The Traveler's Dilemma: Logic and Illogic in New Mexico's Water Laws

Max Yeh, *Percha/Animas Watershed Association*

The words we use to talk about water issues in New Mexicoderive from our water laws. A discourse analysis of some of these terms and of their conceptual interrelations shows how these words form logical and illogical networks of ideas or even ideologies by exploiting literal meanings,implications, mistaken associations, and tropes like metaphors and similes. These words/ideas promote incoherencein our thinking about water and are detrimental to our public interests in sustaining an adequate supply of healthy water for the state. As a consequence of this analysis, I suggest that the legal status of water rights and the doctrine of prior appropriation be completely revised.

The most attractive part of New Mexico's water practices is the original notion that water belongs to everyone to use. It did not "belong" originally in the sense of property, but it was there to be used as air is all around for everyone to breath. Water, however, not being ubiquitous but arising in springs, flowing through streams, or resting in ponds, was localized, so that water's universal availability requires that these locations be kept open to the public. This is why there is an old, 1876, statute in New Mexico that allows any person and his or her animal access to water (NMSA 72-1-6, "Traveler's Use of Water"). You could not fence off water when it was needed

maxyeh@windstream.net

without the risk of having your fence legally taken down. Water on private property was still available and free.

But even as this principle was protected in this law, the forces of what C.S. Kinney later called the Arid Region Doctrine, that is, the concept of water rights as private property and the doctrine of prior appropriation, undermined its intent. The traveling cowboy with his horse can take the water freely from a spring, river, ditch, etc. but not from a well. Presumably, he must pay for water from a well, i.e., for the "development" of the water, a mining metaphor. At this point, it is no longer clear whether the water is free. In mining, the ore, once produced by "development" is by contractual agreement with the government the property of the miner. If the similitude holds, the water in the well is now "developed water" (another phrase wehear in water discussions) and thus private property. Water commoditized into property, water rights become property rights. In fact, in spite of the popular myth that in New Mexico water belongs to the people, the Constitution specifies that what belongs to the people is the "unappropriated" water. "Appropriated" water is private property, an etymological understanding of the word which means "to make itone's own."

But what about "development" makes it an appropriation? In the case of the traveling cowboy, the well owner and apparently the state seem to think that the water in his well is appropriated but the water in his ditch is not, even though he has diverted water and dug the ditch. We might suppose that for the law's authors the difference between a ditch and a well was that the ditch allowed a "free" flow of water while the well was wrongly thought of as a big bucket of water, because if the ditch led to an artificial pond or a tank, that containment, by this statute, would be a "withdrawal" (which isan Anglo-Saxon translation of the Latinate mining term*extraction*), one of the legal actions that constitute appropriation or ownership

This hypothetical train of thought proceeds through several conceptual errors. First, unrestrained flow in a ditch or stream is imagined as "free," suggesting, by a kind of unconscious pun, that it can be "freely" taken. Since ditches usually "return" water to the stream, the flowing ditch water was unused, so unappropriated, and so, available. Further, water in the ground is imagined as static, not flowing, not "free" but contained, and thus of a specific quantity, a body, and thus something much more imaginable as an object or a property, which is why we say that water is "in" the well.

Erroneous as these ideas are hydrologically and ecologically, they are part and parcel of our water vocabulary. Free flow forms a kind of primitive image of "natural" water abundance. Use is through containment. And, containment makes ownership. Even though we know better, containment is what water managers are doing all over New Mexico, deliberately depleting the water supply by storing water in a drought, and they are forced to do this by the codes of the system, just as water rights holders are forced to use as much water as possible during the drought in order to maintain their rights.

The privatization of water into a commodity is surprising given the original notion of public waters, but this contradiction is embedded in all our water discourse. Our 1907 water law begins, "All natural waters…belong to the public and are subject to appropriation for beneficial use." "Subject to appropriation" can meanthe state "sets aside" water for use, a normal usufructuary law, but if the user does theappropriating, i.e., extracting and privatizing water, we have a law negating itself.

Given this longstanding commoditization of water, the state's attempt to rationalize its water policy by adjudication will create something like a state citizenship roll. At the end, we

will have a list of those who have the water to live in New Mexico. Since water will then be fully appropriated, those not endowed with water rights need not come to New Mexico unless they buy their way in. The traveling cowboy will not have rights to a free drink in a stream, not to mention his horse.

A bit of history at this point will help. I return to Kinney's monumental treatise. By surveying both common law and civil law, Kinney shows that our laws have no basis in any Old World legal traditions, not ancient Roman laws, not English common laws or European civil laws, not Arabic laws. In spite of the myth that our water laws come from usufructuary laws of Spain and Mexico,they are, in fact, uniquely an outgrowth of our expansionist Western history. Arid Region Doctrine denies the central principle of water laws in all these legal traditions, that water, like air, is common property. It denies, therefore, notions of equity, principles of common welfare, and the basic constitutional guarantee of life. It replaces these principles with a way of gaining private advantage by maximizing use as the mechanism for acquiring wealth. This "dibs" principle of grabbing what you can as fast as you can originated with the practice of squatting in mining exploitation and expanded under the totally mistaken notion that the desert could and should be turned into a garden of paradise by pouring water on it. At the height of man's hubris towards nature, in the 1890's, Kinney justified the Doctrine by claiming that the region's aridity required that water rights be concentrated in the hands of the few in order to bring the benefits of civilization to the savage land and its "savage" peoples. After 150 years, the Arid Region Doctrine has made the arid region even more arid. What prosperity it brought was temporary. I live in a county thatonce produced a third of the state's wealth but is now one of the poorest counties in the country, and just last month New Mexico beat Mississippi to the bottom of the rankings for food security for children.

The damage caused by the Doctrine has long been recognized. In a 1959 WRRI conference on water scarcity, like this one, New Mexico Supreme Court Justice Irwin Moïse brought together many of these arguments, yet he repeated Kinney's perception that water left to run down the Rio Grande was wasted and suggested that the laws of supply and demand would eventually curb the excesses built into the legal doctrine. Half a century later, I hope we are less complacent.

How to change all that is a Promethean task. This conceptual mind-boggle, the conflict between the Arid Region Doctrine and all other more rational concepts of water use, underlies the physical problem of sustainability. Resolving the irrationalities of our water language may not guarantee sufficient water, but not to solve these conceptual conundrums will surely destroy whatever quantitative balance we imagine for the future. Increasing supply and reducing demand only free up more water to grab. Sustainability demands that the doctrine of water rights and prior appropriation be either scrapped or significantly changed. Further, these reforms need to be articulated in a way that brings in the sustainability equation.

The concept of water rights can be taken apart to distinguish our guarantee of people's free access to water for living (a natural right that should be enshrined in the Constitution) from accessibility to water used for profit. We do not buy and sell the right to vote. In the same way, we should prevent the buying and selling of water accessibility.

The commercial uses of water can be allotted through a complicated bureaucracy of local decisions on comparative values and needs, something, perhaps, modeled on the structure of the regional water plan system but with administrative powers. It is evident to all that there are both direct and indirect relations between water and life and that there are both more and less essential water uses. How this gradient or these gradients of values are determined in an allotment

systemcan only be answered in the details of each situation. But if we remove and protect the natural part of water rights, we return water rights to their "fruit of use" origins (usufructuary rights), where civil law can define and restrict their expansion.

A conservative usufructuary code would strictly embrace these four principles:

1) Water belongs to the people and returns to the people when not consumed.
2) Usufructuary rights cannot be transferred, and so neither inherited nor sold.
3) A sustainability equation is determinative in the negotiations over allotment. Here I replace the market equation of *supply and demand*with an equation of *availability and public value use*. "Availability" differs from "supply" by being a netconcept. It is the amount of water that can be used without damage to the aquifers and stream flows, a kind of total replenishment figure dependent on climate and geology. Since water availability is localized, the application of this fundamental equation requires local administration. It also suggests, since available supply is variable, that whatever administrative structure is put in place to determine needs, that determination is always ongoing. By "public value use," I mean that allotment decisions are justified by public rather than private benefits.This equation places the problem where it should be, on water quantity, rather than on water rights, which is where the present legal system has lodged the discussion on water. Finally, the equation's balance suggests that the measure of water use should be net useorconsumption, so that water quality is part of the equation. Irrigation that returns excessively high saline water to aquifers and streams increases net use. Since usufructs, strictly conceived, do not allow damage to the original property, net use would be a measure of that damage.

maxyeh@windstream.net

4) All activity in the state must be constrained by the sustainability equation. This means on the private level simply that the administration of sustainability is ongoing, but on the public level, it means that all legislative proposals are accompanied by a net water use study to see if the state has enough water for the consequences of legislative actions. On the county and municipal level, too, elected officials andadministrators must embrace the sustainability equation. The aim is to treat water as we presently treat money, accounted as cost in a balanced budget, an economy of water.

This legal change -- away from the language of *rights* and *appropriations* to a language of *sustainability*, *availability*, and *public valueuse*, avoiding the mining ideas of extraction, development, and ownership -- returns us to legal systems of the usufruct which is an entirely different way of conceiving our relations to water.

Every aspect of life in New Mexico depends on this change, but clarification can come only if legislators, whose base is their local constituencies, give up territorial behavior toembrace the whole state, if bureaucrats free themselves of political dependencies,if developers and financial interests will understand that a reasonable water system is to their ultimate benefit, and if the people will demand laws that promote life rather than litigation.

maxyeh@windstream.net