

**Appendix C**  
**Legal Background**



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## **Appendix C. Water Law and Regional Water Planning**

This appendix outlines the basic concepts of water law in New Mexico in an effort to provide general background information. An understanding of basic legal background is particularly important for regional water planning because all regional planning efforts are subject to “laws relating to impact on existing water rights” (NMSA §72-14-44C(5)). New Mexico water law is codified in Chapters 72 (Water Code), 73 (Special Districts), and 74 (Articles 6 (Water Quality) and 6B (Ground Water Protection) of the New Mexico Statutes Annotated. Chapter 73 details the powers and authorities of various water management agencies in the State such as conservancy districts, irrigation districts, and soil and water conservation districts.

### **C.1 Prior Appropriation and Beneficial Use**

In the Region, water rights may be obtained through appropriation pursuant to State Engineer procedures, or through the purchase and transfer of existing water rights, again through State Engineer procedures. This section provides an overview of the general law governing the appropriation and transfer of water. Of particular note to the Region are out-of-basin and out-of-state transfers of water, both of which are discussed in Section C.3.3.2.

New Mexico’s Constitution recognizes beneficial uses as the basis, the measure, and the limit of the right to use water (N.M. Const. art. XVI, §3). Beneficial use means application of water to a lawful purpose that is useful to the appropriator and at the same time consistent with the general public interest.

The State of New Mexico, like most Western states, uses the doctrine of prior appropriation to allocate water use. This doctrine has these essential principles: (1) the first user (appropriator) in time has the right to take and use water; and (2) that right continues against subsequent users as long as the appropriator puts the water to beneficial use (N.M. Const. art. XVI, §2; NMSA §72-12-1). The prior appropriation doctrine is tailored to fit the geography and climate of the western United States, where water is a precious resource in scarce supply. The basic principle behind the prior appropriation doctrine is that, if a water user decides, for a variety of reasons, to stop using water, others should be able to put it to use.



New Mexico codified and refined the prior appropriation doctrine by statute. The territorial legislature enacted the part of the code that governs the use of surface water in 1907 (NMSA §72-1-1). The statutes governing water use are intended to conserve, protect, and develop the public waters of the state and their application to beneficial use (*State ex. rel. Red River Valley Co. v. District Court*, 39 N.M. 523, 530 (1935)). The 1907 water code expressly recognized existing surface water rights, allowing for the filing of declarations with the State Engineer stating the beneficial use of rights prior to 1907 (NMSA §72-1-3). In 1931, the Legislature extended the State water code to underground waters, declaring water in underground streams, channels, artesian basins, lakes, and reservoirs having reasonably ascertainable boundaries to be public waters subject to appropriation for beneficial use (NMSA §72-12-1). The State Engineer has authority over groundwater uses after the Engineer declares a source to have “reasonably ascertainable” boundaries (NMSA §72-12-12). This is done one basin at a time, so the date of the beginning of State Engineer authority is different for each basin. All underground water basins in New Mexico have now been declared, including the recent declaration of certain basins in the Region.

Because water is an essential but scarce resource in New Mexico, the State has a compelling interest in regulating water use. No individual owns the water (NMSA §72-1-1; *Sporhase v. Nebraska*, 458 U.S. 941, 950 (1982)). However, one may acquire a real property right to use the water consistent with the procedures under State law, up to the amount that can be put to a beneficial use (N.M. Const. art. XVI, §2; *United States v. Ballard*, 184 F.Supp.1, 32 (D.N.M. 1960)).

New Mexico statutes regulating water use do not define “beneficial use.” The term has been construed to include irrigation and recreational fishing, as well as other traditional western uses such as stock watering (*State ex rel. State Game Comm’n v. Red River Valley Co.*, 51 N.M. 207, 220 (1945); *First State Bank v. McNew*, 33 N.M. 414, 422-3 (1928)). In 1998, the New Mexico Attorney General issued an opinion that use of water for instream flows is a beneficial use (1998 Op. Att’y Gen. No. 98-01).

If an appropriator stops using water beneficially for a long period of time, the right to use the water can be lost through forfeiture or abandonment. By statute, a water right is forfeited if the



owner of the right fails to apply water to beneficial use for a period of four years and continues the nonuse for one year after notice of proposed forfeiture is given by the State Engineer (NMSA §§2-5-28 and 72-12-8). These statutes do not allow forfeiture when a reasonable cause has brought about the nonuse.

In addition to forfeiture, water rights can also be lost through abandonment when there is both the intent to abandon as well as a failure to use the water. Intent to abandon can be extremely difficult to prove (*State ex rel. Reynolds v. South Springs Co.*, 80 N.M. 144, 148 (1969)). An underlying principle of the American legal system is that the courts traditionally do not favor forfeiture or abandonment of water rights. If a court can find a reason to excuse nonuse, the court will not say that the right has been forfeited or abandoned.

With adoption of the surface water code in 1907 and the groundwater code in 1931, the State took an active role in water use. Persons wanting to use water could not act without a permit issued by the State Engineer to make a new appropriation or to change an existing appropriation. As described in Section C.3, the permit process requires the applicant to prove that a new use will not harm other users.

## **C.2 Administration of Groundwater and Surface Water in New Mexico**

The State Engineer, through the Office of the State Engineer (OSE) administers water rights for the State of New Mexico, as discussed in Sections C.1.1 and C.1.2.

### **C.2.1 Groundwater**

To actively manage groundwater resources in New Mexico, the State Engineer has the authority, as set forth in the Water Code, to delineate groundwater basins that require a permit for groundwater withdrawals. These are referred to as “declared underground water basins.” To withdraw water from these declared basins, a user must have put water to beneficial use prior to the declaration of the basin or must obtain a water permit from the OSE that specifies (1) how much water a user can withdraw within any given year, (2) the location and type of well that will be used to withdraw the water, and (3) the use to which the water will be put. Many water right



permits have special conditions that further define the use and quantity of water allowed under the permit.

Transfers of valid water rights must not be “contrary to the conservation of water within the state and not detrimental to public welfare of the state” (NMSA §§72-5-23, 72-12-3(D)). Further, and of critical importance, is the requirement that any transfers not impair existing rights. Methods of obtaining water rights are discussed in Section C.2.

Water rights files are public records and can be reviewed in the State Engineer district offices, as well as in the main office in Santa Fe. Also, general information about water rights for New Mexico is compiled in the OSE Water Administration Technical Engineering Resource System (WATERS) database, which can be accessed through the internet (<<http://iwaters.ose.state.nm.us:7001/iWATERS/>>). The database is a useful tool for understanding general information about the water rights. However, water rights files are complex and the database does not necessarily provide verification of the current status of the water rights. Consequently, it cannot be used to validate water rights. To determine whether a water right is valid, the paper water rights file must be reviewed and abstracted through both OSE and county records.

### **C.2.2 Surface Water**

Like groundwater, the diversion of water from New Mexico’s surface waters requires either a declaration, a permit, a license, or a court decree to divert the water. Surface water appropriations follow the same standards as groundwater rights in that a transfer or lease cannot impair existing water rights and must not be contrary to public welfare or conservation (NMSA §§72-5-23, 72-12-3(D)).

Many of New Mexico’s surface waters are governed by interstate compacts that require set amounts of water to be delivered to specified delivery points. The Interstate Stream Commission, an adjunct commission to the OSE, has responsibility for ensuring that specific rivers in New Mexico meet their obligations under their respective interstate compacts.



### **C.3 Water Rights Ownership**

Ownership of water rights by individuals or other entities is established by diversion and application to beneficial use. It may be demonstrated administratively through the declaration or permit process. In the case of groundwater rights, a declaration may be filed for water uses that were instituted prior to the declaration of the groundwater basin. In the case of surface water, a declaration may be filed for water uses that were instituted before 1907, the year the State Engineer assumed jurisdiction over all surface water use in New Mexico. A water right declarant may make and file with the OSE a declaration in a form with the date of first application to beneficial use, continuity thereof, location of the source of water, and description of the land where used (NMSA §72-1-3). However, this declaration constitutes a claim of ownership only; it does not guarantee that the declarant will be entitled to the entire amount of water claimed.

Individuals or entities who wish to acquire a new water right must file a permit application with the OSE and go through the entire permitting process (described in Section C.2.1). Permits for new appropriations (as opposed to permits to transfer existing rights) are granted only for unappropriated waters of the State. The judicial recognition of water rights on a stream system takes place through an adjudication. An adjudication is a "suit for the determination of a right to use the waters of any stream system" (NMSA §72-4-17). Upon completion of the adjudication proceeding, an order and decree are entered establishing the priority, amount, purpose, periods and place of use, and specific tracts of land to which the right is appurtenant.

The water right permitting process is discussed in more detail in Section C.2.1. Although the permitting process is the primary method of obtaining water rights for water in declared groundwater basins and for surface water, the right to use water may also be obtained through purchase, lease, or through the pre-1907 surface water declaration process, as discussed in Section C.2.3. The loss of ownership of a water right is discussed in Section C.2.4.

#### **C.3.1 Water Right Permitting Process**

The water right permitting process includes the following steps:



1. The applicant submits an application to the OSE.
2. The OSE issues a notice of the filing of the application, which is published in a general circulation newspaper by the applicant. This provides public notice to allow individuals or entities who believe their rights would be impaired by the approval of the permit, or believe that the granting of the permit would be detrimental to the public welfare or contrary to the conservation of water, to have the opportunity to submit a protest to the application.
3. If no protest is submitted and if the OSE determines that the water exists and that its appropriation would not impair other water rights or adversely impact public welfare and conservation, the OSE approves the water right application.
4. In the case of a protest, the permit application goes through the contested hearing process before a hearing examiner. The OSE is a party to this proceeding, and its Hearings Unit evaluates whether the applied-for water right would meet the statutory criteria for approval (no impairment and no adverse effects on public welfare and conservation). Through the examination of the specific conditions of the application and the protestants, the hearing officer makes a determination, and the application is either granted or denied.
5. If a water right is granted, the OSE may place specific conditions in the permit to protect surrounding water rights holders (*City of Albuquerque v. Reynolds*, 71 N.M. 428, 440 (1962)). Examples of conditions placed on permit holders may include monitoring or metering requirements, restricting use to certain months of the year, or disallowing use under specific conditions (low flow, for example). Further, the State Engineer retains jurisdiction over the permit, to ensure that the permittee complies with permit conditions.

### ***C.3.2 Other Types of Water Rights***

In addition to water rights established through the permitting process, discussed above, two other types of water rights exist in New Mexico. These water rights, prebasin wells and domestic and livestock wells, are established as described below.





### *C.3.2.1 Prebasin Wells*

Since many of the underground water basins were declared after wells had been drilled and water put to beneficial use, the Water Code recognizes these rights as valid. Section 72-12-4 states that "existing water rights based upon application to beneficial use are hereby recognized." Even if actual beneficial use does not take place prior to the declaration, actions that demonstrate an intent to appropriate are sufficient to establish a prebasin water right. The priority date of this water right will "relate back" to these actions (*State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 475 (1961)).

### *C.3.2.2 Domestic and Livestock Watering Wells*

As in many other western states, most New Mexico homeowners with private wells are allowed to use up to 3 acre-feet per year of groundwater for household use or for limited irrigation or livestock watering (NMSA §§72-12-1.1 to 1.3). This rule applies except in areas where there are court restrictions on domestic wells, a situation which sometimes occurs during an adjudication. Recently passed regulations now limit diversions for new domestic wells to 1 ac-ft/yr (19.27.5.9(D)(1) NMAC). The OSE may impose other limitations under specific conditions (as discussed in Section 4 of this regional water plan).

*Domestic wells.* In non-restricted locations, homeowners must file a document indicating that they will use the water, but these domestic use applications are granted automatically by the OSE and are neither published nor subject to protest (NMSA §72-12-1). Local municipalities have some control over domestic well permitting. By statute the State Engineer can issue domestic well permits, provided that permits for domestic use within municipalities are conditioned to require the permittee to comply with all applicable municipal ordinances (NMSA §72-12-1.1).

The OSE does not allow a change in place of these domestic well uses; that is, it does not allow the water right to be moved to another location. In that sense, the domestic well is a right of use only and is not to be sold separately from its intended location and purpose of use. However, non-permitted prebasin domestic wells (Section C.2.2.1) are not subject to this limitation and may therefore be transferred.



*Livestock watering.* Until recently, individuals could impound water for livestock purposes using the 72-12-1 application process, which does not require review and approval from the State Engineer. However, the New Mexico legislature has addressed this loophole in New Mexico water law by amending the water code and requiring permits for this use. The OSE now requires a permit for surface water impoundments of any kind, including livestock water impoundments (NMSA §72-9-3 and NMAC 19.26.2.14). If an application for a livestock pond is made in a perennial stream, the applicant must comply with the surface water appropriation regulations.

To address the issue of so-called livestock ponds built for aesthetic and recreational purposes, the regulations specifically state that water for livestock does not include “the impoundment of surface or groundwater in any amount for fishing, fish propagation, recreation, or aesthetic purposes.” (NMAC 19.26.2.14). No special provisions apply to fishing or recreational ponds. A valid water right is required to fill such structures and an application must be submitted to the OSE and reviewed under the existing surface water regulations or groundwater regulations should the applicant wish to use groundwater to fill a pond. Given the over-appropriation of surface water (and hydrologically connected groundwater) in the region, it is unlikely that any such application would be approved. Furthermore, such an impoundment could not impair existing senior water rights holders. A landowner wishing to construct a fishing or recreational pond could seek instead to purchase an existing water right, and transfer the water right to the new place and purpose of use.

### ***C.3.3 Appropriation and Transfer of Water Rights.***

The State Engineer is charged with “the supervision of waters of the State and of the measurement, appropriation, distribution thereof . . . [a]ccording to the licenses issued by him and the adjudications of the courts” (NMSA §§72-2-1, 72-2-9). The State Engineer can “. . . adopt regulations and codes to implement and enforce any provision of any law administered by him . . . to aid him in the accomplishment of his duties . . .” (NMSA §72-2-8(A)). The State Engineer must approve all new appropriations of water as well as any transfer of a water right (changes in the point of diversion and/or changes in the place and/or purpose of use of an existing water right) (NMSA §§72-5-1, 72-5-23, 72-5-24, 72-5-24.1, 72-5-25, 72-12-3,



72-12-7). The State Engineer can impose conditions on licenses and permits issued (*Roswell v. Berry*, 80 N.M. 110, 112, 452 P.2d 179, 181 (1969)). The State Engineer has the power to appoint water masters, to apportion water consistent with priorities, and to install headgates and meters for measuring the quantity of water being used (NMSA §§72-3-2, 72-5-6, 72-5-20, 72-12-3(E)).

By statute, the State Engineer is granted expansive authority over the administration of both surface water and groundwater. However, water rights acquired prior to the State Engineer gaining authority, while governed by the law of prior appropriation, are free of the State Engineer's control. If they are transferred, they then become subject to the State Engineer's jurisdiction. The State Engineer does not have the power to adjudicate water rights because only a court has that authority.

Water rights and permits to use water can be acquired in several ways: (1) by appropriating the right through a permit or (2) purchasing a right or permit from another. Once a water right or permit is acquired, the owner can transfer the right or permit, through sale or lease; or change or supplement the point of diversion; or type of use.

#### *C.3.3.1 Appropriation.*

Since the surface waters in the State are considered to be fully appropriated, surface waters today can only be acquired through transfer, as discussed in Section C.3.3.2. To appropriate groundwater from a basin in the Northeast Region that has unappropriated water, one must apply for a permit from the State Engineer (NMSA §72-12-3). After filing an application, the applicant publishes a notice of application to appropriate in a newspaper of general circulation where the right is located (NMSA §72-12-3(D)). Standing to file protests is conferred upon persons or entities objecting that the granting of the application would impair the objector's water right. Standing is also conferred upon those persons or entities objecting to the application on the grounds that granting the application will be contrary to the conservation of water or detrimental to the public welfare of the State, if such objectors show they will be substantially and specifically affected by the granting of the application (NMSA §72-12-3(D)). The State of New Mexico and political subdivisions of the State are exempt from the specific standing requirements (NMSA §72-12-3(D)).



When there is a protest, the State Engineer may hold a formal hearing on the issues set out in the protest and decide the case (NMSA §72-12-3(F)). A permit will be granted only if the State Engineer finds there is unappropriated water in the basin, that the proposed appropriation would not impair existing water rights, is not contrary to conservation of water within the State, and is not detrimental to the public welfare of the State.

In *Young & Norton v. Hinderlider*, 15 N.M. 666 (1910), the Supreme Court upheld the authority of the Territorial Engineer to deny a permit because the proposed water use was contrary to the public welfare. The court refused to hold that public welfare included only health and safety. The court considered the following factors to be dispositive:

- That the State's waters should be used to secure the greatest possible benefit for the public
- Whether the proposed project was for speculative purposes
- Whether the cost of a project was so excessive that participants could not afford to pay for it
- Whether the project was efficient
- Whether the project would benefit the residents of the area

Before granting a new appropriation of water, the State Engineer can require retirement of surface water rights or permits. Like surface water, if a groundwater basin is fully appropriated, the only way to acquire a groundwater right or permit is through a transfer (Section C.3.3.2).

### *C.3.3.2 Transfer*

The right to transfer a water right or permit (i.e., to change its point of diversion and/or place and/or purpose of use) is generally the same whether the water is ground or surface. To transfer a water right, an applicant must show that the transfer (1) will not impair other water



rights, (2) is not contrary to the conservation of water, and (3) is not detrimental to public welfare (NMSA §§72-5-23, 72-12-7(A)).

Persons seeking to transfer a water right must file an application with the State Engineer, after which the applicant must publish a notice of intent to transfer the right in a newspaper of general circulation where the right is located (NMSA §§72-5-23, 72-12-7(A)). As discussed above (Section C.3.3.1), protests may be filed if particular criteria are met. Where no protest is filed and the State Engineer finds, after a technical and legal review, the transfer compatible with State law, the transfer application will be approved. Where there is a protest, or the State Engineer decides the granting of the application will impair the rights of others or be contrary to conservation or public welfare, the State Engineer will hold a hearing on the issues set out in the protest and decide the case (NMSA §§72-5-5(A), 72-12-3(F)). A party can appeal the State Engineer's decision to the district court (N.M. Const. Art. XVI, §5; NMSA §§72-7-1 through 3, 72-12-10).

Where a water right has been adjudicated, the protestant bears the burden of disproving the right's use and amount. This is the case because an existing adjudication decree is accepted as *prima facie* evidence of the size and validity of the right. A water right priority date remains the same even though it is transferred.

Most transfers are intra-basin transfers, but out-of-basin and out-of-state transfers are also contemplated in the transfer statutes. In particular, out-of-state transfers are significant in the Northeast Region, due to its close proximity to Texas. Transfers are based on the amount of water consumptively used. Accordingly, water can be transferred from basin to basin, subject to interstate compacts and federal law (NMSA §§72-5-23, 72-12-7(A)). In such an instance, the amount that can be transferred is limited to the prior consumptive use. Simply put, an out-of-basin transfer cannot make the basin hydrologically worse than it was.

Further, the State Engineer can deny an out-of-basin transfer if the transfer would be contrary to the public welfare, or contrary to conservation (NMSA §72-5-23, 72-12-7(A)). If the planning region determined that out-of-basin transfers would be contrary to public welfare or to the



conservation of water within the Region, the State Engineer would likely look at these factors in denying an out-of-basin transfer.

Similarly, out-of-state water transfers would likely be prohibited by the State Engineer. The policy of New Mexico is to maintain adequate water supplies for the State's water requirements (NMSA §72-12B-1(A)). The State Engineer will only allow water rights to be transferred out of New Mexico if the transfer will not impair the water rights of others or be detrimental to the public welfare (NMSA §72-12B-1(C)). In reviewing out-of-state water transfers, the State Engineer will consider the supply of and demand for water in New Mexico, water shortages in New Mexico, and the supply of water in the state where the applicant intends to use the water (NMSA §72-12B-1(D)). Again, the public welfare criteria established by the planning region, as well as the water budgets established for the region, will assist the State Engineer in determining whether an out-of-state transfer request should be granted. Due to water shortages within New Mexico, it is highly unlikely that an out-of-state water transfer would be approved.

New Mexico's water right leasing statute allows temporary transfers, but those transfers, like permanent transfers, require legal notification and a State Engineer permit (NMSA §§72-6-3, 72-6-6). Where a reallocation of water is within irrigation or conservancy districts, is on lands served by the district, and is within the scope of an already existing State Engineer permit, an additional permit is not required. Further, irrigation district water can be leased to municipalities, counties, and certain other entities without having to obtain a State Engineer permit (NMSA §73-10-8).

Whether a domestic water right may be "transferred" is unclear. Certainly, pre-basin domestic well rights that have been put to beneficial use (or "perfected") can be transferred. The State Engineer also allows perfected domestic well rights to be transferred and consolidated into a mutual domestic water system.

#### ***C.3.4 Supplemental and Replacement Wells.***

An owner of a water right may supplement or replace a well, under certain conditions, as described in the following subsections.



#### *C.3.4.1 Replacement Well more than 100 Feet from Original Well*

If an emergency situation exists in which the delay caused by publication and hearing would result in a crop loss or other serious economic loss, a water right owner may drill and use a replacement well more than 100 feet from the original well upon making application, but prior to publication and hearing if (1) the well is drilled into the same underground basin, (2) the amount of appropriation remains the same, and (3) the State Engineer makes a preliminary assessment that the replacement well will not impair existing water rights (NMSA §72-12-23(A)).

In cases where no emergency exists or the State Engineer's preliminary investigation shows that the drilling and use of a replacement well may impair existing rights, a permit will not be issued until after publication and hearing (NMSA §72-12-23(B)). In this instance, impairment to other rights will be considered (NMSA §72-12-23(A)(4)).

#### *C.3.4.2 Replacement Well Within 100 Feet of Original Well*

An owner of a water right or permit may drill and use a replacement well within 100 feet of the original well before applying to the State Engineer and publication and hearing if (1) the well is drilled in the same underground basin, (2) the amount of appropriation remains the same, (3) an emergency exists in which the delay caused by application, publication, and hearing would result in crop loss or other serious economic loss, and (4) the State Engineer is notified prior to drilling (NMSA §72-12-22(A)). The water right owner must then apply for a permit within 30 days after drilling begins. If other water right owners claim to be injured by the drilling of such a well, they cannot stop the drilling or the use of the well, but can only challenge it through a lawsuit for damages or by protesting the granting of a permit (NMSA §72-12-22(B)).

#### *C.3.4.3 Supplemental Well*

The statutory provision for drilling a supplemental well is similar to that for drilling a replacement well more than 100 feet from the original well. If an emergency situation exists in which the delay caused by publication and hearing would result in a crop loss or other serious economic loss, a water right owner may drill and use a supplemental well upon making application, but prior to publication and hearing if (1) the well is drilled into the same underground basin, (2) the amount of appropriation remains the same, and (3) the State Engineer makes a preliminary



assessment that the supplemental well will not impair existing water rights (NMSA §72-12-24(A)).

In cases where no emergency exists or the State Engineer's preliminary investigation shows that the drilling and use of a supplemental well may impair existing rights, a permit will not be issued until after publication and hearing (NMSA §72-12-24(B)). In this instance, impairment to other rights will be considered (NMSA §72-12-24(A)(4)).

### **C.3.5 Change of Ownership**

A water right can be conveyed to a new owner. Although the sale of a water right requires a written document, such as a special warranty deed, the new owner must also file an OSE "change of ownership" form with the State Engineer along with a copy of the written document. The change of ownership and the written document must also be recorded with the clerk of the county where the water right is located (NMSA §72-1-2.1). The OSE change of ownership form does not take the place of a conveyance document, such as a deed, effecting the change of ownership.

### **C.3.6 Loss of Water Rights**

The Water Code specifies that non-use for a period of four consecutive years when water is physically available may lead to forfeiture of the water right. Prior to 1965, water rights were automatically forfeited following a four-year period of non-use. Legislation passed in 1965 requires the OSE to notify a water rights holder that the right is subject to forfeiture. After the OSE has provided notice, the water user has one year to put the water to beneficial use; however, if the non-use continues after the OSE has provided notice, the water right is forfeited (NMSA §§72-5-28, 72-12-8).

The forfeiture provision of the statute contains several exceptions. Of particular interest to the regional water planning community is the exemption for placing water in "state engineer approved water conservation plans" (NMSA §§72-5-28(G), 72-12-8(D)). This provision applies to individuals and entities that own water rights, conservancy and irrigation districts, and acequia and community ditch associations. Further, municipalities, counties, water user





associations, public utilities, community water systems, and state universities are protected from claims of forfeiture by implementing 40-year water plans (NMSA §§72-1-9, 72-5-28(C), 72-12-8(F)) (Section C.3).

Water rights may also be lost through abandonment. Abandonment requires an intent to abandon in addition to discontinued use by the owner of the water, whereas forfeiture does not require an intent to relinquish the right (*State ex. rel. Reynolds v. South Springs Col.*, 80 N.M. 144 (146-47)). An example of abandonment would be the development of land formerly used for irrigation into a building, parking lot, or housing complex, thus clearly demonstrating that the owner of the land no longer intends to put their irrigation water right to use.

### **C.3.7 City and County Regulation of Water**

The availability of an adequate water supply is a potential limiting factor on population growth and development expansion. The provision of an adequate water supply poses physical constraints on growth but it may also impose even further constraints as a regulatory mechanism that may be used to manage growth. Both counties and cities have the authority to adopt ordinances conserving and regulating the use of water within their jurisdictions.

For example, subdivision and other land use approvals are increasingly being conditioned upon the developer demonstrating an adequate water supply. In 1996, the New Mexico legislature amended the State Subdivision Act to require that county subdivision ordinances obligate a subdivider seeking approval of a preliminary plat to show that the subdivider can furnish water of sufficient quantity and quality to meet the needs of the subdivision (NMSA §47-6-11 (F)). As part of the approval process, both the OSE and the New Mexico Environment Department must review the subdivider's documentation demonstrating satisfaction of these requirements (NMSA §47-6-11 (F)).

Likewise, municipalities are charged by State law with the power to adopt city ordinances governing land platting, planning, and zoning (NMSA §§3-19-1 through 12, §§3-20-1 through 3-20-16). Specifically, municipal subdivision regulations may govern the extent and manner in



which water will be provided to the subdivision as a condition of plat approval (NMSA §3-19-6 (B)(5)(b)).

County and municipal regulations may also be important in the regulation of domestic wells. Under the New Mexico Water Code, an applicant may receive a domestic well permit from the State Engineer without acquiring commensurate groundwater rights or retiring surface water rights to offset the effects of domestic well pumping on hydrologically connected surface water (NMSA §72-12-1). Since a domestic water right permit is granted by the State Engineer as a matter of right, it is viewed by many both as a loophole in the regulation of groundwater withdrawals and as an obstacle to the use of water supply as a growth management tool.

Municipalities do have the power to restrict the drilling of new domestic water wells. Municipal water providers have the authority to deny new domestic well permit applications where the property is located within the exterior boundaries of the municipality and the applicant's property line is within 300 feet of the provider's existing water distribution lines (NMSA §3-53-1.1(A)).

A municipality may not deny a new domestic well permit if the total cost to the applicant of extending the municipal water lines, installing a meter, and hooking up to the system exceeds the cost of drilling a new well (NMSA §3-53-1.1(B)). In addition, a municipality declining to authorize a new domestic well must provide domestic water service within 90 days at regular rates (NMSA §3-53-1.1(C)). Existing wells are not affected by this law.

To exercise this authority, a municipality must adopt a well regulation ordinance and file it with the OSE. An applicant in a municipality with a new well ordinance must obtain a permit to drill from the municipality subsequent to State Engineer approval (NMSA §3-53-1.1(E)). A municipality must notify the State Engineer of its denial of drilling permits, and an applicant may appeal a denial to the district court (NMSA §3-53-1.1(G)). The State Engineer has the power to grant a permit for a domestic well within municipal boundaries provided it conforms to all applicable municipal ordinances (NMSA §72-12-1.1, NMSA §3-53-1.1).

Furthermore, municipalities and counties may regulate water use by assuming responsibility for supplying water to their residents. By owning and operating a water utility, a county or



municipality may regulate water use, including imposition of conservation measures. Municipalities may also exercise their powers of eminent domain to establish or expand water utilities. A municipality “within and without the municipal boundary” may condemn, under certain conditions, various water supplies, water rights, rights-of-way “or other necessary ownership for the acquisition of water facilities” (NMSA §3-27-2(A)(1)). However, condemnation of water rights in a public water supply has not occurred in New Mexico (Clark, 1987).

Counties may also own utilities. County authority arises from statutory law providing that all “counties are granted the same powers that are granted municipalities . . . [including those powers] necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants” (NMSA §4-37-1). Certain class B counties are specifically authorized by statute to purchase, own, operate, and sell water and sewer utilities (NMSA §4-36-8). Furthermore, counties are specifically empowered to condemn water rights (NMSA §72-4-2). Incorporated and class H counties also have the power to condemn property for water facilities because they are included in the definition of a municipality in the water code (NMSA §§3-27-2(A), 3-1-2(G)).

### ***C.3.8 Federal Water Rights***

Certain water rights are created under federal law. These include federally reserved rights and water rights through federal regulation, most importantly the Endangered Species Act. These rights are discussed in Sections C.2.6.1 and C.2.6.2.

#### ***C.3.8.1 Federal Reserved Rights***

The doctrine of federally reserved water rights developed over the course of the 20th Century. Simply stated, federally reserved rights are created when the United States sets aside land for specific purposes (thereby withdrawing the land from the general public domain) and there is an implied, if not expressed, concomitant intent to reserve that amount of water required to fulfill the purpose for which the land was set aside. Federally reserved water rights are not created by or limited by State law.



On federal lands (e.g., Indian reservations, U.S. Forest Service lands, National Park Service lands, federal water lands), water rights may be reserved by the United States for use on those lands. The priority date of federally reserved water rights is the date on which the United States reserved the land for the particular use. In some cases, the United States may have State law rights under the prior appropriation system if, for instance, the United States acquires lands with existing water rights.

In *United States v. New Mexico* (438 U.S. 696, 700 (1978)), the United State Supreme Court stated that federally reserved claims must be “carefully examined” for their “primary purposes” and that reserved water rights should not be implied unless “without the water the purposes of the reservation would be entirely defeated.” In that case, which involved federal claims in the Gila National Forest, the court found that the primary purposes of the national forest did not include fish, wildlife, recreation, or aesthetic purposes, but only timber production and watershed protection.

#### *C.3.8.2 Endangered Species Act*

Western states, including New Mexico, have traditionally recognized the right to put water to beneficial use on land. Such water rights are proprietary in nature and are a form of real property. Even federal and Indian water rights have been tied to lands reserved by the federal government for a specified purpose and are called federal and Indian reserved rights. In contrast, over the last three decades a new federal water right has emerged, based not on land ownership but on the preemptive effect of federal regulatory authority. This right is known as a federal “non-reserved” right or a federal regulatory right (Tarlock, 1985).

Federal regulatory rights may be created through three major federal legislative schemes: Section 404 of the Clean Water Act, the Federal Power Act, and of particular importance to the planning regions, the Endangered Species Act. The regulatory water rights created by these statutes differ significantly from proprietary rights, whether held by the government or by private entities. All property rights share common characteristics, but the difference between regulatory and proprietary water rights has prompted concerns in the western states about integrating these rights with traditional state-created water rights. For example, although federally reserved rights have a priority date, regulatory rights have no priority date and may supersede prior



appropriate rights. Furthermore, they are not subject to the beneficial use or reasonableness requirement (Tarlock, 1985).

Pursuant to regulatory water rights, minimum stream flows may be required to meet water quality standards, avoid jeopardy to protected species, or satisfy hydroelectric licensing requirements.

The Endangered Species Act (ESA) (16 U.S. C. §§ 1531-1544 (2000 and 2002 Cum. Supp.)) can play a prominent role in determining the allocation of water, especially of stream and river flows. The ESA was enacted in 1973 and, with limited exceptions, has remained in its current form since then.

The protections of the ESA are triggered by listing a species as “threatened” or “endangered.” The goal of the Act is to protect threatened and endangered species and the habitat on which they depend (16 U.S. C. § 1531(b) (2000)). The Act's ultimate goal is to “recover” species to the point that they no longer need protection under the Act.

The ESA provides several mechanisms for accomplishing these goals:

- The Act makes it unlawful for anyone to “take” a listed species unless an “incidental take” permit or statement is first obtained from the Interior Department (16 U.S.C. §§ 1538, 1539 (2000)). “Take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct” (16 U.S.C. § 1532(19) (2000)).
- In addition, federal agencies must use their authority to conserve listed species and must make sure that their actions do not jeopardize the continued existence of listed species or destroy or harm habitat that has been designated as “critical” for such species (16 U.S.C. § 1536 (2000)).

Federal agencies are also required to consult with the United States Fish and Wildlife Service (USFWS) to determine whether federal actions or federally sponsored actions will affect or jeopardize threatened or endangered species or critical habitats. Whenever a private or public



entity undertakes an action that is “authorized, funded, or carried out,” wholly or in part, by a federal agency, the consultation requirement is triggered and the potential impacts of the undertaking on threatened and endangered species are analyzed by the USFWS (16 U.S.C. § 1536(a)(4)(2000)).

#### **C.4 Setting Aside Water for Future Use**

Through various provisions in the Water Code, the New Mexico legislature has created a mechanism to allow certain organizations to set aside water for use in the future. Although this notion is contrary to the well-known “use it or lose it” concept at the heart of the prior appropriation system, it is essential for long-term water planning.

The entities that have acquired special status for water planning under the code are municipalities, counties, state universities, member-owned community water systems, special water users’ associations, and public utilities supplying water to municipalities or counties. These entities are allowed a 40-year water use planning period, and water rights for these entities are based upon a water development plan, which must be implemented within the 40-year period (NMSA §72-1-9(B)). This provision of the statute allows municipalities and counties to legally appropriate and preserve water that they cannot currently use, but will need to meet projected water requirements for the region. These entities will be required to develop a 40-year water plan for their individual water supplies. The future demand study component of a 40-year plan can support an application to appropriate water for future use.

Municipalities and counties are specifically exempt from forfeiture of unused water rights if those rights have been appropriated for the implementation of a water development plan or for preservation of water supplies (NMSA §72-12-8 (F)). These provisions are the same for both surface water and groundwater (NMSA §72-5-28(C)).

Conservancy districts also have special provisions that allow them to manage water without application of the forfeiture provisions. NMSA §72-5-28 (G) allows “periods of nonuse when water rights are acquired and placed in a state-engineer approved water conservation program” by a conservancy district organized pursuant to NMSA, Chapter 73, Articles 14 through 19.



## C.5 Conjunctive Use

Conjunctive use is the legal and administrative recognition that a hydrologic connection exists between surface water and groundwater. Because of this recognition, New Mexico water law has evolved to incorporate a system whereby the State Engineer can manage groundwater and surface water in conjunction, as opposed to other western states such as Texas and California, which manage groundwater and surface water resources separately (Archer and Patrick, 1994, p. 152). From a water resources management perspective, the authority to manage these resources conjunctively has great benefit.

The recognition of the impact of groundwater pumping on surface flows extends back to early cases in New Mexico. For example, in *Templeton v. Pecos Valley Conservancy District* (65 N.M. 59 (1958)), groundwater pumping reduced the flow of the Rio Felix such that a senior surface water right holder could not fully exercise his water right. The water right holder applied to drill for water in the aquifer that was hydrologically connected to the river. The court agreed that exercising the water right by drilling a well was merely a change in point of diversion of the surface water right, thus recognizing the interconnection between the shallow aquifer and the river itself.

The State Engineer incorporated the concept of conjunctive management by requiring applicants for groundwater in stream-related basins to purchase surface water rights in an amount equivalent to the proposed application in order to offset the impacts the groundwater pumping would have on the river. The City of Albuquerque challenged these conditions when its application for 6,000 acre-feet of groundwater was conditioned upon an offset of surface water. In *City of Albuquerque v. Reynolds* (71 N.M. 428 (1962)) the court upheld the State Engineer's decision, stating that the OSE has the authority to impose these conditions.

The OSE has subsequently integrated this policy into its groundwater administrative criteria in various basins, which require that applicants purchase surface water rights that would offset groundwater pumping in a permit application. In other stream-related basins, the OSE has developed criteria to manage groundwater appropriations in order to protect surface water rights.



## C.6 Water Quality

Federal and state laws and regulations govern water quality within all planning regions within the State. Most water quality laws have their genesis in federal law. An understanding of the federal water statutes and how they interrelate with state law is critical to understanding the regulation of water quality in the area. In particular, water quality can have a specific impact on the quantity of water within a planning region, since minimum instream flows may be necessary to meet water quality standards.

### C.6.1 The Clean Water Act

Several federal laws address water quality issues. Clearly, the most significant federal law is the Clean Water Act (CWA) (33 U.S.C. §§ 1251 to 1387 (2002)). The CWA is a 1977 amendment to the Federal Water Pollution Control Act of 1972, which set the basic structure for regulating discharges of pollutants to navigable waters of the United States. “Navigable waters” has been broadly defined to include every creek, stream, river, or body of water that may in any way affect interstate commerce, including arroyos or ditches (*Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1355-6 (D.C.N.M. 1995)). A very recent and complex United States Supreme Court case, *Rapanos v. United States* (2006 WL 1667087 (June 19, 2006)) addressed the broad definition of navigable waters in the context of wetlands development. The *Rapanos* Court split three ways:

- Four of the nine justices argued that the term *navigable waters* should be restricted to relatively permanent, standing, or continuously flowing bodies of water forming geographic features, such as streams, oceans, rivers, and lakes, or wetlands immediately adjacent to such water. These justices would exclude from navigable waters ordinarily dry channels through which water occasionally or intermittently flows.
- Four other justices argued for retaining an expansive reading of the CWA and for having the term “navigable waters” include wetlands that are adjacent to navigable waters or to tributaries of navigable waters.





- One lone justice wrote the opinion that will guide the lower courts. He argued that a water or wetland constitutes navigable waters under the CWA if it possesses a “significant nexus” to waters that are navigable in fact or that could reasonably be so made. In order to have this nexus, a waterbody must significantly affect the integrity of navigable waters.

The likely result of *Rapanos* is that if a wetland (or an intermittent or ephemeral stream) has a significant nexus (most likely, a hydrological connection) to navigable waters, then such body of water will be protected by the CWA. Nonetheless, since the *Rapanos* decision was highly divided, the issue of what waterbodies are “navigable” will most likely continue to be subject to litigation or further legislative action.

The Act’s objective is to “restore and maintain the chemical, physical and biological integrity” of the waters of the United States (33 U.S.C. § 1251(a) 2002). The CWA has several ways to reach this goal:

- It allows water quality standards for specific segments of surface waters (33 U.S.C. § 1313 (2002)).
- It makes it unlawful for a person to discharge any pollutant into waters without a permit (33 U.S.C. § §1311, 1342 (2002)).
- It allows for the designation of “Total Maximum Daily Loads” (TMDLs) for pollutants threatening the water quality of stream segments (33 U.S.C. § 1313(d) (2002)). TMDLs are identified for those waters where an analysis shows that discharges may result in a violation of water quality standards (33 U.S.C. § 1313(d)(1)(C) (2002)). The TMDL process can be best described as determining and planning a watershed or basin-wide budget for pollutant influx to a watercourse.

By enacting the CWA, Congress gave the United States Environmental Protection Agency (EPA) broad authority to address water pollution. With this authority, the EPA has developed a variety of regulations and programs to reduce pollutants entering surface waters. For example,



applicable water quality standards, discharge permit requirements, and TMDLs are all defined by regulation.

Groundwater pollution is not specifically addressed by the CWA, and pollution such as mining, agricultural, and construction runoff (referred to as “nonpoint sources”) is addressed mainly through voluntary management efforts, called “best management practices,” and state regulation rather than through federal regulation (40 C.F.R. § 130.2 (2002)). Nonetheless, a recent court decision found that the EPA and states have the power to list and issue TMDLs for waters polluted only by nonpoint sources of pollution (*Pronsolino v. Marcus*, 91 F. Supp 2d. 1337, 1356 (N.D. Ca. 2000), affirmed by *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002)).

The CWA also calls for effluent limitations. Simply speaking, an effluent limitation is a restriction on discharges into surface waters from the “end of the pipe,” or point source. These discharges are regulated through the issuance of National Pollutant Discharge Elimination System (NPDES) permits (33 U.S.C. § 1342 (2002)). These permits limit the discharge of a variety of pollutants and control the characteristics, such as temperature, of the discharge. NPDES permits also regulate stormwater discharges entering surface water (33 U.S.C. § 1342(p) (2002)). Although EPA can delegate the administration of the NPDES program to individual states (33 U.S.C. § 1251(b) (2002)), they have not done so with New Mexico.

The CWA allows the EPA to delegate many permitting, administrative, and enforcement aspects to state and tribal governments (33 U.S.C. §§ 1251(g), 1377 (2002)). For example, states and tribes have the power to adopt water quality standards for surface waters within their jurisdictions. A water quality standard generally is a standard that is established to sustain and protect existing or sustainable uses of surface water. A water contaminant is any substance that alters the physical, chemical, biological, or radiological qualities of the water (NMSA §74-6-2 (A)). A contaminant becomes a pollutant when it exceeds an acceptable concentration or standard. Under the CWA, states are required to adopt water quality standards that protect certain designated uses for each river, stream segment, and lake (33 U.S.C. § 1313 (2002)); New Mexico has adopted its own surface water quality standards (20.6.4 NMAC). Tribes meeting certain criteria under the CWA have those same powers for waters within tribal lands (33 U.S.C. § 1377(a) (2002)). Designated uses include recreation, wildlife habitat, domestic



water supply, irrigation and livestock water, or in the case of Indian tribes, culturally significant or sacred uses. The water quality standards must protect the designated use for the surface water at issue. Standards must be reviewed every three years and be modified or replaced as appropriate (33 U.S.C. § 1313(c)(1) (2002)). This process is known as the “Triennial Review.”

### ***C.6.2 The Safe Drinking Water Act***

The Safe Drinking Water Act (42 U.S.C. § 300f et seq. (2002)), protects the quality of drinking water in the United States. This law focuses on all waters actually or potentially designed for drinking use, whether from surface or underground sources. The Act authorizes EPA to establish safe standards and requires all owners or operators of public water systems to comply with the standards. New Mexico has promulgated drinking water regulations that adopt, in part, federal drinking water standards (20.7.10 NMAC).

### ***C.6.3 Groundwater Standards and Regulations***

As noted in Section C.5.1, the CWA focuses primarily on surface water pollution. Groundwater pollution not caused by hazardous waste is addressed directly by the State and tribes, pursuant to the New Mexico Water Quality Act and its regulations (NMSA §74-6-1 et. seq.; 20.6.2 NMAC). In New Mexico, groundwater pollution is caused by a number of sources, including septic tank systems and cesspools, spills and leaks of hazardous materials, solid waste disposal sites, overuse of fertilizers and pesticides, dairies, and mines. Except for hazardous and liquid wastes, which are regulated separately, these sources are required to have discharge plans under the Water Quality Act and its implementing regulations (NMSA §74-6-1 et. seq.; 20.6.2 NMAC).

Improperly installed or maintained domestic septic systems can be a source of groundwater pollution in New Mexico. New Mexico's Environmental Improvement Board is charged with writing regulations for liquid waste disposal and has promulgated regulations applicable to domestic septic systems (NMSA §74-1-8; 20 7.3 NMAC). Releases of hazardous wastes are regulated pursuant to regulations found at 20 4.1 NMAC.



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