1967 WATER LEGISLATION 1/

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This will be a brief resume of the 1967 Water Legislation considered by the First Session of the Twenty-eighth Legislature presented on the evening of March 30, 1967 at the New Mexico Water Conference in a panel chaired by Dr. Ralph Stucky, and also participated in by Representative Hoyt Pattison.

We have had quite a few rather formal debates on the subject of legislation during recent weeks in the course of the legislative session. In most instances Representative Hoyt Pattison, who is also at the head table here this evening, participated in these discussions with enthusiasm and effectiveness. As our moderator has indicated, Mr. Pattison was the sponsor of a large share of the water legislation considered.

It has been one of my greatest pleasures to be involved in a field of activity where things are happening. And things of importance are happening in the many disciplines that are devoting their efforts to water problems. It is fascinating to participate in and watch the functioning of the machinery of water politics, particularly in the context of the First Session of the Twenty-eighth Legislature.

There are an increasingly large number of groups and interested individuals who are participating in the most important field of legislative effort. We see irrigation farmers, dry land farmers, ranchers, representatives of the oil and gas industry, recreationists, sportsmen, conservationists, members of federal, state, municipal government and other political subdivisions, domestic water users, public health representatives and a multitude of industrial interests too numerous to list. It is a fascinating process and I would like to discuss it sometime but we are not here tonight to discuss the process but rather to review the product of this process.

In the interest of briefly reviewing this product and particularly the successful legislation produced by the recent legislature, I have taken the liberty of dividing up the water bills that our offices were most concerned with into six categories. These categories are necessarily somewhat arbitrary and it has been necessary to leave out some legislation which I feel to be of less general interest.

1/ Considered by the First Session of the Twenty-eighth New Mexico Legislature.

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DITCH REHABILITATION

I have denominated the first category "Ditch Rehabilitation," a category in which four bills were introduced as reflected by the following table:

Comm. Sub HB 34	/$100,000 appropriation, statewide, for rehabilitation of irrigation facilities_/	signed (Chapter 67)
SB 174	/Appropriation for rehabilitation of irrigation facilities, Grant County_/	died
SB 175	/Appropriation for rehabilitation of irrigation facilities, Santa Fe County_/	died
SB 312	/Appropriation for rehabilitation of irrigation facilities, San Miguel County_/	died

The several bills shown in the above table are successors to similar bills introduced in previous sessions. The purpose of these bills has been to appropriate moneys to the State Engineer from a trust fund created under the Ferguson Act, the federal act under which the State of New Mexico received grants of federal land for the purpose of improving irrigation. The legislature has directed the State Engineer to use these moneys for the purpose of rehabilitating community ditches and other public irrigation facilities within the State. The practice has been to make these funds available on a matching basis to the local entity, so that a grant from these moneys in the amount of 15% of project cost will be matched by a 15% contribution by the local entity and by as much as a 70% grant from the federal government. The net effect has been to generate substantial expenditures in the interest of conservation with a relatively small contribution from the State.

INTERIM STUDY

The second category of legislation is "Interim Study." The legislation in this category is shown in the following table:

Comm. Sub. HB 116 & HB 179	/Interim study of water law and administration_/	died
HB 396	/Study of agricultural water requirements_/	signed (Chapter 220)

The committee substitute for HB 116 and HB 179 received considerable attention by the legislature and represents the consolidation of features of two bills introduced by Representatives Hoyt Pattison and Richard B. Edwards and others. The bill passed the House but was unsuccessful in the Senate,

where it died in the Senate Conservation Committee. It would have provided a $20,000 appropriation for the purpose of financing an interim legislative committee to study water laws and institutions.

The second bill, HB 396, authorized an appropriation of $6,000 to the New Mexico State University for the purpose of undertaking a two-year study of agricultural water requirements through the year 2060.

WATER POLLUTION

A third category of bills dealing with water pollution are summarized in the following table:

HB 201	/Water Quality Act, creating water quality control commission_/	signed (Chapter 190)
HB 83	/Water Pollution Act_/	died
SB 476	/Water Pollution Act_/	died

The successful bill in this category represents the first substantial New Mexico legislation in the field of water pollution.

CAPITAN REEF PACKAGE

One of the largest categories of water legislation includes the bills that I have chosen to call the "Capitan Reef Package." All of these bills died except one, Committee Substitute for SB 396, but the category represents one of the most important areas of legislative concern. The bills are summarized in the following table:

Comm. Sub SB 396	/Excluding certain water from underground water basins_/	signed (Chapter 86)
HB 321	/Regarding secondary recovery of oil, provides if water injected and withdrawn in equal amounts there is no appropriation_/	died
HB 357	/Required no fresh water be used when brackish water available_/	died
SB 188	/Similar to HB 321_/	died
SB 189	/Similar to SB 188_/	died
SB 314	/Withdraw New Mexico from Pecos Compact_/	died
HB 292	/Same as SB 314_/	died

SB 394	/Repeal existing State Engineer jurisdiction ground water_/	died
SB 395	/Procedures for declaring underground water basins_/	died

All of the bills in this group are related to the concerns of different people with the use of brackish water from the Capitan Reef, particularly in Lea County, New Mexico. Several of these bills including the successful Committee Substitute for SB 396, constituted efforts by representatives of the oil industry to exclude the Capitan Reef from the State Engineer's jurisdiction. More detailed consideration will be given to SB 396 at the conclusion of this paper.

WATER RIGHTS AND ADMINISTRATION

A fifth category of water bills entitled "Water Rights and Administration" are summarized in the following table:

SB 335	/Soldier's exemption_/	signed (Chapter 182)
HB 27	/Similar to SB 335_/	died
SB 162	/Permitting use of water rights on all or part of lands_/	died
HB 89	/Exempts mineral wells from metering_/	died
HB 315	/Procedure for adopting State Engineer regulations, etc._/	signed (Chapter 246)
HB 148	/Create water commission, make State Engineer employee thereof_/	died
SB 393	/Authorize leasing of water rights_/	signed (Chapter 100)
HB 133	/Require permission of land owner prior to well application_/	died (incorporated in HB 306)
SB 381	/Same as HB 133_/	died
Comm. Sub. HB 306	/Eliminates State Engineer hearings in most ground water applications_/	signed (Chapter 308)

SJR 7	/Require de novo hearings in appeals from State Engineer_/	adopted (Constitutional Amendment No. 5)

The bills in this category all deal in some fashion with the modification of water rights statutes or with the method of administration, authority and jurisdiction of the State Engineer. First there were a sub group of two bills (SB 335 and HB 27) which had as their purpose the exemption of persons on active military assignment from the requirement of statute that an application must be filed for extension of time within which to use water in order to avoid the possibility of forfeiture. SB 335 became law and protects a person in the above category against any possibility of forfeiture for non-use of water. SB 335 also incorporated elements of HB 27 and SB 162, authorizing water right owners to use all their water right on a portion of their land without filing an application with the State Engineer.

HB 315 is a rather important piece of legislation dealing with the administrative procedures to be followed by the State Engineer Office. It requires the State Engineer to hold hearings before adopting rules and regulations and requires that a hearing be held following the declaration of a basin, at which hearing the State Engineer shall put on evidence to justify the act of declaration of the basin.

Another bill in this category, HB 148, would have abolished the Interstate Stream Commission and would have rather seriously modified the authority and jurisdiction of the State Engineer. The bill proposed the creation of a 13-man commission whose members would have been appointed by the Governor to represent geographical areas substantially paralleling our present judicial districts. The State Engineer would have been an employee of the commission and the commission would have been given the same authority now enjoyed by the Interstate Stream Commission plus broad supervisory control over the State Engineer Office. The bill died in committee.

SB 393 authorized the leasing of water rights. This bill passed without substantive objection, our only reservation being to its necessity. In my opinion farmers already enjoyed the right of temporarily transferring water rights.

HB 306 is one of the most important bills to pass and I will discuss its primary purpose in a little more detail below. It had the secondary purpose of incorporating the provisions of HB 133 to the effect that nobody may file an application to drill a well on the land of another without securing the prior permission of the owner of the land.

SJR 7 is among the more significant measures adopted since it had the purpose of providing that any appeals from State Engineer decisions shall be de novo. It this proposed constitutional amendment were adopted by the people, it would have the effect of establishing a different method of appeal in water matters than prevails in all other areas of administrative law.

MISCELLANEOUS

A final category of legislation is, or course, "Miscellaneous" and a summary of these bills follows:

SJM 10	/Urges an interim study leading to draft of uniform administrative procedures act_/	adopted
HB 227	/Appropriated $60,000 for measuring devices within the Gila River System and its tributaries_/	signed (Chapter 192)
Comm. Sub. HB 205	/Geothermal Resources Act_/	signed (Chapter 158)
SB 311	/Severance Tax Bonds, Canadian River Dam_/	died
SB 426	/Requires plugging of mine drill holes_/	signed (Chapter 128)
HM 3	/Memorialized Congress to study Pecos River Flood Control Dam_/	passed
SM 10	/Same as HM 3_/	passed
HB 263	/Las Cruces arroyo flood control_/	signed (Chapter 156)

SJM 10, while not having the force of law, urges the Legislative Council to conduct a study of administrative procedures on a statewide basis during the interim and to report back to the legislature at a later date. I am advised that this study will be undertaken and feel that this is the proper way to undertake the evaluation of problems of administrative procedures and administrative law. HB 227 appropriating $60,000 for measuring devices, will relieve water users in the Gila-San Francisco Stream System from the economic burden of complying with the decision of the United States Supreme Court in Arizona v. California, 373 U.S. 546, which determined the relative rights of New Mexico and Arizona to the waters of that stream system. I will not take the time to further describe the other miscellaneous bills.

EVALUATION

It is always dangerous to evaluate the importance of legislation in advance but I will risk it to the extent of suggesting that Comm. Sub. SB 396, Comm. Sub. HB 306 and SJR 7 are the three most important water measures passed by the recent legislature. I will conclude my remarks by briefly describing and evaluating these bills.

SB 396 was probably the most controversial water legislation introduced in this session. It is the sole survivor in the category that I described as being introduced to permit the appropriation of the waters of the Capitan Reef for secondary recovery without the necessity of making application to the State Engineer and without requiring the applicant to bear the usual burden of showing that the new appropriation will not impair existing rights. What the bill says is that "No present or future order of the State Engineer declaring an underground water basin...shall include water in an aquifer, the top of which aquifer is at a depth of twenty-five hundred feet or more below the ground surface at any location at which a well is drilled and which aquifer contains non-potable water." Non-potable water is defined by this act as containing not less than 1000 parts per million of dissolved solids. While the bill was of general application, the intent of its sponsors was to permit the oil industry to proceed to develop water from the Capitan Reef at points where the top of the reef is at least 2500 feet below ground surface, and to do so without having to file an application. There is a serious possibility of fatal ambiguity in the language of the bill. This possible ambiguity was suggested in committee hearings but was not considered seriously enough so that amendment of the language was contemplated. I want you to listen to and read the language of the bill carefully if you will and see if you don't agree that at least two diametrically opposed constructions can be placed upon the language. Under one reading it seems to say that if at any place you drill a well into this aquifer you first encounter non-potable water at 2500 feet or more, then that entire aquifer and the water therein must be excluded from any declared underground water basins. The significance of this interpretation can be suggested by pointing out that if so read the legislation would prevent the State Engineer from having any jurisdiction over the waters of the Roswell Artesian Basin, since the San Andres formation is found in some locations at a depth of 2500 feet or more.

Another construction of which the language is susceptible is to the effect that the water in an aquifer need not be excluded from a declared underground water basin unless water is first encountered at more than 2500 feet in depth at every location where a well is drilled into that aquifer. Given that construction the bill would not apply to the Capitan Reef since there are some locations at which water is first encountered in the Capitan Reef at less than 2500 feet.

I will not extend my discussion of this bill except to say that serious concerns for the constitutionality of the bill and for its practical effects were expressed during the hearings and debate on Comm. Sub. SB 396.

May I next refer to HB 306. This is the one that had the principal purpose of taking the State Engineer part way out of the hearing business, at least as to hearings arising out of applications involving ground waters. The bill eliminates State Engineer hearings in certain instances where this legislation provides that the hearing will be held in the district court instead. Several sections of the new law provide that after an application has been filed and the State Engineer has caused an advertisement to be

made of the application, then, if there is no protest, the State Engineer is directed to consider the application. If he decides that he would have to deny it, he is required to so advise the applicant. If, on the other hand, the application has been protested, the State Engineer is directed to advise the applicant that the application has been protested. The law then provides that "Unless the applicant files within 30 days after receipt of notice...an action for hearing in the district court...the State Engineer may proceed to deny the permit." It is also stated that "The application shall be heard and tried as cases originally docketed in the district court and the State Engineer shall be a party thereto." In other words, under the two circumstances described, no State Engineer hearing is held. It appears that this legislation puts the district court in the position of the State Engineer in deciding applications. Objections to the constitutionality of this legislation were expressed in committee hearings on the grounds that this legislation would require the court to perform what has been denominated by our courts as an administrative function. The risk exists that the legislation will therefore be held to authorize a violation of the separation of powers doctrine. It also runs the risk of failing for the same reason that de novo appeals were rejected by the New Mexico Supreme Court in the case of Kelley v. Carlsbad Irrigation District, 71 N.M. 464.

HB 306 is also subject to some confusion regarding which applications are covered by the new rule. As a matter of law, however, the constitutional objection is the most serious one. As a matter of policy, we feel that there are inherent dangers in the patch work legislative modification of administrative legal procedures contemplated in this law. You have heard this afternoon and this morning considerable emphasis placed on realistic appraisal of the relationship between the disciplines involved in water resources development and an acceptance of the relationship between ground and surface water. This law yields the indefensible result of applying a different administrative procedure to ground waters than is applied to surface water. As such, it constitutes a step backwards in administrative law.

SJR 7. The final measure to be discussed is SJR 7 which will be voted upon by the people of New Mexico as Constitutional Amendment No. 5. This resolution provides that "in any appeal to the district court from a decision of a state executive officer charged with administering water rights, the proceeding appeal is by de novo as cases originally docketed in the district court." This constitutional amendment is stimulated by what must be the most widely known water case in recent time, Kelley v. Carlsbad Irrigation District, supra, which held that appeals from administrative agencies must be based upon the record made at the hearing before the administrative agency. In considering such an appeal, the district court is limited to determining whether, based upon the legal evidence, the administrative officer acted fraudulently, arbitrarily or capriciously and whether his action was substantially supported by the evidence. Two years ago the legislature adopted a resolution substantially identical to the one which will

now be submitted to the voters. That resolution was voted upon and rejected by the people less than two years ago. This bill will result in the issue being submitted to them again.

Several objections to the proposed amendment should be stated. It is inappropriate to establish one rule for appeals from the State Engineer hearings and another rule for all other administrative appeals. Second, a similar constitutional amendment was rejected by the people of New Mexico less than two years ago and it therefore seems premature to ask that the matter be submitted for their approval or rejection again. Third, efforts are now under way in both the executive and legislative branches of government to secure the creation of a constitutional convention. The nature of appeals from administrative agencies is one of the items that should be considered in a comprehensive study of our New Mexico constitution. Also, the Constitutional Revision Commission has had these matters under consideration and is preparing to submit recommendations to the Governor and the Legislature, probably including proposed changes in the area of appellate review of administrative decisions.

The trend of the law is in the direction of increasing the responsibility of administrative agencies and relieving the courts from the burden of hearing the large amount of technical evidence that can be required in cases involving areas such as water. There has been a tremendous growth and refinement of administrative functions and procedures during the last several decades. No one would claim that administrative law has always served the public interest as best it might have. However, it is here to stay and we should attempt to improve it, not abandon it.

The First Session of the Twenty-eighth Legislature has been an important one for water law and water rights administration. The significance of legislation adopted and, indeed, of legislation which failed, may not be known for many years. It is probably sufficient for the moment to describe what has happened and to limit evaluation to the few interpretative remarks contained in this report.