as the real estate dream of some shady developers. At the time the land for the development lay just west of the western boundary of the Rio POCO Underground Basin previously declared by the State Engineer. Without any authority at the time, the developers drilled a deep test well, determined that they could develop a 1,000 acre foot a year sustained production from the well and promptly capped it. Through 2000 Metropolis developed slowly despite the super human efforts of the promoters to attract new residents from Perth Amboy, New Jersey. The few people who came drilled domestic wells of their own. They filed for their wells with the State Engineer and he issued the mandatory permit.

pre-basin well

Beginning three years ago, in 2000, all hell broke loose. Metropolis started to grow by leaps and bounds. The Office of the State Engineer extended the boundaries of and the Rio POCO Underground Basin to include Metropolis. The county demanded that Metropolis stop relying on individual domestic wells and provide a municipal water system. Metropolis will need at least 2,000 acre feet of consumptive use rights in order to meet municipal demand.

2000 City

Metropolis responds in two ways. First, it declares 1,000 acre feet of pre-basin water rights in its existing test well. Second, Metropolis applies to the OSE for a permit to pump an additional 1,000 acre feet from a new well located in the City and within the new limits of the present underground basin.

*1 pre basin
new well*

No one disputes that the new well will be located in an aquifer that is connected to the Rio POCO. Metropolis recognizes that its wells will deplete the Rio POCO. To offset those effects, city officials have gone sixty miles below Metropolis to the deserted Hispanic town of Milagro and contracted to purchase the water rights once used there. The lands have not been irrigated in almost 40 years, partially because of drought conditions and more because of relatively high property taxes that drove poor farmers off their lands and into the city. In its heyday (pun intended) Milagro diverted five acre feet per acre to its fields and Metropolis proposes to buy 100 acres there and transfer the rights to its wells.

*Transfer
Appropriation
to Metropolis
500 acre feet*

In the reach of the river between Milagro and Metropolis, the Rio POCO is a losing stream. There are at least six large farms in the stretch in between whose waters are irrigated by surface water. The owners are not happy about the prospects of the Metropolis transfer and they have threatened to protest.

losing stream transfer issue

In addition, the owners of land and water on the tracts of land in the Rio POCO flood plain immediately east of the Metropolis wells are also raising hell. They are worried about their fields which are irrigated by very old acequias diverting directly from the Rio POCO.

detriment

However, they are even more concerned about their individual domestic wells. Some, dug a long time ago, are no deeper than 20 feet. There's debate among hydrologists, as there always is, about what the effect of the proposed Metropolis wells will be. Nonetheless, it does seem clear that the static water level in the Metropolis well will drop about 3.2 feet a year if the city starts to pump 1,000 acre feet a year from it and that within twenty years the pumps in some of the domestic wells will have to be lowered, other wells will have to be deepened and the pumps lowered, and, finally, a few wells will lose their source of supply altogether. Under the circumstances, the owners of land and water down slope from the Metropolis wells, most of whom are orthopedic surgeons and the like, are up in arms.

important - up to SE

So is the one Pueblo just upstream of Metropolis. Historically this Pueblo has irrigated about 600 acres of land. The alluvial plain in which the Pueblo lies would easily be capable of five times as much irrigation. The Pueblo has opposed massive non-Indian development in the areas surrounding it and the Metropolis growth has not pleased its governing council. The Council has gone on record against the increase in water use by Metropolis.

Pueblo HIA

Finally, the Office of the State Engineer has said that it is concerned about the "compact implications" of the Metropolis application. The State Engineer has not been much more explicit than that and his independent hearings unit, before whom the application is now pending, refuses further comment. You've got to make it.

compact

What issues does the Metropolis application raise and how should they be resolved under current New Mexico water law? Don't assume that the Rio POCO Underground Basin is identical to any existing declared underground basin in New Mexico. There are no formal regulations governing ground water in the Rio POCO basin. Use the general principles of New Mexico water law to analyze this situation.