

4.1 Relevant Water Law

4.1.1 State of New Mexico Law

The 2004 plan, and supporting documents H-5 and H-6 to the 2004 plan, includes a very comprehensive discussion of water law applicable to the region. However, since the accepted regional water plan for the Middle Rio Grande Planning Region was published in 2004 there have been significant changes in New Mexico water law through case law, statutes, and regulations. These changes address statewide issues including, but not limited to: domestic well permitting; the State Engineer's authority to regulate water rights; administrative and legal review of water rights matters; utilizing settlement to allocate water resources; the rights appurtenant to a water right, and; acequia water rights. New law has also been enacted to address water project financing and establishing a new strategic water reserve. These general state law changes are addressed by topic area below. State law more specific to the region is discussed in Section 4.1.2.

4.1.1.1 Regulatory Powers of the OSE

Several cases have addressed the regulatory powers of the Office of the State Engineer. In 2003, the New Mexico Legislature enacted NMSA 1978, Section 72-2-9.1, relating to the administration of water rights by priority date. The legislature recognized "that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer." NMSA 1978, § 72-2-9.1(A) (2003). The statute authorized the State Engineer to adopt rules for priority administration in a manner that does not interfere with future or pending adjudications, creates no impairment of water rights other than what is required to enforce priorities, and creates no increased depletions.

Based on Section 72-2-9.1, the State Engineer promulgated the Active Water Resource Management (AWRM) regulations in December 2004. The regulation's stated purpose is to establish the framework for the State Engineer to "to carry out his responsibility to supervise the physical distribution of water to protect senior water right owners, to assure compliance with interstate stream compacts and to prevent waste by administration of water rights." 19.25.1.6 NMAC. In order to carry out this purpose, the AWRM regulations provide the framework for the promulgation of specific water master district rules and regulations. No district-specific AWRM regulations have been promulgated at the time of writing.

The general AWRM regulations set forth the duties of a water master to administer water rights in the specific district under the water master's control. Before the water master can take steps to manage the district, AWRM requires the OSE to determine the "administrable water rights" for purposes of priority administration. The State Engineer determines the elements, including priority date, of each user's administrable water right using a hierarchy of the best available

evidence, in the following order: (A) a final decree or partial final decree from an adjudication, (B) a subfile order from an adjudication, (C) an offer of judgment from an adjudication, (D) a hydrographic survey, (E) a license issued by the State Engineer, (F) a permit issued by the State Engineer along with proof of beneficial use, and (G) a determination by the State Engineer using “the best available evidence” of historical, beneficial use. Once determined, this list of administrable water rights is published and subject to appeal. 19.25.13.27 NMAC. And once the list is finalized, the water master may evaluate the available water supply in the district and manage that supply according to users’ priority dates.

The general AWRM regulations also allow for the use of replacement plans in order to offset the depletions caused by out-of-priority water use. The development, review, and approval of replacement plans will be based on a generalized hydrologic analysis developed by the State Engineer.

The general AWRM regulations were unsuccessfully challenged in court in *Tri-State Generation and Transmission Ass’n, Inc. v. D’Antonio*, 2012-NMSC-039. In *Tri-State*, the New Mexico Supreme Court analyzed whether Section 72–2–9.1 provided the State Engineer with the authority to adopt regulations allowing it to administer water rights according to interim priority determinations developed by the OSE.

In *Tri-State* the Court held that (1) the Legislature delegated lawful authority to the State Engineer to promulgate the AWRM regulations, and (2) the regulations are not unconstitutional on separation of powers, due process, or vagueness grounds. Specifically, the Court found that establishing such regulations does not violate the constitutional separation of powers because AWRM regulations do not go beyond the broad powers vested in the State Engineer, including the authority vested by Section 72–2–9.1. The Court further found that the AWRM regulations did not violate the separation of powers between the executive and the judiciary despite the fact that the regulations allow priorities to be administered prior to an *inter se* adjudication of priority. Rather, the Legislature chose to grant quasi-judicial authority in administering priorities prior to final adjudication to the OSE, which was well within its discretion to do.

The Court further held that the AWRM regulations do not violate constitutional due process because they do not deprive the party challenging the regulations of a property right. As explained by the Court, a water right is a limited, usufructuary right providing only a right to use a certain amount of water established through beneficial use. As such, based on the long-standing principle that a water right entitles its holder to the use of water according to priority, regulation of that use by the state does not amount to a deprivation of a property right.

In addition to *Tri-State*, several other cases have been decided recently addressing other aspects of the regulatory powers of the OSE. Priority administration was addressed in a case concerning the settlement agreement entered into by the United States, New Mexico (State), the Carlsbad Irrigation District (CID), and the Pecos Valley Artesian Conservancy District (PVACD) related

to the use of the waters of the Pecos River. *State ex rel. Office of the State Engineer v. Lewis*, 2007-NMCA-008, 140 N.M. 1. The issues in the case revolved around (1) the competing claims of downstream, senior surface water users in the Carlsbad area and upstream, junior groundwater users in the Roswell Artesian Basin and (2) the competing claims of New Mexico and Texas users. Through the settlement agreement, the parties sought to resolve these issues through public funding, without offending the doctrine of prior appropriation and without resorting to a priority call. The settlement agreement is, in essence, an alternative administration plan designed to augment the surface flows of the lower Pecos River in order to (1) provide an increased and more stable water supply to the CID, (2) meet the State's obligations to Texas under the 1948 Pecos River Compact (Compact) and the 1988 United States Supreme Court Decree, and (3) limit the circumstances under which the United States and CID would be entitled to make a call for the administration of water right priorities. The agreement included the development of two well fields and pipeline systems to facilitate the physical delivery of groundwater directly into the Pecos River under certain conditions, the purchase and transfer to the well field of existing groundwater rights in the Roswell underground water basin by the State, and the purchase and retirement of irrigated land within PVACD and CID.

The Court of Appeals framed the issue as whether the priority call procedure is the exclusive means under the doctrine of prior appropriation to resolve existing and projected future water shortage issues. The Court held that Article XVI, Section 2 of the Constitution, which states that "[p]riority of appropriation shall give the better right," and Article IX of the Compact, which states that "[i]n maintaining the flows at the New Mexico-Texas state line required by this compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico," do not require a priority call as the sole response to water shortage concerns. The Court found it reasonable to construe these provisions to permit flexibility within the prior appropriation doctrine in attempting to resolve longstanding water issues. Thus, the more flexible approach pursued by the settling parties through the settlement agreement was not ruled out in the Constitution, the Compact, or case precedent.

In relation to the OSE's regulatory authority over supplemental wells, in *Herrington v. State of New Mexico ex rel. State Engineer*, 2006-NMSC-014, 139 N.M. 368, the New Mexico Supreme Court clarified certain aspects of the *Templeton* doctrine. The *Templeton* doctrine allows senior surface water appropriators impaired by junior wells to drill a supplemental well to offset the impact to their water right. See *Templeton v. Pecos Valley Artesian Conservancy District*, 1958-NMSC-131, 65 N.M. 59. According to *Templeton*, drilling the supplemental well allows the senior surface right owner to keep their surface water right whole by drawing upon groundwater that originally fed the surface water supply. Thus the *Templeton* doctrine permits both the aggrieved senior surface appropriator and the junior to divert their full share of water. The requirements for a successful *Templeton* supplemental well include (1) a valid surface water right, (2) surface water fed in part by groundwater (baseflow), (3) junior appropriators

intercepting that groundwater by pumping, and (4) a proposed well that taps the same groundwater source of the applicant's original appropriation.

In *Herrington* the Court clarified that the well at issue would meet the *Templeton* requirements if it was dug into the same aquifer that fed the surface water. The Court also clarified whether a *Templeton* well could be drilled upstream of the surface point of diversion. The Court determined that the proper placement of a *Templeton* well must be considered on a case-by-case basis, and that these supplemental wells are not necessarily required to be upstream in all cases.

Lastly, the Court addressed the difference between a *Templeton* supplemental well and a statutory supplemental well drilled under NMSA 1978, Sections 72-5-23, -24 (1985). The Court found that a statutory transfer must occur within a continuous hydrologic unit, which differs from the narrow *Templeton* same-source requirement. Although surface to ground transfers require a hydrologic connection, this may be a more general determination than the *Templeton* baseflow source requirement. Further, *Templeton* supplemental wells service the original parcel, while statutory transfers may apply to new uses for the water, over significant distances.

Also related to the OSE's regulatory authority, the Court of Appeals addressed unperfected water rights in *Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1. In *Hanson*, a water rights permit holder, who had not yet applied the water to beneficial use, sought to transfer her unperfected water right from irrigation to subdivision use. The State Engineer denied the application because the water had not been put to beneficial use. The permit holder argued that pursuant to NMSA 1978, Section 72-12-7(A) (1985), which allows the owner of a "water right" to change the use of the water upon application to the State Engineer, the State Engineer had wrongly rejected her application. The Court upheld the denial of the application. The Court found that under western water law the term "water right" does not include a permit to appropriate water when no water has been put to beneficial use. Accordingly, as used in Section 72-12-7(A) the term "water right" requires the perfection of a water right through beneficial use before a transfer can be allowed.

Finally, and of great importance to the Middle Rio Grande Region, the State Engineer's power to deny an application without holding an evidentiary hearing was addressed in a case involving the application filed by Augustin Plains Ranch, LLC ("Applicant") to divert and use water from the San Agustin Basin in Catron County, New Mexico. *Augustin Plains Ranch, LLC, v. Verhines and Kokopelli Ranch*, No. D-728-CV-2012-008, Memorandum Decision on Motion for Summary Judgment (11/14/2012). The Applicant sought to appropriate 54,000 acre-feet of groundwater per year for a wide variety of purposes within the broad areas of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe counties. After notice of the application was published, several protestants filed a motion to dismiss the application arguing it was too broad in scope and did not adequately meet the requirements of a water rights application. The State Engineer denied the application without an evidentiary hearing, holding that the application

did not sufficiently describe the place of use and the beneficial use to which the water would be applied. On appeal the district court addressed whether the State Engineer was justified in denying the application without holding an evidentiary hearing. The district court affirmed the State Engineer's denial of the application, agreeing that the application failed to specify the beneficial purpose and place of use of water, contrary to statute. The court also found that the application contradicted the New Mexico Constitution's declaration that water is owned by the public, not individuals, and failed to clearly demonstrate the water would be put to beneficial use, which is the basis of a water right.

4.1.1.2 Legal Review of OSE Determinations

In *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523, the Supreme Court addressed the scope of the district court's review of the State Engineer's determination that there is no water available for appropriation. In *Lion's Gate*, the applicant filed a water rights application, which the State Engineer rejected without publishing notice of the application or holding a hearing, finding there was no water available for appropriation. The rejected application was subsequently reviewed in an administrative proceeding before the State Engineer's hearing examiner. The hearing examiner upheld the State Engineer's decision on the grounds that there was no unappropriated water available for appropriation.

This ruling was appealed to the district court, which determined that it had jurisdiction to hear all matters either presented or which might have been presented to the State Engineer, as well as new evidence developed since the administrative hearing. The OSE disagreed, arguing that only the issue of whether there was water available for appropriation was properly before the district court. The Supreme Court agreed with the OSE. The Court found that the comprehensive nature of the water code's administrative process, its mandate that a hearing must be held prior to any appeal to district court, and the broad powers granted to the State Engineer clearly express the Legislature's intent that the water code provide a complete and exclusive means to acquire water rights. Accordingly, the OSE was correct that the district court's *de novo* review was limited in its review of the application to what the State Engineer had already addressed administratively, in this case whether unappropriated water was available.

The Court also held that the water code does not require publication of an application for a permit to appropriate if the State Engineer determines no water is available for appropriation, because no third-party rights are implicated unless water is available. If water is deemed to be available, the State Engineer must order notice by publication in the appropriate form.

Based in large part on the holding in *Lion's Gate*, the New Mexico Court of Appeals in *Headon v. D'Antonio*, 2011-NMCA-058, 149 N.M. 667, held that a water rights applicant is required to proceed through the administrative process when challenging a decision of the State Engineer. In *Headon* the applicant challenged the OSE's determination that his water rights were forfeited. To do so, he filed a petition seeking declaratory judgment as to the validity of his water rights in district court, circumventing the OSE administrative hearing process. 2011-NMCA-058, ¶¶ 2-3.

The Court held that the applicant must proceed with the administrative hearing, along with its *de novo* review in district court, to challenge the findings of the OSE.

Legal review of OSE determinations was also an issue in *D'Antonio v. Garcia*, 2008-NMCA-139,145 N.M. 95, where the Court of Appeals made several findings related to OSE administrative review of water rights matters. *Garcia* involved an OSE petition to the district court for enforcement of a compliance order after the OSE hearing examiner affirmed the compliance order without holding a full administrative hearing. 2008-NMCA-139, ¶¶ 2-5. The Court first found that the right to a hearing granted in NMSA 1978, Section 72-2-16 (1973), did not create an absolute right to an administrative hearing. Rather, the OSE hearing contemplated in Section 72-2-16 could be waived if a party did not timely request such a hearing. *Id.* ¶ 9. In *Garcia* the defendant had not made such a timely request and therefore was not entitled to a full administrative hearing prior to issuance of an order by the district court.

The Court also examined the regulatory powers of the OSE hearing examiner; specifically, whether 19.25.2.32 NMAC allows the hearing examiner to issue a final order without the express written consent of the state engineer. *Id.* ¶¶ 11-15. The Court held that the regulation allowed the hearing examiner to dismiss a case without the express approval of the state engineer. *Id.* ¶ 14. Finally, the Court held that the OSE hearing examiner may dismiss a case without full hearing when a party willfully fails to comply with the hearing examiner's orders. *Id.* ¶¶ 17-18. Accordingly, the Court in *Garcia* upheld the OSE hearing examiner's action to issue a compliance order without a full administrative hearing or final approval by the state engineer. As such, the district court had the authority to enforce that compliance order.

4.1.1.3 Beneficial Use of Water – Non-Consumptive Use

Carangelo v. Albuquerque-Bernalillo County Water Utility Authority, 2014-NMCA-032, addressed whether a non-consumptive use of water qualifies as a beneficial use under New Mexico law and, accordingly, can be the basis for an appropriation of such water. In *Carangelo*, the OSE granted the Albuquerque-Bernalillo County Water Utility Authority's (Authority) application to divert approximately 45,000 acre-feet per year of Rio Grande surface water, to which the Authority had no appropriative right. The Authority intended to use the water for the non-consumptive purpose of "carrying" the Authority's own San Juan-Chama Project water, Colorado River Basin water to which the Authority had contracted for use of, to a water treatment plant for drinking water purposes. The Court of Appeals found the OSE erred in granting the application because the application failed to seek a new appropriation. The Authority's application sought to divert water, to which the Authority asserted no prior appropriative right, which required a new appropriation. Moreover, the Authority affirmatively asserted no beneficial use of the water. The Court remanded the matter to the OSE to issue a corrected permit.

The Court's decision included the following legal conclusions:

- A new non-consumptive use of surface water in a fully appropriated system requires a new appropriation of water. A “non-consumptive use” is a type of water use where either there is no diversion from a source body or there is no diminishment of the source. Neither the New Mexico Constitution nor statutes governing the appropriation of water distinguishes between diversion of water for consumptive and non-consumptive uses. Because both can be beneficial uses, New Mexico’s water law applies equally to either.
- The Authority did not need to file for a change in place or purpose of use for the diversion of its San Juan-Chama Project water. The Court stated that the San Juan-Chama Project water does not come from the Rio Grande Basin, and the Authority’s entitlement to its beneficial use is not within the administrative scope of the Rio Grande Basin. Accordingly, the Authority already had an appropriative right to that water and did not need to file an application with the OSE for its use.

4.1.1.4 Impairment

Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, 141 N.M. 21, involved applications to transfer surface water rights to groundwater points of diversion in the fully appropriated Rio Grande stream system. In order for a transfer to be approved, an applicant must show, among other factors, that the transfer will not impair existing water uses at the move-to location. In *Lomos Altos*, several parties protested the OSE’s granting of the applications, arguing that surface depletions at the move-to location caused by the applications should be considered *per se* impairment of existing rights. The Court found that questions of impairment are factual and cannot be decided as a matter of law, but must be determined on a case-by-case basis. In doing so, the Court held that surface depletions in a fully appropriated stream system do not result in *per se* impairment, but the Court noted that, under some circumstances, even *de minimis* depletions can lead to a finding of impairment. The Court further found that in order to determine impairment, all existing water rights at the “move-to” location must be considered.

4.1.1.5 Rights Appurtenant to Water Rights

The Supreme Court has issued three recent opinions dealing with appurtenancy. *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142, involved a dispute over ownership of water rights developed by a mining lessee in connection with certain mining claims owned by the lessor. The Supreme Court held that under most circumstances, including mining, water rights are not considered appurtenant to land under a lease. The sole exception to the general rule that water rights are separate and distinct from the land is water used for irrigation. Therefore, a lessee can acquire water rights on leased land by appropriating water and placing it to beneficial use. Those developed rights remain the property of the lessee, not the lessor, unless stipulated otherwise in an agreement.

In a case examining whether irrigation water rights were conveyed with the sale of land, or severed prior to the sale, the Supreme Court examined New Mexico’s transfer statute, NMSA

1978, Section 72-5-23 (1941), along with the OSE regulations addressing the change of place or purpose of use of a water right, 19.26.2.11(B) NMAC. *Turner v. Bassett*, 2005-NMSC-009, 137 N.M. 381. In *Turner* the Court found that the statute, coupled with the applicable regulations and OSE practice, requires consent of the landowner and approval of the transfer application by the State Engineer for severance to occur. The issuance of a permit gives rise to a presumption that the water rights are no longer appurtenant to the land. A landowner who holds water rights and follows the statutory and administrative procedures to affect a severance and initiate a transfer may convey the land severed from its former water rights, without necessarily reserving those water rights in the conveyance documents.

In *Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, the New Mexico Supreme Court examined the issue of whether a water right includes an implicit right to graze. After the United States Forest Service cancelled the Walkers' grazing permits, the Walkers filed a complaint arguing that the United States had taken their property without just compensation in violation of the Fifth Amendment to the United States Constitution. The Walkers asserted a property right to the allotments under New Mexico state law. Specifically, the Walkers argued that the revocation of the federal permit resulted in the loss of "water, forage, and grazing" rights based on New Mexico state law and deprived them of all economically viable use of their cattle ranch.

The Court found that a stock watering right does not include an appurtenant grazing right. In doing so, the Court addressed in depth the long understood principle in western water law that water rights, unless utilized for irrigation, are not appurtenant to the land on which they are used. The Court also clarified that the beneficial use for which a water right is established does not guarantee the water right owner an interminable right to continue that same beneficial use. The Walkers could have transferred their water right to another location or another use if they could not continue with the original uses. For these reasons, the Court rejected the Walkers attempt to make an interest in land incident or appurtenant to a water right.

4.1.1.6 Domestic Wells

New Mexico courts have decided several significant cases addressing domestic well permitting recently and the OSE also recently amended its regulations governing domestic wells.

In *Bounds v. State ex. rel D'Antonio*, 2013-NMSC-037, the New Mexico Supreme Court upheld the constitutionality of New Mexico's Domestic Well Statute (DWS), NMSA 1978, Section 72-12-1.1 (2003). *Bounds*, a rancher and farmer in the fully appropriated and adjudicated Mimbres basin, and the New Mexico Farm and Livestock Bureau (Petitioners), argued that the DWS was facially unconstitutional. The DWS states that the OSE "shall issue" domestic well permits, without determining the availability of unappropriated water or providing other water rights owners in the area the ability to protest the well. The Petitioners argued this practice violated the New Mexico constitutional doctrine of prior appropriation to the detriment of senior water users, as well as due process of law. The Court held that the DWS does not violate the doctrine of prior

appropriation set forth in the New Mexico Constitution. The Court also held that Petitioners failed to adequately demonstrate any violation of their due process rights.

In addressing the facial constitutional challenge, the Court rejected the Petitioners' argument that the New Mexico Constitution mandates that the statutory requirements of notice, opportunity to be heard, and a prior determination of unappropriated waters or lack of impairment be applied to the domestic well application and permitting process. The Court reasoned that the DWS creates a different and more expedient permitting procedure for domestic wells and the constitution does not require a particular permitting process, or identical permitting procedures, for all appropriations. While holding that the DWS was valid in not requiring the same notice, protest, and water availability requirements as other water rights applications, the court confirmed that domestic well permits can be administered in the same way as all other water rights. In other words, domestic wells do not require the same rigors as other water rights when permitted but, when domestic wells are administered, constitutionally mandated priority administration still applies. Thus the DWS, which deals solely with permitting and not with administration, does not conflict with the priority administration provisions of the New Mexico Constitution.

The Court also found that the Petitioners failed to prove a due process violation because they did not demonstrate how the DWS deprived them of their water rights. Specifically, Bounds failed to show any actual impairment, or imminent future impairment, of his water rights. Bounds asserted that any new appropriations must necessarily cause impairment in a closed and fully appropriated basin and, therefore, granting any domestic well permit had the potential to impair his rights. The Court rejected this argument finding that impairment must be proven using scientific analysis, not simply conclusory statements based on a bright line rule that impairment always occurs when new water rights are permitted in fully appropriated basins.

Two other significant domestic well decisions addressed domestic well use within municipalities. In *Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, the Supreme Court examined the authority of the City of Santa Fe to enact an ordinance restricting the drilling of domestic wells. The Court held that under the City's home rule powers, it had authority to prohibit the drilling of a domestic well within the municipal boundaries and that this authority was not preempted by existing state law.

Then in *Stennis v. City of Santa Fe*, 2008-NMSC-008, 143 N.M. 320, Santa Fe's domestic well ordinance was tested when a homeowner (Stennis) applied for a domestic well permit with the OSE, but did not apply for a permit from the City. In examining the statute allowing municipalities to restrict the drilling of domestic wells, the Court found that municipalities must strictly comply with NMSA 1978, Section 3-53-1.1(D) (2001). Section 3-53-1.1(D) requires cities to file their ordinances with the OSE restricting the drilling of domestic water wells. On remand, the Court of Appeals held that Section 3-53-1.1(D) does not allow for *substantial* compliance. *Stennis v. City of Santa Fe*, 2010-NMCA-108, 149 N.M. 92. Rather, strict

compliance is required and the City must have actually filed a copy of the ordinance with the OSE.

In addition to the cases addressing domestic wells, the regulations governing the use of groundwater for domestic use were substantially amended in 2006 to clarify domestic well use pursuant to NMSA 1978, Section 72-12-1.1. (19.27.5.1 et seq. NMAC). The regulations:

1. Limit the amount of water that can be used pursuant to a new domestic well permit to:
 - 1.0 acre feet per year (ac-ft/yr) for a single household use (can be increased to up to 3.0 ac-ft/yr if the applicant can show that the combined diversion from domestic wells will not impair existing water rights)
 - 1.0 ac-ft/yr for each household served by a well serving more than one household, with a cap of 3.0 ac-ft/yr if the well serves three or more households
 - 1.0 ac-ft/yr for drinking and sanitary purposes incidental to the operations of a governmental, commercial, or non-profit facility as long as no other water source is available. The amount of water so permitted is subject to further limitations imposed by a court or a municipal or county ordinance

The amount of water that can be diverted from a domestic well can also be increased by transferring an existing water right to the well. 19.27.5.9 NMAC.

2. Require mandatory metering of all new domestic wells under certain conditions, such as when wells are permitted within a domestic well management area, when a court imposes a metering requirement, when the water use is incidental to the operations of a governmental, commercial, or non-profit facility, and when the well serves multiple households. 19.27.5.13(C) NMAC.
3. Allow for the declaration of domestic well management areas when hydrologic conditions require added protections to prevent impairment to valid, existing surface water rights. In such areas, the maximum diversion from a new domestic well cannot exceed, and may be less than, 0.25 ac-ft/yr for a single household, and up to 3.0 ac-ft/yr for a multiple household well, with each household limited to 0.25 ac-ft/yr. The State Engineer has not declared any domestic well management areas in the planning region.

4.1.1.7 Water Project Financing

The Water Project Finance Act, Chapter 72, Article 4A NMSA 1978, outlines different mechanisms for funding water projects in water planning regions. The purpose of the Water Project Finance Act is to provide for water use efficiency, resource conservation, and the protection, fair distribution, and allocation of New Mexico's scarce water resources for beneficial purposes of use within the State. The Water Project Finance Act creates two funds: the Water Project Fund, NMSA 1978, Section 72-4A-9 (2005), and the Acequia Project Fund,

NMSA 1978, Section 72-4A-9.1 (2004). Both funds are administered by the New Mexico Finance Authority. The Water Trust Board recommends projects to the Legislature to be funded from the Water Project Fund.

The Water Project Fund may be used to make loans or grants to qualified entities (broadly defined to include public entities and Indian tribes and pueblos). To qualify for funding, the project must be approved by the Water Trust Board for one of the following purposes: (1) storage, conveyance or delivery of water to end users; (2) implementation of federal Endangered Species Act of 1973 collaborative programs; (3) restoration and management of watersheds; (4) flood prevention; or (5) water conservation or recycling, treatment or reuse of water as provided by law. NMSA 1978, § 72-4A-5(B) (2011). The Water Trust Board must give priority to Projects that (1) have been identified as being urgent to meet the needs of a regional water planning area that has a completed regional water plan accepted by the Interstate Stream Commission, (2) have matching contributions from federal or local funding sources, and (3) have obtained all requisite state and federal permits and authorizations necessary to initiate the project (NMSA 1978, § 72-4A-5). The Acequia Project Fund may be used to make grants to acequias for any project approved by the Legislature.

The Water Project Finance Act directed the Water Trust Board to adopt regulations governing the terms and conditions of grants and loans recommended by the Board for appropriation by the Legislature from the Water Project Fund. The Board promulgated implementing regulations (19.25.10.1 et seq. NMAC) in 2008. The regulations set forth the procedures to be followed by the Board and New Mexico Finance Authority for identifying projects to recommend to the Legislature for funding. The regulations also require that financial assistance be made only to entities that agree to certain conditions set forth in the regulations.

4.1.1.8 The Strategic Water Reserve

In 2005, the New Mexico Legislature enacted legislation to establish a Strategic Water Reserve, NMSA 1978, Section 72-14-3.3 (2007). Regulations implementing the Strategic Water Reserve statute were also implemented in 2005. 19.25.14.1 et seq. NMAC.

The statute authorizes the Commission to acquire water rights or storage rights to compose the reserve. Section 72-14-3.3(A). Water in the Strategic Water Reserve can be used for two purposes. The first purpose is to comply with interstate stream compacts and court decrees. The second purpose is to manage water for the benefit of endangered or threatened species or to avoid additional listing of species. Section 72-14-3.3(B). The ISC may only acquire water rights that have sufficient seniority and consistent, historical beneficial use to effectively contribute to the purpose of the Reserve. The ISC must annually develop river reach or groundwater basin priorities for the acquisition of water rights for the Strategic Water Reserve. The Middle Rio Grande is a priority basin for the ISC.

4.1.1.9 Acequia Water Use

Two recent cases by New Mexico courts address the issue of acequia water use. *Storm Ditch v. D'Antonio*, 2011-NMCA-104, 150 N.M. 590, examined the process for transferring a landowner's water rights from a community acequia to a municipality. The Court found that actual notice of the transfer application to the acequia was not mandated by statute; instead, publication of the landowner's transfer application provided sufficient notice to the acequia to inform it of the proposed transfer. Further, the statute requiring that the transfer applicant file an affidavit stating that no rules or bylaws for a transfer approval had been adopted by the acequia was not intended to prove notice. Rather, the statute was directed at providing the State Engineer with assurance that the applicant had met all requirements imposed by acequia bylaws before action was taken on the application, not in providing notice.

Pena Blanca Partnership v. San Jose Community Ditch, 2009-NMCA-016, 145 N.M. 555 involved attempts to transfer water rights from agricultural uses appurtenant to lands served by two acequias to non-agricultural uses away from the acequias. The acequias denied the water rights owners' (Owners) requests to make these changes pursuant to their authority under NMSA 1978, Section 73-2-21(E) (2003). The Owners appealed the acequias decision to district court. On appeal, the standard of review listed in Section 73-2-21(E) only allowed reversal of the acequia commissioners if the court found they had acted fraudulently, arbitrarily or capriciously, or not in accordance with law.

The Owners challenged this deferential standard of review in the Court of Appeals based on two grounds. First the Owners argued that the *de novo* review standard in Article XVI, section 5 of the New Mexico Constitution applied to the proposed transfers at issue, not the more deferential standard found in Section 73-2-21(E). The Court disagreed and found that the legislature provided for another review procedure for the decisions of acequia commissioners by enacting § 73-2-21(E).

The Owners second assertion was that the deferential standard of review in Section 73-2-21(E) violated the equal protection clause of Article II, Section 18 of the New Mexico Constitution. The Owners argued that their equal protection guarantees were violated because water rights transfers out of acequias were treated differently than other water rights transfers. The court again disagreed, finding that although other determinations of water rights are afforded a *de novo* hearing in the district court, since the Owners still had access to the courts and the right of appeal there were no equal protection violations.

4.1.1.10 Water Conservation

Guidelines for drafting and implementing water conservation plans are set forth in NMSA 1978, Section 72-14-3.2 (2003). By statute, neither the Water Trust Board nor the New Mexico Finance Authority may accept an application from a covered entity (defined as municipalities, counties and any other entities that supply at least 500 acre-feet per annum of water to its customers, but excluding tribes and pueblos) for financial assistance to construct any water

diversion, storage, conveyance, water treatment or wastewater treatment facility unless the entity includes a copy of its water conservation plan.

The water conservation statute primarily supplies guidance to covered entities, as opposed to mandating any particular action. For example, the statute provides that the covered entity determines the manner in which it will develop, adopt, and implement a water conservation plan. The statute further states that a covered entity “shall consider” either adopting ordinances or codes to encourage conservation, or otherwise “shall consider” incentives to encourage voluntary compliance with conservation guidelines. The statute then states that covered entities “shall consider, and incorporate in its plan if appropriate,” “a variety of conservation measures,” including, in part, water-efficient fixtures and appliances, water reuse, leak repairs, and water rate structures encouraging efficiency and reuse. Section 72-14-3.2(D).

4.1.1.11 Municipal Condemnation

NMSA 1978, Section 3-27-2 (2009) was amended in 2009 to prohibit municipalities from condemning water sources used by, water stored for use by, or water rights owned or served by an acequia, community ditch, irrigation district, conservancy district, or political subdivision of the state.

4.1.2 State Water Laws and Administrative Policies Affecting the Region

In New Mexico, water is administered generally by the State Engineer, who has the “general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required.” NMSA 1978, § 72-2-1 (1982). To administer water throughout the state the State Engineer has several tools at its disposal, including designation of water masters, declaration of underground water basins, and use of the Active Water Resource Management rules, all of which are discussed below, along with other tools used to manage water within regions.

4.1.2.1 Water Masters

The State engineer has the power to create water master districts or sub-districts by drainage area or stream system and to appoint water masters for such districts or sub-districts. NMSA 1978, § 72-3-1 (1919). Water masters have the power to apportion the waters in the water master's district under the general supervision of the state engineer and to appropriate, regulate, and control the waters of the district to prevent waste. NMSA 1978, § 72-3-2 (2007). In the Middle Rio Grande planning region, water masters have been appointed for the Jemez and Middle Rio Grande basins.

4.1.2.2 Groundwater Basin Guidelines

The groundwater basin guidelines applicable to the Middle Rio Grande region are discussed at length in the 2004 plan, Section 5.7.1 and the 2003 Overview, Supporting Document H-6, Section II(C). The declared UWBs in the region are the Middle Rio Grande and Sandia (Figure

4-1). In the Rio Grande UWB, groundwater appropriations are administered through the Middle Rio Grande Administrative Guidelines for Review of Water Right Application (NMOSE, 2000). There are no specific guidelines governing groundwater appropriations in the Sandia UWB.

4.1.2.3 Active Water Resource Management

The Middle Rio Grande River Basin has not been designated as a high priority for implementing AWRM regulations.

4.1.2.4 Special Districts in the Basin

Special districts are various districts within the region having legal control over the use of water in that district. All are subject to specific statutes or other laws concerning their organization and operation. The most important special district in relation to water use in the Middle Rio Grande planning region is the Middle Rio Grande Conservancy District. Additionally, in the planning region there are acequias, mutual domestics, and other forms of special districts. These special districts are discussed in detail in the 2004 plan, Section 5.8.1, and the 2003 Overview, Supporting Document H-6, Section II(E).

4.1.2.5 State Court Adjudications

Not applicable.

4.1.3 Federal Water Laws

The law of water appropriation has been developed primarily through decisions made by state courts. Since the accepted plan was published in 2004 several federal cases have been decided examining various water law questions. These cases are too voluminous to include here, and many of the issues in the cases will not apply directly to the region. However, New Mexico is a party to one original jurisdiction case in the United States Supreme Court involving the Rio Grande Compact and waters of the Lower Rio Grande. Because of its importance to the entire state, especially those regions that include the Rio Grande as a surface water source like the Middle Rio Grande, it is included here.

In *Texas v. New Mexico and Colorado*, No. 141 Original (United States Supreme Court, 2014), Texas alleges that New Mexico has violated the Rio Grande Compact by intercepting water Texas is entitled to under the Compact through groundwater pumping and surface diversions downstream of Elephant Butte Reservoir but upstream of the New Mexico-Texas state line. Colorado is also a Defendant in the lawsuit as it is a signatory to the Rio Grande Compact. The United States has intervened as a Plaintiff in the case. Elephant Butte Irrigation District and El Paso County Water Improvement District Number One have both sought to intervene in the case as well, claiming their interests are not fully represented by the named parties. The motions to intervene along with a motion to dismiss filed by New Mexico are currently pending.

4.1.3.1 Federal Reservations

The doctrine of federally reserved water rights was developed over the course of the 20th Century. Simply stated, federally reserved rights are created when the United States sets aside land for specific purposes, thereby withdrawing the land from the general public domain. In doing so, there is an implied, if not expressed, intent to reserve an amount of water necessary to fulfill the purpose for which the land was set aside. Federally reserved water rights are not created, or limited, by State law.

Section IV(A) of the 2003 Overview, Supporting Document H-6 to the 2004 plan, provides a detailed discussion of federal reserved water rights. Lands with federal reserved rights or aboriginal rights within the Middle Rio Grande planning region include the following:

- The nine Pueblos in the region:
 - Isleta
 - Cochiti
 - Sandia
 - Kewa
 - San Felipe
 - Santa Ana
 - Jemez
 - Laguna
 - Zia

- Jicarilla Apache Tribe
- Tohajiilee Navajo Indian Reservation
- Kirtland Air Force Base
- Santa Fe National Forest
- Cibola National Forest
- National Forest Service Wilderness Areas
- Kasha-Katuwe Tent Rocks National Monument
- Bureau of Land Management Lands

4.1.3.2 Interstate Stream Compacts

Interstate compacts become federal law once ratified by Congress. Three compacts allocate water in the region—the Rio Grande, Upper Colorado River, and Colorado River compacts—and

are discussed in detail in the 2004 plan, Section 5.4.3, and 2003 Overview, Supporting Document H-6, Section VII(B).

As discussed above, the three party states to the Rio Grande Compact are currently involved in litigation over allegations by Texas that New Mexico has violated the terms of the Compact. The allegations primarily involve actions in the Lower Rio Grande of New Mexico. However, the outcome of the suit may affect the upper reaches of the Rio Grande in New Mexico, especially as related to storage and relinquishment credits, which would directly affect water users in the Middle Rio Grande planning region.

4.1.3.3 Treaties

One treaty indirectly governs water use in the Middle Rio Grande planning region: the Convention with Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455, 1 Malloy 1202. This Treaty provides for the distribution between the United States and Mexico of the waters of the Rio Grande in the international reach of the river between the El Paso-Juárez Valley and Fort Quitman, Texas. Although this reach is below the region, any use of water upstream of this reach may impact the downstream distribution of water. It is addressed briefly in the 2004 plan, Section VII(B)(1).

Also of importance to water rights administration in the region, is the treaty of Guadalupe Hidalgo, entered into on February 2, 1848 between the United States and Mexico. 9 Stat. 922. The treaty provides that “property of every kind” of the Mexicans shall be “inviolably respected.” Accordingly, water rights established prior to 1848, which includes many of the water rights in the region, are protected under the treaty. The treaty is mentioned briefly in the 2004 plan, Section III(B).

4.1.3.4 Federal Water Projects

The San Juan-Chama Project and the Rio Grande Project are extremely important federal projects in the planning region. The San Juan-Chama Project is discussed in depth in the 2004 plan, Section 5.5.4, and 2003 Overview, Supporting Document H-6, Section V.

The 2004 plan and 2003 Overview do not discuss in depth the Rio Grande Project, the other major federal project in the region. In 1947 the US Bureau of Reclamation (“Reclamation”) and the US Army Corps of Engineers (“Corps”) completed a comprehensive plan intended to improve and stabilize the Rio Grande’s Middle Valley reaches. The plan included dams for flood and sediment control that were intended to improve operation of the Rio Grande and to ensure deliveries under the Rio Grande Compact. The plan also offered the possibility of a federal loan to rehabilitate the irrigation and drainage systems of the Middle Rio Grande Conservancy District (“MRGCD”).

Congress authorized the Rio Grande Project in 1948. Flood Control Acts of 1948 and 1950 (Pub. L. No. 80-855; Pub. L. No. 81-516) (“The Act”). Congress also authorized the Corps to

construct flood control reservoirs and levees for flood protection. The Act authorized Reclamation to undertake the rehabilitation of the MRGCD works and to pay off outstanding MRGCD bond indebtedness.

In exchange for Reclamations rehabilitating the MRGCD works and paying its debts, the MRGCD entered into a repayment contract with Reclamation in 1951. As security for the loan to pay off the MRGCD debt and to ensure payment of the long-term costs of rehabilitation, the MRGCD agreed to transfer assets to the United States as needed to fully protect its security interests. Pursuant to the terms of the 1951 Contract, the MRGCD was to assign its water rights to the United States as needed by the Secretary of Interior, but no beneficial use rights by individual irrigators on the land were assigned. Ultimately in 1963, the MRGCD transferred to Reclamation only the right to store water in El Vado Reservoir. The MRGCD has repaid the 1951 Contract, but there has been litigation between the MRGCD and Reclamation over the title and to certain parcels and works within the project for a number of years.

Regarding operation of the irrigation works, Reclamation operated the MRGCD works for a period of time in order to protect its security interest and to ensure that the contract was repaid. In the 1970s, Reclamation transferred these duties associated with the diversion dams back to the MRGCD. As part of the transfer, Reclamation and the MRGCD agreed that for purposes of efficiency, and because El Vado Reservoir operations were coordinated with operations of other reservoirs on the Rio Grande, Reclamation would operate El Vado Reservoir to provide releases of water for irrigation purposes with the MRGCD. Thus, the Project requires coordination between the MRGCD and Reclamation.

4.1.3.5 Federal Adjudications in the Basin

Section II(F) of the 2003 Overview, Supporting Document H-6 to the 2004 plan, provides a discussion of adjudications and final decrees.

The Decrees which have been entered in adjudication courts in the Region are:

- Jemez Decree (*United States v. Abousleman*, 83cv01041)
 - Partial Final Judgment and Decree on Non-Pueblo, Non-Federal Proprietary Water Rights (12/01/2000)
 - Partial Final Judgment and Decree of United States' Wild and Scenic River Act Reserved Water Right (10/03/2008)
 - Adjudication resuming to litigate the claims of Pueblos of Jemez, Zia and Santa Ana for historic, existing and future uses (see below)
- Jicarilla Decree: Water rights of Jicarilla resolved pursuant to Jicarilla Apache Water Rights Settlement Act of October 23, 1992, 106 Stat. 2237, and the Act of June 13, 1962, 76 Stat. 96)

Pending adjudications include:

- Rio San Jose adjudication (Subproceeding 1: Adjudication of Acoma and Laguna’s past and present water uses)
- Jemez adjudication (non-Indian claims adjudicated; currently litigating claims of Pueblos of Jemez, Zia and Santa Ana for historical, existing, and future uses)

No adjudication is in progress for the Middle Rio Grande (includes the mainstem pueblos).

4.1.4 Tribal Law

There are 11 Indian nations in the Middle Rio Grande region, and several are administered with a tribal water code, however some do not have such codes. Within the region, the Pueblos of Cochiti, Isleta, Sandia, San Felipe, Santa Ana, Kewa (the mainstem pueblos), Jemez, and Zia do not have water codes. Water codes for the other tribes in the region are described below:

- The Pueblo of Laguna restricts the drilling of domestic wells in the areas of Encinal Canyon and the Village of Philadelphia. These areas are considered “water control and pollution control areas,” and domestic wells can only be drilled with the permission of the Tribal Council. *See* Pueblo of Laguna, New Mexico Tribal Code: Title IX, Chap. 2 (Domestic Water Control).
- Water use on the Jicarilla Apache Nation is governed by its Water Code, Title 21. The Jicarilla Water Code is administered by a Water Commission. *See* Title 21, Chap. 3, § 6. The Code includes provisions for the use and permitting of groundwater and surface water, Chap. 4, §§ 5-6; Chap. 7, §§ 3-4, the transfer of permitted water uses, Chap. 10, water marketing, Chap. 15, conservation, Chap. 16, § 5, and priority enforcement, Chap. 17.
- The Jicarilla Apache Nation also has a Water and Wastewater Utility Code, which includes provisions for conservation. *See* Title 24, Chap. 3, § 6.
- The Navajo Nation Water Code applies to water use on the Tohajiilee Navajo Indian Reservation. *See* 22 N.N.C. §§ 1101 et seq. (1984). The Code is applicable to “all the waters of the Navajo Nation,” which include all surface and groundwater. The Code further declares that “... [I]t shall be unlawful for any person ... to ... make any use of ... water within the territorial jurisdiction of the Navajo Nation unless ... this Code [has] been complied with. No right to use water, from whatever sources, shall be recognized, except use rights obtained under and subject to this Code.”

Additionally, several of the nations within the Middle Rio Grande region have water quality standards:

- The Pueblos of Isleta and Sandia have adopted water quality standards:
 - Pueblo of Isleta Surface Water Quality Standards (amended 03/18/2012).
 - Pueblo of Sandia Water Quality Standards (03/09/2010).
- Laguna Pueblo’s water quality standards are set forth in the Pueblo of Laguna, New Mexico Tribal Code, Title XI, Chapter 2 (Water Quality Standards).
- The Jicarilla Apache Nation Code, Title 14, Section 5 adopts the State of New Mexico surface and groundwater quality standards.
- Water quality on the Tohajiilee Navajo Indian Reservation is governed by the *Navajo Nation Surface Water Quality Standards 2007* (adopted 05/13/2008).

4.1.5 Local Law

Local laws addressing water use have been implemented by both municipalities and counties within the planning region.

4.1.5.1 Bernalillo County

Water use in Bernalillo County is regulated by ordinances, and guided by a Water Conservation Plan and the Albuquerque/Bernalillo County Comprehensive Plan (City of Albuquerque, as amended through 2013).

The Bernalillo County Code of Ordinances has a number of provisions relating to water use.

- Section 30-153 of the Code establishes a combined city, water authority, and county board called the Water Protection Advisory Board, the purpose of which is to advise the three governmental entities on surface and groundwater protection concerns, including policies necessary to enhance protection of surface and groundwater quality, oversee implementation of the groundwater protection policy and action plan, promote consistency in city, authority, and county actions to protect surface and groundwater quality, and advocate effective protection of surface and groundwater quality.
- Section 30-241 of the Code sets forth water conservation requirements in order to reduce per capita water use, encourage responsible use of water, reduce water waste, require conservation measures for new developments, and preserve water supplies within the County.
- Section 30-247 outlines outdoor water restrictions
- Section 30-248 prohibits water waste, and
- Section 30-249 sets forth design and construction requirements for new developments.

The Subdivision Code, Sections 74-96 and 97 outlines the water availability assessments for subdivisions.

Bernalillo County's Water Conservation Plan (04/21/2006) sets for the following initial goals for the plan and its implementation:

- Evaluate current water usage
- Evaluate mandatory, voluntary, and other conservation measures for the Water Conservation Plan
- Determine resource levels for water conservation program
- Determine sources of funding for water conservation program
- Develop priorities
- Set measurement goals and criteria
- Improve baseline information on County water usage and update annually
- Gather information on domestic well permits and domestic well usage on an ongoing basis
- Gradually develop appropriate ordinance(s) from the Water Conservation Plan

The *Albuquerque/Bernalillo County Comprehensive Plan* includes policy goals for both water quality and water management. See Sections II(C)(2) and II(D)(2). The water quality goal is to maintain a dependable, quality supply of water for the urbanized area's needs. The policies for meeting this goal are to minimize the potential for contaminants entering the community water supply, minimize water quality degradation resulting from on-site liquid waste disposal systems, and minimize water quality contamination from solid waste disposal. The water management goal is efficient water management and use. The policies for meeting this goal are to adopt measures to discourage wasteful water use, encourage maximum absorption of precipitation through retention of natural arroyos and other means of runoff conservation, and protect existing water rights and acquire new rights to meet increasing population needs.

4.1.5.2 Albuquerque Bernalillo County Water Utility Authority

The Albuquerque Bernalillo County Water Utility Authority regulates water use through its Water Waste Ordinance. Sections 4-1-3 and 5 of the ordinance define and prohibit water waste, and Section 4-1-4 imposes certain watering restrictions, such as time of day and, under certain conditions set forth in its Drought Management Strategy, day of the week restrictions.

4.1.5.3 City of Albuquerque

The City of Albuquerque Code of Ordinances includes a Water Conservation Landscaping and Water Waste Ordinance. This ordinance prohibits the waste of water, Section 6-1-1-6, imposes time of day water restrictions, Section 6-1-1-5, and imposes water budgets for golf courses and city parks and fields, as well as planting restrictions for new developments, Section 6-1-1-8. The code also includes a Water Conservation Large Users Ordinance, which imposes certain requirements on large users, Section 6-1-4-5. The City's subdivision regulations mandate an adequate water supply for subdivisions, Section 14-14-1-3.

4.1.5.4 Sandoval County

Water use in Sandoval County is governed through subdivision regulations and guided by the *Sandoval County Comprehensive Plan* (Sandoval County, 2013).

The County's subdivision regulations mandate that sufficient water be available for subdivisions and that a subdivision's water requirements be quantified, Sections 4.3, 8.6, and 8.7.

The comprehensive plan sets forth a number of policies relating to water use in Sections I(C)(1) through 5:

- The conservation of water resources is a primary consideration for any new development or changes to land use.
- The augmenting of water resources will be promoted through various strategies to be developed as the need arises.
- Efforts will be made to require community water supply and liquid waste disposal systems in order to ensure safe drinking water for residents.
- Protective zones will be established to ensure that critical areas along the Rio Grande and Jemez River are not negatively impacted by development.
- Critical natural areas will be identified and regulations for their protection adopted where appropriate.

4.1.5.5 Rio Rancho

Water use in Rio Rancho is regulated through the Rio Rancho Municipal Code and the Rio Rancho Comprehensive Plan (Rio Rancho, 2010; amended 02/2015).

- The Rio Rancho Code prohibits the waste of water, Section 52.04, and imposes time of day watering restrictions, Section 52.05. It also sets forth emergency water shortage response stages, Section 52.24. The Code further mandates that a city domestic well permit be obtained prior to obtaining a domestic well permit from the State Engineer,

Section 53.02. A domestic well permit will be denied by the City if the proposed well is within 300 feet of water distribution system, Section 53.04(E).

- The *Rio Rancho Comprehensive Plan* addresses water quality, water availability, and water conservation and reuse, and sets as goals preserving water resources and identifying and securing a long term water supply. See *Rio Rancho, 2015, Sections 2.3.2, 4.2.3, 4.2.4, and 8.2.5.2.*

4.1.5.6 Town of Bernalillo

The Town of Bernalillo regulates water use through its Ordinance No. 198, Water Conservation, Emergency Response and Drought Management Ordinance.

4.1.5.7 Torrance County

Water use in Torrance County is guided by the *Torrance County Comprehensive Plan* (MRCOG, 2003) and regulated through its subdivision regulations.

The comprehensive plan recognizes that there is no regional authority to manage the consumptive use of water resources in the County, with many decisions affecting water resources in the County made by individual local governments and by private sector water providers. The plan recognizes that water is easily the most serious issue affecting the County. The plan sets forth a goal of balancing the needs of a growing population while retaining the rural residential character and culture of the County. The plan also sets as a goal ensuring an adequate and sustainable supply of quality water for current and future needs of the County. The plan outlines the following objectives to meet these goals:

- Administer water rights in the Estancia Basin as a Special Groundwater Management Area.
- Educate water users about the necessity of water conservation, while offering conservation techniques.
- Protect groundwater by preventing land uses that pollute the groundwater.
- Support a Basin-wide program of comprehensive monitoring, metering, and ongoing investigation of water resources in the Estancia Basin.
- Promote the efficient use of centralized water and wastewater systems in the urbanizing areas of the County.

Torrance County subdivision regulations require that subdivisions containing 20 or more parcels with at least one parcel of 2 acres or less must have a State Engineer permit to appropriate for or transfer water to the subdivision. See Section 5.7.

4.1.5.8 Valencia County

There are only specific water ordinances for Valencia County related to subdivision water use. Title XV of the county ordinances (Land Usage), §151.066, requires a State Engineer permit if insufficient water is available to fulfill maximum water requirement for the subdivision.

Water use in Valencia County is primarily guided by the *Comprehensive Land Use Plan for Valencia County, New Mexico* (Valencia County, 2005). This plan sets forth the following goals:

- Encouraging the preservation of the water resources of the County for future generations by protecting to the extent possible all surface waters for agricultural production, recreational activities, ecosystem management, and aquifer recharge
- Promoting water conservation and drought preparedness programs throughout the County
- Supporting restoration of the Rio Grande Bosque to be maintained as a healthy riparian ecosystem
- Establishing and maintaining a water budget for the County that seeks to balance the relationship between the water inflow, local consumptive use or depletion, and the water outflow
- Protecting and improving the quality of water resources available to the County by
 - Developing and implementing a groundwater protection plan and program
 - Identifying sources and constituents of “non-point source” pollution in the County, and developing a plan and program to mitigate the contamination of water resources
 - Identifying and protecting designated wetlands in the County
 - Evaluating the feasibility of constructed wetlands and vegetation filters for purposes of water treatment

The Plan also encourages the establishment of water conservation guidelines for water systems in the unincorporated areas of the County.

4.1.5.9 City of Belen

Water use in the City of Belen is regulated through its code of ordinances and guided by the City of Belen Comprehensive Land Use Plan (MRCOG, 2003).

The Belen Code of Ordinances includes Chapter 13.16 (water waste restrictions) and Chapter 16.24.010 (transfer of water rights by applicant for subdivision approval).

The City of Belen's *Comprehensive Land Use Plan* sets as a policy that an adequate supply of quality water for current and future needs of the City be ensured. To meet this goal, the plan sets for the following objectives:

- Aggressively acquire and secure water rights to meet projected future demands.
- Adopt and maintain a water conservation program that measures residential and business water consumption, offers conservation incentives, and includes a drought contingency plan.
- Educate water users about the benefits of water conservation and other specific water conservation techniques and practices.
- Develop a groundwater protection plan in cooperation with neighboring communities to reduce the potential for groundwater contamination from on-site liquid waste disposal systems, leaking underground storage tanks, and improper handling or disposal of hazardous materials.
- Protect groundwater by preventing land uses that pollute the groundwater from locating in floodplains, groundwater recharge areas, and wellhead protection zones.

The Plan also sets as a goal preparing and implementing a water management program for the City to ensure that the future water supply for the community is secure by adopting and maintaining an active water management program that includes water rights acquisition, conservation strategies, a drought contingency plan, and a groundwater protection plan.

4.1.6.0 Village of Los Lunas

Water use in the Village of Los Lunas is regulated through its Code of Ordinances, and guided by the *Village of Los Lunas 2035 Comprehensive Plan* (Village of Los Lunas, 2013).

- The Los Lunas, New Mexico Code of Ordinances include Chapter 13.20 (emergency water shortage plan) and Chapter 16.40.010 (transfer of water rights by applicant for subdivision approval)
- The comprehensive plan sets forth the goal of maintaining a dependable, quality water supply through reducing the potential for groundwater contamination. It also sets forth the goal of managing water resources efficiently and providing incentives for water conservation by pursuing the acquisition of water rights, promoting water conservation, and investigating the potential of utilizing surface water to augment groundwater supplies.

4.2 Relevant Environmental Law

4.2.1 Species Protection Laws

4.2.1.1 Federal Endangered Species Act

The Endangered Species Act (ESA) can have a tremendous influence on the allocation of water, especially of stream and river flows. 16 U.S.C. §§ 1531 to 1544. The ESA was enacted in 1973 and, with limited exceptions, has remained in its current form since then. The goal of the Act is to protect threatened and endangered species and the habitat on which they depend. 16 U.S.C. § 1531(b). The Act's ultimate goal is to “recover” species so that they no longer need protection under the Act.

The ESA provides several mechanisms for accomplishing these goals. It authorizes the U.S. Fish and Wildlife Service (USFWS) to list “threatened” or “endangered” species, which are then protected under the Act, and to designate “critical habitat” for those species. The Act makes it unlawful for anyone to “take” a listed species unless an “incidental take” permit or statement is first obtained from the Department of the Interior. 16 U.S.C. §§ 1538, 1539. To “take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

In addition, federal agencies must use their authority to conserve listed species. 16 U.S.C. § 1536(a)(1). They must make sure, in consultation with USFWS, that their actions do not jeopardize the continued existence of listed species or destroy or harm habitat that has been designated as critical for such species. 16 U.S.C. § 1536(a)(2). This requirement applies whenever a private or public entity undertakes an action that is “authorized, funded, or carried out,” wholly or in part by a federal agency. *Id.* As part of the consultation process, federal agencies must usually prepare a biological assessment to identify endangered or threatened species and determine the likely effect of the federal action on those species and their critical habitat 16 U.S.C. § 1536(c). At the end of the consultation process, the USFWS prepares a biological opinion stating whether the proposed action will jeopardize the species or destroy or adversely modify its critical habitat. 16 U.S.C. § 1536(c)(4). USFWS may also recommend reasonable alternatives that do not jeopardize the species. *Id.*

The species in the planning region that are subject to protection under the ESA are as follows:

- Yellow-billed cuckoo (threatened): Bernalillo, Sandoval, Torrance, and Valencia counties
- Mexican spotted owl (threatened; implementation of final recovery plan): Bernalillo, Sandoval, Torrance, and Valencia counties
- Southwestern willow flycatcher (endangered; implementation of final recovery plan): Bernalillo, Sandoval, and Valencia counties

- Sprague’s pipit (candidate): Bernalillo County
- Rio Grande silvery minnow (endangered; implementation of final recovery plan): Bernalillo, Sandoval, and Valencia counties
- Jemez Mountains salamander (endangered): Sandoval County
- New Mexico meadow jumping mouse (endangered): Bernalillo, Sandoval, and Valencia counties

There has been significant litigation in the Middle Rio Grande planning region regarding the ESA. The Legal Issues memo, Supporting Document H-5 to the 2004 plan, Section III(C), discusses the original silvery minnow case in depth. In short, in this case environmental groups challenged the validity of a Biological Opinion issued by the U.S. Fish and Wildlife Service concerning the effects of federal water project activities on the silvery minnow, arguing that the Biological Opinion did not adequately consider all of the water in the Rio Grande, including water under San Juan-Chama Project contracts. The court vacated all rulings in the case, and issues raised about the federal use of water for endangered species remain unresolved. The protection of the silvery minnow is guided by the Recovery Plan for Rio Grande Silvery Minnow. 75 FR 7625 (February 22, 2010).

Two new cases regarding ESA issues in the Middle Rio Grande region were filed recently. In the first case, the WildEarth Guardians (WEG) filed a Petition for Review of Agency Action, against the US Army Corps’ of Engineers, (Corps’) and the US Fish and Wildlife Service (Service) in the San Acacia Reach of the Rio Grande regarding the San Acacia Levee Project (Levee Project). *WildEarth Guardians v. U.S. Army Corps of Engineers and U.S. Fish and Wildlife Service*, Case No. 1:15-cv-00159-SMV-KBM (filed 02/24/2015). The Petition alleges that the Corps’ authorization of the Levee Project violates the NEPA, 42 U.S.C. §4321 et seq. and the Administrative Procedure Act (APA) 5 U.S.C. 701 et seq. Specifically, the WEG allege that the Corps’ violated the NEPA by failing to take a hard look at the direct, indirect and the cumulative impacts of the Levee Project to Endangered Species. WEG alleges further that the Service’s Biological Opinion for the Levee Project violates the Endangered Species Act (ESA) and the APA. The case has been stayed and no further action has been taken.

In a second case, the WEG filed a complaint against the Corps and the Bureau of Reclamation (Reclamation) alleging, among other things, that: (1) Reclamation’s operations and activities in the Middle Rio Grande result in jeopardy to the Rio Grande silvery minnow and the southwestern willow flycatcher, and also result in the adverse modification and/or destruction of the species designated critical habitat in violation of the substantive requirements of ESA §7(a)(2); (2) Reclamation’s operations and activities in the Middle Rio Grande have caused, and continue to cause, the incidental take of silvery minnows in violation of ESA § 9; (3) the Corps’ failure to consult with the Service to the full extent of its discretionary authorities over

operations and activities has resulted in the adverse modification and/or destruction of the species designated critical habitat in the Middle Rio Grande, in violation of the procedural requirements of ESA § 7(a)(2); and (4) Reclamation failed to consult with the Service as to the full extent of its discretionary authorities over operations and activities in the Middle Rio Grande when needed to assure compliance with the ESA in violation of the procedural requirements of ESA §7(a)(2).

The Middle Rio Grande Conservancy District (“MRGCD”) intervened as a Defendant in the case. The Federal Defendants and the MRGCD filed a motion to dismiss. The federal district court filed a Memorandum Opinion and Order on September 23, 2015 granting in part and denying in part the motion to dismiss. The court dismissed WEG’s claim that Defendant Reclamation violated the procedural requirements of ESA § 7(a)(2). However, the court also determined that the WEG’s claim that Reclamation violated the substantive provisions of ESA § 7(a)(2) was justiciable.

The district court issued a second Memorandum Opinion and Order on September 23, 2015 related to the WEG’s claims against the Corps. The district court did not dismiss the WEG’s claims against the Corps. In the decision the court found that the Corps’ does engage in affirmative actions relating to the operation of its Middle Rio Grande dams and reservoirs and, accordingly, the agency has sufficient discretionary authority to modify its actions to benefit endangered species.

The case is currently pending before the federal district court.

4.2.1.2 New Mexico Wildlife Conservation Act

The New Mexico Wildlife Conservation Act, enacted in 1974, provides for the listing and protection of threatened and endangered wildlife species in the State. NMSA 1978, §§ 17-2-37 to 17-2-46. In enacting the law, the Legislature found that indigenous New Mexico species that are threatened or endangered “should be managed to maintain and, to the extent possible, enhance their numbers within the carrying capacity of the habitat.” NMSA 1978, § 17-2-39(A).

The Act authorizes the New Mexico Department of Game and Fish to conduct investigations of indigenous New Mexico wildlife species suspected of being threatened or endangered to determine if they should be listed. NMSA 1978, § 17-2-40(A). Based on the investigation, the director then makes listing recommendations to the Game and Fish Commission. *Id.* The Act authorizes the Commission to issue regulations listing wildlife species as threatened or endangered based on the investigation and recommendations of the Department. NMSA 1978, § 17-2-41(A). Once a species is listed, the Department of Game and Fish, “to the extent practicable,” is to develop a recovery plan for that species. NMSA 1978, § 17-2-40.1. The act makes it illegal to “take, possess, transport, export, process, sell or offer for sale[,] or ship” any listed endangered wildlife species. NMSA 1978, § 17-2-41(C). However, enforcement of this provision of the Act is very limited.

Pursuant to the Act, the Commission has listed over 100 wildlife species – mammals, birds, fish, reptiles, amphibians, crustaceans, and mollusks – as endangered or threatened. 19.33.6.8 NMAC. As of August 2014, 62 species were listed as threatened, and 56 species were listed as endangered. *Id.* In the Middle Rio Grande planning region, all of the federally listed species discussed above are also protected under the Act.

4.2.2 Water Quality Laws

4.2.2.1 Federal Clean Water Act

The Clean Water Act (CWA), 33 U.S.C. §§ 1251 to 1387, is discussed in detail in Section 5.5.1 of the 2004 plan and Section VIII(A) of the 2003 Overview, Supporting Document H-6.

4.2.2.1.1 Waters of the United States

Since the 2004 plan was published, there have been significant legal changes to the term “waters of the United States” as used in the CWA. The term “waters of the United States” delineates the scope of CWA jurisdiction, both for the section 402 NPDES permit program, and for the section 404 dredge and fill permit program. The term is not defined in the CWA, but is derived from the definition of “navigable waters,” which means “waters of the United States including the territorial seas.” 33 U.S.C. § 1362(7). In 1979, EPA promulgated regulations defining the term “waters of the United States.” *See* 40 C.F.R. § 230.3(s) (2014) (between 1979 and 2014, the term remained substantially the same). This definition, interpreted and implemented by both EPA and the Corps, remained settled for many years.

In 2001, however, the Supreme Court began to cast doubt on the validity of the definition as interpreted by EPA and the Corps. The Court took up a case in which the Corps had asserted CWA jurisdiction over an isolated wetland used by migratory birds, applying the Migratory Bird Rule. The Court ruled that the Corps had no jurisdiction under the CWA, emphasizing that the CWA refers to “navigable waters,” and that the isolated wetland had no nexus to any navigable-in-fact water. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S.159 (2001).

The Court muddied the waters further in its 2006 decision in *Rapanos v. United States*, 547 U.S. 715 (2006) (consolidated with *Carabell v. U.S. Army Corps of Engineers*). Both these cases challenged the Corps’ assertion of CWA jurisdiction over wetlands separated from traditional navigable waters by a man-made ditch. In a fractured 4-1-4 decision, the Court ruled that the Corps did not have CWA authority to regulate these wetlands. The plurality opinion, authored by Justice Scalia, held that CWA jurisdiction extends only to relatively permanent standing or flowing bodies of water that constitute rivers, streams, oceans, and lakes. *Id.* at 739.

Nevertheless, jurisdiction extends to streams or lakes that occasionally dry up, and to streams that flow only seasonally. *Id.* at 732, n.3. And jurisdiction extends to wetlands with a continuous surface connection to such water bodies. *Id.* at 742. The concurring opinion, per Justice Kennedy, stated that CWA jurisdiction extends to waters having a “significant nexus” to

a navigable water, such nexus the Corps had failed to show in either case. *Id.* at 779-80. In dissent, Justice Stevens would have found CWA jurisdiction in both cases. *Id.* at 787.

There has been considerable confusion over the proper application of these opinions. Based on this confusion, EPA and the Corps recently amended the regulatory definition of “waters of the United States” to conform to the *Northern Cook County* and *Rapanos* decisions. Final Rule, 80 Fed. Reg. 37054 (June 29, 2015) codified at 33 C.F.R. pt 328; 40 C.F.R. pts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401. The new definition covers: 1) waters used for interstate or foreign commerce; 2) interstate waters; 3) the territorial seas; 4) impounded waters otherwise meeting the definition; 5) tributaries of the foregoing waters; 6) waters, including wetlands, adjacent to the foregoing waters; 7) certain specified wetlands having a significant nexus to the foregoing waters; and 8) waters in the 100-year floodplain of the foregoing waters. 40 C.F.R. § 302.3.

Several states and industry groups have challenged the new definition in federal district courts and courts of appeal. In one such challenge, the district court granted a preliminary injunction temporarily staying the rule. *North Dakota v. EPA*, 2015 WL 5060744 (Aug. 27, 2015). Because the New Mexico Environment Department and the New Mexico Office of the State Engineer are plaintiffs in this case, the stay is effective – and the new definition does not now apply – in New Mexico. The United States is likely to appeal the decision.

4.2.2.2 Federal Safe Drinking Water Act

Enacted in 1974, the Safe Drinking Water Act (SDWA) regulates the provision of drinking water in the United States. 42 U.S.C. §§ 300f to 300j-26. The act’s overriding purpose is “to insure the quality of publicly supplied water.” *Arco Oil & Gas Co. v. EPA*, 14 F.3d 1431, 1436 (10th Cir. 1993). Sections 5.5.1 of the 2004 Plan and VIII(B)(1) of the 2003 Overview provide detailed discussions of the Safe Drinking Water Act. The Safe Drinking Water Act (SDWA) protects the quality of drinking water in the United States (42 U.S.C. § 300f et seq. (2002)). This law focuses on all waters actually or potentially designed for drinking use, whether from above-ground or underground sources. The Act authorizes EPA to establish safe standards and requires all owners or operators of public water systems to comply with the standards. New Mexico has promulgated drinking water regulations that adopt, in part, federal drinking water standards. *See* NMAC 20.7.10.

4.2.2.3 New Mexico Water Quality Act

The most important New Mexico law addressing water quality is the New Mexico Water Quality Act (WQA), NMSA 1978, §§ 74-6-1 to 74-6-17. The New Mexico Legislature enacted the WQA in 1967. The purpose of the WQA is “to abate and prevent water pollution.” *Bokum Res. Corp. v. N.M. Water Quality Control Comm’n*, 93 N.M. 546, 555, 603 P.2d 285, 294 (1979).

The WQA created the Water Quality Control Commission to implement many of its provisions. NMSA 1978, § 74-6-3. The WQA authorizes the Commission to adopt State water quality

standards for surface and ground waters and to adopt regulations to prevent or abate water pollution. NMSA 1978, § 74-6-4(C) and (D). The WQA also authorizes the Commission to adopt regulations requiring persons to obtain from the New Mexico Environment Department a permit for the discharge into groundwater of any water contaminant. NMSA 1978, § 74-6-5(A). The Department must deny a discharge permit if the discharge would cause or contribute to contaminant levels in excess of water quality standards “at any place of withdrawal of water for present or reasonably foreseeable future use.” NMSA 1978, § 74-6-5(E)(3). The WQA also authorizes the Commission to adopt regulations relating to monitoring and sampling, record keeping, and Department notification regarding the permit. NMSA 1978, § 74-6-5(I). Permit terms are generally limited to five years. NMSA 1978, § 74-6-5(H).

Accordingly, the Commission has adopted ground water quality standards, regulations requiring discharge permits, and regulations requiring abatement of groundwater contamination. 20.6.2 NMAC. The water quality standards for ground water are published at sections 20.6.2.3100 through 3114 NMAC and the regulations for discharge permits are published at sections 20.6.2.3101 to 3114 NMAC.

An important part of these regulations are those addressing abatement. 20.6.2.4101 - .4115 NMAC. The purpose of the abatement regulations is to “[a]bate pollution of subsurface water so that all groundwater of the state of New Mexico which has a background concentration of 10,000 milligrams per liter or less total dissolved solids is either remediated or protected for use as domestic or agricultural water supply.” 20.6.2.4101.A(1) NMAC. The regulations require that groundwater pollution must be abated to conform to the water quality standards. 20.6.2.4103.B NMAC. Abatement must be conducted pursuant to an abatement plan approved by the Department, 20.6.2.4104.A NMAC, or pursuant to a discharge permit, 20.6.2.3109.E NMAC.

In addition, the Commission has adopted standards for surface water. 20.6.1 NMAC. The objective of these standards, consistent with the federal Clean Water Act (discussed above) is “to establish water quality standards that consist of the designated use or uses of surface waters of the [S]tate, the water quality criteria necessary to protect the use or uses[,] and an antidegradation policy.” 20.6.4.6.A NMAC. The standards include designated uses for specific bodies of water within the State. 20.6.4.50 to 20.6.4.806 NMAC. The standards also include general water quality criteria, 20.6.4.13 NMAC; water quality criteria for specific designated uses, 20.6.4.900 NMAC; and water quality criteria for specific bodies of water, 20.6.4.50 to 20.6.4.806 NMAC. The standards also include an antidegradation policy, applicable to all surface waters of the State, to protect and maintain water quality. 20.6.4.8 NMAC. The antidegradation policy sets three levels of protection, closely matched to the federal regulations.

Lastly, the Commission has also adopted regulations limiting the discharge of pollutants into surface waters. 20.6.2.2100 to 2202 NMAC.

4.2.2.4 New Mexico Drinking Water Standards

The New Mexico Environmental Improvement Act created an Environmental Improvement Board, and it authorizes the Board to promulgate rules and standards for water supply. NMSA

1978, § 74-1-8(A)(2). The Board has accordingly adopted State drinking water standards for all public water systems. 20.7.10 NMAC. The State regulations incorporate by reference the federal primary and secondary drinking water standards (40 C.F.R. parts 141 and 143) established by the U.S. Environmental Protection Agency (EPA) under the Safe Drinking Water Act (discussed above). 20.7.10.100 NMAC, 20.7.10.101 NMAC.

4.3 Legal Issues Unique to the Region and Local Conflicts Needing Resolution

4.3.1 Ongoing or Threatened Litigation that May Affect Water Management

State of New Mexico v. U.S. Bureau of Reclamation, et al., No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011) involves the 2008 Operating Agreement for the Rio Grande Project. The Operating Agreement was developed during settlement of litigation between the Elephant Butte Irrigation District (EBID), El Paso County Water Improvement District Number One and the United States Bureau of Reclamation (USBOR). The State of New Mexico asserts that implementation of this agreement appears to have reduced EBID's allocation of Rio Grande Project water in full-supply years by more than 150,000 acre-feet. Furthermore, the State of New Mexico asserts that the USBOR illegally took New Mexico credit water as allocated under the Rio Grande Compact and violated the National Environmental Policy Act in implementing the agreement. The MRGCD has sought to intervene in the case because of the impacts the Operating Agreement have on upstream storage and relinquishment related to the Rio Grande Compact, and accordingly, on the water users in the middle-valley. The case is currently stayed pending action by the United States Supreme Court in *Texas v. New Mexico and Colorado*, No. 220141 Original (U.S. Supreme Court).

In addition, as discussed above, the of *Texas v. New Mexico and Colorado*, No. 220141 Original (U.S. Supreme Ct.), may impact water use in the region. See Section 4.1.3.

Other matters of importance to water users in the region are the outcomes of the Jemez and Rio San Jose adjudications, as well as the Agustin Plains Ranch water rights transfer application.

Other key issues including conflicts in the region identified by the region are summarized in Section 5 below.