

Water law in New Mexico: Basics of state and federal law

Reed D. Benson
UNM School of Law
June 2015

The prior appropriation doctrine

Western territories and states adopted their own system for allocating water: prior appropriation

- originally in court decisions, later in statutes

“Beneficial use is the basis, measure, and limit of a water right” under prior appropriation

- Rights arise when water applied to beneficial use

Users typically had to divert water to get a right

“First in time is first in right”: when water is short, “senior” uses get water, & juniors may get none

Getting a water right

Originally, users could establish a right just by putting water to beneficial use (still true in CO)

Later, states adopted statutes regulating new uses:

- any new water use needed a state-issued permit

“Adjudications” are huge court cases that determine all pre-permit water rights in a river system

Permitting decisions are made by state agencies based primarily on water availability

Even permit-based water rights generally last forever so long as water remains in “beneficial use”

Water law in the NM Constitution

Like several other western states, New Mexico has water law written into its constitution (Art. XVI)

Section 1: existing water rights confirmed

Section 2: unappropriated water of every natural stream belongs to the public

- subject to appropriation for beneficial use
- priority of appropriation gives “the better right”

Section 3: beneficial use is basis, measure, & limit

New Mexico's water statutes

1907 Water Code is still the basis of NM water law

- Permits required for all new appropriations
- Adjudications, following investigation by state agency, to determine all water rights in a basin
- Water rights may be changed to a new place or type of use, but prior state approval is required
- State Engineer given broad supervisory powers

1907 statute has often been revised, never replaced

Groundwater law

Groundwater law is less uniform—western state laws differ in how it's allocated and managed

- but most, incl. NM, use prior appropriation

NM was one of the early states to adopt more-or-less comprehensive regulation of groundwater use

- 1931 code requiring permits in designated basins
- **but** domestic well permits are issued w/o review

NM S Ct upheld State Engineer's power to restrict pumping to protect surface flows (*ABQ v. Reynolds*)

Federal water law

Water law is mostly state law, but federal law is important in key aspects of water management

- e.g. interstate allocation, federal and tribal lands

Federal water projects are subject to federal laws

- Bureau of Reclamation, Corps of Engineers
- much of the law is specific to individual projects

Endangered Species Act affects water management

- though it doesn't create or eliminate water rights
- federal water projects have been most affected

Interstate compact basics

Compacts are binding agreements regarding the allocation (or other aspects) of interstate waters:

- Must be ratified by each signatory state
- Must also be approved by Congress

Compact may allocate waters by requiring delivery of a %age of flow at the state line, or otherwise

Compacts require state officials to regulate water rights in order to ensure compact compliance

Compact disputes often land in U.S. Supreme Ct.

- *Texas v. New Mexico* is now in litigation

Reserved water right basics

Doctrine began w/ *Winters v. US*, Supreme Ct. 1908

Originally applied to Indian reservations, on theory that water was needed to fulfill their purposes

Later extended to other federal lands w/ specific use

- but *Winters* doesn't apply to Indian pueblos in NM

Basic features of reserved water rights:

- Created by operation of federal, not state, law
- Priority usually is date of reservation/designation
- Quantity of water is the amount minimally needed to fulfill primary purpose(s) of reservation