

Active Water Resource Management

For decades, most of the waters of the State of New Mexico have been the subject of water rights adjudications to establish all the water rights. Stream systems and sub-basins geographically define the adjudications. There are twelve active cases. However, complete adjudication of all New Mexico water rights is still many years away. Meanwhile, water use in the state has evolved. New water users increasingly look to acquire existing water rights rather than developing new rights. Decisions on administration, distribution, and redistribution of water have to be made.

New Mexico experienced a particularly dry year in 2002 and another in 2013. In 2002, every county in the state was declared a drought disaster area by the USDA; irrigators received a fraction of their normal water allotments and municipal water systems struggled to maintain their supplies.

Throughout that year, the interim Water and Natural Resources Committee heard testimony from stakeholders, ranging from the Water Trust Board and the State Engineer to 1000 Friends of New Mexico and Defenders of Wildlife, that the lack of a final adjudication of water rights was hindering the negotiation and implementation of solutions to water shortage problems. The water administration problems were wide-ranging, including delivering Pecos River water to Texas in compliance with the Pecos River Compact; structuring an agreement with the Navajo Nation; and, on the Rio Grande, delivering to irrigators and maintaining habitat for the silvery minnow in compliance with the Endangered Species Act.

It was widely held, though not unanimously, that the State Engineer needed greater authority to administer water rights until the courts' adjudication of rights was complete. In 2013, most of the state experienced extreme drought. A call for priority administration was made on the Pecos River, surface and groundwater water shortages were felt throughout the state, Texas sued New Mexico in the United States Supreme Court over Rio Grande Compact deliveries, and the New Mexico Legislature's Interim Water and Natural Resources Committee activated a Drought Sub-committee.

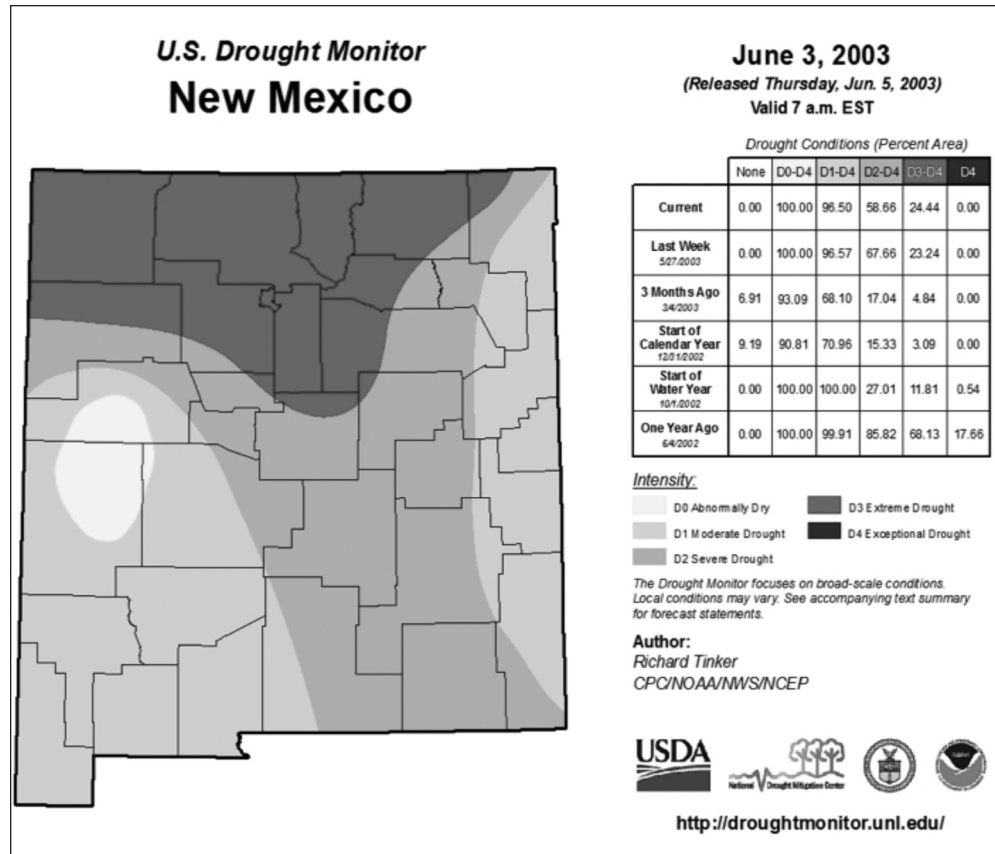
“ [I]f the State Engineer does not have some kind of ability to regulate water rights in the absence of a full adjudication...you might as well pack your bags...and have chaos in the state in terms of how you administer water rights.”

N.M. State Engineer
Eluid Martinez (1991–1994)

Stream systems and sub-basins
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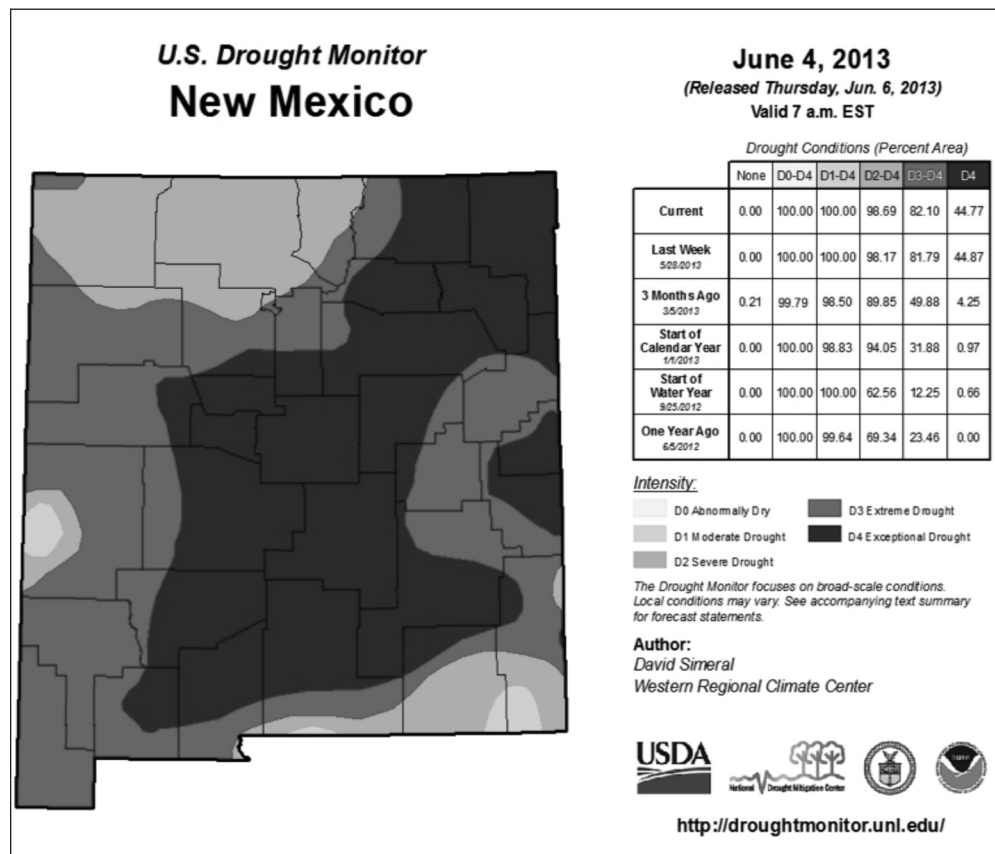
June 3, 2003
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 Monitor, New Mexico

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June 4, 2014
 U.S.D.A. Drought
 Monitor, New Mexico

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Priority Administration Legislation

In the 2003 legislative session, two committee members, Representative Joe Stell and Senator Sue Wilson Beffort, introduced identical bills directing the State Engineer to issue rules for priority administration and rules for expedited water marketing and leasing. The bills stated that priority administration should not interfere with adjudications, should not impair water rights any more than necessary for enforcement, and should not increase depletions. The bills stated that rules for expedited marketing and leasing of water should be based on the appropriate hydrological models. Both bills were amended to exempt acequias and community ditches and to require that rules for marketing and leasing water be consistent with current law governing changes of point of diversion, place of use, and purpose of use of water rights. Both bills passed both houses and Senator Beffort’s bill was signed by the governor, becoming § 72-2-9.1 of New Mexico law.

Acting on the new law the State Engineer issued proposed rules, titled Active Water Resource Management (AWRM) in early 2004, and invited comment. A public hearing was held, comments were collected through the State Engineer’s website, and revised proposed rules were issued—followed by another public hearing. In December 2004, the final version of the rules was published and AWRM officially went into effect.

Active Water Resource Management Regulations

The AWRM regulations broaden and formalize the Office of the State Engineer’s (OSE) use of water districts and water masters to manage the state’s waters. A water master is an appointed local administrator with the full authority of the State Engineer within the district. Water masters use measuring and metering and district-specific rules to administer and protect water rights.

The regulations call for establishing districts and subdistricts based on stream system hydrology. The water master district

manager compiles a master list of all water rights in the district and their priorities. The State Engineer conducts a general hydrological analysis of available water and, with extensive input from water right owners, develops district-specific rules for priority administration. Installation of headgates and/or meters may be required for some or all points of diversion. The water master works with water right owners to monitor and enforce compliance with the district’s rules. The water master is also charged with keeping records of and regularly reporting on water use and compliance measures.

“We are committed to taking proactive steps toward the management of all New Mexico rivers. Steps taken this year to develop AWRM into a statewide program will help provide services for active administration that will apply to future drought cycles as well as during wet cycles in our state.”

—N.M. State Engineer,
John D’Antonio Jr. (2003–2011)

During times of shortage when the water supplies available within the district are insufficient for all water rights within the district, the water master distributes the available water through one of four forms of administration identified in the regulations. The four forms of administration are:

- Direct flow administration
- Storage water administration
- Depletion limit administration
- Alternative administration

Under *direct flow administration*, the water master may determine on a daily or other periodic basis (1) the currently available direct flows of surface water, (2) which water rights are in-priority, and (3) which rights are out-of-priority. The water master then delivers water to those rights that are in-priority. Those rights, which are

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out-of-priority, are not served until more water becomes available. The goal of direct flow administration is to administer to protect seniors through strict priority administration.

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Depletion limit administration may be used for conjunctively managed surface and ground water sources. The water master establishes an administration date and uses it to identify a priority cutoff point. Any water right owners whose priority date falls after the administration date must stop diverting and using water until the administration date is revised or cancelled. An administration date may be ordered to (1) remedy supply problems within the district or elsewhere in the stream system or (2) service interstate stream compact obligations. Owners of water rights may object to the administration date and may request a hearing. The goal depletion limit administration is to allow the surface supply used by senior rights to recover from junior groundwater pumping depletions.

Under *alternative administration*, owners of water rights that are out-of-priority may obtain other water by filing a replacement plan with the Office of the State Engineer (OSE). A replacement plan requires an agreement between the junior water right owner facing a cutoff and an owner of a

water right that is senior to the administration date who will not be using that water. The plan allows the junior water rights owner to use the senior water right owner's water temporarily. The State Engineer may approve the replacement plan for a maximum of two years after determining that the temporary change of place and purpose of use is hydrologically viable under the district's rules. A replacement plan must be published and other water right owners may object to it. The agency may require changes to the plan. The plan can be revoked later if water supply conditions make revocation necessary. A replacement plan is not to be a substitute for permanent acquisition of water rights when an owner of a junior water right is likely to be cut off permanently.

Communities may also work together to develop shortage-sharing agreements, which may be implemented under alternative administration. The rules encourage water right owners to collaborate in working out these agreements as an alternative to priority administration. Shortage sharing agreements must be approved by the State Engineer and implemented in place of strict priority enforcement.

When the proposed AWRM framework was published for public review in 2004, a number of objections were raised. These objections were mostly based on the perceptions that (1) the State Engineer was substituting his authority and judgment for that of the courts to conduct water rights adjudications, and (2) the State Engineer's hearing process was inadequate for a water right owner who had been cut off to protest an adverse decision. Another objection was that replacement plans would become transfers of water rights without the procedural protections of transfers under current law. The State Engineer countered that any determinations regarding water rights under AWRM are temporary, for the purpose of administration, and subject to correction by the adjudication process, which continues separate from AWRM administration.

In 2005, Tri-State Generation and Transmission Association and the New Mexico Mining Association filed suit in Socorro County seeking to have the AWRM regulations declared unconstitutional. In November 2012, the New Mexico Supreme Court issued its decision rejecting Tri-State's claims and overturning the decisions of the lower courts. The Supreme Court upheld that the State Engineer's authority to promulgate the AWRM regulations and to use the types of evidence listed in the regulations for determining priority. It held that the legislature delegated to the State Engineer the authority to make these determinations administratively and that this authority does not conflict with the authority that the legislature separately delegated to the courts to adjudicate water rights. The Court found that the legislature's delegation of authority to the State Engineer is constitutional; the regulations do not violate due process; and the regulations are not unconstitutionally vague.

Conclusion

The urgency for water management in the state is growing more intense. In 2012, the entire state experienced severe to extreme drought conditions. In 2013, nearly all the state suffered extreme drought conditions. It is clear that the State Engineer must be ready to address water shortages.

To that end, the OSE Water Rights Division has moved forward with implementing AWRM in its conjunctive management of ground and surface water within river basins. The Division's AWRM efforts have focused on getting implementation tools in place: installing meters; inventorying water rights; developing GIS-based databases; and, abstracting, imaging, and posting water right files online so that they are immediately available across the state. These tools will be

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used to process new and changed water right applications. The Division has also assembled interdepartmental teams to manage water within river basins and to continue developing district-specific regulations for administering water in times during shortages.

The State Engineer has identified seven priority stream systems for implementation of Active Water Resource Management: the Lower Pecos, the Lower Rio Grande, the San Juan, the Upper Mimbres, the Rio Gallinas, the Nambe-Pojoaque-Tesuque, and the Rio Chama. Now that the State Engineer's legal basis has been affirmed by the Supreme Court, he has directed his staff to move forward with district specific regulations to actively manage water under AWRM in those seven priority basins.

According to State Engineer Scott Verhines, the Tri-State "ruling upholds the water management tools which are exactly what New Mexico needs to navigate the difficult drought conditions burdening our state. The last twenty-four months have been the hottest and driest in recorded state history. Active Water Resource Management gives New Mexico the ability to respond to our variable water supply."

By Paul Bossert, Esq. (2008)

Latest Update by
Gregory C. Ridgley, Esq. (2013)

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