

Welcome Back!

There has been a hiatus of several years since SONREEL has produced a Newsletter. This year the Board has supported law student articles, to both provide a link with the Law School and to generate articles of interest to Section members. This document is the result, and we hope you will find it useful and thought-provoking. The publication will best serve our readers if you provide us with feed-back on what you like, what you could do without, topics you might be interested in, and your own articles or letters. Please contact me (466-7139 or jjpruett@cybermesa.com) if you have comments or would like to write a short article for our next issue, which we hope to publish late next fall (2005).

Thanks for your support and happy reading,

Jennifer J. Pruett, Editor

The Sleeping Giant on the San Juan

by Joshua Mann

How does a nation that professes to spread democracy and freedom to oppressed peoples of the world settle its own less than righteous past and make good on its debt to the people from whose land and water this great nation grew? Reconciling the claims of indigenous peoples with the reality of the people now living on that land is a daunting task with no easy solution. The proposed Navajo Settlement on the San Juan Basin is no exception. The Navajo possibly have a very large legal claim to water of the San Juan Basin (in excess of New Mexico's entire apportionment of the Colorado River), but that important claim is amorphous and not useful without the infrastructure to bring wet water to the reservation.

On the Eastern Agency of the Navajo reservation approximately half of the people lack running water in their homes.¹ On the other side, the State of New Mexico seeks to cast off the cloud of uncertainty hovering above the San Juan Basin to ensure growth and development there. These parties have come together

to avoid long, costly litigation, have formed compromises and on April 19, 2005 signed a complex settlement agreement. This agreement between Navajo Nation, the State of New Mexico and the United States aims to "resolve the claims of the Navajo Nation to the use of water of the San Juan River Basin... [and] is intended to provide water rights and associated water development projects...in exchange for a release of claims to water that potentially might otherwise displace existing non-Navajo water uses in the Basin."²

The history of the Navajo Nation and current law provides an important context for understanding
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Sleeping Giant

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the nature of the Settlement. The Navajo have traditionally occupied the Four Corners area where the San Juan River flows and forms the Northern border of the reservation.³ In 1863 the US government took over the Navajo territory and forced the Navajo to relocate in southeastern New Mexico. However in 1868 both parties signed a treaty that allowed the Navajo to return to their homeland and granted each Navajo family 160 acres of farmland and single adults 80 acres.⁴ In 1906, the Supreme Court handed down the Winters Doctrine⁵, which held that when the Federal Government sought to change the Indians from nomads to farmers, it gave them sufficient water to irrigate their lands. Winter's recognizes that Indian reservations have a right to a quantity of water based on the amount of "practically irrigable acres" on the reservation, a right that cannot be lost to nonuse and a right that has a priority set at the date of the reservation/treaty. Accordingly, the Navajo Nation has a powerful right to water from the San Juan River with a priority date of 1868 and a quantity that some have measured as large as five million acre feet.⁶ New Mexico follows the Doctrine of Prior Appropriation which basically holds both that users senior in time have a superior right to more recent or junior users; however, unlike Winter's, the water must be put to "beneficial use" or the right to that water is lost.



The Settlement bridges the conflicting aspects of the two doctrines by quantifying the Navajo Nation's rights to San Juan water, establishing the administration of that water with respect to other uses in the basin, and providing appropriations for water projects benefiting Navajo Nation. Accordingly, it includes four appendix documents: a Partial Final Decree for entry in the San Juan River Adjudication; a Supplemental Partial Final Decree for entry in the Adjudication quantifying certain reserved rights of the Navajo Nation for historic and existing uses; a Settlement Act for Congress to authorize the construction and operation of the Navajo-Gallup project and to fund construction and rehabilitation of Navajo water projects; and a Settlement Contract to provide for deliveries to the Navajo Nation under Bureau of Reclamation water projects.

The agreement quantifies Navajo Nation's "reserved rights" that are subject to the San Juan Adjudication (606,660 acre feet per year). However, individual Navajo members who have been allotted land by the U.S. are not bound by the Settlement and may have additional claims to "historic and existing agriculture, stock and domestic uses" in the San Juan River Basin. A hydrographic survey prepared jointly by the U.S. and N.M. will determine the limit of those remaining rights. However, any of those claims would be "serviced by, or offset

by corresponding reductions" in use by the rights of the Navajo Nation and not additional to them.

Under the administration provisions of the Settlement, the Navajo Nation agrees to subordinate its priority rights and reduce its ability to make priority calls on the River. Although the Nation will retain an 1868 priority date for its use of the Navajo Indian Irrigation Project (NIIP) and Navajo-Gallup Water Supply Project, those rights will be subject to a 1955 priority date and will share shortages with the San Juan-Chama Project, the Jicarilla Apache Nation, the Hammond Irrigation Project and other Project contractors. Similarly, the Navajo Nation will retain an 1868 priority date for use of Animas-La Plata Project water that will be subordinated to a 1956 priority and will share shortages with the San Juan Water Commission and other Project contractors. Senior irrigation rights for Navajo and non-Navajo ditches on the San Juan and its tributaries will retain their rights in a priority administration of the river and not share shortages. Under the settlement, the Navajo Nation will administer its rights on Navajo lands subject to non-impairment of non-Navajo water rights, and the State Engineer would monitor Navajo Nation water uses for compliance with the decree. This is significant because these "provisions substantially reduce the risks and occurrences of shortage to direct-flow users that otherwise would be anticipated to result from priority calls on the river."⁷

The Settlement Act authorizes federal appropriations totaling \$720 million dollars for the construction or rehabilitation of water develop-

ment projects, including the Fruitland-Cambridge Irrigation Project, the Hogback-Cudei Irrigation Project and the Navajo-Gallup Water Supply Project. It requires that “certain project construction and funding milestones be achieved by specific completion dates.” The big question remains whether Congress will fund the settlement as it stands now. If the current state of the Aamodt case, which was designed to settle decades-old water rights claims among Pojoaque, Tesuque, Nambe and San Ildefonso pueblos and non-Indian residents in the Pojoaque basin, is a sign of things to come, then it may be a long road to passage. For that settlement, Senators Domenici and Bingaman have only been able to secure eleven million of the estimated \$212 million needed.

The Settlement of the San Juan is extremely important to all parties involved. It provides the Navajo Nation with resources to get wet water to its members, it provides New Mexico with certainty and the ability to administer water from the San Juan and it provides the United States an opportunity to make good on its debt. The settlement is signed and ready for Congress to approve. It is now up to the Federal Government to choose whether to fund this cause or spend our money elsewhere.

Endnotes

- ¹ Stanley M. Pollack, *Integrated Water Resources Management in the San Juan Basin: The Navajo Perspective*.
- ² REVISED DRAFT: EXECUTIVE SUMMARY OF THE SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT 1 (Dec. 10, 2004).
- ³ Kaylee Ann Newell, *Federal Water*

Projects, Native Americans And Environmental Justice: The Bureau Of Reclamation's History Of Discrimination, 20-JUN ENVIRONS ENVTL. L. & POL'Y J. 40, 45 (June, 1997).

- ⁴ *Id.*
- ⁵ *Winters v. United States*, 207 U.S. 564 (1908).
- ⁶ Newell *supra* note 3, citing Daniel Mccool, COMMAND OF THE WA-

TERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER 2 (1987).
⁷ REVISED DRAFT: EXECUTIVE SUMMARY OF THE SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT 6 (Dec. 10, 2004).

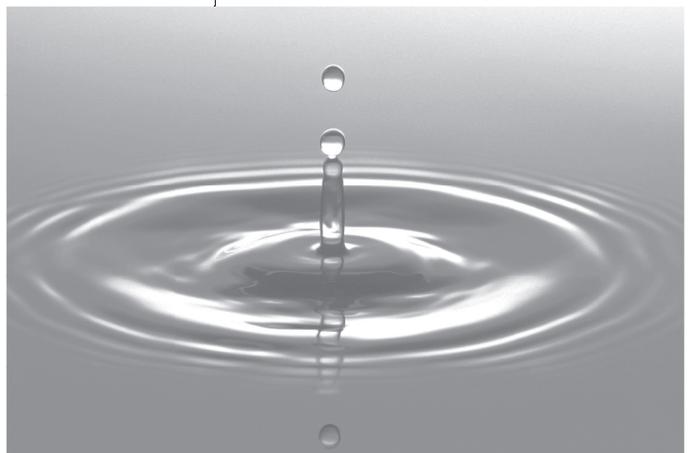
The Pending New Mexico Supreme Court Decision in *Herrington v. State ex rel. Office of State Engineer*: Will it Affect the Future of New Mexico Water Management Policy?

by Gabriel Wade

Introduction

In 1982, Ellis and LaVerne Herrington filed an application with the Office of the State Engineer (OSE) for a partial change in their surface water point of diversion on the Rio de Arenas, a tributary of the Mimbres River, to a downstream well. The Herringtons argued that ground water pumping by up-stream, junior appropriators had diminished the surface water available at their existing point of diversion. The Herringtons applied for the change in diversion points from surface to groundwater under the *Templeton* doctrine,¹ as well as asserting an independent right to transfer based on *Clodfelter v. Reynolds*.² After unsuccessful appeals to

the OSE and the district court, the Herringtons appealed to the New Mexico Court of Appeals and were again denied the transfer.³ On May



17, 2004, the New Mexico Supreme Court granted certiorari. This article will discuss the Court of Appeals decision, and what the Herringtons and the OSE are arguing before the New Mexico Supreme Court as a matter of law.

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The Court of Appeals Decision

According to the Court of Appeals, the *Templeton* “same-source” requirement is only satisfied when the water drawn from the well is a source of the appropriated surface waters *at the point of the surface diversion*. The Court held that as a matter of law, a downstream well could not meet that requirement because it necessarily draws on seepage and percolation into the river that occurs downstream of the surface water diversion. As the Herringtons’ proposed well was downstream of their surface diversion, the transfer did not meet the *Templeton* “same source” requirement. The Court of Appeals also ruled that the *Templeton* requirements apply to *all* surface to ground transfers, and *Clodfelter* did not create a right to transfer a surface to a ground water point of diversion independent of the *Templeton* requirements.

The Supreme Court Arguments

The Herringtons challenged the Court of Appeals definition of “same-source” under *Templeton* and that a *Clodfelter* right to transfer does not exist, so all surface to ground transfers can only be made under *Templeton*.⁴ The Herringtons argue that the location of the well should not determine “same source” as a matter of law. Instead, hydrologic facts should determine same source, even if the proposed well is downstream. The Herringtons also argue that even if the transfer is denied under *Templeton*, *Clodfelter* allows water right transfers as long as there is no impairment to other rights. The right to transfer surface water rights has been recognized by statutory and common law, and is crucial for New

Mexico water policy. Future water planning depends on a water market system where outdated water uses may be transferred into new uses. This includes surface to ground water transfers. Placing all such transfers under the narrow *Templeton* doctrine is contrary to good water policy.

The OSE argues that the primary question before the Supreme Court is whether substantial evidence supports the factual determinations of the district court, as upheld by the Court of Appeals.⁵ Having affirmed the facts determined by the district court and upheld by the Court of Appeals, the Supreme Court must determine whether the Court of Appeals correctly upheld the trial court’s application of *Templeton* and *Clodfelter only to the facts of this case*. In affirming the lower court’s decisions, it is not necessary to uphold the Court of Appeals’ broader findings as a matter of law that a well downstream of the surface point of diversion cannot meet the *Templeton* “same-source” requirement, and that a surface water right can never be transferred to groundwater outside of *Templeton*. Instead, the Herrington transfer must be examined on its facts, including the fact that the original application for transfer was made under the *Templeton* doctrine and not under *Clodfelter*. Under the factual determinations made by the district and Appeals Courts in this case, the Herringtons are unable to meet the *Templeton* “same-source” requirement or the *Clodfelter* “no-impairment” requirement. No further policy decisions need be made.

Conclusion

The Supreme Court’s decision in this case is likely to have a significant effect on water management policy in New Mexico. Under the Court of Appeals ruling, the only surface to ground transfers possible are under the *Templeton* Doctrine. The *Templeton* Doctrine creates a more difficult barrier to water transfers than does a *Clodfelter*-- “no impairment” transfer. In a water market situation, the ease of water transfers is crucial to re-allocation of water rights. However, the OSE would prefer that no broad policy implications be decided in this case. Instead, the OSE wants all transfer applications to be permitted or denied under the specific fact determinations in each application. In this way, the OSE has a greater ability to control water transfers and New Mexico water policy.

Endnotes

¹ Established by *Templeton v. Pecos Val. Artesian Conservancy Dist.*, 65 N.M. 59, 332 P.2d 465 (1958), the *Templeton* doctrine allows for a partial change in diversion points from surface to groundwater to supplement surface flows under two conditions. One, the ground water to be pumped must be the “same source” of the surface water. Second, the change in point of diversion must not impair other existing water rights. If the transfer is successful, the ground water well takes on the priority date of the surface water appropriation. Additionally, the transfer can be made even when the ground water basin has been closed to new appropriation.

² 358 P.2d 626 (1961). In *Clodfelter*, the New Mexico Supreme Court agreed with Colorado case law establishing that the right to change the

An Overview Of Government Incentives Aimed At Increasing Geothermal Electric Development In The United States

by Carlos Ruiz de la Torre

This Paper surveys the various federal and state governmental incentives designed to promote the creation of geothermal electric plants in the United States. Like other renewable energies, geothermal electric power has enormous potential to supply a significant portion of the nation's energy needs. Benefits associated with geothermal power make it a very attractive alternative to the dominant methods of producing electricity, which generally involve the burning of finite fossil fuels. In light of significant obstacles facing investors of geothermal electricity, there remains much more for the government to do if geothermal power is ever to supply a significant portion of our energy needs.

I. Federal Government Incentives and Initiatives

Currently, there are relatively few incentives and initiatives for geothermal development at the federal level.

Of all the programs, funding for research and development (R&D) is perhaps the most critical to the growth of the geothermal industry because it is used to develop technologies that will ultimately bring down

The Public Utilities Regulatory Policies Act (PURPA) is another federal program that significantly encourages geothermal development. Under PURPA, utilities are required to buy a certain amount of power

Like other renewable energies, geothermal electric power has enormous potential to supply a significant portion of the nation's energy needs.

the price of geothermal electricity. President Clinton's Committee of Advisors on Science and Technology had recommended that \$51 million be set aside for geothermal energy. However, R&D appropriations from 1998 to 2003 remained relatively flat at \$25 million. Increased federal geothermal R&D appropriations would help the geothermal industry expand to its fullest potential.

(set at the utility's "avoided cost"—i.e., the amount that a utility would otherwise have to spend to generate or procure their additional needed power) from small renewable energy plants and co-generation plants (i.e., plants that produce electricity and another form of energy while using the same fuel source). Geothermal electric projects conveniently fit into both of these categories much of the time.

Federal tax credits are another means used by the government to promote the growth of the geothermal industry. The Energy Policy Act of 1992 extended a 10% Federal tax credit for investments in geothermal technologies and equipment. This 10% tax credit had initially been created by the Energy Act of 1978, was later repealed in 1985 by the Tax Reform Act, and was reinstated by the 1992 Energy Policy Act. Unfortunately, this kind of variability in the

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point of diversion, or place of use of water is one of the rights of ownership. The only requirement is that the transfer does not cause impairment to any other water rights holder-- junior or senior. If the transfer is allowed, the priority date becomes the date of the transfer.

³ *Herrington v. State ex rel. Office of State Engineer*, 2004-NMCA-062, 92 P.3d 31.

⁴ Brief in Chief of Ellis B. and LaVerne Herrington, *Herrington v. State ex rel. Office of State Engineer*, 2004-NMCA-062, 92 P.3d 31 (No. 28, 628).

⁵ *State of New Mexico ex rel. Office of the State Engineer's Answer Brief, Herrington v. State ex rel. Office of State Engineer*, 2004-NMCA-062, 92 P.3d 31 (No. 28, 628).

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political support of tax incentives for renewable energies has a negative effect upon investor confidence and the long-term stability of the geothermal energy market.

II. State Incentives and Initiatives

In recent years, many states have implemented novel programs to promote the growth of the renewable energy industries. One such device, Public Benefit Funds (PBFs), has been used by at least 24 states as a means to raise money primarily for R&D. Typically generated from customer charges on utility bills and new user access fees, PBFs fund various public programs, including renewables technology development. New Mexico's "Clean Energy Grants Fund" allows municipalities, state agencies, public schools, universities, and Indian tribes to apply to the Energy, Minerals, and Natural Resources Department for funding of geothermal and other clean energy technology and education programs.

Renewable Portfolio Standards (RPSs) have been used by at least 12 states to require electricity retailers to ensure that a certain percentage of the

power they sell will be produced from renewable sources. In New Mexico, utilities will be required to obtain 5% of their electricity from renewable energies, including geothermal energy, by the year 2006, increasing by 1% each year until a 10% RPS will be required in 2011. In order for utilities to comply with this mandate, New Mexico allows the costs incurred in meeting the RPS to be passed on to consumers via the rate-making process and also provides for a trading system whereby electricity retailers can sell their renewable energy credits in excess of the RPS to other utilities.

Other state programs affecting utilities include Green Market Portfolios, used in at least two states, requiring power providers to offer a menu of different renewable (or "green") products to customers. Disclosure and Certification Programs, used by 25 states, promote "truth in advertising" for electricity retailers by requiring them to display on a customer's bill the mix of fuel sources that were used to generate the electricity, including the amount derived from renewable sources. Also, Net-Metering,

used by 14 states, "allows renewables producers to reverse their meters when generating more electricity than is demanded."

Sometimes a state sets an example for private industry by committing itself to increased use of renewable energies. State Renewables Purchase, already used by at least five states, requires a state to purchase a certain amount of its energy from renewable sources for use in state-owned facilities.

State tax incentives and credits are another device used to promote geothermal energy. State Production Tax Credits, used in at least four states, provide a tax credit (usually around 1 cent per kWh) for electricity generated from renewable resources. Property Tax Incentives, used by at least 24 states, appear as exemptions, exclusions and credits, generally structured so that any additional value that a device adds to a property is not included in the value of the property for taxation purposes (i.e. if a renewable heating system costs \$2,000 compared to \$1,000 for a traditional system, the renewable system will only be assessed a property tax based on \$1,000). Finally, Sales Tax Incentives, used in at least 16 states, exempt renewable energy equipment from state sales tax.

III. Conclusion

In addition to the initiatives described above, other federal and state initiatives are needed to make geothermal energy projects more attractive to investors. For example, government loan guarantee programs, the creation of a National Renewable Portfolio Standard, the inclusion of geothermal energy under the Federal Production Tax Credit, and other

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incentives already effectively implemented in the Philippines have been suggested. Our elected representatives would best serve us by exploring these ideas and by pondering the profound irony common to all renewable industries: (1) improved technology is needed to bring down the price of geothermal electricity, which will benefit the U.S., but (2) the U.S. cannot afford to heavily subsidize the geothermal industry, and thus new geothermal projects and the needed technological advancements do not materialize.

Endnotes

- ¹ Although the various obstacles facing investors are not examined in this article, see generally Kaveh Badiei, *Geothermal Energy: Is It Attractive Enough To Draw Investors For Construction of Geothermal Electric Plants?*, 7 HASTINGS W.-N.W. J. ENVTL. L. & POLY 109 (2001); Robert L. Humphrey & Clayton J. Parr, *Geothermal Sales Contracts*, 14 NAT. RESOURCES LAW. 613 (1982); Laura MacGregor Bettis, *In Hot Water: Can Idaho's Ground Water Laws Adequately Govern Low Temperature Geothermal Resources?*, 39 IDAHO L. REV. 113 (2002).
- ² RENEWABLE ENERGY POLICY PROJECT [REPP], GEOTHERMAL ENERGY FOR ELECTRIC POWER 16 (2003) [hereinafter REPP], available at http://www.repp.org/articles/static/1/binaries/Geothermal_Issue_Brief.pdf (last visited Mar. 1, 2005).
- ³ New Mexico has historically attracted significant R&D federal dollars. See NMSA § 71-7-2.
- ⁴ REPP, *supra* note 2, at 17.
- ⁵ *Id.* at 18.
- ⁶ *Id.*
- ⁷ *Id.*
- ⁸ Advanced Energy Technologies Economic Development Act, NMSA § 71-7-1 to -7.

- ⁹ TROY GAGLIANO, NATIONAL CONFERENCE OF STATE LEGISLATURES, *Geothermal Energy: A Primer on State Policies and Technology*, 28 STATE LEGISLATIVE REPORT 1, 11 (2003) [hereinafter GAGLIANO], available at http://www.eere.energy.gov/geothermal/pdfs/state_legislative_report.pdf (last visited Mar. 1, 2005).
- ¹⁰ Renewable Energy Act, NMSA § 62-16-1 to -10.
- ¹¹ GAGLIANO, *supra* note 9, at 12.
- ¹² *Id.*
- ¹³ Christopher Flavin, *Renewable Energy Technologies and Policies: Status and Prospects*, 5 BUFF. ENVTL. L.J. 1 (1997).
- ¹⁴ GAGLIANO, *supra* note 9.
- ¹⁵ *Id.* New Mexico extends a Production Tax Credit for solar, wind, and biomass energies, but not for geother-

mal energy. See Renewable Energy Production Tax Credit, NMSA § 7-2A-19.

- ¹⁶ *Id.* Because property tax is collected locally, some states give local authorities the option of providing a property tax incentive for renewable energy devices. *Id.*
- ¹⁷ *Id.*
- ¹⁸ See 30 U.S.C. §§ 1501-1542, 1141(b)(1)-(5) (2002); see also 27 AM. JUR. 2D, *Energy and Power Sources* § 58 (2004).
- ¹⁹ See Lauren Miura, *Renewables Industry Waiting For Word on RPS, Tax Incentives*, LAND LETTER (Sept. 25, 2003).
- ²⁰ See Energy Tax Incentives Act of 2003, S.597, 108th Cong. (2003), proposed by Senator Charles E. Grassley (Iowa).
- ²¹ REPP, *supra* note 2, at 19.

Your Section Dues at Work

2005 SECTION BUDGET

FUND BALANCE CARRY FORWARD:	\$ 3,908.93
PROJECTED DUES REVENUE:	3,780.00
OTHER PROJECTED REVENUE:	2,483.00
Source: 2004 reserves designated for newsletter	_____
 TOTAL FUNDS AVAILABLE:	 \$10,171.93
 BUDGETED EXPENDITURES:	
Administrative Expense	50.00
Annual Meeting	300.00
Board Meetings	750.00
CLE	3,000.00
Marketing	100.00
Newsletter	2,483.00
Scholarships	2,500.00
Web Pages	125.00
_____	_____
TOTAL PROPOSED EXPENDITURES:	\$9,308.00
Unbudgeted	\$863.93

Natural Resources, Energy & Environmental Law Section

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