

**Overview of
Water Law
Applicable to
The Middle Rio Grande Water
Planning Region**

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I. INTRODUCTION.

The Middle Rio Grande Planning Region (sometimes referred to as “the Region”) is partly defined by shared water resources and partly by shared political and economic interests. The Region largely consists of the area within the boundaries of Sandoval, Bernalillo, and Valencia counties.¹ All or portions of 12 Native American Tribal Lands lie within the boundaries of the Region. These lands consist of the Pueblos of Cochiti, Isleta, Jemez, Laguna, Sandia, San Felipe, Santa Ana, Santa Clara, Santo Domingo, and Zia, and small portions of the Jicarilla and Navajo Reservations . The Middle Rio Grande Water Planning Region has the largest population of any planning region in New Mexico. See Figure 1. Approximately 700,000 people live within the Region. For planning purposes, the Region is divided into three subregions. The subregions are identified as the Rio Jemez subregion, the Rio Puerco subregion, and the Rio Grande Valley subregion. See Figure 2.

The Rio Jemez subregion lies entirely within Sandoval County and includes the watershed area of the Jemez River within Sandoval County down to its confluence with the Rio Grande. The Rio Jemez subregion, with an area of approximately 1,017 square miles, occupies approximately 18% of the total Region.

The Rio Puerco subregion extends from Sandoval County through Bernalillo County and into Valencia County. It occupies that portion of the Rio Puerco watershed within those three counties, and has an area of approximately 2,119 square miles. The Rio Puerco subregion occupies approximately 39% of the total Region.

The Rio Grande Valley subregion occupies the easternmost portion of the Region in Sandoval, Bernalillo and Valencia counties. It also includes a portion of Torrance County on the western slope of the Manzano Mountains. The Rio Grande Valley subregion has an area of approximately 2,359 square miles, or 43% of the total Region.

The Middle Rio Grande Water Planning Region is adjacent to five other water-planning regions. The Rio Arriba planning region lies to the north, Jemez y Sangre to the northeast, Estancia Basin to the southeast, Socorro/Sierra to the south, Northwest New Mexico to the west, and the San Juan water planning region is situated to the northwest. Two of the neighboring water-planning regions, Jemez y Sangre and Socorro/Sierra, include reaches of the Rio Grande. Two of the adjacent planning regions, Northwest New Mexico and Socorro/Sierra, also include portions of the Rio Puerco watershed. A small portion of the Rio Jemez watershed lies within the Rio Arriba water-planning region.

¹ All of Valencia County lies within the Region, and most of Bernalillo and Sandoval counties. The easternmost portion of Bernalillo County drains into the Estancia Basin and is included within the Estancia Basin Planning Region. A small portion of northern Sandoval County is situated west of the continental divide and drains to the San Juan River and ultimately to the Colorado River Basin. This northern portion of Sandoval County is part of the San Juan Water Planning Region. A small portion of Torrance county on the western slope of the Manzano Mountains is also included in the Region.

Within the Middle Rio Grande Water Planning Region, a variety of federal, state, county, and tribal laws and regulations govern the use of water. An overview of each of these areas of law is necessary in understanding the water planning efforts of the Middle Rio Grande Council of Governments and the Middle Rio Grande Water Assembly.²

II. NEW MEXICO WATER LAW.³

A. Prior Appropriation and Beneficial Use.

New Mexico's Constitution recognizes beneficial uses as the basis, the measure, and the limit of the right to use water.⁴ Beneficial use means application of water to a lawful purpose that is useful to the appropriator and at the same time is a use 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.⁵

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.

An example of how this system operates may be helpful. The day a person diverts water from a stream or from the ground becomes the "priority date" of the right.⁶ More priority dates are assigned as more people use the water source. In New Mexico, water supply is often "feast or famine" and it is typical that in most years more rights to use water exist than is available. When there is insufficient water in a stream to meet the demand, the person with the oldest water right can

² Water planning in the Region is being accomplished through a partnership formed in 1998 between these two entities.

³ This discussion only discusses the principles that apply to the allocation of water and focuses on water quantity. However, the right to use water cannot be separated from water quality issues because quality concerns will determine the quantity of water available for particular uses. Water quality laws are addressed in Section VIII of this paper.

⁴ N.M. Const. art. XVI, § 3.

⁵ N.M. Const. art. XVI, § 2; NMSA 1978, § 72-12-1 (1907).

⁶ The date of first beneficial use is the priority date for the right to use water where the State Engineer has no jurisdiction. Once the State Engineer has jurisdiction over a stream or basin, the priority date is the date the water user applies with the State Engineer to allow such use. The State Engineer's jurisdiction will be described below.

use up to his or her full amount irrespective of geographical location. The first user's right only limits other users to the extent that the first user can actually put water to use. For practical purposes, a senior water right is a "right of first refusal" to put water to use. The fact that the first user may not be able to use their full right all the time does not destroy the right. In New Mexico, there will be times, as to some water sources, where even the senior right cannot be fully met. Once the senior right is met, the next most senior right in time may be used to its full amount, and so on. Thus, persons with the newest rights potentially get no water.

New Mexico codified and refined the prior appropriation doctrine in the New Mexico water code. The territorial legislature enacted the part of the code that governs the use of surface water in 1907.⁷ The code's purpose is the "conservation, protection, and development of public waters of the state and their application to beneficial use."⁸ 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 1907.⁹ 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.¹⁰ The State Engineer has authority over groundwater uses after the Engineer declares a source to have "reasonably ascertainable" boundaries.¹¹ This is done one basin at a time, so the date of the beginning of State Engineer authority is different for each basin.

Most areas of the State have declared underground water basins. In the remaining undeclared areas, however, the State Engineer has no jurisdiction over groundwater use. The underground basin within the Region was declared in 1956, or by extension thereafter. The New Mexico Supreme Court in State v. Mendenhall¹² held that a person who commences drilling a well prior to declaration of an underground basin and diligently develops the water right subsequent to declaration acquires a water right with a priority date relating back to the date of commencement of drilling. Finally, the State Engineer is required to approve wells for domestic and livestock use.¹³

The Water Code grants the State Engineer expansive authority over both surface and groundwater, but it does not give the Engineer the power to adjudicate water rights because only a

⁷ NMSA 1978, § 72-1-1 (1907).

⁸ State ex. rel. Red River Valley Co. v. District Court, 39 N.M. 523, 530, 51 P.2d 239, 243 (1935).

⁹ NMSA 1978, § 72-1-3 (1959).

¹⁰ NMSA 1978, § 72-12-1 (1931).

¹¹ NMSA 1978, § 72-12-12 (1949).

¹² 68 N.M. 467, 475, 362 P.2d 998, 1004 (1961).

¹³ NMSA 1978, § 72-12-1(A) (1931).

court has that authority. 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.

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.¹⁴ However, one may acquire a real property right¹⁵ to use the water consistent with the procedures under State law,¹⁶ up to the amount which can be put to a beneficial use.¹⁷

New Mexico statutes regulating water use do not define "beneficial use." The term has been construed to include irrigation and recreational fishing,¹⁸ as well as other traditional western uses such as stock watering.¹⁹ In 1998, the New Mexico Attorney General issued an opinion that use of water for instream flows is a beneficial use.²⁰

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.²¹ In addition to forfeiture, water rights can also be lost through abandonment when both the intent to abandon as well as a failure to use the water occur. Intent to abandon can be extremely difficult to prove.²² 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 the right has been forfeited or abandoned.

¹⁴ NMSA 1978, § 72-1-1 (1907); Sporhase v. Nebraska, 458 U.S. 941, 950 (1982).

¹⁵ N.M. Const. art. XVI, § 2.

¹⁶ United States v. Ballard, 184 F.Supp.1, 32 (D.N.M. 1960).

¹⁷ N.M. Const. art. XVI, § 2.

¹⁸ State ex rel. State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 220, 182 P.2d 421, 429 (1945).

¹⁹ First State Bank v. McNew, 33 N.M. 414, 422-3, 269 P. 56, 59-60 (1928). *See also* Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 231, 61 P. 357, 357 (1900) (holding that a corporation could appropriate water for a third party).

²⁰ 1998 Op. Att'y Gen. No. 98-01.

²¹ NMSA 1978, §§ 72-5-28 (1907) and 72-12-8 (1931). These statutes do not allow forfeiture when a reasonable cause has brought about the nonuse. Prior to 1965, there was no requirement of notice from the State Engineer and of the additional one-year waiting period.

²² State ex rel. Reynolds v. South Springs Co., 80 N.M. 144, 148, 452 P.2d 478, 482 (1969).

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 to make a new appropriation or to change an existing appropriation. Only the State Engineer was given authority to issue permits.²³ The permit process requires the applicant to prove that a new use will not harm other users. This was a significant change from the pre-1907 law. Prior to 1907, the person challenging a newer use had to prove they would be harmed in order to succeed in the challenge.

B. Administration of Water Rights.

With the adoption of the New Mexico Water Code,²⁴ the Office of the Territorial (now State) Engineer was created.²⁵ The State Engineer is charged with “the supervision of waters of the State and of the measurement, appropriation, distribution thereof²⁶. . . [a]ccording to the licenses issued by him and the adjudications of the courts.”²⁷ He 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”²⁸ The State Engineer must approve all new appropriations of water as well as changes in the point of diversion and/or changes in the place and/or purpose of use of an existing water right, commonly referred to as a “transfer.”²⁹ The State Engineer can impose conditions on licenses and permits issued.³⁰ 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.³¹

²³ NMSA 1978, §§ 72-5-1 (1907) through 72-5-39 (1965); NMSA 1978, §§ 72-12-1 (1931) through 72-12-28 (1967).

²⁴ Codified at Chapter 72 NMSA 1978, (2000 Cum. Supp.).

²⁵ NMSA 1978, § 72-2-1 (1907).

²⁶ *Id.*

²⁷ NMSA 1978, § 72-2-9 (1907).

²⁸ NMSA 1978, § 72-2-8(A) (1953). State Engineer regulations may be for the purpose of “prescribing procedures and interpreting and exemplifying the statutes to which they relate.” NMSA 1978, § 72-2-8(B)(1) (1953).

²⁹ NMSA 1978, §§ 72-2-9 (1907), 72-5-1 (1907) through 72-5-39 (1965), 72-12-7 (1931).

³⁰ Roswell v. Berry, 80 N.M. 110, 112, 452 P.2d 179, 181 (1969).

³¹ NMSA 1978, §§ 72-3-2 (1907), 72-5-20 (1907), 72-12-3 (1931), 72-12-7 (1931).

The State Engineer also has statutory enforcement powers.³² The State Engineer has power to issue compliance orders for violations of the Water Code, State Engineer rules and regulations, permit or license conditions, and court orders entered in water adjudications.³³ The compliance order must state the nature of the violation and require compliance within a specified time period.³⁴ The State Engineer may impose penalties for overdiversion or illegal diversion of water in an amount up to double the amount of the unauthorized diversion.³⁵ While the penalty is discretionary, the State Engineer must consider the seriousness of the violation, any good faith efforts to comply with applicable requirements and other relevant factors.³⁶ Persons named in the compliance order have the opportunity to informally contest the alleged violation with the State Engineer, in addition to the right to a public hearing.³⁷ If a final compliance order is issued and a person fails to comply, the State Engineer may file a civil action to enforce the order.³⁸

The State Engineer manages water resources to maintain an equilibrium between ground and surface water in stream-related aquifers. New Mexico recognizes the hydrologic relationship between water in the ground and water flowing on the surface in stream beds.³⁹ Because virtually all surface waters of the State are appropriated, stream-connected groundwater appropriations or transfers are only approved with a condition requiring retirement of surface water rights, or other stream augmentation such as return flows, to offset any depletions of surface flow caused by groundwater pumping.⁴⁰

C. Conjunctive Management of Water.

In the Middle Rio Grande valley, the conjunctive management of surface and ground water will be of great importance. For more than 40 years, the State Engineer has administered the Middle Rio Grande Basin to maintain an equilibrium between ground and surface water. In determining appropriation and beneficial use, New Mexico recognizes the hydrologic relationship between water

³² NMSA 1978, § 72-2-18 (2001).

³³ *Id.* at ¶ A.

³⁴ *Id.*

³⁵ NMSA 1978, § 72-2-18(C) (2001).

³⁶ *Id.*

³⁷ NMSA 1978, § 72-2-18(D) (2001).

³⁸ NMSA 1978, § 72-2-18(G) (2001).

³⁹ Albuquerque v. Reynolds, 71 N.M. 428, 434-5, 379 P.2d 73, 79-80 (1962).

⁴⁰ *Id.* at 440, 379 P.2d at 85. In 1994 the Attorney General issued an opinion that the State Engineer's practice was unlawful to the extent that the specific rights to be retired need not be identified in the application because it effectively prevented public notice and comment. 1994 Op. Att'y. Gen. No. 94-07.

in the ground and water flowing on the surface in stream beds.⁴¹ Because virtually all surface waters of the State are fully appropriated, stream-connected groundwater appropriations or transfers will be conditioned to require retirement of surface water rights to offset any depletions caused by groundwater pumping.⁴²

City of Albuquerque v. Reynolds⁴³ is the seminal New Mexico case involving conjunctive management of ground and surface water. The Reynolds case was the first to recognize the hydrologic relationship between groundwater and water flowing on the surface in stream beds.⁴⁴ Reynolds addressed the issues of surface water depletion and impairment of surface water rights by groundwater appropriators pumping from stream-related underground water basins. The case established an additional appropriation requirement – namely, applicants wishing to appropriate groundwater in a stream-related aquifer must offset surface water impacts caused by the appropriation. An offset is achieved by acquiring water through a water right or other contractual obligation in the affected water source and releasing that water to replenish the depletions in the source due to pumping.⁴⁵

In Reynolds, the city of Albuquerque filed with the State Engineer four applications to appropriate water from the Rio Grande Underground Water Basin.⁴⁶ The State Engineer denied the applications on the grounds that the underground waters sought to be appropriated constitute part of the base flow of the Rio Grande, that river water is fully appropriated, that the granting of the applications would impair existing rights, and that the city refused to comply with State Engineer-imposed requirements to offset, or retire existing surface water rights as a condition precedent to the diversion and use of underground waters.⁴⁷ Regarding the interrelatedness of the aquifer and the Rio Grande in light of the permit denial, the State Engineer concluded:

⁴¹ Clark, *Ground Water Law: Problem Areas*, 8 NAT.RESOURCES J. 377 (1975).

⁴² City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (1963).

⁴³ *Id.*

⁴⁴ Clark, *Ground Water Law: Problem Areas*, 8 NAT. RESOURCES J. 377 (1975).

⁴⁵ *Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications, the New Mexico Office of the State Engineer*, Santa Fe, New Mexico (January 5, 1999) at C(1).

⁴⁶ City of Albuquerque v. Reynolds, 71 N.M. 428, 430, 379 P.2d 73 (1962).

⁴⁷ *Id.* at 431.

The scientific considerations...show clearly that accretions from the underground reservoir constitute a major source of the fully appropriated surface water of the Rio Grande. These considerations also show that over a 75-year period, about one-half of the [underground] water proposed to be taken [by the city] would be extracted from surface flows and about one-half would be taken from underground storage. Much of the water in storage in the Rio Grande Underground Reservoir is unappropriated and may be taken for beneficial use under an application properly formed to insure against the impairment of existing rights...[The city's application] makes it clear that the applicants do not intend that any rights to the use of surface water are to be pledged or retired in connection with those applications; therefore, approval of the applications in their present form would result in the impairment of valid existing rights to the use of the waters of the Rio Grande.⁴⁸

On appeal to the New Mexico Supreme Court, the Court found in favor of the State Engineer.⁴⁹ Among several issues before the Court was whether the jurisdiction of the State Engineer includes the ability to condition the withdrawal of groundwater.⁵⁰ Both parties stipulated to the interrelationship of underground and surface waters in the Rio Grande Underground Water Basin to the extent that such underground waters contribute substantially to the stream flow.⁵¹

The Court upheld the State Engineer permit condition that existing rights to the consumptive use of surface water would be retired to the extent necessary to offset the effects of the appropriation on the Rio Grande.⁵² The Court found statutory authority for the State Engineer's jurisdiction to enforce such permit requirements under the non-impairment clause in Section 72-12-3 [then Section 75-11-3]:⁵³ "The State Engineer shall, if he finds that there are in such underground reservoir unappropriated waters, or that the proposed appropriation would not impair existing water rights from such source, grant the said application and issue a permit to the applicant to appropriate all or a part of the waters applied for subject to the rights of all prior appropriators from said source."⁵⁴ The Court reasoned that "with the Rio Grande stream system being fully appropriated, it would indeed be anomalous for the legislature to enact laws designed to permit water, which would

⁴⁸ *Id.* at 435.

⁴⁹ *Id.* at 439.

⁵⁰ *Id.* at 435-436.

⁵¹ *Id.*

⁵² *Id.* at 435.

⁵³ § 75-11-3 NMSA was amended in 1959 as § 72-12-3 NMSA 1978.

⁵⁴ *Reynolds*, 71 N.M. at 433.

otherwise reach the stream in substantial quantities, to be withdrawn by pumps and thereby attempt to deprive the prior appropriators of their vested rights.”⁵⁵

While the statutory “offset requirement” for permits to appropriate groundwater in a stream-related aquifer falls under the broader non-impairment clause in Section 72-12-3, the administrative corollary is contained in various State Engineer guidelines for stream-related groundwater basins. These guidelines are basin-specific and administered by the State Engineer in addition to the state-wide State Engineer Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Groundwater in New Mexico.

The Middle Rio Grande Administrative Area Guidelines contain an offset requirement. The Middle Rio Grande aquifer is hydrologically connected to the Rio Grande surface water system.⁵⁶ Since groundwater diversions from aquifers hydrologically connected to the Rio Grande affect the fully appropriated surface flow, the State Engineer conjunctively manages the water resources within the Rio Grande Basin to protect existing water rights and to ensure New Mexico’s compliance with the Rio Grande Compact.⁵⁷

The Middle Rio Grande Guidelines require that groundwater permittees obtain valid surface water rights in an amount sufficient to offset the effects of their groundwater diversions on the surface flow of the Rio Grande stream system.⁵⁸ This requirement protects the surface flows of the Rio Grande from being depleted or reduced by groundwater diversions.⁵⁹

The Middle Rio Grande Guidelines require that the appropriator obtain valid consumptive use surface water rights to offset the greater of either: a) total well diversions less any flow returned directly to the Rio Grande on a yearly basis; or b) the net surface water depletion associated with past and present use including consideration of residual effects of past diversion, on a time schedule approved by the State Engineer.⁶⁰ Valid consumptive use surface water rights “retired” by the appropriator for the purpose of offsetting future depletions may be leased for other purposes as provided by Section 72-6-3 NMSA 1978 until necessary to offset the surface water depletions caused by the permitted groundwater diversion.⁶¹

⁵⁵ *Id.* at 437.

⁵⁶ *Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications*, New Mexico Office of the State Engineer, September 13, 2000, at Introduction.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at No. 5.

⁶¹ *Id.* at No. 6.

D. Appropriation and Transfer of Water Rights and State Permitted Uses.

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.

1. Appropriation.

Since almost all surface waters in the State (and all of the major rivers, such as the Rio Grande and Pecos) are fully appropriated, surface waters today can only be acquired through transfer, as discussed below. Prior to the declaration of the Rio Grande Basin in 1956, no permit is needed to appropriate groundwater.⁶² To appropriate groundwater from a declared basin (if water is available for appropriation), one must apply for a permit from the State Engineer.⁶³ After filing an application, the applicant publishes a notice of intent to appropriate in a newspaper of general circulation where the right is located.⁶⁴ Standing to file protests is conferred upon persons or entities objecting that the granting of the application will 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.⁶⁵ The State of New Mexico and political subdivision of the State are exempt from the specific standing requirements.⁶⁶ 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.⁶⁷ 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.⁶⁸ The State Engineer can require retirement of

⁶² State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 470, 362 P.2d 998, 1000 (1961).

⁶³ NMSA 1978, § 72-12-3 (1931).

⁶⁴ *Id.* at ¶ D.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ NMSA 1978, § 72-12-3(F) (1931).

⁶⁸ In Young & Norton v. Hinderlider, 15 N.M. 666, 110 P. 1045 (1910), the Territorial 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:

- (1) That the State's waters should be used to secure the greatest possible benefit for the public;
- (2) Whether the proposed project was for speculative purposes;

surface water rights or permits. Like surface water, if the basin is fully appropriated, the only way to acquire a groundwater right or permit is through a transfer.

In 2000, the State Engineer adopted the Middle Rio Grande guidelines, which only allow appropriation of groundwater if equivalent surface water rights are acquired.

New Mexico allows the State Engineer to issue permits allowing use of up to three acre-feet per year for “watering livestock; for irrigation not to exceed one acre of noncommercial trees, lawn or garden; [and in] household or other domestic use...”⁶⁹ An application must be made for such use, but by statute, if water is available, the State Engineer has limited discretion to deny the permit.⁷⁰ Local municipalities have some control over domestic well permitting. By statute, the State Engineer can issue permits “provided that permits for domestic use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978[.]”⁷¹ A domestic well applicant may receive a domestic well permit from the State Engineer without acquiring commensurate groundwater rights or retiring offsetting surface water rights.

Whether domestic wells may be “transferred” is unclear. Certainly, a perfected pre-basin or *Mendenhall* domestic well right can be transferred. There also are examples of the State Engineer allowing perfected domestic well permits to be transferred and consolidated into a mutual domestic water system.

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.⁷²

Persons seeking to transfer a water right must file a formal application with the State Engineer. After filing an application, the applicant must publish a notice of intent to transfer the

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- (3) Whether the cost of a project was so excessive that participants could not afford to pay for it;
 - (4) Whether the project was efficient; and,
 - (5) Whether the project would benefit the residents of the area.

⁶⁹ NMSA 1978, § 72-12-1 (1931).

⁷⁰ *Id.*

⁷¹ NMSA 1978, § 72-12-1(A) (1931).

⁷² NMSA 1978, §§ 72-5-23 (1907), 72-12-7 (1931).

right in a newspaper of general circulation where the right is located.⁷³ As discussed above, standing to protest a transfer application is conferred 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, the State Engineer will hold a formal hearing on the issues set out in the protest and decide the case.⁷⁴ A party can appeal the State Engineer's decision to the district court.⁷⁵

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.

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.⁷⁶ 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.⁷⁷

New Mexico's water right leasing statute allows temporary transfers,⁷⁸ but those transfers, like permanent transfers, require legal notification and a State Engineer permit.⁷⁹ 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, as discussed below.

3. Supplemental and Replacement Wells.

An owner of a water right may supplement or replace a well, under certain conditions.

a. Replacement well over one hundred 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

⁷³ NMSA 1978, §§ 72-5-23 (1907), 72-12-7(A) (1931).

⁷⁴ NMSA 1978, §§ 72-5-5(A) (1965), 72-12-3(A) (1931).

⁷⁵ N.M. Const. art. XVI, § 5; NMSA 1978, §§ 72-7-1 through 3 (1907).

⁷⁶ NMSA 1978, § 72-5-23 (1907).

⁷⁷ *Id.*

⁷⁸ NMSA 1978, § 72-6-3 (1967).

⁷⁹ *Id.*

replacement well over one hundred 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.⁸⁰

In the 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.⁸¹ In this instance, the same factors considered in a transfer (impairment, conservation of water, and public welfare) will be examined.⁸²

b. Replacement well within one hundred feet of original well.

An owner of a water right or permit may drill and use a replacement 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.⁸³ 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.⁸⁴

c. Supplemental well.

The statutory provision for drilling a supplemental well is similar to that for drilling a replacement well over one hundred 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.⁸⁵

⁸⁰ NMSA 1978, § 72-12-23 (1959).

⁸¹ *Id.*

⁸² *Id.*

⁸³ NMSA 1978, § 72-12-22 (1959).

⁸⁴ *Id.*

⁸⁵ NMSA 1978, § 72-12-24 (1959).

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.⁸⁶ In this instance, the same factors considered in a transfer (impairment, conservation of water, and public welfare) will be examined.⁸⁷

4. 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 a 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.⁸⁸ The Office of the State Engineer (OSE) has specific "change of ownership" forms to be used to notify the OSE. This does not take the place of a conveyance document, such as a deed, effecting the change of ownership.

E. Other Public Entities Regulating Water Rights.

The State Engineer is not alone in administering water. Over the years, the legislature has spawned numerous other entities with overlapping jurisdictions. For example, the Interstate Stream Commission is given the authority to investigate, develop and conserve both the intrastate and interstate waters of New Mexico.⁸⁹ At the local level numerous entities such as conservancy and irrigation districts, acéquias, and other types of water supply entities are granted authority over the management and administration of waters within their respective jurisdictions. Some have been in existence for centuries; others are more modern creations.

1. Acéquias and Community Ditch Associations.

Acéquias, or community ditches, are ditch systems which are managed by a community and used for irrigation purposes. The first acéquias were used in the Southwest by Pueblo Indians, and early Spanish settlers adopted this water distribution method.⁹⁰ In New Mexico, settlements were formed along the banks of perennial rivers, or in the mountain valleys where water from springs and creeks was reasonably certain to be available for irrigation at the needed times.⁹¹ Acéquias were

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ NMSA 1978, § 72-1-2.1 (1991).

⁸⁹ NMSA 1978, § 72-14-3 (1935).

⁹⁰ David H. Getches, *Water Law* 419 (3rd ed. 1997).

⁹¹ Snow v. Abalos, 18 N.M. 681, 692, 140 P. 1044, 1045 (1914).

established by individuals or community members to convey water. A main canal was constructed with lateral ditches to distribute the water and serve their individual lands.⁹² The water rights were owned by the individuals, but the ditch was collectively owned by the individuals on the ditch as tenants-in-common.⁹³ When a landholder under a community acequia conveyed his land, his right to the use of water as a member of the community passed with his land.⁹⁴

In New Mexico, acéquias continue to operate statewide; but acequia management is now governed by statute.⁹⁵ All New Mexicans have the right to construct and use either private or common acéquias.⁹⁶ With a community ditch or acequia, the acequia members are not entitled to compensation for the ditch or ditches crossing their respective properties.⁹⁷ After construction, the ditches belong to the acequia members, and no other person can use the ditch without a majority consent from the owners and payment of a share of ditch construction costs proportionate to the amount of water to be used.⁹⁸ Ownership of the ditch is separate from the right to use water that the ditch conveys.⁹⁹

Officials elected by the community manage the ditch or ditches with respect to construction, operation, maintenance, and water allocation, and the ditch members provide the necessary labor to construct and maintain the ditch.¹⁰⁰ Acéquias have three elected commissioners and one mayordomo, or superintendent.¹⁰¹ Each must own an interest in the ditch or a water right.¹⁰² The officers have the authority to manage the affairs of the acequia, including contracting and making

⁹² *Id.*

⁹³ *Id.* at 694-5, 140 P. at 1048-9 (1914).

⁹⁴ *Id.* at 692, 140 P. at 1045.

⁹⁵ NMSA 1978, §§ 73-2-1 (1874) through 73-2-68 (1993), NMSA 1978, §§ 73-2A-1 through 73-2A-3 (1988), NMSA 1978, §§ 73-3-1 through 11 (1903).

⁹⁶ NMSA 1978, § 73-2-1 (1874).

⁹⁷ NMSA 1978, § 72-2-3 (1851-1852).

⁹⁸ NMSA 1978, § 72-2-7 (1882).

⁹⁹ Holmberg v. Bradford, 56 N.M. 401, 403, 244 P.2d 785, 787 (1952).

¹⁰⁰ Snow v. Abalos, 18 N.M. 681, 691-4, 140 P. 1044, 1047-9 (1914).

¹⁰¹ NMSA 1978, § 73-2-12 (1895).

¹⁰² *Id.*

assessments to provide payment of expenses related to the acequia, distributing water, supervising ditch maintenance and operation, and collecting fines.¹⁰³

Acéquias are corporations with the power to sue and be sued.¹⁰⁴ Moreover, acéquias are considered political subdivisions of the State.¹⁰⁵ This status is significant because it allows acéquias to condemn land.¹⁰⁶ It also enables acéquias to receive loans from the Interstate Stream Commission for ditch improvements,¹⁰⁷ and exempts them from payment of taxes on irrigation works.¹⁰⁸ Within the Region, there are no longer acéquias in the Rio Grande Valley, because all the then-operating acéquias diverting off the Rio Grande joined to form the Middle Rio Grande Conservancy District. Today, there remain a few acéquias on tributaries, most notably on the Rio Jemez.

2. Domestic Water Supply Entities.

a. Cooperative and Mutual Domestic Water Associations.

Water for domestic uses was first described as “dipping” rights. People in the community had the right to take water from ditches or ponds for domestic uses. Today, these uses are often met through cooperative associations. Cooperatives may be formed to acquire and distribute any type of goods or services, including water.¹⁰⁹ Water cooperatives are also known as mutual domestic water associations and are organized as non-profit organizations.¹¹⁰

Five or more individuals, or two or more associations, may incorporate to form a cooperative.¹¹¹ The “dipping” rights provided the first water rights of many of these associations. Cooperatives may be financed in a variety of ways. Usually a cooperative sells shares to its members. Cooperatives may also borrow money, mortgage cooperative assets, or enter into agreements of mutual federation and aid with other cooperatives.¹¹²

¹⁰³ NMSA 1978, § 73-2-21 (1895).

¹⁰⁴ NMSA 1978, § 73-2-1 (1895).

¹⁰⁵ NMSA 1978, § 73-2-28 (1965)

¹⁰⁶ 1969 Op. Att’y. Gen. No. 69-96.

¹⁰⁷ 1964 Op. Att’y. Gen. No. 64-95.

¹⁰⁸ *Id.*

¹⁰⁹ NMSA 1978, § 53-4-3 (1939).

¹¹⁰ NMSA 1978, § 53-4-1(A) (1939).

¹¹¹ NMSA 1978, § 53-4-2 (1939).

¹¹² NMSA 1978, § 53-4-4 (1939).

Water cooperatives are private utilities because they do not hold themselves out to serve the public. Cooperatives are not required to obtain a certificate of necessity and convenience prior to acquiring or developing a water supply system.¹¹³ However, cooperatives must file an annual report with the public regulation commission that discusses the cooperative's financial condition.¹¹⁴ Failure to do so may result in revocation of an association's corporate status.¹¹⁵

In many parts of New Mexico, the growth of residential communities and land development are placing greater and greater demands on the natural and institutional resources of rural regions. As development expands beyond traditional community environs into new areas populated by diverse consumers, new institutions may be necessary to cope with the added demands, particularly with regard to the supply and delivery of water in adequate amounts and of drinking quality. Under New Mexico law, apart from cooperative associations, eight types of water entities may be formed to provide water for domestic and industrial consumers. These are investor owned utilities; municipal utilities; municipal improvement districts; county-owned utilities; county improvement districts; intercommunity water districts; water and sanitation districts; and sanitary projects. Each is briefly discussed below.

b. Investor Owned Utilities.

Investor owned utilities¹¹⁶ are formed by statute when "any five persons" who wish to form a company to construct and maintain reservoirs, canals, ditches, and pipelines to supply water for irrigation, mining, manufacturing, domestic, and other uses (including cities and towns), file articles of incorporation with the New Mexico Public Regulation Commission.¹¹⁷ The powers of such corporation include the power to construct conveyance channels, divert surplus water, furnish water for payment, and condemn land.¹¹⁸ The statute governing investor owned utilities will be repealed on July 1, 2003.¹¹⁹

¹¹³ See generally NMSA 1978, Ch. 53 art. 4 (1939).

¹¹⁴ NMSA 1978, § 53-4-34 (1939).

¹¹⁵ NMSA 1978, § 53-4-35 (1939).

¹¹⁶ NMSA 1978, §§ 62-2-1 through 62-2-22 (1887) (to be repealed July 1, 2003), NMSA 1978, § 53-11-1 (1967), NMSA 1978, § 53-18-12 (1967).

¹¹⁷ NMSA 1978, § 62-2-1 (1887).

¹¹⁸ NMSA 1978, §§ 62-2-5(C)(D)(E)(F) (1887).

¹¹⁹ NMSA 1978, § 62-2-1 (1887).

