



WATER LAW 101 PRESENTATION

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BACKGROUND PRINCIPLES OF WATER RIGHTS IN NEW MEXICO

- Water belongs to the public and is subject to appropriation by beneficial use. N.M. Const. Art. 16, § 2.
- Beneficial use is the basis, the measure, and the limit of a water right. N.M. Const. Art. 16, § 3.
- Priority of appropriation shall be given the better right. N.M. Const. Art. 16, § 2.
- A water right is a “usufructuary” property right – it is the right to use water, not the right to own water.
- Elements of a Water Right:

- Priority
- Quantity
- Point of Diversion
- Place of Use
- Purpose of Use
- Source

FIRST ELEMENT: PRIORITY

A water right's priority date is the date by which the appropriator first takes concrete steps to putting the water to beneficial use.

- Date ditch construction/well drilling began (if water right created prior to SE jurisdiction); or
- Date application is filed with the OSE.

For Pueblo water rights, the priority date is “time immemorial.”

For federally reserved water rights, the priority date is the date of the federal action reserving the right.

SECOND ELEMENT: QUANTITY

How to quantify a water right:

- Diversion amount (or Farm Delivery Requirement “FDR”)
- Consumptive use amount (“CU”, or Consumptive Irrigation Requirement “CIR”).

Water diverted but not consumptively used returns to the system and is eventually available for someone else to use.

Water rights are typically expressed in units of acre-feet per year, (“AFY” or “AFA”), but some older decrees and licenses list diversion amounts in cubic feet per second (“cfs”).

Example: A 10 acre farm may have a water right that allows for the diversion of 40 acre-feet of water per year, with a consumptive use amount of 20 acre-feet per year. The remaining 20 acre-feet of water must be returned to the system.

THIRD AND FOURTH ELEMENTS: POINT OF DIVERSION AND PLACE OF USE

The point of diversion can be a ditch, headgate, well, etc. It is fixed for each water right, and cannot be changed except through a permit from the State Engineer.

Similarly, the place of use is fixed. For irrigation rights, it is the specific tract of land served by the water right, and the right is appurtenant to that tract of land.

FIFTH ELEMENT: PURPOSE OF USE

Each water right has a purpose of use. Some purposes of use:

- irrigation/agriculture
- commercial
- municipal
- industrial/mining
- stock
- domestic
- environmental/in-stream purposes of use.

Different purposes of use can correspond to different consumptive use ratios. For example, an irrigation right has a diversion amount that can be double the consumptive use amount. Commercial rights typically have the same diversion and consumptive use quantities. Municipal rights vary.

Important point: New Mexico law does not recognize a hierarchy of uses. All rights are treated similarly, regardless of purpose of use.

SIXTH ELEMENT: SOURCE

Groundwater and surface water are managed conjunctively. However, not all sources are connected. Therefore, it is important to identify the source of a water right to ensure that when it is transferred elsewhere, it must still come from the same stream system or aquifer.

PERMITS, ADJUDICATIONS, DECLARATIONS: HOW WATER RIGHTS ARE CREATED, RECOGNIZED, AND CHANGED

SURFACE RIGHTS: PRE- AND POST-1907

The Water Code gave the State Engineer jurisdiction over all new surface water appropriations in 1907. After that date, no one can appropriate surface water except by application to the State Engineer.

Pre-1907 water rights that were already established by beneficial use were protected under the Water Code.

How to systematically identify and account for pre-1907 water rights?

- By having water rights owners file “declarations” with the OSE if they want to change the water rights.
- By conducting comprehensive water rights adjudications in each stream system.

GROUNDWATER RIGHTS: BASIN DECLARATIONS

The Water Code provides that the State Engineer can assert jurisdiction over any groundwater basin in the State by issuing a basin declaration.

“Pre-basin” groundwater rights are like “pre-1907” surface rights – they can be created by simply drilling a well and putting water to beneficial use.

Once a basin is declared, new appropriations must be by application to the State Engineer.

All groundwater in New Mexico (absent some non-potable aquifers) is now part of a declared basin.

PERMITTING PROCESS FOR NEW APPROPRIATIONS/CHANGES IN WATER RIGHTS

- When a water rights owner seeks to change any element of their water right, or wants to make a new appropriation, they must apply for a permit.
- There are significant procedural and substantive protections for existing water rights owners .
- Exceptions to the full permitting process: domestic/stock wells, stock ponds, some other small and temporary appropriations, and emergencies.

PERMITTING PROCESS FOR NEW APPROPRIATIONS/CHANGES IN WATER RIGHTS

- Threshold inquiry for new appropriations: is there water available to appropriate?
- Additional considerations for all applications:
 - Will this application impair an existing user?
 - Is the proposed appropriation/change contrary to conservation of water within NM?
 - Is the proposed appropriation/change detrimental to the public welfare?

PERMITTING PROCESS FOR NEW APPROPRIATIONS/CHANGES IN WATER RIGHTS

- Most applications go through a 70-day publication period, followed by a period of several months during which the OSE Water Rights Division analyzes the application based on the statutory factors. The minimum time to completed permit is ~ 6-8 months.
- If some party protests the application following the publication period, or if the applicant is dissatisfied with the WRD permitting decision and requests a hearing, the administrative hearing process can take 2+ years.

PERMITTING PROCESS FOR NEW APPROPRIATIONS/CHANGES IN WATER RIGHTS

- There are special permitting protections for acequias – among other protections, if the acequia has established bylaws, then water rights cannot be transferred off the acequia unless the acequia consents by following the process set forth in the bylaws.

ENFORCEMENT

- **Property rights are not valuable unless the rules are enforced.**
- **Penalties for violations of permits and the Water Code include monetary penalties and double “repayment” of over-diversions.**
- **Enforcement is highly resource-intensive – agency resources are limiting factor in successfully protecting private property rights.**

WATER RIGHTS CASE STUDY: CANNABIS

- Many New Mexicans are excited about the opportunity to grow cannabis commercially.
- To obtain a commercial grower's license, state law requires that they prove that they have sufficient water rights.
 - Regulations further spell out what they need to do to prove their water rights.
- Many people believe that they can use an existing domestic well, or an existing irrigation water right, to grow cannabis in a greenhouse/hoop house. That is incorrect.

WATER RIGHTS CASE STUDY: CANNABIS

- Some would-be applicants believe that they can use an existing domestic well, or an existing irrigation water right, to grow cannabis in a greenhouse/hoop house. That is incorrect.

Why?

WATER RIGHTS CASE STUDY: CANNABIS

- Domestic wells are essentially *de minimis* exceptions to the stringent permitting requirements. They cannot be transferred to other uses.
- Irrigation water rights typically have a diversion quantity that is greater than the consumptive use quantity, because they are based on traditional flood irrigation practices.
 - In contrast, greenhouses and hoop houses rely on drip or nozzle irrigation that returns little or no water to the stream/ditch.

WATER RIGHTS CASE STUDY: CANNABIS

- If a user has an existing irrigation water right and seeks to use a greenhouse to grow any crop commercially, the user must apply for a change of purpose of use to a commercial purpose of use.
- That change will allow them to consume the same amount of water as before, but will limit them so that they can only divert their consumptive use amount.
- More info on the OSE website:

<https://www.ose.state.nm.us/WR/cannabis.php>

WATER RIGHTS CASE STUDY: CANNABIS

- Example: existing irrigation right on a 10-acre farm has a right to divert 50 acre-feet of water per year, and to consume 25 acre-feet of water per year.
- If the owner wants to use a greenhouse to grow his/her crops (including cannabis), the owner must apply to change the right to a commercial purpose of use with a right to divert 25 acre-feet of water per year and consume 25 acre-feet of water per year.

50-YEAR WATER PLAN UPDATE

- Completion in Summer 2022
- Goal » Help New Mexico prepare for the impacts of climate change impacts to water resources
 - Stewardship
 - Sustainability
 - Equity



NEW MEXICO'S WATER FUTURE = DRIER / MORE VARIABLE

- Anticipated continued changes in climate will mean less water is available while demands continue to increase.
- Given this new reality, we must plan ahead to ensure continuing economic development and the needs of all New Mexicans are met.

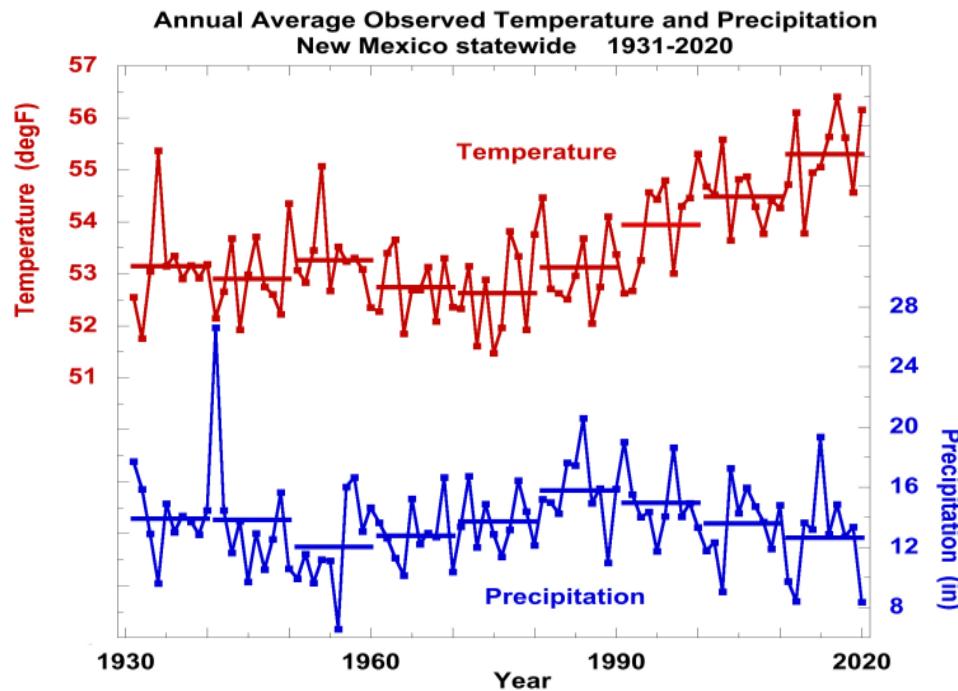


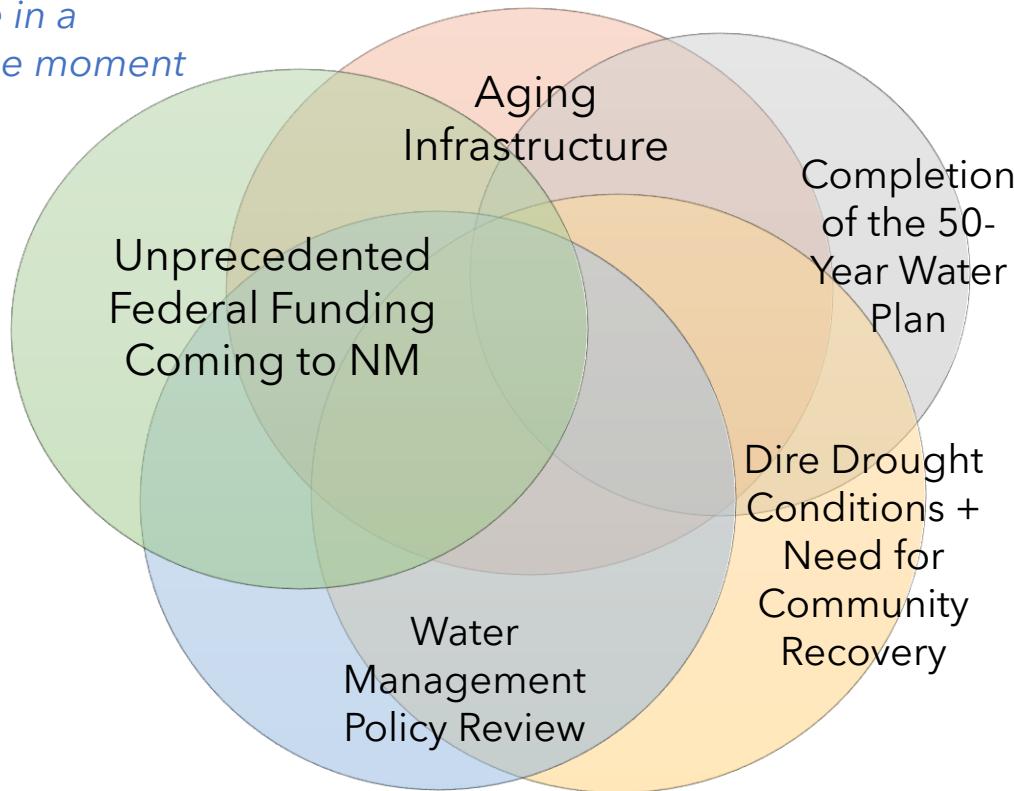
Image from [Climate Change in New Mexico over the Next 50 Years: Impacts on Water Resources](#)

Climate Change and Water in New Mexico: The Next 50 Years

- Average temperature rise of 5° to 7°F
- Lower streamflow and aquifer recharge
- Greater year-to-year variability in precipitation
- Hotter, more severe droughts
- Decreasing snowpack, earlier and diminishing runoff
- Greater demands on dwindling groundwater due to surface water shortfall
- Stress on natural vegetation caused by increasing temperature and decreased water availability
- Increasing catastrophic forest fire frequency resulting from heat and dryness
- Increasing flooding and sediment transport due to more intense storm events and fires
- Irreversible damage to soils through loss of vegetation and erosion
- Degraded quality of surface waters

Water Policy and Infrastructure Task Force

*A once in a
life-time moment*



*Is there a
willingness
to act?*

Water Policy and Infrastructure Task Force

GOAL » Bring expertise from every water use sector to the table to craft recommendations for action related to:

- 1) Preparing for Continued Drought and Climate Change Impacts to Water Resources

= *Input to the 50-Year Water Plan*

Summer 2022



- 2) Review Current Water Policies to Address Both Regional and Statewide Water Management Goals » Recommended Legislation

- 3) Funding Mechanisms Reform Related to Water Infrastructure
- 4) Capacity Development on Multiple Levels

= *Report to the Legislature*

Fall 2022



Capacity Development

- Communities Across the State
- State Agencies
 - Internal Capacity for State Funding Management and Distribution
- Private Sector
 - Engineering Services, Construction Contracting, etc.
- Program / Project Management
- Funding Mechanisms Reform as Identified in the June 2021 LFC Report
- Long-Term Sustainability for Rural and Agricultural Communities and Small Domestic Water Systems



Future of Farming in New Mexico?



Can Traditional Flood Irrigation Farming be Sustained?

Other Challenges, Issues and Milestones

- *TX v NM/CO in Supreme Court Case 141*
- *New Mexico Debit Status under the Rio Grande Compact*
- *Potential for Priority Call on the Pecos River*
- *Implementation of Indian Water Rights Settlements*
 - Navajo Nation San Juan Basin
 - Taos Pueblo
 - Aamodt Settlement for four Pueblos in the Pojoaque Basin
- *IWRS – two new settlements just signed by the Governor*
 - Rio Jemez involving the Jemez and Zia Pueblos
 - Rio San Jose for the Acoma and Laguna Pueblos
 - Three pending negotiations: Ohkay Owingeh, Santa Clara, other Navajo claims
- *Several large water supply projects*
 - Navajo/Gallup
 - Eastern NM
 - Pojoaque Valley

QUESTIONS?

