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School of Law Library
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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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.