

NEW MEXICO LAW AFFECTING THE PECOS RIVER

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A. HISTORIC CONTEXT

The source of New Mexico water law is twofold. On the one hand, there is caselaw, i.e., written judicial opinions. The opinion is the end of the story. The story starts with a controversy. It is a controversy significant enough to spend money on lawyers and embattled enough to let a judge dictate the result. When a party is dissatisfied with the judge's decision and appeals it, then we get a written judicial opinion. These written opinions deal with a specific set of facts and wrestle with specific legal questions. It is fair to ask how anything so specific and narrow can be relied on to provide guidance. The truth is that caselaw is not necessarily consistent. Moreover, in New Mexico, not every fact situation and not every legal question has been addressed in a written judicial opinion. Nevertheless, much of New Mexico's water law stems from written judicial opinions.

On the other hand, there are lawmakers and statutes. New Mexico is a relatively young state despite 400+ years of European presence. New Mexico's first territorial legislature met in 1850. The territorial legislature did not adopt a Water Code until 1907.¹ Consider the investments made in diversion and storage works on the Pecos River in the late nineteenth and early twentieth centuries without the structure of written water laws as we know them today.

The history of the Pecos River contributed greatly to the development of New Mexico water law. Pioneers and promoters built projects in the Pecos River communities. These projects all relied on the same resource—water—and so naturally controversy arose among competitors or with regulators. Controversy emerged into caselaw. Caselaw, common practice, and (for better or worse) legal theory informed the 1907 Water Code and New Mexico's 1911 Constitution. Truth be told, the State Engineer was already late to the game in 1907.

B. CONSTITUTIONAL BASIS FOR NEW MEXICO'S WATER LAW

The New Mexico Constitution nicely articulates the foundation of New Mexico water law: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." Art. XVI, Sec. 2. There are three very important legal principles contained in these two short sentences.

First, consider what needs to be juggled. Bear in mind that by 1911 when New Mexico voters adopted the Constitution, there had been considerable investment in waterworks, diversion projects, dams, etc., on the Pecos River and in other parts of the state. Who owned the water delivered by these projects? The Constitution clarified that all New Mexico water is owned by "the public". What did that mean for those who made investments made in water infrastructure? The Constitution protected these investments and efforts by stating that "[a]ll existing rights to

¹ Officially speaking, the Water Code of 1907 was merely declaratory of the law existing at that time. Hagerman Irrigation Co. v. McMurry, 1911- NMSC-021, ¶4, 113 P. 823, 824.

the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.” Art. XVI, Sec. 1.

The Constitution uses the very important phrase “appropriation for beneficial use.” “Appropriation” means “the taking or diversion of [water] from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial purpose and consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purpose.” Carlsbad Irr. Dist. v. Ford, 46 N.M. 335, 340 128 P. 2d 1047 (XXXX) . One of the key concepts is the “actual application” of water. It is not sufficient to build a ditch capable of delivering water. “Appropriation” requires that the water actually be applied to a useful or beneficial purpose. Millheiser v. Long, 10 N.M. 99, 61 P. 11 (1900)

“Beneficial use” is another key concept. The current regulatory definition of “beneficial use” is “[t]he direct use or storage and use of water by man for a beneficial purpose including, but not limited to, agricultural, municipal, commercial, industrial, domestic, livestock, fish and wildlife, and recreational uses....” 19.26.2.7(D) NMAC. New Mexico does not prioritize different types of beneficial uses. Instead, priority is set by the date of the appropriation, which is the “priority date.” As stated above: “Priority of appropriation shall give the better right.” N.M. Const. Art. XVI, Sec. 1. “Beneficial use” also is important because it defines the amount of water to which one has a right. “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. In other words, wasted water (e.g., water allowed to run uncontrolled on the land because of leaky infrastructure or water diverted in excess of what is needed) is not being beneficially used and one does not acquire any right to continue to use this wasted quantity of water. State v. McLean, 62 N.M. 264, 308 P.2d 983 (1957) . By contrast, through appropriating and beneficially using water, one acquires a right to continue to use this quantity of water. This right to continued use is called a “water right.”

C. STATE ENGINEER JURISDICTION

To recap, a person can acquire the right to use New Mexico’s publicly-owned water by appropriating and beneficially using the water “in accordance with the laws of the state.” Prior to 1907, there were no statutes relating to appropriations of water, only caselaw. When the territorial legislature passed the Water Code in 1907, it created statutes governing new appropriations of water. It also created a new position: the State Engineer. But as mentioned above, water had already been appropriated and placed in beneficial use, thus there already were existing, vested rights to use water in 1907. Early case law deals with the struggle of bringing water rights from an unregulated regime into a regulated regime.

Under the 1907 Water Code, the State Engineer’s role was limited. The 1907 Water Code addressed surface water like rivers and lakes, but not groundwater. The State Engineer had no control over groundwater until the legislature changed the law in 1931. Even then, the State Engineer could not exercise jurisdiction over the groundwater until he “declared” it as a “basin” and defined its geographic limits. The State Engineer declared the artesian water basin in the Roswell area in 1931.

Water uses that were established before 1907 or before the State Engineer declared a groundwater basin were vested pursuant to the Water Code and the Constitution. Administratively, a person who claimed a vested pre-1907 or pre-basin water right filed a form called a “Declaration” listing the attributes of his water right: i.e., (a) the amount of water that has been put to beneficial use, (b) the source of the water (its diversion point), (c) the place of use, (d) the nature of the use (e.g., irrigation), and (e) the priority date. Pre-jurisdictional water uses were allowed to continue free from State Engineer control.² New appropriations of water, however, were subject to a State Engineer process. The process is more refined today but not materially different. (See below discussion regarding water rights permits and transfers).

An interesting question arose when a landowner began the process of appropriating underground water before the State Engineer declared the Roswell artesian basin in 1931. He was not able to beneficially use the water until after the basin was declared. The [New Mexico Supreme] Court determined that he established a lawful pre-basin water right the priority date of which “related back” to the beginning of his work because he lawfully initiated development of the water right and carried it to completion with reasonable diligence. State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 998 (1961). This principle of “relation back” is known as the Mendenhall Doctrine.

D. PROCEDURAL ISSUES: WATER RIGHTS PERMITS AND TRANSFERS

Recall that a key principle of New Mexico water law is that all water is owned by the public. A “water right” is a usufructuary right. The right to use water is also a real property right that can be bought and sold (even though the water itself is not owned—what is being sold is the right to use water). Thus, an appurtenant irrigation water right can be severed from the farm it irrigated and sold, thereby “drying up” the land.

Typically, a water right transaction would start with a purchase agreement, an earnest money deposit, and due diligence, just like a real estate transaction. However, closing often takes place after the completion of the State Engineer administrative process described in the next paragraph. At closing, typically the water right is conveyed by a deed. The deed must be filed in County Records. The deed is then sent to the State Engineer’s Office with a Change of Ownership form. After the State Engineer’s Office accepts the Change of Ownership form, it returns the original (deed attached) to the new owner who must record the Change of Ownership form in County Records. In other words, with a water right transaction, there is a title component similar to conveying title in a real estate transaction (although New Mexico Title Companies cannot insure title to water rights), and there is a separate State Engineer administrative component, too.

What is the State Engineer administrative process to “transfer” a water right, i.e., a request to change the point of diversion, the place of use, and the nature of use (e.g., from

² If any attribute of a Declared water right is changed, however, it becomes subject to State Engineer jurisdiction and must follow the State Engineer process described below.

irrigation to municipal use)?³ It is not simple to transfer a water right. The State Engineer criteria are listed below. Procedurally, the applicant files its transfer application. The request must be properly noticed in the newspaper. Protests can be filed. If so, or upon request by State Engineer Staff, the matter is set for an administrative hearing before a State Engineer employed Hearing Examiner. The hearing process can easily take two years from start to finish, and typically requires the applicant to hire professionals such as an attorney and a hydrologist. If the matter does not go to hearing, State Engineer Staff process the application. An appeal of a State Engineer Hearing Examiner decision or an “aggrieval” from a State Engineer Staff decision are procedurally unique and governed by statute. § 72-7-1 NMSA 1978 and 19.25.2 NMAC.

The process for a new appropriation of water is the same as that for a change to an existing water right. Today, new appropriations of water are rare. The State Engineer has “closed” practically all stream systems and underground basins to new appropriations. More common are requests to change an existing water right, especially a water rights transfer. The State Engineer’s Office will consider:

(1) Whether granting the application will result in impairment to any existing water rights. There is no statutory or regulatory definition of “impairment,” the analysis depends on the facts of each case. A change in water quality is not necessarily impairment. City of Roswell v. Berry, 80 N.M. 110, 452 P.2d 179 (1969) . Lowering of a water table does not necessarily constitute impairment. Mathers v Texaco, 77 N.M. 239, 421 P.2d 771 (1966) .

(2) Whether granting the application will be contrary to conservation of water within the state. This relatively recent addition to the checklist has not been defined in statute or regulation, or interpreted by the courts.

(3) Whether granting the application will be detrimental to the public welfare of the state. This relatively recent addition to the checklist has not been defined in statute or regulation, or interpreted by the courts.

(4) Availability of water to satisfy the application.

(5) Nature and extent of the claimed water right.

Note that a water right permit is simply that: a permit. It is not evidence of a vested water right. As discussed above, a permittee must vest the water right by putting water to beneficial use in accordance with the terms of the permit. Procedurally, after a permittee vests the water right, he files a Proof of Beneficial Use with the Office of the State Engineer stating the amount of water placed in beneficial use. The permittee is then eligible for a license to use that same

³ Note that a change to water rights where both the move-to and the move-from tracts are within an irrigation district does not need to go through the State Engineer transfer process. An irrigation district’s board of directors may change the place of use of irrigated land within the district. The change in place of use must be advertised, and the irrigation district must hold an open meeting to consider the proposed change. § 73-13-4 NMSA 1978.

amount of water. If a permittee cannot put water to beneficial use within the time period stated in the permit, he may request an extension of time. Failure to timely file a Proof of Beneficial Use or timely request an extension may result in permit cancellation.

E. USE IT OR LOSE IT

All New Mexico water rights are subject to loss under principles of forfeiture and abandonment: permits to appropriate, vested water rights, licensed water rights, adjudicated water rights, etc. The policy behind this rule is that in an arid state, if a person fails to put water to beneficial use, that water should be made available to someone else who will beneficially use it. This harsh policy is tempered by the fact that State Engineer Staff are not actively investigating water use and threatening to enforce the principles of forfeiture and abandonment. That being said, for each and every application made to the State Engineer's Office, Staff will scrutinize the application. Under the checklist item "nature and extent of the claimed water right," Staff will consider whether there is evidence that the water right—or a portion of it—has been lost to forfeiture or abandonment.

"Forfeiture" is statutory. §§ 72-5-28, 72-12-8, NMSA 1978. If, prior to June 1, 1965, a water right was not used for four consecutive years, it has been forfeited and the water reverts to the public domain for appropriation and use by others. If the non-use occurred after June 1, 1965, the State Engineer must provide notice and a one-year time period in which the forfeiture may be cured by putting the water to beneficial use. There are statutory exceptions to the rule of forfeiture. Examples include periods of nonuse (a) when irrigated farm lands are placed under a federal reserve program, (b) when a water rights holder is on active duty, (c) when water rights are held by a conservancy or irrigation district or an acequia or community ditch, and (e) when water has been deposited in an Interstate Stream Commission-approved water bank for the Pecos River Basin.⁴ Other case-by-case reasons also may be sufficient grounds acceptable to State Engineer Staff.

"Abandonment" is not statutory. It is common law. See, e.g., State ex rel. Reynolds v. South Springs Co., 80 N.M. 144, 452 P.2d 478 (1969). Legally, abandonment requires intent to abandon. For example, if a person builds a home and paves a driveway in a portion of an irrigated field, State Engineer Staff will take the position that irrigation water rights have been abandoned in the area of the footprint of the house and driveway. The permanent structures are evidence of intent to permanently abandon irrigation in that portion of the field. Also, where there is a demonstrated "unreasonable" period of time in which water rights have not been used,

⁴ The Interstate Stream Commission oversees New Mexico's interstate compacts, such as the Pecos River Compact of 1949. In 2002, the Legislature made law allowing the Commission to "recognize a water bank established by an irrigation district, a conservancy district, an artesian conservancy district, a community ditch, an acequia or a water users association in the lower Pecos river basin below Sumner lake for purposes of compliance with the Pecos River Compact." §72-1-2.3 NMSA. Rules implementing this new law were drafted but so far have not been finalized.

abandonment is presumed and the burden shifts to the water right holder to offer a legally acceptable reason why the water right has not been used.

New Mexico does not necessarily adhere to the “use it or lose it” principle when an impractical result would follow. In 2007, the Legislature passed law expressly allowing water conserved through improved irrigation or changes in agricultural practices to be used for other purposes through the State Engineer transfer process described above. § 72-5-18(C) NMSA.

F. INSTREAM FLOW

New Mexico’s “use it or lose it” rule suggests that there should be no non-used water remaining in a river system to support instream flow. Nevertheless, New Mexico probably recognizes instream flow as a beneficial use when existing water rights are transferred for use as instream flow. This issue has not been litigated. However, a New Mexico Attorney General opined that “there is nothing in the New Mexico Constitution, statutes, or case law that would preclude the State Engineer from approving an application to change the purpose of use of an existing water right to an instream purpose.” Opinion No. 98-01 (Mar. 27, 1998).

In 2005, the New Mexico Legislature buttressed the Attorney General’s position by passing the Strategic Water Reserve Act. § 72-14-3.3 NMSA 1978. The new law requires the Interstate Stream Commission to establish a Strategic Water Reserve. The Strategic Water Reserve consists of water or water rights purchased, leased or donated to the Commission. The water and water rights in the Strategic Water Reserve must be used to assist the state (a) in complying with interstate stream compacts and court decrees or (b) in water management efforts for the benefit of threatened or endangered species or in a program intended to avoid additional listings of species.

The Pecos River Basin has been designated a priority reach each year since the passage of the Strategic Water Reserve Act. The Strategic Water Reserve has helped the Commission meet the flow requirements contained in the U.S. Fish and Wildlife Service’s Biological Opinion for the threatened Pecos bluntnose shiner, primarily via the Vaughan Conservation Pipeline project. This project uses ground water to augment Pecos River flows at a location just above the critical habitat for the Pecos bluntnose shiner. All water used in this project was acquired through the Strategic Water Reserve.

As of 2013, the Interstate Stream Commission no longer had funding to purchase additional water rights in the Pecos River Basin. According to Interstate Stream Commission Director, Estevan R López, the Commission “continues to pursue options to obtain water rights for the Strategic Water Reserve via lease or donation. However, in 2012, the greatest impediment to this effort has been loss of interest from potential lessors.”⁵

G. THE PRIOR APPROPRIATION SYSTEM – IS IT WORKING?

⁵ Letter from Estevan R López, ISC Director, to Stephen R. Farris, Assistant Attorney General dated March 6, 2013.

Under the prior appropriation system, when the State Engineer evaluated a permit for a new appropriation of water, he theoretically considered (a) all other appropriators, i.e., pre-jurisdictional vested water rights plus all permits that have been granted, (b) the quantity of water that the other appropriators have a right to use, (c) the quantity of water made available by Mother Nature. This is a tough task. Assuming for a moment that the State Engineer's records were perfect and he had good data identifying all other appropriators and quantifying accurately the water they were using, it is still a tough task because the Pecos River flows are highly variable. Nevertheless, let's assume the permit is granted. The permittee is "junior" to all the prior "senior" appropriators. This pecking order of "senior" relative to "junior" water rights is important. This is the "prior appropriation" system acknowledged by the Constitution: "[p]riority of appropriation shall give the better right." N.M. Const. Art. XVI, Sec. 1. In times of water shortage, a water right owner can demand that any and all water rights owners that are "junior" to him cease their water use so that there is water available for his more senior use. In theory at least.

The truth is that New Mexico has not traditionally enforced the prior appropriation system—to the frustration of senior water rights holders. There are political and policy reasons. From a legal perspective, Many basins are still unadjudicated. "Adjudication" is a court determination of the priority, amount and ownership of all water rights within a specified reach or basin. The Pecos River Basin adjudication (known as the Lewis case) was initiated in 1956 by the Pecos Valley Artesian Conservancy District. It initially sought to determine and define water rights in the Roswell Basin and to enjoin illegal use of water. In 1965, lands irrigated by the Hagerman Canal were added to the scope of the Lewis case. In 1973, the Hondo River system was added. In 1978, the scope was expanded to include all water rights within the Pecos River Basin. Today, the adjudication is still pending. Acequia claims in the headwater Gallinas River remain open. Also pending is resolution of a remand to the adjudication court on the issue of the City of Las Vegas' "reliance interest" in the Pueblo Rights Doctrine. In other words, how can the State Engineer accurately identify who is entitled to use what amount of water, and in what priority, when there are claims pending in the Pecos River headwaters?

In 2003, the Legislature passed law known as "priority administration." The preamble to this law states well the problem: "The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer." §72-2-9.1(A) NMSA 1978. Basically, the new law expressly authorizes the State Engineer to enforce water right priorities based on the information he has in his records. Following litigation, the New Mexico Supreme Court recently upheld the State Engineer's Active Water Resource Management rules. Tri-State Generation & Transmission Assn., Inc. v. D'Antonio, 2012-NMSC-039, 289 P.3d 1232.

While priority administration may allow State Engineer enforcement, there remain hurdles. For example, acequias and community ditches are exempt from priority administration. §72-2-9.1(C) NMSA 1978. With exceptions, the State Engineer has no authority to deny a

domestic well permit. § 72-12-1.1 NMSA 1978. Also, consider how to prioritize the effect of groundwater pumping on downstream surface irrigators. Certainly not an easy task.

In economic theory, the prior appropriation system was supposed to ensure that senior water rights would be sold to higher and better uses. The reality is that the senior-most rights in the state are held by entities that do not sell: Indian tribes and Pueblos, acequias, community ditches, and irrigation and conservation districts. The other problem is policy: State Engineer Staff in some districts take the position that a water right must be fully vested before it can be transferred. Thus if a new business buys a vested water right intending to use it in the business, transfers the water right, then the business fails, that water right would be unavailable for transfer to a new business. In addition, New Mexicans do not seem to have the political will power to take away a person's water. Even though senior users threaten, somehow shortage sharing agreements, temporary retirement of farmland, or other negotiated solutions somehow happen.

H. RIVER ACCESS

The New Mexico Attorney General recently issued Opinion No. 14-04. This opinion follows the logic of State ex rel. State Game Commission v. Red River Valley Company, 1945-NMSC-034, 182 P.2d 421. The opinion concludes:

[T]he water in New Mexico streams belongs to the public and is subject to public's beneficial use for fishing and recreational activities. The public's right to enjoy the use of public waters is no different when those waters are located on or run through private property. The owner of property upon which a public stream is located ... cannot exclude others from fishing in the stream. The public's right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters. This includes walking, wading and standing in a stream in order to fish. Although ... a person may not trespass on private property in order to gain access to public waters, a person using public waters to fish, including incidental activities such as walking, wading or standing in a stream bed, is not trespassing.

The opinion acknowledges in a footnote that New Mexico statutory and regulatory law does not clearly recognize or protect the right to use public streams on private land for fishing, nor has the legislature authorized the Department of Game and Fish or any other state agency to regulate or enforce that right. Nevertheless, the Attorney General felt comfortable issuing the opinion to "clarify the parameters." Please also note that because New Mexico streams belong to the public, the bed and banks arguably are among State Trust Lands managed by the State Land Office. This is another agency that could help clarify the parameters.

I. WATER QUALITY

Water quality is a separate legal issue from water rights. The New Mexico State Engineer has no jurisdiction over water quality issues.

New Mexico does not have primacy under the Clean Water Act. This means that the National Pollutant Discharge Elimination System (NPDES) is administered by the U.S. Environmental Protection Agency (EPA). A NPDES permit regulates a permittees' discharges into surface water such as the Pecos River. So EPA (not the New Mexico Environment Department) issues NPDES permits in New Mexico. Note that the NPDES program regulates discharges, not overall ambient water quality. Under the NPDES program, most discharges into surface water from irrigated agriculture do not require a NPDES permit. Stated differently, the NPDES program does not monitor water quality from irrigation water returned to the Pecos River. Discharges from concentrated animal feeding operations, i.e., dairies, are monitored and do fall under a NPDES general permit. Construction activity also falls under a NPDES general permit.