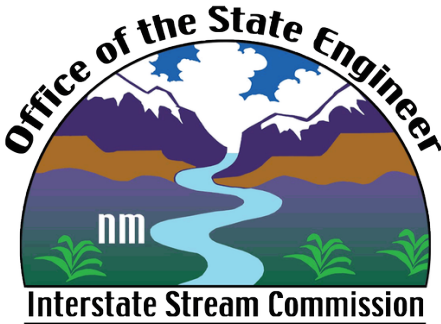


New Mexico State Water Plan Part III: Legal Landmarks

Gaining a Statewide Perspective through Analysis and Integration of
Water Planning Activities, Including New Mexico's 16 Regional Water Plans



DRAFT 2018

New Mexico State Water Plan Part III: Legal Landmarks

Prepared by the New Mexico Interstate Stream Commission



Published 2018

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List of Acronyms

AWRM	Active Water Resource Management
CWA	Clean Water Act
ESA	Endangered Species Act
Handbook	<i>Updated Regional Water Planning Handbook: Guidelines to Preparing Updates to New Mexico Regional Water Plans</i> (ISC, 2013)
ISC	Interstate Stream Commission
NMSA	New Mexico Statutes Annotated
NMSC	New Mexico State Code
Reclamation	United States Bureau of Reclamation
USSC	United States Supreme Court
WQA	Water Quality Act

Major Landmarks of New Mexico Water Law

1. Introduction

Two principles govern New Mexico water law. The principle that “prior appropriation shall give the better right,” N.M. Const., Sec. 2, means that the water right owner whose right was established first will get water first in times of scarcity. The earlier the priority date of a water right, the more likely it is to get a full supply of water. The second principle is that “beneficial use shall be the basis, the measure and the limit of the right to the use of water,” N.M. Const., Art. XVI, Sec. 3. This means that the private¹ property of a water right is only in the use of water for a beneficial purpose. That property right only exists to the extent of historic beneficial use, and only as long as water under that right continues to be beneficially used.

Both of these principles look to history, first as to when a water use began and then as to how much water was historically used and continued to be used. In addition to these fundamental principles, there are other statutory provisions, historical events and court decisions that have shaped the way New Mexico governs water. This section of the State Water Plan sets out some of these landmarks.²

2. The 1907 Water Code

In 1907, the Territory of New Mexico passed the comprehensive Water Code that still forms the basis for much of New Mexico water law. NMSA 1978 Chapter 72. The Code recited the two fundamental principles of New Mexico water law--prior appropriation and beneficial use--anticipating their inclusion in the Constitution that New Mexico adopted with statehood in 1912. Although these principles had been part of New Mexico law for many years prior to 1907, the precise language of the Code was largely based on a draft model water code written by an employee of the United States Reclamation Service (now the United States Bureau of Reclamation) (“Reclamation”). Reclamation was formed in 1902 under the Reclamation Act, 57 P.L. 161, 32 Stat. 388, 57 Cong. Ch. 1093, 57 P.L. 161, 32 Stat. 388, 57 Cong. Ch. 1093, which promoted the construction of large irrigation projects, including infrastructure such as dams, throughout the West. New Mexico was eager to smooth the way for the United States to come into New Mexico and build those large irrigation projects. Thus, New Mexico’s Water Code was designed to ensure that the State had sufficient practical administrative and judicial authority and understanding regarding water resources that Reclamation would feel confident that those resources could be developed in an orderly way. This administrative and judicial authority was established through a variety of strategies, including three that continue to be important today.

2.1 The Broad Authority of the State Engineer

The New Mexico Water Code of 1907 greatly increased the authority of the water official for the Territory of New Mexico. The historian Ira Clark, in his detailed and distinguished work *Water In New Mexico* (1987) (University of New Mexico Press, 1987), begins his analysis of the 1907 code by stating that its most “striking feature” was the expansion of the powers of the [then Territorial] Engineer, whose “overall responsibilities were covered by a sweeping statement: ‘He [sic] shall have general supervision of the waters of the Territory and of the measurement, appropriation, and distribution thereof, and such other duties as are required by this act.’” Clark, at 119. See NMSA §72-2-1.

¹ The water itself is owned by the public. N.M. Const. Sec. 2.

² The events and landmarks discussed here are not exhaustive, but are intended to give a rough framework for understanding New Mexico water law.

When water is sold, how does change of use and point of diversion (e.g.) work - does the buyer have to petition?

The extensive, centralized authority of the State Engineer has been a constant theme of New Mexico water law. In 2009, in *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622, the New Mexico Supreme Court (NMSC) confirmed that since the 1907 Water Code, the State Engineer has had broad authority over water in New Mexico:

The general purpose of the water code's grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process that maximizes resources through its efficiency, while seeking to protect the rights and interests of water rights applicants.

Lion's Gate at 532-3.

2.2 Application Processes before the State Engineer

Water rights applications were a second great change made by the 1907 Water Code. Prior to 1907, a water right could be established simply by diverting water and applying it to beneficial use. Following the passage of the 1907 Water Code, however, the exclusive means for establishing a new water right was through an application process before the State Engineer. New uses of surface water initiated without a permit or license from the State Engineer became illegal. Thus, in New Mexico, surface water uses that were made before March 20, 1907—the date the Water Code came into effect—established a water right simply by diverting and using before that date, providing that the water use was continuous after that date. Surface water uses that were begun after March 20, 1907, however, establish water rights only if they were put to beneficial use pursuant to a permit from the State Engineer.

The 1907 creation of the State Engineer permitting process contributed to New Mexico's authority and understanding regarding its water by providing for a centralized perspective on water. From this centralized perspective, the 1907 Code requires the State Engineer, before granting a permit, to determine that the proposed new water right can be satisfied within the supply of available, unappropriated water,³ NMSA §72-5-6, thus reducing potential conflicts that could arise from over-appropriation. In addition, the application process includes an opportunity for affected third parties to protest an application before the State Engineer. *E.g.* NMSA §72-5-5. Because of the flowing nature of water, the new statute required that the State Engineer would hear the concerns of neighbors, if there were any, in considering the effects of a proposed new water use.

2.3 The State Engineer's Technical Expertise

The 1907 Water Code also requires that the State Engineer be a qualified and registered professional engineer. NMSA §72-2-1. The New Mexico Water Code was passed during a period of American history known as the Progressive Era, between the 1890s and the 1920s. During that time, great hopes were placed on engineers, scientists and others with technical training to make the world better. One historian of irrigation in the United States remarked of the "new engineers" of the time that "The engineer was the master of technology—and the logical arbiter of economic progress. The scientific method made him a rationalist free of bias, suited both to lead and to mediate between economic interests and conflicting classes." Donald J. Pisani, Water and American Government: The Reclamation Bureau, National Water Policy, and the West, 1902-1933 (University of California Press, 2002, p. 24). The New Mexico Water Code envisioned that determinations regarding water would be made in accordance with scientific principles. *See also, Lion's Gate, supra*, at 533 (the NMSC notes that the purpose of the broad powers given to the State Engineer was for the State Engineer to use an "expertise in hydrology").

³ As discussed below, statutory changes in the 1980s required the State Engineer, before approving a permit, to make additional findings that the proposed new water right would not be contrary to the public welfare or detrimental to the conservation of water in the State. *E.g.*, NMSA §72-5-6.

2.4 Water Rights Adjudications

The 1907 Code places one aspect of water law in the courts rather than the State Engineer. While water rights are *administered* through State Engineer processes, they are *adjudicated* through the courts. The Water Code created a statutorily defined type of lawsuit, often called a “water rights adjudication.” See NMSA §72-4-13 *et seq.* These lawsuits judicially determine water rights in a single proceeding for an entire stream system, which means that they often involve thousands of defendants. The State Engineer acts as a technical expert in the adjudication, providing a hydrographic survey to ensure that court decisions have a solid factual and technical foundation. NMSA §72-4-16. Thus, although the duties of water administration and water adjudication have been split between the State Engineer and the courts, the statutes still guarantee that the State Engineer’s technical expertise will inform the adjudication process.

3. Acequias and Special Districts

While the State Engineer applies technical expertise to a centralized administrative process, and may appoint water masters to distribute water in accordance with established water rights, NMSA §72-3-1 *et seq.*, other water-related local governing bodies also have an essential role in New Mexico water administration. One of the special tasks of New Mexico water law is to promote and support a working partnership between the centralized scientifically-based duties of the State Engineer and the locally-based autonomy embodied both in New Mexico’s acequias, and in other special water districts in the State.

3.1 The Unique Law of Acequias

Long before the 1907 Water Code, acequias were well-established in New Mexico. Acequias are governed by a separate set of laws within the Water Code, many of which pre-date the 1907 Code. These laws recognize the autonomy of acequias and set the conditions for the officers of the acequia to distribute water along the ditch. See NMSA §73-2-1 *et seq.* The “mayordomo” of an acequia, for example, is a local official invested with authority by the water users on the ditch. The mayordomo is the executive officer of the acequia, reporting to a governing commission. NMSA §73-2-21. Thus, acequias continue to have a proud tradition of “local control and discretionary authority.” Rivera, Jose A., *Acequia Culture: Water, Land and Community in the Southwest* (Albuquerque, NM, 1998, pp. 4-5).

3.2 Irrigation Districts, Conservancy Districts and Other Special Districts

New Mexico statutes recognize and provide for a variety of types of special districts related to water and water uses. For example, water rights owners may form irrigation districts to regulate themselves with regard to irrigation. NMSA §73-9-1 *et seq.* Some irrigation districts are especially intended to work with Reclamation on federal irrigation projects, and are subject to somewhat different statutes. NMSA §73-10-1 *et seq.*; NMSA §73-11-1 *et seq.* The Elephant Butte Irrigation District, for example, was created in 1919 to partner with the federal Rio Grande Project pursuant to which Elephant Butte reservoir was built. Conservancy districts, which may also be organized by individuals under state statutes, have as their chief purpose flood control and protection, although they may also serve farmers. NMSA §73-14-1 through 73-19-5. The Middle Rio Grande Conservancy District, for example, was formed in 1923 to provide flood protection from the Rio Grande and to drain swamp lands, as well as to deliver irrigation water to farmlands.

In addition to these types of districts, the statutes provide for artesian conservancy districts, NMSA §73-1-1 *et seq.*, drainage districts, NMSA §73-6-1 *et seq.*, soil and water conservation districts, NMSA §72-20-1 *et seq.*, and a variety of others.

4. Interstate Compacts

As Reclamation built dams along major rivers in the West, the western states became concerned about ensuring that each state got its fair share of water supply from any river that flowed across state boundaries. For this reason, starting in the 1920s, the states began to negotiate interstate agreements regarding water. These agreements became known as “interstate compacts,” which can be entered into under the Compact Clause of the United States Constitution, Art. 1, §10, Cl 3 (no state shall enter into any agreement or compact with another state except with the consent of Congress). Where the Compact Clause is invoked, interstate compacts are generally enacted into both state and federal law.

New Mexico is a party to eight interstate compacts—the [Canadian River Compact](#), the [Colorado River Compact](#), the [Upper Colorado River Basin Compact](#), the [La Plata River Compact](#), the [Rio Grande Compact](#), the [Costilla Creek Compact](#), the [Pecos River Compact](#) and the [Animas-La Plata Project Compact](#). All of these are codified in the New Mexico statutes at Article 15 of Chapter 72. The compacts define New Mexico’s share of the rivers that flow into and out of the State.

Often, a compact contains a statement of purpose like this one from the Canadian River Compact, NMSA §72-15-2, Art. 1:

The major purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; and to provide for the construction of additional works for the conservation of the waters of the Canadian river.

Despite the purpose of avoiding controversies, there have been lawsuits over the meanings of various interstate compacts. One state party to a compact may sue another state party to that compact, claiming that the compact has been violated. See *e.g.*, *Texas v. New Mexico*, No. 65 (Original) (the Pecos River litigation).

Under the United States Constitution, when a state of the Union sues another state of the Union, the first court that hears the lawsuit is the United States Supreme Court (USSC). This is known as “original jurisdiction.”⁴ US Const. Art. III, § 2, Cl 2. New Mexico has been party to several original jurisdiction cases regarding interstate compacts. For example, in the Pecos River compact litigation begun in 1973, Texas claimed that New Mexico had violated the Pecos River Compact, NMSA §72-15-19. In 1988, the USSC entered an Amended Decree that appointed a federal River Master for the Pecos Compact, and established an accounting method to verify the apportionment of Pecos River flows between New Mexico and Texas. *Texas v. New Mexico*, 485 U.S. 388 (1988). Since that time, New Mexico has expended enormous amounts of time, effort and money to ensure that New Mexico remains in compliance with the requirements of the 1988 Amended Decree.

Most recently, Texas has sued New Mexico over the Rio Grande Compact. *Texas v. New Mexico*, No. 141 (Original); NMSA §72-15-23 (Rio Grande Compact). New Mexico takes its duty of compact compliance very seriously. In NMSA §72-2-9.1, the New Mexico legislature, “recognize[d] that . . . compact compliance is *imperative* (emphasis added).” Compact compliance is an overriding concern for all water planning.

⁴ Original jurisdiction cases are unusual—there have been fewer than 150 such cases in the history of the United States. Most cases before the USSC get there after appeals from lower courts, and only when the USSC has exercised its discretion to decide to hear that case. In contrast, the USSC is constitutionally required to hear original jurisdiction cases.

5. The Interstate Stream Commission

New Mexico's Interstate Stream Commission (ISC) was created in 1935 and authorized:

. . . to negotiate compacts with other states to settle interstate controversies or looking toward an equitable distribution and division of waters in interstate stream systems, subject, in all cases, to final approval by the legislature of New Mexico; to match appropriations made by the congress of the United States for investigations looking to the development of interstate streams originating in or flowing through the state of New Mexico; to investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise; to institute or cause to be instituted in the name of the state of New Mexico any and all negotiations and/or legal proceedings as in its judgment are necessary to carry out the provisions of this act [72-14-1 to 72-14-3 NMSA 1978]; to do all other things necessary to carry out the provisions of this act . . .

NMSA §72-14-3.

The ISC presently consists of nine members, eight appointed by the governor. The State Engineer is the ninth member, serving as *ex officio* secretary of the ISC. NMSA §72-14-1. The ISC has monthly meetings to which the public is welcome.

In 2003, the legislature tasked the ISC with creating the State Water Plan. NMSA §73-14-3.1. The statute requires that the State Water Plan be updated every five years, which is the basis for this document. *Id.* at (H).

6. The Weather Takes a Hand

In the middle of the twentieth century, New Mexico was subject to extremes of weather. The year 1941, for example, was the wettest year in New Mexico's recorded history. Throughout the State, floods destroyed property and drowned lands. So much damage was done by the 1941 floods that the federal government responded with Flood Control Acts in 1946, 1948 and 1950. These acts increased the federal budget and authority for flood control projects, opening the way for large physical infrastructure projects to channel streams.

In the 1950s, by contrast, New Mexico suffered prolonged drought. This drought brought about a variety of changes in water use, law and infrastructure. For example, groundwater pumping in New Mexico greatly increased, coinciding with improvements in pumping technology that enabled deeper and more efficient wells. In 1957, the legislature passed the Watershed District Act, which allowed for the creation of soil and water conservation districts. NMSA 73-20-1 *et seq.* New storage facilities were built in New Mexico, in tandem with the authorities in the Flood Control Acts. *E.g.*, Abiquiu dam (1956), Cochiti dam (1965). In this spirit of technological solutions, planning began for a project that would take New Mexico's share of the Colorado River through mountain tunnels for use in New Mexico's most populated corridor along the Rio Grande. This became the San Juan-Chama Project. *See Colorado River Storage Project Act of 1956*, 43 U.S.C. §620. San Juan-Chama Project construction began in 1964 and was completed in 1976.

7. Groundwater and the Assertion of Hydrologic Connection—*City of Albuquerque v. Reynolds*, 71 N.M. 428; 379 P.2d 73 (1963)

7.1 Filling in a Loophole—a Groundwater Code

For the first few decades after the passage of the New Mexico Water Code in 1907, New Mexico statutes applied only to surface water. In 1931, a new groundwater code was enacted. That 1931 enactment, which forms the basis of what is presently Article 12 of NMSA Chap. 72 (Water Laws), stated that “[t]he waters of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use.” NMSA §72-12-1. NMSA §72-12-3 then lays out the application procedures to be followed before the State Engineer to obtain a permit for the use of underground water, which procedures track closely those of the surface water code. Nothing in the groundwater code, however, provides any guidance on how it would be determined that a groundwater basin had “reasonably ascertainable boundaries,” the trigger for State Engineer jurisdiction.

The State Engineer on his own initiative developed an administrative procedure in order to bridge this gap. He determined the boundaries of several groundwater basins deemed by him to require administration and “declared” those basins, creating conditions and rules as appropriate. Clark, Water in New Mexico, p. 298.

During the 1929 Depression and the World War II years, this procedure went unchallenged, but increasing groundwater use as a result of drought and advances in pumping technology made it inevitable that the State Engineer’s assertion of his jurisdiction would be the subject of controversy. The NMSC heard a challenge to the State Engineer’s authority to declare groundwater basins in *State ex rel. Bliss v. Dority*, 55 N.M. 12, 18; 225 P.2d 1007, 1013 (1950). In its analysis, the Court cited the same kinds of considerations of the need for centralized administrative authority and technical expertise regarding water resources that had informed the 1907 Water Code. The Court declared that prosperity in the West depended upon “a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water.” *Bliss* at 25, quoting *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 157 (1935). If New Mexico was to grow, the prior appropriation system had to work, which meant that there could be no loopholes. All water uses had to be included within the prior appropriation system, and the State Engineer needed to have all those water uses under his supervision. The *Bliss* court ruled in favor of the State Engineer and upheld the State Engineer’s authority to appropriate the regulation of groundwater.

7.2 Administering Surface and Groundwater Together-- *City of Albuquerque v. Reynolds*, 71 N.M. 428; 379 P.2d 73 (1963)

Once the procedure for asserting State Engineer jurisdiction over groundwater basins was in place, and had survived challenges, the State Engineer engaged in another administrative initiative that had even more far-reaching consequences. In *City of Albuquerque v. Reynolds*, 71 N.M. 428; 379 P.2d 73 (1963), the NMSC upheld the State Engineer’s authority to manage surface and groundwater conjunctively. This meant that someone applying to appropriate groundwater under the groundwater code would be held responsible for the effects of the proposed appropriation on surface water rights. The City of Albuquerque, for example, which had been relying on groundwater wells to supply municipal needs, was required to accept permit conditions imposed by the State Engineer to protect senior surface water rights from being harmed by the effects of the City’s groundwater pumping.

The State Engineer's discretionary decision to impose conjunctive management of surface and groundwater in the Rio Grande was a radical move. Some case law supported the general principle of the interrelationship of surface and groundwater. *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59,69; 332 P.2d 465, 471 (1958) (in which a surface water right owner was permitted to obtain his supply through groundwater on condition that the source for the surface right and the groundwater pumped was the same). But the assertion of State Engineer authority to administer surface and groundwater conjunctively was rooted in the State Engineer's technical expertise and driven by a practical need: the State Engineer must have the power to administer water in a way that reflects the scientific, hydrologic reality that surface water and groundwater are connected.

Through this action by the New Mexico State Engineer, New Mexico became a leader in the West in recognizing the need for conjunctive management, to which most states now subscribe. Tarlock, *Law of Water Rights and Resources*, 6.06 [2] ("New Mexico has a long and strong tradition of the coordination of ground and surface water rights . . . The Rio Grande protection decision [*City of Albuquerque*] is especially important and far-reaching because it sustained the power of an administrative official to use a long time horizon in measuring the impact of groundwater pumping on surface flows").

8. Adjudications Become Active

Water rights adjudications were a new idea when the Water Code was passed in 1907, and turned out to be difficult to accomplish. Although a few adjudications were completed in the early part of the twentieth century, *e.g. United States v. Hope Community Ditch*, Cause No. 712 (Equity) (D.N.M.1933), others were begun but not completed. *E.g. Snow v. Abalos*, 18 N.M. 681 (the first effort to adjudicate the Lower Rio Grande). The cases were found to be unwieldy and expensive. As a practical matter, New Mexico's water continued to be administered through various water districts or by acequias.

In middle of the twentieth century there was a renewed push to adjudicate New Mexico's water rights. One driver of that movement was a federal law known as the McCarran Amendment, 43 U.S.C. 666 (1952), which waived the sovereign immunity of the United States in both state and federal court adjudications. Prior to the McCarran Amendment, the federal government could avoid participating in a water rights adjudication under a claim of sovereign immunity. Because the federal government, both in its own right and as trustees of the water rights of Native American tribes, can make claims to large amounts of water, an adjudication that did not have the United States as party was limited in scope. Following the passage of the McCarran Amendment, many of the water rights adjudication lawsuits that are presently on-going were filed so that the water right claims of Native American tribes could be addressed.

Another driver of the renewed effort to adjudicate was a consequence of planning for the San Juan-Chama Project, which introduced a new source of water into the upper reaches of the Rio Grande. This water must be carefully accounted for separately from the water rights that already exist on the northern Rio Grande and its tributaries. Thus, many New Mexico adjudications were filed while the San Juan-Chama Project was being built, between 1964-76. For example, the Nambe-Pojoaque-Tesuque adjudication (the *Aamodt* adjudication), was filed in 1966 and the Chama and Taos/Hondo adjudications were filed in 1969.

In the southwestern part of the state, the Rio Mimbres adjudication was originally filed as a private case in 1966, but the State Engineer intervened in 1970 to transform it into a full-fledged adjudication. *Mimbres Valley Irrigation Co. v. Salopek*, 1977-NMSC-039, 90 N.M. 410, 564 P.2d 615. It was in the Mimbres adjudication that the USSC determined the proper measure for federal water rights on non-Native American federal reservations of land, in that case a national forest. *United States v. New Mexico*, 438 U.S. 696 (1978).

Adjudications are complicated matters that must proceed slowly, as it is important to make sure that permanent, judicial determinations of water rights are accurate, and that all parties interested have a full chance to be heard on each water

right. In the face of this need for careful, deliberate, inevitably time-consuming processes, the New Mexico legislature noted in 2003 that water administration was too urgent a matter to wait until adjudications were finished. In NMSA §72-2-9.1, the legislature directed the State Engineer to promulgate regulations for how the State Engineer would administer water in accordance with the two fundamental principles of New Mexico water law—priority of appropriation and beneficial use—whether or not an adjudication in the area to be administered had been completed. In response, the State Engineer promulgated the Active Water Resources Management (AWRM) regulations. 19.25.13.1 *et seq.* NMAC. The regulations were challenged in court on the grounds, among others, that priority administration could not take place before the completion of an adjudication. The NMSC rejected the challenges and upheld the regulations. *Tri - State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232.

The NMSC's ruling effectively recognizes that, while adjudications are essential for determining the legal elements of water rights, these judicial determinations are not a precondition for the administration of water. The NMSC's recognition of a longstanding practical separation of administrative and judicial functions in New Mexico law allows, as the legislature intended, for the urgent issue of water administration to be addressed under the State Engineer's administrative authority while adjudications proceed at their own pace to make judicial determinations of water rights.

In addition, the AWRM regulations allow for flexible arrangements for water rights administration. The AWRM regulations are framework regulations that allow the State Engineer to promulgate district-specific regulations for particular water master districts in the State, allowing for the unique circumstances of each district to be accommodated. 19.25.13.6 NMAC. The AWRM regulations also allow water user groups to be formed to propose ideas for alternative administration that, provided that there is agreement within the district and approval by the State Engineer, may be used for administration. 19.25.13.38 NMAC.

Over time, water rights adjudications have gradually taken their proper place as the judicial undertakings that support the overarching goal of comprehensive administration of New Mexico's water resources.

9. Native American Water Rights

With twenty-four recognized Indian tribes, Pueblos and nations, New Mexico is unique in the strong presence and diversity of its Native American population. New Mexico works with the tribes, Pueblos, and nations to ensure that Native American water rights are determined and administered under appropriate laws.

9.1 Federal Law Theories of the Quantification of Native American Water Rights

The adjudication courts apply different legal standards to the determination of Native American water rights. For tribes, Pueblos and nations which have a federal reservation of land, the court applies the doctrine of federally reserved water rights. Under this doctrine, established by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908) actual beneficial use—so fundamental to state law—is not the basis of the water right. Instead, the court looks to the intent of Congress in making the reservation and implies a reservation of water in the amount necessary to fulfill that purpose, regardless of actual beneficial use. The priority date relates to the date the United States created the reservation. *See, e.g., Arizona v. California*, 460 U.S. 605 (1983) (holding that the quantification of Native American water rights can be based on the standard of “practicably irrigable acreage;” that is, enough water to irrigate however much of the reservation can be irrigated as a practical matter, whether or not there has ever been actual irrigation on those lands); *State of N.M. ex rel. State Engineer v. Comm'r of Pub. Lands*, 2009-NMCA-004. For Pueblos, the law to apply to determine water rights which are not based upon a federal reservation is still a subject for litigation in the court, making the adjudication even more time-consuming and expensive in requiring the development of both law and facts.

9.2 Native American Water Rights Settlements

The United States, New Mexico and seven tribes, Pueblos and nations have successfully negotiated 4 separate settlements of Native American water rights which have been approved by Congress: the Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-441, 106 Stat. 2237, as amended, Pub. L. No. 104-261, 110 Stat. 3176 (1996), as amended, Pub. L. 105-256, 12 Stat. 1896 (1998); the Northwestern New Mexico Rural Water Projects Act (Navajo San Juan Settlement), Pub.L.No. 111-11, Part X, Subtitle B, 123 Stat. 991 (2009); the Taos Pueblo Indian Water Rights Settlement Act of 2010, Pub. L. No. 111-291, title V, 124 Stat. 3064, 3122; and the Aamodt Litigation Settlement Act of 2010 (Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque), Pub. L. No. 111-291, title VI, 124 Stat. 3064, 3133. Such settlements offer a workable alternative to decades of litigation over issues of Indian water rights adjudication. More importantly, such settlements allow local governments and water rights owners to develop regional solutions with the tribes, Pueblos and nations that promote finality and certainty about water.

10. The Rise of Environmentalism

In the late 1960s and early 1970s, Congress passed a variety of environmental laws, including the Endangered Species Act (ESA), 15 U.S.C. §1531 *et seq.*, and the Clean Water Act (CWA), 33 U.S.C. §1251 *et seq.* Environmental laws add different issues to traditional water law. In litigation under the ESA, for example, arguments have been offered that the beneficial use of water includes uses to support endangered species of fish or birds, and that instream flows must be considered for these purposes.

There have been several ESA situations in New Mexico that have raised the question of possible changes to established water administration practices in order to protect endangered species. In [*Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 \(10th Cir. N.M., 2004\)](#), and related cases environmental groups sued to have Reclamation time and quantify its releases of water in such a way as to protect the endangered Rio Grande Silvery Minnow, one of the last native fishes remaining in the Rio Grande. Similarly, the Pecos Bluntnose Shiner, also an endangered species of fish, has caused re-consideration of how dams are operated on the Pecos River. See http://www.ose.state.nm.us/Basins/Pecos/jsc_pecos_nepa.php (describing alternative operations proposals under the National Environmental Policy Act [NEPA], 42 U.S.C. §4321 *et seq.*).

The CWA also suggests some possible new issues. In the 1907 Water Code, the law addressed *quantity* questions for the appropriation of water—how can New Mexico properly distribute a scarce resource? The CWA requires water administrators to look at water *quality*—is the water clean enough for use? Bringing these two ways of thinking about water closer together is likely to be an important challenge for the future. New Mexico has sought to meet that challenge through, for example, the Water Quality Act (WQA), NMSA §74-6-1 *et seq.* The WQA creates the Water Quality Control Commission. The State Engineer, so central to every aspect of water quantity issues, sits on the Commission (or the State Engineer's designee), among other agency heads. NMSA 1978 §74-6-3. The Commission is charged with creating a “comprehensive water quality management program,” as well as a continuing planning process and water quality standards. NMSA 1978 §74-6-4.

The ESA and the CWA are only two examples of the way that the rise and increasing importance of environmentalism poses new questions for the administration of water in New Mexico. These new questions must be considered in the context of the long development of New Mexico water law. In turn, they join all of the landmark events and circumstances that render this field of law so important and so complex. The 1907 Water Code, acequias and special districts, the negotiation of interstate compacts, building infrastructure to prepare for floods and droughts, the integration of groundwater into water administration, the push for adjudications and the rise of environmental considerations are each and all part of the need for comprehensive state water planning that can provide New Mexico guidance for its water future.

11. The El Paso Case, Public Welfare, and State Water Planning

New Mexico's water planning statutes are themselves a landmark event in the development of New Mexico water law. Water planning, as the population increases, would undoubtedly have become a critical feature of water policy under any circumstances. As it happened, however, New Mexico's water planning statutes are one consequence of a particular chain of circumstances that began with the USSC case of *Sporhase v. Nebraska*, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982). In that case, the USSC ruled that water is an article of interstate commerce, so that it was unconstitutional for states to forbid the export of water across state lines.

Before that ruling, most states in the West, including New Mexico, had statutes that forbade the export of water from the state. In 1983, the City of El Paso, Texas, which wished to obtain groundwater rights in New Mexico for use in Texas, sued to have New Mexico's anti-export statute declared unconstitutional under *Sporhase*, and won. *El Paso by Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).

New Mexico enacted a statute in 1983, NMSA §72-12B-1, which allows the export of water from the State provided that the State Engineer finds that the export "would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico." *Id.* at (C). Roughly simultaneously, this language requiring the State Engineer to consider the public welfare and the conservation of water within the State was added to many provisions of the Water Code. *E.g.* NMSA §72-5-7 (basis for the State Engineer to grant a surface water permit). In 1985, New Mexico also enacted NMSA §72-1-9, which codified a longstanding principle of law that, because of a need to plan for growth and future use, certain public institutions, including municipalities, were allowed a longer period than other entities within which to place water to beneficial use under a State Engineer permit. *See State ex rel. State Eng'r v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967). The new statute recognized an existing State Engineer administrative policy of capping the grace period at forty years, effectively allowed for a planning period of forty years. NMSA §72-1-9 (A).

These standards regarding public welfare and conservation, as well as a forty-year planning period, were applied to the applications of the City of El Paso, Texas to appropriate groundwater in New Mexico. El Paso was unable to prove that it could put the water to use within forty years and its applications were denied.

The changes to New Mexico's statutes made in connection with the shift in water law brought on by *Sporhase* have had long term consequences, especially for water planning. NMSA 72-12B-1(D) states that, among other factors that are relevant to the question of whether a particular application to export water is consistent with the public welfare, the State Engineer must consider:

- (1) the supply of water available to the state of New Mexico;
- (2) water demands of the state of New Mexico;
- (3) whether there are water shortages within the state of New Mexico;

The need to have this information available gave rise to New Mexico's regional water planning program, funded by a 1987 statute, NMSA §72-14-44, which provided funding to the Interstate Stream Commission for such a program.

Regional water planning developed over time. *See* John R. Brown: "Whisky's fer Drinkin'; Water's fer Fightin'!" *Is It? Resolving a Collective Action Dilemma in New Mexico*, 43 Nat. Resources J. 185, 190-200 (2003) (giving a description of the development of the regional water planning program). The process was aided in 1994 with the creation of the Interstate Stream Commission's Regional Water Planning Handbook (revised in 2013) (Handbook). The Handbook's

template, containing elements to be included in all regional water plans, allowed the plans to be compared with each other and also allowed for a common vocabulary and common standards to evolve. Perhaps even more importantly, the Handbook explicitly adopted the principle that it was essential in water planning to have public participation—it should not be just a matter of consulting experts. Brown, *supra*, at 198 (“The idea that public participation is essential, not only to local legitimacy but to a proper understanding of public welfare . . . became no longer simply a working assumption of regional planners, but an accepted tenet of state water policy”).

In 2003, the New Mexico legislature enacted NMSA §72-14-3.1, which directs the Interstate Stream Commission, in collaboration with the Office of the State Engineer and the Water Trust Board, to prepare and implement a comprehensive State Water Plan. The State Water Plan builds on the work of the regional water plans, integrating them into the plan as consistent with state water plan policies and strategies. *Id.*, at (C) (11). Public participation and input remain integral parts of the State Water Plan. *Id.*, at (F).