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A Water Rights Manual for Mutual Domestic Water Consumers Associations

Utton Center, University of New Mexico - School of Law

Zachary Carpenter

University of New Mexico - School of Law

Gregory Chakalian

University of New Mexico - School of Law

Darcy S. Bushnell

University of New Mexico - School of Law

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**A Water Rights Manual
for
Mutual Domestic Water Consumers Associations**



Utton Transboundary Resources Center

University of New Mexico
School of Law
MSC11 6070
1 University of New Mexico
Albuquerque, NM 87131-0001

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Preface

The Utton Center prepared this Water Rights Manual to assist Mutual Domestic Water Consumers Associations (MDWCAs) with the development, protection and management of their water rights.

The handbook was prepared in 2011 by Zackary Carpenter and Gregory Chakalian, both of the UNM School of Law Class of 2013; edited by Darcy S. Bushnell; and updated in 2013.

Greatest thanks to Jeff Albright, Ellen Drew, Matt Holmes, Ramón Lucero, Heather Himmelberger, Adrian Oglesby, Blanca Surgeon and Jerri Trujillo for their invaluable guidance and critical suggestions.

MDWCAs are formed under the New Mexico Sanitary Projects Act (NMSA 1978 § 3-29-1, *et seq.*¹) to:

improve the public health of rural communities in New Mexico by providing for the establishment and maintenance of a political subdivision of the state that is empowered by the state to receive public funds for acquisition, construction and improvement of water supply, reuse, storm drainage and wastewater facilities in communities, and to operate and maintain such facilities for the public good.

In the pursuit of this mission, MDWCAs are faced with many complex and challenging tasks, including compliance with a variety of governance, reporting, financing and water right rules and regulations. This Water Rights Manual focuses on pertinent water right rules. It provides a basic overview of water rights in New Mexico and explains how MDWCAs can acquire and maintain water rights.²

***This Manual is an educational tool and
is not intended to provide or replace legal advice.***

**This work was made possible by a grant from the McCune Charitable Foundation.
The Utton Center thanks the McCune Foundation for its generous support over the years.**

¹ The Latin phrase “*et seq.*” means “everything that follows” so in this case, it’s a short hand for all the statutes in Chapter 3, Section 29. Latin usually appears in italic.

² For more information see Ch. 2 Basic Water Law Concepts & Ch. 12 Community Water Systems, *Water Matters!*, <http://uttoncenter.unm.edu/projects/water-matters.php> and *Rural Water Systems Statutory Assessment* (Dec. 2005), <http://uttoncenter.unm.edu/projects/nm-rural-water-systems.php>

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INTRODUCTION TO WATER RIGHTS IN NEW MEXICO

New Mexico is a special place. Geographically, the state boasts a varied terrain with everything from prickly, dry deserts to soaring mountains covered with evergreen forests. One feature unites the entire state's geography – the scarcity of water.

Water Sources

New Mexicans get water from two sources – surface water and groundwater. Surface water is naturally occurring water that sits on the earth's surface, such as ponds, lakes, streams, rivers and arroyos.³ Groundwater is the water that lies beneath the earth's surface and includes sources like "underground streams, channels, artesian basins, reservoirs and lakes that have reasonably ascertainable boundaries."⁴ While some MDWCAs draw from surface water, most fulfill their water needs with water from New Mexico's valley-fill, basin-fill, limestone or sandstone aquifers.

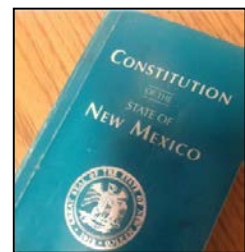
Water Rights Laws

There are four types of laws that affect water rights:

- The New Mexico Constitution provides broad over-arching principles about how water is viewed in the state;
- The statutes flesh out the mechanisms for how the principles are implemented;
- The regulations are developed by agencies, such as the New Mexico State Engineer (OSE) and New Mexico Environment Department (NMED), and provide the detailed rules for operations.
- Case law is developed by the courts and answers questions of how the laws apply to specific situations.

All of these create the environment in which water rights are understood.

The New Mexico Constitution declares that all *available water* belongs to the public.⁵ It recognizes *rights to the use of water*.⁶ Where there is water available, it can be appropriated and put to beneficial use⁷ under the New Mexico water code.⁸ The Constitution protects surface water rights that



Courtesy of Capitol Report

³ N.M. Const. art. XVI, § 2, Appropriation of Water; Glossary of Water Terms, OSE, http://www.ose.state.nm.us/water_info_glossary.html#B (last visited May 15, 2013).

⁴ *McBee v. Reynolds*, 74 N.M. 783, 399 P.2d 110 (1965); *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); See NMSA 1978 § 72-12-3, Applications for use of underground water.

⁵ N.M. Const. art. XVI, § 2; see also NMSA 1978 § 72-1-1, Natural waters; § 72-12-1 Underground waters.

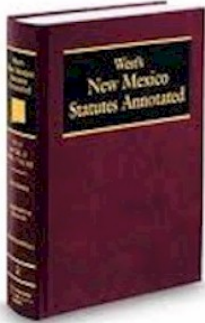
⁶ N.M. Const. art. XVI, § 1, Existing water rights confirmed.

⁷ *Id.* at § 2 and § 3 Beneficial use of water; see also NMSA 1978 § 72-1-2, Water rights; § 72-12-1.

⁸ Generally, Chapters 72 & 73 of the New Mexico statutes, and other scattered statutes.

were developed before this area became a state.⁹ It recognizes that priority provides the better right in distribution.¹⁰

The statutes repeat and further define the principles set forth in the Constitution. Thus, they develop concepts such as:



NM Statutes,
Courtesy of NMSU¹¹

- The nature of water rights generally (Ch. 72, Sec. 1);
- The nature, appointment and authority of the State Engineer (Ch. 72, Sec. 2);
- The nature, appointment, and authority of water masters and water districts (Ch. 72, Sec. 3);
- The appropriation and use of surface water (Ch. 72, Sec. 5);
- The appropriation and use of groundwater (Ch. 72, Sec. 12);
- The nature and rules for conduct of adjudications (Ch. 72, Sec. 4; and
- Many other aspects of water rights.

Water Regulation

New Mexico's semi-arid climate, limited water sources and water demand require that water use be regulated, especially during drought. Numerous local, state, tribal and federal agencies and organizations are involved in managing water in the state. The primary water managers of concern for Mutual Domestic Consumer Water Associations (MDWCAs) are the OSE and the NMED. The OSE supervises the administration of water in New Mexico and issues all permits and licenses for the use of and changes in use of water.¹² The NMED oversees water quality, as well as a part of the permitting process for MDWCAs.¹³

The State Engineer issues regulations to flesh out the details of developing and administering water and water rights.¹⁴ These regulations can be found on the Office of the State Engineer website at: http://www.ose.state.nm.us/legal_rules_regulations_final.html



Courtesy of the OSE

The rules and regulations include, but are not limited to:

- Active Water Resource Management (ARWM) (NMAC § 19.25.13 (2004));

⁹ N.M. Const. art. XVI, § 1.

¹⁰ NM Const. art. XVI, § 2.

¹¹ NM Statutes, NMSU, <http://bikes.nmsu.edu/documents/nm-statutes-book200wx310hpx.jpg>

¹² NMSA 1978 § 72-2-1, *et seq.*, Appointment; removal; qualifications; duties...

¹³ Two other agencies have reporting requirements which apply to MDWCAs. The Public Regulatory Commission (PRC) has no jurisdiction over the rates and revenues of MDWCAs, but requires the filing of corporation documents and annual non-profit reports. See Fee Schedule, <http://www.nmprc.state.nm.us/corporations/fee-schedule.html>; The New Mexico Department of Finance & Administration reviews budgetary and financial reporting and conducts audits. See Budget Certification of Local Public Bodies, NMAC 2006 § 2-2-3, <http://www.nmcpr.state.nm.us/nmac/parts/title02/02.002.0003.htm>

¹⁴ Final Rules and Regulations, OSE, http://www.ose.state.nm.us/legal_rules_regulations_final.html

- Hearing Unit (NMAC § 19.25.2 & 19.25.4 (2001));
- Water Rights Rules and Regulations, including specific regulations for
 - Surface water (NMAC § 19.26.2 (2005));
 - Groundwater (1995, rev. 2006);
 - Domestic wells (NMAC § 19.27.5 (2011)); and
 - Certain areas of the state.
- Well Driller Licensing, Construction, Repair, and Plugging of Wells (NMAC § 19.27.4 (2005)).

WHAT IS A WATER RIGHT?

Water rights are a core asset of a MDWCA. This asset requires a certain amount of care and attention to maintain existing rights and to provide sufficient rights for projected growth.

Definition

A water right is the right *to use* an amount of water for a specified purpose in a specific place.¹⁵ It is measured by the amount of water applied to a *beneficial use*¹⁶ and no one is entitled to receive more water than is necessary for his or her actual beneficial use.¹⁷ This rule is captured in the New Mexico Constitution at Art. XVI, Sec. 3 which states: “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.” The condition is repeated in the statutes.¹⁸

What is a beneficial use? Beneficial uses of water are not specifically enumerated in New Mexico’s water code but New Mexico courts have recognized irrigation, domestic/household use, watering of livestock, and in connection with mining, commercial, and industrial activities as beneficial uses. MDWCAs generally supply water for domestic use, a clearly recognized beneficial use. Drinking, cleaning, cooking, watering of some livestock, and non-commercial irrigation of less than one acre are valid domestic uses.

Beneficial use does not include waste,¹⁹ hoarding,²⁰ or illegal²¹ water use. Examples of these non-beneficial uses include:

¹⁵ *Snow v. Abalos*, 18 N.M. 681 (1914).

¹⁶ Glossary of Water Terms, OSE, http://www.ose.state.nm.us/water_info_glossary.html#B (last visited May 15, 2013).

¹⁷ *State Engineer v. McLean*, 62 N.M. 264 (1957).

¹⁸ NMSA 1978 § 72-1-2, Water Rights; appurtenant to land; priorities.

¹⁹ *Jicarilla Apache Tribe v. U.S.*, 657 F.2d 1126 (10th Cir. 1981); *State Engineer v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957);

²⁰ *Kaiser Steel v. W. S. Ranch Co.*, 81 N.M. 414, 417, 467 P.2d 986 (1970) (water is in short supply and must be put to the maximum beneficial use).

²¹ NMSA 1978 § 72-5-39, Illegal application of water.

- Using more than a reasonable amount of water for a purpose is considered waste;
- Filling tanks with water that will not be used merely to maintain a permitted amount is hoarding. This prohibition does not include “aesthetic” ponds. The water rights for the ponds remain in effect even though the water is not “used”.
- Using water in excess of that amount permitted or licensed is an illegal water use.

Wasting, hoarding, or illegal water uses do not qualify for water rights.

Elements of a Water Right²²

Water rights are described by certain elements which include:

- Purpose of use (the beneficial use);
- Priority date of the right;
- Amount used;
- Period and place of use; and
- If an irrigation right, the tract on which it is used.



A court may determine that there are other conditions which are necessary to fully define the right. The State Engineer can also impose conditions at the time of permitting a right and these will appear on the back of the permit issued.

Knowledge of these elements and any conditions is necessary when a user is planning to develop a new water right, to change, purchase or transfer an existing right, or is involved in a water rights adjudication.

HOW TO ACQUIRE A WATER RIGHT

A MDWCA may obtain water rights either by (1) acquiring and transferring existing **valid** water rights to the association’s use and point of diversion or (2) applying a new appropriation. The state statutes and OSE’s regulations for domestic water uses²³ and underground water uses²⁴ apply. Forms and fees may be found at http://www.ose.state.nm.us/water_info_rights_apps_forms.html

²² NMSA 1978 § 72-4-19, Adjudication of rights.

²³ NMAC § 19.27.5, Rules & Regulations Governing Use of Public Underground Water for Household or Other Domestic Use (2011) (“Domestic Well Regulations”), <http://www.ose.state.nm.us/PDF/RulesRegsGuidelines/DomesticWells/72-12-1-Rules19-27-5-NMAC-2011-10-31.pdf>

²⁴ Rules & Regulations Governing Appropriation & Use of Groundwater in NM (“Groundwater Regulations”) (Rev. 2006), <http://www.ose.state.nm.us/PDF/RulesRegsGuidelines/GroundWaterRulesRegs-2005-08-15.pdf>

Transferring Existing Water Rights²⁵

MDWCAs build their water rights portfolios by acquiring and/or transferring *valid* existing water rights into their well(s). Surface water rights or non-domestic well rights may be transferred from their original use to the new use for community supply.



It is important to note that only the “consumptive use”²⁶ portion of a right gets transferred.²⁷ For example, suppose that an association wants to acquire and transfer a water right from 1 acre of irrigated land. The amount of the irrigation right is identified as being 3 acre-feet per acre per year. The amount transferred will be the *consumptive use for the irrigation right* – say 2.1 acre-feet. At the original place of use, the remaining .9 acre-foot always returned to the stream and groundwater system. To keep these systems whole, that amount remains at the original place of use. The amount that can be transferred from other kinds of water rights will vary depending on the purposes of use for the original right.

The Office of the State Engineer can help with these types of information.

As a general rule, uses from domestic (§ 72-12-1) wells cannot be transferred to another place or purpose of use, however, an exception exists for MDWCAs. An association and a well owner can apply for a permit from the State Engineer to allow an alternate point of diversion for that amount allocated to in-house use, that is, .25 acre-foot per year per domestic well. The owner of the domestic well must either meter his/her domestic well to measure the allowed outdoor use and file an affidavit with the State Engineer regarding the continued use OR plug his/her well.

*Application:*²⁸ If a MDWCA wishes to purchase a valid existing water right, it submits a joint application with the current owner(s) to the State Engineer to change the place of use, purpose of use, and point of diversion of the right. The association is listed as a co-applicant with the original owner. A change of ownership form is also required. Forms must be submitted in triplicate and the required fees paid. Forms and fee information may be obtained from http://www.ose.state.nm.us/water_info_rights_apps_forms.html

²⁵ NMSA 1978 §§ 72-5-4, Notice; § 72-5-5, Objections; & § 72-5-23 Change of Place of Use; (surface water); NMSA 1978 §§ 72-12-3, Application; § 72-12-7, Change of location of well (groundwater); NMAC §§ 19.27.5.9 & 19.27.5.11-E (2), Domestic Well Uses; Article 2, Groundwater Regulations.

²⁶ NMAC § 19.27.5.7, Domestic Well Uses (quantity of water consumed during application of water to beneficial use).

²⁷ NMAC § 19.27.5.9, Domestic Well Uses.

²⁸ NMSA 1978 § 72-5-4, 72-5-5 & § 72-5-23 (surface water); NMSA 1978 § 72-12-3 (groundwater); NMAC § 19.27.5.9 & 19.27.5.11-E, , Domestic Well Uses; Article 2, Groundwater Regulations.

Where an association plans to change the point of diversion from a domestic well, it completes form no. wr-31. The form is available at http://www.ose.state.nm.us/water-info/water-rights/Forms/WR31_AMDWUA.pdf. The form accommodates changes for up to twelve domestic wells. The fee is \$75 dollars per well. The application must include a map of the “infrastructure capacity area”²⁹ and the domestic well(s) must be located within that area.³⁰ The association’s well is designated as the alternate point of diversion.

Other kinds of transfers are done with the standard form, no. wr-06, “Application for Permit to Change an Existing Water Right, http://www.ose.state.nm.us/water_info_rights_apps/forms.html and the fees vary.

*Notice, Proof & Hearing:*³¹ Whether an application involves a domestic well or some other kind of water right, the notice, proof, and hearing processes are the same. Notice alerts other water users in the area that someone is petitioning for a water use that may affect them. The State Engineer writes the notice and the transfer applicants arrange and pay for its publication for three consecutive weeks in a newspaper of general circulation in the county(s) where the move-from and the move-to wells are located.

The criteria that the State Engineer uses when considering whether to grant any application except one for a domestic well include whether:

- It will impair existing rights (senior rights);
- It will be contrary to the conservation of water; and
- It will be detrimental to the public welfare of the state.

Anyone who believes his/her water right will be impaired or the proposed transfer does not meet the other two criteria can file a protest.

After the notice period has run and if there are no objections one of two things can happen.

- 1) If the State Engineer determines that there is unappropriated water at the new location OR the three criteria listed above are met, the permit to transfer will be granted.
- 2) If the State Engineer determines that these criteria are not met, he will deny the application.

In certain instances, the State Engineer may reject an application when the moved-to well is located in an area where restrictions on water use or well drilling have been imposed by the courts.³² The State Engineer may also reject an application if the proposed well is located in an

²⁹ NMAC § 19.27.5.7-J, Domestic Well Uses.

³⁰ *General Instructions*, Application for Permit to Change the Indoor Use from a Domestic Well Point of Diversion to a MDWCA well(s) at 7, http://www.ose.state.nm.us/water-info/water-rights/Forms/WR31_AMDWUA.pdf

³¹ NMSA 1978 § 72-5-23; § 72-12-3(D); § 72-12-7; NMAC § 19.27.5.11-E & F; Article 1, Groundwater Regulations.

³² NMSA 1978 § 72-2-8; NMAC § 19.27.5.13, Domestic Well Uses.

area where water quality is a concern or where a county or local government recommends against the drilling of new wells.³³

If someone protests the proposed water use OR if the State Engineer determines that the application should not be granted, he may hold an administrative hearing (conducted by the OSE Administrative Litigation Unit) with the applicant and the protestor. The Engineer may also simply deny the application.

A protestant must show that the proposed transfer will significantly and specifically injure his/her water right. Merely lowering the level of other wells is not considered substantial impairment of existing water rights for purposes of challenging an application.³⁴ The State Engineer hearing officer takes the evidence and files a report upon which the State Engineer makes the final determination.

If the water right to be transferred is a right within an acequia or community ditch, the transfer must comply with applicable requirements, if any, in the acequia or community ditch association's by-laws.³⁵

Once an application is granted, the transferred use at the move-from well must cease, unless the State Engineer otherwise provides. If there are no more rights in the well, it must be plugged.³⁶

Appeals: Before an appeal from the State Engineer's decision can be made, an OSE hearing must be held and a decision entered. Appeals are made in the district court in the county where the wells are located or appropriation will be made.³⁷

Development of New Water Rights³⁸

Another way a MDWCA can obtain more water is to apply for new water right permit. The process is very similar to that described above for transfers. Applications may be obtained at http://www.ose.state.nm.us/water_info_rights_apps_forms.html and require information such as:

- Name and contact information for the applicant;
- Type of use;

³³ NMSA 1978 § 3-53-1.1; NMAC § 19.27.5.13, Domestic Well Uses.

³⁴ Rule 1-7, Groundwater Regulations; *In re Roswell*, 86 N.M. 249 (1974); *Stokes v. Morgan*, 101 N.M. 195 (1984).

³⁵ NMSA 1978 §72-5-24.1.

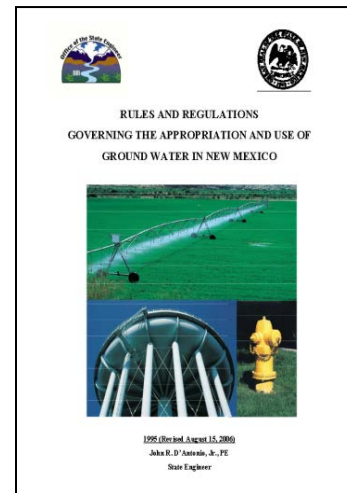
³⁶ Rules 2-12 & 2-13, Groundwater Regulations.

³⁷ NMSA 1978 §72-7-1; NMAC § 19.27.5.16; Article 3, Groundwater Regulations.

³⁸ Article I, Groundwater Regulations; Forms and fees may be found at http://www.ose.state.nm.us/water_info_rights_apps_forms.html

- Number of households to be served;
- Location of the well³⁹;
- Source of water;
- Name of land owner;
- the name and license number of the well driller;
- Proposed depth of the well;
- Outside diameter of the well casing; and
- Other information the State Engineer may require such as deeds, purchase contracts, or survey plats.

The application should be consulted for specific required information.



Groundwater Regulations, Courtesy of OSE

Once the application is filed, notice is complete and any fees paid, the State Engineer will review the request. He may or may not have a hearing on any objections received. In considering whether to grant a permit application, the State Engineer must determine whether 1) there is unappropriated water in the system which can be used; 2) any senior rights will be harmed by a new use; and 3) granting the permit would be contrary to conservation or detrimental to the public welfare,⁴⁰ The Engineer may also consider local conditions that would counsel against water rights development –particularly for potable water – and whether there are local ordinances which otherwise limit the development of additional water rights.⁴¹

The State Engineer may issue the permit for less than requested⁴² or may impose conditions on it. Such conditions may relate to the size of the well casing, the required set back from existing wells, special rules pertaining to wells in artesian basins or local water quality conditions. Permits may also be limited by water master districts rules, ordinances of local governments or OSE management areas.⁴³

An increasingly common condition for new wells is the installation of a meter, with a corresponding requirement to regularly report – usually quarterly or monthly - the readings to the OSE. The permit will indicate the reporting requirement. Reports can be mailed, faxed, or emailed directly to the OSE. Meters are required on wells:

- As ordered by a court;⁴⁴
- As ordered by the OSE;

³⁹ The application may involve developing a new right in an old well or moving a right into an existing well.

⁴⁰ NMSA 1978 §72-5-6.

⁴¹ NMSA 1978 § 3-53-1.1; NMAC § 19.27.5.13, Domestic Well Uses.

⁴² Rule 1-3, Amount of Water – Limitations, Groundwater Regulations.

⁴³ *Id.*; See for example, Curry County & Portales Underground Water Basins, OSE Rules & Regulations, http://www.ose.state.nm.us/water_info_rights_rules.html

⁴⁴ See *N.M. v. Aamodt*, No. CV-66-6639, District Court of NM, US District Court (1983).

- Which serve governmental, commercial, or non-profit facilities;
- Which are located in certain stressed groundwater basins;
- Which are classified as supplemental or replacement; and most importantly for MDWCAs,
- Which serve multiple households.

The meters and their installation are paid for by the applicant and the applicant is responsible for regularly filing the necessary reports with the OSE.

Failure to meet notice requirements⁴⁵ or the conditions of a permit in a timely fashion⁴⁶ may result in the cancelation of the permit.

If an applicant or other interested party disagrees with the State Engineer’s decision, once a hearing is held, an appeal to the local district court can be filed.⁴⁷

The applicant is also responsible to ensure that the well drilling records are submitted to the OSE in a timely manner.⁴⁸

Leasing Water Rights

Leasing water rights for MDWCA use is strongly discouraged. MDWCAs require certain and reliable water supplies. Leases by nature are temporary and may end without renewal, leaving a MDWCA’s customers without a water supply.

New Mexico limits leases of water rights to an initial term of no more than ten years.⁴⁹ If a MDWCA has adopted a water development plan intended to preserve its water supply for forty-years, it may lease water for its needs in that forty-year period. A lease of a water right is subject to the same State Engineer application and transfer requirements as the transfer of a purchased water right.⁵⁰

PATHWAYS TO A RECOGNIZED WATER RIGHT

In New Mexico, the validity of water rights are ultimately confirmed or denied by the courts. An “adjudication” of water rights is a lawsuit that formalizes the details of water rights including the amount of water and the priority date of each right. An adjudication addresses all water right

⁴⁵ Rule 1-5, Publication, Groundwater Regulations.

⁴⁶ Rule 1-9, Cancelation, Groundwater Regulations.

⁴⁷ NMSA 1978 §72-7-1; NMAC § 19.27.5.16, Domestic Well Uses; Article 3, Groundwater Regulations.

⁴⁸ Rule 1-18, Requirements for Metering, Groundwater Regulations; NMAC §§ 19.27.5.9 & 19.27.5.13.

⁴⁹ NMSA 1978 § 72-6-3.

⁵⁰ NMSA 1978 § 72-1-9.

claims in a stream system. Prior to an adjudication, a water right may be acquired through the State Engineer “permitting” and/or “licensing” process. If a water right existed before the State Engineer had authority to issue permits, a water right owner may file a “declaration” with the State Engineer, giving the agency notice of the existence of the water use.

Adjudication Process⁵¹

The law requires the State Engineer to conduct adjudications.⁵² In 2013, there are twelve active cases – six in state court and six in federal court. In both court systems adjudications are overseen by one judge although that judge has the assistance of other judges and special masters. The Office of the State Engineer (OSE) plans to finish some of these before opening more. However, anyone in a stream system can file a request to a court to start an adjudication.



Map Courtesy of the State Engineer⁵³

An adjudication has four major phases: the hydrographic survey phase, the stream system issues phase, the subfile phase and the *inter se* phase. Although these phases could be conducted one after another, in reality they overlap. At the end of the case, the judge enters a final decree.

Hydrographic Survey Phase: The State Engineer prefers to divide a stream system into several geographic areas and proceed through one area before moving onto another. This approach conserves resources and time. In the hydrograph survey phase, the OSE technical staff review all public information available about each specific tract within an area, including water rights documents, deeds, and aerial or satellite imagery, and prepare an abstract of the water right with a map showing the location of irrigated acreage and any wells.

Stream System Issue Phase: The courts may require that the stream system issues be conducted at the outset before the subfile phase begins because these issues tend to affect the content of the subfile offers. Examples of stream system issues include the rights of a major claimant like the federal government, or the amount of water allowed per acre of irrigated land which is known as the “duty” or by the more technical terms “farm delivery requirement” (FDR) and

⁵¹ For more information see Bridget Buynak, Esq. *Adjudications, Water Matters!*, UTTON CENTER (REV. 2011), <http://uttoncenter.unm.edu/pdfs/Water-Matters-2013/Adjudications.pdf>

⁵² NMSA 1978 §§ 72-4-13, 72-4-15, 72-4-17 through 72-4-19 (the adjudication statutes).

⁵³ Water Rights Adjudication in NM, http://www.ose.state.nm.us/legal_ose_adjudication.html

“consumptive irrigation requirement” (CIR).⁵⁴ These elements of irrigation rights may have bearing on water rights being purchased and transferred to a MDWCA’s use.

Subfile Phase: Then the State’s legal staff asks the court to join the owner(s). The staff mails a packet containing a description of the water right and other documents, including a summons,⁵⁵ a proposed order with a map, and a form objection.

- The owner then reviews and accepts or objects to the water right described. If the owner accepts the description of the right, s/he signs the proposed order, returns it to the State legal staff, keeping a copy for his or her records. The State’s attorney signs the order and sends it to the court for entry. The court signs & files the order and the State sends the owner a file-stamped copy. This copy should be kept in a safe place along with other important documents.
- If the owner does not agree with the description of the water right, s/he fills out the objection form, explaining the problem, and mails it back to the State legal staff, keeping a copy for his or her records. The staff then contacts the owner to see if the problem can be resolved. If it cannot be resolved, the owner and the State will either go (1) to mediation and if the problem is not resolved to trial or (2) straight to trial. The owner may ask for an appointment to talk to the Engineer about the documents.
- Once a court order is entered whether the consent order was entered or the matter went to trial, the question of the water right is completed as between the State and the owner.



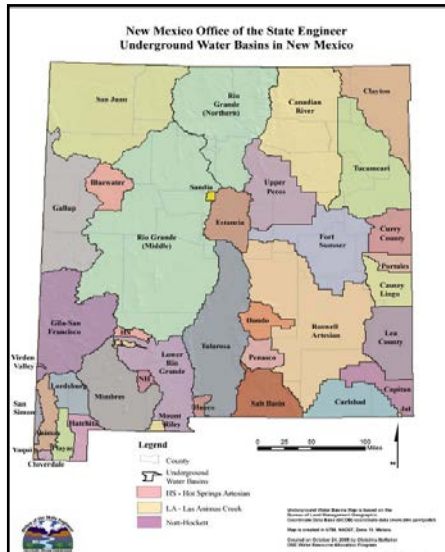
Inter Se Phase: *Inter se* is Latin for “between each other”. In this phase, the community in which the water right is situated has an opportunity to challenge any water right order. The challenge may result in a negotiation or a trial.

Once this phase is completed, the court enters a decree and the water right is fully recognized under the law. Most of the time, this phase occurs when all the water right orders between owners and the State for the system are entered. However, in the Animas Underground Basin case, the state court is experimenting with conducting this phase right after a water right order is entered so that the entire process can be completed in a relatively short amount of time.

⁵⁴ Appendix R. Detailed Procedure to Calculate the Consumptive Irrigation Requirement (CIR) & Other Irrigated Acreage Information http://www.ose.state.nm.us/water-info/NMWaterPlanning/regions/leacounty/leacnty_apndx_r-v.pdf ; Glossary of Water Terms, Office of the State Engineer, http://www.ose.state.nm.us/water_info_glossary.html#B (last visited May 15, 2013).

⁵⁵ The packet *may* also include a “waiver of service.” This document is your acknowledgment of the case and allows the State to proceed with your water right without needing to send out a sheriff or other official to hand deliver the summons and other papers to you. You are asked to sign the waiver and return it with the other documents.

Water right adjudications can go on for decades due to the number of parties involved, the complexity of the issues addressed, the amount hydrographic data collected, and the limited funding available to the state and the courts to support the cases. Fortunately upon the conclusion of an adjudication, the confirmed water rights are rarely again subject to challenge.



Map courtesy of the Office of the State Engineer⁵⁷

Permits⁵⁶

The State Engineer issues permits for both surface and groundwater uses. The Engineer has the authority to issue a permit for *surface water use* for any right created after 1907 when the state’s Water Code was enacted. The Engineer has the authority to issue permits for groundwater use only after he declares the relevant groundwater basin. All groundwater basins in the state were declared by the end of July 2006. Construction of works such as a well to divert the water described in the permit application may not begin until the State Engineer issues a permit. A water right claimant must also apply to the State Engineer for a permit to make changes to a water right, such as a change of place or purpose of use.

A permit authorizes the use of water and describes the *limits* on that use, but a permit is not itself a water right.

Licenses⁵⁸

Once the diversion works have been completed and water is put to use as described in the permit, the licensing procedure may be begun. The applicant files a “Proof of Beneficial Use” (PBU) using the form wr-23. The State Engineer has the works inspected in a field check and determines the amount of water applied to beneficial use. The well is then considered licensed. Upon request the State Engineer will produce a physical paper license for the applicant once the filing fee has been paid. A water right license provides the holder greater certainty about the validity of his claimed water right because a license certifies that the State Engineer has inspected the water works and the amount of water actually used. Nonetheless, a licensed water right may still be subject to challenge when it is ultimately adjudicated.

⁵⁶ NMSA 1978 §72-5-1, *et seq.*, Appropriation & use of surface water; §72-12-1, *et seq.*, Appropriation & use of groundwater.

⁵⁷ For the specifics of any basin see Article 7, Declared Underground Water Basins, Rules and Regulations, <http://www.ose.state.nm.us/PDF/GroundWaterRegs-Article7.pdf>

⁵⁸ NMSA § 72-5-13 (Surface water use licenses).

Declarations⁵⁹

Where water was put to beneficial use before New Mexico adopted its current surface water law code in 1907 or before the State Engineer declared a groundwater basin,⁶⁰ the claimant should file a declaration with the State Engineer stating how the water is used, when it was first put to use, the continuity of use, and the place of use. The information provided in a declaration of a pre-1907 water right is considered to be true until proven otherwise. When filing a declaration, additional documentation can be attached.

MAINTAINING A WATER RIGHT

There are basic requirements for maintaining a water right, in addition to any special conditions of use placed on the water right by the State Engineer or the courts.

Put the Water to Beneficial Use

First and foremost the water must be put to beneficial use. Once permitted, water rights must be developed in a timely fashion and then regularly exercised to be maintained. The State Engineer determines the amount of time required to construct the works needed to apply water to a beneficial use, based on the size and complexity of the project.

Timely Construction & Beneficial Use: In the case of surface water diversions, the construction of the works must not take more than five years, although limited extensions for construction and beneficial use are possible.⁶¹ The water must be put to beneficial use within four years of completion of the construction of the works.⁶² If an extension is granted, the combined time for construction and beneficial use must not exceed ten years.

In the case of groundwater rights, the well must be constructed by a well driller licensed by the OSE.⁶³ The permit may require that the well be completed within a certain time after the OSE grants the application. Once the well has been drilled, the applicant must file with the OSE a “Final Inspection and Report” or “Proof of Completion of Well” and “Proof of Beneficial Use” prepared in triplicate by a Registered Professional Engineer and Land Surveyor or Registered Land Surveyor. The OSE will inspect the construction and, if satisfactory, issue a Certificate and

⁵⁹ NMSA 1978 §72-1-3 (Declaration of Water Rights) §§ 72-12-5 & 72-12-6 (groundwater declarations).

⁶⁰ NMSA 1978 § 72-12-20 (Appropriation allowed without permit).

⁶¹ NMSA § 72-5-14 (Time for construction; extension); NMAC § 19.26.2.13, Permits, Surface Water Regulations.

⁶² NMSA § 72-5-6 (Hearing; approval; permit).

⁶³ NMSA 1978 § 72-12-12, License required to drill water well from “underground source”.

License to Appropriate.”⁶⁴ Failure to complete this process may result in loss of the water right.⁶⁵

Potential Loss of a Water Right

Once a water right is created, it can be lost through non-use or as noted above, through violation of its permit or license. The loss of a water right through nonuse occurs through either “forfeiture” or “abandonment.” Once a water right is lost, the water becomes a part of the public pool and is subject to appropriation by others.⁶⁶ Thus, it is important for a MDWCA to know the history of a water right before acquiring it and to maintain its water rights properly.

*Forfeiture*⁶⁷: Forfeiture is captured in the statutes and occurs when a water right is not used for four years. Before June 30, 1965, the right ended as a matter of law; that is, automatically. That rule still applies if the nonuse occurred before that date. The law changed in 1965 and today, State Engineer must give the water right holder notice of nonuse and a year to put the water to beneficial use.

Abandonment:⁶⁸ The abandonment of a water right occurs where there are many indications of non-use and must be decreed by a court. Abandonment occurs when the courts determine a water right or part of one has been intentionally abandoned. Notice from the State Engineer is not involved. Courts have also found that non-use for several years, deteriorated or destroyed works and ditches gives rise to abandonment.⁶⁹

In either case, the water right holder may be able to show that the non-use was due to circumstances beyond his/her control and that s/he could not use the water in spite of diligent efforts. Courts have found that circumstances such as drought or failure of water to reach a water right holder’s land as excuse non-use.⁷⁰

A water right can also be lost if the conditions of its permit are not met.⁷¹

⁶⁴ Rule 1-13, Requirements After Completion of Well & Rule 1-14, Certificate & License, Groundwater Regulations.

⁶⁵ Rule 1-9, Cancellation, Groundwater Regulations.

⁶⁶ NMSA § 72-5-28, Failure to use water; forfeiture; *State Engineer v. EBID.*, [2012-NMCA-090](#), 287 P.3d 324.

⁶⁷ NMSA § 72-5-28; § 72-12-8; *State Engineer v. McDermett*, 120 N.M. 327, 332, 901 P.2d 745 (Ct. App. 1995).

⁶⁸ *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929); *State Engineer v. South Springs*, 80 N.M. 144, 452 P.2d 478 (S. Ct. 1969).

⁶⁹ *State Engineer v. South Springs*, 80 N.M. at 146.

⁷⁰ *Chavez v. Gutierrez*, 213 P.2d 597 (1950); *NM Prods. Co. v. NM Power Co.*, 77 P.2d 634 (1937).

⁷¹ Rule 1-9, Cancellation & Rule 2.8 Permit – Granting of, Limitations, Cancellation, Groundwater Regulations; NMAC § 19.27.5.15.

When the Well Runs Dry: Replacement & Supplemental Wells

Sometimes, wells need to be replaced, supplemented, repaired or deepened due to changes in the groundwater table or malfunctions with the well casing.

Replacement Wells: A replacement well is one in which the old well is plugged or capped, a new one is drilled and the water right transfers into the new well. A State Engineer permit is required to drill a replacement well. The replacement well serves the same place and purpose of use as the original well. Replacement well applications must provide the information required for a new water right application described above, in addition to describing the well to be replaced. The well must be drilled into the same water source as the original well and must not impair other users.⁷² A new well may be subject to set-back requirements from the original well.⁷³ Following the completion of a non-domestic replacement well, the permittee must file an OSE "Proof of Completion of Well" form in triplicate with the State Engineer.⁷⁴

Supplemental Wells: A Supplemental well is drilled to supplement the water production of an original well. The combined use cannot exceed the amount of the original water right. The State Engineer requires a permit to drill a supplemental well. The application is similar in form to that required for a replacement well. Total diversions from the original well and its supplemental well must not exceed the maximum diversion amount authorized for the original well. The well must be drilled into the same water source as the original well and must not impair other users.⁷⁵ A domestic well may be subject to set-back requirements from the original well.⁷⁶ Following the completion of a non-domestic supplemental well, the permittee must file an OSE "Proof of Completion of Well" form in triplicate with the State Engineer.⁷⁷

*Repairing or Deepening a Well:*⁷⁸ When experiencing difficulties with a well, it may be more affordable for a MDWCA to repair or deepen the existing well, rather than drill a replacement or supplemental well. Permits from the OSE are only required for repairs that involve the use of a drilling rig and so a permit is not required to repair a well pump. However as of July 1, 2013, the

⁷² NMSA 1978 § 72-12-22 (Replacement well within one hundred feet); NMSA 1978 § 72-12-22 (Replacement well over one hundred feet); NMSA 1978 § 72-12-3 (Application for use); Rule 2-1, Change of Location of Well, Groundwater Regulations; NMAC § 19.27.5.11 (A).

⁷³ NMAC §§ 19.27.5.13-D.

⁷⁴ Rule 2-9, Requirements After Completion of Well, Groundwater Regulations.

⁷⁵ NMSA 1978 § 72-12-24, Supplemental Well; Rule 2-4, Supplemental Well, Groundwater Regulations; NMAC §§ 19.27.5.9-E & 19.27.5.11-B, Domestic Well Uses.

⁷⁶ NMAC §§ 19.27.5.13-D, Domestic Well Uses.

⁷⁷ Rule 2-9, Requirements After Completion of Well, Groundwater Regulations.

⁷⁸ Rule 2-16, Prerequisites of Drilling, Deepening, Repairing, Groundwater Regulations; NMAC § 19.27.5.11(C).

Construction Industries Division (CID) of the New Mexico Regulation and Licensing Department requires that pumps must be installed or repaired by a licensed contractor.⁷⁹

Upon approval of a permit to supplement, replace, or deepen a well, the State Engineer may require the installation of a meter as a condition of the permit.⁸⁰

Enforcement⁸¹

The State Engineer has the authority of enforcement to carry out his administrative responsibilities. He can issue a compliance order, levy a fine, require repayment of up to double the over or illegal diversion, or revoke a permit for failing to follow the OSE regulations or the water code. Where a water right holder is required to pay back tan over or illegal diversion, the Engineer can order it done by 1) reducing diversions in the following year or 2) acquiring or leasing a valid water right to cover the difference and filing a replacement plan with the State Engineer.

WATER MANAGEMENT⁸²

In New Mexico, the State Engineer is charged with the water administration within the state boundaries. Administration takes several forms. For example as discussed above, all new water uses or changes to existing uses go through the permitting process. In the process, the State Engineer may impose conditions upon these permits to preserve or extend the life of the water source. Rules for water management may vary from place to place in the state because local conditions have special requirements.

Shortages

The State Engineer's administrative responsibilities extend to managing water in times of shortage. Shortages occur where increased demand out strips supply such as in times of drought or excessive population growth.

In New Mexico, as well as most other western states, water rights are administered under a legal doctrine known as "prior appropriation." This term means that those who put their water to beneficial use *first* have a right that is *senior* to those who put their water to beneficial use later. This "first come, first served" concept is often described as "first in time, first in right." This rule

⁷⁹ For more information on licensed contactors see http://public.psiexams.com/contractor_information.jsp

⁸⁰ Rule 1-18, Requirements for Metering Groundwater Withdrawals, Groundwater Regulations; NMAC §19.27.5.11, Domestic Well Uses.

⁸¹ NMSA 1978 § 72-12-18, State engineer; enforcement; compliance orders; penalty; NMAC §19.27.5.15, Enforcement, Domestic Well Uses..

⁸² NMSA 1978 § 72-2-1; § 72-2-8, Administrative regulations; § 72-2-9. Supervising apportionment of waters.

is captured in the New Mexico Constitution which states: “priority of appropriation shall give the better right.”

In times of water shortage, senior water rights that have actually and continually been used are served with water before more recent or *junior* water rights. The State Engineer has the authority to administer water rights according to their priority dates in a process known as a “*priority call*” or as “priority administration.” A priority call occurs in times of shortage and someone calls upon the State Engineer to administer a water source by reducing or stopping diversions by junior users. Such calls can have serious economic and social consequences, so the State Engineer encourages water users to develop voluntary agreements to allow for shortage sharing, water delivery rotations, water banking, and other alternative water management agreements - thus reserving the priority call for use as a last resort.⁸³

At one time, it was believed that priority calls could not be conducted without completed adjudications to identify and describe all the water rights in an area. In 2003, the New Mexico Legislature passed a law NMSA 1978 Sec. 72-2-9.1 that allowed the State Engineer to proceed with priority administration prior to full adjudication. In response, the State Engineer developed the Active Water Resource Management regulations which identified how and when priority administration would be conducted and allowed for the development of alternative management plans if a priority call was deemed not the best way to proceed.⁸⁴ These regulations were challenged in court, but in 2011, the New Mexico Supreme Court ruled in favor of the regulations.⁸⁵

WATER PLANNING⁸⁶

MDWCAs are strongly encouraged to plan for their future water needs. The statutes include a mechanism known as the “Forty Year Plan.” This planning tool recognizes that certain entities within the state, including MDWUs, need to be able to provide for reasonable supplies of water for growth without risking the loss of water rights through non-use. The planning period is defined as “not to exceed forty years.”

The requirements for a plan include the following. The plan must be based upon filed applications for permits in order to be considered. The State Engineer *will not consider* pre-basin, “Inchoate” (never developed) water claims as a part of any forty year plan. The start date for counting the forty years is the date of the application for appropriation or change of place or

⁸³ NMAC § 19.25.13.7(c)(4), AWRM Alternative Administration (Dec.28, 2004), <http://www.ose.state.nm.us/PDF/ActiveWaterMgt-2004-12-28.pdf>

⁸⁴ NMAC § 19.25.13, Active Water Resource Management.

⁸⁵ *Tri-State Gen. & Trans. Ass'n., Inc. V. D'Antonio*, 2012-NMSC-039, __ P.3d __.

⁸⁶ NMSA § 72-1-9, Water development plans; preservation of water supplies; Rule 1-3, Amount of Water – Limitations, Groundwater Regulations.

purpose of use. This applies to water rights that are purchased, leased or acquired in any other way. The amount of water is limited to an amount that can be reasonably projected for the forty years for the use described by the plan. The plans are filed with the State Engineer for approval. If a plan has been submitted and a reasonable period of time has passed without a response, the applicant should contact the State Engineer to determine the status of the review.

ADDITIONAL CONSIDERATIONS FOR MDWCAs:

This Handbook is focused on water right issues faced by MDWCAs. In addition to water rights rules, MDWCAs must comply with a variety of legal requirements to build, operate and maintain a reliable water supply system.

The Sanitary Projects Act

MDWCAs are formed pursuant to New Mexico's Sanitary Projects Act (SPA)⁸⁷. The New Mexico Environment Department (NMED) enforces the SPA. The SPA is intended to standardize the training of MDWCAs' boards of directors. The SPA requires MDWCA board members to be trained on the following topics⁸⁸:

- The general responsibilities of governing bodies (such as the MDWCAs bylaws, election procedures, and the Governmental Conduct Act);
- The Safe Drinking Water Act;
- New Mexico drinking water regulations;
- New Mexico water system operator requirements;
- The Open Meetings Act and Inspection of Public Records Act;
- The State Audit Act and Procurement Code;
- State Engineer reporting requirements; &
- Basic accounting, budgeting and rate setting.

Particular to its management of its water rights, a MDWCAs board must shut off connections that are unauthorized, illegal, or have charges for delinquent payment⁸⁹

⁸⁷ NMSA § 3-29-1, *et seq.*, Sanitary Projects Act.

⁸⁸ NMAC § 20.12.2.9, Board Of Director Training Requirements – NMED (2007), http://www.nmrwa.org/resources/bod_training_rule.pdf

⁸⁹ NMSA 1978 §3-29-6(D), Board of Directors; powers and duties.

RESOURCES

Office of the State Engineer Forms, Fees & Regulations

The following websites are OSE resources for water right development and management:

Water Rights Lookup site: NM Water Rights Reporting System

<http://nmwrrs.ose.state.nm.us/nmwrrs/index.html>

Office of the State Engineer

The State Engineer has six offices located throughout the state, and each office can act in the State Engineer's full authority. The offices are in the following locations:

Albuquerque - District 1

5550 San Antonio Dr NE
Albuquerque, NM 87109-4127
Tel: (505) 383-4000
Fax: (505) 383-4030

Las Cruces – District 4

1680 Hickory Loop, Suite J
Las Cruces, NM 88005
Tel: (575) 524-6161
Fax: (575) 524-6160

Aztec - District 5

100 Gossett Drive, Suite A
Aztec, NM 87410
Tel: (505) 334-4571
Fax: (505) 334-4575

Roswell – District 2

1900 West Second St.
Roswell, NM 88201
Tel: (575) 622-6521
Fax: (575) 623-8559

Cimarron - District 7

PO Box 481
301 East 9th Street
Cimarron, NM 87714
Tel: (575) 376-2918
(575) 376-2410
Fax: (575) 376-4565

Santa Fe – District 6

407 Galisteo St.
Bataan Memorial Bldg.
PO Box 25102
Santa Fe, NM 87504-5102
Tel: (505) 827-6120
Fax: (505) 827-6682

www.ose.state.nm.us

NM Environment Department

Physical Address:
Harold L. Runnels Building
1190 St. Francis Drive
Suite N4050
Santa Fe, New Mexico 87505

Mailing Address:
PO Box 5469
Santa Fe, New Mexico 87502-5469

Providing:

- Training
- Loans
- Testing
- Inspection

Tel: (800) 219-6157
Tel: (505) 827-2855
www.nmenv.state.nm.us

SW Environmental Finance Center

Heather Himmelberger, Director
MSC01 1070
359 Hokona Hall
1 University of New Mexico
Telephone: (505) 272-7357
Albuquerque, NM 87131-0001
Tel: (505) 681-7437
Email: heatherh@unm.edu
<http://southwestefc.unm.edu>

NM Rural Water Association

3413 Carlisle Boulevard NE
Albuquerque, NM 87110
Tel: (505) 884-1031
Tel: (800) 819-9893
Fax: (505) 884-1032
www.nmrwa.org

Utton Transboundary Resource Center

Physical Address:
UNM School of Law
1117 Stanford Dr. NE
Albuquerque, NM 87106

Mailing Address:

The Utton Transboundary Resources Center
UNM School of Law, MSC 11-6070
1 University of New Mexico
Albuquerque, NM 87131-0001
Tel: (505) 277-0551
Fax: (505) 277-3319
E-mail: uttoncenter@law.unm.edu
<http://uttoncenter.unm.edu>

Providing:

- Utility Asset Management (including training & direct assistance)
- Tribal Drinking Water Technical Assistance
- Tribal Operator Certification & Training
- Water System Optimization (including comprehensive performance evaluations for groundwater systems)
- Safe Drinking Water Act Compliance & Related Activities (including drinking water sampling & data administration)
- Water System Capacity Assessment & Development
- Water Loss Reduction Strategies
- Multiple Barrier Evaluations (Sanitary Surveys)
- Neutral Evaluation for treatment technologies, utilities and related topics

Providing:

- Educational materials & classes
- Funding opportunities
- Assistance at discounted rates
- Contact: Peter Nathanson at 575-405-0972.

Providing

- Water Matters! Includes chapters about NM water issues & resources written in plain English.
- Publications & Resources