

Introduction to Water Rights

Taos Valley Acequia Association Fact Sheet *

Every water right in New Mexico carries with it the right to use water from a specific water source to be used at a specific location and for a specific purpose of use. A water right for irrigation purposes is associated with a designated tract of land. When someone sells his or her land, the sale automatically includes any water rights unless the seller specifically states in the deed that he or she is retaining ownership of the water right. As long as the tract of land continues to be irrigated, without any long periods of non-use, the water right will remain valid.

Most irrigation water rights in New Mexico became established simply by historic irrigation of the land and continuous use to the present. Surface water rights originating prior to 1907 do not need any kind of permit or paperwork to be considered valid today, as long there is continued use. The land does not need to be plowed or planted with crops to have a water right; for example, land that is irrigated only for pasture or for a lawn can have a valid water right. The only requirements are a man-made diversion from a stream and beneficial use associated with the irrigation. People who wanted to obtain a new surface water right after 1907 had to get a permit from the State Engineer, and could only get one by proving that there was surplus water in the particular stream system.

A “water right” differs from a “ditch right”. A water right has to do with the State’s rules and laws governing who can take water from a stream. A ditch right usually refers to the specific rules a particular ditch has about being in good standing with the Acequia. A person can temporarily lose ditch rights, for example, by failing to pay dues, but can re-establish them by paying the back dues. None of this affects the validity of the water right under state law. But if a water right is lost according to state law, it is permanently lost. The state can *only* take away an established water right if the requirements of forfeiture or abandonment are met (see “Forfeiture and Abandonment”). Usually it is a court that determines whether someone has lost his or her water right. The Office of the State Engineer (OSE) often has an opinion about whether a water right has been lost under state law, but if there is any disagreement about the OSE’s opinion, it must be resolved by a court. Likewise, an Acequia cannot decide whether a water right is lost under state law. Only the courts can make this determination.

Every water right is legally defined by a number of elements:

- Source of water (i.e., which stream)
- Place of use (i.e., which tract of land and how many acres)
- Purpose of use
- Point of diversion
- Priority date (i.e., date water was first put to use on the land)
- Amount of water (limit on the volume of water that can be used per acre)

Priority dates and the prior appropriation system

New Mexico has a type of water law called the Prior Appropriation System that is found in most Western states. This system gives preference in times of water shortage to those water rights with the oldest priority dates. The priority date of a water right is the date the water was first put to “beneficial use” on the land. For most Acequia-based water rights, this is the date the Acequia was first constructed. In many regions of New Mexico the most senior water rights (i.e., those with the oldest priority dates) are held Pueblos and by Acequia parciales, because those are the oldest communities in those regions with a continuous history of irrigated agriculture. The priority dates of most Acequias are in the 1600s-1800s, which reflect the dates those communities were settled. The laws and Constitution of New Mexico recognize the preference that is given to senior water rights.

If there is a shortage of water on a stream, and the water users do not have an established system for rationing or sharing the water, then the senior water right owners have the right to demand that junior water right owners reduce or stop their diversion of water so that the senior water users can get enough water. This is called a “priority call.” A court can enforce these senior rights if necessary. There is also a provision in New Mexico law for priority administration, in which the State Engineer or a Water Master appointed by the State Engineer is legally authorized in times of shortage to allocate water in accordance with the different priority dates, if necessary by curtailing the use of junior water users.

The laws regarding priority administration have rarely been used, and there is not a consistent record of the OSE or water masters actually curtailing junior users when senior users have asked the OSE for protection of their rights. The OSE has recently developed regulations for priority administration (called “Active Water Resource Management” regulations), but it is not clear whether this will result in honoring senior-priority rights in the manner set forth in the state’s laws and Constitution.

*Adapted from a fact sheet provided by the New Mexico Acequia Association