Water Rights in New Mexico

NM Real Estate Commission
Continuing Education Course

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Kyle S. Harwood is an attorney and water resources professional who, prior to becoming of counsel to Egolf + Ferlic + Day, LLC, was owner of Harwood Consulting, PC which provided legal and interdisciplinary water resource consulting services through New Mexico.

Kyle has advised clients on land and water law regulation and policy issues throughout New Mexico. He litigates these issues in courts throughout the state, and also drafts regulations and policy for clients. He has authored numerous articles on water resource issues and lectured on land use and water law. Kyle represents public, private and nonprofit clients, as well as governmental clients, in water and natural resource issues, including special master assignments and expert witness services.

Kyle received recognition as a New Mexico State Bar Board Certified Specialist in Natural Resource Law – Water Law in 2013. Kyle was certified as an instructor for the New Mexico Real Estate Commission in 2012 and has taught classes in water law to hundreds of real estate professionals. Kyle is a former board member and chair of the New Mexico State Bar Natural Resources, Environment and Energy Law (NREEL) Section.
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Introduction

- How are water rights and water law relevant to real estate transactions?
- Professional and ethical considerations
- Real estate disclosures and information sheets
- How to be an informed consumer of legal services
- How to advise real estate clients
“3 Legged Stool”
- water supply
- water infrastructure
- water right

Water system types: domestic well, shared wells, mutual domestic, private or public utility

Water use and features- domestic, irrigation, stock ponds, acequias, springs, streams, reservoirs, cisterns
NM Constitution

Article XVI Irrigation and Water Right

Section 1: Existing water rights confirmed – “All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.”

Section 2: Appropriation of water – “The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”

Section 3: Beneficial use of water – “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”
Water Right Terms and Definitions

- Surface water and Ground water
- Acre Foot – Acre Foot per Year – Acre Foot per Year per Acre
- Consumptive Use vs. Diversionary Use
- Declaration, Permit, PCW, EOT, PBU, License
Water Right Terms and Definitions

- Prior Appropriation, Priority, Hydrographic Survey
- Adjudication, Orders, Decrees
- Domestic Well, Acequia Bylaws
- Return Flow Plan
- WSA (well share agreement)
- WRPA (water right purchase agreement)
What is a Water Right?

- Usufructuary Right … (no joke)
- (Owner)
- Point of Diversion
- Place of Use
- Purpose of Use
- Volume (or other measure of amount)
- Priority Date
- ($ Value)
What a Water Right is Not
Hydrology

Figure 1. Progressive changes to groundwater flow and streamflow before, during, and after pumping at a hypothetical well site.

A. Under natural conditions recharge at the water table is equal to discharge at the stream.

B. Pumping from a well removes water from storage in a cone of depression and reduces discharge to the stream.
C. In some circumstances, the pumping rate of the well may be large enough to cause water to flow from the stream to the aquifer, a process called induced infiltration of streamflow.

D. After pumping stops, groundwater levels begin to recover, and water flows into aquifer storage to refill the cone of depression created by the previous pumping stress.

E. Eventually, the system may return to its prepumping condition with no additional changes in aquifer storage or streamflow depletion.
Researching Water Rights

- Office of the State Engineer
  - District Offices
  - WATERS database
  - OSE Adjudication Database - LAP
- County Clerk
- Adjudication Courts
"Understanding New Mexico water law is not unlike learning statistics. It seems inscrutable at first, causing confusion and consternation. After a while, basic rules and principles are learned and the rest eventually falls in place, at least for some. For others, we conclude it will never make sense and hope we’ll never really have to deal with it. Unlike statistics, water law questions regularly do appear in the practice of law in New Mexico and the frequency is likely to increase as competition for limited supplies escalates."

– credited to Tim De Young, J.D., RIP
Top 10 Questions

1. Who owns the water located on or under my property?

2. Do I have a water right?

3. Is a water right conveyed with real estate?

4. How much is my water right worth?

5. When is public notice required?
Top 10 Questions

6. Is my well share agreement enforceable?

7. Has my water right been lost through non-use?

8. Should I file a 'Proof of Beneficial Use' or an 'Extension of Time'?

9. Can I move my water right?

10. How many homes can share a domestic well?

11. Should I hire a water law attorney?
72-12-1.1. Underground waters; domestic use

A person, firm or corporation desiring to use public underground waters described in this section for irrigation of not to exceed one acre of noncommercial trees, lawn or garden or for household or other domestic use shall make application to the state engineer for a well on a form to be prescribed by the state engineer. Upon the filing of each application describing the use applied for, the state engineer shall issue a permit to the applicant to use the underground waters applied for; provided that permits for domestic water use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978.

History: 1978 Comp., § 72-12-1.1, enacted by Laws 2003, ch. 298, § 2.

Application for Permit
Change of Ownership Form
Non- 72-12-1s

- Declarations
- Type of Applications
  - Change Purpose of Use
  - Change Place of Use
  - Change Point of Diversion
- Other Considerations

Change of Ownership Form

http://donnaclairprintstore.blogspot.com
Well Location Data

- PLSS (Township, Range, Section, QQQs)
- UTM NAD 1927 (feet or meters)
- UTM NAD 1983 (feet or meters)
- Latitude/Longitude
Well Share Agreements

Preamble:
1. Description of the Parties;
2. Effective Date;
3. Property Description;
4. Description of the Physical Well and OSE Permit;
5. Description of easements and conditions that will be established;
6. Description of regulatory obligations of the shared well;
Well Share Agreement

Terms of Agreement:
1. Ownership of the well and water right;
2. Well usage by the respective parties, amount and purpose;
3. Provisions for maintenance, operation and repair of Well;
4. Cost sharing for maintenance, operations and repair of the Well;
5. Installation and payment for electricity and well infrastructure;
6. Metering of Well and private supply lines;
7. Establishment of Well Administrator;
8. Establishment of Well Account and reserve amount;
9. Description of periodic payments to the Well Account;
Well Share Agreement

11. Limits on water use, individual and total;
12. Provisions for overuse of water, over-diversion from the Well;
13. Provision for reporting meter readings to the OSE;
14. Repair of damage due to negligence;
15. Amendment in writing;
16. Termination of Agreement;
17. Notices;
18. Mediation;
19. Indemnification;
20. Attorney’s Fees;
21. Severability;
22. No waiver by non-enforcement;
23. Easements and obligations to run with the land;
Water Right Market and Transfer Process

- Negotiations
- Water Right Purchase Agreement
- Application with the OSE
- Notice in the Paper
- Possible Protests
- Approved Transfer
- Change of Ownership of the Water Right
Water Right Purchase Agreement

**Preamble:**
1. Description of the Parties;
2. Description of the Water Right;

**Terms of Agreement:**
1. Agreement to Sell and Purchase the Water Right;
2. Purchase Price and Payments;
3. Representations, Covenants, and Warranties of Seller;
   A. Enforceability;
   B. Authority;
   C. Title to the Water Right;
   D. Judgments, Litigation, and Claims;
   E. Compliance with Conditions Precedent;
   F. No Further Sale or Assignment;
   G. Cooperation.
Water Right Purchase Agreements

4. Representations of Buyer;
5. Termination;
6. Conditions Precedent;
   A. Representations True;
   B. Sellers Compliance with all Conditions by or on Closing;
   C. Proof of Title of Real Property;
   D. Approval of Acequia;
   E. Approval of OSE;
      1. If permit is not acceptable to either Buyer or Seller;
      2. If permit is protested, Buyer’s options;
      3. If OSE makes a determination of a invalid water right;
      4. Permit acceptable to Buyer issued by OSE before closing;
   F. Survey and Legal Description.
Water Right Purchase Agreements

7. Deposit Funds and Escrow Documents with Escrow;
8. Closing;
   A. Closing after Conditions Precedent met;
   B. Date, Location, Settlement Statement;
9. Fees and Costs Exhibit;
10. Miscellaneous Provisions;
   A. Buyer’s Authority to enter Agreement;
   B. Parties’ Cooperation on Additional Documentation;
   C. Indemnification;
   D. Notices;
   E. Applicable Notice;
   F. Binding Effect of Agreement;
   G. Captions;
   H. Attorney’s Fees;
   I. Entire Agreement;
   J. Exhibits Incorporated;
   K. Nature and Survival of Representations;
11. Signatures.
Water Quality Issues
Review of RANM Forms

- **Form 2104** Residential Resale
- **Form 2307** Important General Information and Disclaimer Water Rights and Domestic Wells
Aamodt Settlement

- Categories of Wells
  - 4 Types of Domestic Wells
  - Shared Domestic Well
  - Other Wells
- “Election” Options
- Show Cause Packet
- Order
- Change of Ownership Form
- Alerting the ALU
San Juan Chama Water

After three years of deep drought, the San Juan-Chama Project, which supplies water to Santa Fe and Albuquerque, had its first-ever shortfall this year in four decades of operation.

Source: U.S. Bureau of Reclamation
The Silvery Minnow

- Endangered Species Act
- Minnow I
- Minnow II