



Administrative Office of the Courts

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Contact: Barry Massey, public information officer

bmassey@nmcourts.gov

505-470-3436

Supreme Court rules that NM law allows for partial forfeiture of groundwater rights

SANTA FE – New Mexico law allows for the partial forfeiture of underground water rights, the state Supreme Court ruled today.

In a unanimous opinion, the justices affirmed decisions of a district court and the Court of Appeals in a case involving Toby Romero, the owner of land and a well in Sierra County near Cutter, a defunct mining town southeast of Truth or Consequences. A railroad originally used the well to service steam locomotives and later to water livestock. The town ceased to exist after mines and the railroad depot shut down decades ago. Romero acquired the property and well in the 1990s, and planned to market the water rights.

The state's groundwater statute provides for forfeiture of water rights but it does not specify whether that applies to just a portion of the rights. Today's opinion settled that legal question, concluding that New Mexico statutes provide for the partial forfeiture of rights to any portion of unused underground water.

In an opinion by Justice David K. Thomson, the Court explained that "forfeiture is an essential enforcement mechanism" for the doctrine of beneficial use of water, which is recognized in Article XVI, Section 3 of the state constitution and serves as a foundation for water law in New Mexico. The doctrine requires those who acquire a right to a particular amount of water to put that water to a continuing beneficial use.

The Court wrote that the groundwater forfeiture law, "if interpreted to disallow partial forfeiture, would subvert enforcement of the critical policies of preventing waste and using water 'to do the greatest good to the greatest number.' In addition, there is no distinction drawn between partial forfeiture and forfeiture. Whether a water owner has ceased to use *all* of the water right or has ceased to use *part* of the water right, Article XVI's admonishment is the same: *use* is the *measure* of that right."

Romero claimed he had a right to 394.85 acre feet of groundwater a year from the railroad's well and that use of a small portion of that water for livestock preserved his right to the larger amount of water.

However, a special master in the case determined the amount of water attributed to the railroad right was much less and it had been forfeited because the railroad stopped using the water, except for an amount for livestock, long before Romero purchased the property. The district court adopted the special master's recommendation to adjudicate a water right to Romero for three acre-feet a year for livestock watering. An acre-foot is nearly 326,000 gallons of water, and represents the amount of water needed to cover an acre of land one foot deep.

The Court determined that the special master's findings about nonuse of water was supported by substantial evidence, including historical records about the decline of the mining town, logs kept by the railroad and witness testimony.

The Court concluded that the beneficial doctrine requires that the state's groundwater statute "allow for any portion of unused water to return to the public and be subject to appropriation by the state."

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To read the decision in *State ex rel. Office of State Engineer v. Romero*, No. S-1-SC-37903, please visit the New Mexico Compilation Commission's website using the following link:

<https://nmonesource.com/nmos/nmsc/en/item/521374/index.do>