

AN OUTLINE OF THE STATUTES GOVERNING THE APPROPRIATION AND
USE OF GROUND WATER IN NEW MEXICO

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New Mexico's ground-water code which was enacted in essentially its present form in 1931 is based on the appropriation doctrine of water rights. This is the same doctrine followed by custom, and then by law, in regard to the appropriation of surface waters in New Mexico long before statehood. Under the appropriation doctrine one has no right to the use of water simply because it flows by, or through or under his land. Under this doctrine the right first established must be first served. It seems clear that this is a very practical system for the management of water in an arid land. Certainly, development of any nature would be discouraged if it were possible for the latecomer to interfere in any way with the water supply upon which earlier investments were based.

The New Mexico statutes provide that all of the underground waters of the state belong to the public and are subject to appropriation for beneficial use. Beneficial use is the basis, the measure and the limit to the right to the use of these waters.

When the State Engineer determines that underground streams, channels, artesian basins, reservoirs or lakes have reasonably ascertainable boundaries, and he so proclaims, he assumes jurisdiction over the drilling of wells for the appropriation of ground water in such declared basins. The State Engineer has declared 19 such areas to prevent the impairment of existing rights to the use of ground water, to insure beneficial use of the water, and to provide for the orderly development of the underground-water resources of the state.

Almost one-fifth of the state's total acreage is now included within ground water basins declared by the State Engineer.

Within declared underground-water basins no well may be drilled except by a driller licensed by the State Engineer, and no well may be drilled without a permit from the State Engineer. A person not licensed by the State Engineer may construct a driven well within a declared underground-water basin provided that the casing of the well does not exceed 2-3/8 inches outside diameter. However, a permit to construct such a well must be obtained from the State Engineer.

In areas not included in underground-water basins declared by the State Engineer the underground waters still belong to the public but wells to appropriate such waters can be drilled by a person not licensed by the State Engineer and without a permit.

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A person seeking to appropriate the underground waters in a declared basin must make application to the State Engineer. The application must set forth the basin from which the water is to be appropriated, the beneficial use to which it is proposed to apply the water, the location of the well, the amount of water applied for, the owner of the land upon which the well is to be drilled, and, if the water is to be used for irrigation, the name of the owner of the land to be irrigated. Notice of the application must be published in a newspaper of general circulation in the county where the well will be located, at least once a week for three consecutive weeks. Objections to the granting of the permit may be filed within ten days after the last publication.

If there is no protest to granting the permit the State Engineer shall grant it if he finds that there are unappropriated waters in the designated source, and that the proposed appropriation would not impair existing water rights from such source.

If the application is protested by persons believing that their water rights would be impaired, there must be a hearing before the State Engineer. In this hearing the applicant bears the burden of proving that there is unappropriated water in the designated source and that the proposed appropriation would not impair existing rights from the source.

If the State Engineer finds after considering the evidence presented at the hearing that there is unappropriated water in the designated source and that no impairment of existing rights from the source would result, he grants the permit. If either the applicant or the protestant is aggrieved by the decision of the State Engineer he may, within 30 days, appeal to the District Court. The decision of the District Court may, of course, be appealed to the Supreme Court of the State of New Mexico.

The statutes provide that the State Engineer shall grant permits for the use of water for watering livestock, for the irrigation of not to exceed one acre of noncommercial trees, lawn or garden, or for household or other domestic use. Such applications are not subject to the provisions for publication of notice, protest and hearing described above.

The statutes provide that water rights for irrigation purposes are appurtenant to the land and can be severed therefrom only with the permission of the land owner.

The point of diversion of a ground-water right and the place and purpose of use of such rights may be changed upon application to the State Engineer, if the State Engineer finds that existing rights are not impaired by such changes. Applications to change the point of diversion, or place, or purpose of use, are subject to the same provisions for publication of notice, protest and hearing which relate to applications to make a new appropriation.

A permit ripens into a license to appropriate when the water has been applied to beneficial use and proof of such beneficial use is filed with the State Engineer. The priority date of the licensed use is established by the date of filing of the original application.

Until 1957 a right to the use of the underground waters was forfeited when for a period of four years the owner of the right failed to apply the water to the use for which the right had vested, was appropriated, or was adjudicated.

Amendments enacted in 1957 and 1959 provide that the owner of a water right may apply to the State Engineer for an extension of time in which to put the water to beneficial use. Under these amendments the State Engineer may grant, for reasonable cause, such extensions of time not to exceed one year for each extension. It is important to note that a water right initiated prior to the inclusion of the area in which the well is located in a declared underground-water basin may be forfeited by 4 years of nonuse unless an extension of time in which to put the water to beneficial use is obtained.

The statutes provide that any person owning a water right initiated prior to the inclusion of the area in which the well is located in a declared underground-water basin may file with the State Engineer a declaration of his right setting forth the beneficial use to which the water has been applied, the date of first application to beneficial use, the continuity of the use, the location of the well, and, if the water has been used for irrigation purposes, the description of the land upon which such water has been used and the name of the owner thereof. Such records, or officially certified copies of such records, are prima facie evidence of the truth of their contents.

In the past the statutory provisions regarding the procedure for publication of notice, protest, and hearing, sometimes worked a serious hardship on appropriators whose wells suddenly failed. The 1959 session of the legislature amended the statutes to meet this problem. These amendments provide that the owner of a water right may drill a replacement well within 100 feet of his original well prior to application to the State Engineer in emergency situations which would result in serious economic loss, provided that he files application, or notifies the State Engineer of the facts by registered letter prior to drilling, and provided that he files formal application for a permit to drill the well within 30 days after drilling begins. This amendment provides that other water right owners may not enjoin the drilling of such a well but are limited to an action at law to recover damages, and to their right to protest the granting of a permit.

The amendment also provides that the owner of a water right may drill and use a replacement well more than 100 feet from his

original well after he has made application, but without waiting for the completion of the publication and hearing, if the State Engineer finds after a preliminary investigation that the change does not impair existing water rights. Here again there must exist an emergency situation which would result in serious economic loss.

Also, the owner of a water right may drill and use a supplemental well upon making application, but without waiting for the publication and hearing in emergency situations, if the State Engineer finds after a preliminary investigation that the supplemental well would not impair existing rights.