

# *Catron County Water Rights Manual*

*Excerpted From:*

*New Mexico Water Rights*

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*The Catron County  
Water Advisory Board  
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Soil and Water*

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## FORWARD

Water is the most important resource next to air. Therefore, there is concern in Catron County about both the quantity and quality of available water. Any future economic development or population growth will require securing enough water for those purposes. The people of Catron County should be cautioned that, just because we may not want to grow economically, or in population, the water will be used. This would preclude any additional acquisition or water. That use will occur in neighboring counties in New Mexico and Arizona.

The implementing ordinance for the Catron County Water Plan requires that this Water Rights handbook be created. Because of the importance of water, each county resident should have a basic understanding of the laws, customs and history governing its use.

Because of the outstanding job Linda Harris did on the publication, New Mexico Water Rights, (Updated by Leslie Blair and published by New Mexico Water Resources Research Institute, Miscellaneous Report No. 15.), it was used for the foundation of this manual. The publication was edited to fit Catron County with specific sections added that apply exclusively to the county.

Also used in this publication is the, Ten Most Common Mistakes in Filings Before the State Engineer and How to Avoid Them, by Charles T. DuMars and Marilyn O'Leary, Sheehan, Sheehan & Stelzner, P.A., Albuquerque.<sup>1</sup>

Please read the glossary before beginning the text. Understanding the terms will be required. To get a more complete understanding of the county's water resources read the Catron County Water Plan. Contact the County Commission office for a copy or to locate a copy in your community. Residents are also encouraged to participate in the ongoing water planning and development actions. At the back of the publication you will find a list of where to get more information and a list of references and suggested reading.

The information contained in this manual is not intended to be a document giving legal advice, but rather a discussion of issues of general interest for the people of Catron County.

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<sup>1</sup> This article was the second in a series provided for the New Mexico Cattlegrowers Association by Sheehan, Sheehan & Selzner, P.A. The First was entitled "New Mexico Water Rights." The Authors thank Shannon Parden and Maria O'Brien for their research assistance. The article is not intended to be a document giving legal advice, but rather a discussion of issues of general interest.

## GLOSSARY

**Acequia:** Spanish, meaning a community irrigation ditch.

**Acre-foot:** quantity of water which will cover one acre of land to a depth of one foot; 43,560 cubic feet or 325,851 gallons of water.

**Adjudication:** a formal court proceeding which results in the determination of the validity and extent of a water right.

**Apportionment:** the division and distribution of water according to a plan.

**Appropriator:** a person who takes either surface water or groundwater and applies it to a beneficial use.

**Aquifer:** a geologic formation that contains sufficient permeable material saturated with water as to yield a usable quantity of water to wells or springs. The word aquifer is derived from Latin - "aqua" meaning water and "fer" meaning to carry.

**Beneficial use:** generally, all use including agricultural, commercial, industrial and recreational are considered beneficial; the exception is willful waste of water.

**Conditioned water right:** the case where a water right is granted under a condition that would prevent the right from adversely affecting the flow of a stream or another water right.

**Consumptive irrigation requirement:** the amount of water a plant needs over the entire growing season for transpiration and for building plant tissue, plus evaporation from the soil surface.

**Declared groundwater basin:** an area with definite hydrogeologic boundaries that has been designated by the State Engineer to prevent the impairment of existing water rights and to ensure the orderly development of water rights.

**Depletion:** the amount of water used and not returned to a surface or groundwater system; similar to consumptive use.

**Diversion:** a man-made construction that diverts water from its natural source for beneficial use.

**Drainage basin:** the entire area drained by a stream or system of connecting streams so that all the stream flow originating in the area is discharged through a single outlet.

**Fully appropriated:** when all available water has been reserved for existing water rights.

**Groundwater:** water located below the surface of the earth, including underground streams.

**Interstate compact:** an agreement made between two or more states, which is approved by Congress and the President, on the division of waters in rivers and streams that flow from one state into another.

**Litigation:** legal action

**Prior appropriation:** doctrine that entitles the first person who diverts water and puts it to beneficial use the right to the water; *first in time, first in right*.

**Pueblo water right:** the pueblo rights doctrine holds that any municipality tracing its origins to a Spanish or Mexican pueblo grant, has a prior and paramount right to all waters of non-navigable streams flowing through or by the pueblo to the extent necessary to serve its future growth. It is peculiar to California and New Mexico.

**Recharge:** the addition of water to an aquifer by infiltration, either directly into the aquifer or indirectly by way of another rock formation; recharge may be artificial, as when water is injected through wells or spread over permeable surfaces for the purpose of recharging an aquifer.

**Retired water right:** a right withdrawn from use.

**Return flow:** water diverted for a use that finds its way back to its source of supply.

**Riparian water right:** a doctrine common to the Eastern United States where one has the automatic right to use water from a natural water course on or next to a land owner's property; includes the right to have the natural flow continue.

**Senior water right:** determined by date or initiation of a right; first uses take precedence over users who come later.

**Surface water:** all water located on the surface of the land.

**Vested water right:** rights established before the 1907 Surface Water Code, or a groundwater right established prior to the State Engineer's declaration of an underground water basin.

**Waste:** any water diverted by man that is not put to beneficial use.

**Water right:** a legal right to divert water to a specific beneficial use.

**Winters Doctrine:** cornerstone of American Indian water rights; implies a reservation of water for the Indians present and future use and exempts Indian reservations from state water law.

## HISTORICAL PERSPECTIVE

For over a thousand years, inhabitants of New Mexico have been regulating their water supply. The ruins of ancient irrigation canals are reminders that even prehistoric Indians controlled their water resources. Soldiers with the expedition of Antonio de Espejo in 1582-83 wrote of finding irrigation ditches supplying water to pueblos near Socorro, and referred to the Acoma Indians as having "many partitions of water" in a marsh two leagues from the pueblo.

Writing about the Piro Indians on the Rio Grande, near what is now Socorro, Espejo wrote, "They have fields planted with corn, beans, calabazas, and tobacco in abundance. These crops are seasonal, dependent on rainfall, or they are irrigated by means of good ditches."

These 16th century Spanish conquerors brought to their new colony technological advances in ditch irrigation and a European legal system of water control. Some historians believe the legal system was borrowed from ancient Roman law, reasoning that the two were, "remarkably alike concerning water rights and appropriation."

Part of the legal process involved the formation of **acequias**, or community ditches, for irrigation. The required community participation in maintaining the extensive acequia system bound the early Spanish settlers into social units that still exist today. The ditch master, or **mayordomo**, who granted the right to use water and meted out the duties necessary to maintain the ditch, was an important village leader.

The pueblos adopted many of the Spanish irrigation practices such as the system of labor under a mayordomo and technical aspects of dam and acequia construction, but continued ancient ceremonial practices associated with irrigation. In the mid-1800's, Josiah Gregg described the Pueblo Indians as the best horticulturalists in New Mexico.

### Territorial Expansion

When New Mexico became a United States territory in 1848, it also became heir to an expansive agricultural system based on conflicting rules of land ownership and water rights. In the last half of the 19th century, massive irrigation projects were begun, dams were built, and the technology to pump water from underground sources was developed.

About the same time, mining also entered the competition for water. German miners, like the American settlers and the Spanish explorers before them brought along their special brand of water law. Each mining camp designed its own water laws based loosely on civil laws originating from the Germanic Middle Ages.

By 1851, the Territorial Legislature had begun establishing water laws based on the Indian-Spanish concept of public control of water and community ownership of ditches. The Legislature continued its protectorate role in water rights and by 1907 adopted the territory's first comprehensive surface water law. This law included the basic concept of prior appropriation and established the territorial engineer as the administering officer. Simply, prior appropriation means the first person to take the water and put it to a beneficial use is entitled to the right of that water, first in time, first in right. Similar laws regulating ground water were adopted by the State Legislature in 1931.

In the following decades, improvements in technology made it possible to tap vast underground water supplies and open new areas to irrigated agriculture. The oil and gas industry also began to boom, creating yet another demand for the state's water and adding to the complexity of administering New Mexico water law.

New Mexico as the beneficiary of historic custom, classic civil law, and modern technology, today has a set of strong, workable water laws that enable the state to make the best use of a scarce resource in an arid environment.

### THE NATURE OF WATER

An appreciation of the complexity of water law must begin with an understanding of the nature of water. Water is a dynamic resource that is in nearly constant motion as it travels from one stage to the next in the hydrologic cycle. (See Table 1) Movement gives it life, but this motion also makes it a most difficult resource to manage.

Efficient management is crucial. On average, New Mexico receives about 14 inches of

precipitation a year, earning it the dubious honor of being the third most arid state in the nation. Precipitation varies from about 7 inches per year in the northwest to about 20 inches per year in the mountains. In Catron County the precipitation varies from 14 inches to 60 inches. Precipitation plus river flows into the state add 87.7 million acre-feet of water each year to the state's total. However, 97 percent of this supply evaporates. Water flowing out of state and other losses leave a net of 1.2 million acre-feet of usable surface water. An acre-foot, the standard measure of water, is the quantity of water it takes to cover one acre of land to a depth of one foot or 325,851 gallons.

New Mexico's vast underground water supply is estimated at 20 billion acre-feet - enough to cover the entire state to a depth of about 260 feet. However, most of this water is saline and some that is considered fresh water is not desirable for public use.

## **Surface Water**

Surface water is all water located on the surface of the land, such as rivers, lakes, and streams. Because the Continental Divide runs through New Mexico, the state's surface water also divides to follow gravitational pulls either to the Pacific Ocean or the Gulf of Mexico. Most of the state's small streams flow intermittently, except in mountainous areas.

As a thoroughfare for these rivers, New Mexico must share the surface water with its neighboring states according to the terms of the interstate compacts and court decrees. Allocating an equitable share of the river flows requires close cooperation between New Mexico and its bordering states. For example, before New Mexico can build a dam on one of its interstate rivers, special care must be taken to make sure the state downstream receives its legal share of water.

For many years, most of New Mexico's water supply has been fully appropriated, meaning that all available water has been allocated to prior water users. Much of this is dedicated to agricultural uses. Only about 7 percent of New Mexico's population depends on surface water for domestic water needs.

## **Ground water**

Understanding ground water requires some science and little imagination. Because it is for the most part unseen, ground water has been viewed with both superstition and uncertainty. For centuries, only owners with divining rods claimed the magical power to locate ground water.

Fortunately, modern hydrology has removed much of the uncertainty and has made ground water easier to understand. Even so, many people still think of ground water as huge pools of water stored in underground caverns or as rivers flowing uninterrupted beneath the earth.

In truth, and in New Mexico, ground water either flows through gravel beds or takes a slow route through rock crevices. An underground water source is called an aquifer. When ground water flows through gravel beds, it is found in consolidated deposits such as silt, loose sand and gravel. This type of pebbly aquifer is porous like a sponge. It's a young aquifer, usually only about 2 million years old, and was formed when eroded debris from mountains washed in the valleys and stream channels. The Mesilla Basin, which underlies part of the Rio Grande, is typical of an unconsolidated aquifer.

The second and more prevalent type of aquifer is a consolidated rock aquifer, which can be billions of years old. It consists of mineral particles of different shapes and sizes welded by heat and pressure or chemical reactions into a solid mass. In a consolidated aquifer, water flows through tiny cracks, pores and channels within the rock. This type includes the water-bearing rocks of the San Juan Basin and the limestone aquifer in the Roswell Artesian Basin.

The valley-fill aquifers are mostly unconfined, consisting of sand, silt, gravel and clay. The water quality of these aquifers is suitable for most uses. The basin-fill aquifers may be unconfined, consisting of sand, silt, gravel and clay. The water quality of these aquifers is suitable for most uses. The basin-fill aquifers may be unconfined or confined, consisting of sand and silt, gravel and clay. In some areas the water from the basin-fill aquifers may be too saline for municipal or domestic use. Sandstone aquifers like those found in the northwestern part of the state are made up of a very-fine and medium-grained sandstone. Water quality of sandstone

aquifers near the outcrop areas are generally suitable for most uses. An outcrop area is where the aquifer "crops out" at the earth's surface. The limestone aquifers are usually confined, consisting mostly of limestone, dolomite gypsum and anhydrite. In some areas water from the limestone aquifers may not be suitable for municipal or domestic uses because of excessive chloride.

### **Mutually Dependent Systems.**

Both consolidated and unconsolidated aquifers operate in an indicate balance with the surface water supply. Generally surface and ground water systems are mutually dependent. Surface waters drain into underground crevices and gravel beds to replenish the aquifer, while springs and seepage from the aquifer provide underflow to streams and rivers. Changes in one system often cause changes in the other.

# **THE RIPARIAN DOCTRINE Vs. THE DOCTRINE OF PRIOR APPROPRIATION**

## **THE RIPARIAN DOCTRINE**

When the founding fathers wrote the United States Constitution, they borrowed heavily from English common law. The Riparian Doctrine was part of this adopted law. By definition, riparian means adjacent to or living on the bank of a river or lake. A riparian right, then, entitles the landowner the automatic right to use water from a natural watercourse on or next to his property.

Under this doctrine, rights to surface water are governed by two concepts. The first concept is natural flow where each owner of property on a watercourse is entitled not to have his stream flow retarded, diminished, or polluted.

The second concept is reasonable use where each owner may use water for any purpose as long as the purpose is reasonable with respect to other owners along the stream and the purpose does not unreasonably interfere with their uses.

While the principle of riparian rights worked as well in the humid eastern states as it had in England, the Riparian Doctrine was not suited to the arid West. New Mexico expressly rejected the Riparian Doctrine, first in its Territorial Supreme Court in 1891 and again in 1945 in the New Mexico Supreme Court.

Some states, however, have revised the Riparian Doctrine to fit their ground water needs. California, for example, adopted a Doctrine of Correlative Rights that stated each overlying landowner had a right only to a "reasonable" share of the ground water that would not damage his neighbor's supply. Reasonable depended on how much water was available.

## **PRIOR APPROPRIATION**

Although the riparian doctrine protected the property rights of the well owner, it failed to protect those of their neighbors.

Instead of the riparian doctrine, New Mexico adopted into its constitution the concept of prior appropriation. Under the definition of prior appropriation, a person who takes water and puts it to a beneficial use is an appropriator. The taking of the water constitutes an appropriation, which includes a priority date. This Priority entitles the appropriator to receive his full appropriation before those with junior, or newer, water rights receive their appropriations.

## **DEVELOPMENT OF A DOCTRINE**

The development of the Doctrine of Prior Appropriation had its beginnings in three unrelated events. [WAB Note: There are indications that there may have been one or several other influencing events in the development of the doctrine. We have no documentation, at this time, of the indigenous cultures development of allocation methods. There is also evidence of Old World settlers and explorers who brought their customs and laws governing allocation of water from their native arid Southern Europe and Northern Africa. Arid land cultures throughout the world have developed allocation methods similar to prior appropriation. The Spanish influence may have been the second time that culture brought the seeds of this doctrine to the New World. If there are readers who have additional information concerning the influences discussed above, please contact the WAB and we will endeavor to include that information in future editions.] The first was the Spanish Colonization of the Southwest in which the settlers introduced the acequia system of community-controlled irrigation.

The second was the Mormon migration to Utah where the religious settlers became the first Anglos to use irrigation on a large scale. When the Mormon church took possession of lands in the region, it also supervised parceling the land, including the right to water for irrigating the land.

Farther west, a third event also was affecting water rights - the California gold rush. Prior appropriation evolved from customs and rules established by gold miners by diverting water

from its natural banks to wash away soil clinging to the gold. Gold also lured thousands to the West and Southwest who otherwise wouldn't have risked the hardships of the arid territory. Whether it was brought about because of mining demands or the accompanying population boom, the Doctrine of Prior Appropriation was adopted in seven western states, including New Mexico, during the 25 years following the 1849 gold rush.

## **OWNING A WATER RIGHT**

An appropriation **water right**, like equipment or furniture, is considered property and can be separated from the land to another location. However, in most states, including New Mexico, the appropriator "owns" only the right to use the water and not the "corpus" or body of water itself.

New Mexico law broadly states that "all natural waters belong to the public and are subject to appropriation. The law further classifies all underground water as public. Arizona and Colorado also follow this doctrine.

The federal Desert Land Act of 1877, in recognizing the special needs of arid lands, validated the Doctrine of Prior Appropriation. The act provided that water rights on desert land should depend on "bona fide prior appropriation." The act also provided that all surplus water above actual appropriation and necessary use should be available for public appropriation for irrigation, mining and manufacturing.

## **BUILDING A DIVERSION**

The necessity of a man-made **diversion**, such as a dam or irrigation ditch, is the first of two requirements for establishing a water right in New Mexico. For example, a person who builds a ditch to carry water from the stream to a field is fulfilling the intent of establishing a water right. On the other hand, a person who uses water in a stream for fishing or rafting isn't establishing a right to that water because water hasn't been diverted from the stream. These in-stream uses are allowed, but are not protected by water rights. The act of diverting water, then, sets the stage for the second requirement for water right ownership - beneficial use.

## **BENEFICIAL USE**

According to the New Mexico Constitution:

"Beneficial use shall be the basis, the measure and the limit of the right to use the water....Priority in time shall give the better right."

The constitutions of a majority of the western states contain language similar to New Mexico's to determine water rights.

Although the law sets beneficial use as its standard for awarding a water right, and sets penalties for uses that aren't beneficial, the law doesn't specify what those uses are. Generally, nearly all uses are considered beneficial, whether water is used for agriculture, recreation, industry or secondary recovery of oil. New Mexico courts have validated uses such as stock watering as a beneficial use. However, the law does classify the "willful waste of surface or underground water to the detriment of another or the public" as a misdemeanor. "Willful waste", then, is not a beneficial use.

In New Mexico, all beneficial uses are considered equal regardless of the economic value produced by the use. Municipalities and counties may condemn water rights for public purposes at a reasonable price set by the court. This allows for population growth and its accompanying demand for more water.

New Mexico Supreme Court Justice Irwin S. Moise said the broad definition of beneficial use is workable because it makes the greatest use of water at the earliest date "when to have held it for future use would result in waste if not loss." He also said the law of supply and demand would take care of changes from one beneficial use to another or better use.

## **THE WATER RIGHT**

New Mexico historically has considered its water a public resource, and early on set forth rules governing its use. Gen. Steven W. Kearney, who claimed New Mexico for the United

States in 1846, followed historic precedent in recognizing the territory's public control over its water resources.

The 1907 Water Code confirmed these earlier laws and stated that "all natural water flowing in streams and watercourses, whether such be perennial or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use."

## **ADMINISTRATION**

Water rights development in many areas in the Southwest has a checkered history of chaos and bloodshed. This wasn't the case in New Mexico. Here the development of water rights evolved both naturally and formally throughout the state's history.

Administration has played a key role in this development. The 1907 Water Code established "the right to use of water" as regulated either by permit of the territorial engineer or by court decree. The state engineer, as he is now called, is appointed by the governor and confirmed by the state Senate. He is responsible for the general supervision of the state's water resources, including their measurement, appropriation and distribution.

The 1907 Water Code referred only to the state's surface water because at that time the technology for ground water development was in its infancy. The state's original water rights laws, then applied only to surface water.

At the turn of the century, farmers first began using the Roswell Artesian Aquifer for irrigation. By 1909 they had drilled 800 wells. By 1916 the basin had shrunk from 663 square miles to 499 square miles. Because the water supply was so uncertain, the Federal Land Bank of Wichita refused to grant loans to farmers using groundwater for irrigation. Concerned Roswell businessmen decided to study the situation, and enlisted the help of U.S. Geological Survey engineer Albert G. Fiedler on a cost-share basis. Fiedler studied the basin for a year and submitted a report to the businessmen in 1926. With Fiedler's help, attorney Herman Crile drafted a bill which was passed by the state Legislature in 1927, paralleling the state's surface water code. In 1931 the ground water code was slightly revised and reenacted substantially in its present form. Sixteen western states followed New Mexico's lead to some degree when establishing their ground water regulations.

The state engineer's initial jurisdiction over the state's surface water now includes responsibility over ground water in **declared ground water basins**.

When the state engineer finds that the water of an underground source has reasonably ascertainable boundaries, he can assume jurisdiction over the appropriation and use of such water by "declaring" or describing the administrative boundaries of the basin.

Within a declared underground water basin, no well may be drilled without a permit and drilling: may be done only by a well driller licensed by the State Engineer Office. Currently declared ground water basins cover approximately 86,073 square miles or 71 percent of the state.

The state engineer makes a declaration to protect prior appropriations, to guarantee the water's beneficial use and to ensure the orderly development of the resource. He may declare a basin without prior notice. However, after declaring the basin, he must hold a public hearing on the declaration within a specified time. The State engineer has no jurisdiction outside declared underground basins, except to prevent waste.

Declaring a basin has no effect on water rights initiated before the declaration date. After that date, however, those wanting a water right or wanting to drill additional wells for an existing right must apply to the state engineer for a permit. If the water in a basin has been fully appropriated, no new water rights will, be issued. Although many people refer to such basins as "closed", the correct term is "fully appropriated ted".

## **ADJUDICATION**

Although the State Engineer Office plays an administrative role, rather than a legal one, New Mexico statutes guarantee the authority of that office in the **adjudication** of water rights disputes. An adjudication is the legal action taken either by individual appropriators or by the state engineer to protect a water right and to ensure that it is properly recognized. A water right adjudication is similar to a title search used to investigate and guarantee proof of

ownership of property such as a house or land.

New Mexico law specifically allows the state engineer to:

"Adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties."

Adjudication, especially in water rights disputes, often depends on scientific studies for validation. The court can require the state engineer to provide this scientific information. For example, the court normally requires him to furnish a complete hydrographic survey of a stream system or ground water basin under dispute to determine the rights involved. The court has the jurisdiction to hear and determine questions necessary for the adjudication of all water rights within a stream system. During adjudication, the court, armed with scientific studies and other factual information determines the amount of water allocated to the right.

## LITIGATION

The state engineer also may intervene in some legal cases. Intervention may be necessary, for example, where the rights on an interstate stream system have been subject to legal dispute or litigation.

Because lawsuits can tie up water entitled to other users, the state engineer assumes control of all or any part of an interstate stream during litigation. During this period, he also controls the diversion and distribution of the water and administers it in the public interest. In all legal cases, the state engineer is represented by the special assistant to the attorney general, by the attorney general himself, or by the district attorney of the county where the legal questions arise.

## APPORTIONMENT

The state engineer 's prime responsibility is supervising the **apportionment** of water in the state.

Apportionment, usually the result of an adjudication, is the fair, but not necessarily equal, division of the state' s waters.

The state engineer supervises the apportionment of water according to the water rights permits issued by him and his predecessors and according to the adjudications of the courts.

In general, a stream system must be adjudicated by the courts before the state engineer will appoint a watermaster. The watermaster assumes responsibility for supervising the apportionment of the water in that stream system.

## DETERMINING THE AMOUNT OF A WATER RIGHT

One of the most crucial steps during an adjudication is deciding how much water to allocate to a water right. If the water right is historic, the amount based on the established use of the water and the water needed to continue that use.

The amount allocated to a new right depends on reasonable need and water availability. If the water is vested for a municipal or industrial use, the amount of the right generally is recognized as 60 percent of the pumping capability of the existing well. It is not generally feasible to pump a well more than 60 percent of the time over a year's time.

The amount allocated to any agricultural water right is based on the average **consumptive irrigation requirement** for all crops grown in the area. The requirement, as determined by the Blaney-Criddle method is the amount of water a plant needs over the entire growing season for transpiration and for building plant tissue, plus evaporation from the soil surface. Blaney-Criddle takes into consideration influences such as average temperature, sunlight, precipitation and growing or irrigation season for the area.

Another important consideration in determining an allocation to an agricultural right is the amount of **return flow**. Return flow is water that finds its way back to its source of supply.

Return flow also includes water that could return to its supply source if its course were not obstructed; avoidable and unavoidable losses such as water escaping from canal banks; and water unused by a plant because the water has seeped below the plant's root zone.

Return flow from irrigation, either as surface water or ground water, is an important factor in

determining the water supply for downstream users and in considering municipal and industrial uses.

## **WATER RIGHTS CONSTRAINTS**

Constraints on New Mexico's water rights are a mix of good news and bad news. New Mexico's pioneers in water rights administration set precedents that still protect the state's water. But some view those precedents as barriers to competition for water rights. New Mexico, through interstate compacts, gets an equitable share of the surface water flowing through the state. In turn, however, it can't use so much water that a downstream state fails to receive its equitable share.

The Bill of Rights in the U. S. Constitution protects a water right, which is legally considered property, by virtue of its prohibition against taking private property without due process of law and just compensation. However, federal jurisdiction prevents New Mexico from having sole authority over the water within its boundaries.

## **VESTED WATER RIGHTS**

New Mexico's 1907 Water Code set the criteria for rights to the state's water. The code also confirmed the priority of water rights established before that date. Those water rights, based on historical use, are called **vested**, or automatic, rights and date from the initiation of the claim. Since 1907, anyone wanting a surface water right has had to apply for a permit to the territorial or state engineer.

## **SENIOR WATER RIGHTS**

Those with **senior water rights** have priority over those with junior water rights. The seniority, however, applies only to the water in the original right. Any surplus water becomes available to junior appropriators. Sometimes there is no surplus. In a dry year, not uncommon in the Southwest, the more junior the right, the less likely it is that the junior right holder will get water.

Sometimes it's the senior right holder who objects to junior appropriators. A case in point concerned senior water right holders in the Carlsbad Irrigation District. They asked the state engineer to prevent junior right holders in the Pecos River drainage area from pumping ground water from the Pecos River Basin. They contended that the junior right holders caused a decrease in the flow of the Pecos River and a corresponding decrease in the supply available to downstream, senior right holders.

## **INTERSTATE COMPACTS**

One constraint in apportioning surface water is that most New Mexico's surface water supplies also are governed by eight **interstate compacts** to which New Mexico is a party. Although the Constitution forbids alliances and treaties between states, it permits states to enter into agreements, or compacts, with the consent of the U. S. Congress. Compacts may supersede state laws and constitutions and are preferable to judicial procedures in resolving interstate water conflicts. Compacts generally have the flexibility to meet changing physical and economic conditions.

States that share a surface water or groundwater resource enter into a compact first by reaching an agreement among the states concerning the conditions of the compact. Then, when the legislature of each state involved ratifies the compact, it is sent to each state governor for approval. After state approval, the compact is sent to the U.S. Congress for approval and then to the president where it is signed into law.

The Rio Grande Compact, which was adopted in 1938, is the major compact effecting New Mexico. The compact divides the river water, according to a set percentage among Colorado, New Mexico and Texas. Its purpose is to ensure that each state continues to receive its share of the surface water supply.

The Pecos River, Colorado River, Upper Colorado Basin, La Plata River, Canadian River and Costillo Creek compacts also have had considerable importance in determining New

Mexico's relations with its neighboring states.

## INDIAN WATER RIGHTS

Indian water rights also have a profound effect on New Mexico because nearly 10 percent of the state's area is Indian reservation. Indian water rights are similar to federal reserved rights in that the right pertains to a reservation for a particular purpose.

Federal control over Indian water rights is based on the **WINTERS DOCTRINE**. The doctrine is the result of a dispute in the early 1900s over water in the Milk River, which bordered the Indian reservation at Fort Belknap, Montana. Upstream land owners who acquired land under the Desert Land Act had constructed dams and reservoirs to divert the majority of the Milk River flow for their irrigation.

The United States, as the legal guardian of the Indians, sued to halt diversion construction. The settlers said they had a right to appropriate "unused" water under Montana state law. The Indian's countered that the river was reserved for future agricultural uses on the reservation based on an 1888 treaty. The U.S. Supreme Court in *Winter v. United States* ruled in favor of the Indians, reasoning that their right was based on the riparian right on federal land. The **Winters** decision was construed as a federal treaty with an Indian tribe, based on the power of the United States to exempt these waters from appropriation under state law.

Basically, the Winter Doctrine states that each reservation of Indian land carried with it, by implication, a reservation of water sufficient for all future purposes. The right is exempt from the traditional beneficial use requirement.

The Winters Doctrine stands as a cornerstone of American Indian water rights. In upholding the doctrine, the court ruled that "Indians have the right to occupy and use large tracts of arid lands." The court recognized water as essential to the purpose of the reservation.

Most Indian reservations were established before extensive water development in the West. Although current studies of water uses have addressed the issue of Indian water requirements, the fact remains that the quantities involved often are unknown or in dispute. Regional water development is dependent on knowledge of existing and proposed water uses.

New Mexico has three major Indian water rights lawsuits in progress involving four Pueblo reservations on the Rio Grande; the Mescalero Apache tribe on the Pecos River; and the Navajo, Jicarilla Apache and Ute Mountain tribes on the San Juan River.

New Mexico suffers from the same problem as many water-deficient states in contending with Indian water rights. When the Indians have attempted to claim their reserved water rights, other appropriators - many of them long-standing - may be deprived of the water they have used traditionally. On the other hand, the Indians may need these waters to develop their own lands.

## INTERSTATE GROUNDWATER TRANSFER

Under a January 1983 Federal District Court decision, New Mexico can no longer prohibit the out-of-state export of groundwater. New Mexico's statute banning the export of its groundwater was struck down as violating U.S. Constitutional protections for interstate commerce.

The decision was based, in part, on the decision of the U.S. Supreme Court in **Sporhase v. Nebraska** in which the court ruled that water was an article of commerce and that states are therefore limited in their power to ban its export.

The **Sporhase** decision has made state water laws more vulnerable to constitutional challenge. In *Sporhase*, the court held that the state's interest in conserving and preserving scarce water resources in the arid West clearly has an interstate dimension. The state could not, however, totally prohibit the export of state waters.

Because of the 1983 District Court decision, New Mexico's 1983 Legislature passed a law that allows groundwater export under certain conditions. The law states that:

In order to approve an application under this act, the state engineer must find that the applicant's withdrawal and transportation of water for use outside the state would not impair existing water rights, is not contrary to the conservation of water within the state and is not otherwise detrimental to the public welfare of the citizens of New Mexico.

Under the new law, the state engineer considers several factors in deciding whether to approve a permit to withdraw water from surface or groundwater sources in New Mexico for transport outside the state. The law then list six of the factors to be considered:

- the supply of water available to the state of New Mexico;
- water demands of the state of New Mexico;
- whether there are water shortages within the state of New Mexico
- whether the water that is the subject of the application could be transported feasibly to alleviate the water shortages in the state of New Mexico;
- the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and
- the demands placed on the applicant's supply in the state where the applicant intends to use the water.

To date, this new law has withstood legal challenge.

## **OBTAINING A WATER RIGHT**

Virtually all of the stat's surface waters are already appropriated. This means the right to use nearly every acre-foot of surface water is appropriated already. And, as was pointed out earlier, declared underground water basins cover approximately 71 percent of the state's area. The scarcity of high quality "new" water forces water rights to their best advantage, or market the rights to a new owner. Therefore, most of the transactions involving both surface and groundwater rights are water rights transfers.

However, its' important to first understand the legal procedure under which those original rights were obtained.

## **APPLYING FOR A SURFACE WATER RIGHT**

The process for obtaining a surface water right begins when the applicant files with the State Engineer for a permit to appropriate water. Application forms are available at the State Engineer Office in Santa Fe and at its district offices in Albuquerque, Roswell, Deming and Las Cruces. The applicant must state the amount of water to be used, place, purpose, and point of diversion. The application also may require information such as maps showing the location and nature of the proposed project, and the applicant's ability to accomplish construction. Plans and specifications are required on dams more than 10 feet high. If the construction involves more than 500 cubic feet of water per second, or construction of a dam more than 30 feet high, the State Engineer may require more information. Permits are not required for stock tanks that do not impound more than 10 acre-feet of water.

After filing, the applicant publishes a legal notice in a newspaper having general circulation in the are where the water will be appropriated. The notice is published once a week for three consecutive weeks giving all essential facts such as the applicant's name and address, the amount of water to be used, and the purpose and location of its use. Protests to the application must be filed with the State Engineer within 10 days of the last published notice.

The State Engineer will hold a hearing on protested applications. He may order that a hearing be held before he makes a decision, whether or not a protest has been filed. He will deny an application if unappropriated water is not available, if the new use will impair existing water rights, or if he believes approval would be detrimental to the public welfare or contrary to conservation of water in New Mexico.

If the State Engineer determines from the evidence that unappropriated water is available and that other criteria are met, he approves the application which then becomes a permit to appropriate water. The permit states when construction should be completed and when water will be put to beneficial use. The completion deadline depends on the size and complexity of the project, but normally is not more than five years. Also four years may be granted to allow the application of beneficial use.

When construction is completed, or at the construction deadline, the State Engineer has the site inspected. The inspector determines the capacity of the works, its safety and efficiency. If the inspector finds the construction satisfactory, he signs a certificate of construction setting forth the actual capacity of the works and the limits of the water right. However, if the construction fails inspection, the State Engineer can require that certain changes be made within a reasonable time.

## **APPLYING FOR A GROUNDWATER RIGHT**

The application procedure for rights to groundwater is basically the same as for surface water rights. The difference is that the State Engineer has jurisdiction only over water in declared basins. In a declared basin, after a permit has been granted, a well can be drilled only by a driller licensed by the State Engineer. As with surface water rights, those with vested rights are exempt from the application procedure, but should document their prior use with the State Engineer.

An applicant for a groundwater right also must comply with certain requirements before the application will be considered. First, the applicant must designate:

- the particular underground stream, channel, artesian basin reservoir or lake from which water will be appropriated;
- the beneficial use to which the water will be applied;
- the location of the proposed well;
- the name of the owner of the land on which the well will be located;
- the amount of water applied for;
- the use for which the water is desired; and
- if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.

In addition, if the well will be located on privately owned land and the applicant is not the land owner, further information must be provided showing the applicant has the owner's permission to drill and operate the well.

As with a surface water right, the State Engineer looks at the groundwater application and determines whether unappropriated water is available and whether granting the permit will impair existing rights. If water is available and the new permit won't harm other rights and isn't detrimental to the public welfare or contrary to conservation of New Mexico's water, the permit will be granted.

Some permits for a water right are granted automatically upon application to the State Engineer. For example, applications for domestic wells for household uses and noncommercial gardens of less than an acre generally are approved automatically unless the court limits such permits.

Domestic consumptive use of water is restricted in the San Francisco Basin of Southwestern Catron County. This basin is fully adjudicated and appropriated. Domestic use outside of a closed conduit from the well through the house and delivered to the septic drain system 3 feet below the ground is prohibited without a consumptive use water right.

If the seller of a parcel of land has water rights that the buyer expects to obtain with the property, the buyer should require that the water right be conveyed in the property deed and that all documents related to the water right be given to the buyer. Under a 1991 state law, a change of ownership form must be filed at the county clerk's office in the county where the water right is located. Those who inherit or purchase water rights must complete the change

of ownership form.

## **CONDITIONED WATER RIGHTS**

The State Engineer also can attach strings to a permit approval for either a surface or groundwater right. These strings are called **conditions**. A condition on a surface water right, for example, might hold the appropriator accountable for evaporation and transmission losses. Conditions also are attached to groundwater permits, for example, where there is a hydrologic connection between the surface water and the groundwater supply.

A right also might be granted on the condition that the appropriator agrees to purchase a certain amount of land and withdraw from use, the irrigation rights from the land. The appropriator then would be able to appropriate a stipulated amount of water for use in a new location.

Most water rights conditions are made so that the condition, such a retiring a right, must be met before the water may be diverted. If the appropriator fails to meet or maintain the condition, the permit will be canceled.

## **APPEALING A DECISION**

New Mexico, as guardian of the state's water, also guarantees the legal right of those who dispute the decision of the State Engineer in a water rights allocation. A person objecting to such a decision has recourse through the state court system. When the State Engineer rejects an application for a water right, the rejected applicant has 30 days to appeal the decision back to the State Engineer. The State Engineer then holds a hearing on the appeal and makes a second decision. The applicant then has 30 days to appeal that decision to the New Mexico District Court. Appeal from district court are then made to the New Mexico Court of Appeals.

Generally, water rights issues come under the authority of the federal courts only if there is a dispute over the constitutionality of a state law, if Indian water rights are involved, or if the dispute involves other states. The *El Paso v. Reynolds et al.* case, for example, came before the federal courts only because El Paso challenged the constitutionality of the New Mexico law banning export of the state's groundwater.

## **WATER RIGHTS TRANSACTIONS AND PENALTIES**

In areas of full appropriation, and that includes most of New Mexico, water rights become the object of supply and demand. Even in the market place, however, water rights are subject to state water laws. In New Mexico, a water right is a property right and inherent in that ownership is the prerogative to change the point of diversion, place or use of the right. These changes, however, are governed by the overriding question of whether or not the change will impair the existing water rights holders. Simply, if the change would result in an impairment to other rights, the transfer won't be allowed. The right retains its priority date and its specific quantity of water as long as the right continues to be exercised.

## **SEPARATING THE RIGHT FROM THE LAND**

Although the right to water is transferred with the sale of land, unless reserved in deed, a water right can be sold separately from the land and sold for a new use in another area (an application to the State Engineer is required). For example, an owner can sell the rights in one area for use in another area if the transaction will not impair other rights in the new area. By doing so, he withdraws the use of that water in the first area. The water withdrawn from use is adjusted for losses associated with the change of the point of diversion and credited to the water supply in the second area. The new owner then is allowed to draw from the credited supply.

## CHANGING THE PLACE OR PURPOSE OF USE

Most water rights transfers today are in groundwater and generally are transferred from agricultural uses to municipal, commercial or industrial uses. Remember, under New Mexico law, all beneficial uses are equal regardless of the value of the use.

A water right transfer does not always mean that the owner wants to change the use of the water, the amount of the allocation, or the location of the well under his recognized water right. Changes in place and purpose of use or changing the location of a well require application to the State Engineer and then showing that the change would not impair the existing rights.

In the case of well changes, the transfer might simply mean that the owner wants to "rearrange" wells or drill replacement wells. For example, a farmer wanting to take a water right from one field and use it on a second field, which he also owns, applies to the State Engineer for that change. The change may be allowed depending on the water source location, location of other rights, and return flow. Another instance might be where an owner applied for a permit to move a well because the casing in an old well was broken and could not be repaired.

The State Engineer must guard against injuring to downstream users from upstream changes. This is especially true of changes that affect **depletion**. Depletion is the amount of water used up and not returned to a surface or groundwater system. A water right owner for example, might want to change his use from agricultural to domestic, which would decrease the depletion percentage of the total amount diverted. In agriculture, for example, as much as 70 percent, or 2.1 acre-feet of the 3 acre-feet of water per acre delivered to a field actually may be consumed. The remaining 30 percent could seep back to the water source as return flow and be available for other uses.

In a subdivision, however, 50 percent or more of the water delivered could be returned to the water supply as sewage effluent, and so the subdivision could be allowed 4.2 acre-feet because has depleted only 2.1 acre feet.

In contrast,, road construction depletes nearly 100 percent of its withdrawal, and so a transfer from irrigation would be allowed a diversion of only 2.1 acre-feet per acre. A use in a new location is never allowed to deplete more water than was granted in the original permit.

A change within an agricultural use can effect the amount of water depleted, but if the use is changed from one type of crop to another, the State Engineer doesn't require a new permit. This type of change is allowed because the water use within a given area is determined by the average cropping pattern for the area, not on the amount used on a specific field.

## LEASING A WATER RIGHT

A Water right owner can lease all or part of this right for not more than 10 years without affecting his original water right. A major benefit of leasing the right is that the owner avoids losing the right due to nonuse. New Mexico water law requires that a water right be unused for four years to be subject to forfeiture.

The lease may be effective immediately, or the lease may be for future uses, as long as the use is not allowed to accumulate or impair other water uses.

## RETIRING A WATER RIGHT

In some instances, a new appropriation is allowed in a fully appropriated basin. In the Rio Grande Basin, for example, a new appropriation of groundwater is permitted under the condition that the appropriator acquire and **retire**, or withdraw from use, water rights in the amounts sufficient to compensate for the increasing effects of pumping on the stream.

This retirement scheduling ensures that the supply for continuing surface water rights will not

be impaired while permitting the new user to take a large portion of his supply from groundwater. The appropriator is, in effect, buying up, but not using, surface water in order to obtain rights to groundwater.

## **BASIN TRANSFERS**

The law doesn't allow a water right transfer from one ground water basin drainage basin to another. This prohibition maintains that the retirement of a right in one basin would not offset the effects of a new use in another basin. A transfer to another basin would amount to a new appropriation.

Generally, the physical transport of water from one basin to another is not allowed. One exception to this has been water from the San Juan-Chama project transported from the San Juan by way of the Chama River to the Rio Grande for uses within the Rio Grande drainage area. In this case, it is the water that is transported, not the water right.

Additionally transfers within the San Francisco Basin are restricted. Check with the Deming office of the State Engineer before proceeding with a purchase of water rights in this basin.

## **SPECIAL DISTRICTS**

Water rights owners can form irrigation and conservancy districts for their mutual benefit. Members of the districts share the costs and expenses of transporting the water and also the right to use the water. The major districts in New Mexico are the Middle Rio Grande Conservancy District, the Elephant Butte Irrigation District, the Carlsbad Irrigation District, the Pecos Valley Artesian Conservancy District, and the Bloomfield Irrigation District.

## **PENALTIES**

Just as New Mexico law governs water rights ownership and transfer, the law also carries penalties for neglecting those rights.

The most serious penalty is loss of the water right. In New Mexico, a water right owner may forfeit his right if he doesn't beneficially use all or any part of the water right for four years. If, after official notice from the State Engineer, the right holder still doesn't use his right within one year, the right reverts back to the public. The law provides for exceptions under circumstances beyond the owner's control. Not included in the four year limitation are periods allowed incorporated municipalities or counties for implementing their water development plans or for preserving municipal water supplies. Also exempt from the time requirement are active duty members of the armed forces.

Other water right transgressions are judged as misdemeanors and are punishable by a fine of up to \$100.00 or imprisonment of up to six months. The unauthorized use of water that belongs to someone else or willfully wasting surface or groundwater to the detriment of another or the public are misdemeanors.

It's impractical to save every acre-foot of water, and so some "waste" is inevitable. **Waste**, in the definitive sense, means unnecessary waste that reasonably can be avoided. Transmission loss of artesian water in excess of 20 percent is defined by law as waste. An example of willful waste would be a well allowed to flow 24 hours a day onto grazing land that has no constructed irrigation system.

## **WATER QUALITY**

Water quality in New Mexico for surface and groundwater is regulated and administered by the N.M. Environment Department and the N.M. Water Quality Control Commission. New Mexico coordinates with the Federal Government (EPA) in implementing the federal Clean Water Act and other federal acts which contain water quality protection provisions. New Mexico has also adopted a variety of its own laws such as the New Mexico Water Quality Act

governing water quality of surface and groundwater. These laws relate to such areas as: water quality standards, hazardous waste, solid waste disposal, underground storage tanks, point and non-point source discharges etc.

Water quality standards vary throughout the state. Different rivers or streams or specific segments of those rivers and streams can have different water quality standards based on different designated uses. The same is true for aquifers, portions of aquifers or different underground basins. Those recognized uses vary from protection and propagation of fish, shellfish and wildlife to recreation to agricultural, municipal, domestic and industrial water supplies.

Anyone performing any type of construction or creating any type of disturbance in a water course or ephemeral stream (arroyo) needs to contact the Army Corp of Engineers. Past a certain size, a 404 permit needs to be filed with them.

Any observations of contaminated surface or ground water should be reported to the local Water Advisory Board and to the above mentioned agencies.

## **WATER TESTING**

Checking your water for bacteria and other contaminants is a good idea when developing a water supply. All public water supplies need to be tested by a New Mexico Environment Department certified laboratory. Anyone can call their main office in Santa Fe and find out where the nearest field office is and where certified laboratories are. Silver City is the closest one to Catron County. All private water supplies can be tested by any lab that is capable of testing drinking water.

The N.M. Environment Department offers free private well water testing through water fairs. Tests for nitrates, sulfates, iron and organic vapors are performed at these fairs. These tests do not include bacteria and water from public water supplies. These fairs are given in selected communities throughout the state. Call the N.M. Environment Department to find out if and when they will be conducting a fair nearest you.

There are a lot of water treatment devices advertised on the market these days and not all of them do what they claim to do. They can be either filters or purifiers and are intended to treat domestic water supplies for a specific outlet (sink etc.) or for a whole house. Not all of them do what they claim they can do. Information on water treatment can be obtained from the Environment Department in Santa Fe.

## **IMPAIRMENT**

What happens when the water user above you on a stream uses all the water and you have an adjudicated right to the water that is senior to his water right? What happens when your neighbor drills a well and your well goes dry? Both of the cases above are examples of *impairment*.

## **SURFACE WATER**

On surface water such as streams or irrigation ditches it is relatively simple to prove impairment by putting devices to measure the water that is being delivered. The local irrigation district, Soil & Conservation Service, or the State Engineer Office should be willing to give the technical advice to measure actual water delivery to your land. A junior water right holder may use more water than is legal so as to impair, harm, or reduce your water delivery to a point below which you are legally entitled by your water right.

The first step is to document or collect the data that prove you are not receiving the water to which you are entitled. The second step should be direct contact with the individuals involved to notify them of your difficulty, since they may not be aware of your water shortage. (Irrigation Districts or Associations often have an individual responsible for solving these disputes) If you are still not satisfied, or there is no Irrigation Association, you have the option of

contacting the local water board, and if all the parties in the dispute agree, request that the local water board serve as an arbitrator. The next step should be to contact the State Engineer Office and if still not satisfied, seek redress through the court system.

## **Section 404 Permits**

The section 404 permit is part of the Clean Water Act. Under a cooperative agreement with the Army Corp of Engineers, the New Mexico Environment Department, Surface Water Quality Bureau, reviews all permit applications.

Most activities that would require construction in or near a river, lake or woodland require approval of plans before work begins. The act governs the placement of dredged or fill materials into waters during such activities as maintaining or constructing river crossings of utility pipelines, bridge building, bank stabilization, and dam and levee building.

The Environment Department and U.S. Army Corps of Engineers staff will assist in completing permit applications. Contact the New Mexico Environment Department by calling 1-(800)-879-3421 or (505)-827-2850.

## **UNDERGROUND WATER**

Proving impairment and seeking redress for impairment of ground water is more difficult. In an open and/or declared basin it is important to document the static water level in your well. Ideally it would be a good idea to turn your well off for an extended period of time and measure the water level. Then when you use the well for normal purposes measure the static water level again to collect the information to arrive at your well capacity. The local water board, Soil and Water Conservation District, well drillers and repairmen, Natural Resource Conservation Service and State Engineer Office will be able to help. If the well pipe needs to be pulled, another method for measuring static water level, is noting the water level that usually shows up on the pipe. The difficulty about impairment of ground water is if a neighbor's new well draws down your water level and your well still supplies the same amount or a little less water, you may feel you are being harmed, but since you are still receiving water the State Engineer Office may not feel your water right is legally impaired.

The only way you can prove impairment of ground water is by documentation. If another entity is lowering the water table and effecting your well, the State Engineer Office may not take any action until it either has documentation of a significant decrease in the water table, or the water in the horizon which supplies your well is depleted. Another difficulty is proving the actual cause of impairment. (Can it be proven the new windmill a mile up, the leaky pipe, or natural draught and reduced recharge are the cause of decreased water production.) The options, if there is a moderate draw down is (1) consultation with the other individuals that you feel may be effecting your well for a voluntary solution, (2) the local water board, (3) the State Engineer Office, and (4) civil legal action.

## **NORTH COUNTY INFORMATION**

The Quemado area is in a ***declared underground basin***. In 1995 the State Engineer designated the geohydrologic groundwater boundaries of the basin that encompasses the Little Colorado basin of Northwestern Catron County. A permit is required to drill a well and apply water to beneficial use.

For wells in existence before the Engineer's declaration:

The owner of a well should collect documentation showing beneficial use, initial well drilling, and measured historic water levels. Documentation may include photographs, dated surveys showing well locations, affidavits from individuals who can describe the location of a well, the date it was put into service, how much water was pumped and to what beneficial use was the water applied. This documentation could prove useful in the event of a dispute and /or an

adjudication of the basin to establish seniority of water rights .

For wells in existence after the Engineer's declaration:

Read the sections above for description of applying for a water right, application of water to beneficial use and impairment.

## PREPARING FOR CHANGE

New Mexico's aridity and isolation protected it from outside pressures long enough - about four centuries - to build a strong and workable water rights system.

Times change, however. The West's dry climate and wide open spaces now promote, not discourage development. Out-of-state demands as well as demands of new residents, new businesses, and new industries make it increasingly important that the state's water is managed well. This calls for us, as New Mexicans, to increase our understanding of our most valuable natural resource. We need to learn more about how science and technology conserve and preserve the quality that drives our underground and surface water systems.

As water resources increasingly change from a state to a regional or national issue, we need to look at how the water problems of other states affect New Mexico's water resources management.

It's only natural that when an increasing population is faced with a limited resource, it will press for changes in the laws which govern the distribution of that resource. It is important that when considering changes, New Mexicans have a thorough understanding of the history and reasoning behind those laws.

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## FOR MORE INFORMATION

New Mexico Water Resources Research Institute  
Box 30001 - Dept. 3167  
Las Cruces, New Mexico 88003  
505-646-1813

New Mexico Office of the State Engineer  
Interstate Stream Commission  
Directory of Office Addresses and Telephone Numbers Last Modified: 5/22/01

<http://www.seo.state.nm.us/inside/contact.html>

Office of the State Engineer 130 South Capitol Street NEA Building PO Box 25102 Santa Fe, NM 87504-5102 ☐☐☐☐	Phone: 1-505-827-6175 FAX: 1-505-827-6188
Program Support: (Lew Wallace Building)	1-505-827-6168
Financial Services Bureau	1-505-827-6107
Human Resources Bureau (Bataan Memorial Building)	1-505-827-6183
Information Technology Systems Bureau ☐☐☐☐	1-505-827-5825
Litigation & Adjudication Program: (NEA Building)	1-505-827-6150
Hydrographic Survey Bureau ☐☐☐☐	1-505-827-6154
Water Resource Allocation Program: ☐☐☐☐	1-505-827-6120 (FAX) 1-505-827-6682
(Bataan Memorial Building - Room 102) Water Rights Unit & District Offices - See below	
Hydrology Bureau ☐☐☐☐	1-505-827-6140
Water Use & Conservation Bureau Conservation (Bataan Memorial Bldg.) ☐☐☐☐	1-505-827-6691 (FAX) 1-505-827-3813
☐☐☐☐	
Water Use (Lew Wallace Building) ☐☐☐☐	1-505-827-6121 (FAX) 1-505-827-4692
Water Conservation Info-Line ☐☐☐☐	1-800-WATERNM (FAX) 1-505-827-3813
(Lew Wallace Building) Dam Safety Bureau ☐	1-505-827-6122 (FAX) 1-505-827-4692
☐☐☐☐	
Interstate Stream Commission: 407 Galisteo Street Bataan Memorial Building, Room 101 PO Box 25102 Santa Fe, NM 87504-5102	1-505-827-6160 FAX: 1-505-827-6188



OSE Hearing Unit:



1-505-827-1430  
(FAX) 1-505-827-3777

Administrative Litigation Unit

1-505-827-3519  
(FAX) 1-505-827-3520

Lew Wallace Building:  
495 Old Santa Fe Trail  
Santa Fe, New Mexico

New Mexico Environment Department  
Harold Runnels Building  
1190 St. Francis Drive  
Santa Fe, New Mexico 87505  
505-827-2850  
505-827-2836 (fax)  
1-800-222-6742 (Occupational Safety/Health)  
1-800-879-3421

## Appendix I

### FREQUENTLY ASKED QUESTIONS ABOUT THE LEGAL SERVICES DIVISION

Q. Is this the State Attorney General's Office?

A. No, but State Engineer attorneys are commissioned by the Attorney General to represent the State and the State Engineer in water right adjudications as Special Assistant Attorneys General.

Q. Do you give information/advice about water rights?

A. By law, the attorneys in the Legal Division may not provide specific legal advice to any person, nor provide them with legal representation on a specific matter. However, the Legal Division is pleased to provide general information to any person regarding pending adjudications.

Q. In what newspaper must legal notice of an application be published?

A. In a newspaper of general circulation in the stream system for a surface water application and in a newspaper of general circulation in the county in which the well will be located if for a groundwater application.

Q. If there is a mistake in the legal description in a notice, would the notice have to be corrected and published?

A. Yes.

Q. Who is responsible for the contents of the legal notice?

A. The applicant.

Q. I am involved in a water law suit against my neighbor. Will the Office of the State Engineer supply a witness for me?

A. No, each defendant is responsible for his/her own presentation.

Q. If I subpoena one of your staff, what can he or she testify about? Do I have to pay per diem to this person?

A. A State Engineer employee may only testify about general policies and practices of the office and cannot become the advocate for any defendant. State law requires a party who requested the subpoena to pay witness fee costs.

Q. The person I hired to drill my water well did a poor job, took too long to finish the work and charged too much. Will the Office of the State Engineer sue him for me and take away his driller's license?

A. The Office of the State Engineer cannot pursue a legal action on behalf of an individual citizen to recover money. However, the Office of the State Engineer does have jurisdiction to cancel a well driller's license for violations of the terms of a license. You should report any violations to the Office of the State Engineer.

## Appendix II

### THE TEN MOST COMMON MISTAKES MADE IN FILINGS BEFORE THE STATE ENGINEER AND HOW TO AVOID THEM

By  
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The increasing value of water rights in New Mexico makes it critical that rights are protected as fully as possible in filings at the Office of the State Engineer. Mistakes can be costly. Not all mistakes will cause a loss of rights, but they may complicate and delay the application process if, for instance, the state engineer must return an application for correction of a mistake. The state engineer will notice obvious mistakes, but others not evident from the face of the document may not surface until future conflicts arise as to the ownership and extent of one's water rights. Clearing up confusion at that point might be more difficult than doing it right the first time.

To protect one's water rights sufficiently, it is important that filings before the state engineer are accurate and thorough reflections of the rights .

We consulted with supervisors at various regional state engineer offices to come up with this list of the most common mistakes. We hope this newsletters focus on common mistakes made in filings before the state engineer and how to avoid them will be of assistance in filing documents.

**MISTAKE #1:** The legal description of a proposed or actual location of a well, place of use, or point of diversion is sometimes too broad, incomplete, or otherwise insufficient.

This article is the second in a series provided for the New Mexico Cattlegrowers Association by Sheehan, Sheehan & Stelzner, P.k The first was entitled "New Mexico Water Rights.' The authors thank Shannon Parden and Maria O'Brien for their research assistance.

This newsletter is not intended to be a document giving legal advice, but rather a discussion of issues of general interest.

**WHY IT CAUSES A PROBLEM:** If the description of the location is too broad or incomplete, the state engineer may not be able to find the location when a field investigation is conducted and may ask the applicant to revise the application form. Inaccurate computer-generated entries and satellite locations make it difficult to translate location descriptions. Also, the state engineer's office does not consider "projected" sections to be a legal description.

**SOLUTION:** Within the section, the well location should be accurate down to 10 acres. Use the New Mexico Coordinate System (X and Y coordinates), especially within grant areas. Both hydrographic survey and conservancy district map and tract numbers are also acceptable. Additionally, indicate the zone (West or Central, for example) and enclose a map with the application.

**MISTAKE #2:** The applicant does not declare or adequately describe all purposes for which the water is being and has been used.

**WHY IT CAUSES A PROBLEM:** Failure to document these facts may cause loss of the ability to use the right for specific purposes and might impair the ability to change the place or purpose of use of the right.

**SOLUTION:** Thoroughly describe and document all current and past uses of water in all filings with the state engineer, even if the water is no longer being used for all of those purposes. For

example, if water was used for stock and irrigation prior to 1988 and now is only being used for irrigation, document that the water was previously also used for stock. If a diversion used in the past was washed out, document its location and prior use. If a well that was formerly equipped is now located under a driveway, document what the water was previously used for and where the well was located.

**MISTAKE #3:** After a ground water basin is declared, water users already putting water to beneficial use fail to file a declaration of water right.  
(A map of declared underground basins is attached to this newsletter.)

**WHY IT CAUSES A PROBLEM:** The applicant could lose rights to which he or she is entitled. Suppose, for instance, that a rancher has drilled three wells and capped one, intending to use it again in the future. Then the state engineer declares a basin, and the rancher records the amount of water which has been put to beneficial use, but fails to mention the capped well and associated water or indicate an intention or diligence toward putting it to beneficial use. There is no P" to file a declaration, but sometime in the future this may be evidence of abandonment.

**SOLUTION:** If one believes that he or she has vested rights when the state engineer declares a basin along with an intention to apply more water to beneficial use in the future, a declaration of water rights should be filed. In the filing, state the ultimate amount that is intended to be used. Do not be talked into declaring less than the well's capacity if a future use for the water was contemplated when the well was drilled. Also explain what diligence or developments are intended to be made toward achieving that goal.

**MISTAKE #4:** After a permit for a well is granted, and new wells are drilled and water is put to beneficial use, the state engineer is not notified of those actions.

**WHY IT CAUSES A PROBLEM:** If completion of the well and application of water to beneficial use are not recorded by the filing of a "Final Inspection and Report," the state engineer will not issue a Certificate and License to Appropriate.

A water right is not perfected until that final certificate has been issued. If, on the other hand, the well has not been completed, the owner may need to file an Application for Extension of Time to Put Water to Beneficial Use. If such an application is not filed, the permit may be subject to forfeiture

**SOLUTION:** As soon as possible after a well is completed and water has been put to its permitted use, complete and file the state engineer form, "Final Inspection and Report." This form must be accompanied by a plat and prepared by a Registered Professional Engineer and Land Surveyor or Registered Land Surveyor.

**MISTAKE #5:** Changes in ownership and in the owner's address are not filed with the state engineer.

**WHY IT CAUSES A PROBLEM:** The state engineer will not process an application in the name of the present owner of the water rights until the ownership file is complete and up-to-date.

**SOLUTION:** In buying water rights or land with water rights appurtenant, first investigate the state engineer's file to ensure that the records are correct and complete. When ownership or addresses change, file a change of ownership form with the state engineer. A buyer should require the seller to sign and file the change of ownership form. When filing a change of ownership, there should be no gaps in ownership between the past owner of record at the state engineer's office and the present owner.

MISTAKE #6: The wrong form is used.

WHY IT CAUSES A PROBLEM: The top of the application form has a "title" line. This title may not correctly state the intentions of the applicant and consequently may not alert the state engineer to the applicant's goal.

SOLUTION: Be sure to use the correct form. If the titles on the forms available do not reflect the intended use, find the form that comes the closest, and then modify the caption so that it reflects your purposes. For example, an "Application To Change Place of Use" can be changed to an "Application To Enlarge Place of Use." (A list of all forms available from the state engineer is attached to this newsletter.)

MISTAKE #7: Requests for amount of use are inaccurate.

WHY IT CAUSES A PROBLEM: An applicant will receive rights only for the amount requested. If an application fails to include future projections of use, an applicant will not receive rights for the projected amount. Consequently, another application would be required to obtain the additional water. Also, the priority date for the latter amount will be the date of the second permit and thus will be junior to other appropriators rights obtained since the date of the first permit.

SOLUTION: Ensure that requests for amount of use include future projections.

MISTAKE #8: Applicants give insufficient reasons for requiring additional time to put their rights to beneficial use.

WHY IT CAUSES A PROBLEM: The state engineer may not grant an extension of time to put the water to beneficial use; the right could then be lost.

SOLUTION: Be sure to have a legally sufficient reason for requesting additional time to put the water to beneficial use. Such examples would be that there is litigation over the rights, the rights are in an estate being probated, the applicant has been seriously sick, or the applicant has begun the work necessary to put the water to beneficial use and needs more time for completion. Financial difficulties or economic reasons will not suffice.

MISTAKE #9: The applications are incomplete.

WHY IT CAUSES A PROBLEM: This delays processing of the applications while the state engineer either attempts to salvage an application or returns it to the applicant.

SOLUTION: Use N/A (not applicable) instead of leaving blanks, and be sure that all blanks are filled in. Also be sure that the application is signed by the applicant and a notary where applicable. Finally, ensure that the filing fee is correct and that the correct number of copies is filed.

MISTAKE #10: Filing fees submitted to the state engineer are incorrect.

WHY IT CAUSES A PROBLEM: The state engineer must notify the applicant that the fee is insufficient. Again, this delays processing the application.

SOLUTION: Ensure that the correct amount is enclosed with the application. In case of questions, call the office of the state engineer. (A list of state engineer regional offices is attached to this newsletter.)

## SUMMARY

The staff at the state engineer's office is willing to answer questions and assist applicants in filling out forms. They can be most helpful. Filling out forms correctly will speed a filing on its way. Finally, it is important to remember that some applications will require an independent determination by a hearing examiner before action on them can be taken. Also remember, however, that you as the applicant have a particular goal in mind. The personnel at the state engineer's office cannot give you advice on how to achieve that goal. If you have any questions at all, consult a competent water lawyer.

The following is a list of forms available from the Office of the State Engineer to be used in filings related to water rights. Prior to filing, the applicant should check with the state engineer's office to determine the proper fee.

1. Application to Appropriate Underground Waters in Accordance With Section 72-12-1 New Mexico Statutes.
2. Well Record.
3. Application for Permit to Repair or Deepen Well.
4. Declaration of Owner of Underground Water Right.
5. Change of Ownership of Water Right.
6. Proof of Completion of Well.
7. Final Inspection and Report of Beneficial Use, Underground Waters.
8. Application for Permit (To Appropriate the Underground Waters of the State of New Mexico).
9. Application for Permit to Change Point of Diversion and Place and/or Purpose of Use of Surface Waters.
10. Application for Extension of Time.
11. Application for Permit to Change Partial Point of Diversion (By Drilling a Well to Supplement Surface Waters).
12. Application for Permit to Change Place or Purpose of Use of Underground Waters.
13. Application for Permit to Change Location of Well and Place or Purpose of Use of Underground Waters.
14. Application for Permit to Change Location of Well.
15. Application to Change Point of Diversion and Place and/or Purpose of Use From Surface to Ground Water.
16. Application for Permit to Change Place or Purpose of Use of Surface Waters.
17. Declaration of Ownership of Water Right Perfected Prior to March 19, 1907.

18. Application for Permit to Change Point of Diversion (Surface Waters).
19. Application for Permit to appropriate the Public Surface Waters of the State of New Mexico.
20. Application for Extension of Time in Which to Perfect an Appropriation of Surface Waters.
21. Notice of intention to Make Formal Application for Permit.
22. Proof of Application of Water to Beneficial Use.
23. Proof of Completion of Works (Surface Waters).
24. Declaration of Ownership of Livestock Water Dam or Tank.
25. Application for Permit to Construct a Flood Control Dam.
26. Notice of Intention to Drill or Recomplete a Well Pursuant to Chapter 86 of the Session Laws of 1967.
27. Application for Renewal of Water Well Driller's License (with Attachment).
28. Well Driller's Bond.
29. Application for Well Driller's License.
30. Emergency Permit Authorizing the Drilling and Use of Well.