



Water Rights and Water Quality



OVERVIEW

Modrall Sperling's environmental and water lawyers partner with developers, natural resources companies, including those in oil, gas, and mining, ranching and agriculture, and manufacturers, as well as wind and solar developers. Because use and management of water rights often implicates concerns regarding water quality, our water lawyers are adept with regard to the interplay of water resource protection as well as water quality implications and concerns. Modrall Sperling has the broad experience necessary to acquire and protect water rights and to assist with the full range of water rights and water quality issues, including navigating the complex statutory and regulatory schemes governing permitting, on-going compliance, and litigation where necessary. We have experience with federal water quality statutes and regulations, as well as environmental regulations and ordinances promulgated by Native American tribes, states, and local bodies.

Our water rights and water quality practice also involves the representation of developers, banks, and lenders, among other kinds of clients, in evaluating and contractually protecting against risks of environmental liabilities arising from commercial and private real estate transactions. In this representation, we coordinate with environmental consultants on Phase I, II and III environmental evaluations and Transaction Screens as may be prudent or required, and drafting indemnification provisions and other similar risk allocation devices, as well as handling insurance coverage issues.

Industry Leadership

Our lawyers' opinions are widely sought, as they have written articles and presented papers on topics including the Environmental Protection Agency's assessment of the potential for hydraulic fracturing to impact drinking water sources and the U.S. Army Corps of Engineers' Clean Water Act (CWA) jurisdictional determinations. These lawyers also play key roles in various national and local industry groups, including the Foundation for Natural Resources and Energy Law (f/k/a Rocky Mountain Mineral Law Foundation), New Mexico Mining Association and the State Bar of New Mexico's Section of Natural Resources, Energy and Environmental Law.

Water Rights

To address water allocation, use, acquisition, and protection of water resources, we bring the appropriate experience to bear regarding:

- Acquisition and protection of water supplies for municipalities, regulated water suppliers, energy and resource development projects, and real estate development
- Negotiation of contracts for the purchase and sale of water rights and complex water agreements
- Securing and protecting of water rights in federal and state court adjudications



- Negotiation of and counsel relating to contracts and water supply issues within U.S. Bureau of Reclamation (BOR) and U.S. Army Corps of Engineers (ACOE) projects
- Development of long term water strategies and conservation programs for municipalities, political subdivisions, business and industry
- Counsel regarding all aspects of issues relating to the determination of federal reserved water rights including claims of Native American tribes
- Assistance in drafting federal and state legislation
- Management of regulatory compliance and litigation under the Endangered Species Act (ESA), the Clean Water Act and National Environmental Policy Act (NEPA)

Native American Water Rights

Native American water rights are a significant component of our water resources practice. We have represented tribes, non-Indian water users and states in adjudications and settlements involving substantial Indian water rights claims. In the San Juan stream adjudication in New Mexico, we represent Arizona Public Service Company and Public Service Company of New Mexico and prior to that, BHP Navajo Coal Company with regard to the claims of the Navajo Nation, working with the State of New Mexico and the Navajo Nation to ensure that settlement of the Nation's claims and necessary Congressional approval recognized existing state water rights, afforded sufficient protections for those rights and allowed for appropriate state administration. We currently represent the State of Oklahoma in litigation and ongoing settlement negotiations regarding the water rights of two tribes, the Chickasaw Nation and the Choctaw Nation of Oklahoma. We represent the Pueblo of Pojoaque in the long-running *Aamodt* adjudication of water rights in northern New Mexico.

Energy and Resource Development

Our water rights attorneys assist local, national, and multinational businesses in acquiring and protecting the water rights needed for their industries. We have worked on transactional components, administrative approvals, and litigation in connection with acquisitions of water supply for oil and gas operations and processing, coal, garnet, copper, and other mines, and coal- and gas-fired generating stations. We represent numerous renewable solar and wind projects in New Mexico on water and siting issues including negotiation of water supply agreements for the first utility scale solar project in New Mexico.

Interstate Issues

Modrall Sperling's water practice includes representing clients on interstate rivers. Our lawyers address interstate water compact issues, interstate allocation issues, and jurisdictional issues. Currently, our representation of El Paso County Water Improvement District No. 1 as the downstream beneficiary in the Rio Grande Project, a federal interstate reclamation project, includes lawsuits in state and federal courts and the United States Supreme Court relating to the Rio Grande Project and the Rio Grande Compact. On behalf of the City of Carlsbad, we have negotiated an agreement between the City and New Mexico Interstate Stream Commission regarding storage of interstate waters under the Pecos River Compact.

Water Supply

Our water lawyers have the expertise to assist with ensuring an adequate water supply exists for governmental and business purposes. We have analyzed water resource and environmental issues related to the feasibility and construction of inter-basin water supply pipelines. Working with municipalities and utilities with existing or developing infrastructure, our lawyers assist in obtaining adequate water supply. We have worked on transactional components and administrative approvals in connection with the acquisition of water supply for the Abo Canyon double track rail construction project on behalf of a railroad.

Representative Matters (Water Rights)

Municipal and Public Water Supply



- Represented the City of Albuquerque (and successor in interest Albuquerque Bernalillo County Water Utility Authority) with regard to NEPA compliance relating to implementation of the City's San Juan-Chama Drinking Water Project (DWP) for use of transbasin water from federal reclamation project; representation of City and ABCWUA regarding Endangered Species Act (ESA) claims regarding the City's DWP (*Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2010); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 599 F.3d 1165 (10th Cir. 2010); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010)); negotiation of settlement agreement in ESA litigation and assistance in drafting of federal legislation relating to ESA issues and the City's DWP; continued representation of ABCWUA on ESA compliance issues
- Represented the City of Carlsbad with regard to all aspects of water rights for City's municipal supply. Representation has included negotiation of agreement with the New Mexico Interstate Stream Commission for the sale of \$6 million of water rights; successful litigation of objections to City's inter-basin transfer of water; drafting and implementation of conservation and wellhead protection ordinances; drafting and implementation of long-term water strategy
- Negotiated and implemented the City of Rio Rancho's access to an additional 12,000 acre-feet per annum of groundwater in a fully appropriated basin and assistance in continued acquisition of additional supplies; work with City on formulation and implementation of aquifer storage and recovery projects, conservation ordinances, and long-term water planning strategies
- Served as water and utility counsel to a regulated utility with five operating districts as to all water supply and utility issues

Mining and Energy Development

- Worked on a public utility's transactional components and administrative approvals in connection with acquisition of water supply for 210 MW gas fired generating plant
- Worked on transactional components and administrative litigation in connection with an energy utility's acquisition of water supply for 190 MW gas fired generating plant
- Represented an energy company with regard to all of its water supply matters in the San Juan River Basin and issues relating to the supply of that water to coal mines and two coal-fired generating stations.
- Represented natural resources company in connection with surface water and stormwater control issues at its coal operations arising under the CWA and the SMCRA

Adjudications

- *New Mexico, ex rel. State Eng'r v. Aamodt*, CIV 66-06639-MV, United States District Court for the District Court of New Mexico. Represented the Pueblo of Pojoaque in a federal court stream adjudication to determine all the water rights in the Nambe-Tesuque-Pojoaque Basin as among several thousand non-Indian water users, four Native American Tribes, the County of Santa Fe, the State of New Mexico, and the United States. A six-year negotiation culminated in a settlement agreement with Congressional approval as part of the Claims Resolution Act of 2010. Our continued representation of the Pueblo on settlement implementation efforts include construction of a regional water system which will provide out of basin water to Indian and non-Indian water users.
- *New Mexico, ex rel. State Engineer and Pecos Valley Artesian Conservancy District v. L.T. Lewis, et al., v. Hagerman Canal Co.*, 20294 and 22600 (Consolidated), Fifth Judicial District Court, State of New Mexico. Represented the City of Carlsbad in state court adjudication to determine all the rights in the Pecos River Basin. Issues in the adjudication have included resolution of claims within a federal reclamation project.
- *New Mexico, ex rel. State Engineer v. Elephant Butte Irrigation District*, No. CV-96-888, Third Judicial District Court, State of



New Mexico. Represented the El Paso Improvement District No. 1 (EPCWID), a political subdivision of the State of Texas, in state court adjudication in the Lower Rio Grande to adjudicate the water rights in the Lower Rio Grande, New Mexico including the rights of the United States in the Rio Grande Project. EPCWID is one of two irrigation districts which are beneficiaries to the Rio Grande Project, an interstate federal reclamation project providing several hundred thousand acre-feet per year of irrigation and municipal water in New Mexico and Texas.

- *New Mexico, ex rel. State Engineer v. Kerr McGee Corp.*, Nos. CB-83-190-CV and CB-83-220-CV (Consolidated), Thirteenth Judicial District Court, State of New Mexico. Represented resource developers in adjudication involving irrigation districts, three Native American tribes, municipalities and hundreds of domestic well owners. Issues include legal issues relating to quantification of Native American claims and challenges to quantification of individual domestic rights.
- *New Mexico ex rel. State Engineer v. John Abbott, et al.*, 68cv07488 and 70cv08650 (Consolidated), United States District Court for the District of New Mexico. Represented the Pueblo of Pojoaque in federal court adjudication involving determination of water rights in the Rio Truchas/Rio Santa Cruz basins, tributaries to the Rio Grande. Adjudication includes necessary resolution of a multitude of Native American claims, municipal claims and irrigation claims.

Water Quality

Protection of water quality, wise use and the ability to treat, recycle and reuse water resources are paramount concerns for businesses and regulators in the arid Southwest. As water resources and water quality issues become more complicated, a growing range of stakeholders throughout the West are turning to Modrall Sperling's experience.

Modrall Sperling has experience with federal, state, and tribal water quality requirements, including:

Federal

- Provide counsel regarding the Clean Water Act (CWA), including Section 402 National Pollution Detection and Elimination System (NPDES) permitting, Section 404 Dredge and Fill permitting, storm water permits, citizen suits, compliance and enforcement, wetlands, and jurisdictional waters of the U.S.
- Provide counsel regarding permitting, compliance with Maximum Contaminant Limits and other standards, and handling underground injection control program matters pursuant to the Safe Drinking Water Act (SDWA)

State

- Represent clients during ground water discharge plan permitting, application of water quality standards, abatement plan processes, closure issues, rulemakings, interpretations of jurisdiction, and proceedings before the Water Quality Control Commission (WQCC) and the New Mexico Environment Department (NMED), as well as litigation and appeals pursuant to the Water Quality Act (WQA)
- Represent clients during Triennial Review processes
- Disposition of produced water pursuant to New Mexico Oil Conservation Division (NMOCD) rules
- Represent clients at disposal facility permitting and enforcement proceedings pursuant to the Solid and Hazardous Waste Acts (SHWA) in New Mexico
- Provide counsel regarding Surface Water Bureau programs at the NMED, including federally delegated programs under the CWA

Municipalities and Indian Country



- City and county ordinance and land use regimes statewide
- Tribal and Pueblo environmental regimes within Indian country in New Mexico and elsewhere
- Tribes that have sought or obtained Treatment as State Status under the CWA

Representative Matters (Water Quality)

- Assisted a pipeline client with ACOE and BLM approvals for pipelines crossing BLM-administered lands and an ACOE reservoir
- Assisted a coal mine in obtaining needed ACOE and Environmental Protection Agency (EPA) permits, which included, among other things, reviewing and providing comments on a draft environmental impact statement analyzing the environmental impacts of multiple agency actions, including approvals by the ACOE and the EPA
- Representing a national laboratory in appealing an adverse permitting decision arising under the Resource Conservation and Recovery Act (RCRA). At the initial appeal level the permitting decision was reversed, and the matter is ongoing.
- Represented energy company and its two New Mexico coal mines in two cycles of “Triennial Review” proceedings under the federal CWA before the WQCC, seeking to avoid the application of human contact standards and aquatic life criteria (the so-called “fishable swimmable” surface water quality standards that generally apply under the CWA) to man-made water impoundments at the mines during operations and following reclamation and closure
- Representing a mining company in more than a decade’s worth of New Mexico Water Quality Act (NMWQA) groundwater discharge permitting and closure proceedings before the Environment Department, adjudicative administrative appeals before the Water Quality Control Commission, and judicial reviews of adjudications and related rulemaking proceedings by the New Mexico Court of Appeals and Supreme Court, all related in one way or another to the central question of whether and how key language of the NMWQA should be interpreted in requiring that groundwater standards be met at “places of withdrawal of water for present or reasonably foreseeable use”
- Represented a railroad in multi-party, pre-litigation negotiations, administrative proceedings under New Mexico’s voluntary remediation program (known as Brownfield sites at the federal level), settlement and transactional instruments to allow the sale and use of a significant downtown Albuquerque property that had fueling station-originated diesel contamination in groundwater, but that the City and University of New Mexico wanted to purchase in order to make it the hub of the Innovate ABQ program seeking high-tech business development downtown
- Representing a country club and resort in negotiations with the NMED Ground Water Quality Bureau, and an administrative appeal to the WQCC, relating to the club’s secondary uses of treated wastewater diluted with river water as sources for golf course ponds and course irrigation water
- Representing a mining company in connection with water quality standards and related issues involving water that is currently in an open pit created by a predecessor mining company, and to be in the pit at the conclusion of mining, at a time when the designated post-mine land use will include wildlife uses
- Representing a mine owner in connection with water quality issues associated with the NMED permitting to permit a pilot groundwater treatment process and renew a discharge pit for the mine, and with the Mining and Minerals Division to allow the mine to come off of standby status and return to active status
- Representing a mining company on NMWQA ground water discharge permitting strategies in connection with the permitting of an industrial mining operation and associated processing facility, tailings facility and dust suppression activities
- Represented a mining exploration company in connection with a drilling project that would intersect groundwater. Local residents and Non-Governmental Organization (NGO) groups feared the drilling would jeopardize groundwater, a nearby stream, and an endangered snail species.



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