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Variables to Consider when Transferring Water Rights in New Mexico

by

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A Professional Project Report Submitted in Partial Fulfillment of the Requirements
for the Degree of

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Committee Approval

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Abstract

Demand for water is growing in New Mexico. One potential solution to extend future supplies may be transferring water rights. Water rights transfers occur when existing water rights are moved to a new location or use. Because water transfers are becoming an increasingly popular way to re-allocate water, water rights holders should become familiar with the transfer process and the administrative bodies and policies governing their movement. The transfer process can be complex, influenced by many variables. Parties interested transferring water rights may be unaware of these variables and lack a basic understanding of what constitutes a water right, how water rights are determined, transaction costs, and common pitfalls in the transfer process that can lead to the denial a transfer. Pitfalls identified in this paper include initial validity of the right, continuous beneficial use, defects in title or ownership of the right, type of water right, and protests. Water right holders that can overcome these pitfalls may increase their chances of a successful transfer. The purpose of this paper is to provide a “roadmap” or “guide” to right holders interested in transferring water rights. A discussion of water rights, their administration, and the transfer process will be given to explain this relationship. Next, the five pitfalls identified will be explained to show why they are important in the transfer process. Finally, recommendations will be given on what right holders should do before transferring their water rights.

Introduction

As demand for water grows in New Mexico, especially among municipal, industrial, and commercial uses, water rights transfers are being seen as a possible mechanism to extend future water supplies. Water rights transfers occur when existing water rights are moved to a new location and the use is changed. For example, an agricultural surface water right transferred to a municipal ground water right. Because water rights transfers are becoming an increasingly popular way to re-allocate water, water right holders should become familiar with the transfer process and the administrative bodies and policies governing their movement. They should also take steps to “prove up” their water rights before entering into any transactions.

The transfer process can be complex, influenced by many variables that can either make or break a transfer. Parties interested in transferring water rights may be unaware of these variables. Often they lack a basic understanding of what constitutes a water right, how water rights are determined, transaction costs, and common pitfalls in the transfer process that can lead to the denial or partial denial of a transfer. Pitfalls identified in this paper include initial validity of the water right, continuous beneficial use, defects in title or ownership of the water right, type of water right, and protests. Water right holder’s that can overcome these pitfalls will increase their chances of a successful transfer.

The purpose of this paper is to provide a “roadmap” or “guide” to water right holders interested in transferring water rights. It also serves to answer common questions that may exist concerning water rights. For example, what is the priority date of a water right? What does beneficial use mean? What rights can be transferred? Has a right been forfeited or abandoned? Who administers water rights? How can you “prove up” a water right? And what steps should individual water right holders take before applying for a transfer? First, a discussion of water rights, their administration, and the transfer process will be given to explain this relationship. Next, the five

pitfalls identified will be explained to show why they are important in the transfer process. Finally, recommendations will be given on what a water right holder should do before filing a transfer application.

Of course, not all questions can be answered about water rights in this paper. Many complex issues arise from the re-allocation of water in New Mexico including federal water rights. Because the New Mexico State Engineer generally does not have jurisdiction over federal water rights and because federal water rights are deemed non-transferable, discussion of these rights is excluded from this paper (Brown et al., p 1,1992). In addition, New Mexico water law, administrative code, and internal State Engineer policies change over time. Therefore, the information in this paper may become outdated.

Water Rights

Basic Concepts -

In New Mexico, a water right is the legal right to use water from an available physical supply and is generally considered a real property right (OSE/ISC, p 14, 2001). The elements of a water right include a priority date, type of use, place of use, quantity, and point of diversion (Brown et al., p 3, 1992). Water rights are appurtenant to the land to which they are applied and may be bought, sold, and leased (NMSA 1978, § 72-5-23, § 72-6-3). The elements of a water right are usually identified in a court decree, declaration, permit, or license. Decrees are issued by the courts that have the authority to adjudicate water rights. Permits and licenses are issued by the State Engineer. Declarations are submitted by individual water right owners (Rogers, p 33, 34, 1990).

Not all of these “rights” represent the same degree of certainty or validity when being transferred. For example, adjudicated rights are the most definitive. These rights have been judicially determined by the courts establishing a priority date, point of diversion, purpose of use, place of use, and quantity. In un-adjudicated basins, the most valid water rights are licensed. Licenses are issued by the State Engineer to water rights holders who have filed a “proof of

beneficial use”. Licensed water rights establish continuous water use under a permit and are field checked by the State Engineer to determine their extent. A permit is an indication of a water right but is not as valid as a license since it lacks verification. A declaration is a validated statement by a potential right holder without any form of verification (Office of the State Engineers, personnel communication, June, 22, 2005).

Beneficial Use -

To obtain a water right, water must first be put to beneficial use. According to statute, all waters within the state of New Mexico, both surface and ground water, are deemed public and are subject to appropriation for beneficial use (NMSA 1978, § 72-1-1, § 72-12-1). Beneficial use of water is “the basis, the measure, and the limit of the right to the use of water” (New Mexico Constitution. Art. XVI, § 3). A beneficial use is not statutorily defined (Brown et al., p 2, 1992). Water uses for agriculture, municipal, and industrial purposes are clear. These uses have identifiable points of diversion, places of use, purpose of use, and quantity. In-stream flow water rights for purposes such as recreation, fish and wildlife, and ecological uses are less clear. These rights leave water in the river where it is “used” for in-stream purposes. Potentially, one could obtain a permit for in-stream flow rights through an approved permit by the State Engineer, but this is rare (Belin, p 7, 8, 1998).

Water rights can be lost if beneficial use is not continuous. There are two ways this may occur. First, water rights may be lost by *forfeiture*, which is defined by statute. Forfeiture is the involuntary or forced loss of a water right caused by the failure of the appropriator to beneficially use the water. Failure to make beneficial use of water for a period of four years results in the loss of a water right. This may indicate that the water in the system is no longer being used and is available for someone else to appropriate. Prior to 1965 water rights not beneficially used did not require the State Engineer to notify the water right holder as to the forfeiture of the right. After

1965, if a right holder has not placed water to beneficial use for a period of one year after notification the State Engineer can declare the water right forfeit (NMSA 1978, § 72-5-28, § 72-12-8). However, water right holders may file for time extensions in order to use the water. In this case, extensions may be granted retro-actively for a period of one to three years. The second way to lose a water right is through *abandonment*, which is a common law or court-created doctrine. Abandonment requires both non-use of the water by a person entitled to it and the intent to abandon the right. This is determined in court. If an unreasonable period of time goes by and water has not been beneficially used, this may imply abandonment. In addition, factual evidence may be present proving abandonment or non-abandonment. For example, land uses inconsistent with the application of water, permanent structures such as buildings or roads built where water was once applied, neglect of works, failure to file timely documents showing intent to use the water (e.g. extensions of time, proofs of beneficial use), failure to defend legal challenges to the right, or failure to pay taxes on the land are all signs of abandonment. If abandonment occurs, the water right is considered lost as of the date determined. The original water right may not be re-established by subsequent use (OSE/ISC, 2005a). Court cases helping explain abandonment and forfeiture issues include *New Mexico ex rel. Reynolds v. South Springs Co., 1969*, *New Mexico ex. rel. Reynolds v. Fanning, 1961*, and *New Mexico ex rel. Erickson v. Mclean, 1957*.

Other considerations of the State Engineer and the courts when reviewing forfeiture and abandonment include determining if the water right was covered under a forty-year plan (i.e. municipal rights), whether the water right owner was on active duty in the armed forces, whether there were factors beyond the water right holder's control in applying the water to a beneficial use (i.e. floods), and whether the water was placed in an irrigation district or water conservation program (OSE/ISC, 2005a).

Priority -

Water rights in New Mexico are governed by a system of prior appropriation. This gives right holders who placed water to beneficial use earliest the better right. In times of low supply, rights with the earliest priority, or senior water rights, can continue using available water. Water rights with later priority, or junior water rights, must discontinue their use if the use impairs a senior water right. A priority date may be established in one of the following ways: a permit issued by the State Engineer showing when the water was first placed to beneficial use, a court decree determining the priority date, or a declaration claiming water use before the jurisdiction over a ground water or surface water basin by the State Engineer (Brown et al., p 2, 5, 1992).

Some water users in New Mexico have the right to divert water in the absence of a permit, license, or decree. For example, those who diverted surface water for beneficial use prior to the State Engineer's jurisdiction on March 19th, 1907 have vested rights and are entitled to continue using water whether they have a permit or not (N.M. Const. Art. XVI § 1; NMSA 1978, § 72-1-2, § 72-1-3). In addition, those who applied ground water to a beneficial use in basins prior to the State Engineer's jurisdiction have the right to keep pumping (NMSA 1978, § 72-12-4). In these cases, if the water right holder is considering a transfer, he/she must file a declaration on the rights prior to filing a transfer application. This is so the State Engineer can determine the priority and quantity of the right.

Quantity -

The quantity of a water right determines the amount of water a right holder is entitled to divert and use. Terms used to quantify rights include amount of irrigated land and acre-feet per year (Brown et al., p 3, 1992; NMSA 1978, § 72-5-19). If historic, the right may be quantified by established use of the water and the amount needed to continue that use. For municipal rights, the amount quantified is the per capita water use determined by reasonable demand. Agricultural rights

are determined by the amount necessary to irrigate crops in the area as calculated by the Blaney-Criddle formula or some other method adjusted for altitude, temperature, precipitation, and other relevant variables (Brown et al., p 3, 1992; Harris, p 20, 21, 1984).

The quantity of water rights is referred to in two categories: diversion amount and consumptive use. Diversion amount is the amount of water actually being diverted from an underground source or surface water supply. Consumptive use is the amount actually consumed by the use and not returned to the system (NMAC 19.25.13.7). Usually, the amount stated in permits, licenses, and court decrees is the diversion amount. However because diversion amounts include return flows, or water that can be returned to the hydrologic system for other appropriators, only the consumptive use is transferable (Brown et al., p 3, 1992).

Point of Diversion -

A water right's point of diversion is the location of works where water is diverted from a stream, watercourse, or well (NMAC 19.26.2.7). This is an important element of a water right because it establishes where water is taken from the hydrologic system and applied to a beneficial use. All water rights have a point of diversion assigned to them. Points of diversion are typically identified by geographic coordinates such as latitude and longitude, X/Y coordinates on the New Mexico state plane system, or township, section, and range (NMAC 19.26.2.26).

Place of Use -

A water right's place of use establishes where water has been used historically. (Brown et al., p 4, 1992). For irrigation, the place of use may be a parcel of land defined by a map or plat (OSE/ISC, 2005a; OSE/ISC, 2005b). Municipal or industrial uses may be described by legal subdivision (NMAC 19.27.1.28).

Administration

Basic Concepts -

In New Mexico both the State Engineer and the state judiciary have administrative roles with regard to water rights (p 4, Brown et al., 1992). The State Engineer is responsible for the general supervision of water in the state including the measurement, the appropriation, and the related administrative policies, such as “Active Water Resource Management” (NMSA 1978, § 72-2-1). The courts are responsible for settling disputes and defining water rights through general stream adjudications (NMSA 1978, § 72-4-17, § 72-4-18, § 72-4-19). Both entities have a role in how the State’s water is managed.

The State Engineer -

The State Engineer is responsible for supervising and administering New Mexico’s waters. New Mexico law says the State Engineer may “adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties” (NMSA 1978, § 72-2-8). This statutory mandate gives the State Engineer broad authority to apply policies and decisions with respect to administering water- rights, and the power to deny water rights transfers where he feels it is appropriate.

The State Engineer has at least three administrative functions with respect to water rights. First, he is responsible for maintaining records of all declared, permitted, and licensed rights. This includes records issued by him and his predecessors, as well as adjudicated water rights. Second, he is responsible for issuing new permits to use water. In areas where water is available for appropriation, new permits can be granted provided they do not impair existing water rights, or cause waste, or cause detriment to the public welfare. Third, he is responsible for supervising transfers of existing water rights with respect to point of diversion, place of use, purpose of use, and quantity (Brown et al., p 4, 1992).

Policies of the State Engineer reflect the importance of water management in New Mexico. The three principles used when formulating these policies include protection of existing water rights, assurance water is put to beneficial use, and orderly development of the resource (Harris, p 18, 1984). Many of the State Engineer's policies have been litigated by contesting water rights holders and upheld on legal and scientific grounds. When implementing new policy or management, the courts typically presume the State Engineer correct, unless proven otherwise (Jones, p 950, 2002).

An example of the State Engineer's power over water management in New Mexico is the declared Middle Rio Grande Underground Water Basin. This basin was formed by the State Engineer in 1956 and gave him jurisdiction to manage ground water within its boundaries. Prior to the declaration, those who pumped ground water within the basin did not need a permit. However, as pumping ground water threatened existing surface water users and interstate compact compliance, the State Engineer recognized more control over the basin was necessary. "Declaring" the basin gave the State Engineer jurisdiction over the appropriation of ground water and allowed him to make technical decisions about the proper management of its use. It also brought forward the policy of "coordinated" or "conjunctive" management. This occurs when streams and aquifers are managed as a single hydrologic system. Under this policy, depletions from underground sources affect surface water flows and surface water depletions affect available ground water. For example, if one seeks to pump ground water in a fully appropriated basin they must acquire valid existing surface water rights and transfer them to the new well, or they must find a pre-basin ground water right. This is to off-set the effects pumping ground water will have on available surface water supplies (Jones, p 941-943, 952, 2002). The state Supreme Court upheld these policies in *City of Albuquerque v. Reynolds (1962)*. Among other things, the city claimed the State Engineer did not have the authority to protect prior appropriators from impairment in an un-adjudicated basin. The court

disagreed. They found the policies the State Engineer adopted were “the only known plan to avoid impairment to existing rights” and are “within the lawful power and authority of the State Engineer” (*City of Albuquerque*, p 81)

The Courts -

New Mexico State Courts are ultimately responsible for legally determining water rights. This includes settling water rights lawsuits, interpreting policy, and conducting general stream adjudications (NMSA 1978, § 72-4-17, § 72-4-18, § 72-4-19). In general stream adjudications, the courts determine the rights of all water users within a particular stream, watercourse, or ground water basin. Typically a final judgment or court decree is issued defining each water right’s point of diversion, priority date, place of use, purpose of use, and quantity (Brown et al., p 5, 1992). Adjudicated water rights are legally defined or “valid” rights. The State Engineer must recognize all elements of a court determined right and act accordingly when a transfer is applied for (NMSA 1978, § 72-2-9).

Water rights litigation relies predominantly upon evidence. Whether for steam adjudications, validating a permit, or other disputes, the courts rely heavily on scientific and factual evidence in determining water rights (Brown et al., p 6, 1992). For example, stream adjudications require the State Engineer to conduct hydrographic surveys and investigations into each stream system and water supply (NMSA 1978, § 72-4-17). This includes reviewing documents outlining historical water use, past conveyances of ownership, relevant permits, and other information sustaining a right. Gathered information is then used by the court to legally define the water rights of a particular hydrologic system (Harris, p 19, 20, 1984). Upon approval by affected water users and the issuance of a court decree, adjudication is complete (NMSA 1978, § 72-4-19).

On the other hand, if a dispute arises over water rights in an un-adjudicated basin, hydrographic surveys or the State Engineer’s investigations may not have been done. These cases

place the burden of proof on the water right holder or the party challenging the right. If there is insufficient evidence validating the right, the transfer may be denied (NMSA 1978, § 72-12-7).

Active Water Resource Management -

Recent policies by the State Engineer reflect an increasing role in management and supervision of rights. Because water demand is outpacing renewable supply in some areas of the state, the State Engineer is formulating policy in the hopes of making more efficient use of available water. Active Water Resource Management is a key component. AWRM allows the State Engineer to play a more active role in administration of water rights. This policy relies on three fundamental concepts to guide its implementation: measurement, management, and markets. Under these guidelines the State Engineer hopes to meet existing water rights, fulfill demands for transferred rights, and ensure interstate compact compliance (OSE/ISC, p 5, 6, 2001).

Measurement -

Measurement is the metering of water uses and the monitoring of water supplies. Having accurate measurements of available supplies will help the State Engineer manage water more efficiently. This will be particularly important during times of drought. Measurement may be accomplished by placing more metering devices on diversions. These measurements are then submitted to the State Engineer. In some parts of New Mexico the State Engineer may apply this information to ground and surface water modeling applications to determine the extent of local hydrologic conditions. These conditions can influence the State Engineer when deciding on a transfer. (OSE/ISC, p 5, 15, 2001).

Management -

Management is an essential component underlying AWRM. If the State Engineer is to actively manage the waters of New Mexico then development of this concept is inevitable. Recently, emerging management policies reflect AWRM in their wording. For example, the State Engineer's "Middle Rio Grande Administrative Area Guidelines for Review of Water Rights

Applications” calls for compliance with the Rio Grande Compact, prevention of impairment to existing rights, and limiting the rate of decline in the aquifer so as to extend its life and reduce subsidence. Different ways to accomplish these goals are outlined in the publication through administrative criteria developed for water rights applications. These guidelines are to be followed by the State Engineer’s staff when reviewing applications within the Middle Rio Grande basin. These criteria outline various aspects associated with the management of water rights including ability to acquire and hold water rights, permit limits on actual diversions, valid surface water rights, offset requirements, and leasing of water rights.

Other examples of the State Engineer’s determination to implement AWRM in his policies are highlighted in recent administrative codes. Under NMAC 19.25.13 (Active Water Resource Management), the State Engineer establishes policies to assign “water masters” throughout the state in basins where water supplies and distribution need increased supervision. Water masters are in charge of administering water rights and supervising the water supply in declared “water master districts”. Water master districts are created if the State Engineer feels certain conditions warrant it. Water masters have authority over many aspects of water in these districts including quantifying local water supply, supervising measurement devices, establishing beneficial use requirements, and administering existing water rights. Water rights holders can always appeal to the State Engineer if they are not satisfied with the outcome of a water master’s decision, although this process can take time, tying up the water rights in question and increase transaction costs.

Markets -

Markets are the final element of AWRM. The State Engineer would like to see markets develop for areas where water has been completely appropriated, like the Middle Rio Grande Valley. Markets for water may help re-allocate water to more efficient and new uses. This can be an effective way to get water to where it is needed. Markets would allow willing sellers and buyers to

influence where water is used. Under a market system, water would be severed from an existing use and location and transferred to another, with payment going to the owner of the severed right (OSE/ISC, p 6, 29, 2001).

Unfortunately, barriers exist that make it hard for water markets to function. Lack of adjudicated water rights and uncertainty over federal uses greatly inhibit free transferability and productive markets. In addition, markets require accurate and responsive measurement and hydrologic modeling to properly supervise diversion and supply amounts (OSE/ISC, p 16, 2001).

Reducing barriers will help facilitate the market. The State Engineer is trying to do this through AWRM. Many new policies clearly indicate an effort to make the transfer process more efficient. Two policies including “Rules and Regulations Governing the Appropriation and Use of Surface Water” published in 2005, and “Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water” published in 1995 establish detailed transfer requirements. These administrative codes outline the process for transferring water rights and the criteria necessary when filing an application.

In other efforts to facilitate markets the State Engineer and the courts have started adjudicating numerous streams and rivers in New Mexico. For example, the Lower Rio Grande, Lower Pecos, and San Juan River basins are all actively being adjudicated. Adjudicated water rights will speed up the ability to transfer water rights by legally defining who has the right to what water (OSE/ISC, p 17, 2001).

Water Rights Transfers

The Administrative Process -

Those who wish to transfer water rights must file an application with the State Engineer (NMSA 1978, § 72-5-23). Transfer applications exist for both surface and ground water rights, and identify the “move from” and “move to” locations. If a change of ownership occurs, a “Change of

Ownership of Water Right” form must be recorded with the State Engineer’s office. In addition, water right holder’s should record these documents along with a quitclaim deed in the county clerk’s office (NMAC 19.26.2.17).

After an application is filed the applicant must publish notice of the transfer (NMSA 1978, § 72-5-4). This notice identifies the change of the water right’s point of diversion, place of use, type of use, and generally, ownership (NMSA 1978, § 72-5-23). Notices of the transfer must be published at least once a week for three consecutive weeks in a newspaper of general circulation in the county or counties where the transfer occurred (NMSA 1978, § 72-5-4).

Those who object to a proposed transfer must file a formal protest with the State Engineer. Protests can be filed on the basis that the transfer impairs existing water rights, is contrary to the conservation of water within the state, or is detrimental to the public welfare (NMSA 1978, § 72-5-5). This statute also states that protestants must be “specifically and substantially” affected if the protest is a result of waste or if it is a public welfare issue. Protestants have ten days beyond the last date of the publication to file a protest. Beyond this period, protests are deemed invalid (NMAC 19.26.2.12, 19.27.1.14)

Protested transfers go through a formal hearing process with the State Engineer (NMSA 1978, § 72-5-5). In un-adjudicated basins, the applicant bears the burden of proving non-impairment, conservation of water, and consistency with public welfare (NMSA 1978, § 72-12-7). They must also prove the use and amount of the transferred rights.

If rights are transferred in adjudicated basins, the protestant must disprove the right’s use and amount. Adjudicated water rights are seen as *prima facie* evidence of a water right by the State Engineer (*W.S. Ranch v. Kaiser Steel Corp.*, 1968). During a hearing, if the protestant cannot disprove the water right’s use and amount through sufficient evidence, the adjudicated water right should hold up.

If any party is dissatisfied with any or all terms of the State Engineer's hearing decision, that party has the right to appeal the State Engineer's decision in district court within 30 days (NMSA 1978, § 72-12-10).

If the State Engineer makes a determination that results in an approved transfer, the amount and priority date of the water right are conveyed (NMSA 1978, § 72-5-23). However, approvals may be subject to conditions by the State Engineer. Conditions may include metering requirements, submission of proof of beneficial use, or other evidence substantiating the water right once it is transferred (NMAC 19.26.2.12, 19.26.2.13). See appendix A for a summary of the application process.

Certainty -

The legal title to a water right in New Mexico comes with different degrees of certainty. The most secure rights are adjudicated (OSE/ISC, p 14, 2001). Adjudicated water rights are valid and entitled to all the benefits of state law, including changes in purpose and place of use (NMSA 1978, § 72-2-9, § 72-5-23).

Un-adjudicated water rights are less secure and may be subject to numerous pitfalls in the transfer process (Matthews, p 5, 2004). Since these water rights are not judicially defined, the State Engineer must determine the extent of the right's validity and quantity. Rights in un-adjudicated basins, like in the Middle Rio Grande Valley, are determined by the State Engineer on an interim basis, or until adjudication. (Rogers, p 33, 1990).

The State Engineer relies upon hydrologic data and legal information to manage water rights in un-adjudicated basins (OSE/ISC, p 13, 14, 15, 2001). Hydrologic data can include information such as hydrographic surveys, surface and ground water flow models, and water level monitoring. Legal information includes relevant New Mexico laws and statutes, current administrative policy, and evidence about individual rights. Before the State Engineer evaluates a

transfer from a hydrologic standpoint, the legal nature of a water right is determined. If the history of a water right suggests a legitimate transfer is possible, the hydrology and physical impacts are then evaluated (Office of the State Engineer, personnel communication, June, 22, 2005).

Water rights files contain information about existing water rights (Brown et al., p 8, 1992). These files are contained in the State Engineer's district offices in Santa Fe, Albuquerque, Deming, Las Cruces, and Roswell . Documents found in these files provide details about a water right such as priority, place, and quantity of use. These documents are usually in the form of permits, licenses, or declarations.

Additional information may be found documenting the right as well. For example, there may be State Engineer letters, surveys, aerial photography, affidavits, meter readings, maps, wills, deeds, etc. (Personal Research, June 22, 2005). All of this information is used by the State Engineer to determine the extent of a water right.

How the State Engineer manages information in these files is important. Guidelines for "Active Water Resource Management" require that transfer applications be processed in a timely and thorough manner (OSE/ISC, p 5, 2001). Files that are complete and contain the necessary information the State Engineer uses to determine a water right may have a quicker application processing. Water rights files that are incomplete and missing information may cause confusion and delay an application potentially increasing transaction costs.

As the State Engineer implements new management criteria for water transfers it will be increasingly important that water rights files are maintained and updated by right holders. This is to keep the information current about the right. Therefore, if a decision is ever made to transfer the water right, or if a adjudication takes place, having an up to date file will help "prove up" the right.

Transaction Costs -

Whenever water rights are transferred there are transaction costs. Transaction costs can be in time, money, or effort spent identifying, negotiating, and completing the transfer of a water right (Libecap, p 7, 2005). Transaction costs are incurred by all those involved in a transfer, including sellers, buyers, outside or third-parties such as protests, and the State Engineer (Khoshakhlagh et al., p 41, 42, 1977).

Buyers and sellers invest time and money in negotiating the sale of water rights. The State Engineer invests time and money in staff and resources used to evaluate transfers. If a water right is not substantiated by evidence, transaction costs can increase as a result of additional resources needed to identify and cure defects in the right.

Sellers of water rights may pay transaction costs in efforts to validate their rights (Khoshakhlagh et al., p 41, 42, 1977). This can include time and effort spent reviewing water rights files, talking to regulatory agencies about the water right, taking action to cure title defects, and the cost of professional help to handle review of the water right and resolve problems and file paper work. Sellers also incur costs trying to find buyers. Some firms sell and broker water rights. Sellers may elect to pay these firms to find buyers, to review the transferability of the water right, to put together contracts, to publish notices, and to prepare closing documents (Waterbank.com, 2005).

Buyers incur transaction costs when they are involved in a transfer (Khoshakhlagh et al., p 41-44, 1977). These transaction costs can vary. Transfers easily processed and approved may face few expenses. Transactions faced with protests and other problems may incur more. These require hearings, and potentially litigation depending on the buyer's willingness to pursue the right.

Finally, the administrative system experiences transaction costs (Khoshakhlagh et al., p 41-44, 1977). The State Engineer's Office devotes staff and resources to determine valid water rights, to run hydrologic models, and to decide on transfer applications. Consideration of issues such as

impairment to existing rights, conservation of water, and the public welfare are also evaluated. The complexity of the transfer can influence the transaction costs incurred by the State Engineer.

Transfer Pitfalls -

New Mexico courts can define water rights through general stream adjudications (NMSA 1978, § 72-4-17, § 72-4-18). These rights are the most certain and easiest to validate for a transfer, but their historical use since the adjudication must also be examined (OSE/ISC, p 17, 2001). On the other hand, in un-adjudicated basins such as the Middle Rio Grande Valley, water rights face at least five potential pitfalls in the transfer process that may lead to the denial or partial denial of a transfer. The pitfalls identified include proving initial validity of the water right, showing continuous water use, identifying the type of water right, curing defects in title or ownership, and defending against protests. Any of these issues can affect the transfer process by leading to uncertainties about the right and increasing transaction costs when trying to identify and resolve problems. They can also lead to the denial of a transfer.

Initial validity-

When a water right is transferred its initial validity must be confirmed by the State Engineer (NMSA 1978, § 72-1-2). Initial validity of a water right establishes when water was first put to beneficial use. This creates a priority, point of diversion, purpose, place, and quantity of use. Initial validity is important because in a system of priority the earliest right holders are protected from transfers that may impair them. If transferred rights are junior, impairment claims may arise. This can increase transaction costs as a result of hearings or litigation that may result from the dispute. Establishing initial validity can also be important because the State Engineer may deny transfers he feels do not have the correct priority attached to them. If no evidence backs up initial validity, the right may be non-transferable.

In the Middle Rio Grande Valley for surface water rights established prior to the requirement of permits or March 19th, 1907, initial validity can be established with maps (see

appendix B). In this case, the State Engineer uses the 1917 Rio Grande Drainage Survey to help determine pre-1907 rights (Office of the State Engineer, personnel communication, June, 22, 2005). This map identifies land as either cultivated or non-cultivated. It also shows classifications of bosque, marsh, swamp, and alkali soils. If a declared water right is classified under cultivated land, this is evidence of the right's pre-1907 validity. If the land is not classified under cultivated land the pre-1907 validity is rejected unless additional information proves otherwise. In this case, other maps or documents can be used. For example, early county and soil surveys, as well as Bureau of Land Management (BLM) and railroad maps (OSE/ISC, 2005a; OSE/ISC, 2005c) can supplement missing information.

Knowing initial validity allows water rights holders to evaluate where they stand with respect to priority. If priority is senior to other rights, the right may be of higher value. If it is a later priority, the value could be less.

Continuous Use -

Water must be continuously put to beneficial use subsequent to a water right's establishment. When a water right is transferred the amount of water conveyed depends upon the amount that has been historically consumed (NMAC 19.26.2.11). As mentioned previously, beneficial use is the measure and limit of a water right. Therefore the amount of water continuously put to beneficial use should be neither less nor greater than that initially put to use. If the amount is under-diverted, issues such as forfeiture and abandonment may arise. If over-diverted, water must be paid back to the system. This is done by reducing diversions over time until the over-diverted water is returned (Office of the State Engineer, personnel communication, June, 22, 2005).

Establishing continuous beneficial use can be difficult. If a water right predates aerial photography historical records must be used to determine continuous use (OSE/ISC, 2005a). In the Middle Rio Grande Valley, the two most important historical records include the 1917 Rio

Grande Drainage Survey and the 1926 Middle Rio Grande Conservancy District Planetable and Appraisal Sheets. These and other records are used by the State Engineer to establish continuous use in the Valley. In addition to information from the 1917 Drainage Survey, the 1926 Planetable Map and Appraisal Sheets provide evidence of early irrigation. The planetable map outlines property boundaries and ownership of the land. The appraisal sheets document crop type (i.e. corn, alfalfa, hay, beans, pasture), irrigated and non-irrigated land, location, owner, and other assets. If the State Engineer finds the land under review was not irrigated as shown in the appraisal sheets, the transfer can be rejected

Aerial photographs can also prove continuous use. Since the 1930's land-use along many rivers and streams in New Mexico, including the Rio Grande, Gila, Pecos, and San Juan have been documented by aerial photography. Three federal agencies including the U.S. Soil Conservation Service, U.S. Geological Service and the U.S. Bureau of Reclamation have contributed to these archives. Aerial photographs can indicate point of diversion, amount of irrigated land, and what year's water was used (OSE/ISC, 2005a).

Aerial photography is important because the State Engineer uses it when validating pre-1907 Middle Rio Grande surface water rights (Office of the State Engineer, personnel communication, June, 22, 2005). In the Middle Rio Grande once initial validity and continuous use have been established by the 1917 and 1926 Middle Rio Grande Surveys, aerial photography is used to show subsequent water use. The State Engineer uses aerial photography for evidence of irrigation from the years 1935, 1947, 1955, and 1965. After 1965, evidence of continuous use is established through subsequent aerial photography and from a field investigation.

For ground water in New Mexico, meter readings documenting continuous use can help substantiate a right (OSE/ISC, 2005a). Typically meter reading are submitted on a monthly basis

and give detailed quantities of use. Many times ground water permits will require metering as a condition of the approval. Surface water metering is less frequent.

Having evidence present in a water right file documenting continuous use can be advantageous when transferring water rights (Office of the State Engineer, personnel communication, June, 22, 2005). For example, if a water rights file has all the necessary information determining continuous use, it may take less time to process the application.

Type of Water Right -

Two types of water rights exist in New Mexico; surface water and ground water rights. Depending on the type of water right, the State Engineer may have different transfer policies for each.

For example, surface water rights established prior to March 19th, 1907, are considered “vested” or automatic rights and date from the initiation of beneficial use. (NMSA 1978, § 72-1-3). In this case, right holders who have “vested” water rights can continue to use water in the absence of documentation (Brown, p 5, 1992). If no State Engineer documentation exists the water rights cannot be transferred. In un-adjudicated basins, water rights must have a declaration, permit, or license establishing them before being transferred. A declaration is filed by an individual claimant of a water right, permits are applications to appropriate water that have been approved by the State Engineer, and licenses are issued to permit holders that have proved beneficial use. These documents and associated information give the State Engineer the information he needs to determine the extent of a water right

In areas claimed by the State Engineer to be fully appropriated, such as the Middle Rio Grande Valley, establishing a pre-1907 surface water right can be important. Because of their priorities these water rights are considered the most secure and valuable. If a water right holder has not filed a declaration on pre-1907 water right in the Middle Rio Grande he/she may be over-

looking a significant asset. Additionally, if adjudication occurs on the stream system, information stated in a declaration can be used by the court to determine the water right.

For ground water uses, if a basin has been declared, the State Engineer has jurisdiction. Those who pump after the declaration have to obtain a permit. Those who pump prior to the declaration can continue without one. However, because ground water rights cannot be transferred without State Engineer documentation and approval, those who pumped prior to the establishment of the basin should file declarations on their water rights.

In areas of growing demand, the type of water right is becoming increasingly important. In declared basins, municipal, industrial, and commercial entities use mostly ground water. They are required to obtain additional water rights before increasing use (Office of the State Engineer, personnel communication, June 22, 2005). Because these water rights are conjunctively managed those who seek to pump ground water must offset the effects of their pumping to the surface water supply by acquiring and transferring valid surface water rights. The State Engineer does this to ensure interstate compact compliance, to prevent impairment to existing rights, and to limit the rate of ground water decline. As an example, valid surface rights in the Middle Rio Grande Administrative Area are defined as surface water rights transferred to ground water under an existing permit. In addition they can be “other valid water rights, including contract water for San Juan-Chama Project water, deemed acceptable to the State Engineer” (Middle Rio Grande Administrative Area Guidelines for Review of Water Right Applications, p 1, 5, 2000). There are two different types of water rights. One is a ground water right that has secured valid surface water rights. The other is a surface water right. It is important for water rights holders to distinguish between the two when selling water rights. For example, if a ground water right does not have valid surface water rights attached to it, it will be considered less valuable than pre-1907 surface rights

(City of Albuquerque, personnel communication, June 24, 2005; City of Rio Rancho, personnel communication, June 24, 2005).

Defects in Title or Ownership -

Similar to land, when a buyer and seller agree to exchange water rights, state law requires record of the transaction (NMSA 1978, § 72-1-2.1). This means filing a “change of ownership of water rights” with the State Engineer’s Office and the county clerk’s office where the transfer occurred. Water rights being transferred must show a clear chain of title. If they do not, clarification will be requested by the State Engineer.

A “change of ownership” form must be accompanied by proof of ownership. The State Engineer will not file a change of ownership unless it is attached with an instrument of conveyance documenting the exchanged rights. Acceptable instruments of conveyance include “warranty deeds, special warranty deeds, quitclaim deeds, personal representative deeds, special master deeds, or tax deeds where such instruments unconditionally convey present title to the right” (NMAC 19.26.2.17).

Determining ownership of water rights can get complicated. Depending upon the age of the right, the number of previous owners can vary. Older rights may have long histories with many previous owners. Newer water rights may be held by the original owner. Water rights transfers that have long title histories can take longer to process.

In addition, disputes may arise as to the ownership of a water right. For example, an appurtenant water right severed from the land prior to the sale of that land does not have to be expressly reserved in a contract. If the owner has received an approved permit from the State Engineer to sever the water rights, even if the transferred water rights have not been completely beneficially used at the new location, the rights can be considered severed. This is important because as the State Engineer reviews transfers, if the chain of title does not clearly show

appurtenant water rights, none exist. Examples of lawsuits arising over water rights ownership include *Twin Forks Ranch Inc. v. Brooks*, 1998, *Sunland Vineyards v Luna County Wine Development Corp.*, 1988, and *Turner v. Bassett*, 2005.

Protests -

A wide variety of people have the right to object to a transfer. Standing to object can be based on impairment to existing rights, the use being contrary to the conservation of water, or the use causing detriment to public welfare. Impairment to existing rights is the most clearly defined. The New Mexico Supreme Court has considered degraded water quality and lowered water tables as impairment issues. Cases such as *City of Roswell v. Reynolds*, 1982, *Stokes v. Morgan*, 1984, and *Mathers v. Texaco*, 1966, are good examples. In these cases the courts tolerated some degree of impairment to existing uses if the transferred water was put to beneficial use. The courts applied a practical approach to transfers, deferring to the policy of beneficial use, rather than a strict interpretation of impairment (Rogers, p 36, 1990)

A few cases discuss conservation or public welfare as grounds for protest. One relevant example is *Ensenada Land and Water Users Association v. Sleeper* (1988). Here the protestant's claimed that the granting of an application to transfer water rights from agricultural use to a commercial use by the State Engineer was contrary to the public interest. They argued that the development of a ski area where the water was to be used would erode their traditional land-based culture and economy. In addition, few jobs would be created for local residents. At the time, no statutes required a consideration of the public interest as an administrative requirement for water transfers. The court subsequently found in favor the applicant and upheld the transfer. Considerations of conservation and public welfare have since been statutorily mandated by the legislature.

Protests are a wildcard in the transfer process. Some may result in the complete or partial denial of a water right depending upon the outcome of hearings. Others may require litigation to

resolve the issue. Importantly, in un-adjudicated basins the applicant must justify and substantiate the rights being transferred. If a water rights holder can prove no impairment to existing water rights, show conservation of water, and show no detriment to the public welfare, a transfer should be approved.

Without well defined premises for protest, particularly public welfare, it is likely that protests will continue to hinder markets (Brown et al., p 42, 1992). Because there is lack of certainty associated with transfers that are protested, increased transactions may hinge on the State Engineer's determination of whether a protest is valid or not, and under what conditions the rights may be moved.

Right holders interested in transferring their water rights should be mindful of potential protests and consider some possibilities of avoiding them. One potential strategy is to break up larger blocks of water rights into smaller blocks and move them over time. Another strategy may be to consider only moving the water a short distance, say a few miles or so, so the physical effect of a transfer will not cause impairment to existing rights. Strategizing the movement of water rights prior to filing any applications may help avoid protests.

Recommendations -

The pitfalls previously discussed create uncertainty when transferring water rights. Unless water right holders have a basic understanding of the transfer process and what restrictions apply to their rights, it will be hard to calculate the potential risks of a transaction.

With this in mind, three recommendations are given to right holders before applying for a transfer: Evaluate, Communicate, and Act. Because transfers are handled on a case by case basis, every transfer is different and the outcome may not be what the right holder and/or water rights buyers expected. Some transfers are processed smoothly with minimal transaction costs. Others

may be more complicated, resulting in hearings, even litigation. Following these recommendations may give right holders a better understanding of their water rights and their transferability.

Evaluate -

At Home -

If records exist at home detailing appurtenant water rights, go over them. These documents can be anything relating to the right. For example, in adjudicated basins the most important document would be a court decree. In un-adjudicated basins this may be a declaration, permit, or license. These documents should outline the priority date, point of diversion, place, purpose, and quantity of the water right. In addition, property descriptions, warranty deeds, letters from the State Engineer, maps, surveys, and affidavits are all pieces of evidence substantiating a water right. When all of this information is gathered, it should be organized and brought to the State Engineer's office.

At the State Engineer's Office -

The right-holder should compare his documentation to the State Engineer's. This is to make sure no inconsistencies exist between records. Information about the right can be found in water rights files. Files can be looked up by reference number, owner, or location of water use. Once a file is obtained, the water right holder should review enclosed documents and make sure that they match theirs. For example, is the priority date clear? What about diversion and consumptive use amounts? Is the location of use correct? Is there evidence establishing continuous use? Is everything signed and dated accordingly? Is there a clear chain of title to the right?

If inconsistencies exist, it is up to the water right holder to clarify things. Hopefully, the right holder has information in their records to supplement the State Engineer's records. If not, the right holder may want to speak to State Engineer personnel or a water rights professional about their options.

Communicate -

With the State Engineer's Office -

State Engineer offices have personnel who field questions from the public. Typically, one or two are on hand at each office and are known as “floor personnel”. Ask to see a floor person about any questions or concerns about the right. One place to start is the water right file. Sit down with a floor person and go over your file to see if there are any voids that need to be filled. For example, is there enough evidence substantiating initial validity, continuous use, and ownership of the right? Are there other pieces of evidence the State Engineer can use when determining the right? If so, ask how these can be obtained.

If enough information is present to verify the right, the right holder should move on to the question of transferability. For example, what restrictions apply to the right? Various areas of the state have different administrative criteria governing transfers. For example, criteria in the Roswell Basin are different than that of the Middle Rio Grande Basin. The Lower Rio Grande Basin criteria are different from that of the Estancia Basin. It is important to understand these criteria, and how they affect the transferability of a particular water right. This can help right holders understand potential restrictions on their water rights, and what issues may arise in the transfer process.

However, the State Engineer's office does not sell water rights and has no authority to value them. This information is left up to the water right holder.

With a Professional -

If there is any confusion about a water right's value or whether it is in demand in the area, the right holder should contact a professional that deals with transfers on a regular basis. Even though the State Engineer's office can provide information about the right and restrictions associated with a transfer, they cannot give updates on market conditions or where one's water rights may fall in it, or even the latest market price. In this case, a licensed and insured real-estate

brokerage firm or water rights broker may be able to answer questions. In addition, some law firms and hydrologic consultants provide these services.

When speaking to a professional, it is prudent to have existing information about the right present. This will allow him/her to look over the right's documentation, listen to the owner, and render an opinion as to whether the transfer will succeed or not. Because transaction costs can increase as the complexity of a transfer grows, some water right holders are better off not transferring their rights at all. An example would be someone transferring a small water right of only 2 or 3 acre-feet. If this transfer is protested and results in hearings or litigation, or has title defects, the transaction costs may end up being more than the value of the water rights themselves. To the contrary, transfers processed quickly with minimal transaction costs can benefit a water right holder. A professional may be able to give a better understanding of pitfalls in the transfer process and how one can cover their bases when transferring rights.

When choosing a professional, ask about their experience. How long have they been involved in water rights? How many transactions have they helped close? What sort of experience with protests or hearings do they have? These questions can help a right holder make an informed decision about who to ask for help.

Act -

It is up to the right holder to decide if a transfer is in their best interests. Because so many variables influence the transfer process it is hard to predict the outcome of a transfer. In any case, water right holder's can take steps to show evidence of their rights. This evidence should be documented in personal records and those of the State Engineer's. It is also wise to record this information with the county clerk's office, for water rights are considered real property in New Mexico. Providing evidence may help alleviate transfer pitfalls like initial validity, continuous use, and defects in title or ownership. Other pitfalls like type of water right and protests are harder to

avoid. These issues may require the assistance of the State Engineer's office and/or a professional's advice to understand.

Conclusion –

As demand for water increases in New Mexico it will be important for water right holders to have a basic understanding of the water rights transfer process. Understanding the basic concepts of water rights, their administration, and variables in the transfer process may likely reduce transaction costs. Unfortunately, establishing initial validity, proving continuous use, identifying the type of water right, curing defects in title or ownership, and protests all remain transfer pitfalls that create uncertainty in water rights and can lead to the denial of a transfer. Water right holders interested in transferring their water rights should take precautions before applying for a transfer or selling their water rights. This includes evaluating, communicating, and acting on the rights so as much information about the right is up front before an application is filed. This will give water right holders a better perspective of what issues may arise in the transfer, and allow them to judge for themselves whether transferring their water rights is in their best interest.

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Articles

Article XVI, Section 1. Existing water rights confirmed.

All existing water rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

XVI, Section 3. [Beneficial use of water.]

Beneficial use shall be the basis, the measure, and the limit of the right to the use of water.

Statutes

72-5-23. Water appurtenant to land; change of place of use.

All water used in this state for irrigation purposes, except as otherwise provided in this article, shall be considered appurtenant to the land upon which it is used, and the right to use it upon the land shall never be severed from the land without the consent of the owner of the land, but, by and with the consent of the owner of the land, all or any part of the right may be severed from the land, simultaneously transferred and become appurtenant to other land, or may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state, on the approval of an application of the owner by the State Engineer. Publication of notice of application, opportunity for the filing of objections or protests and a hearing on the application shall be provided as required by Sections 72-5-4 and 72-5-5 NMSA 1978.

72-6-3. Owner may lease use of water.

A. An owner may lease to any person all or any part of the water use due him under his water right, and the owner's water right shall not be affected by the lease of the use. The use to which the owner is entitled under his right shall, during the exercise of the lease, be reduced by the amount of water so leased. Upon termination of the lease, the water use and location of use subject to the lease shall revert to the owner's original use and location of use.

B. The lease may be effective for immediate use of water or may be effective for future use of the water covered by the lease; however, the lease shall not be effective to cumulate water from year to year or to substantially enlarge the use of the water in such manner that it would injure other water users. The lease shall not toll any forfeiture of water rights for nonuse, and the owner shall not, by reason of the lease, escape the forfeiture for nonuse prescribed by law; provided, however, that the State Engineer shall notify both the owner and the lessee of declaration of nonuser as provided in Sections 72-5-28 and 72-12-8 NMSA 1978. The initial or any renewal term of a lease of water use shall not exceed ten years, except as provided in Subsection C of this section.

C. A water use may be leased for forty years by municipalities, counties, state universities, special water users' associations, public utilities supplying water to municipalities or counties and member-owned community water systems as lessee and shall be entitled to the protection of the forty-year water use planning period as provided in Section 72-1-9 NMSA 1978. A water use deriving from an acequia or community ditch organized pursuant to Chapter 73, Article 2 or 3 NMSA 1978, whether owned by a water right owner under the acequia or community ditch or by the acequia or community ditch may be leased for a term not to exceed ten years.

72-1-1. Natural water; public.

All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

72-12-1. Underground waters to be declared public.

The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, is declared to belong to the public and is subject to appropriation for beneficial use. By reason of the varying amounts and time such water is used and the relatively small amounts of water consumed in the watering of livestock; in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use; and in prospecting, mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state, application for any such use shall be governed by the provisions of Sections 72-12-1.1 through 72-12-1.3 NMSA 1978.

72-5-28. Failure to use water; forfeiture.

A. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the State Engineer, revert to the public and shall be regarded as unappropriated public water; provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner; and provided that periods of nonuse when irrigated farm lands are placed under the acreage reserve program or conservation reserve program provided by the federal Food Security Act of 1985, P.L. 99-198, shall not be computed as part of the four-year forfeiture period; and provided, further, that the condition of notice and declaration of nonuser shall not apply to water that has reverted to the public by operation of law prior to June 1, 1965.

B. Upon application to the State Engineer at any time and a proper showing of reasonable cause for delay or for nonuse or upon the State Engineer finding that it is in the public interest, the State Engineer may grant extensions of time, for a period not to exceed three years for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a water right has vested, was appropriated or has been adjudicated.

C. Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute.

D. A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the four-year period for the period of the exemption, and the period of exemption shall not be included in computing the four-year period.

E. Periods of nonuse when the nonuser of acquired water rights is on active duty as a member of the armed forces of this country shall not be included in computing the four-year period.

F. The owner or holder of a valid water right or permit to appropriate waters for agricultural purposes appurtenant to designated or specified lands may apply the full amount of water covered by or included in the water right or permit to any part of the designated or specified tract without penalty or forfeiture.

G. Periods of nonuse when water rights are acquired and placed in a State Engineer-approved water conservation program, by an individual or entity that owns water rights, a conservancy district organized pursuant to Chapter 73, Articles 14 through 19 NMSA 1978, a soil and water conservation district organized pursuant to Chapter 73, Article 20 NMSA 1978, an acequia or community ditch association organized pursuant to Chapter 73, Article 2 or 3 NMSA 1978, an irrigation district organized pursuant to Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate stream commission shall not be computed as part of the four-year forfeiture period.

H. Water deposited in a lower Pecos river basin below Sumner lake water bank approved by the interstate stream commission or an acequia or community ditch water bank shall not be computed as part of the four-year forfeiture period.

72-12-8. Water right forfeiture.

A. When for a period of four years the owner of a water right in any of the waters described in Sections 72-12-1 through 72-12-28 NMSA 1978 or the holder of a permit from the State Engineer to appropriate any such waters has failed to apply them to the use for which the permit was granted or the right has vested, was appropriated or has been adjudicated, the water rights shall be, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the State Engineer, forfeited and the water so unused shall revert to the public and be subject to further appropriation; provided that the condition of notice and declaration of nonuser shall not apply to water that has reverted to the public by operation of law prior to June 1, 1965.

B. Upon application to the State Engineer at any time and a proper showing of reasonable cause for delay or for nonuse or upon the State Engineer finding that it is in the public interest, the State Engineer may grant extensions of time, for a period not to exceed three years for each extension, in which to apply to beneficial use the water for which a permit to appropriate has been issued or a water right has vested, was appropriated or has been adjudicated.

C. Periods of nonuse when irrigated farm lands are placed under the acreage reserve program or conservation reserve program provided by the federal Food Security Act of 1985, P.L. 99-198, shall not be computed as part of the four-year forfeiture period.

D. Periods of nonuse when water rights are acquired and placed in a State Engineer-approved water conservation program by an individual or entity that owns water rights, an artesian conservancy district, a conservancy district, a soil and water conservation district organized pursuant to Chapter 73, Article 20 NMSA 1978, an acequia or community ditch association organized pursuant to Chapter 73, Article 2 or 3 NMSA 1978, an irrigation district organized pursuant to Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate stream commission shall not be computed as part of the four-year forfeiture statute.

E. A lawful exemption from the requirements of beneficial use, either by an extension of time or other statutory exemption, stops the running of the four-year period for the period of the exemption, and the period of exemption shall not be included in computing the four-year period.

F. Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute.

G. Periods of nonuse when the nonuser of acquired water rights is on active duty as a member of the armed forces of this country shall not be included in computing the four-year period.

H. The owner or holder of a valid water right or permit to appropriate waters for agricultural purposes appurtenant to designated or specified lands may apply the full amount of water covered by or included in that water right or permit to any part of the designated or specified tract without penalty or forfeiture.

I. Water deposited in a lower Pecos river basin below Sumner lake water bank approved by the interstate stream commission or an acequia or community ditch water bank shall not be computed as part of the four-year forfeiture period.

72-1-2. Water rights; appurtenant to land; priorities.

Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon, or until the severance of such right from the land in the manner hereinafter provided in this article. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to March 19, 1907, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of water initiated thereafter shall relate back to the date of the receipt of an application therefor in the office of the territorial or State Engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder.

72-1-3. Declaration of water right vested prior to March 1907; form; contents; verification; filing; recording; presumption.

Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the State Engineer a declaration in a form to be prescribed by the State Engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the State Engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

72-12-4. Existing water rights recognized.

Existing water rights based upon application to beneficial use are hereby recognized. Nothing herein contained is intended to impair the same or to disturb the priorities thereof.

72-5-14. Time for construction; extension.

The State Engineer shall have the power to grant extensions of time in which to complete construction of works, to apply water to beneficial use and for such other reasonable purpose as may in his opinion appear, under any water right application on file in his office, upon proper showing by the applicant of due diligence or reasonable cause for delay. Extensions of time not exceeding five years beyond the time for construction allowed in the original permit, and in no case exceeding a total of ten years after the date of approval of the application, may be granted by the State Engineer for construction of works and application of water to beneficial use; provided, that if it shall be made to appear to the State Engineer by affidavit of the applicant, his successors or assigns, or by any person for or on behalf of such applicant, and by such other evidence as the State Engineer may require, that at least one-fourth of the actual construction work has been completed within such period as extended, the State Engineer may, if he is satisfied of the good faith of the applicant and that the project will be to the interest of the development of the state, extend the time for completion of works and application of water to beneficial use for any additional periods he may deem necessary, but not exceeding two years for any one extension, upon such reasonable terms and conditions as he may prescribe; and at the time of granting such extension shall endorse his approval thereon and shall make the proper entry in his records.

72-2-4. Existing water rights recognized.

Existing water rights based upon application to beneficial use are hereby recognized. Nothing herein contained is intended to impair the same or to disturb the priorities thereof.

72-5-19. Standards for measuring flow and volume of water.

The standard of measurement of the flow of water shall be the cubic foot per second of time; the standard of measurement of the volume of water shall be the acre-foot, being the amount of water upon an acre covered one foot deep, equivalent to forty-three thousand five hundred and sixty cubic feet. The miner's inch shall be regarded as one-fiftieth of a cubic foot per second in all cases, except when some other equivalent of the cubic foot per second has been specifically stated by contract, or has been established by actual measurement or use.

72-2-8. Administrative regulations; codes; instructions; orders; presumption of correctness.

A. The State Engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties. In order to accomplish its purpose, this provision is to be liberally construed.

B. Directives issued by the State Engineer shall be in form substantially as follows:

(1) regulations are written statements of the State Engineer of general application to the public, implementing statutes, prescribing procedures and interpreting and exemplifying the statutes to which they relate;

(2) codes are written standards and specifications governing design and construction of dams:

(3) orders are written statements of the State Engineer to implement his decision;

(4) special orders are written statements defining the declared boundaries of underground streams, channels, artesian basins, reservoirs or lakes.

C. To be effective, a regulation, code or special order issued by the State Engineer shall be reviewed by the attorney general or other legal counsel of the State Engineer's office prior to being filed as required by law and the fact of his review shall be indicated thereon.

D. To be effective, a regulation or code shall first be issued as a proposed regulation or proposed code and filed for public inspection in the office of the State Engineer along with the findings of fact that in the opinion of the State Engineer justify the regulation or code. Distribution shall also be made to each district and field office for public inspection and to each of the persons on the file of interested persons hereinafter mentioned. After the proposed regulation or code has been on file for one month, he shall publish it, or if it is lengthy, a resume of it, in not less than five newspapers of general circulation in the state, once a week for two consecutive weeks, with the statement that there will be a hearing on the proposed regulation or code on a day set in the publication, which shall be not more than thirty days nor less than twenty days after the last publication. The hearing shall be held in Santa Fe, and any person who is or may be affected by the proposed regulation or code may appear and testify.

E. Special orders may be promulgated without prior notice and hearing, but the State Engineer shall, within ten days of promulgation of a special order, set a date for a hearing on the special order, and publish notice of the public hearing in the same manner required above.

F. In addition to filing copies of regulations as required by law, the State Engineer shall maintain in his office duplicate official sets of current regulations, codes and special orders, which sets shall be available for inspection by the public.

G. The State Engineer shall develop and maintain a file of names and addresses of individuals, professional, agricultural and other groups having an interest in the promulgation of new, revised or proposed regulations and shall at convenient times distribute to these persons all such regulations, making such charges therefor as will defray the expense incurred in their physical preparation and mailing.

H. Any regulation, code or order issued by the State Engineer is presumed to be in proper implementation of the provisions of the water laws administered by him.

I. The State Engineer shall state the extent to which regulations, codes and orders will have retroactive effect and, if no such statement is made, they will be applied prospectively only.

72-4-17. Suits for determination of water rights; parties; hydrographic surveys; investigations; unknown claimants.

In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. When any such suit has been filed the court shall, by its order duly entered, direct the State Engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved. Money heretofore spent on hydrographic surveys by the State Engineer, but not assessed against the water users on the effective date of this act, shall not be assessed against the water users. The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; and may submit any question of fact arising therein to a jury or to one or more referees, at its discretion; and the attorney general may bring suit as provided in Section 72-4-15 NMSA 1978 in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes, and all unknown persons who may claim any interest or right to the use of the waters of any such system, and the unknown heirs of any deceased person who made claim of any right or interest to the waters of such stream system in his lifetime, may be made parties in such suit by their names as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased person and said unknown persons by the name and style of unknown claimants of interest to water in such stream system, and service of process on, and notice of such suit, against such parties may be made as in other cases by publication.

72-4-18. Suits concerning water rights; submission of facts to jury or referee.

In any suit concerning water rights, or in any suit or appeal provided for in this article, the court may in its discretion submit any question of fact arising therein to a jury, or may appoint a referee or referees to take testimony and report upon the rights of the parties.

72-4-19. Adjudication of rights; decree filed with State Engineer; contents of decree.

Upon the adjudication of the rights to the use of the waters of a stream system, a certified copy of the decree shall be prepared and filed in the office of the State Engineer by the clerk of the court, at the cost of the parties. Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

72-2-9. Supervising apportionment of waters.

The State Engineer shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts.

72-12-7. Change of location of well; change of use; temporary change.

A. The owner of a water right may change the location of his well or change the use of the water, but only upon application to the State Engineer and upon showing that the change will not impair existing rights and will not be contrary to the conservation of water within the state and will not be detrimental to the public welfare of the state. The application may be granted only after such advertisement and hearing as are prescribed in the case of original applications.

B. When the owner of a water right applies for a temporary change of not to exceed one year for not more than three acre-feet of water to a different location or to a different use, or both, the State Engineer shall make an investigation and, if the change does not permanently impair any vested rights of others, he shall enter an order authorizing the change. If he finds that the change sought might impair vested rights, he shall order advertisement and hearing as in other cases.

C. If objections or protests have been filed within the time prescribed in the notice or if the State Engineer is of the opinion that the permit should not be issued, the State Engineer may deny the application or, before he acts on the application, may order that a hearing be held. He shall notify the applicant of his action by certified mail sent to the address shown in the application.

72-5-4. Notice; publication.

Upon the filing of an application that complies with the provisions of this article and the rules established thereunder, accompanied by the proper fees, the State Engineer shall instruct the applicant to publish notice thereof, in a form and in a newspaper prescribed by the State Engineer, in some newspaper that is published and distributed in each county affected by the diversion and in each county where the water will be or has been put to beneficial use, or if there is no such newspaper, then in some newspaper of general circulation in the stream system, once a week for three consecutive weeks. The notice shall give all essential facts as to the proposed appropriation; among them, the places of appropriation and of use, amount of water, the purpose for which it is to be used, name and address of applicant and the time when the application shall be taken up by the State Engineer for consideration. Proof of publication as required shall be filed with the State Engineer within sixty days of his instructions to make publication. In case of failure to file satisfactory proof of publication in accordance with the rules within the time required, the

application shall be treated as an original application filed on the date of receipt of proofs of publication in proper form.

72-5-5. Objections to application; publication of notice; filing of protests; definition of standing.

A. Whenever an application is filed which requires advertisement by virtue of the provisions of Chapter 72, Article 5 NMSA 1978, the advertisement shall state that objections or protests to the granting of the application may be filed with the State Engineer within ten days after the last publication of the notice. If objection or protest is timely filed, the State Engineer shall advise interested parties, and a hearing shall be held as otherwise provided by statute.

B. Any person, firm or corporation or other entity objecting that the granting of the application will be detrimental to the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests. Provided, however, that the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions shall have standing to file objections or protests.

72-12-10. Appeal to district court.

The decision of the State Engineer shall be final in all cases unless appeal be taken to the district court within thirty days after his decision as provided by Section 72-7-1 NMSA 1978.

72-1-2.1. Water rights; change of ownership; filing and recording; constructive notice.

In the event of any changes of ownership of a water right, whether by sale, gift or any other type of conveyance, affecting the title to a water right that has been permitted or licensed by the State Engineer, has been declared with the State Engineer or has been adjudicated and is evidenced by a sub-file order, partial final decree, final decree or any other court order, the new owner of the water right shall file a change of ownership form with the State Engineer. The form shall include all information conforming with water rights of record filed with the State Engineer and shall be accompanied by a copy of a warranty deed or other instrument of conveyance. The new owner shall record a copy of the change of ownership form filed with the State Engineer with the clerk of the county in which the water right will be located. The filing shall be public notice of the existence and contents of the instruments so recorded from the time of recording with the county clerk.

Administrative Code

19.25.13.7 DEFINITIONS:

F. Consumptive use: The quantity of water beneficially consumed during the application of water to beneficial use.

19.26.2.7 DEFINITIONS:

X. Point of diversion: The location of constructed works where water is diverted from a stream, watercourse, or well.

19.26.2.26 FORMAT FOR PLAN DRAWINGS, PROOF OF BENEFICIAL USE AND DECLARATION MAPS:

(2) Location of point of diversion: The location of the point of diversion on the stream, whether supplying water to direct diversion to a ditch or to an off-channel reservoir, shall be identified on the drawings as follows:

The head-gate, which is the point of diversion from _____ (river, creek, spring, arroyo) from which the works derive their water supply, is located as follows _ _____ (latitude) and _____ (longitude) or X = _____ and Y = _____, (New Mexico state plane coordinate system), NAD _____.

19.27.1.28 DESCRIPTION OF WELL LOCATION AND PLACE OF USE:

The legal description of both the present and the proposed well location must be set out in an application. Well description shall be to the nearest forty (40) acre subdivision, unless otherwise prescribed by the State Engineer. If the use is for irrigation, the lands from which water rights are transferred and the lands to which water rights are transferred shall be described by legal subdivision in the application. Where the use is for other than irrigation, the place of use shall be described by legal subdivision.[SE-66-1 Article 2-5, Recomplied 12/31/01]

19.26.2.17 CHANGE OF OWNERSHIP:

In the event of any changes of ownership affecting the title to a declaration, permit, license, or adjudicated water right, the new owner shall file a change of ownership form with the State Engineer. The new owner shall file a separate change of ownership for each declaration, permit, license, or adjudicated water right of record filed with the State Engineer. Upon acceptance by the State Engineer for filing, the new owner shall record a copy of the change of ownership form filed with the State Engineer with the clerk of the county in which the declaration, permit, license, or adjudicated water right is located.

19.26.2.12 APPLICATION PROCESSING:

E. Protest to application: Any person, firm, corporation or other entity objecting that the granting of the application will impair the objector's water rights shall have standing to file objections or protests. Any person, firm, corporation or other entity objecting that granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests. Pursuant to Section 72-5-5.1 NMSA, standing shall be afforded for those asserting legitimate concerns involving public welfare and conservation of water in a manner which avoids unduly

burdening the administrative and judicial process. All objections and protests shall set forth the grounds for asserting standing. All objections or protests failing to meet the above criteria for standing will not be recognized as valid protests. The state of New Mexico or any of its branches, agencies, and political subdivisions shall have standing to file objections or protests. The State Engineer will mail one copy of the objections or protests to the applicant.

(1) Filing deadline: All objections and protests must be filed with the State Engineer not later than ten (10) calendar days after the date of the last publication of the notice. If the final day for filing a protest falls on a weekend or a state of New Mexico recognized holiday, protests received on the next business day shall be deemed timely. All objections or protests filed after the ten-day period will not be recognized as valid protests.

19.27.1.14 PROTEST - FILING, ANSWER:

Any person deeming that the granting of an application would be detrimental to his rights may protest in writing the proposal set forth in the application. The protest shall set forth reasons why the application should not be approved and must be filed in triplicate with the State Engineer not later than ten (10) days after the date of the last publication of the notice referred to in Article 1-5 [now 19.27.1.12 NMAC]. The State Engineer shall mail one copy of the protest to the applicant. The applicant may file with the State Engineer, in triplicate, answers to such protests. The State Engineer shall furnish all protestants with a copy thereof by mail.

H. Action of the State Engineer – un-protested application: After receipt of an affidavit of publication for an application to which no timely protest was received or remains, the State Engineer will act on the application

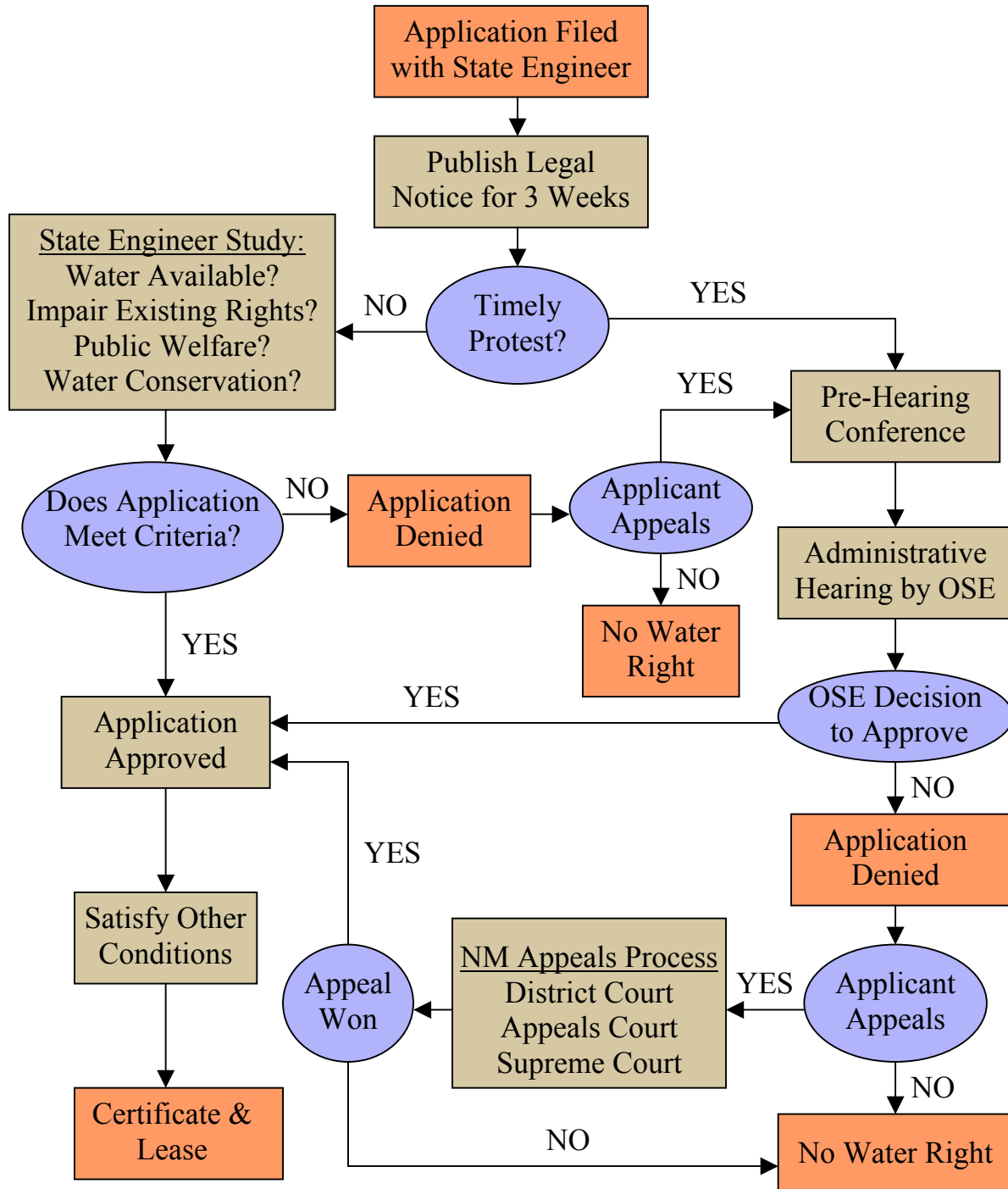
(2) Permits - conditions of approval: The State Engineer may approve an application and may impose reasonable conditions of approval including measurement at the point of diversion. The State Engineer retains jurisdiction of all permits.

19.26.2.13 PERMITS:

B. Proof of application of water to beneficial use: Upon applying water to beneficial use as provided by the permit, on or before the due date set by the permit, the permittee shall file with the State Engineer proof of application of water to beneficial use. The beneficial use of water must be in accordance with the permit conditions of approval. Once a proof of application of water to beneficial use has been filed, the water right shall be limited to the amount of water that has been put to beneficial use, and no further development of the water right may occur.

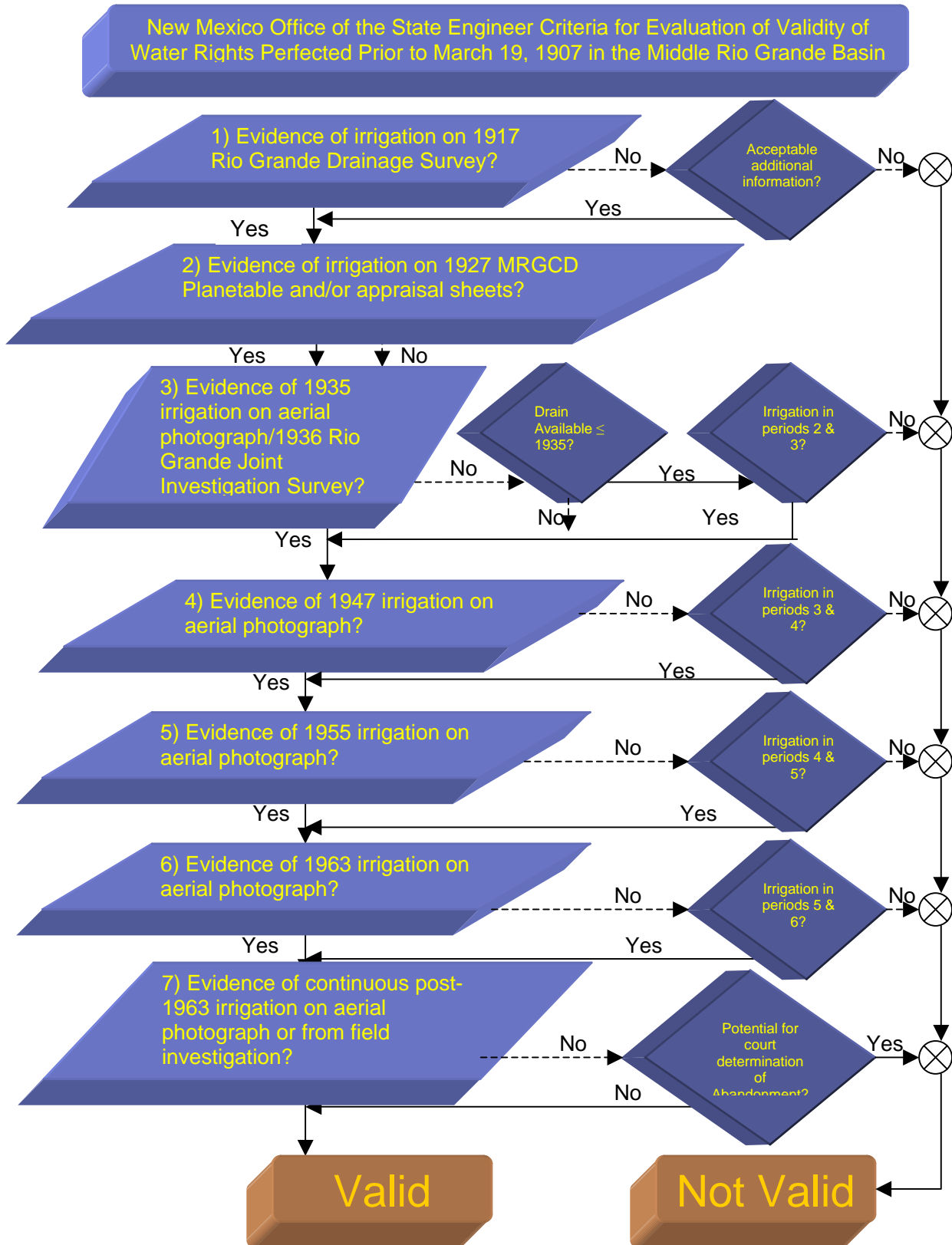
Appendix A

WATER RIGHT APPLICATION FLOW CHART



Source: NMOSE, 2005

Appendix B



Source: NMOSE, 2001.

Glossary of Terms

Acequia: a ditch, channel, or canal, through which water, diverted from its natural course is conducted for use in irrigation or other purposes.

Acre-foot: quantity of water that will cover one acre of land to a depth of one foot; 43,650 cubic feet or 325,851 gallons of water.

Adjudication: a formal court proceeding which results in the determination of the validity and extent of a water right.

Apportionment: the division and distribution of water according to a plan.

Appropriation: water set aside and put to beneficial use, associated with a date on which the water was first put to beneficial use.

Appropriator: a person who takes either surface or ground water and applies it to a beneficial use.

Aquifer: a geologic formation that contains sufficient permeable material saturated with water as to yield a usable quantity of water to wells or springs.

Beneficial use: generally, all uses including agriculture, commercial, industrial, and recreational are considered beneficial; the exception is willful waste of water.

Bosque: low-lying area near rivers, densely forested with cottonwoods and other deciduous trees

Call: a demand that upstream water rights with more recent (junior) priority dates than the calling right cease diverting; the exercise of a senior water right holder in "calling" for his or her water rights, requiring junior water right holders to allow water to pass to the senior right holder.

Compact: A formal agreement between states concerning the use of water in a river or stream that flows across state boundaries.

Conditioned water right: a water right granted under conditions preventing the right from adversely affecting the flow of a stream or other water rights.

Consumptive irrigation requirement: the amount of water a plant needs over the entire growing season for transpiration and for building plant tissue, plus evaporation from the soil surface.

Cubic Foot Per Second (CFS): The rate of discharge representing a volume of 1 cubic foot passing a given point during 1 second. It is equivalent to 7.48 gallons per second, or 448.8 gallons per minute.

Declared ground water basin: an area with definite hydro-geologic boundaries that has been designated by the State Engineer to prevent impairment to existing water rights and to ensure orderly development of the resource.

Declared water right: a water right claimed prior to State Engineer jurisdiction. A “declaration” must be filed on a form prescribed by the State Engineer. Acceptance of the form does not constitute validation of the right claimed.

Demand Forecast: A prediction of future water use. Most water demand forecasting models are either directly or indirectly based upon projected changes in demographic data, such as population, etc.

Depletion: the amount of water used and not returned to a surface or ground water system; similar to consumptive use.

Diversion: a man made construction that diverts water from its natural source for beneficial use.

Drainage basin: the entire area drained by a stream or system of connecting streams so that all of the stream flow originating in the area is discharged through a single outlet.

Fully appropriated: when all available water has been reserved for existing water rights.

Hearing: an administrative proceeding on an order entered by the State Engineer, or filing of application, protest, aggrievial or other pleading, in which parties may present evidence about the water right and associated actions.

License: a document issued by the State Engineer after final proof of application of water to beneficial use has been filed and inspection has been completed that confirms the extent of division and beneficial use of water made in conformance with permit conditions.

Litigation: legal action.

Permit: a document issued by the State Engineer that authorizes the diversion of water from a specific point of diversion, for a particular beneficial use, and at a particular place of use, in accordance with the conditions of the permit. A permit allows the permittee to develop a water right through the application of water to beneficial use, in conformance with the permit’s condition of approval. A permit itself does not constitute a water right.

Perfected water right: a water right that has proven beneficial and obtained a license from the State Engineer to appropriate.

Prior appropriation: doctrine that entitles the first person who diverts water and puts it to beneficial use the right to that water; first in time, first in right.

Return flow: water diverted for a use that finds its way back to its source of supply.

Senior water right: determined by date of initiation of a right; first user takes precedence over users who come later.

Transaction costs: any costs incurred by any party associated with the transfer of a water right.

Water right: Legal rights to use a specific quantity of water, on a specific time schedule, at a specific place, and for a specific purpose.

Water right contract: an agreement entered into by two or more parties outlining the sale or transfer of a water right.

For more information –

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