

*“Whiskey is for drinking, water is for fighting.”*

# Charting a Course for Produced Water Regulation in New Mexico

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Once again the doctrine of prior appropriation and hydrologic reality are clashing in the West.

Gas operators in coal bed methane fields are finding they need to remove large amounts of relatively pure water in order to reduce reservoir pressure in coal seams so that the reservoirs can desorb the methane in economically feasible quantities. In some places, the water produced is usable or can be made usable with very little treatment.

Prior appropriators with water rights in such areas are watching warily as the water is produced, feeling that this production is depleting their claims as a matter of hydrologic connection or as a matter of right. Their grievances are compounded by the fact that through a combination of environmental, legal, and economic factors, the only currently viable disposition of this water is to inject it into deeper, lower-quality aquifers, thereby permanently contaminating the produced water and preventing its future beneficial use.

## *Line Between Jurisdictions is Blurring*

In New Mexico, like most prior-appropriation states, the water rights system and the beneficial use of fresh water are generally the jurisdiction of the state engineer, but water that is produced incident to oil and gas operations is regulated as a waste product by the Oil Conservation Commission (OCC). Historically, these fresh and produced waters have been quite distinct in terms of their quality and in the depths of the aquifers or reservoirs that contain them. But with technologic advances in water treatment and the relentless development of coal bed methane reservoirs, these differences are becoming less significant. Jurisdictional problems arise when gas producers wish to put the produced water to beneficial use, rather than dispose of it by injection.

In a water-short state like New Mexico, state regulators *should* attempt to accommodate the beneficial use of a resource that would otherwise be treated as waste. However, what rights does the oil or gas producer have to use water that, but for the fact that it was produced with oil or gas, might be available to satisfy the prior water appropriator's claim, either currently or in the future?

## *Rights and Regulations*

The New Mexico Legislature has charged the OCC with developing rules to regulate the use of produced water. As we develop the rules to govern this activity, there are two principles to which we will attempt to adhere.

First, the current rules concerning the injection of produced water will remain in effect and operators will continue to have the option to inject. Most of the water produced incident to oil and gas operations will not be economically treatable for many years to come, so there is no reason to do anything except inject it.

Second, disposal of produced water by any means other than injection would not create a “water right,” but a right to dispose of the produced water in the manner described in the permit, for as long as the oil or gas well is economically viable.

Once the water ceases to meet the definition of produced water – water that is an incidental byproduct from drilling for or the production of oil and gas, the OCC permit would no longer be in effect.

These guiding principles are being used to develop proposed rules. Under the rules, an application for the use of produced water would be subject to publication notice to allow for a period of protest. Upon the receipt of a protest, the matter would be heard before the commission. If no protest is received, the application may be administratively approved.

### **Handling Protests**

If there is a protest, the protestant (normally the prior appropriator) must meet a two-pronged test or threshold, first proving his prior rights and second showing that the water to satisfy that right is in hydrologic communication with the water the applicant intends to use. The prior appropriator will have no claim to new water: water that would not be available except for the fact that it is produced incident to oil and gas operations and that does not deplete the protestant's water right.

The state engineer would have the right to notice of hearing and to support or oppose any such claim in the hearing before the commission. The extent and

validity of a previously adjudicated water right would be binding.

If there is no adjudicated water right, only a naked claim, the extent and validity of that non-adjudicated right would be subject to examination by the OCC, which would ask the state engineer to determine the extent and validity of the right.

Such determination, if the state engineer chooses to give one, would establish a rebuttable presumption that the validity and extent of the water right is as determined by the state engineer. OCC will accept evidence to the contrary, but the protestant bears the burden of proving that the state engineer is not correct.

While the OCC will defer to the state engineer and the courts concerning the extent and validity of the water right, OCC will determine whether the produced water is in hydrologic communication with the water to which a protestant claims pre-existing rights, according to evidence presented at the hearing.

Failure to meet the two-part threshold would result in dismissal of the protest. The OCC will then direct the Oil Conservation Division Director to issue the permit. If the threshold showing is met, the OCC will attempt to balance the need to dispose of produced water with the need to minimize the depletion of the prior appropriator's right. The commission will be able to deny the application, approve the application with conditions, or offer the protestant the opportunity to take control and possession of that portion of the water to which they have a claim. The prior appropriator would then have to take control of the water at the gas-water separator in a timely manner and be responsible for their share of any treatment and transportation costs.

It is hoped that these proposed rules will prevent the waste of usable or potentially usable water, protect the rights of prior appropriators, and offer petroleum producers an incentive to develop economically viable uses for produced water.

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