

# New Mexico Water Law Case Capsules

New Mexico has a rich body of water law. This list contains some of the key cases decided in the state and federal courts of New Mexico with *very brief* descriptions of the rulings. The finalized cases have been arranged by topic. This chapter is intended to be a quick and handy reference guide and not a thorough summary of the facts and law of each case. This year we have also included a list of water law statutes.

## Water Rights: Beneficial Use; Forfeiture; Priority; Representation

*State of New Mexico, ex rel. Erickson v. McLean*, 1957-NMSC-012, 62 N.M. 264, 308 P.2d 983. “Beneficial use” is the use of such water as may be necessary for some useful and beneficial purpose in connection with land from which it is taken. No one has right to use or divert water except for beneficial use.

*Carangelo v. D’Antonio*, No. 26,757, Slip Op. (N.M. Ct. App. 2014-NMCA 032, 320 P. 3d 492, Nov. 26, 2013). A diversion of native water to supply a non-consumptive beneficial use requires a permit for appropriation. The State Engineer has the authority to determine whether a new non-consumptive beneficial use would adversely impact “available water” in a fully appropriated basin and whether to issue a permit.

*Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, 81 N.M. 414, 467 P.2d 986. For the exercise of eminent domain, the beneficial use of water is a public purpose. A water right holder may condemn a right-of-way in order to put water to beneficial use.

*State of New Mexico, ex rel. Reynolds v. South Springs Co.*, 1969-NMSC-023, 80 N.M. 144, 452 P.2d 478. Forfeiture is a statutory penalty for four continuous years of nonuse of a water right. In contrast, abandonment derives from the water right holder’s intent to relinquish the right. A long period of nonuse, alone, does not constitute intent to abandon, but the burden shifts to the holder of the right to explain the nonuse.

*State of New Mexico, ex rel. State Engineer v. Pecos Valley Artesian Conservancy District*, 1983-NMSC-044, 99 N.M. 699, 663 P.2d 358. Priority

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*State ex rel. Erickson v. McLean*

administration of water rights need not wait for a final adjudication decree so long as due process rights are protected.

*State of New Mexico, ex rel., State Engineer v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998. The priority of a water right “relates back” to the date that the owner of the right initiated the process of putting water to beneficial use, so long as the owner is reasonably diligent in maintaining progress toward completion.

*State of New Mexico, ex rel. State Engineer v. United States of America, et al.* (San Juan River Adjudication), CV-75-184, Case No. AB-07-1, Memorandum Opinion and Order Granting Motions to Strike, November 30, 2011. Individual water owners using a community ditch are necessary parties in a lawsuit adjudicating their water rights. The ditch cannot represent the diverse interests of the individual owners. However, when the ditch pursues an interest it has in common with its individual users, it has legal standing to act on behalf of its members. This does not mean that the members automatically become parties to the lawsuit, nor does it mean that a law firm representing the ditch necessarily represents the members.

### Impairment

*Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, 141 N.M. 21, 150 P.3d 971. The State Engineer must evaluate the potential impairment of *all* water rights at the move-to location and not just those of the protestants.

*Mathers v. Texaco*, 1966-NMSC-226, 77 N.M. 239, 421 P.2d 771. The State Engineer determines what constitutes “impairment.” Some lowering of the water

table or some change in water quality does not necessarily require a finding of impairment of existing rights.

*Clodfelter v. Reynolds*, 1961-NMSC-003, 68 N.M. 61, 358 P.2d 626. The right to change the point of diversion, including a change from surface to groundwater, is an inherent element of the property right in water, subject to non-impairment of other’s water rights.

### State Engineer Authority

*Bounds v. D’Antonio*, 2013-NMSC-037, 306 P.3d 457. The domestic well statute, NMSA 1978, § 72-12-1.1, provides that the State Engineer “shall issue” domestic well permits. Since the issuance is mandatory, the State Engineer does so without conducting an assessment of water availability or impairment to others. The statute does not violate the prior appropriation doctrine. The domestic well statute is a permitting statute. The constitutional provision for priority administration determines how water rights are administered. Domestic permits are administered in the same manner as all other water rights. All water rights are inherently conditional, being dependent upon the availability of water.

*Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1, 94 P.3d 1. A State Engineer water permit provides permission to develop a water right with a specific place and a beneficial use. A permit does not constitute a water right in and of itself.

*Tri-State Gen. & Trans. Ass’n., Inc. v. D’Antonio*, 2012-NMSC-039, 289 P.3d 1232. Under NMSA 1978, § 72-2-9.1, the State Engineer has the authority to adopt regulations for administering water rights in the event of a water shortage through the curtailment of junior priority rights. In 2004, the State Engineer promulgated the Active Water Resource Management (AWRM) regulations to address water administration where a water rights adjudication had not been completed. In 2012, the N.M. Supreme Court affirmed the legislature’s grant of authority to the State

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*Montgomery v. Lomos Altos, Inc.*

Engineer to promulgate the AWRM regulations and to use the types of evidence listed in the regulations for determining priority. The Supreme Court also held that AWRM regulations are not unconstitutionally vague and do not violate due process.

*City of Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P.2d 73. Conjunctive management of surface and groundwater rights is necessary to protect senior water right users and is within the authority of the State Engineer. The authority to grant or deny an application to appropriate water includes the authority to impose conditions to insure that a new appropriation does not impair existing rights.

### Groundwater Rights

*Stennis v. City of Santa Fe*, 2008-NMSC-008, 143 N.M. 320, 176 P.3d 309. A permit from the State Engineer to drill a domestic well does not supersede a municipal ordinance restricting domestic wells.

*Herrington v. Office of the State Engineer*, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258. A *Templeton* well need not be located upstream of the surface point of diversion, as long as it taps groundwater that previously fed the surface supply.

*Templeton v. Pecos Valley Artesian Conservancy District*, 1958-NMSC-131, 65 N.M. 59, 332 P.2d 465. A senior surface-water user, whose surface supply is adversely affected by junior wells, is entitled to drill a supplemental well to recover his full appropriation. The well may access only groundwater that originally fed the surface supply.

### Endangered Species

*Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010). Environmental groups sued the United States Bureau of Reclamation and the United States Army Corps of Engineers in federal court under the Endangered Species Act, challenging the validity of a biological

The City of Albuquerque was granted a permit to divert surface water from the Rio Grande and then return it to the river without consuming any of it.

*Carangelo v. D'Antonio*

opinion (Opinion) issued by the U.S. Fish and Wildlife Service. The Opinion concerned the effects of federal water project activities on the endangered Rio Grande silvery minnow. The environmental groups argued that the Opinion, then in effect, did not adequately consider all water in the Rio Grande, including the water under contracts to diverters such as the City of Albuquerque. During the course of litigation, a new Opinion was issued in 2003, which rendered the litigation “moot.”

After numerous hearings, court decisions and appeals to the 10<sup>th</sup> Circuit Court of Appeals on various issues, a decision was rendered in April of 2010 that essentially has vacated all rulings in the case. The issues raised in the case about federal use of water for endangered species remain unresolved.

The 2003 Opinion expired in the spring of 2013. Although federal and non-federal water management agencies are working to complete a new opinion, a new one has not been issued as of December of 2013.

Please go to [http://uttoncenter.unm.edu/pdfs/Silvery\\_Minnow\\_litigation.pdf](http://uttoncenter.unm.edu/pdfs/Silvery_Minnow_litigation.pdf) for a thorough summary of the eleven years of litigation in federal court.

### Ongoing Litigation

*State of New Mexico v. United States, et. al.*, U.S. Dist. Ct., Dist. of N.M., 2011-CV-691. On August 8, 2011, the New Mexico Attorney General filed a lawsuit against the U.S. Bureau of Reclamation (Reclamation) over a purported change in the accounting and allocation of the water in the Rio Grande Project. In late July of 2011, Reclamation allegedly reallocated

approximately 33,000 acre-feet of New Mexico Compact credit water so that water could be made available for release to Texas. In 2008, a new Operating Agreement was implemented between the Elephant Butte Irrigation District (EBID), the El Paso County Water Improvement District No. 1 (EP #1) and Reclamation. The new agreement changed the method of allocation of Rio Grande Project waters. The complaint filed by the Attorney General's Office alleges the new operational protocol results in a dramatic shift in the net allocation of Project water. Under the previous protocol, EBID received 57 percent of the water and EP #1 received 43 percent. These percentages were based on irrigated acreage in each of the districts. The Attorney General argues that the new protocol results in 38 percent allocation of Rio Grande Project water for EBID and 62 percent for EP #1. The districts assert that the new operating agreement takes into account groundwater withdrawals by EBID farmers as well as irrigated acreage. The federal court has stayed this case until the U.S. Supreme Court has decided whether to take *Texas vs. New Mexico and Colorado*, U.S. Jan. 8, 2013, CV No. 22O141 ORG. For more information, please see the chapter "Water Litigation in the Lower Rio Grande" in this edition of *Water Matters!*

*Augustin Plains Ranch LLC v. Verhines et al.*, No. 2012-CV-08. Augustin Plains Ranch LLC filed an application with the New Mexico State Engineer in 2008 for a permit

to develop 37 wells with a maximum depth of 3,500 feet and to appropriate 54,000 acre-feet of groundwater per year for any uses within New Mexico. The wells were to be located in the San Agustin Basin in Catron County. The application was protested by many. In April of 2012, the State Engineer denied the application because it lacked specificity as to use and place of use. The Ranch appealed to the Seventh Judicial District Court in Catron County on the issue of whether the Ranch should be allowed to present evidence to the State Engineer in support of its application. The district court denied the Ranch's appeal in November 2012 on the basis that specificity regarding use and place of use is required in a groundwater application as a matter of law. In 2013, the Ranch filed in the Court of Appeals arguing that the district court erred in upholding the State Engineer's denial of application without an evidentiary hearing on the merits of the application. As of November of 2013, this case is still pending.

#### Updates From N. M. State Engineer Decisions—2012

*In the Matter of the Application by the Albuquerque Bernalillo County Water Utility Authority for Permit to Appropriate, Store, and Divert the Public Surface Waters of the State of New Mexico*, Hearing No. 11-007 (December 2012). In May of 2001, the City of Albuquerque filed a permit to appropriate surface-waters in New Mexico. It was returned to the Bernalillo County Water Utility Authority without publication. In May of 2012, the Water Rights Division filed a Motion for Summary Judgment stating that, as a matter of law, there are no unappropriated surface-waters available to satisfy the application. The State Engineer granted the motion in December of 2012. He found that the surface-waters of the Rio Grande stream system are fully appropriated and therefore, rejected the application based on NMSA 1978, § 72-5-7. The case is on

“Until now, ‘fully appropriated’ has been conceptualized with regard only to consumptive appropriations.” Today, “we must recognize the possibility that a non-consumptive beneficial use piggy-backed onto a fully appropriated basin can, under appropriate circumstances, be a legitimate appropriation.”

*Carangelo v. ABCWUA*

appeal in the Second Judicial District Court. The State Engineer filed a Motion to Dismiss for Lack of Property Venue and both parties filed a joint motion to stay proceedings. The court granted the order to stay proceedings until December 18, 2013,

and no decision has been entered as yet. See Case No. D-202-CV-201300153.

Latest Update by Stephanie Tsosie, University of New Mexico School of Law, Class of 2015, (2013).

## New Mexico Water Law Statutes

The following outlines the subject matter of Chapter 72, Water Law.

Chapter 72 of the New Mexico statutes articulates the water law of the state. The articles within the Chapter outline types of water uses, water sources, and parties and offices that may be a part of administering water rights. A basic description of each article is given below.

**ARTICLE 1** outlines water rights in general. Subsections 1 through 4 detail definitions of water rights, sources of water, and the implementation of the Desert Lands Act. Subsections 5 through 8 outline individual uses of water. Subsections 9 and 10 provide for municipal water uses. Subsections 11 and 12 give specific provisions for Indian water rights settlements.

**ARTICLE 2** details the duties and powers of the State Engineer.

**ARTICLE 3** defines water districts and the position of water masters. Subsections detail the accountability and appeal procedure from the water master to the state engineer.

**ARTICLE 4** provides for water surveys, investigations, and the adjudication of water rights.

**ARTICLE 4A** provides for water project financing.

**ARTICLE 5** addresses appropriation and use of surface water.

**ARTICLE 5A** details groundwater storage and recovery.

**ARTICLE 6** contains provisions for water use and leasing, including the application, approval, notice, hearings and appeals.

**ARTICLE 7** outlines the process of appeals from the State Engineer to the District Court.

**ARTICLES 8 & 9** outline the offenses and penalties under and application of the Water Act of 1907.

**ARTICLE 10** addresses community uses of water.

**ARTICLE 11** concerns salt lakes.

**ARTICLE 12** concerns underground waters.

**ARTICLE 12A** outlines procedures for mine dewatering.

**ARTICLE 12B** has two sections for the application and use of New Mexico waters outside the state.

**ARTICLE 13** contains provisions for artesian wells.

**ARTICLE 14** sets up the Interstate Stream Commission and provides for the protection of interstate waters.

**ARTICLE 15** lists the notice, ratification, and approval of interstate compacts.

**ARTICLES 16 THROUGH 20** consist of flood control provisions for Albuquerque, Las Cruces, Southern Sandoval County, Eastern Sandoval County and other Flood Control Districts.

