

A Word on Water Rights – November 25, 2007

The 2007 irrigation season has come to an end for the Hammond Conservancy District (HCD) but this is no time to forget how important and valuable water is to HCD irrigators and all rural water users in the San Juan Basin (SJB). We need to keep abreast of important ongoing activities and issues that may affect water availability and the water-rights of all irrigators in the SJB in the future.

A Brief Introduction to New Mexico Water Law

Water law in New Mexico (and most other intermountain states) is based on the system of prior appropriation or what has been called the ‘first in time, first in right’ doctrine. Generally, in this system, a water right is established by legally filing for a diversion of a given volume of water for beneficial use. A ‘priority date’ becomes the date that the legal filing was formally initiated, even though it may be some time before the water is actually put to beneficial use. The earlier the priority date, the more senior is the water right and, in times of water shortage or water over-allocation (where paper water rights exceed the available ‘wet’ water in the river), senior rights take precedence over junior rights (those having more recent priority dates). While the allocation of water rights has been generally left up to individual states through a state administrator (the Office of the State Engineer in New Mexico), the federal government has demonstrated its right to preempt state water law by affirming the existence of a doctrine of federal and Indian reserved water rights. This limits the state’s control over large volumes of water within state boundaries. For much more information on water rights and water laws in the west see the reference list below.

Local Issues

As the population and development of the SJB continues, water diversion rights in the basin may exceed the dependable surface flow of the San Juan, Animas, and La Plata rivers in the future. To help ameliorate these potential water deficits, the 11th District Judicial Court has instituted a water law division to resolve all water claims and disputes in the basin. The ongoing lawsuit, filed by the NM Office of the State Engineer is designed to adjudicate the water rights of the U.S. and Tribal Governments which were not parties to the Echo Ditch Decree, a lawsuit filed in 1937 (signed in 1948) to establish the water rights for about 26,000 acres of irrigated land (and for some municipal and industrial uses) in the basin. The Winters Doctrine, a Supreme Court decision dating back to the early 1900s, provided water rights to Indian tribes, including those living on the Navajo Reservation (est. 1868), even though water was not being diverted by the tribes at that time. Presently, the hearings and adjudication actions involve the La Plata River and the proceedings can be followed on the internet by clicking on:

<http://www.11thjdc.com/modules/tinycontent/?id=79>

Since decisions made during the La Plata adjudication may potentially set a precedence for decisions made during the future San Juan River adjudication, it’s important for HCD irrigators (and all SJB water users) to keep abreast of these hearings.

The concept of beneficial use

According to the New Mexico State Constitution, all existing water rights are recognized and confirmed – as long as that water is being put to ‘beneficial use’. Claimed ownership of water may be without merit unless it can be shown that the water has been put to beneficial use. One of the primary objectives of the ongoing lawsuit is to determine if there is any new, unappropriated water currently available (i.e. water that is not claimed or is claimed but not being put to beneficial use).

What is beneficial use?

There appears to be no clear definition of the term and the state of New Mexico has not specifically itemized or prioritized what constitutes beneficial use. Two important judicial decisions however (*Harley v. Smith*, 31, NM 521, 1926 and *8 State ex rel State Engineer v. Miranda*, 83 NM443, 1972) established the basic principle that use of a **man-made diversion** was an essential component of a water right. While this inferred that ‘in stream flow’ did not constitute beneficial use, federal law (i.e. Endangered Species Act), as we’ve recently seen, can take precedence over state statutes and declare in-stream flows to be a beneficial use for the protection of endangered fishes.

The definition of beneficial use then, appears to be evolving as new ideas, concepts, and laws enter the picture. Global warming, for example, may have a significant effect on the views of beneficial use in the near future. For example, some would contend that water diverted to grow non-harvested trees, shrubs, or perennial turfgrasses in a landscape is not beneficially used since it does not result in an economic return. Because these plants remove and sequester or tie-up carbon dioxide (the primary ‘greenhouse gas’ of the atmosphere), however, their growth could be viewed as beneficial since they may help decelerate global warming. They might also provide local cooling and help prevent soil erosion.

Certainly, any decisions that affect water rights in the San Juan Basin should rely heavily on a ‘common sense’ approach to beneficial use. Consider these scenarios and ask yourself whether or not they should be considered beneficial use:

- Diversion of water to cities and rural communities for domestic uses such as drinking and cooking, flushing toilets, washing, and irrigating municipal parks and golf courses.
- Diversion of water to irrigate poorly managed agricultural crops that provide economic deficits or very low economic returns and which may pollute ground and surface water with residual fertilizers and pesticides.
- Diversion of water for the energy industry which creates jobs for the local populace but whose activities may degrade air and water quality, jeopardizing human health.

- Diversion of water for delivery to farther away cities and communities that provides little benefit to local society or the local economy.
- Diversion of water to small farms that grow high-value fruit and vegetable crops for sale at local farmer's markets and consumption by the local population.
- Diversion of water in an attempt to simulate beneficial use (to protect an existing water right) even though the water is allowed to run across uncultivated land and back to the river through washes and arroyos.
- Diversion of water to grow perennial, unharvested trees, shrubs, and grasses that sequester carbon from the atmosphere that would otherwise contribute to the build up of CO₂ and global warming.
- Non-diversion of water to provide in-stream flow to protect the riparian ecology for endangered species and human recreation and tourism (including fishing, rafting, etc.).

Since each of us would have a unique ranking of the above list based on our own incentives, ethics and values, it's easy to see how the issues related to water rights or water use can be argued for years in the courts. As farmers and gardeners, most HCD irrigators might agree that diversion of water for the benefit of crop growth is of utmost importance but, in the end, water rights decisions will undoubtedly be made by lawyers, judges, engineers, and economists that have limited ties to the soil and land stewardship. Water will invariably flow towards money. Those who can afford to buy it (federal and city governments [using taxpayer funds], mining and industry, large downstream urban centers, the golf and tourism industry, etc.) will get the lion's share of the water and, without your help, SJB agriculture, despite its social and economic importance and quality-of-life significance, will eventually be replaced by trailer parks and housing developments, interlaced with dusty streets and telephone poles.

As irrigators of the HCD, we can take several actions to protect our water rights:

- Insure that the water you're diverting is put to beneficial use. Grow something on your land and manage it properly. Don't waste the water you're entitled to.
- Be a good steward of the land: work diligently to improve your soil's tilth and fertility; keep weeds under control; control water runoff and soil erosion.
- If you cannot immediately use your allotted water, put it in the water bank where it can be beneficially used by other irrigators or can be secured for later use.
- Keep informed of the ongoing legal proceedings that may affect your water rights in the future and get involved to insure that your rights are secured. To keep abreast of what is happening in the San Juan Adjudication hearings and to

participate in the hearings go to:

<http://www.11thjdc.com/modules/tinycontent/?id=79>

The next three hearings are scheduled for: November 29th (Farmington), December 19th (Aztec), and January 18th (Aztec).

Study the proceedings and options and make sure your voice is heard at these hearings.

INTERNET REFERENCES FOR FURTHER INFORMATION

Water Rights Law in the West – Prior Appropriation:

<http://library.findlaw.com/1999/Jan/1/241492.html>

New Mexico Water Law – Brief Summary:

<http://www.westernwaterlaw.com/newmexico.htm>

National Public Radio Website – Water in the West

<http://www.npr.org/programs/atc/features/2003/aug/water/>

A Spoof on Water Law

<http://www.bandersnatch.com/water.htm>

US Dept. of Interior Water 2025 Initiative:

<http://www.doi.gov/initiatives/water2025.html>

Less Snow, Less Water: Climate Disruption in the West:

<http://www.cleartheair.org/waterinthewest/>

List of Books on Water Rights:

<http://ecoethics.net/bib/tl-156-a.htm>

Water Information – SW Colorado

<http://www.waterinfo.org/>

Article on Navajo Water Rights

<http://www.ag.arizona.edu/AZWATER/awr/septoct03/feature1.html>

Article: Western Water: Solutions to Overallocation

http://www.newwest.net/main/article/hal_rothman/

San Juan County Growth Management Plan - Water

https://www.arcforms.info/sanjuandownloads/SJCo_VI_Water_WasteWater.pdf

New Mexico Water Connections

<http://www.nmwaterconnections.org/index.php3>

Note: Find links to various San Juan County water issues from the HCD home page.

This bulletin was written by Dan Smeal who is wholly responsible for its content. While every effort has been made to verify the content and insure its accuracy, the author makes no guarantees of perfection. The opinions expressed herein do not necessarily represent those of the Hammond Conservancy District.

DS

November 2007.

If you would like to comment on this paper or issue, please respond to the link at the bottom of the HCD homepage. Thank you.