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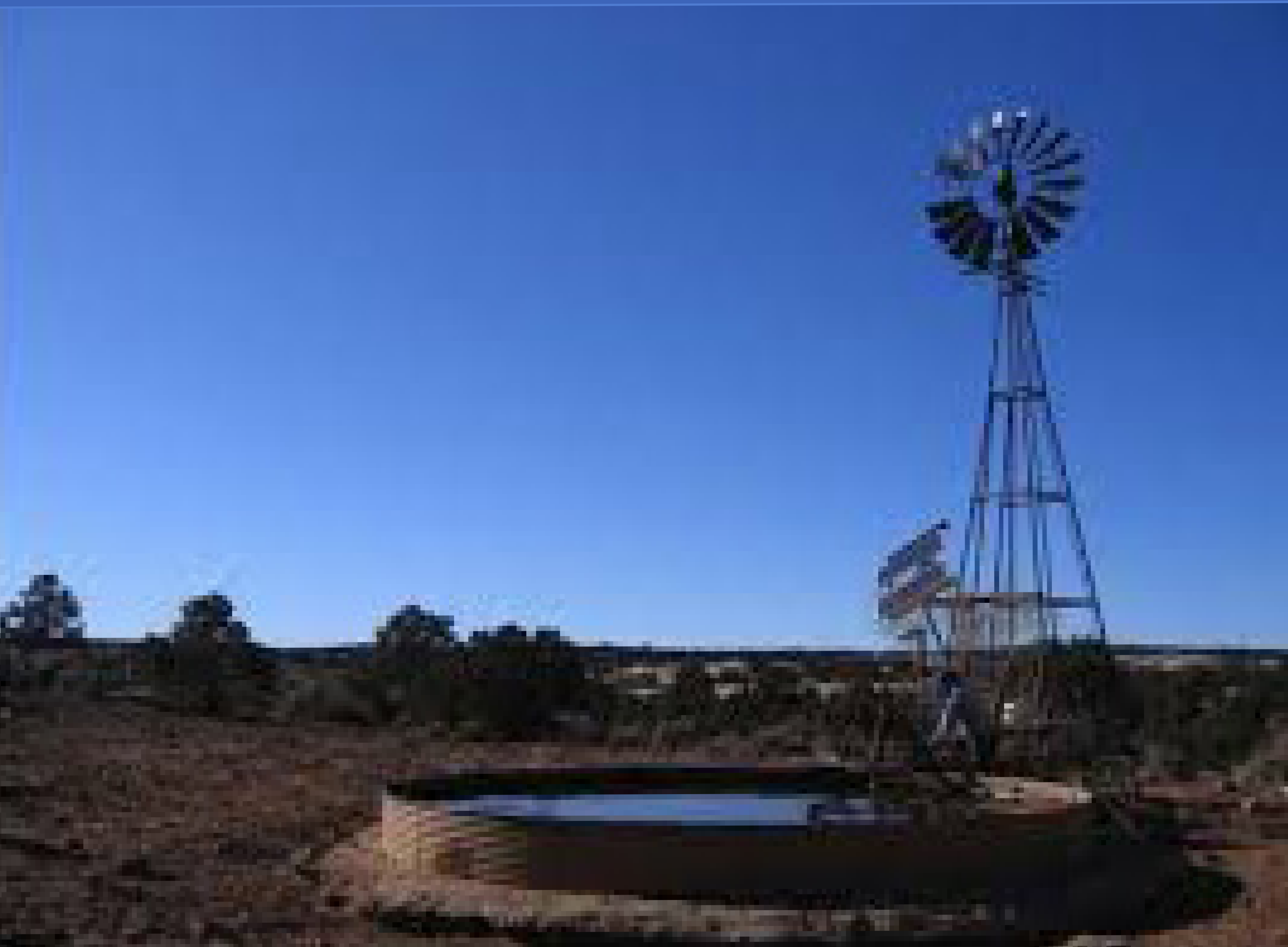
NEW MEXICO STOCK WATER



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Introduction

While not a unique condition in the Western states, much of New Mexico is owned by the federal and state government[1]. For decades, ranchers have been issued grazing permits from the Bureau of Land Management (BLM) the United States Forest Service (USFS) and leases from the State Land Office (SLO) on New Mexico trust lands in order to graze their cattle herds. Water, the most limited factor of production for livestock grazing, necessitated the appropriation of water on the aforementioned grazing allotments.

The control and ownership of stock water rights for the purpose of grazing livestock is essential to the creation of a sustainable enterprise. Recent movement by the federal government to establish control over stock water rights on public domains, most often at the expense of livestock industry, is a great concern. This paper attempts to answer the questions:

- Where does our system of water law come from?
- Who has jurisdictional authority over water in New Mexico?
- What power over water does the federal government have?
- What is the position of federal agencies with regard to water on the public domain?
- How do you secure your water rights?

Methodology

Case law, legal opinions, and Congressional Acts that have that have defined stock water rights throughout the years is heavily cited, as well as current regulations from federal and state agencies.

Stock water right ownership data from the Office of the State Engineer (OSE) in all 32 basins[2] In New Mexico was quantified and input into an Excel format. Stock water ownership by individuals was determined, as well as which state and federal agency own stock water rights exclusively, and which were co-owned with the permittee/lessee.

A summary of the history of prior appropriation in New Mexico, progressing to an analysis of stock water right ownership is presented. All agencies, both state and federal, having an impact on stock water ownership rights are examined to determine their position with respect to the range livestock industry.

1 http://www.propertyrightsresearch.org/2004/articles6/state_by_state_government_land_o.htm

2 See Table 1 Stock water Right Ownership by Basin

Origins of Water Law

In the arid West, the availability of water is typically very different from that which exists in the East where water is ample. In riparian areas, the right to use water is part of one's ownership of the lands over which the water source flows.

Each landowner along the watercourse has the right to make a reasonable use of the water, none have a greater right than another, and all share the available water in times of scarcity. Because the right to use the water is incidental with land ownership the right is not lost through disuse or limited to a numerical quantity[3] .

In the West however, water laws developed along the lines of an appropriation system that did not depend upon ownership of land containing the water source. This was particularly true on public domains where ownership was not possible, but still, water was essential to life and the perpetuation of industry.

The prior appropriation system in use today in the west depends on the requirement of priority of diversion and beneficial use. In other words the one who first diverted the water and put it to an approved use was recognized as having a priority to that amount of water for as long as the use was continued[4]. .

Early prospectors and miners in the western United States applied appropriation theory to mineral deposits i.e. the first one to discover and begin mining a deposit was acknowledged to have a legal right to mine. The requirements that already applied to the ownership of minerals were adapted for rights to water. Under this system, anyone who established a water diversion for the purpose of operating a mine created a "right" that was recognized by other miners.

The water right was for a specific quantity, and unlike riparian law, could be lost through disuse or misuse. In times of shortage, those with earlier priority had rights to the established amount of water at the expense of junior right holders. The prior appropriation doctrine is a legal concept that evolved in the American West as a means of establishing the right to use scarce water from rivers, streams and eventually ground water[5].Over time, many miners discouraged with gold-mining, turned to farming and ranching as a way of earning their living.Because the system of prior appropriation they had practiced in the goldfields was so effective, many turned to this method for agricul-

3 Gould and Grant, Water Law, Cases and Materials – 7th edition West Publishing Co. (2005)

4 Wiel, Samuel C., Water Rights in the Western States, Bancroft-Whitney publishing company (1961)

5 id

tural purposes as well[6]

Before states were created, the federal government held all possible attributes of property and sovereignty to the lands of the "public domain" due to the fact that most of the land was acquired by the United States through various treaties and agreements . The United States acquired much of the land west of the Mississippi River through the Louisiana Purchase, the treaty of Guadalupe Hidalgo, and through transactions with various Indian tribes[7] .

When the United States found itself the owner of the vast western territories, Congress debated the various approaches and policies as to how best to dispose of the lands. The Constitution of the United States granted Congress the power to dispose of the land and any resources upon them, including water, however it saw fit[8] .

Though largely ignored by the federal government in the early part of the 1800s, the newly acquired lands were the destination of thousands of miners, farmers and ranchers who used this "federal domain" freely.

After the end of the Civil War however, Congress began to focus their attention to the federal domain if only to approve of the development and settlement that had already occurred[9].

After the Civil War in 1866, Congress passed the first mining law[10] that applied to public domains known as the Mining Law of 1866.

"The mining law of 1866 recognized the custom of prior appropriation of water rights claimed by pioneers on the federal domain. With this recognition, water rights became a legal property interest."

The mining law of 1866 recognized the custom of prior appropriation of water rights claimed by pioneers on the federal domain. With this recognition, water rights became legal property interests and considered valid against any claims of superior rights by the United States government, as well as any interlopers who came afterwards.

The mining law revisions of 1870 and 1872[11] , and the Desert Lands Act of 1877[12] , further recognized that patents of land and homesteads granted by the United States were subject to vested and accrued rights; this was true in New Mexico as well.

"Historical evidence reveals that water appropriation systems were used in New Mexico much earlier than in any other part of the Western frontier."

Historical evidence reveals that water appropriation systems were used in New Mexico much earlier than in any other part of the Western frontier. Francisco Vasquez de Coronado observed Native Americans growing corn using a cooperative irrigation system as early as 1697.[13]

By 1800, 164 acequias[14] were in operation around New Mexico. Zebulon Pike commented in 1807 that the citizens around Albuquerque "were beginning to open canals to let water of the river fertilize the plains and fields that border the banks on both sides; where we saw men women and children of all ages and sexes at the joyful labor."

Gen. Stephen Watts Kearney stated that New Mexico had the oldest conscious tradition of water control and use in all of the present United States.[15]

In 1851 the First Legislative Assembly in New Mexico territory enacted water laws that reflected two basic characteristics inherited from the Spanish-Mexican period: dedication of waters to agriculture, and clustering water usage around the Acequia, and by 1852 the acequia system was a source of water for some 220,000 acres, or almost half of the irrigated acreage in New Mexico territory.[16].

In the constitutional provision termed "Constitutional Recognition," New Mexico courts concurred with historical evidence that the appropriation doctrine for surface water prevailed in the region before its acquisition by the United States, stating that prior appropriation is only a declaration of existing law and has always been the rule and practice under both Spanish and Mexican dominion.[17]

The mining law of 1866 formally recognized water rights secured under state or local appropriation systems located

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6 id

7 See PAUL W. GATES, HISTORY OF FEDERAL LAND LAW DEVELOPMENT 75-85 (1968) (describing all major land acquisitions of the United States); CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 34 (1992) (describing land acquisitions made by the United States).

8 The Property Clause of the United States Constitution grants Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to theUnited States..." U.S. CONST. art. IV, § 3, cl. 2.

9 Professor Wilkinson describes the Mining Law of 1866, which validated former trespassers' claims to land, as follows: "The 1866 act may have been a federal statute, but it was in large part an empty vessel to be filled by state law and local custom...." This statement embodies the common perception of most of the early laws relating to the public domains -- that federal law was simply a codification or approval of existing state systems

10 Mining Law of 1866, 14 Stat. 86

11 30 USC § 51 - Water users' vested and accrued right

12 §43 USC CHAPTER 14

13 http://www.fs.fed.us/rm/pubs/rmrs_p002.pdf

14 Acequias are gravity chutes, similar in concept to flumes. Some acequias are conveyed through pipes or aqueducts, of modern fabrication or decades or centuries old. The majority, however, are simple open ditches with dirt banks

15 id at 4

16 Jose A. Rivera. Acequia Culture: Water, Land, and Community in the Southwest. Albuquerque: University of New Mexico Press. 1998

17 NMSA Chapter 72: Water Law ,Article 9: Application of Water Act of 1907, 72-9-1 through 72-9-4

on the federal domain.

The 1870 amendment to that Act stated that all future mineral patentees and homesteaders must also conform to the laws and requirements of local governments and courts when appropriating water on the federal domain. The Desert Land Act of 1877 , which opened up the federal domain to purchase, specified that "the right to use of water… shall depend upon bona fide prior appropriation…[18]Addressing the meanings of the Mining Act of 1866, and its 1870 amendment, the Supreme Court in Cal/Oregon[19]

"The Supreme Court recognized that non-navigable waters were severed from the federal domain by Congress, allowing the states the power to administer the appropriation of those waters for beneficial use."

recognized that non-navigable waters were severed from the federal domain by Congress, allowing the states the power to administer the appropriation of those waters for beneficial use.

This was further reinforced by several court cases that deferred questions concerning water back to the state courts of New Mexico for resolution.[20]

Still, the federal government was not content to accept the decisions of the court without argument, and set about to challenge precedents with new litigation.

In New Mexico v. U.S. (438 U.S. 696, 700, 1978), the federal government attempted to secure reserved rights over stock water on the public domain because they believed that they had an earlier priority date than any other appropriator however, the court held that the federal government did not have reserved rights for stock watering purposes. Rather, the United States had rights with the earlier priority date only for the primary purposes of timber production and the securing of favorable water flows.

Federal land management agencies in response to this decision filed for and received stock water rights from many allotments that were either abandoned or forfeited by prior owners. Currently, there are at least 222 stock water rights in New Mexico (2%) that are either a cooperative agreement, or exclusively owned by a federal or state agency (see Table1).

"Currently, there are at least 220 stock water rights in New Mexico (2%) that are either co-owned, or exclusively owned by a federal or state agency"

After the 1978 decision in New Mexico, Leo Krulitz, solicitor for the Department of the Interior introduced the concept of "non-reserved" water rights held by the federal government conceivably to try and circumvent the New Mexico decision.

Krulitz argued that Congress did not expressly grant states power to administer the water rights when the purpose is to complete a federal program, implying that their right to groundwater was inclusive in the non-reserved paradigm. To justify this position, Krulitz discounted the Mining Act of 1866, Act of 1870, and the Desert Land Act of 1877 claiming that the Acts only applied to private party appropriations and not to federal government appropriations[21].

Less than two years later Clyde O. Martz a different Solicitor supplemented the Krulitz opinion, possibly in an effort to leave the door open for further discussion as the Reagan administration took office.[22]

On September 11, 1981, William H. Coldiron released a Solicitor's opinion diametrically opposite that of the previous Solicitors. He stated unequivocally that the theory of non-reserved rights "created a new and unnecessary cloud of ambiguity over private water rights dependent on water resources that are on, under, over or appurtenant to federal lands." Coldiron acknowledged that the combination of the Property Clause, Commerce Clause, and the Supremacy Clause gave Congress full power over the management and disposition of water found on federal lands, and that it is unlikely that state law could preclude reasonable water use by a federal agency if Congress specifies that use. Coldiron argued however, that Congress had granted exclusive sovereignty over water to the states; that the water was severed from federal lands by the Desert Land Act of 1877 Stating further that Congress had not retained any power over water on federal lands.

"Coldiron argued that Congress had granted exclusive sovereignty over water to the states; that the water was severed from federal lands by the Desert Land Act of 1877."

One of the most important court cases involving stock water rights was U.S. v. New Mexico, where the State of New Mexico fully supported the adjudication of stock watering rights to the livestock owners on federal lands. This position is supported by New Mexico statutes as well. A provision that was first passed in 1889 as a territorial law states:

Any person, company or corporation that may ap-

18 Id. at 164 n.2 (identifying the Reclamation Act of 1902 and the Indian Appropriation Act of 1909 as two pieces of legislation that verify congressional recognition of the supremacy of state law with respect to the acquisition of water located on public domains).

19 Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

20 Walker v. United States, 162 P.3d 882 (N.M. 2007) (property right in water under state law) Turner v. Bassett, 111 P.3d 701 (N.M. 2005) (severance of water rights)

21 4 Pub. Land L. Rev. 114 (1983)

22 id

propriate and stock a range upon the public domain of the United States, or otherwise, with cattle shall be deemed to be in possession thereof: provided, that such person, company or corporation shall lawfully possess or occupy, or be the lawful owner or possessor of sufficient living, permanent water upon such range for the proper maintenance of such cattle[23].

This provision was supported by further language that made it a misdemeanor to graze cattle on public lands without first having a water right.

[Ch.61 § 3, 28th Legislative Session 1889; Use of public land for range without owning water rights, penalty]: Any person, company or corporation violating the provisions of the preceding section shall be guilty of a misdemeanor and punishable by imprisonment in the county jail of the county wherein the offense was committed, for a period not to exceed six months, or by a fine of not less than one hundred dollars [($100)] nor more than one thousand dollars [($1,000)], and such person, company or corporation violating such provisions as aforesaid shall further be liable to any party or parties injured for all damages which such party or parties may sustain; the same to be recoverable by a civil suit. All fines and costs so assessed and all damages which may at any time be awarded shall be and constitute a lien upon such herd of cattle.

NMSA 72-5-1 sets the scope of entities that can hold a water right, notwithstanding that 72-12-1.2, relating to livestock water, does not include the state and federal livestock water right, and it does not follow the cattle, but remains with the land. To exemplify the point, if a person leases land from an individual to graze cattle and uses a livestock water belonging to the land owner, the land owner retains the water right[24].

The New Mexico Legislature could do much to abate the conflict over stock water rights by confirming that under New Mexico Territorial law, stock watering rights were recognized as a valid property right. Further the Legislature should officially recognize that pre-1907 stock watering rights should be validated and the State Engineer should be tasked with instructing the public 1) how these were rights established and 2) how livestock owners can provide proof for such rights.

Stock water rights on federal lands are based on custom, culture, and practice and the decisions of the courts under New Mexico law are confirmed by the Mining Act of 1866. By clarifying whether constructed improvements are truly necessary to prove a stock water right, and the use of the water by the cattle is the act of diversion without improvements being necessary, would alleviate much of the debate. Taken as a whole, the state of New Mexico has the right to adjudicate state and federal water rights within their boundaries with certain exceptions that will be discussed later in this paper.

The Office of the State Engineer (OSE) and the Interstate Stream Commission are the state agencies charged with management of the waters in New Mexico. The OSE supervises the waters of the state, including their measurement, appropriation, distribution, apportionment and adjudications by the courts[25] .

In 1953, the State Engineer was required to grant applications for groundwater for livestock wells and for household and domestic purposes for up to three acre feet per year [26]. These applications (termed exempt wells) did not require public notice and were not subject to statutory criteria applying to new appropriations of groundwater. In 2006 the amount was reduced to a maximum of 1 acre feet per year for households and domestic use however, livestock wells were exempt from these new regulations allowing the full three acre feet[27].

The recent case before the court, Bounds v. State[28] , centered on these so called "exempt wells", and the effect on the prior appropriation doctrine. Typically, in order to appropriate water, an individual must file an application with the OSE. For most appropriations, the legislature requires an extensive permitting process and analysis before a permit is granted. However, because exempt wells are considered "De Minimis[29]" in nature, a separate procedure was established dealing with watering livestock, irrigation of not more than one acre foot, or other domestic uses.

In this case, Mr. Bounds, a senior appropriator in the Mimbres basin, filed suit against the OSE. The entire Mimbres Basin has been closed since 1972. In the legal sense, a basin is "closed" when all the water has been appropriated and adjudicated. Mr. Bounds claimed that the domestic well statute that requires the OSE to issue a domestic well permit when one is requested, especially in a fully appropriated basin, violates the constitutional rights of senior appropriators as well as the prior appropriation doctrine set forth in the New Mexico Constitution.

To illustrate the scope of the problem, New Mexico has over 200,000 legally permitted domestic wells; with countless other domestic wells drilled illegally, all drawing water from New Mexico aquifers [30]. In addition there are well over 12,000 stock water rights held by corporations and in-

23 Chapter 61§ 1 , 28th Session of the NM Legislature, 1889

24 Personal Communication with Tom Mobley

25 Sections 72-2-1 and 72-2-9 NMSA 1978

26 NMSA 1978, § 72-12-1 (2003)

27 See Rules and Regulations Governing the Use of Public Underground Waters for Household or Other Domestic Use, §72-12-1.1 NMSA § 19.27.5.7 (E)

28 252 P. 3d 708 (2010)

29 An abbreviated form of the Latin Maxim de minimis non curat lex, "the law cares not for small things." A legal doctrine by which a court refuses to consider trifling matters.

30 http://nmwrrs.ose.state.nm.us/nmwrrs/waterRightSummary.html

dividuals with an additional 224 stock water rights owned either by a federal or state agency [31].

While Mr. Bounds technically lost the case the Supreme Court ruled[32] that while New Mexico residents remain free to drill domestic or livestock wells to meet water needs, the state has an obligation to ensure that, once wells are drilled, the groundwater pumping doesn't diminish the senior right holders appropriated water. The decision gives added strength to the doctrine of prior appropriation and that the state of New Mexico must defend the rights of the senior water right holders over junior right holders; this of course applies to both surface and ground waters.

Federal Water Powers in New Mexico

The Supremacy Clause of Article VI[33] of the Constitution gives Congress authority to preempt state law in either of two ways; when state law conflicts with federal law and where a state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress[34] ; enter the "reserved right" doctrine.

The reserved rights doctrine is a legal rule that states when the federal government reserves public lands for a particular purpose, such as a national park, forest or Indian reservation, it also reserves sufficient water to accomplish that purpose. Sometimes called the Winters Doctrine[35] , the reserved rights doctrine underwent modification in 1976 with the passage of the McCarran Amendment[36] , which gave official congressional consent to include the United States as a party in state general adjudications of water rights.

While there is general agreement that states have the authority to regulate water within their boundaries, wilderness, National Monument, or other federal land reserve designation could change the model.

Winters v. U.S. in 1908 , addressed the divergence between the water rights of an appropriator under state law and the water rights reserved for land withdrawn from the public domain, in this case, an Indian reservation.

The Winters Doctrine specifies that quantities of water that are reserved on public lands are withdrawn for the reserve from the public domain. Federal reserved rights assume a superior position, relegating all other appropriators to junior status, even though such rights were appropriated according to state law and with federal endorsement.

For many years, people assumed that the Winters Doctrine applied exclusively to Indian reservations. The United States Supreme Court indicated otherwise in Arizona v. California [37], stating that the doctrine of reserved rights applied to all federal reservations of land including national parks, forests, and wildlife refuges.

The court reduced the impact of this ruling however, when it later clarified that the reserved water rights are limited to the water needed to fulfill the explicit purposes of such federal land reservations [38].

While water law may not change quickly, there is considerable evidence that the federal government is attempting to expand its role in water ownership and regulation by the liberal interpretation of the reserved rights doctrine.

Though the case mentioned supra concerns Indian reservations, the law makes no distinction between the "types" of reservation made, only that it is withdrawn from the public domain. With this is mind further investigation into what constitutes a "reservation" is imperative.

In June of 2011, the Monument fire destroyed thousands of acres and many homes in Arizona. To compound the problem heavy monsoons in July, 2011 resulted in significant flooding, erosion, and mud slides in the Huachuca Mountains, destroying Tombstone, Arizona's waterlines and water reservoirs that have been in existence for 130 years. This catastrophe disrupted from 50% to 80% of the entire water supply to Tombstone. The majority of the pipeline is in the Miller Peak Wilderness area of the Coronado National Forest.[39]

The City of Tombstone has been prohibited from making repairs on the waterline. The city wanted to use heavy machinery to repair water lines located in the nearby Coronado National Forest.

Tombstone officials claimed they were just trying to recover water they had access to before the fire and floods, and consequently even before the creation of the Wilderness Act[40] , or even before the existence of the Coronado national Forest. City officials say they spent nine months trying to get permission from the U.S. Forest Service, to no avail. The court ruled that the city didn't exhaust its efforts to get that permission[41]. The Forest Service cited a ninth circuit case, Cappaert v. United States[42], as the precedent that held sway in this matter.

31 See Table 1
32 https://www.dropbox.com/s/kjpfbi5cuo68h6j/Bounds%20Decision.pdf
33 Article Six, Clause 2 of the United States Constitution
34 "…This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme
35 Winters v. United States, 207 U.S. 564 (1908)
36 43 U.S.C. § 666 (2000).

37 Arizona v. California, 373 U.S. 546, 601 (1963).
38 United States v. New Mexico, 438 U.S. 696, 700 (1978); Cappaert v. United States, 426 U.S. 128, 141 (1976).
39 Case 4:11-cv-00845-FRZ Document 50 Filed 03/30/12
40 The Wilderness Act of 1964 (Pub.L. 88–577)
41 Case 4:11-cv-00845-FRZ Document 48 Filed 03/30/12
42 Cappaert v. United States, 426 U.S. 128 (1976)

In Cappaert, the question presented was whether the reservation of Devil's Hole as a National Monument, reserved federal water rights in unappropriated waters? The Court of Appeals ruled in the affirmative, stating that the area in question had been owned by the United States government since the 1848 treaty of Guadalupe Hidalgo, and thus owned the water as well. President Truman withdrew the 40 acre tract from the public domain in 1952 as a National Monument [43].

The Taylor Grazing Act (TGA) of 1934[44] was designed to stop the deterioration of federal rangelands through the creation of grazing districts to protect and improve the rangelands and to stabilize the livestock industry.

Congress instructed land managers to withdraw from the public domain and prevent private ownership of the land in the grazing districts with the exception of mining patents, using the term "reserve "throughout the discussion [45].

In a 2001 letter, the Solicitor General of the Department 0f Interior to the Director of the BLM presented an opinion as to whether Public Lands established as Grazing Districts are "reservations" within the context of section 4(e) of the Federal Powers Act (FPA) .

In his conclusion the Solicitor remarked: "The plain language of the FPA, its legislative history, pertinent case law and administrative rulings all compel the conclusion that BLM-managed lands that are 'withdrawn . . . and reserved for classification' by Executive Orders 6910 and 6964[46] and those that are established as Grazing Districts are "reservations" under the Federal Power Act[47] .

Although this particular communique concerns the effective coordination and development of hydroelectric projects in the United States, it is within the realm of possibility for federal agencies to use this "reservation" language to exert reserved right claims to water within Grazing Districts[48]. Case in Point, The Antiquities Act gives standing presidents authority to name new monuments, a power generally residing with Congress. Presidents going back to Theodore Roosevelt have used the act to set aside natural wonders, including the Grand Canyon in 1908, which was later named a national park against the wishes of local officials[49].

Recently, President Obama[50] defied congressional opposition and designated five new National Monuments, using his executive authority to put historic sites and wild landscapes in a half-dozen states off limits to development , as well as creating an opportunity to take control of water through the reserved right doctrine. Case in point, the designation of the Organ Mountain/ Desert Peaks National Monument in Las Cruces New Mexico.

Because the monument will withdraw land from the public domain and, according to the wording in Presidential Proclamation 90-31; "shall be the dominant reservation", it is entirely possible that current senior water rights holders within the monument area could lose their senior rights and be relegated to junior status.

Another area of concern is the broad powers possessed by the Environmental Protection Agency and its science advisory board. The EPA Science Advisory Board [51] recently announced a public meeting to review their EPA draft report[52] that addresses the connectivity of downstream waters based on scientific evidence compiled from hundreds of studies. The report clearly makes a case for the connectivity of all stream flows irrespective of flow rate.

> *All tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported*

The implications of this report are alarming. The Desert Land Act of 1877[53] states: "if not before, all non-navigable waters then a part of the federal domain became… Subject to the plenary control of the designated states…[54] ." The Supreme Court recognized that non-navigable waters were severed from the federal domain by Congress, allowing the states the power to administer the appropriation of those waters for beneficial use[55].

In light of this study however, federal agencies could attempt to claim jurisdiction over non-navigable waterways without the "significant nexus test [56]" established by the Su-

43 PROCLAMATION 2961
44 43 USC 315
45 Review of the Taylor Grazing Act, 88th Congress, 1st session U.S. Govt. Printing Office, (1963)
46 Franklin D. Roosevelt: "Executive Order 7599 – AMENDMENT OF EXECUTIVE ORDERS NO. 6910 OF NOVEMBER 26, 1934, AS AMENDED, AND NO. 6964 OF FEBRUARY 5, 1935, AS AMENDED, WITHDRAWING PUBLIC LANDS IN CERTAIN STATES,"
47 http://www.doi.gov/solicitor/opinions/M-37005.pdf
48 438 U.S. 696, 700 (1978)
49 Brinkley, D. (2009), THE WILDERNESS WARRIOR New York, Harper
50 http://www.whitehouse.gov/the-press-office/2013/03/25/president-obama-designates-five-new-national-monuments
51 Congress established the EPA Science Advisory Board (SAB) in 1978 and gave it a broad mandate to advise the Agency on technical matters
52 Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, September, 2013 External Review Draft (EPA/600/R-11/098B)
53 43 USC 641
54 Id. at 163-64
55 Identifying the Reclamation Act of 1902 and the Indian Appropriation Act of 1909 as two pieces of legislation that verify congressional recognition of the supremacy of state law with respect to the acquisi ion of water located on public domains.
56 The words "significant nexus" was used in the Rapanos decision to differentiate navigable from non-navigable waters. It was intended to address only those standing or continuously flowing waters i.e. oceans, rivers, and lakes forming geographic features as waters of the U.S., and not the Connectivity of Streams and Wetlands to Downstream Waters.

preme Court ruling in Rapanos [57].

"federal agencies could attempt to claim jurisdiction over non-navigable waterways without the "significant nexus test " established by the Supreme Court ruling in Rapanos ".

The proposed changes would give the agency a say in ponds, lakes, wetlands and any stream -- natural or man-made -- that would have an effect on downstream navigable waters on both public land and private property.

If the compliance order stands as an example of how EPA intends to operate after completing its current 'waters of the United States' rulemaking, it should give each and every landowner throughout the country reason to be concerned. In other words, federal agencies may attempt to use the report to argue that all streams, arroyos, ponds, or washes are navigable irrespective of the flow rate and thus under the jurisdiction of the federal government and not the state.

This would effectively circumvent the Desert Lands Act without the need for Congressional action to amend or repeal the Act. Using the reserved rights doctrine, any and all senior water rights could be forfeit, with the federal government assuming senior appropriator status.

Across the country, resourceful homeowners have captured rain water as a way of conserving water supplies for use on gardens. Unfortunately, catching rain water may become illegal if the federal government has its way[58]. Facing water scarcity, cities and states have begun to debate the topic of water rights versus conservation, and whether or not an individual has the right to capture water that would otherwise go to recharge aquifers and river flows.

In addition to reserved rights and administrative agency intervention, the federal government has the power to regulate water users based on the Supremacy Clause of the Constitution .

The ability to preempt state water laws in order to carry out federal purposes is rooted in the land mark case First Iowa Hydro-Electric Cooperative v. Federal Power Commission[59] . In First Iowa, a dam construction permit was denied by the state of Iowa to a contractor engaged in the construction of a federal hydro-electric dam project.

The Supreme Court ruled that the state could not require a state licensing of applicants if such licensing would frustrate the intent of Congress "to make progress with the development of the long idle water power resources of the nation…[60] " Because denial of a state license would have stopped the project, thus frustrating congressional mandates, the Federal Powers Act preempted the Iowa state licensing requirement.

57 547 U.S 715, 62 ERC 1481 (2006)

58 http://www.popularmechanics.com/science/environment/a11758/4314447/

59 First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n, 328 U.S. 152 (1946).

Agency Position on Public Domain Water

The BLM is governed primarily by the Taylor Grazing Act (TGA)[61] , and Federal Land Policy Management Act (FLPMA)[62] and the USFS is governed primarily by the Organic Act of 1897, and the National Environmental Policy Act (NEPA) [63].

The Bureau of Land Management regulations regarding rangeland water rights are vague. Under the Taylor Grazing Act , water rights for livestock purposes were historically held in the form of Section IV permits in the name of the rancher and the BLM.

In the 1980's various changes were introduced that modified policies affecting water on federal rangelands. In the 1980 documents the objective of the BLM was to cooperate with state governments and follow applicable state water right laws "except as otherwise mandated by Congress." Their instructions were to "acquire and/or perfect water rights necessary to carry out federal land management purposes through state law and administrative procedures, unless a federal reserved right is otherwise available, and a determination is made that a primary purpose of the reservation will be served more effectively through the assertion of the available federal reserved water right[64].

The United States Forest Service, on the other hand believes that it is essential for water rights remain with the land, rather than with individual permittees. They believe this will give them the flexibility they need for the effective management of the national forests and grasslands regardless who the permittee is. By implication this seems to indicate that cooperation with applicable state law is not a priority[65].

Federal agencies as well as the New Mexico OSE"s office espouses the view that holding stock water rights in the name of the agency, rather in the name of the permittee would better serve the federal or states interest, advancing the argument that this provides the flexibility necessary for management of the national forests and grasslands in the

60 Id. at 171.

61 43 USC 315

62 Pub.L. 94–579

63 United States Department of Agriculture Forest Service FS Publication April 2004 Selected Laws Affecting Forest Service Activities

64 Release 7-86, March 19, 1984 revising BLM Manual Section 7250 - Water Rights, § 7250.02.

65 USFS report of June 29, 1984, entitled "Development of Forest Service Water Rights Policy Related to Grazing – an Overview"

federal interest and trust lands in New Mexico, regardless of who the permittee or lessee may be .

Securing Stock Water Rights

As we have established, the doctrine of prior appropriation governs the use of surface and groundwater in New Mexico. All water in New Mexico is owned by the State and the appropriator obtains a 'usufructuary right[66]'

The senior right to water usage is the reward for enduring years of risk and hardship while settling the harsh and unforgiving arid west. A groundwater right is considered a property right and therefore the permit owner has a right to change the place of use, purpose of use, and/or the point of diversion as long as existing rights are not impaired[67].

Conversations with legal professionals[68] adept in water adjudication procedures emphasize the importance of filing for water rights immediately if you haven't already done so. Under prior appropriation, water rights are allocated to the first person to put a specific quantity of water to beneficial use.

The doctrine of "relation back" or "chain of title" is used in most water law casebooks to introduce this concept. Establishing a priority date as early as possible trumps any and all later claims to the water right and so a discussion of its importance is an imperative[69].

Diligent development and beneficial use are closely connected. Diligent development is critical because it allows relation back of the priority date to the beginning of the actual undertaking (s) to take and use water, even though the occurrence of beneficial use did not take place immediately after wells were dug, or ditches were laid out.

Herein lies a dilemma; if application of the water to a beneficial use is not established within a reasonable time period; diligent development is irrelevant. In other words, application of water to beneficial use is essential to complete appropriation, even if a diversion construct exists[70].

The ideal length of time to establish a priority right varies from surface to ground water. Ideally, surface water rights established on or before 1907 provides the better right. It is important to document beneficial use and a point of diversion for 30 to 40 years of tenure is desirable..

Ground water on the other hand needs to be established from the date of drilling and optimally prior to/at the time of the declaration of the basin to establish the better right[71].

Surface water development in the state of New Mexico predates groundwater development by more than two decades. The surface water code was passed by the New Mexico territorial legislature in 1907 and jurisdiction given to the Territorial Engineer.

In 1931, rather than automatically granting the State Engineer authority over underground water basins, the OSE received jurisdiction only after an order declaring that an underground basin had "reasonably ascertainable boundaries" was issued[72].

The creation of a groundwater right and the regulation of a groundwater right differ depending upon whether it was initiated before or after a basin declaration.

Prior to the declaration of a groundwater basin, common law applied with regard to the development and use of a groundwater right[73]. An individual/entity desiring to appropriate water that drilled a well and placed the water to beneficial use prior to the declaration of a groundwater basin, obtained a vested and perfected right [74].

If the groundwater right was initiated prior to the declaration of a groundwater basin but was not put to beneficial use until after declaration, that individual/entity was allowed to do so as long as they used reasonable diligence in diverting water to beneficial use[75].

The three critical elements outlined in State v. Mendenhall [76] to obtain perfected rights were essentially: to legally commence drilling a well prior to declaration of the basin, proceed diligently to develop the water according to a plan and, apply the water to beneficial use. By complying with these three criteria the appropriator acquired a good and valid water right with a priority date as of the initiation of the right, with the subsequent declaration of the basin having no effect on the validity, legality, or extent of the appropriation.

For example; the Lea County basin was declared on October 1, 1932, whereas the Tularosa Basin was not declared until September 23, 2005. Water rights or declaration with a priority date before or at the declaration of a basin, and in compliance with the Mendenhall criteria would not be affected by the basin declaration. The declaration of groundwater basins began August 21, 1931 and was completed September 23, 2005. Today, all underground waters in New Mexico are in declared basins (See Figure 1).

To establish water rights, the obvious first step is to file an

66 Erickson v. McLean, 308 P.2d 983(1957), Coldwater Cattle Company v. Portales Valley Project Inc., 428 P.2d 15 (1967)
67 Clodfelter v. Reynolds, 358 P.2d 626 (1961); Durand v. Reynolds, 406 P.2d 817 (1965)
68 Special thanks to Mr. Lee Peters JD, for his invaluable information concerning current water issues in New Mexico
69 Trelease, Frank J. (1967) Water Law, Cases and Materials, West Publishing Co.
70 State ex rel State Engineer v. Crider ,431 P.2d 45,48-49 (1967)

71 Transactional Due Diligence in New Mexico,. Schroeder Law Office, LLC, Portland, Oregon; Reno Nevada
72 NMSA 1978, §72-12-1 (2002)
73 Yeo v, Tweedy,286 P.2d 970 (1929); State v. Mendenhall, 362 P.2d 998 (1961)
74 State ex rel. Erickson v. McLean, 308 P.2d 983
75 id

application with the OSE. Equally as important is to request a property title report for predecessors in interest from a title company. From here, check all property deeds for inclusion of water rights, and make sure that water rights are not separately conveyed to a third party. Finally, make sure the chain of title is clear.

There are several sources for checking the historic use of water rights; of course not all sources will be available for every water right. Usually, the current owner can provide useful information and documentation for the use of the water right, or direction to other sources.

Conclusion

New Mexico stock water rights are vital to the range livestock industry; without water all the feed on the rangeland is of little use to livestock, wildlife and society.

Water law in the desert Southwest is steeped in custom, culture and history. The prior appropriation doctrine for surface water is based upon diversion and beneficial use and has been the cornerstone of the development of the range livestock industry in New Mexico.

The Supreme Court has recognized that non-navigable waters were severed from the federal domain by Congress with the passage of the Desert Lands Act of 1877. States were given the authority to administer the appropriation of the non-navigable water; adjudication of non-navigable water in New Mexico is under the jurisdiction of the Office of the State Engineer.

All water basins in New Mexico are fully appropriated and require a permit from the state engineer to drill for water.

Granting of a 3 acre feet stock water right is mandatory. The federal government does not have superior rights to stock water unless they have "first in time" filing status like any other entity under the authority of the state engineer's office.

The federal government may hold a water right for the purpose for which the land was withdrawn such as timber production but does not have superior advantage based upon the date the forest reserve was created. Rather, they may have a junior water declaration based on the date of filing. Currently there are 172 water filings on record at the OSE that are in the exclusive ownership or coownership by the federal government; this constitutes roughly 2% of the stock water rights.

Congress has full power over water on the federal domain based on the combination of Property, Commerce, and Supremacy Clause. When Congress reserves a portion of the federal domain by special designation such as a National Park or National Monument the water is removed from the state engineer's jurisdiction and returned to the purview of the federal government.

The war on water continues to escalate, creating an ever growing urgency to secure water rights with a priority date as early as possible. Surface water rights with a priority date on or before 1907 will secure the better right. Groundwater priority dates on or before the declaration of the basin will provide a perfected right. Further, every effort should be made to oppose withdrawal of lands from the public domain for the creation of National Monuments, National Parks, Wilderness or any other federal reservation that withdraws land from the public domain. Applying a liberal interpretation of the Reserved Rights Doctrine could circumvent existing law to the detriment of senior right water appropriators.

Stock Water by Basin

Basin	Private	BLM	USFS	State
Animas	263	2	0	3
Blue Water	119	0	3	2
Canadian River	1,263	0	0	2
Capitan	210	1	0	4
Carsbad	532	14	2	8
Causay Lingo	40	0	0	0
Clayton	177	0	0	0
Curry	162	1	0	0
Estancia	1,033	0	3	0
Fort Sumner	42	14	0	0
Gallup	398	9	0	0
Gila SF	164	1	7	0
Hachita	8	2	28	0
Hondo	281	0	0	0
Hot Sprigs	103	4	6	0
Hueco	2	0	0	0
Las Animas	24	0	0	0
Lea	877	0	0	9
Lordburg	83	1	0	0
LRG	48	3	2	3
Mimbres	632	0	1	4
Nutt/Hocket	64	0	0	0
Playas	122	0	0	0
Portales	360	0	1	1
Rio Grande	200	5	2	1
Roswell/Artesian	1,852	1	17	0
Salt Basin	155	0	0	0
San Juan	411	19	9	9
San Simon	44	4	0	0
Sandia Basin	16	0	0	0
Tucumcari	1,396	0	6	2
Tularosa	450	0	4	0
Upper Pecos	637	0	2	0
Virden Valley	11	0	0	0
Total	12,179	81	93	48

Table 1- Stock Water Ownership by Basin

New Mexico Office of the State Engineer
Underground Water Basins in New Mexico

San Juan
Rio Grande (Northern)
Canadian River
Clayton
Tucumcari
Bluewater
Sandia
Upper Pecos
Gallup
Estancia
Curry County
Fort Sumner
Rio Grande (Middle)
Portales
Causey Lingo
Hondo
Roswell Artesian
Lea County
Gila-San Francisco
HS
Tularosa
Lower Rio Grande
Virden Valley
Penasco
NH
Capitan
Lordsburg
Mimbres
Salt Basin
Carlsbad
San Simon
Hueco
Jal
Mount Riley
Hatchita
Animas
Yaqui
Playas
Cloverdale

0 25 50 100 Miles

N

Legend

County
Underground Water Basins
HS - Hot Springs Artesian
LA - Las Animas Creek
Nutt-Hockett

Underground Water Basins Map is based on the Bureau of Land Management Geographic Coordinate Data Base (GCDB) coordinate data (www.blm.gov/gcdb/)

Map is created in UTM, NAD27, Zone 13, Meters.

Created on October 24, 2005 by Christina Nofltsker
OSE Water Resource Allocation Program

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Figure 1- New Mexico Water Basins