



STATE OF NEW MEXICO
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**Quarterly Report By the Office of the State Engineer on the Efforts of
the AOC/OSE Working Group on Adjudications**

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A joint working group of staff from the Administrative Office of the Courts (the "AOC") and staff from the Office of the State Engineer (the "OSE") has been exploring ways to expedite and improve the water rights adjudication process in New Mexico. In March and July, the working group submitted to the legislature two joint quarterly reports on the group's efforts. Recently the AOC unilaterally submitted two additional reports. The OSE now submits its report.

1. In its separate reports, the AOC offered an "AOC Approach" to "Comprehensive, Judicially-Based Adjudication Reform," and contrasted this to what it characterized as the "OSE Approach," which was described as a "hybrid adjudication." The AOC presented these as two alternatives that represent a policy choice for the legislature, suggesting that the two approaches are mutually exclusive. The OSE does not share the AOC's opinion. The OSE licensing proposal is not a "hybrid" approach to the adjudication of water rights, but rather is intended as an administrative measure that will benefit water right owners both before and after any water rights adjudication and will promote a more efficient adjudication process, whether existing or reformed. The State Engineer's licensing proposal is not directly linked to adjudication or judicial reform. Therefore, the OSE disagrees that the efforts of the working group to date have produced alternative adjudication reform proposals requiring a policy choice by the legislature. Enactment of the State Engineer's licensing proposal will not preclude any legislation to reform the adjudication process.
2. The OSE strongly believes that it is important to take the time to consider adjudication reform deliberately, carefully, and thoroughly. The working group has undertaken considerable research, but it has not thoroughly analyzed the research that has been completed, and, therefore, it really is not possible to have reached any conclusions that the group can rely upon to recommend comprehensive legislative or judicial changes with any degree of confidence that they will result in an adjudication process that is more efficient, more accurate, less litigious, and less costly. In our view, adopting such legislative or judicial changes at this juncture would be making change for the sake of change.

3. Effective adjudication reform will require cooperation and consensus among the branches of government if we are to minimize, if not altogether avoid, protracted litigation concerning significant separation of powers and due process issues. Since the AOC/OSE working group has focused its efforts on ways to expedite and improve future water rights adjudications, the Middle Rio Grande specifically, the OSE holds the opinion that we must carefully consider changes to the law and procedures that would govern a future Middle Rio Grande adjudication with respect to the Rio Grande tributary adjudications currently pending in the state and federal courts. We reference the New Mexico Supreme Court's decision in *State ex rel. Reynolds v. Allman*, 78 N.M.1, 427 P.2d 886 (1967), concerning the consolidation of tributary and mainstem adjudications of the Pecos River. In *Allman*, the Court held that due process required that owners of adjudicated water rights on the Pecos River mainstem be allowed to assert relation back priority claims once they were consolidated with the owners of water rights on the Rio Hondo. The OSE also believes that in the Middle Rio Grande we must be particularly sensitive to the unprecedented complications of adjudicating heavily complex permit conditions. These permit conditions are the limits prescribed by the State Engineer to protect against impairment and maintain the state's ability to comply with the Rio Grande Compact.
4. The experiences of other Western states demonstrate the need to take time for full analysis. No state has enacted comprehensive adjudication reform without several years of consideration and development. Moving ahead without the necessary analysis, planning, and consensus building could easily create delays in the filing of a Middle Rio Grande adjudication or could moot any increases in efficiency that new adjudication procedures might bring, because new procedures likely will lead to years of litigation to resolve the issues set forth above and make it more expensive. See J. Thorsen, Dividing Western Waters: A Century of Adjudicating Rivers and Streams, 8 Denv. Water L. Rev. 355 (2005).
5. The Middle Rio Grande, which has been the focus of the issue of adjudication reform, has enjoyed a full supply of water for many years. Moreover, the State Engineer and the Interstate Stream Commission have successfully managed depletions in the Middle Rio Grande so that New Mexico has enjoyed credit status under the Rio Grande Compact since the early 1990's and has not suffered suit for under-deliveries since the 1950's. It therefore is not clear that the adjudication of Middle Rio Grande water rights is an urgent matter. Thus, in the OSE's view, New Mexico should take advantage of the window of opportunity it currently enjoys to do the thorough analysis and careful planning and consensus building that must be done for adjudication reform to be effective. This is particularly true if immediate administrative measures such as the State Engineer's licensing proposal address the genuine, practical needs of Middle Rio Grande water right owners.
6. For all of these reasons, while there may be immediate, stand-alone legislative actions relating to water rights adjudications that can be taken in the upcoming session, comprehensive adjudication reform needs further analysis and discussion before we can draft new laws intelligently.

7. The AOC reports appear to reflect a fundamental misunderstanding of the State Engineer's licensing proposal. As the OSE stated from the beginning of the working group's discussions, the State Engineer has long been considering a licensing proposal, and that proposal was spurred forward by Judge Valentine's suggestions to this committee. The State Engineer's licensing proposal is not an alternative approach to the adjudication of water rights, but an administrative measure that will provide a number of short and long term benefits, among them a means for water right owners to obtain immediate increased certainty in water rights *vis-à-vis* the State Engineer, as well as an increase in the accuracy of State Engineer records. Both of these immediate benefits will have collateral benefits to water rights adjudications, but adjudication reform is not the focus of the State Engineer's licensing proposal.
8. It was the OSE's understanding that the judicial participants in the working group felt constrained as a matter of judicial ethics to refrain from participating in discussions over possible reform of administrative procedures, or from making recommendations concerning the policy choices of the legislature. For this reason, although the OSE has kept the AOC apprised of the development of the licensing proposal, the working group's analysis of the State Engineer's licensing proposal was never completed. The OSE was therefore surprised that the AOC reports comment on the State Engineer's proposal.
9. The State Engineer's licensing proposal is not an alternative approach to adjudication reform. Instead, it is an administrative measure that will bring immediate benefits no matter what adjudication reforms are enacted, or when they are enacted. As a result, there is no reason for the legislature to not act on the State Engineer's licensing proposal. Since the licensing proposal is not an alternative to adjudication reform, the legislature has the flexibility to enact the licensing proposal without sacrificing any reform it might wish to pursue.

Next Steps

The OSE is committed to working with the AOC to improve and expedite water rights adjudications in New Mexico. If the Interim Water and Natural Resources Committee desires to endorse statutory proposals for introduction in the 2009 legislative session, then the OSE would be happy to work with the AOC on a discrete, stand-alone proposal or proposals designed to improve the adjudication process incrementally. The working group could reasonably perform the needed analysis and evaluation of a focused proposal of this nature in the limited time left before the Interim Committee's November meeting.

It is the OSE's view, however, that there is not sufficient time to perform thorough expert analysis of any proposal for comprehensive reform of New Mexico's adjudication process in time for the 2009 legislative session. The OSE believes that comprehensive adjudication reform will best be furthered by allowing the working group to complete its analysis and present to the public fully formed proposals that anticipate and address in a thorough, considered way the complications of reform.