

3

LEGAL ISSUES

REGIONAL WATER PLAN · RIO CHAMA WATERSHED

CHAPTER 3

CONTENTS

Introduction	1
Historical Perspective	1
Treaties	2
1848 Treaty of Guadalupe Hildgo	2
1907 Rio Grande Treaty with Mexico	2
State Laws	3
Surface water	3
Ground water	4
Appropriation and transfer of water rights	4
Acequias	5
Federal issues	5
Federal reserved water rights	5
Wild and Scenic Rivers Act	6
San Juan-Chama Project Act	6
Heron Dam and Reservoir	6
El Vado Dam and Reservoir	6
Abiquiu Dam and Reservoir	7
Endangered Species Act	7
National Environmental Policy Act	7
Other Federal Laws	7
Indian Pueblo and tribal water rights	8
Federal reserved water rights	8
Aboriginal water rights	8
Religious uses	8
Water rights acquired under State law	8
Tribal and Pueblo water codes	8
Water quality issues	9
The Clean Water Act	9
The Safe Drinking Water Act	9
State of New Mexico Water Quality laws	9
Court cases	9
Water rights administration	10

INTRODUCTION

Regional water planning must be done within the constraints and context of applicable water law. In the Rio Chama Basin water rights were and are defined and affected by prior Spanish and Mexican laws and water use customs; the Treaty of Guadalupe Hidalgo between the United States and Mexico; New Mexico water statutes; the Rio Grande Compact between Colorado, New Mexico, and Texas; the 1907 Rio Grande Treaty with Mexico; and a host of federal laws that affect Rio Chama operations which are as varied as the San Juan Chama Project Act, which is a trans-basin diversion from the Colorado River, and the Wild and Scenic Rivers Act which seeks to protect aquatic, scenic, and recreational river values.

Various state and federal agencies are given authority to affect Rio Chama water operations. The U.S. Bureau of Reclamation operates Heron Reservoir and El Vado Reservoir; the Army Corps of Engineers operates Abiquiu Reservoir; and the U.S. Department of the Interior is responsible for implementing the Wild and Scenic Rivers Act. The New Mexico State Engineer is responsible for administering state law-based water rights, and the New

Mexico Interstate Stream Commission is responsible for monitoring compliance with interstate compacts such as the Rio Grande Compact.

There is presently pending in the United States District Court for New Mexico a case (State of New Mexico, ex rel. State Engineer v. Aragon, et al., No. 69cv07941 JEC-ACE), which when completed will identify every water right, its owner, quantity, use, and other elements in the entire Rio Chama Stream System.

The Rio Chama has served the needs of Native Americans, European Americans, and United States citizens for centuries. A variety of compacts, laws, and treaties have developed in response to the demands for the use of these waters. These laws are at times seemingly contradictory, yet all have the potential to affect the availability and usage of water along the Rio Chama. Except for the San Juan Chama Project's imported water, the water of the Rio Chama is considered part of the Rio Grande Basin and is therefore subject to the laws, compacts and treaties affecting the Rio Grande.

HISTORICAL PERSPECTIVE

There is evidence of irrigation by Native Americans in the southwestern United States prior to the arrival of Spanish explorers in the 1500's. The prehistoric Hohokam of the Gila River Basin in Arizona had a large extensive canal system. In New Mexico there is evidence of small irrigation ditches during prehistoric times at Bandelier National Monument east of Los Alamos and at Pot Creek south of Taos. Early chronicles of the Spanish explorer Coronado reported crops, including cotton, grown with irrigation water at the middle Rio Grande Pueblos. However there is no evidence of prehistoric irrigation from the Upper Rio Grande (north of Cochiti) or the Rio Chama. The first reported irrigation from the Rio Chama was by the first non-Indian settlers who came with the Spanish explorer and settler Juan de Oñate. When he first arrived in the Espanola Valley in September of 1598 at San Juan Pueblo he brought with him a large contingent of settlers, soldiers, Franciscan

priests, and their livestock. They promptly, with the assistance of Native Americans, dug the first acequia from the Rio Grande. By 1599 they had moved the settlement to the west side of the Rio Grande at present day Chamita and began irrigation from the Rio Chama. Spanish settlement and irrigation spread up the Chama Valley to the west and into the nearby Santa Cruz Valley to the east. This settlement and irrigation did not extend north of Abiquiu in the 1600's because of hostile Navajo raids. It was not until after the Pueblo Revolt of 1680 and the subsequent reconquest by DeVargas that settlement and irrigation could spread north to the Tierra Amarilla area, in the 1700's.

To the east along the main stem of the Rio Grande, irrigation by Hispanic settlers of the San Luis Valley began around the 1850's. In the 1880's and 1890's the extensive development in the San Luis Valley resulted in large canal systems and other irrigation works in that valley. As a

result of this upper basin development (in combination with a drought) the lower basin, particularly in the El Paso area, experienced a severe water shortage. The Republic of Mexico then filed a claim against the United States that ultimately led to the 1907 Treaty with Mexico. In addition, the Secretary of Interior suspended all applications from Colorado and New Mexico for right of ways across federal lands for purposes of using Rio Grande water. This effectively reduced the state of Colorado's ability to store water. In 1923 the Legislatures of the states of Colorado, New Mexico, and Texas passed statutes appointing commissioners to create the Rio Grande Compact. After a long and arduous process, the Rio Grande Compact of 1938 was born.

Pre-historic Native Americans surely had their own local water use practices and customs. The Spanish settlers brought with them their own practices and customs of water use, written laws about settlement and irrigation, and legal institutions. Virtually every early community had

acequias to take water from rivers, streams, and springs, and deliver it for irrigation, livestock watering, and domestic uses. Today about 1,000 acequias continue to operate throughout New Mexico. They make up the fabric of the rural community.

By 1846 when General Stephen Kearney and the United States army captured the territory of New Mexico it already had a long-established system of water use and sharing by the Spanish and Mexican settlers and Native Americans. There was also a well-established legal system of courts and judicial decision making. General Kearney wrote a code to ensure the continued rule of law, including water law. In particular the code provided that "laws heretofore in force concerning water courses" were to be maintained. (Kearny Code; Water Courses, Stock Marks, etc., Section 1). The Kearny Code specifically adopted Mexican laws that defined and protected the water rights of the inhabitants of New Mexico.

TREATIES

Under Article VI of the Constitution of the United States, treaties are the supreme law of the land and all judges are bound to honor them. There are two treaties that affect water rights in New Mexico and the Rio Chama Basin that are considered below.

1848 TREATY OF GUADALUPE HIDALGO

After the end of the war between the United States and The Republic of Mexico they executed the Treaty of Peace between the United States and Mexico at the city of Guadalupe Hidalgo, on February 2, 1848. The treaty has come to be known as the Treaty of Guadalupe Hidalgo (9 Stat. 922). The most important and the most invoked provision of the treaty as it pertains to land, water, property and personal rights, is Article VIII. It provides that "property of every kind" of the Mexicans "shall be inviolably respected."

Property of every kind certainly includes water rights, which are property rights. Most of the surface water rights in the Rio Chama Basin were established prior to 1848 and therefore are protected by the Treaty of Guadalupe Hidalgo.

1907 RIO GRANDE TREATY WITH MEXICO

In 1906, Mexico filed a claim against the United States due to the shortage of water in the lower Rio Grande basin as mentioned previously. Although disclaiming liability to Mexico, the United States entered into a treaty with Mexico that guarantees Mexico 60,000 acre-feet of water per year. Under the treaty the United States agreed at its own expense to construct the storage and delivery system necessary for the delivery of such waters to Mexico. The water is to be delivered to the Old Mexican Canal above the city of Juarez and the amounts to be delivered will vary from month to month according to a set schedule.

Although the 60,000 acre-feet allotment to Mexico derives from the Rio Grande Basin, it does not affect the interstate schedules of delivery. Finally, although the United States is bound by treaty to deliver these waters to Mexico, in case of extraordinary drought or serious accident the water is to be divided proportionately.

STATE LAWS

SURFACE WATER

The use of surface water in New Mexico is governed by the 1907 water code (NMSA 1978, Section 72-1-1 (1907)). The doctrine of prior appropriation is recognized by that code (NMSA 1978, Section 72-12-1 (1907)) as well as by the New Mexico Constitution adopted in 1912 (N.M. Const. Art. XXI). Under the prior appropriation doctrine, the first user of water has a better right to take and use water than a later user. In times of shortage senior users of water may make a priority call and prevent junior or later users from taking water.

The prior appropriation doctrine arose primarily in California during the gold rush of the 1840's. The doctrine has generally been adopted with differences throughout the western United States. In New Mexico it certainly was adopted as stated above, however water rights established prior to 1907 may very likely be governed by additional or different legal principles. The 1907 water code specifically provides that it shall not be construed to impair water rights that existed prior to that date. (NMSA 1978, Section 72-9-1).

Most surface water rights in Rio Arriba County were established prior to 1848 during the times of Spanish and Mexican government colonization of the southwestern United States. Therefore to properly understand water rights associated with acequias and pre-1848 uses, those rights must be defined consistent with Spanish and Mexican water law principles and the local history. The rights of the Spanish and Mexican settlers developed "according to the laws, customs and usages in force in the republic of Mexico" (Trambly v. Luterman, 6 N.M. 15, 23).

In addition to understanding the laws, customs and usages of the prior sovereigns, we must also be knowledgeable of the local history of the community. There may have been prior water rights disputes that were resolved by local judges, the prior governments, or municipal councils ("ayuntamientos"). There may have been water rights decisions made by the United States Territorial Courts in New Mexico or water sharing agreements filed in cases before those courts. Decisions that resolve water rights disputes can also be found in the probate court and justice of

the peace court records during the nineteenth and early twentieth centuries.

The fact may be that water has been shared in a particular manner by different acequias or different communities for hundreds of years. Whether by long practiced custom or prior judicial decision, the relative rights of different acequias and communities have become established.

Spanish, and later Mexican, officials allocated water among all users in New Mexico, both Indian and non-Indian, based upon well-established legal principles, which include need, non-injury to third parties, prior use, equity, and the common good (Michael C. Meyer, Water in the Hispanic Southwest: A Social and Legal History 1550-1880, Tucson: University of Arizona Press). Dr. Meyer lists seven general principles, but the above are the most commonly reported ones. These water allocation principles were not prioritized, but depending upon the situation, different principles were examined and balanced by the judicial authorities to reach a just decision. Malcolm Ebright limits the basic water allocation factors to need/equity and prior use ("Sharing the Shortages: Water Litigation and Regulation in Hispanic New Mexico, 1600-1850"; N.M. Historical Review 76 (Jan. 2001: 3-45)). Both of these historians and others report that "prior use" was but one factor and not the controlling one, which is different from the term "priority" as used in the prior appropriation doctrine. So long as established water allocations, whether based on long-standing customs or prior judicial decisions, are adjudicated as defining acequia related and other party's water rights, there is no conflict between the Spanish and Mexican legal term "prior use" and New Mexico's adoption of the prior appropriation doctrine.

By the Treaty of Guadalupe Hidalgo (9 Stat. 922) the United States agreed to protect the rights recognized by the prior sovereigns of Spain and Mexico. It is clear from the cases construing the Treaty of Guadalupe Hidalgo, from international law, from the treaty itself, and from other cases, that Article VIII of the Treaty protects water rights established by customary law in New Mexico as of 1846. (Summa Corp. v. California ex rel. State Lands Commission, 466 U.S. 198).

Virtually all surface water rights within the planning region are within the scope of a water right adjudication case now pending in federal court: State of New Mexico, ex rel. State Engineer v. Aragon, et al., No. 69cv07941 JEC-ACE. Therefore every water right will eventually be contained in and described in a court decree. At the time of writing, about two-thirds to three-fourths of all non-Indian surface water rights had been adjudicated.

While the Rio Chama adjudication has been pending for over forty years it may take another ten to twenty years to be completely resolved. That case has been the source of much litigation and expense, but when it is completed water planners will be certain of the nature and extent of all water rights in the Rio Chama Basin.

GROUND WATER

Groundwater was included in New Mexico's water code in 1931 (NMSA 1978 Section 72-12-1 (1931)). The State Engineer has extended his authority over groundwater in the Rio Chama Underground Water Basin. Prior to then people were free to dig or drill a well for any purpose that wasn't wasteful. Now appropriations of groundwater can only be made in accordance with the law and the permits issued by the State Engineer.

The law still requires the State Engineer to issue a permit upon every request for a well for domestic household uses and outdoor non-commercial trees, lawns and gardens up to one acre. (NMSA 1978 Section 72-12-1). These permits entitle a domestic well to appropriate up to three acre-feet per year. There have been recent attempts to change the present law that entitles a resident to a domestic well permit for up to 3 acre-feet per year. The legislature has not adopted any revisions to this law. The State Engineer has recently proposed new rules which, if adopted, would allow the his office to reduce the amount of water from domestic wells to one acre-foot per year, and to deny domestic well permits entirely in certain areas of the state where there are significant ground water depletions.

APPROPRIATION AND TRANSFER OF WATER RIGHTS

The New Mexico water code governs the appropriation of water rights. However there is virtually no unappropriated surface water in New Mexico or the Rio Chama Planning

Region. The only unappropriated surface water that may exist would be that surplus water that occurs during heavy snowmelt runoff periods. All other surface water is claimed by the many acequias, San Juan Pueblo, Jicarilla Apache Tribe and Middle Rio Grande storage rights in El Vado Lake. Furthermore the Rio Grande Compact restricts any new storage of surface water after 1929 except in those few occasional years where the excess spring flood waters cause an overflow or spill at Elephant Butte Dam.

New appropriations can be made of groundwater in the Rio Chama Planning Region pursuant to Chapter 72, Article 12, NMSA 1978 of the water code. Such appropriations can be made for domestic, municipal, industrial, or agricultural purposes. However, these new appropriations can be made only if the State Engineer finds that there is unappropriated water available, there would be no impairment of existing water rights, it would not be contrary to conservation of water, and it would not be detrimental to the public welfare of the state (NMSA [1978] Section 72-12-3). Furthermore, a new ground water appropriation can be made only if any surface water or stream flow impacts are offset.

Another way for cities, towns, or individuals to acquire water rights for new uses is to transfer them from existing uses. Transfers of surface water rights to new or different places or uses is governed by NMSA (1978) Sections 72-5-22, 23, and 24. Such a transfer will only be allowed if (1) there is no impairment of other water rights, (2) the transfer is consistent with the public welfare, and (3) the transfer is not contrary to the conservation of water. Transfers of groundwater to new or different places or uses may be made on basically the same conditions. Transfers of surface water rights will be limited to their historically available supplies, and only the consumptive, beneficial use can be transferred.

Impairment means anything that would interfere with or prevent another person from using their water rights. The public welfare and conservation of water provisions of the law are relatively new and there are no state guidelines and very little case law that interpret them. Planners should be aware that while transfers of water rights may be necessary, transaction costs could be substantial considering the need for experts, attorneys, and court costs. These transaction costs are in addition to the actual cost of the water rights sought to be acquired and transferred.

ACEQUIAS

An acequia is both a physical irrigation ditch and a community of people or “parciantes” who own water rights distributed by the irrigation ditch and who operate the ditch for their common benefit and good. Acequias, also called community ditch associations, are political subdivisions of New Mexico (Section 73-2-28, N.M.S.A. 1978). Acequias are also like corporations, with the power to sue or be sued as such (Section 73-2-11, N.M.S.A. 1978). The Supreme Court of New Mexico has described acequias as “a hybrid between a corporation and a public body” (Wilson v. Denver [1998] 125 N.M. 308, 961 P.2d 153).

Most of New Mexico’s acequias were established in the seventeenth, eighteenth, and nineteenth centuries during Spanish and Mexican administrations. While local courts resolved water rights disputes throughout that time, the concept and process of a general stream adjudication complete with hydrographic surveys, is relatively modern, first appearing in the 1907 water code. By that time acequias had been well established with water rights defined by Spanish and Mexican legal principles.

New Mexico’s water laws regarding acequias are basically a codification of legal principles that have developed over the centuries. These acequia laws are contained at NMSA 1978, 73-2-1, et seq. and 73-3-1, et seq. However, Article 3 does not apply to acequias in certain counties, including Rio Arriba County.

Two recent laws have given more authority to acequias to regulate water uses and to protect themselves from harmful water transfers. Under Section 73.2.55.1 an acequia may establish a water bank for the purpose of temporarily reallocating water within places of use served by the acequia. These temporary transfers may be done without formal proceedings before the State Engineer. Water rights placed in an acequia water bank are not subject to loss for non-use.

Pursuant to Section 72.2.21(E) acequias may adopt rules or bylaws which require commissioners of and acequia to approve any transfer of water rights from an acequia to another place or purpose of use. The transfer or change may be denied only if the commissioners determine that it would be detrimental to the acequia or its members and they make and explain their decision in writing.

FEDERAL ISSUES

The federal government affects water rights, water quality, and water availability by judicial and congressional actions.

FEDERAL RESERVED WATER RIGHTS

The federal reserved water rights doctrine was developed by the federal courts over the last hundred years. That doctrine provides that when the federal government sets aside land for certain purposes, such as creating national forests, there is an implied reservation of the then available unappropriated water in an amount necessary to fulfill the purpose of the reservation. (Winters v. United States, [1908] 207 U.S. 564). The Winters case involved the implied reservation of water by the United States when it established the Fort Belknap Indian Reservation in Montana. Later cases established that the implied reservation of water rights applied to non-Indian federal reservations (Arizona vs. California [1963] 373 U.S. 546 [water for national forests]; Cappert vs. United States [1976] 426 U.S. 128 [water for the desert pup fish in underground

pools]; and United States vs. New Mexico [1978] 438 U.S. 696 [water for the Gila National Forest]).

By far the largest non-Indian reservations that the United States has in the Rio Chama River Basin are the many thousands of acres of Carson National Forest and Santa Fe National Forest. The quantification of the water rights connected with those national forests is pending in the Rio Chama Adjudication (Aragon case). It may be ten more years before such water rights are finally determined, however the total quantity of water rights for these two national forests is relatively small based upon other adjudications and the limitations set out in United States vs. New Mexico (supra).

The Organic Act of 1897, 16 U.S.C. Section 475 created the national forest system and the purposes for withdrawing or reserving them. The United States Supreme Court held in U.S. vs. New Mexico that the primary purposes of the national forests were watershed protection and timber production, not as argued by the United States, aesthetic,

recreational, wildlife, fish, or recreation purposes. Therefore the adjudicated water rights for the national forests will be very small compared to all other water rights in the basin. The national forests will have some other relatively small quantities of water rights that have been established under state law, such as water from springs, stock tanks, and irrigated land. Any wilderness areas within the Rio Chama Basin will also have some very small quantities of water rights.

WILD AND SCENIC RIVERS ACT

In 1980 Congress passed the Wild and Scenic Rivers Act and as one of its initial designations, established the Rio Chama Wild and Scenic River Area. In the pending Aragon adjudication suit, the court has determined that Congress impliedly intended to reserve water to fulfill the purposes of the Act, which were to preserve the wild and scenic nature of the Rio Chama and to provide for its continued aesthetic and recreational enjoyment. Presently the quantification of instream flows to meet those purposes is being negotiated by the United States, the State of New Mexico and several acequias. The relatively late or junior priority date of 1980 should not present any problems for existing water users. However future uses and planning must consider and prevent any impairment of the instream flow requirements of the Rio Chama Wild and Scenic River Area.

SAN JUAN-CHAMA PROJECT ACT

Congress authorized the construction of the San Juan-Chama Project in 1962 for the purposes of providing water to the City of Albuquerque, the Middle Rio Grande Conservancy District, and acequias and rural communities in northern New Mexico (northern tributary units). (Act of June 13, 1962, P.L. 87-483, 76 Stat. 96). The San Juan-Chama Project was built to enable New Mexico to fully utilize its 11 percent share of the Colorado River as a participating project of the Colorado River Storage Project. Water is transported from tributaries of the San Juan River, a tributary of the Colorado River, through tunnels under the Continental Divide to Willow Creek, a tributary of the Rio Chama.

Although originally authorized to transport more water, the San Juan-Chama Project was built to convey 110,000 acre-feet of water annually. The current estimated firm yield is 96,200 acre feet per year. The imported water is stored

and held for release at Heron Reservoir on the Rio Chama.

Because diversion and storage facilities were not constructed in many of the tributaries of the Rio Grande as originally planned, the imported water has been contracted for use by approximately a dozen cities and towns in New Mexico, including the City of Española. Also an annual allocation of about 5,000 acre-feet has been made to provide for fish, wildlife, and recreation purposes at Cochiti Lake on the Rio Grande.

Heron Dam and Reservoir

Heron Dam and Reservoir is authorized only to store the imported San Juan-Chama Project water. Natural flows of the Rio Chama cannot be stored in Herron. Also, the imported water cannot be carried over from one year to the next. The Bureau of Reclamation has allowed temporary waivers of the carryover restrictions to enhance Rio Chama flows. The carryover restrictions have resulted in various San Juan-Chama contractors storing their unused water at El Vado, Abiquiu, Jemez Canyon, and Elephant Butte reservoirs.

El Vado Dam and Reservoir

The Middle Rio Grande Conservancy District owns El Vado Dam, which is operated by the Bureau of Reclamation. Construction of the dam was completed in 1935.

There are several restrictions on the storage of water at El Vado Reservoir. Article VII of the Rio Grande Compact prohibits storage of native Rio Grande, including Rio Chama, water in post compact reservoirs (constructed after 1929) when usable water in storage at both Elephant Butte and Caballo Reservoirs is less than 400,000 acre feet. This basically means that during low runoff years storage of native Rio Chama water at El Vado is limited or restricted.

An additional restriction on storage at El Vado is the requirement that there can be no storage which would deprive downstream acequias on the Rio Chama of their senior water rights. Those acequias require a flow during the irrigation season of approximately 140 cfs. That amount must bypass the dam and there can be no storage of natural flow at El Vado when the Rio Chama flow rate is less than 140 cfs.

El Vado Dam and Reservoir stores water for the six southern Indian Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta. The Bureau of Indian Affairs and the Bureau of Reclamation cooperate in the storage and release of these six Pueblos' stored water.

Abiquiu Dam and Reservoir

The Flood Control Acts of 1948 (P.L. 80-858) and 1950 provided authority for the construction of Abiquiu Dam. It is owned and operated by the Corps of Engineers. In addition to the primary purpose of flood control, Congress in 1981 (P.L. 97-140) authorized the storage of 200,000 acre-feet of San Juan-Chama water at Abiquiu. Through a contract with the Corps, the City of Albuquerque has the primary right to store its San Juan-Chama water there.

In order to improve the safety of Abiquiu Dam, the Corps of Engineers in 1984 raised the dam about 15 feet. This modification allows for additional storage capacity that could be allocated for other purposes. Congress passed P.L. 100-522 in 1988 which authorized the storage of 200,000 acre-feet of Rio Chama water at Abiquiu if the space is not required for the storage of San Juan-Chama water.

ENDANGERED SPECIES ACT

The Endangered Species Act (ESA) (16 USC Section 1531-1544) can affect water allocation and uses. Recently a lawsuit was filed to force the Bureau of Reclamation to reallocate imported San Juan-Chama water so that portions of it can be used to assist in the recovery and survival of the Rio Grande silvery minnow, an endangered species (Rio Grande Silvery Minnow vs. Keys [10th Cir 2003] 333 F.3rd 1109). The court determined that under the ESA federal agencies, such as the Bureau of Reclamation, must take actions that not only do not harm an endangered species but that will assist in its survival. This obligation under the ESA superseded the rights of municipalities and irrigators who had contracts for the delivery of imported San Juan-Chama water and relied upon it for their basic needs. In response to the court's decision Congress passed legislation in 2004 which placed the use of San Juan-Chama water outside the reach of the ESA.

Federal agencies now voluntarily cooperate in their operation of dams and reservoirs on the Rio Chama and Rio Grande to assist in the recovery of the silvery minnow. Other endangered species, such as the Southwestern willow flycatcher, may also affect the operations of dams and reservoirs. Water planners should be aware that any actions which reduce water flows in the Rio Chama or its tributaries or harm habitat used by an endangered species will be subject to limitation.

NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) is a federal law which requires that an analysis be conducted of the environmental impacts of any major federal action. (42 U.S.C. Section 4332 (2000)). A major federal action that requires a NEPA review includes any projects that are financed, regulated, or approved by federal agencies. There are three alternative levels of analysis that may occur: a categorical exclusion (where there is an initial finding of no significant environmental impact), an environmental impact statement, or an environmental assessment (which determines whether a full environmental impact statement is necessary or not). NEPA by itself does not prohibit any federal actions but it does determine the steps that must be taken to analyze the impacts on the environment and what mitigation efforts must be taken to protect the environment. A NEPA analysis allows for public input and may be a lengthy, costly process that could impose significant mitigation costs.

OTHER FEDERAL LAWS

There are two other federal laws that could affect allocation and use of water in the Planning Region: The Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). RCRA (42 U.S.C. Section 6901-6992K [2002]) regulates the creation, transportation, storage, and disposal of hazardous wastes. CERCLA (42 U.S.C. Section 9601 et seq. [2002]) establishes procedures for addressing closed or abandoned hazardous waste sites, known as Superfund sites. Water quality is protected by the regulation or cleanup of hazardous wastes.

INDIAN PUEBLO AND TRIBAL WATER RIGHTS

San Juan Pueblo and the Jicarilla Apache Tribe are located within the Rio Chama planning region. Both are Native American or Indian communities and their water rights are defined and measured by complex and multiple legal standards. The several basic types of Pueblo or Indian water rights are discussed below.

The nature and extent of the Jicarilla Apache Tribe's water rights has already been negotiated and adjudicated in the Aragon or Rio Chama adjudication. The water rights claims of San Juan Pueblo have not yet been adjudicated nor have there been any negotiations.

FEDERAL RESERVED WATER RIGHTS

As discussed above, the Winters case established that Indian water rights can be implied to exist whenever the United States has established a reservation as in the case of the Jicarilla Apache Tribe. The priority date of those water rights is the date that the United States set aside or established the reservation. The quantity of those reserved water rights is that amount of the then-unappropriated water that is necessary to fulfill the purpose of the reservation. San Juan Pueblo is not a reservation and none of its lands were set aside as a reservation, therefore it does not have federal reserved water rights.

ABORIGINAL WATER RIGHTS

Both Pueblos and Tribes may have aboriginal water rights which arise from their use of water during aboriginal, or prehistoric, times and the continued water use today on those same aboriginal lands. Aboriginal water rights have not been extinguished by any acts of the prior sovereigns of Spain or Mexico (New Mexico v. Aamodt (D.N.M. 1983) 618 F. Supp. 993). The Aamodt court has determined that the amount of aboriginally irrigated lands includes any land irrigated up to the passage of the Pueblo Lands Act of 1924. Aboriginal domestic uses are to be similarly measured by those amounts prior to 1924.

RELIGIOUS USES

Tribes and Pueblos will have water rights for religious uses. While these are typically not large quantities, such water uses may be protected from impairment by other parties.

WATER RIGHTS ACQUIRED UNDER STATE LAW

Pueblos and Tribes may have bought water rights from non-Indian parties who established these rights under the laws of the State of New Mexico. Such purchased water rights retain their non-Indian attributes, such as priority dates, until the lands appurtenant to the water rights have been made a part of an Indian reservation by an act of Congress. In such a case, as has happened to certain non-Indian water rights and lands bought by the Jicarilla Apaches, the water rights may be transmuted or transformed into federally protected Indian water rights that are protected from forfeiture or abandonment under state law.

Basically Pueblo and Tribal water rights are not subject to state regulation and the New Mexico Office of the State Engineer has no authority over the water rights of Pueblos or Tribes.

TRIBAL AND PUEBLO WATER CODES

The Jicarilla Apache Nation and the Pueblo of San Juan have each adopted water codes or regulations that affect water use and water quality on waters that pass through or originate on their lands. The federal courts have recognized the right of Indian communities to enact such laws which may be more stringent or restrictive than federal or state standards. Water planners should consult such codes or laws of San Juan Pueblo or the Jicarilla Apache Nation if any action is contemplated that may involve water uses that are within or pass through those communities.

WATER QUALITY ISSUES

In addition to Pueblos' and Tribes' water quality standards (discussed above), there are state and federal standards that must be complied with. In fact most water quality laws are founded on federal laws.

THE CLEAN WATER ACT

Congress' objective in enacting the Clean Water Act (CWA) (33 U.S.C. Sections 1251 to 1387 (2002)) was to "restore and maintain the chemical, physical and biological integrity" of the waters of the United States (33 U.S.C. Section 1251 (a)). The focus of the CWA is to prevent or control pollution of surface waters. The CWA does not address ground water pollution. Water pollution caused by mining and runoff from construction and agriculture (called "nonpoint sources") are not regulated by the government but are primarily addressed through voluntary management practices (40 C.F.R. Section 130.2).

The CWA addresses the discharge of pollutants to the navigable waters of the United States. "Navigable waters" has been defined by the courts very broadly to include virtually every river, stream, or body of water, including even arroyos or ditches (Friends of Santa Fe County v. LAC Minerals, Inc. (D.C.N.M. 1995), 89 2 F.Supp. 1333).

The Environmental Protection Agency (EPA) is responsible for administering the CWA. The EPA establishes water quality standards to protect streams and issues permits which are the only lawful way that any pollutants may be discharged into the nation's waters. (33 U.S.C. Section 1313). These National Pollution Discharge Elimination System (NPDES) permits regulate the type or amounts of pollution discharges, including sewage.

The EPA may delegate its responsibilities under the CWA to state and tribal governments (33 U.S.C. Sections 1251 (g), 1377). The EPA has not done so in New Mexico. However, states and tribes do have the right to adopt their own water quality standards, which in fact has been done by New Mexico and by San Juan Pueblo and the Jicarilla Apache Nation. The CWA requires that water quality standards must be reviewed every three years, and if necessary revised, called the "Triennial Review" (33 U.S.C. Section 1313 (c)1).

THE SAFE DRINKING WATER ACT

Congress also passed the Safe Drinking Water Act (42 U.S.C. Section 300 (f), et seq. 2002) in order to protect drinking water quality. Both surface and ground water that are or may be used for drinking purposes are covered by this Act. The EPA is authorized by the Act to establish safe drinking water standards that must be complied with by all public water systems.

STATE OF NEW MEXICO WATER QUALITY LAWS

New Mexico has its own surface water quality standards, which define a water contaminant as any substance that alters the physical, chemical, biological, or radiological qualities of water (NMSA 1978, Section 74-6-2 (A) (1967)). The New Mexico Environment Department is responsible for establishing water quality standards and protecting the state's water from contamination.

COURT CASES

There have been many court cases and judicial decisions involving water rights within the planning region. These cases span centuries from the time of the earliest Spanish settlers in the 1600's, to the times of Mexican administration, territorial courts under United States administration, and during more recent times. To identify all relevant water rights cases would be a fascinating but lengthy archival study beyond the scope

of this water plan. It also would be unnecessary for the water plan purposes since the ongoing Aragon adjudication case will eventually adjudicate each and every water right in the Rio Chama Basin and the planning region. That adjudication not only will have determined the nature and extent of every water right but also their interrelationships.

The Aragon adjudication has focused primarily on surface water diversions by acequias and private ditches for irrigation, domestic and livestock uses. Surface and ground water rights claims by all other entities and persons will also be adjudicated. This includes water rights of any municipalities, towns, mutual domestic water associations, U.S. forest service, and the Bureau of Land Management.

The water rights of the Jicarilla Apache Tribe or Nation have already been determined by the federal court. The adjudication of San Juan Pueblo's water rights from the Rio Chama has barely begun and may take many years to complete. It is hoped that, as with the Jicarilla Apache Tribe, the water rights of San Juan Pueblo can be negotiated and agreed upon by all parties, thereby avoiding a lengthy, costly, and socially divisive trial.

WATER RIGHTS ADMINISTRATION

The Office of the State Engineer (OSE) is the state agency that is responsible for administering waters and water rights in New Mexico. The OSE has detailed rules and regulations governing the administration of water. A complete recitation of those rules and regulations is beyond the scope of this summary of key legal issues. Acequias have the responsibility to administer water within their own ditches and members. Laws that discuss the administration of acequia water are contained within New Mexico Statutes at 72-2-1-68. Sample bylaws for acequia administration may be obtained from the New Mexico Acequia Association or the OSE. Counties and municipalities have the power to pass laws or ordinances to regulate water use within their jurisdictions. County subdivision ordinances must contain provisions that require a subdivider to prove that there is sufficient water to meet the needs of the subdivision (NMSA 1978, Section 47-6-11[F]). Municipalities have similar requirements for subdivisions (NMSA 1978, Section 3-19-6[B][5][b]). Municipalities may also restrict the drilling of new domestic wells if property is within 300 feet of a municipal water line (NMSA 1978, Section 3-53-1.1 [A]). Counties may own water utilities (NMSA 1978, Section 4-36-8) and may condemn water rights in order to provide water to residents (NMSA 1978, Section 72-4-2 through -12).

Rio Arriba County has taken a proactive stance in the protection of water resources. In 1973 the County adopted comprehensive subdivision regulations. These regulations have been amended several times to ensure that traditional rural water uses were protected.

In 1999 Land Development Regulations were adopted for the purpose of protecting the unique cultural history and

traditions of the County's residents, along with its fragile environment. In particular, those regulations state that "the transfer of water rights from traditional uses, such as irrigation by the acequias to residential subdivision or commercial uses, will generally not promote the public welfare because of its adverse effects on the communities of the County."

In 2000 Rio Arriba County passed a zoning ordinance to protect agricultural land, known as Appendix Q of the Land Development Regulations. This ordinance restricts building on agricultural land and required shared wells on lots of less than three-quarters of an acre.

County subdivision regulations require a review by the OSE to ensure adequate water rights for any proposed subdivision. In addition, review by the New Mexico Environment Department is required to ensure that standards are met for safe drinking water and appropriate sewage disposal.

As indicated above, municipal and county subdivision regulations may regulate domestic wells. They may restrict the drilling of new domestic wells, and they may limit the amount of water that can be pumped or used per household. As mentioned, municipalities have additional authority to regulate water use within municipal boundaries.

Counties and municipalities may own and operate water utilities. By doing so they may impose their own restrictions on household or other water uses, including restrictions on outdoor watering and provisions for drought management.