Water Issues Facing Land Grants-Mercedes

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I. The Treaty of Guadalupe Hidalgo pledged that **"property of every kind"** would be **"inviolably respected"** by the United States. Article VIII, Treaty of Guadalupe Hidalgo. The New Mexico Constitution also "preserves inviolate" the "rights, privileges, and immunities" guaranteed by the Treaty of Guadalupe Hidalgo. N.M. Const. Art II, Sec. 5.

II. The N.M. Supreme Court in *State ex rel. State Game Comm'n v. Red River Valley Co.*, 51 N.M. 207, 182 P.2d 421 (1945) stated that "The [confirmation of the land grant by Congress] was not a gratuity, it was intended to be a discharge of the obligations of the Treaty between the United States and Mexico. **It was a confirmation of rights which existed, and as they existed.**" (Citing *Jones v. St. Louis Land and Cattle Company*, 232 U.S. 355, 34 S.Ct. 419, 420, 58 L.Ed. 636.) (Emphasis added.)

III. N. M. Supreme Court: *State ex rel. Martinez v. City of Las Vegas*, 135 NM 375 (2004). The Court abolished the Pueblo Right Doctrine as being fundamentally "inconsistent with New Mexico law and not protected by the Treaty of Guadalupe Hidalgo." The Court made these points with respect to the Treaty:

- **Inchoate or imperfect rights were not protected by the Treaty**. Only those water rights that were actually being exercised at the time of the Treaty (1848) are protected. In this case, the expanding portion of a Pueblo Right was not vested at the time of the Treaty, and therefore not protected.
- How imperfect rights were to be treated was a matter of discretion for the new sovereign (the U.S. Government), which, in matters of water rights, deferred this task to the states.
- The State of New Mexico has circumscribed any such right by the **overriding principle of beneficial use and by a structure of state regulation**, both of which are compromised by the Pueblo Right Doctrine.

What water rights does a land grant-merced possess?

An example of water rights that a land grant would possess would be water rights that are exercised on common lands or that are somehow **associated with common lands**. For example, if there is a **spring, a stock pond, or a well with a stock tank on the common lands**, particularly if it is open to general use by heirs of the land grant, these water rights might belong to the land grant because they are not intended to be for the private exclusive use of any one person or heir. It is also possible for a land grant to possess water rights for **domestic use**, for **irrigation** of for **storage**, particularly if they are not purely private systems.

Issues

1. Declarations of Ownership of Water Rights

Issue: State Engineer is rejecting declarations.

A **"Declaration of Ownership of Water Rights"** is a sworn statement made on a form issued by the Office of the State Engineer (OSE) in which a water right owner describes the nature and extent of his or her water right. It is an affidavit-like document which has special status under New Mexico statutes as credible proof of a person's water right claim. ("**Prima facie evidence**")

In the declaration, the water right owner describes the key **elements of the water right**, including: (1) the quantity of the water right, based on past beneficial use, (2) the year the water right was initiated, also called the "priority date", (3) the purpose of use, (4) a description of the delivery system (e.g. the ditch or the well), (5) the location of the point of diversion, and (6) if it is an irrigation right, the location and amount of land irrigated.

There is nothing in the declaration statute that suggests that the OSE has the right to reject a properly filled-out declaration form. Yet, the OSE is currently rejecting many declarations that are filed. **This is contrary to the idea behind the declaration law**, which is for there to be a process for people to make a written **claim** as to their water rights, regardless of whether an official or an agency agrees with the claim.

2. Adjudication of Land Grant-Merced Water Rights

Issue: Will the State Engineer and/or the courts recognize the proper priority date?

Precedent: In the Upper Pecos River section of the *Lewis* adjudication (Pecos River adjudication), community wells (MDWCAs) were awarded older priority dates: NOT the date of the modern well installation but instead the much-earlier date of the local acequia.

Rationale: The domestic water use was formerly exercised out of the acequia, along with the irrigation rights supplied by the same acequia. When the community well was installed, the long-standing **domestic use was moved from the acequia to the community well**. But the priority date (first-use) of water for domestic purposes should date back to when the acequia was constructed and that was the source of domestic water.

Problem: This precedent has only sporadically been applied. Too often, the date that the State offers is the date the modern infrastructure was installed, rather than when the use originated in the early days of settlement of the land grant.

3. Prospective Water Systems

Issue: Possible acquisition of water rights and/or disruption of local hydrology

Land grant-based water systems often have a lengthy record of sustainability. However, surface and underground uses in any area are notoriously interconnected and therefore vulnerable. Any new water service that might consider to entering such a community much be extremely careful that those plans not impair the hydrologic system or the current uses that the community values.

Assumptions in one section of a county, for example, about the desirability of acquisition of agricultural water rights or installation of large-volume wells, may not be shared in a part of the county that (1) has a strong agricultural tradition, (2) has early-priority water rights, (3) is in the upper part of the watershed with good quality and quantity of water, and (4) already has community-based water management systems in place (such as acequias and/or land grants).