

Basic Water Law Concepts

History of New Mexico Waters: A Brief Overview

Water problems have always plagued New Mexico. Its inhabitants have struggled with how to survive in a land thirsty for water from long before recorded history. Just as past leaders of this arid land have tried to implement policies and laws to distribute the precious resource of water equitably, our present and future leaders will continue to wrestle with how to most wisely manage water in New Mexico.

Modern water law has been forged by history. Concepts, attitudes, the language found in today's constitution, statutes, and judicial decisions addressing New Mexico's water law have long-standing historical roots. A brief overview of the peoples who have inhabited New Mexico provides a basic understanding of current water law.

Pueblos and Tribes: New Mexico's indigenous peoples have been harnessing water for irrigation since as early as 800 A.D. Ancient canals still wind throughout the modern lands of New Mexico. When the Spaniards arrived in the mid 1500s, the Pueblos and Navajos were established agrarians, with developed irrigation canals and ditches. Early settlers noted the growing of corn, beans, melons, and other crops that depend upon a wide variety of irrigation methods. The Pueblo Indians are the first people known to have placed water to beneficial use in New Mexico, which today entitles them to the earliest priority dates for their water rights.

Spanish Influence: The Spaniards brought to the new world their legal principles for governing water usage. Central to their water management approach was the acequia, a community managed water distribution system. 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. The acequia management system 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.

“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.”

Bounds v. D'Antonio,
2013-NMSC-037,
306 P.3d 457

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From a Mexican Province to an American Territory: Under both Spanish and Mexican rule, the equitable distribution of water was a frequently contested issue. Most disputes were resolved at the local level, but provincial governors sometimes determined the outcome of more difficult cases. During times of shortage, locally imposed interim measures allowed contending groups to share the shortage until precipitation brought increased stream flow. Although not everyone was happy with the process, it provided community participation and reflected time-honored procedures for water management. According to historian John Baxter, the goal seemed to be the healing of rifts within the community rather than determining a legal winner and loser.

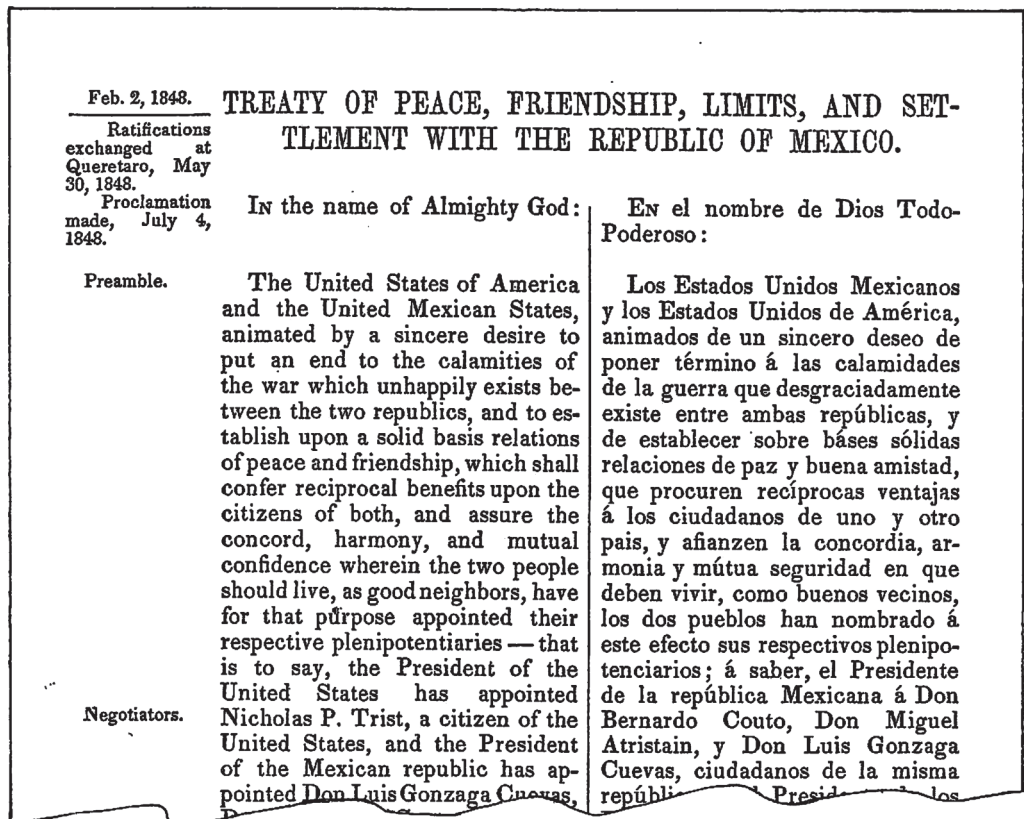
Feeling national growth and expansion to be its "Manifest Destiny," the United States began to look to the lands of New Mexico. In September of 1846, a month after General Stephen Watts Kearny led the U.S. Army of the West unopposed into Santa Fe, he implemented a legal code for the new territory. It provided protection to the inhabitants of their life, property, and religion. The Kearny Code stated that the "laws, heretofore in force concerning water courses, . . . shall continue in force."

In 1848, the United States and Mexico entered into a peace treaty to end the Mexican-American War. The Treaty of Guadalupe Hidalgo transferred New Mexico and California to the United States. Five years later, the strip of land in the most southern parts of New Mexico and Arizona was added under the Gadsden Treaty. Under both treaties, inhabitants' pre-existing property rights are to be respected.

New Mexico water law began changing in the 1880s with the coming of the railroad and outside investors. The territorial laws, written in the late nineteenth century and

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Treaty of Guadalupe Hidalgo



later adopted by the State through its constitution and statutes, were based on Western mining laws and embraced the concept of prior appropriation. Miners who staked claims needed to use water and with those needs came the question of how to determine rights to stream flow diversions. Since titles to mining claims were based on “first in time, first in right,” the same principle was applied to the appropriation of water, resulting in the development and adoption of the prior appropriation doctrine.

In an 1891 Territorial Supreme Court case, *Trambley v. Luterman*, the Court specifically identified prior appropriation as the law of New Mexico. The Court found that an earlier appropriation of water for a grist mill on the Gallinas River near Las Vegas, New Mexico, takes precedence over a subsequent owner’s assertion of a water right under the common law doctrine of riparian rights. The Court’s rejection of *riparian rights* in favor of *prior appropriation* created a precedent that has been since consistently followed in the state. In 1905, the territorial assembly reduced existing practices regarding surface-water use to statutory form without substantial alteration. New Mexico’s system closely paralleled the appropriation doctrine developed by 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. In addition to codifying certain rights and practices, the legislature centralized the administration of water with the creation of the territorial engineer (now the State Engineer). This official has general authority to supervise the waters of New Mexico including the measurement, appropriation, and distribution of water.

Statehood: When New Mexico became a state in 1912, its constitution formally adopted the principles of public ownership of water and the doctrines of prior appropriation and beneficial use found in the 1907 Water Code.

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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. New Mexico is now a party to eight interstate compacts, administered by the New Mexico Interstate Stream Commission.

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. The federal government rehabilitated irrigation works on the lower Pecos River in 1908, and formed the Carlsbad Irrigation District. The federal government then built Elephant Butte Dam to serve the Rio Grande Project in 1916. Federal-state relations over water issues continue to be significant, especially in regard to financing water infrastructure projects, protecting water quality, and recovering endangered species.

Legal Concepts: A Brief Overview

Prior Appropriation: The doctrine of prior appropriation states that when shortages occur, the right to use water is determined by the chronological order in which the water

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was put to beneficial use. “Senior” appropriators are served first, and in a water-short year, “junior” appropriators may receive a reduced amount or no water, depending on the supply. A senior user is the first person to apply a quantity of water to a specific beneficial 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 appropriators. The key word is “use” as the doctrine awards a water right to the person actually using the water.

Beneficial Use: Fundamental to maintaining water rights under a system of priority administration is the requirement that a user apply the water to a beneficial use. Beneficial use does not include the wasteful use of water. In fact, either wasting water or using water without authorization is a crime in New Mexico. A water right may be lost through “forfeiture” or “abandonment.” Under either mechanism, the owner loses the right for failure to “beneficially use” the water. The idea is that if a senior water user no longer appropriates water, the water can be freed up for someone else to use. The New Mexico Constitution states “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”

The New Mexico Constitution does not define beneficial use, but judicial decisions and statutes characterize it as including irrigation, domestic, commercial and industrial, game and fish, and endangered species uses. There is no priority scheme *by type of use* for allocation of water during shortages.

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appropriated prior to statehood belongs to the public and is subject to appropriation for beneficial use. A water right is actually a right to “beneficially use” water, not a right to own water. Water rights can be conveyed with real property or severed from the property and sold separately. 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.

Pre-1907 Water Rights: The New Mexico Constitution recognizes and confirms all existing appropriations of water for useful or beneficial purposes. These pre-existing vested water rights date from the initial use of that water. After 1907, a permit from the State Engineer was required for any new appropriations of surface-water. One may still claim pre-1907 surface-water appropriations by filing a declaration of use with the Office of the State Engineer (OSE). A limited review of a declaration is performed to be sure there is no overlap with another declaration. However, under current practice, outside of the adjudication process, the State Engineer will not formally recognize pre-1907 water rights until a transfer or change of use is proposed, at which time the OSE will undertake a validity study. The practice for determining the validity of pre-1907 rights may vary from basin to basin according to the type of records available.

Surface Appropriations: Since 1907, a person may use unappropriated surface-water or transfer existing water rights after receiving a permit from the State Engineer. The Engineer must find that there is water available and that approval of the application will not impair existing rights, be detrimental to the public welfare of the state, or be contrary to water conservation. The provisions for public welfare and conservation, although not defined, were added to the law in 1985. If the new use of water meets these criteria, the State Engineer will issue the requested permit. Once the water has been put to beneficial use as described in the permit, the applicant may

submit proof of the beneficial use of the water to have the water right formally licensed by the State Engineer.

Groundwater: The State did not regulate groundwater use until 1931 when the legislature declared groundwater to be public and subject to appropriation for beneficial use. In basins that are “declared,” that is, in areas where the State Engineer deemed it necessary to limit the unregulated and unlimited use of groundwater, the State Engineer requires permits for new groundwater appropriations like those required for surface-water appropriations. 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. In 2006, the State Engineer completed the declaration of all groundwater basins within the state. For more information, please see the chapter “Groundwater” in this edition of *Water Matters!*.

Priority and Alternative Administration: Under the doctrine of prior appropriation, water rights owners are entitled to a given quantity of water for a specified purpose. Each water right also has an associated priority date based on when owner took the first steps to put the water to beneficial use. Each year, the senior owner who has the earliest appropriation date may use up to the full amount of the water right, provided that the water source can supply it. Then the owner with the next earliest appropriation date may use his or her full allocation and so on. During shortages, junior owners might not receive their full allocation or even any water at all. Under the prior appropriation system, shortages are not shared and do not result any diminishment of the amount a senior appropriator can take, if sufficient water is available. Understandably, priority administration can be technically and politically challenging. For instance in years of low runoff, it is difficult to prevent the delayed impacts on senior surface-water right owners from pumping that has occurred in previous years by junior groundwater users.

The State’s statutes charge the State Engineer with pursuing water rights adjudications as one of its water management responsibilities.

The New Mexico Supreme Court has recognized the broad discretion of the State Engineer to administer water within New Mexico’s version of the prior appropriation system. Historically, there have been many water sharing agreements among water users in times of shortage, including water rotation and scheduling agreements. The State Engineer encourages local communities’ agreements that avoid the need to strictly enforce the priority system.

The State Engineer has also been authorized to administer water right priorities in areas where the courts have not yet formally determined the priority dates and quantities of existing water rights through adjudication. With the establishment of water districts and water masters, the State Engineer can enforce priorities or local agreements, even in the absence of fully adjudicated water rights. The state Supreme Court upheld this authority in the 2012 case, *Tri-State v. D’Antonio*. For more information, please see the chapter “Active Water Resource Management” in this edition of *Water Matters!*.

Adjudication: The State’s statutes charge the State Engineer with pursuing water rights adjudications as one of its water management responsibilities. The purpose of an adjudication is to formally describe water uses in a stream system so that the State Engineer can effectively carry out his statutory mandate to apportion and administer water within that system. An adjudication results in a final decree that defines and formalizes all rights to a stream system’s water supply. The decree quantifies and legally determines: all surface-water rights that predate the State’s adoption of the 1907 water code; all groundwater rights that predate the State Engineer’s assertion of administrative authority over a groundwater basin; all water rights that are subject to State Engineer permitting; and the relative

priorities of all water rights, both Indian and non-Indian, that share a common hydrologically connected source. Ultimately these adjudications should help the State define its existing water rights, meet its interstate compact obligations, manage shortages, and protect the state's waters.

For more information, please see the chapter "Adjudication" in this edition of *Water Matters!*.

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