

**AUGUST 1, 2012 REMARKS BEFORE THE INTERIM WATER &  
NATURAL RESOURCES COMMITTEE**

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For over a century the United States and the majority of the Western States have enjoyed a productive relationship that has led to the settlement of the arid west. The relationship however, is being strained by US agencies using federal laws and litigation to intrude upon State primacy over groundwater. Recently, at the State of New Mexico's request, the Western States Water Council adopted Position No. 340, "State Primacy Over Groundwater." (Handout A)

The United States is pursuing 4 legal theories that, if successful will undermine New Mexico's exclusive ownership of and jurisdiction over all groundwater within the State. First, natural resource damages to groundwater under the Superfund Act have been exclusive to the State, until recently. In the *Molycorp* Superfund case the State of New Mexico reached a settlement on damages for pollution to the State's groundwater. Thereafter the Federal Trustees representing the Department of Agriculture and Department of Interior claimed (and continue to claim) that the US is entitled to a portion of the damages New Mexico negotiated on its own behalf because some of the polluted groundwater is under federal lands. Since the US has no groundwater rights, the only basis for its claim is that it owns the groundwater under federal lands. This unprecedented position resulted in a formal letter from the Western Governors' Association to the Secretaries of the two departments requesting the legal basis for the Federal Trustees' claims to New Mexico's damages. (Handout B)

Second, in the Middle Rio Grande (MRG), below Cochiti Dam and above of the Isleta diversion, the US is preparing a new Biological Opinion for the endangered Silvery Minnow. The federal agencies appear to be focused on effects of groundwater diversions on the surface water supply available to maintain the Minnow's habitat. The implication is that one or more of

the US agencies will use the ESA to expand jurisdiction to regulate groundwater which is otherwise beyond US jurisdiction. Reclamation is working with the State to demonstrate to US Fish and Wildlife that the State Engineer's conjunctive management of surface and groundwater sources results in no or negligible effects on the surface water supply for the Silvery Minnow.

Third, and perhaps the most sensitive, US claims that tribe and pueblo water rights include the right to groundwater within the reservation or pueblo boundaries. Until recently, Indian water rights were generally limited to the available surface water source, as that was the only water source at the time reservations and pueblos were established. The point is not whether groundwater should be a source of supply for Indian water rights, but the highlight that States primacy over groundwater is slowly eroding as US policies evolve.

The last and perhaps most disconcerting evolution of US policy, is the US claim in the lower Rio Grande Adjudication that the Rio Grande Project has a right to groundwater as a source of supply for the Project. In pursuing this claim, the US offers several legal theories unknown and antithetical to the Prior Appropriation Doctrine. The US does not claim that it has ever drilled a well, diverted groundwater, and placed groundwater to beneficial use through the Project under State law or that it has a federal reserved water right for the Project under federal law. The US claims that because, in its opinion, the Project requires groundwater to properly function and fulfill its purposes, federal law preempts state law requirements for the appropriation of groundwater. Since the US has no legal basis for claiming a federal reserved groundwater right, the US seeks to establish a "federal non-reserved water right" to circumvent New Mexico's statutes governing appropriation of water.

These four examples illustrate the efforts of the State to maintain State primacy over groundwater. The State's primacy over groundwater within reservation or pueblo boundaries is

now questionable. If the US prevails on its claim to groundwater under federal lands, that the effects of groundwater administration on surface water for endangered species falls within the scope of ESA, or to appropriation of groundwater as a federal non-reserved water right New Mexico will no longer own and have exclusive jurisdiction over all groundwater in New Mexico.

In my opinion, among the four examples cited, the US' federal non-reserved water right theory that it is postulating in the LRG adjudication poses the greatest threat to the future use of New Mexico's groundwater.