Solving The Puzzle: The Water Court Structure and Process of Water Administration in New Mexico

I. INTRODUCTION

Water is the most precious resource in the arid deserts of New Mexico, yet developing and defining a coherent process for administering and adjudicating this resource has proven elusive. New Mexico's haphazard development of a procedure for the final adjudication of water rights [1]muddles understanding of the actual process for administering permitted water rights prior to their final adjudication. This paper will attempt to synthesize and contextualize the intent and holding in the evolution of relevant governing authorities of statutes, regulations, and case law. Throughout the Western states, the particular process of administering and/or adjudicating water rights has varied as the unique historical, hydrologic and political circumstance of each state has demanded, and New Mexico is no exception.[2]

At the outset, the three components of New Mexico's water rights administration process must be addressed to acquire a preliminary understanding of the state's water scheme.[3] First, there is the regulatory process of administering water rights through the office of the State Engineer. Second is the role of "Water Courts" in resolving water-related issues in a non-final adjudication function. Third, and finally, is the "Adjudication Court" which holds exclusive jurisdiction to

[1] Water Rights Management in New Mexico and Along the Middle Rio Grande: Is AWRM Sufficent?, Carol Romero-Wirth, Esq. and Susan Kelly, Esq., November 2012, (Utton Transboundary Resource Center, UNM School of Law), page 7.[2] Water Rights Administration, Memo to LFC on survey of adjudication procedures, September 14, 2007. [3] N.M. Stat. Ann. § 72-4-19 (1978); N.M. Const., art. XVI, § 5; N.M. Stat. Ann. §§ 72-1-1 et seq.

[2] Water Rights Administration, Memo to LFC on survey of adjudication procedures, September 14, 2007. [3] N.M. Stat. Ann. § 72-4-19 (1978); N.M. Const., art. XVI, § 5; N.M. Stat. Ann. §§ 72-1-1 et seq.

[3] N.M. Stat. Ann. § 72-4-19 (1978); N.M. Const., art. XVI, § 5; N.M. Stat. Ann. §§ 72-1-1 et seq.

determine final water rights predicated on the basic elements of ownership.[4] Granted, this is a rather simplistic generalization of the three components involved in administering water rights, and consequently ignores the fact that each component was established at different times to serve different yet interconnected purposes. However, the common factor in these three integral components is a lack of clear and consolidated procedure setting forth the roles and functions of each component.[5] As an example of the resulting confusion, neither the established statutory Water Code, case law, nor regulations distinguish or label these components by their respective formal names of "Water Courts" and "Adjudication Courts".[6]

Throughout this paper, the term "Water Court" refers both to the established water court divisions created by the Supreme Court order of January 27, 2004, and to those district courts which have previously decided water issues resulting in the appellate body of law on such issues. However, such Water Court decisions were not final determinations of water rights in a system-wide adjudication.[7] References to "Adjudication Court" indicate the special court endowed under NMSA 1978, Section 72-4-17 with exclusive jurisdiction over system-wide adjudications to make final water rights determinations. A Supreme Court order designates an adjudication judge to conduct such final adjudications.[8]

Without the benefit of formal nomenclature, New Mexico water administration begins to resemble an unsolvable puzzle with seemingly disparate pieces, welcoming a comparison to a

[4] N.M. Stat. Ann. § 72-4-19 (1978).
[5] Water Rights Administration, Memo to LFC on survey of adjudication procedures, September 14, 2007.
[6] *See, e.g.*, §§ 72-2-16, 72-7-1, 72-2-16, & 72-2-18, and § 72-4-17.
[7] See, e.g., Lion's Gate Water v. D'Antonio, 147 N.M. 523, 226 P.3d 622, 2009-NMSC-057 (Examining the scope of district [water] court's review of State Engineer's denial of application to appropriate water).
[8] *See* § 72-4-17.

Rubik's Cube ®.[9] When one proverbially turns over and rotates the parts of the water puzzle to the side where they belong—sides being the three components of the State Engineer, Water Court or Adjudication Court-- eventually a pattern will emerge in which each piece falls into place within the function of that respective side or component. In fact, some pieces may fit on several sides and have multiple functions. Like the Rubik's Cube ®, the genius of this New Mexico water puzzle is that when all the pieces fall into place, a sensical order or process of water rights administration does emerge, despite the initial confusion.

II. A BRIEF AND GENERAL HISTORY:

The Development of Water Rights Administration Law in New Mexico.

New Mexico's statutory scheme has long contemplated the existence of multiple roles for governing water administration and adjudication. The state's Water Code was in enacted in 1907, predating New Mexico's statehood by five years.[12] The original Water Code was an adaption of the water law that then existed in the state of Colorado.[13] The original title to the Water Code characterized it as "[a]n act to conserve and regulate the use and distribution of the waters of New Mexico, to create the office of territorial engineer, to create a board of water commissioners, and for other purposes."[14] Section 12 of the Act clarified that the territorial engineer, or State Engineer, "shall have the supervision of the apportionment of water in this territory according to the licenses

[9] RUBIK'S CUBE, Registration No. 1,242,974.
[12] State ex rel. Bliss v. Davis, 63 N.M. 322, 319 P.2d 207, 1957-NMSC-102.
[13] Lindsey v. McClure, 136 F.2d 65 (10TH Cir. 1943) (Colorado and New Mexico have the same basic water law.)
[14] Pueblo of Isleta v. Tondre, 18 N.M. 388, 137 P. 86 1913-NMSC-067.

issued by him and his predecessors and the adjudications of the courts"[15]. This demonstrates that since its inception, the Water Code has required a license or permit from the State Engineer for any new appropriation of water.[16]

Then in 1911, four years after the Water Code's enactment, the New Mexico Constitution declared that the State's unappropriated water belonged to the public and was available for beneficial use, a critical ownership concept that will be discussed in depth later in this paper.[17] This declaration was not novel in concept, but rather incorporated prior existing law that had always been the rule and practice under Spanish and Mexican regimes, under whom New Mexico had existed prior to statehood. [18] Thus, while still reserving a substantial role for the State Engineer, the New Mexico Constitution defined the negative parameters of authority with respect to unclaimed waters.[19]

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[15] *See id.*
[16] *See id.*
[17] N.M. Const., art. XVI, § 2.
[18] State ex rel. v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 1945-NMSC-034.

[19] Despite state and federal law being very clear that "the States have the control of water within their boundaries," federal judges continue to question whether a state has the power to control its own water. *See California v. U.S.*, 438 U.S. 645, 678-679 (1978). In *State of New Mexico v. U.S. et. al*, a retired federal judge sitting on New Mexico Court of Appeals even went so far as to hold that a state has *no power* to control the water within its boundaries. NO. A-1-CA-33535, p. 8. According to Judge Black, because water "can move in interstate commerce," it is "ultimately subject to the control of the federal, not the state, government." *Id.* This is clearly erroneous and flies in the face of one hundred and fifty years of federal and state precedence, as pointed out in the State Engineer's Motion to Reconsider. *See generally* S-1-SC-37068 ("[T]he Opinion fails to follow this Court's long-established water law precedents regarding the State's ownership or and regulatory control over all surface and groundwater within New Mexico."). The authors hope that the Court of Appeals faulty opinion will eventually be reversed by the New Mexico Supreme Court. Regardless of the ultimate outcome, however, the Court's holding illustrates the importance of scholarship in the area of water law. Failure to understand these fundamental principles could prevent the states from effectively protecting their rights in future water litigation.

The original Water Code also contemplated the concept of exclusive jurisdiction for adjudication courts under Section 21, Laws 1907, Code 15, Chapter 49 (what is now NMSA 1978, Section 72-4-17). Specifically, the Water Code allowed "[t] he court in which any suit involving the adjudication of water rights" to have the exclusive jurisdiction to hear all questions concerning the adjudication of water rights within the involved stream system.[20] Following the enactment of the Water Code, a number of cases specifically referred to the exclusive jurisdiction of the courts handling the final adjudication of water rights.[21] During this period of time (1907-1988), the "adjudication court" referred to any district court to whom the adjudication case was "properly brought" in that particular district under Section 72-4-17.[22] This later evolved into a specialized adjudication court (hereinafter referred to as "Adjudication Court") with a designated judge appointed by the Chief Justice of the Supreme Court.[23]

Recognizing the constraints placed on water availability during drought conditions in the state, in 2003 the legislature provided new authority to the State Engineer to administer water in accordance with the water rights priorities recorded with the office or declared.[24] This law required the State Engineer to adopt rules for priority administration to supervise the physical distribution of water rights so as to not interfere with adjudications, and to enforce priorities "so as to create no increased depletions."[25] This legislation recognized that no provision relieved the State

[20] NMSA Section 72-4-17 (1978).
[21] *See e.g.*, El Paso & R. I. Ry. Co. v. District Court of Fifth Judicial Dist., 36 N.M. 94, 8 P.2d 1064, 1931-NMSC-055; Public Service Co. v. Reynolds, 68 N.M. 54, 358 P.2d 621 1960-NMSC-137.
[22] §72-4-17
[23] See for example, the 2011 amendments to the Rules of Civil Procedure relating to stream system adjudication suits, specifically, NMRCP 1-071.5.

[24] *See* § 72-2-9.1.
[25] § 72-2-9.1B.

Engineer of his duty to administer water pending adjudication completion, despite the State Engineer's broad powers and central role in triggering a system-wide adjudication of water rights through the courts.[26] Ultimately, this legislation acknowledges that while water adjudication process may be slow, in the interim the State Engineer is allowed to administer water allocations and to adopt rules for priority administration.[27] This piece of legislation helps to harmonize two components of the water law puzzle with respect to the administrative process and adjudication courts, insofar as the State Engineer ensures smooth distribution of existing rights while ultimate outcomes pend in the Adjudication Court.

Next, on January 27, 2004, the Supreme Court established the Water Court, the third component of our puzzle . A Water Court arises by way of a Water Court Division within each judicial district, with a sitting judge designated as a water judge by Supreme Court appointment.[28] Each water judge (hereinafter referred to as "Water Judge" or "Water Court") receives cases "involving water law issues arising in each respective district," while at the same time maintaining the other typical district court dockets.[30] Notably, and confusingly, the Order did not distinguish or differentiate the scope of jurisdictional authority or duty among Water Courts, the Adjudication Court, or the State Engineer.[31]In December of that same year, the State Engineer promulgated a new set of regulations known as the Active Water Resource Management ("AWRM") to provide

[26] *See supra*, n. 21.
[27] § 72-2-9.1(A).
[28] Supreme Court Order No. 04-8110, In the Matter of the Establishment of a Water Court Structure for New Mexico, filed January 27, 2004.
[30] *Id.*
[31] *See id.*

for priority administration.[32] AWRM was game-changing and quickly became the subject of litigation over its constitutionality and the legislature's intent.[33]

Despite the evolution of the water law components and authority up to this point, sometimes concurrently (such as the Water Courts and AWRM), a noticeable lack of a formal nomenclature declaration and defined roles led to ambiguity and legal challenge. In fact, the first express reference to the distinction between a Water Court and an Adjudication Court in a formal pronouncement of law did not arrive until 2007.[34] In that year, the Supreme Court approved Rules of Civil Procedure 1-071.1 through 1-071.5, governing the process for statutory stream system adjudications.[35] Specifically, Rule 1-017.5 on excusals or recusals of a water judge distinguishes between the two components with regard to how "[e]ach *water judge in each judicial district*, including *judges assigned to stream adjudications*" cannot be peremptorily excused[36] (emphasis added). Thus distinctions inadvertently began to emerge among the three water law components, notwithstanding the absence of same in the original Order.

Environmental factors have also played a critical role in the evolution of New Mexico water law. During the sustained period of drought in 2007 and 2008, the legislature wrestled with the issue of how to best administer this scarce resource. Due to the then-unclear process for adjudicating water rights, the legislature sought direction from a comparative study of other Western states' water laws.[37] To oversee this ambitious endeavor, in June 2007 the Interim

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[32] *See* AWRM.
[33] Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio, 149 N.M. 394, 249 P.3d 932, 2011-NMCA-015.
[34] *See* Rule 1-071.1-1.071.5 NMRA.
[35] *See id.*
[36] See id.
[37] Water Rights Administration, Memo to LFC on survey of adjudication procedures, September 14, 2007.

Legislative Water and Natural Resources Committee created an adjudication subcommittee to study adjudication reform.[38] Three months later, the Administrative Offices of the Court provided the Legislative Finance Committee a memo surveying adjudication laws of other western states. After months of surveying neighboring states' water laws, the resulting memo concluded that there does not exist one correct procedure for adjudicating water rights.[39] Furthermore, the memo characterized New Mexico's procedure as "haphazard," in part based upon its gradual development starting in 1907, and its use of the same procedural rules as regular civil law suits.[40] Ultimately, and unfortunately, the study and memorandum did not prove fruitful as no agreements were reached.[41]

In 2012, a landmark case further clarified administrative and adjudicative functions. That case arose as a constitutional challenge to the State Engineer's adoption of the AWRM regulations, and the Supreme Court of New Mexico settled the matter. In Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio (hereinafter "Tri-State Generation"), the Court of Appeals initially held that the legislature was barred under Separation of Powers Doctrine from delegating authority to the State Engineer to make administrative determinations that considered any factors beyond the licenses [or permits] issued by the State Engineer, and adjudications of the courts.[42] The Supreme Court reversed the appellate ruling, instead holding that the State Engineer can still administratively manage water rights priorities before a final *inter se* adjudication is entered, notwithstanding the essential function that statutody adjudication serves

[38] *See id*.

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] 149 N.M. 394, 249 P.3d 932, 2011-NMCA-015.

in final water right determinations.[43] In essence, the case allowed that in a time of a water shortage, the State Engineer can continue administratively managing water allocations, and may further consider other factors in a quasi-judicial manner as necessary, even during an ongoing adjudication to determine final water rights.[44] Tri-State Generation thus further defined the State Engineer component with respect to its flexible and rapid managerial role while final adjudications pend.

III. SUMMARY OF LAW GRANTING AUTHORITY

A. THE STATE ENGINEER:

i. The Water Code.

The authority of the State Engineer to administer the waters of New Mexico starts and ends with the aforementioned Water Act of 1907 ("Water Code"), now reflected in Section 72-1-1 et seq.[45] As previously discussed, over the years the duties of the State Engineer have been enlarged, clarified, and amended as the legislature has seen fit. Water-use leasing, underground water administration, establishing a hearing process, and mine dewatering include some of the matters that have come to fall under the umbrella of the State Engineer's authority.[46] For the purposes of this paper, two aspects of the administrative process are paramount to understanding how the State Engineer fits within the statutory framework. First, the administrative duties of State Engineer

[43] 289 P.3d 1232, 2012-NMSC-039.
[44] *See id.*
[45] §§ 72-1-1 et seq.
[46] § 72-6-5; § 72-12-3; § 72-2-16; § 72-12-3.

apply to all waters that are appropriated within the State.[47] Second, all appropriations must be done through an administrative permit issued by the State Engineer.[48]

ii. Active Water Resource Management (AWRM).

As briefly described in the above section, the 2003 enactment of Section 72-2-9.1 gave the State Engineer new authority to administer water in accordance with recorded or declared water rights priorities.[49] As upheld in Tri-State Generation, this law allows the State Engineer to use AWRM to adopt rules for priority administration of permitted appropriations, even while an adjudication of those same waters is pending before an adjudication court awaiting a final determination of rights.[50] In sum, no Separation of Powers conflict exists with regard to AWRM regulations as they accomplish important water policy objectives of consistent and continuous management, and afford the State Engineer flexibility in their execution.

B. THE ADJUDICATION COURT: NMSA 1978, Section 72-4-17 (Suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants).

The Adjudication Court arises directly from statutory authority. Section 72-4-17 bestows the adjudication court with its primary grant and outlines its scope of authority.[52] This section on the final adjudication of system-wide water rights, requires that all claimants identified by a hydrographic survey be joined as parties to an adjudication filed by the office of the State Engineer.[53] In turn, filing an adjudication suit triggers exclusive jurisdiction: "… [the] court in

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[47] § 72-1-1; § 72-2-9.
[48] *See* §§ 72-5-1 (governing surface waters); 72-12-3(A) (governing underground waters).
[49] § 72-2-9.1.
[50] See NMCA Title 19, Chapter 26, Part 2, Regulation No. 19.26.2.1 et seq. (2005) [Administration].
[52] § 72-4-17.
[53] *Id.*

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 ...".[54] Upon the adjudication of a water right, the Adjudication Court incorporates the final decree into a "Sub file Order," which is retained in the claimant's court file to document the adjudicated water rights. The sub file orer establishes the required elements-- priority, amount, purpose, periods of use, and place of use-- of the claimant's water right as determined by a final hydrographic survey.[55]

C. THE WATER COURTS.

i. New Mexico Constitution, Art. XVI, Section 5.

The genesis of Water Court authority is born from several sources. First, the New Mexico Constitution provides for *de novo* appeals from a decision, an act, or refusal to act of any state executive (State Engineer) in matters relating to water rights.[56] The specific process for a *de novo* appeal is contained within the Water Code in Section 72-7-1.[58] For our purposes, the important point is that Water Courts serve as venues for these appeals.

ii. Supreme Court Order of January 27, 2004.

The Supreme Court Order established a particular "Water Court Division" within the judiciary.[59] Consequently, each court district now has a designated "water law Judge" who is assigned cases "involving water law issues arising in that specific judicial district".[60] These

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[54] *Id.*
[55] § 72-4-19.
[56] N.M. Const., art. XVI, § 5
[58] *See* Section 72-7-1 (Appeal to district court; procedure)
[59] *See* supra, n. 53.
[60] Supreme Court Order No. 04-8110, In the Matter of the Establishment of a Water Court Structure for New Mexico, filed January 27, 2004.

judges also preside over cases in other areas of law, unlike the judge appointed to oversee the Adjudication Court.[61]

iii. Water Code, Sections 72-1-1, et al.

The Water Code expands on the foundational authority of the above sources. Throughout the Water Code, there are multiple references to "district judge,"[62] "district court,"[63] "the court having jurisdiction thereof,"[64] and "adjudications of the courts."[65] Some of these statutes refer to the important appeal process taken from decisions of the State Engineer as authorized by the state Constitution. Meanwhile, a number of the statutes authorize the district court to act in ancillary matters, such as enforcement of penalties and compliance orders, injunctions, licensing actions, and flood zone establishment.[66] Unpacking Water Court powers thus requires a close and contextual reading of the Water Code.

IV. CASE LAW AUTHORITY FURTHER DEFINING JURISDICTION

As outlined above, particularized sources of jurisdictional authority are given to the State Engineer, the Adjudication Court, and the Water Courts. A body of case law further defining these authoritative grants has evolved over time. For example, cases discussed *supra* explain the parameters of the constitutional grant of jurisdiction to district courts to resolve "matters relating to water rights" arising from any act or omission on the part of the State Engineer.[67] As a

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[61] *Id*.
[62] *See* § 72-1-7.
[63] *See, e.g.*, §§ 72-2-16, 72-7-1, 72-2-16, & 72-2-18 (regarding compliance order-injunction); §§ 72-12-10, 72-12-14 (regarding licensing action); § 72-18-4 (establishing flood control districts);
[64] § 72-8-1 (regarding offenses and penalties).
[65] § 72-2-9 (supervising apportionment of waters according to licenses).
[66] *See id.*
[67] N.M. Const., art. XVI, § 5; Supreme Court Order No. 04-8110, In the Matter of the Establishment of a Water Court Structure for New Mexico, filed January 27, 2004.

consequence of this case law, a set of principles and/or limitations has developed that direct the respective components in the water administration process. We begin with the primary principle in New Mexico's process of water administration, exclusivity.

A. Adjudication Courts: Exclusive Jurisdiction to Determine the Water Rights as to the Elements of Priority, Amount, Purpose, Periods and Places of Use.

To recap, adjudication courts are unique in that they alone have the power to adjudicate final water rights.[68] The Water Code still allows the State Engineer to administer water rights outside of the adjudication process based on permits as an inchoate right, a necessary first step in obtaining an adjudicated water right.[69] However, the State Engineer's inchoate right of administration only exists in the interim until the Adjudication Court decides final water rights.[70] In terms of relief, administrative decisions disputed in the district court forum can only be resolved to the extent that such orders do not alter, impede or are inconsistent with the final adjudications of the water rights.[71] Currently only one Adjudication Court exists, and therefore it is the sole forum for final right determinations.

The case of El Paso & R. I. Ry. Co. v. District Court of Fifth Judicial Dist.[72] illustrates why the Adjudication Court maintains the exclusive jurisdiction to adjudicate final water rights. The case began with a lawsuit filed in the Lincoln County district court to settle water rights in a general adjudication of all rights in the Bonito stream system.[73] Shortly thereafter, Chaves County district court issued an injunction precluding the State Engineer's approval of a new use of the water, with

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[68] *See* §§ 72-4-17 & 72-4-19**.**
[69] *Id.*
[70] *See Tri-State Generation*, supra n. 40; *Hanson v. Turney*, 136 N.M. 1, 94 P.3d 1 (N.M. Ct. App. 2004).
[71] *Miller Farms v. Verhines*, WL 2534812.
[72] 36 N.M. 94, 8 P.2d 1064, 1931-NMSC-055.
[73] *Id.*

that new use being that the water would be leaving the Bonito water shed.[74] This water shed normally would have led to the recharge of the distant Roswell artesian basin, making the water's diversion from it contested.[75] Ultimately, the Supreme Court issued an alternative writ of prohibition against the Chaves county action, and in its opinion noted a problematic clash of courts:

> "The present case well illustrates the unfortunate results which might follow a divided jurisdiction. The water right asserted by petitioners is now at issue in two courts. To have it upheld in the adjudication suit would be useless if it can be invalidated in the injunction suit. Defendants in the adjudication suit may have rights decreed to them."[76]

Subsequent cases have continued to uphold the fundamental principle that elements of a final water right can only be determined in a water rights adjudication action before an Adjudication Court.[77] A separate Water Court or district court cannot alter or affect the water rights over which the Adjudication Court alone has authority to make final.[78]

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[74] *Id.*
[75] *Id.*
[76] *Id.* at 1068.
[77] *See, e.g.,* Ulibarri v. Hagan, 98 N.M. 676, 652 P.2d 226 1982-NMSC-101 (dictating that before a district court can dismiss the suit on grounds that an Adjudication Court has exclusive jurisdiction, the district court must be satisfied that the water right at issue was part of the "stream system involved"); *Miller Farms v. Verhines*, WL 2534812 (N.M. Ct. App. April 29, 2014) (persuasive) (limiting pursuant to Section 72–4–17, the district court's jurisdiction to issue a writ of mandamus compelling the State Engineer to accept petitioners' declarations regarding their assertions to pre–1907 surface water rights, since a previously filed adjudication of petitioners' water rights was pending).

[78] *Id.*

B. The State Engineer: "There is a distinction between "holders of permits" and "owners of water rights".[79]

While the Adjudication Court's exclusive jurisdiction appears simple in concept, the contours of that authority become fuzzy when one considers two factors: (1) the State Engineer's authority over inchoate water rights during an adjudication, and (2) the Water Court's authority under the Water Code. We must first examine further the State Engineer's use of the permitting process to administer interim water rights.

It is well-settled that the State Engineer has general supervision of the waters of the State.[80] Anyone seeking the right to beneficial use of surface or underground waters[81] must apply to the State Engineer for a "permit." However, upon the Adjudication Court's final adjudication of water rights, that Court will enter a final decree declaring the elements of ownership.[82] The Adjudication Court will then incorporate the final decree into a "Subfile Order" establishing the claimant's water right as a "license."[83] Since all waters belong to the State of New Mexico,[84] a license is only issued to the "owner of a water right," as opposed to an interim permit. This process is consistent with the distinction between "holders of permits" and "owners of water rights" as illustrated by the case below."[85]

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[79] *Hanson v. Turney*, 136 N.M. 1, 94 P.3d 1, 2004-NMCA-069.

[80] § 72-2-1.
[81] § 72-5-1.
[82] § 72-4-19
[83] *See, e.g.,* Subfile Final Judgment: Licensed Water Rights filed in D307-CV-2005-0045 on 12/19/16 and issued pursuant to Case Management Order Mandating Basis-Wide Issue Proceeding and Expedited Inter Se proceedings.
[84] N.M. Const., art. XVI, § 2.
[85] *See* supra, n. 74.

In *Hanson v.Turney*, a permit holder had acquired permits to appropriate waters in 1989 and 1992 for irrigation use.[87] The permit holder drilled two wells, but never put the water to beneficial use, which is the bedrock principle of water right ownership.[88] Later the permit holder filed two applications requesting a change to subdivision use.[89] The State Engineer denied both applications because no water had been put to beneficial use.[90] Upon affirming the grant of summary judgment for the State Engineer, the Court of Appeals decided the meaning of the statutory term "water right," and whether it included a permit to appropriate water, even when no water has been put to beneficial use.[91]

The Hanson court began its analysis by noting that establishing a water right is a process that takes a period of time.[92] Accordingly, it distinguished a water permit as an inchoate right, which "is the necessary first step" in obtaining a water right: it is "the authority to pursue a water right—a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired."[93] Hanson further pointed out that the legislature distinguished between "holders of permits" and "owners of water rights", as demonstrated by § 72–12–8, which provides that both forfeit their right if the water is not applied to beneficial use.[94]

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* at 3.
[94] *Id.* at 4; *see also* § 72–12–8(A).

C. Water Courts: Equitable Relief is Within the Penumbra of Jurisdiction

Water Court may apply equitable relief in absence of an active administrative or adjudicatory process. While Water Court jurisdiction initially appears to be limited by Adjudication Court exclusivity, the Supreme Court Order authorizes such courts to preside over matters "involving water law issues arising in their specific district".[102] In fact, the law predating Water Court establishment supports the district courts' power to entertain equitable actions, so long as such actions will not impair or impede an adjudication process. In fact, such actions are encouraged where it will assist the State Engineer in the administrative process.

i. Injunctions

Injunctive relief is one type of equitable remedy a Water Court may administer. In Carlsbad Irrigation Dist. v. Ford, an irrigation district sought to enjoin the riparian owners' alleged unlawful appropriation of water from the river above the district's reservoirs.[103] As a defense, the riparian owners asserted that they had applied with the State Engineer to appropriate waters from the river.[104] The Supreme Court noted that the pending administrative permit claim might support defendants' claim that they had not proceeded in a willful manner, but since the permits had not yet been issued, the application established no rights in them.[105] In an attempt to contest venue, the defendants argued they were diverting water in Chaves county, while only the reservoir sat in Eddy County.[106] The Supreme Court reasoned that venue was properly situated in Eddy county

[102] Supreme Court Order of January 27, 2004.
[103] *Carlsbad Irrigation Dist. v. Ford*, 46 NM 335, 128 P.2d 1047 (1942).
[104] *Id.*
[105] *Id.* at 1050.
[106] *Id.*

because the lawsuit did not concern adjudication of water rights in a stream system.[107] The Court went on to enjoin the defendants from unlawfully appropriating any waters from the Pecos River, including flood waters.[108]

The holding in Carlsbad Irrigation Dist. v. Ford is consistent with § 72-5-39 of the Water Code. This section allows use of public waters only in accordance with the laws of New Mexico, so long as that use "shall in no way be construed to affect the existing right of a court of equity in the exercise of its general equity powers to grant relief to the state of New Mexico by injunction or otherwise."[110] This case demonstrates that absent an adjudication suit, the Supreme Court acknowledged the district courts' role in resolving matters "involving water law issues arising in their specific district," and further recognized that the State Engineer's interim actions may affect claims of injunctive relief.[112]

ii. Declaratory Judgments, Laches and Estoppel

Additional forms of equitable relief remain open to Water Courts. In the Village of Wagon Mound v. The Mora Trust— another decision prior to the establishment of Water Courts and prior to a system-wide adjudication— a district court was confronted with the issue of enforcing a water contract between the village of Wagon Mound and a private trust.[113] The village's sole source of water was a spring located on the trust's property.[114] The source and access to the water was predicated on a contract entered into between the village and the prior owner some 65 years

[107] *Id.*
[108] *Id.*
[110] § 72-5-39.
[112] *Id.*
[113] *See generally* 133 N.M. 373, 62 P.3d 1255, 2003-NMCA-035.
[114] *Id.*

earlier.[115] That contract provided for the village to have a perpetual right to take and divert water from the spring.[116] Neither the landowner nor the village had ever filed anything with the State Engineer, nor did they seek to clarify their rights to the spring waters by an adjudication or filing.[117]

A subsequent buyer to the land filed a Declaration of Ownership with the State Engineer and obtained a license several decades later.[118] The Mora Trust arose after the death of this subsequent buyer.[119] The heirs to the trust then sought to hold the water contract invalid and unenforceable.[120] The village in turn filed a declaratory action with the district court to hold the contract valid, and the district court granted summary judgment.[121] Before the Court of Appeals, the village argued that it had water rights under the contract.[122]

The appellate court noted that the State Engineer had not permitted or licensed the village any right to appropriate water, but rather viewed the village's rights to access and divert the water as contractual.[123] The village countered with the argument that there had been no transfer of place of use, purpose, or point of diversion regarding pre- or post–1907 rights and, therefore no need to invoke the State Engineer's jurisdiction.[124] The appellate court did not find any water rights in the village; however, it did affirm the district court's order in declaring the contract valid. This ruling assured that the village had the perpetual right to use of the water along with the necessary right-

[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*

of-way.[125] The village had also argued a second equitable claim, the doctrine of laches, against the counterclaims made by the trust. The village asserted that under undisputed facts, laches should attach to prevent the trust from challenging the enforceability of the contractual obligation through a stale defense. .[126] The appellate court affirmed the village's use of laches.[127]

Although the Village of Wagon Mound court made its decision on the basis of contractual rights rather than on established water rights, the case is nevertheless a water rights case. The decisions in both Ford and Village of Wagon Mound are consistent with the dictates of Section 72-5-39 that laws governing water may not "be construed to affect the existing right of a court of equity in the exercise of its general equity powers to grant relief to the state of New Mexico by injunction or otherwise."[130] Moreover, both of these cases involved district court decisions rendered in their now-known capacity as "Water Courts," since no system-wide final adjudications was at issue. The parties in these cases similarly either had permitted rights, pending applications for permitted rights, or no permitted rights.

iii. The Declaratory Judgment Act: An Alternative Means of Presenting Controversies to Courts Already Having Appropriate Jurisdiction Without Enlarging Jurisdiction.

As described in the aforementioned cases, declaratory actions provide another mechanism to settle party differences in water disputes.[131] In the Smith v. City of Santa Fe case, the Supreme

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[125] *Id.*
[126] *Id.*
[127] *Id.*
[130] § 72-5-39; *see generally Village of Wagon Mound*, 62 P.3d 1255; *Ford*, 128 P.2d 1047 (standing for the proposition that because the waters belong to the State, any relief granted to parties over water rights permitted by the State Engineer is really a grant of relief to the State in further administration of such rights).
[131] *Smith v. City of Santa Fe*, 142 N.M. 786, 171 P.3d 300, 2007-NMSC-055 (allowing a plaintiff to use declaratory judgment to challenge city authority to regulate the permitting of domestic

Court has explicitly held that a declaratory judgment action may provide an alternative means of challenging an administrative entity's authority, as long as such action is not used to circumvent established procedures for seeking judicial review of a municipality's administrative decisions.[132]

While the Smith case involved a municipal water code rather than the statutory Water Code, it remains instructive to water cases for purposes of determining when a party may pursue a declaratory judgment instead of first exhausting administrative remedies.[133] The doctrine of exhaustion of remedies requires that the litigant complete the administrative process with the State Engineer once a litigant initiates it. This doctrine essentially bars a litigant from forum shopping by filing a declaratory action to secure a more favorable result from a Water Court.[134]

This is the situation addressed in the Headen case, where the plaintiff filed an application with the State Engineer to change his claimed rights' point of diversion and place and purpose.[135] The State Engineer denied the plaintiff's application, deciding that he in fact did not possess any valid water rights to transfer.[136] Consequently, the plaintiff requested an administrative hearing.[137] However, prior to the hearing, plaintiff tried to circumvent the administrative process by filing a declaratory judgment action in district court to establish the validity of his water rights.[138] In affirming the dismissal of plaintiff's claim, the appellate court characterized the administrative

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water wells as that fell within the Declaratory Judgment Act, while prohibiting a second plaintiff from circumventing the already-initiated administrative process by filing a declaratory action).

[132] *Id.*

[133] *See Smith*, 171 P.3d 300; *see also Headen v. D'Antonio*, 149 N.M. 667, 671, 253 P.3d 957, 961, 2011-NMCA-058.

[134] *See Headen*, 253 P.3d 957 (2011).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

proceedings as a forfeiture determination under the Water Code, which required plaintiff to proceed through the administrative process.[139]

In Headen, the appellate court further noted that declaratory judgment actions should be limited to purely legal issues that do not require fact-finding by the administrative entity.[140] Accordingly, both the Smith and Headen cases caution against using a declaratory judgment action to challenge or review administrative actions if such an approach would affect any of the following: foreclose administrative entity fact-finding, discourage reliance on any special expertise at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations that would otherwise limit review through means other than a declaratory judgment action.[141]

Granted, there may be occasions when a declaratory action includes a request for supplemental relief (under Section 44-6-9), or where the determination of the parties' legal relations may require some fact finding.[142] In such instances, however, Water Courts must be cognizant of the cautionary language from the Smith and Headen cases, which directs that courts defer to administrative proceedings, including the necessary fact-finding for which administrative agencies are best suited.[143] However, certain fact-finding inquiries where the individual rights of litigants are in dispute may fare better in a Water Court, as discussed *infra.*

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[139] *Id.*
[140] *Id.*
[141] *See id*; *Smith*, 171 P.3d 300 (2007).
[142] *See State ex rel. Reynolds v. Mears*, 486 N.M. 510, 525 P.2d 870, 1974-NMSC-070 (determining that trial court findings supported its determination of extent of the water rights to which landowners were entitled in the context of a declaratory action by the State Engineer seeking to declare that landowners had not perfected underground water rights on their lands,).
[143] *See Smith*, 171 P.3d 300; *Headen*, 253 P.3d 957.

D. Water Courts and Hybrid Functions: A Puzzling Affair

i. The State Engineer Can Administratively Resolve Disputes on Water Rights Priorities Before a Final *Inter Se* Adjudication.

To review the basic framework crafted in preceding sections, the State Engineer has the authority to administer permitted water rights. In 2003, the State Engineer's authority expanded to allow water administration according to the water rights priorities recorded with the office or as declared.[144] Tri-State Generation confirmed the State Engineer's authority to adopt rules for priority administration of permitted appropriations, even while an adjudication of those same waters is pending before the Adjudication Court.[145] The key message of the Tri-State Generation decision remains that during a pending and protracted judicial process to adjudicate final water rights, the State Engineer can still administer the permitted water rights exclusively through the administrative process.[146]

Given that water rights are merely usufructuary-- in other words belong to the State-- they are subject to public servitudes and thus "incapable of full ownership and [are] subject to constraints that [they] be used nonwastefully, reasonably, beneficially, etc."[147] In Tri-State Generation, the Supreme Court rejected the argument that the State Engineer's regulation of water rights was adjudicatory in nature: "We agree with Tri–State that the State Engineer lacks the authority to adjudicate water rights…. But whether the State Engineer may adjudicate water rights is not the

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[144] § 72-2-9.1.

[145] *See Tri-State Generation*, 289 P.3d 1232; *see also*, NMCA 2005, Title 19, Chapter 26, Part 2, Regulation No. 19.26.2.1 et seq. [Administration].

[146] *See generally Tri-State Generation*, 289 P.3d 1232.

[147] *Id.* at 1242 ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use.... The state as owner of water has the right to prescribe how it may be used")

issue before us; rather, we are addressing the State Engineer's statutory authority to administer water outside of the adjudication process."[148]

Morever, the Tri-State Generation Court recognized unique nature of the State Engineer's delegated duties. Namely, obligations already involving water administration based upon extra-adjudicatory priority determinations, which in turn often places the State Engineer in a position of issuing de facto factual determinations .[149] Given this somewhat hybrid function, the Court noted that it was proper for the legislature to vest an agency with quasi-judicial functions.[150]

ii. Certain Factual Determinations Necessary for the State Engineer's Water Administration Require Water Court Resolution.

While the issue of a Water Court's authority was not raised in Tri-State Generation, the Supreme Court clearly relied upon cases establishing that an administrative agency in the exercise

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[148] *Id.* at 1240.

[149] *Id.* (citing *Templeton v. Pecos Valley Artesian Conservancy Dist.*, 65 N.M. 59, 61, 69, 332 P.2d 465, 466, 471 (1958) (rejecting the argument that the State Engineer's denial of a permit to change the place of diversion was a de facto adjudication, stating, "[I]t is true that the State Engineer cannot conduct a proceeding to adjudicate the priorities of water rights. However, each time a permit is granted, the State Engineer has to consider all prior appropriations to determine whether or not there are any unappropriated waters. To that extent, he is required to consider prior appropriations.").

[150] *Id.* (citing *Wylie Corp. v. Mowrer*, 104 N.M. 751, 752–53, 726 P.2d 1381, 1382–83 (1986) (overruling *State ex rel. Hovey Concrete Prods. Co. v. Mechem*, 63 N.M. 250, 316 P.2d 1069 (1957) in holding that the Legislature can grant authority under the Workmen's Compensation Act to an administrative agency to address individual rights as a quasi-judicial body)); *see also New Energy Econ., Inc. v. Shoobridge*, 2010–NMSC–049, ¶ 14, 149 N.M. 42, 243 P.3d 746 (Within the separation of powers scheme, "we have recognized the Legislature's power to delegate both adjudicative and rule-making power to administrative agencies.").

of its police powers has authority to resolve some factual disputes.[151] Though not explored in that case, certain types of such factual disputes are not well suited for administrative relief, but instead best fit under the purview of judicial resolution.

a. Fellows v. Shultz

Such was the case in Fellows v. Shultz. There, the Supreme Court delineated the differences in factual resolutions best handled by administrative agencies and those better suited for the courts in the context of an application to change a well location.[152]The Court distinguished that "[t]his court has held that the legislature, in exercising its police powers, may confer certain 'quasi-judicial' powers on administrative agencies with regard to laws affecting the general public, *but that such powers do not extend to determinations of rights and liabilities between individuals*."[153] (Emphasis added).

Specifically, Fellows involved a separation of powers challenge to Water Code Section 75—11—7, pertaining to applications requesting the State Engineer for permission to relocate water wells.[154] Upon objection or denial of a permit, the statute allowed the applicant to file an action for a district court hearing as an originally docketed case.[155] In relevant part, that statute contemplated an *original proceeding* in district court without requiring an appeal, a prior *de novo* review, or the State Engineer's act or refusal to act.[156] Ultimately, the court decidedly struck down

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[151] *Id.* (e.g., boards regulating common carriers, transportation, telephone, utility rates, liquor control, etc).
[152] *Fellows v. Shultz*, 81 NM 496, 496 P.2d 141 (1970).
[153] *Id* at 497 (citing *State ex rel. Hovey Concrete Products Co. v. Mechem*, 63 N.M. 250, 252, 316 P.2d 1069 (1957); *State v. Kelly*, 27 N.M. 412, 202 P. 524, 530, 21 A.L.R. 156 (1921)).
[154] §75—11—7
[155] *Fellows*, 496 P.2d at 497.
[156] *Id* (citing § 75—11—7).

that provision because it unconstitutionally violated the separation of powers doctrine, and grounded that decision in the distinct functions of the courts and administrative agencies:

> "The crucial question here, however, is whether a proceeding which has long been established as administrative in nature can be made judicial in nature by the legislative act of removing such proceeding from the jurisdiction of an administrative body and placing it within the original jurisdiction of the courts … *it must follow that, just as the commission cannot perform a judicial function, neither can the court perform an administrative one*"[157] (emphasis added).

As the Supreme Court noted in Smith, a court should resist a legal challenge to, or review of, administrative actions if such an action would foreclose any necessary fact-finding by the administrative entity, discourage reliance on any special expertise that may exist at the administrative level, disregard an exclusive statutory scheme for the review of administrative decisions, or circumvent procedural or substantive limitations placed on reviewing administrative action.[158] At the same time, however, an administrative agency must be careful to avoid making factual determinations involving the rights and liabilities between individuals, where such determinations are not a core function of its police powers.[159] Thus, a careful balance must be struck in fact-finding inquiries to avoid crossing into unlawful territory.

Water Courts are also the proper forum to determine the elements of a *permitted* water right between litigants, as opposed to the elements of a water right on final adjudication. Whether it is

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[157] *Id. at* 499-500 (citing *Continental Oil Co. v. Oil Conservation Commission*, 70 N.M. 310, 373 P.2d 809 (1962)).
[158] *See Smith*, 171 P.3d at 305
[159] *See Fellows*, 496 P.2d at 143

a dispute as to the use of a common well (place of use), the quantity of acre feet placed into beneficial use (amount), or simply the ownership of that permitted water right, Water Courts are often called upon to resolve these disputes. These issues are quite often local and reach the Water Court as a State Engineer appeal or referral arising from a private dispute. They can also arise simply through private parties in court litigation. For example, a party may challenge the State Engineer's archived documentation to support a permitted water right as a forgery, or a transactional document may be challenged as lacking consideration. Documents leading to a claim of permitted water rights-- contracts of sale, last wills bequeathing water rights, quitclaim deeds, assignments, etc. -- are the typical supporting documents that may be questioned or challenged. As discussed *supra* in Fellows and Smith, these types of issues may be beyond the special expertise of the State Engineer and outside its core function, thereby necessitating a resolution of the parties' rights and liabilities through a Water Court.[160]

b. Moongate Water Co. v. Dona Ana Mutual Water Consumer's Association

The case of Moongate Water Co. v. Dona Ana Mutual Water Consumer's Association, currently on appeal, showcases the issue of which factual matters a Water Court may resolve.[161] In Moongate, two water companies claimed the same 82 acre feet of water ("afy") originating from the same source, Westmoreland.[162] Westmoreland originally leased and contracted with Moongate to provide water services to its subdivision.[163] Westmoreland allowed Moongate to serve the subdivision with Westmoreland's unperfected, but permitted, water rights.[164] Moongate placed

[160] *See generally Smith*, 171 P.3d 300; *Fellows*, 496 P.2d 141.
[161] D-307-CV-2013-1480 (pending on appeal: A-1-CA-38589).
[162] *Id.*

[163] *Id.*
[164] *Id.*

82 afy of water rights to beneficial use in the subdivision in 1997.[165] The contract with Westmoreland expired two years later.[166] In 2002, Westmoreland then sold the same 82 afy of perfected water rights to Dona Ana, who immediately filed a Declaration of Ownership with the State Engineer.[167] Later, a dispute arose when Moongate claimed the same permitted rights through the doctrine of beneficial use under Hydro Resources Corp. v. Gray.[168]

A pre-eminent authority on this doctrine, Hydro Resources holds that the person who develops water by placing the water to beneficial use becomes the owner of the water right under a lease.[169] Thus, had the lessor desired to retain the water rights, he could have placed language in the lease to accomplish this.[170] Upon objection to Dona Ana's request to transfer the point of discharge in Moongate, the State Engineer hearing officer referred the issue of ownership to the Third Judicial District Court, the appropriate Water Court forum.[171] In response, Dona Ana challenged the Water Court's jurisdiction, contending that only the Adjudication Court can determine ownership of a water right.[172]

The Water Court in Moongate held that no evidence had been introduced that the specific permitted water rights of the parties were before the Adjudication Court, or that State Engineer had intended to refer matter to the Adjudication Court.[173] In addition, Moongate was able to establish ownership through evidence that it developed the water rights by placing the water to

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[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* (citing *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 NM 142, 173 P.3d 749.
[169] *See generally Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 NM 142, 173 P.3d 749
[170] *Id.*
[171] *Moongate*, D-307-CV-2013-1480.
[172] *Id.*
[173] *Id. (The administrative order stayed the proceedings, "pending District Court determination ..." of the issues. Trial Exhibit 51, D-307-CV-2013-1480).*

beneficial use as set forth by Hydro Resources.[174] Since one of the causes of action involved a declaratory judgment, the Water Court declared "that Moongate is the valid holder of 82.49 afy of *permitted* water rights which originated from the Westmoreland 1988 Contract of Sale to Moongate, and which Moongate placed into beneficial use in 1997 as reflected in the meter readings filed with the OSE."[175]

Though aforementioned issues in Moongate have been simplified for purposes of this paper, through this case the appellate courts will likely bring some long-awaited finality to this question of the jurisdiction of the Water Courts. Folded into the larger Water Court jurisdictional question needing guidance lies the critical issue of its ability to make factual resolutions in assisting the State Engineer with its administrative duties. Although Moongate may have resolved the issue of the Water Courts jurisdiction for now, if the appellate courts affirm the district court decision, further issues will arise concerning the effect of the Water Courts' factual determinations on an Adjudication Court. For example, the district court in Moongate factually resolved the issue of ownership of *permitted* water rights, but how will such a decision affect an Adjudication Court's final adjudication on ownership of those same rights? As stated throughout this paper, the Water Court's factual determinations are as to permitted water rights, which are usufructuary in nature. The Adjudication Court can only undertake factual resolutions as a final order on the five elements of a water right after all claimants identified by a hydrographic survey are joined.[176] Until then, all water rights are simply permitted rights.

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[174] *Id.*
[175] *Id.* (Emphasis added).
[176] *See* § 72-4-17.

iii. Res Judicata: The "grey area" where water court decisions affect title.

The res judicata issue presents another piece of the puzzle. Despite the doctrine of res judicata being an equitable remedy, discussion of it also falls under this section as it relates to the present quandary of hybrid functions relating to fact finding. Specifically, the outstanding question is whether a Water Court's factual resolution of an issue, such as ownership of permitted water rights, functions as *res judicata* on a claimant at an adjudication.

The answer to this question will require some analysis of the particular issue's factual context. For instance, if the issue was the State Engineer's referral to the Water Court, and the State Engineer incorporated the Water Court's resolution in its own administrative findings, then any subsequent adjudication proceeding might consider those findings to be the "law of the case" for that matter.[177] An issue resolved in the Water Court may again be raised in a subsequent "*inter se* proceeding" before the Adjudication Court. Essentially, in that proceeding claimants not parties to the original Water Court action can object to the water right of any other claimant before the Adjudication Court. In that situation, the Adjudication Court might choose to apply the doctrine of the "law of the case" if the objectors are unable to present different facts or interests.[178] If an objector does present different facts or changes the context in which the Water Court formulated its resolution, the Adjudication Court may choose to resolve the matter on its own as a final determination of rights.

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[177] *See* § 72-7-1 (governing the procedure of appeal to district court).

[178] *See First Interstate Bank of Lea County v. Heritage Square, Ltd.*,113 N.M. 763, 833 P.2d 240, 1992-NMSC-037 (Court's dismissal of owners' cross claim for amounts retained by tenant as offsets was "law of the case" regarding the landlords' claims against the tenant's principals.)

On the other hand, if an issue arises between two private court litigants absent any State Engineer involvement, such as a dispute over the quantity of water from shared wells, then it is possible that the Adjudication Court will adopt a *res judicata* position on the issue. In summary, it's likely that a Water Court decision made to assist the State Engineer in the administration of permitted water rights could conceivably be altered by a final adjudication, so long as the decision had a primary purpose of assisting the State Engineer in his administrative duties, rather than permanently affecting the rights and liabilities between parties.

The question of how an Adjudication Court will treat a Water Court's factual resolution of a disputed matter is thus presentation and context driven. Given the current pace of water law development, this and associated issues will likely be addressed at some time in the near future. As more and more demands are placed on the State's scant water resources, these issues will come up more frequently and require more urgent resolution and finality.

iv. Beneficial use establishes ownership to a water right, as opposed to a Declaration of Ownership filed with the State Engineer.

Water Courts are increasingly tasked with resolving issues or disparities between the content of the State Engineer's files and extrinsic evidence of claimed rights.[179] Such evidentiary disputes increase challenges to Water Court jurisdiction, and reaching a proper resolution requires an understanding of the administrative law and the policies governing administrative bodies.

As a preliminary matter, depending on the type or source of water right, a person or corporation "may" or "shall" file a declaration of ownership.[180] The Water Code provides some instruction here. Section 72-1-3 allows that any person or corporation seeking to declare pre-1907 water rights

[179] *See, e.g., Moongate*, D-307-CV-2013-1480.
[180] § 72-1-3; § 72-1-2.1

"*may* make and file" a declaration with the State Engineer[181] (emphasis added). Section 72-1-2.1 requires that upon a change of ownership or conveyance of water rights, the new owner, "*shall* file a change of ownership form" with office of the State Engineer[182] (emphasis added). Finally, a person or corporation claiming to be the owner of a vested water right from any underground source by applying such water to beneficial use "*may* make and file" a declaration with OSE[183] (emphasis added). The typical legal argument in an ownership dispute occurs where the "first to file" prevails in such claim, especially when the change of ownership occurred under the mandatory filing declaration of Section 72-1-2.1.[185]

However, the source of water may affect the claim of ownership, as Moongate illustrated.[186] Regardless of the statute that applies, filing a declaration of ownership form with the State Engineer does not in effect equate to filing a real estate deed, where the first filing may obtain priority over the second filing. Rather, both the Constitution and Section 72-12-2 establish the bedrock principle of New Mexico water law: "Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act."[187] The existing canon of case law and State Engineer regulations further bolster this principle. For example, regulation no. 19.26.2.17(D) provides that even if the State Engineer accepts a change of ownership form for filing, that acceptance does not constitute per se approval of either the validity of the conveyance or of the right conveyed.[188] Rather, determination of water right ownership is left strictly to the courts.

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[181] § 72-1-3.
[182] § 72-1-2.1.
[183] § 72-12-5.
[185] § 72-1-2.1.
[186] *See Moongate*, D-307-CV-2013-1480.
[187] N.M. Const, art. XVI, § 3; *see* § 72-12-2.
[188] NMCA 2005, Regulation No. 19.26.2.17(D).

Thus, this regulation harmonizes case law holdings that only the courts have the authority to adjudicate water rights.[189]

It is important to reiterate that a Water Court's power to decide the ownership of a permitted water right does not derive from a sole source of statutory authority. Rather it may result from the nature of the proceeding, the nature of the claimed right, or all of the above, as Moongate demonstrates.[190] The converse of this result is also true: a Water Court may lack jurisdiction depending on the nature of proceeding, the nature of the claimed water right, a statutory prohibition, or all of the above. Consequently, it is of paramount importance that a Water Court always conduct a thorough analysis of jurisdiction to determine whether it can proceed in the matter.

v. Water Courts cannot issue writs or orders which would alter the five basic elements of priority in a matter pending before an Adjudication Court.

Although Water Courts may decide issues based on permitted water rights, or on claimed but unadjudicated water rights, such courts must be cautious that any decision does not impair, contradict, or impede the work of an Adjudication Court. Moreover, Water Courts must be acutely aware that their decisions on permitted water rights may affect the recordings within the State Engineer's office, and thereby directly or indirectly affect the five components of a water right awaiting adjudication: its priority, amount, purpose, period and place of use. While fact-specific resolutions may be unavoidable as necessary to assist the State Engineer in its administration of water, a Water Court should not allow its decisions to artificially insert or alter an element of a pending water adjudication claim.

[189] *State ex rel. Reynolds v. Lewis*, 84 NM 768, 508 P.2d 577 (1973).
[190] *See Moongate*, D-307-CV-2013-1480.

Miller Farms v. Verhines exemplifies this fraught process.[191] There, the petitioners sought to have the Water Court compel the State Engineer to accept and file a Declaration of Water Rights vesting the rights prior to the passage of the 1907 Laws.[192] Meanwhile, those same water rights were undergoing adjudication in the Adjudication Court.[193] Although the statute could be interpreted to require that the declaration "*shall* be recorded at length," the Court reasoned that recording the declaration would have had the unlawful effect of "leap-frogging" previously recorded claims while the matter was pending before the Adjudication Court.[194] Thus, the Water Court determined that it lacked jurisdiction to issue an alternative writ of mandamus against the State Engineer due to the pending Adjudication Court proceeding.[195] The Court of Appeals agreed that no Water Court jurisdiction existed, and so affirmed the denial of the alternative writ of mandamus.[196]

V. MECHANICS OF WATER LAW: "REAL WORLD" PROBLEMS AND PRINCIPLE APPLICATIONS

A. Administrative decisions can be susceptible to subsequent litigation on appeal or through ancillary district court litigation on issues not addressed administratively.

As stated earlier, the legislature may use its police powers to confer certain 'quasi-judicial' powers on administrative agencies with regard to laws affecting the general public; however, such powers do not extend to the determinations of rights and liabilities between individuals. As such, certain standards are invoked when courts review the administrative agency decisions.[197] On questions of fact, the court will generally defer to the decision of the agency, especially if the

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[191] *See generally* Miller Farms, WL 2534812.
[192] *Id.*
[193] *Id.*
[194] *Id.*; § 72-1-3.
[195] Miller Farms, WL 2534812.
[196] *Id.*
[197] See e.g., Rule of Civil Procedure 1-074 (1978)

factual issues concern matters of specialized agency expertise.[198] On legal questions, courts afford a heightened degree of deference to the agency where questions of law implicate agency expertise or fundamental policy determinations within scope of agency's statutory function.[199] However, the district courts' review of the matter might not be so limited if an issue is left unaddressed, or if it is simply not necessary to an agency's decision, as the case below illustrates

In Reynolds v. Rio Rancho Estates, Inc., the State Engineer decided to permit a developer to repair a well existing under a pre-basin water right, subject to certain conditions.[200] In its application for repair, the applicant requested a permit to repair and clean the well, but did not request a change in the amount of water it could use.[201] Because the well could not be repaired for a number of reasons, the applicant then applied for a permit to change the location of the well.[202] This application also requested an 18-inch diameter well to replace the original 7-inch well.[203] The State Engineer approved the change of location application; however, it notified the applicant that changing the location would be conditioned on the same size and depth of the previous permit.[204] Upon a protest hearing, the State Engineer asserted that the doctrine of administrative *res judicata* barred litigation of the issue of the depth of the well and the diameter of the pipe. [205]

[198] *See Smith*, 171 P.3d at 305
[199] See *Morningstar Water Users Ass'n v. New Mexico Public Utility Com'n*, 120 N.M. 579, 904 P.2d 28, 1995-NMSC-062.
[200] 95 NM 560, 624 P.2d 502 (1981).
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*

On a *de novo* appeal, the district court found that the applicant was entitled to continue to construct the well pursuant to the doctrine of relation back under State v. Mendenhall.[206] This right included the right to change the location of the well absent any size or depth limitations, since the initial permit did not require a statement of limitation to repair the well.[207] The Supreme Court agreed and held that the State Engineer could not impose limitations on the well's size and depth since it had not found that changing the well's location would impair existing rights. The only caveat was that the developer could not withdraw more than a specified amount of water per year.[208] The Court pointed out that a party should not have to litigate every incidental matter which might come up in a proceeding before the State Engineer for fear of losing its claim forever.[209] Here, where neither the depth of applicant's well, the diameter of the pipe, nor the amount of water were at issue and essential to the prior decision, the State Engineer's determination did not bar the subsequent litigation of those issues.[210]

Rio Rancho Estates, Inc, is significant to Water Courts because it shows that an administrative decision may not bar subsequent litigation over application or permit conditions when those same conditions were not at issue and non-essential to the State Engineer's application or permit decision. This conclusion, however, should be preceded by a Water Court's analysis of whether the question at issue is one that implicates special agency expertise or a determination of

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[206] *Id.* (citing *State v. Mendenhall* 68 N.M. 467, 362 P.2d 998 (1961) (Providing that for a claim of relation back of their water rights priority date, a party is required to show that they: (1) legally commenced drilling their well before declaration of the basin, (2) proceeded diligently to develop a means of applying the water pursuant to a plan, and (3) applied the water to beneficial use within a reasonable time).
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*

fundamental policies within the scope of agency's statutory function. If so, then the Water Court should contemplate whether a remand to the agency is the best resolution.

B. Governmental immunity statutes may not apply to the jurisdictional authority of the Water Courts.

Governmental entities are frequently sued in order to have rights determined or clarified. If a statute were to immunize any governmental entity from having to defend any action to clarify water related issues, then such rights would never be settled. Thus, the logic behind this policy choice attempts to ward off absurd results.

Prior case law has indicated that water rights are treated as property rights.[211] Governmental entities, specifically quasi-governmental entities such as mutual domestic water associations, have previously raised this characterization of water rights as a basis for immunity.[212] Litigants such as in the Moongate decision rely upon Section 42-11-1 to support this defense: "The State of New Mexico and its political subdivsions…are granted immunity from and may not be named a defendant in any suit…. involving a claim of title to or interest in real property except as specifically authorized by law."[213]

The key language of Section 42-11-1 that allows Water Courts to exercise jurisdiction over the quasi-governmental or governmental entities is the phrase "… except as specifically authorized by law."[214] Frequently, issues affecting water rights are brought through the Declaratory Judgment

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[211] *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 238 (N.M. Ct. App. 1993) ("Water rights are real property rights that are generally tied to specific land.")
[212] *See, e.g., Moongate*, D-307-CV-2013-1480 (relying on § 42-11-1, which provides in relevant part that "The State of New Mexico and its political subdivsions…are granted immunity from and may not be named a defendant in any suit….involving a claim of title to or interest in real property except as specifically authorized by law.").
[213] N.M Stat. Ann. (1978) 42-11-1
[214] § 42-11-1.

Act.[215] Under the Act, the State of New Mexico, or any state official, may be sued when the parties' legal relations call for the construction of any statute or laws of the State of New Mexico.[216] In the context of a State Engineer decision or action, the "laws of the State of New Mexico" are frequently implicated through the Water Code.[217] Thus, governmental entities are regularly subject to water law questions.

Governmental and quasi-governmental entities also fall under the jurisdiction of the Water Courts for purposes of equitable actions. As previously discussed, the Carlsbad Irrigation Dist. and Village of Wagon Mound decisions are both consistent with the dictates of Section 72-5-39 insofar as water shall be used in the manner provided by the laws of the State, but such laws, "… shall in no way be construed to affect the existing right of a court of equity in the exercise of its general equity powers to grant relief to the state of New Mexico by injunction or otherwise."[218]

While the general state of the law does not appear to support a claim of immunity, some entities may still choose to mount that defense. Of course, sometimes a governmental entity might not raise an immunity defense because it has a strategic interest in the particular dispute being resolved.[219] Whatever the case, foundational rules remain intact: the adjudication court maintains exclusive jurisdiction to hear all water right adjudication questions, the State owns all waters, and

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[215] § 44-6-13.
[216] *Id.*
[217] *See § 72-2-1, et seq.*
[218] § 72-5-39; *see generally* Carlsbad Irrigation Dist. 128 P.2d 1047; *Village of Wagon Mound* 62 P.3d 1255; *see also Bounds v. State*, 149 N.M. 484, 252 P.3d 708, 2011-NMCA-011 (determining that an action against State and State Engineer for declaratory and injunctive relief alleging that domestic well statute was unconstitutional).
[219] *See, e.g., Burnham v. City of Farmington*, 125 N.M. 129, 957 P.2d 1163, 1998-NMCA-056 (bringing a quiet title action against the city to resolve a disputed river boundary).

the district courts have authority to grant relief, including equitable.[221] Courts are thus empowered to decide these matters because water conservation and preservation are of upmost importance to the doctrine of maximum utilization as a fundamental requisite of beneficial use.[222]

C. Transfers of water rights are independent of the process of foreclosure proceedings.

Water right transfers operate independently of bank or other commercial transfers. The method for transferring an existing water right is governed by Sections 72–5–22 and72–5–23.[223] Section 72–5–22 recognizes the right of a party holding a water right to assign that right, but specifies that no assignment "shall be binding except upon the parties thereto, unless filed for record in the office of the state engineer."[224] Section 72–5–23 provides that water used for irrigation purposes shall be considered appurtenant to the land upon which it is used, and thus can only be severed from the land "… upon approval of an application of the owner by the state engineer."[225]

Water transfers, sales or assignments are occasionally attempted outside of the manner provided under the Water Code. This may occur through real estate contracts, deeds or written assignments. In the context of a foreclosure proceeding where the deeded rights are at issue, the district courts must determine the legal status of all property, including the associated water rights. Similarly, the district or Water Court necessarily becomes involved in resolving legal complications resulting from the transfer of water rights outside of the Water Code.

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[221] § 72-4-17; § 72-5-39.
[222] *See, e.g.*, *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981).
[223] § 72–5–22 (Repl. 1985) (governing transfer of water rights); § 72–5–23 (governing water appurtenant to land).
[224] § 72–5–22.
[225] § 72–5–23; *McCasland v. Miskell*, 119 N.M. 390, 890 P.2d 1322, 1994-NMCA-163.

The McCasland case involves a complex fact pattern which highlights the additional legal complications that can arise when parties attempt water rights transfers outside of the Water Code process.[226] The property at issue, ultimately the subject of a foreclosure proceeding, involved a feedlot with 28.74 acre-feet of irrigation water rights that remained appurtenant to the feedlot property subsequently acquired by the defendant.[227] The plaintiffs contended that when the non-feed yard property was conveyed to them, they were deeded all water rights, including appurtenant water rights.[228] Additionally, the plaintiffs claimed to have used the 28.74 acre-feet on the other deeded property for some years.[229] Problematically, there was no evidence that any of the parties had complied with the procedures under the Water Code to formalize any transfer of water rights.[230] As a consequence, the Court of Appeals held that merely using the 28.74 acre-feet water on another parcel did not effect a transfer of those water rights from the feed yard.[231] The district court further erred in declaring the plaintiffs owners of the water rights, absent the prior land owner seeking to sever water rights from land in compliance with the statutory method .[232]

In a similar district court foreclosure, a creditor bank sought to foreclose on a lien that included the water rights on part of a dairy farm.[233] The creditor failed to fulfill the requirements of Section 72–1–2.1 for a transfer of water rights, and further failed to properly acknowledge its recorded

[226] *McCasland*, 890 P.2d 1322.
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *In re Borges*, U.S. Bankruptcy Court, D. New Mexico, December 31, 2012, 485 B.R. 743.

mortgage.[234] Since the change of ownership forms were not properly recorded with the State Engineer, the creditor's interest in the water rights was never perfected.[235]

Occasionally during foreclosures, subsequent developments or oversights may hurt the accuracy of State Engineer's documentation, even if the parties transferring water rights follow the proper Water Code process. In such circumstances, foreclosures may be completed with the property, but water rights resolution should be delegated to the State Engineer through a decree that declares *permitted* water rights as recognized but, "… *as may be further developed before, and determined by the Office of the State Engineer*."[236]

By way of example, in Moore v. La Union Holdings, an owner sold restaurant property along with the water rights to the initial buyers, who promptly filed a declaration of ownership with State Engineer.[237] Due to health code and zoning restrictions, the point of diversion was moved to another well on a neighbor's adjoining farmland.[238] The initial buyers then defaulted on the contract, and the permitted water rights remained in their names under a water sharing agreement filed with the State Engineer.[239] Later, the owner failed to assign the water sharing agreement to the subsequent buyers of the restaurant.[240] A foreclosure of the restaurant and the water rights was eventually filed against the subsequent buyers.[241] Upon entry of the foreclosure decree, the district court recognized the owners' possession of the permitted water rights "… *and as may be developed*

[234] *Id.*; § 72-1-2.1 (governing change of ownership, recording, constructive notice).
[235] *In re Borges*, 485 B.R. 743.
[236] D-307-CV-2013-0033; Third Judicial District, New Mexico
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*

before, and determined by the Office of the State Engineer" so as to give the parties an opportunity to correct the documentation within the State Engineer's office.[242]

D. The Adjudication of a "Stream System" Includes Permitted Underground Water Rights.

Throughout this paper, we have utilized the terms "permitted" water rights and "holders" of water rights to distinguish between inchoate water rights and adjudicated water rights. There is also a literal distinction between surface water rights and underground water rights.[243] However, this latter distinction bears little meaning for purposes of an adjudication. While "underground water rights" are not statutorily described as part of the "waters of any stream system," the legislative intent contemplates that judicial decree settle all water rights in the state.[244]

The argument in City of Albuquerque v. Reynolds turned upon whether the territorial legislature may have intended the State Engineer to have different duties in light of the later-adopted statutory underground waters article.[245] However, the Supreme Court rejected this view and found no meaningful distinction in the jurisdiction and duties of State Engineer with regard to stream and underground waters appropriation.[246] While the Legislature has provided somewhat

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[242] *Id.*

[243] §§ 75-5-1 through 75-5-39 (regarding Appropriation and Use of Surface Water); §§ 72-12-1 through 72-12-28 (regarding Underground Waters).

[244] *See State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943, 1959-NMSC-080 (explaining that the 1907 water code statute is 'all-embracing', and includes claimed rights of appropriators from an artesian basin within a stream system); *City of Albquerque v. Reynolds*, 71 N.M.428, 379 P.2d 73 (1962); *see also* Order Regarding Adjudication Procedures, D307-CV-96-888, Third Judicial District (September 30, 1998) (setting forth the process for the Lower Rio Grande Adjudication, which encompasses adjudication for four basins in the Lower Rio Grande survey and "other areas not otherwise described", in addition to the stream system of the surface waters.)

[245] 379 P.2d 73.

[246] *See id.*

different administrative procedures for the two sources, the substantive rights are identical once obtained.

Another State Engineer duty under the Water Code is determining water rights through filing a system-wide adjudication of any stream system .[247] Filing this stream system adjudication affords the court exclusive jurisdiction over the adjudication. Thus, the legislature evidently designed judicial decree to adjudicate and settle all water rights in the state.[248] Furthermore, considering that stream flows are often interconnected with other sources of water, the Supreme Court in El Paso & R. I. Ry. Co. v. District Court of Fifth Judicial District held that the statutes clearly contemplate all rights in a system, both underground and surface, for purposes of a system-wide adjudication.[249]

V. SUMMARY

This paper primarily explores and analyzes the origins and the jurisdiction of the New Mexico Water Courts. Any analysis of the jurisdiction of the State Engineer or the Adjudication Court is cursory, and a thorough examination is beyond this paper. Nevertheless, understanding the Water Courts' jurisdiction does require general comprehension of the jurisdiction of the other two entities.

Ascertaining Water Court jurisdiction can be complex depending on the source of the authority. On one hand, an appeal from the State Engineer's action or inaction under the Water Code is largely straightforward and statutory. On the other hand, a water law dispute between private litigants with permitted water rights-- who may or may not have a pending adjudication-- likely requires some analysis before a Water Court can determine if its jurisdiction has been properly

[247] § 72-4-17.
[248] *Snow v. Abalos*, 18 N.M. 681, 140 P.1044 (1914).
[249] 8 P.2d 1064.

invoked. This analysis will most likely require a review of administrative law, water law principles, and at times constitutional law. In the end, knowing the function and purpose for each component in the New Mexico water law system, the parameters under which they operate, and recognizing those grey areas where the components may mutually coexist and operate will hopefully result in understanding the process by which the puzzle of water administration in New Mexico works.

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