

Letter/Attachment for GTCC EIS Scoping Comment #18

5. LEGAL ISSUES

5.1 INTRODUCTION

Lea County is committed to thoroughly studying its water supply and the demand for water in Lea County so that it can manage this precious resource to meet the current and future demand for water in Lea County. Legal issues can potentially have a significant impact on a county's supply of and demand for water. This section thus discusses the federal, state and local legal issues that may impact the supply of and demand for water in Lea County. This discussion is important in assessing Lea County's future need for water and its ability to meet such need.

As the following discussion indicates, there are no federal legal issues that directly constrain water supply in Lea County or Lea County's ability to adequately plan for future demand of water in Lea County. However, the Pecos River Compact and the United States Supreme Court's ruling in *Texas v. New Mexico*, 462 U.S. 554 (1983), while not placing a direct burden on Lea County's water supply, may indirectly affect Lea County's water supply by creating pressure for water users outside of Lea County to obtain water from Lea County as an alternate source of water. State legal issues similarly do not appear to directly affect the supply of or demand for water in Lea County. One state legal issue of concern to Lea County, however, is the potential effect that the New Mexico State Supreme Court ruling in *Mathers v. Texaco, Inc.*, 77 N.M. 239, 421 P.2d 771 (1966) will have in causing water levels in Lea County's underground water basins to continue to decline. As discussed in more detail below, Lea County is attempting to resolve this concern by appropriating the remaining water rights in the Lea County Underground water basin so it can conserve these rights and have flexibility to better plan for development and expanded use of water in Lea County.

5.2 FEDERAL LEGAL ISSUES IMPACTING THE SUPPLY OF AND DEMAND FOR WATER IN LEA COUNTY

No federal reservations, federal environmental law issues, treaties, or federal water projects are known to exist within Lea County. In addition, no known, direct compact obligations currently exist within Lea County. As discussed in Section 5.2.1, federal water quality standards, however, do apply to all municipalities within Lea County. As also discussed by Section 5.2.1, federal water quality standards do not impact the supply of or demand for water in Lea County. As discussed in Section 5.2.2 and 5.2.2.1, however, the supply of and demand for water in Lea County may be indirectly impacted by the Pecos River Compact and the United States Supreme Court's decision in *Texas v. New Mexico*, 462 U.S. 554 (1983).

5.2.1 Impact of Federal Water Quality Standards on the Supply of and Demand for Water in Lea County

All municipalities within Lea County must comply with current water quality standards for drinking water established by Federal law. The current guidelines for assessing the suitability of a surface water or ground-water for use as a public water supply are the regulations mandated by the U.S. Environmental Protection Agency (EPA). The regulations are delineated in Title 40, Parts 141 and 143 of the Safe Drinking Water Act. The primary regulations include maximum permissible levels for inorganic and organic chemicals, turbidity, coliform bacteria, and radiological constituents. In accordance with the Safe Drinking Water Act, the EPA promulgates a regulatory scheme for maintaining the quality of the public drinking water. The New Mexico Environment Department (NMED) has primacy to adopt and implement the EPA standards in regulating community water facilities. Federal drinking water standards, as enforced by the NMED, and the results of the most recent laboratory results of the major public water supply systems in Lea County are summarized in Tables 11 and 12 in Section 6.2. As these Tables indicate, the water quality in the major public water supply systems meets the standards promulgated by the EPA. As a result, these standards do not negatively affect the supply of or demand for water in Lea County.

5.2.2 The Pecos River Compact and *Texas v. New Mexico* (1983)

The 1949 Pecos River Compact between New Mexico and Texas divides the water of the Pecos River between the two states. Due to the river's irregular flow, the Compact does not specify a particular quantity of water to be delivered to Texas by New Mexico annually. Instead, in Article III(a), the key provision of the Compact provides that "...New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition."

In 1974, Texas filed an original action in the United States Supreme Court to resolve a dispute between the two states as to the meaning of "1947 condition." A Special Master was appointed and, in 1979, filed a report defining "the 1947 condition" and proposed a method of determining Texas entitlement to water. The Supreme Court adopted the Special Master's report in its entirety.

The successor to the original Special Master held hearings to determine whether, based on the method adopted by the Supreme Court, New Mexico had fulfilled its Compact obligations. The Special Master issued a report concluding that for the years 1950-1983, New Mexico had fallen short in its delivery requirements by 340,100 acre-feet. The Master recommended that New Mexico be required to not only perform its ongoing Compact obligations, but also be required to make up the delivery shortfall by delivering 34,010 acre-feet of water each year for ten years, with a "water interest" penalty for any bad faith failure to deliver the make-up quantities. In *Texas v. New Mexico*, 462 U.S. 554 (1983), the Court accepted the Special Master's conclusion regarding the shortfall quantity, but returned the matter to the Master for further proceedings and recommendations regarding whether New Mexico should be allowed to elect a monetary rather than an in-kind remedy. The Court issued a decree which enjoined New Mexico "to comply with its Article III(a) obligations under the Pecos River Compact and to determine the extent of its obligation in accordance with the formula approved by the decisions of this Court."

The Supreme Court's holding in *Texas v. New Mexico* requires New Mexico to make as much water as possible available for delivery to Texas in order to meet the Compact obligations. New Mexico is now forced to acquire, by purchase or lease, water rights in the Pecos River system to meet its delivery requirements to Texas. Through the Interstate Stream Commission (ISC), the State is currently purchasing water rights in the Pecos River system and placing those rights in the Pecos River Conservation Project. However, if there are insufficient irrigation rights available to reach compliance, the State will be forced to retire junior water rights upstream or strictly enforce forfeiture statutes across the board. Strict enforcement of forfeiture statutes would affect every water user in the Pecos River system.

5.2.2.1 Impact of the Pecos River Compact and *Texas v. New Mexico* (1983) on the Supply of and Demand for Water in Lea County

Available information indicates that water in the Capitan Underground Water Basin is in hydraulic communication with the Pecos River. Withdrawals from the Capitan UWB could cause reduction in the flow of the Pecos River and the supply available to wells in the Pecos Valley. Consequently, New Mexico's obligations under the Pecos River Compact could affect existing water rights, as well as the availability of ground-water for future appropriations, within the Capitan UWB. Portions of the Carlsbad UWB are also thought to be hydrologically connected to the Pecos River. However, the portion of the Carlsbad UWB within Lea County has no known hydrological connection to the river, and appropriations within that area should not be affected by New Mexico's Compact obligations.

An additional concern is that the reduction in the availability of water in the Pecos River system will cause municipalities and industry in that region to attempt to appropriate greater amounts of water from Lea County. As discussed in Section 5.4.3, litigation has already arisen out of attempts by water users to appropriate large quantities of ground-water from the Lea County UWB for use outside the basin.

5.3 STATE LEGAL ISSUES IMPACTING THE SUPPLY AND DEMAND FOR WATER IN LEA COUNTY

5.3.1 Surface Water

Surface waters within the State of New Mexico are public and subject to appropriation for beneficial use. Beneficial use provides the basis, measure and the limit for all water rights. Surface water use in all of New Mexico is governed by the provisions of NMSA 1978, 72-5-1 through 72-5-39 (1997).

Surface water within Lea County is limited to ephemeral streams, lakes, and small playa lakes that result from rainfall during the summer months. Some surface water runoff is impounded for livestock purposes. None of these ephemeral waters fall within the jurisdiction of the New Mexico Office of the State Engineer (NMOSE) because they are not viewed as surface waters subject to appropriation for beneficial use. Since surface water in Lea County is not subject to appropriation and is predominantly lost to evapotranspiration, such water currently does not impact Lea County's present or future availability of water. Lea County may, however, study alternative methods of using ephemeral waters to recharge its aquifer. See Aquifer Recharge, Section 8.1.2.4. If a suitable method is found to recharge Lea County's aquifer using ephemeral waters, the fact that such waters are not subject to appropriation by the general public will enable Lea County to use ephemeral waters to supplement its water supply.

Additionally, surface water outside of Lea County is not diverted for beneficial use within the County. Therefore, surface water within or outside of Lea County does not currently impact Lea County's availability or supply of water.

5.3.2 Ground-Water

5.3.2.1 State Statutes Affecting Ground-water in Lea County

New Mexico statutes provide that the water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable bodies are public waters of the State, and are subject to appropriation for beneficial use. Appropriation of ground-water from basins declared by the NMOSE is governed by the provisions of NMSA 1978, 72-12-1 through 72-12-28 (1997). As discussed in Section 5.3.2.2, the primary ground-water sources in the Plan area governed by these statutory provisions include, from north to south, the Lea County UWB, the Capitan

UWB, the Carlsbad UWB, and the Jal UWB. In addition, a small portion of the Roswell UWB lies within west-central and northwest Lea County.

In addition, New Mexico regulates ground-water quality pursuant to its own Water Quality Act in 20 NMAC 6.2. Under this Act, NMED and the Oil Conservation Division (OCD) implement ground-water protection standards and regulate discharge by all activities that could impact the supply of protectable ground-water. New Mexico ground-water quality standards, for the most part, mirror the federal standards for drinking water. A key contaminant of concern in New Mexico and Lea County is nitrogen, particularly in the form of nitrate, which can originate from many sources. NMED in administering its ground-water protection program is, to a large extent, concerned with limiting the amount of nitrogen that enters underground-water supplies. These standards have a positive impact on Lea County's supply of water in that these standards help protect the quality of Lea County's water.

5.3.2.2 State Regulatory Policies Affecting Ground-water in Lea County

The NMOSE has jurisdiction over appropriation of ground-water within declared basins for beneficial use. Permits may be issued, provided that application is made to the NMOSE and is subjected to notice and the opportunity for protest. The permit will be granted if the NMOSE determines that there is available water, the granting of the application will not impair other water rights, and will not be contrary to the conservation of water within the state or detrimental to the public welfare of the state. In addition, NMSA 72-12-1 allows parties to obtain a permit without notice if they are seeking to appropriate up to three-acre-feet of ground-water from a declared basin for domestic use, livestock, watering, or up to one acre of non-commercial irrigation, or to seek to use the water right for prospecting, mining, or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state. The NMOSE will grant the permit as long as the proposed use will not permanently impair the existing water rights of others. All permits may be subject to conditions. For instance, consumptive use figures for ground-water, which vary depending upon the source of supply and purpose of use, may be calculated and imposed upon permits.

5.3.2.2.1 Declared Ground-water Basin Criteria - Lea County Underground-water Basin

The Lea County UWB (see FIGURE 4) was declared by the NMOSE in 1931 and closed to further appropriation in 1948. The basin was extended in 1952, and Orders reopening parts of the basin to further development were issued in 1952 and again in 1953. In 1953, the NMOSE developed specific administrative criteria for managing ground-water appropriations within the Lea County UWB.

Because the Lea County UWB is a "mined basin,"¹ it is administered to allow ground-water use at rates which will not deplete its reserves in less than a predetermined forty-year planning period. The current administrative criteria estimate the annual ground-water recharge within the basin to be approximately 29,000 acre-feet, although estimates by others² indicate a recharge in the range of 29,000 to 58,000 acre-feet may occur. The current administrative criteria permit the annual basin-wide withdrawal of approximately 440,000 acre-feet.

The NMOSE has divided the Lea County UWB into individual management units known as "townships," or "blocks." Block administration, when used in conjunction with a time dimension, attempts to insure a uniform life for most of the water rights, and permit the orderly development and greatest use of the ground-water resource by distributing the points of diversion throughout the basin. Unfortunately, the majority of diversions occur on the eastern portion of the basin because the lack of good soil cover on the western portion of the basin generally prohibits agriculture. There are 71 administrative blocks in the Lea County UWB.

The NMOSE applies the "move-to area" test to all applications to change the location of a well, the place the water from a well is used, or the way the water is used. Under this test, if moving the well, or changing the place or method of use, will impair existing rights in the move-to area, the application will likely be denied. In the Lea County UWB, water rights transfers between blocks will not be permitted where the move-to block is fully appropriated, or does not have enough water available. Several blocks within the Lea County UWB are closed to new appropriations.

5.3.2.2.2 Declared Ground-water Basin Criteria - Capitan Underground-Water Basin

The Capitan UWB (see FIGURE 4) was declared by the NMOSE in 1965. The basin includes the portion of the Capitan reef and near associated backreef formations not included in the previously declared underground-water basins. Water is currently available for appropriation from several aquifers within the Capitan UWB, provided that there would be no impairment or detriment to existing water rights. In the Capitan UWB, consideration of an

¹ A "mined-basin" is a ground water basin in which well withdrawals exceed recharge.

² Theis, 1934 and McAda, 1984

application to appropriate water is based on nine administrative blocks arranged in a square with three blocks to a side. Each block is a square unit of four sections. The center block of the nine administrative blocks is the block in which the proposed appropriation is to be made. The primary criterion for approval of a new appropriation, aside from impairment, is that each of the nine administrative blocks considered have an existing useful life extending through 2006.

5.3.2.2.3 Declared Ground-water Basin Criteria - Jal Underground-Water Basin

The Jal UWB, in southeastern Lea County, was declared by the NMOSE in 1961. Consideration of applications to appropriate water in the Jal Basin is based on basin quadrants. Water is available for appropriation in those administrative quadrants in which vested and permitted water rights have not reached the administrative limit, provided that there would be no impairment or detriment to existing water rights.

5.3.2.2.4 Declared Ground-water Basin Criteria - Carlsbad Underground-Water Basin

The NMOSE began declaring portions of this UWB in 1947. According to the NMOSE, there are only 12 wells located in that portion of the Carlsbad UWB located within Lea County. These wells are used in oil recovery, and together account for approximately 50 to 100 acre-feet of annual ground-water withdrawal. The NMOSE is developing a new ground-water model for management of the Carlsbad Basin. Currently, the entire Carlsbad UWB is closed to new appropriations.

5.3.2.2.4 Declared Ground-water Basin Criteria - Roswell Underground-water Basin

The NMOSE has no recorded declarations within the portion of the Roswell UWB which lies within Lea County. In addition, the entire UWB is closed to new appropriations.

5.3.2.3 State Case Law Affecting Ground-water in Lea County - *Mathers v. Texaco, Inc.* - 1966

Mathers v. Texaco, Inc., 77 N.M. 239, 421 P.2d 771 (1966), involved a challenge by several water users to Texaco's application to appropriate ground-water from the Lea County UWB. The New Mexico Supreme Court held in *Mathers* that the lowering of the water table in any particular amount in a non-rechargeable basin effected by a new appropriation of ground-water does not necessarily constitute impairment of senior water rights. The Court reasoned that the beneficial use by the public of ground-water in a closed or non-rechargeable basin requires giving such use a time limitation. Thus, the rights of the protestants to appropriate water from within the Lea County UWB were subject to this time limitation. The Court held that the lowering of the water level of the protestants' wells, together with increased pumping costs and reduced pumping yields, did not constitute an impairment of the protestants' rights as a matter of law, because these are the inevitable results of the beneficial use by the public of ground-water in a non-rechargeable basin.

5.3.2.4 Impact of State Statutes, Regulatory Policies, and Case Law on the Supply and Demand on Ground-water in Declared Underground Water Basins in Lea County

All of the basins in Lea County are "mined" basins. In addition, the Lea County, Capitan, and Jal UWBs are still open to new appropriations. State statutes and regulatory policies, as discussed in Sections 5.1.2.1 and 5.1.2.2, direct that appropriations in these basins are approved as long as the requested appropriation does not impair existing water rights. *Mathers v. Texaco, Inc.*, however, holds that lowered water levels in wells, increased pumping costs, and reduced pumping yields do not constitute impairment of existing water right holders sufficient to deny an application

for a new appropriation of water from a declared underground water basin. Thus, New Mexico State law, along with the New Mexico Supreme Court's decision in *Mathers v. Texaco*, and the fact that water is not recharged into these basins as quickly as it is consumed, means that Lea County's ground-water supply will likely continue to decline over the next forty years.

Lea County, however, is investigating ways to counteract this projected decline. For example, the Lea County Water Users Association has filed an application with the NMOSE to appropriate any remaining water rights within the Lea County UWB. By filing this application, Lea County is proactively seeking to take control of its ground-water supply so that it can conserve its water supply and have flexibility to efficiently and conscientiously plan for and manage present and future demand for its water supply. In addition, Lea County is investigating methods it can employ to treat poor quality water from the Capitan, Jal, and Carlsbad UWBs and reinject such treated water into the Lea County UWB, and thereby increase the water supply in this basin. Lea County has also requested that the NMOSE close the LEA UWB to new appropriations.

5.3.2.5 Pending Adjudications Affecting Ground-water in Lea County

Approximately 550 square miles in the northern portion of Lea County (see **FIGURE 4**) has not been declared by the NMOSE. Appropriation of ground-water in this region is governed solely by the common law doctrine of prior appropriation. No pending adjudications within the Plan area are known at this time. Thus the ground-water in this region may likely be relied upon as a future source of water for Lea County water users.

5.3.3 Legal Issues Needing Resolution

Aside from Lea County Water Users Association's application with the NMOSE to appropriate any remaining blocks within the Lea County UWB, there are currently no legal issues pertaining to Lea County's water supply needing resolution.

5.4 LOCAL CONFLICTS

5.4.1 Oil Production Ground-Water Contamination

Oil production in the plan area involves the use of substantial quantities of brine. Studies have implied there have been cases of ground-water contamination of wells in Lea County caused by brine intrusion and oil seepage. Alleged well contamination was also the basis of at least one lawsuit filed in district court in Lea County by a well owner against several oil producers. In addition, there are various known areas of contamination of fresh water by brine water and petroleum products. It has not been proven that well contamination by oil production activities has occurred, however, and, to our knowledge, no judgments against oil producers have been found.

5.4.2 Ground-Water Drawdown

The NMOSE predicts significant ground-water depletion in and around municipalities in Lea County over the next 40 years. This drawdown may render existing municipal well fields incapable of providing a sufficient supply of potable water. To the extent that these municipalities seek new appropriations of ground-water, there exists the potential for challenges to the appropriations by other water users. Ground-water depletion throughout the plan area may also lead to legal conflict between appropriators pumping fresh water for secondary recovery of oil or for irrigation water users.

5.4.3 Out of County Use

Current and future use and demand for water outside of Lea County not only intensifies the pressure of outside water users to obtain water from Lea County, but it also impacts Lea County's water supply.

An example of outside pressure to obtain water from Lea County occurred in 1997 when the ISC attempted to purchase and retire water rights in the Pecos River system owned by IMC Kallium, a potash mining company. The LCWUA filed a lawsuit against ISC that specifically challenged the Commission's plan to pump water from the Lea County UWB for use in subsidizing the available water in the Pecos River system. The commission ultimately abandoned its plan to retire IMC Kallium water rights.

In 1998, IMC Kallium filed applications with NMOSE seeking licenses to pump an additional 6,000 acre-feet of ground-water per year from the Lea County UWB for use outside of the basin at its potash mining operation in Eddy County, New Mexico. IMC Kallium's applications were protested. IMC Kallium and the LCWUA ultimately entered into a global settlement involving not only these applications, but also IMC Kallium's annual water use appropriations from the Lea County UWB. Under the terms of the settlement, although IMC Kallium has licenses for Lea County UWB water totaling 6,529 acre-feet per annum, it agreed to reduce its usage of water from the Lea County UWB to a maximum of 2,000 acre-feet per year subject to the contingency of an occurrence of legal stoppage or curtailment of water usage by IMC Kallium from its La Huerta Capitan water rights. If such stoppage or curtailment occurs, the annual 2,000 acre-feet maximum from the Lea County UWB may be exceeded by IMC Kallium using its licensed rights only by an amount equal to the loss of water resulting from such stoppage or curtailment of water usage from its La Huerta Capitan water rights and, then, only for the period of time the stoppage or curtailment continues. IMC Kallium withdrew its applications for the additional 6,000 acre-feet and LCWUA has made application for these water rights with NMOSE.

The demand for water along the Texas-New Mexico border has increased significantly and is expected to continue to increase. One reason for the increase in water is that range land in this area is being converted into irrigated land. The water used to irrigate these lands is mined water from the Ogallala Water Basin. Mining water from the Ogallala Water Basin will likely impact Lea County's water supply. Currently there is no legal mechanism to protect underground water basins in New Mexico from mining.

5.4.4 Special Districts

The Soil and Water Conservation District exists within Lea County. Their concerns have been included in the development of this plan.