Basic Water Law Concepts

History of New Mexico Waters: A Brief Overview

Water issues have always plagued New Mexico. Its inhabitants have struggled with how to survive in a land thirsty for water from before recorded history. As past leaders of this arid land have implemented policies and laws to distribute the precious resource of water, so will its present and future leaders wrestle with these issues.

Water law is historically based. A brief overview of the peoples who have inhabited New Mexico provides the foundations of current water law. Concepts, attitudes and the language found in today’s constitution and statutes addressing New Mexico’s water law have long-standing historical roots.

Pueblos

New Mexico’s water use rights and practices predate statehood by several centuries. Ancient canals winding throughout the modern lands of New Mexico were initially constructed in pre-recorded history. The Pueblo Indians placed water to historical, beneficial use and thus, have an early priority date to their water rights. Early settlers noted the growing of corn, beans, melons and other crops which depended upon a wide variety of irrigation methods.

Spanish Influence

For decades water primarily supported local subsistence-based economies. The governing principles came from Spanish practices, including those of certain local controls over land and water and usufruct rights (the right of use). Developed by the Moors and Berbers, the acequia was a water conveyance system common in fifteenth-century Spain. Spanish settlers brought this system into the New World where it matured into the community acequia which became the generally accepted basis for water administration in New Mexico. The first acequias were constructed in New Mexico by the earliest Spanish colonists in about 1598 at Chamita on the lower Rio Chama.

Under both Spanish and Mexican rule, the equitable distribution of water was the most frequently contested issue. Most disputes were resolved at the local level, but provincial governors sometimes determined the outcome of

“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”

Constitution of the State of New Mexico, Article XVI, Irrigation and Water Rights

“Pursuant to the several statutes relating to the administration of the appropriation and use of water, including priority administration, the State Engineer must see to it that senior water rights are not impaired by new appropriations.”


Early settlers noted the growing of corn, beans, melons and other crops which depended upon a wide variety of irrigation methods.
During times of shortage, locally imposed interim measures allowed contending groups to share the shortage until precipitation brought increased stream flow.
“first in time, first in right,” the same principle was applied to the appropriation of water, resulting in the prior appropriation doctrine.

In a New Mexico territorial Supreme Court case in 1891, the Court specifically declared prior appropriation the law of New Mexico. In *Trambley v. Luterman*, 6 N.M. 15, 27 P. 312 (1891), the Court found that the prior appropriation of water for a grist mill on the Gallinas River takes precedence over a subsequent riparian owner’s assertion of a water right based on common law doctrine. The Court’s rejection of *riparian rights* in favor of *prior appropriation* was a precedent consistently followed in New Mexico thereafter. In 1905 the territorial assembly reduced existing practices of water use concerning appropriation of surface water to statutory form without substantial alteration. New Mexico’s system closely paralleled the appropriation doctrine developed by Anglo settlers in other western states and territories.

In 1907 New Mexico’s territorial legislature passed a comprehensive code of water law, which still forms the basis for the State’s water laws and regulations today. Although lawmakers intended to protect the community acequias and other traditional institutions, after 1907 the Anglo sociocultural framework increasingly dominated water policy. Besides codifying certain rights and practices, the legislature centralized the administration of water with the creation of the territorial engineer. This official had the authority to allocate water in various streams and approve applications for new irrigation projects.

**Statehood**

When New Mexico became a state in 1912, its constitution employed the principles of public ownership of water, the doctrine of prior appropriation and beneficial use – all of which were found in the 1907 Water Code. Early in its statehood, New Mexico entered into three compacts with neighboring states. These compacts attempted to minimize conflicts over the Colorado and La Plata rivers and the Rio Grande. Compacts were seen as an alternative to litigation with neighboring states.

The federal government also played a significant role in early New Mexico water law, entering into a Treaty with Mexico for delivery of Rio Grande waters in 1906 and building Elephant Butte Dam to serve the Rio Grande Project in 1916. Federal-state relations continue to be significant when issues surrounding New Mexico’s waters are being addressed, especially in regard to financing water infrastructure projects.

**Legal Concepts: A Brief Overview**

*Prior Appropriation*

Prior appropriation means that the right to water is determined by the chronological order in which claims (appropriations) to the water are made. The first person to use a quantity of water from a water source for a beneficial use has the right to continue to use that quantity of water for that purpose. Subsequent users from the same source can use the remaining water for their own beneficial purposes, provided that they do not impinge on the rights of prior users. The key word is “use” and the doctrine awards a water right to a person actually using the water. The idea is that if a senior
Article 16 of the New Mexico Constitution provides that the unappropriated water of every natural stream, perennial or torrential, within New Mexico belongs to the public and is subject to appropriation for beneficial use.

Non-use is protected for certain water users by allowing certain public water providers a forty-year planning period in which they would not be subject to forfeiture for non-use.

While New Mexico is the only western state that does not statutorily recognize “instream flow” as a beneficial use, an Attorney General Opinion issued in 1998 did indicate that New Mexico law allows the State Engineer to provide legal protection for instream flows in certain circumstances.

Article 16 of the New Mexico Constitution provides that the unappropriated water of every natural stream, perennial or torrential, within New Mexico belongs to the public and is subject to appropriation for beneficial use. A property right for surface or groundwater is actually a use right to “beneficial use” of the water, not ownership of it. When a water right is sold, it retains its original appropriation date and is limited to the amount of water historically consumed for that use.

Appropriation

A person may appropriate unappropriated water by filing a permit application with the State Engineer. The Engineer must find that there is unappropriated water available and that approval of the application will not impair existing rights, be detrimental to the public welfare of the state, nor be contrary to water conservation. The State provisions for public welfare and conservation, although not defined, were added to the law in 1985. A water right is subject to “forfeiture” or loss of that right for failure to “use” the water right. These constitutional and statutory terms and concepts are fundamental to the State’s water laws.
Groundwater

The State did not regulate groundwater use until 1931 when the Legislature declared underground water to be public and subject to appropriation for beneficial use. In basins that are ‘declared,’ that is, areas where the State Engineer deemed it necessary to limit the unregulated and unlimited use of groundwater, the State Engineer may require permits for new groundwater appropriations, too. The State Engineer makes these designations based upon the source aquifers being non-rechargeable or connected to streams. The criteria for issuance of groundwater permits are essentially the same as for surface water claims. There are currently thirty-three declared basins, covering about ninety-two percent of the state.

Priority Administration

In a system of prior appropriation, each water rights holder has a yearly quantity and an appropriation date. Each year, the user with the earliest appropriation date (known as the “senior appropriator”) may use up to the full allocation (provided the water source can supply it). Then the user with the next earliest appropriation date may use his or her full allocation and so on. In times of drought, users with junior appropriation dates might not receive their full allocation or even any water at all. Legally, shortages do not result in sharing of the resource or any diminishment of the amount the senior appropriator can take, if sufficient water is available. But historically there are many examples of shortage sharing among all users in a drought. Also, priority administration can be technically challenging. For instance, in years of low runoff it is difficult to prevent the delayed effects on senior water right holders, of pumping that has occurred in previous years by junior groundwater users.

Adjudication

The State’s statutes charge the State Engineer and the Interstate Stream Commission with the management of the State’s waters and its attendant responsibilities. A water rights adjudication produces a single decree that defines all competing demands on the stream system’s water supply so that the State Engineer can effectively carry out his statutory mandate to apportion and administer water to satisfy those demands. These adjudications result in the quantification and legal determination of surface water rights that predate the State’s adoption of the 1907 water code; the quantification and legal determination of groundwater rights that predate the State Engineer’s assertion of administrative authority over a groundwater basin; and the quantification and legal determination of the relative priorities of all water rights, both Indian and non-Indian, that share a common hydrologically connected source. These adjudications help the State define its existing water rights, meet its interstate compact obligations, and protect the State’s waters.

By Brigette Buynak (2008)
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