Active Water Resource Management

For decades, most of the waters of the State of New Mexico have been the subject of litigation to establish the relative priorities of all water users. Although the adjudication process has been divided into dozens of stream systems and sub-basins, complete adjudication of all New Mexico water rights remains a distant hope. Meanwhile, water use in the state has evolved. New water users look to acquire water from old, as dry years come and go. Decisions on distribution and redistribution of water have to be made.

2002 was a particularly dry year in New Mexico. Every county in the state was declared a drought disaster area by the USDA; irrigators received a fraction of their normal 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 problems were wide-ranging, including delivery of water to Texas in compliance with the Pecos River Compact; structuring an agreement with the Navajo Nation; and, on the Rio Grande, deliveries to irrigators and maintenance of 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.

Authorizing 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 section 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 OSE’s use of water districts and water masters. 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.

Districts and subdistricts are to be established based on stream system hydrology. A master list of water rights in the district and their priorities will be compiled and district-specific rules for priority administration are to be created with extensive input from the district’s water users, including a generalized hydrological analysis of available water. Installation of headgates and/or meters may be required for some or all points of diversion. The water master works with water users to monitor and enforce compliance with the district’s rules. The water master is also charged with keeping records of water use and compliance measures and issuing reports regularly.

If there is a shortage of water, the water master may implement an administration date. An administration date establishes a priority cutoff point. All water right holders whose priority date is later than the administration date must stop using water until the administration date is revised or cancelled. An administration date may be ordered to remedy supply problems within the district or elsewhere in the stream system, or to service interstate stream compact obligations. Owners of water rights may object to the administration date and may request a hearing.

An owner of a water right who has been cut off by the administration date may obtain other water by filing a replacement plan. A replacement plan requires an agreement between the junior water user and an owner of a water right that is senior to the administration date who will not be using that water. It allows the junior user temporarily to use the senior water right holder’s water. The state engineer approves 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 users may object. Modifications to the plan may be required or the plan may be revoked if water supply conditions make it 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.

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The rules encourage the formation of water user groups to facilitate communication and to work out agreements for alternatives to priority administration. Shortage sharing agreements approved by the OSE may be incorporated into the district’s rules and implemented in place of strict priority enforcement.

Objections to AWRM

When the proposed AWRM rules were published for public review a number of objections were raised. These objections were mostly based on the perceptions that 1) the OSE was substituting its authority and judgment for that of the courts to conduct water rights adjudications, and 2) the OSE’s hearing process was inadequate for a water user 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 OSE countered that any determinations regarding water rights under AWRM were only temporary, for the purpose of administration, and subject to correction by the adjudication process, which would continue separate from AWRM administration.

Regulations Challenged in Court

In 2005, Tri-State Generation and Transmission Association and the New Mexico Mining Association filed suit in Socorro County seeking to have the AWRM rules declared unconstitutional. In May, 2007, Judge Matthew Reynolds issued his decision, finding two parts of the AWRM rules to be unconstitutional but leaving the rest of the rules in place.

The district court found that because Section 72-2-9.1 did not include explicit and detailed instruction for evaluating water rights, the legislature did not intend to give the State Engineer any new authority to determine the elements of water rights. Therefore, the State Engineer’s authority to administer water rights could only be based on elements that have been fully determined under existing procedures. Thus, the State Engineer’s authority under AWRM was narrowed but not eliminated.

The court also found a problem with the procedure for hearing objections to administrative decisions under AWRM. According to Judge Reynolds, it would not speed up decision-making, which was the law’s stated purpose. It could cause people to have their water use curtailed for months or years before getting their “day in court.” Judge Reynolds affirmed the State Engineer’s authority to administer water rights in the absence of a final adjudication (in the case of licenses, partial final decrees, subfile orders, and offers of judgment) but significantly increased the procedural requirements that would need to be met. In his view, portions of the regulations impermissibly expanded the scope of the State Engineer’s statutory authority and violated due process protections.

The OSE appealed the decision and after briefing and oral arguments, the New Mexico Court of Appeals issued a decision on October 28, 2010.
New Mexico Court of Appeals
The Court of Appeals affirmed the district court in part and reversed in part. The Court held that based upon the statutory language and the historical authority of the State Engineer, the Legislature did not intend Section 72-2-9.1 to provide the State Engineer with the power to take actions to address priority administration beyond adjudication decrees and licenses necessary to carry out the AWRM regulations. The court stated that both licenses and final adjudication decrees result from a process that incorporates procedures to allow parties to object and be afforded the opportunity for a full hearing prior to administration. “Based upon the scope of the task involved, the existing adjudication statutes, and case law limiting the State Engineer’s authority to administer priorities until after adjudication, had the Legislature wished to grant the State Engineer such authority for determining priorities, it would have done so in direct, clear, and certain terms.” The Court of Appeals emphasizes that the Legislature has the power to create a different system.

Conclusion
The debate over AWRM and adjudication of water rights will likely continue, even if the Legislature were able to develop a detailed regulatory scheme. Whether the “licensing” procedure as currently written in statute meets due process standards will likely continue to be challenged. The State Engineer will no doubt consider this when and if the regulations are re-written. Meanwhile, the New Mexico Attorney General’s Office has petitioned the Supreme Court to reverse the appeals court decision.

As of December 2010, a decision on whether the Supreme Court would hear the appeal was pending.
Meanwhile, the urgency of need for management of the state’s limited water remains. The OSE is working toward completing district-specific regulations for seven stream systems it has identified as most in need of Active Water Resource Management – the Lower Pecos, Lower Rio Grande, San Juan, Upper Mimbres, Rio Gallinas, Nambe-Pojoaque-Tesuque, and Rio Chama – and is further developing plans to license water rights. The OSE’s efforts in AWRM are largely focused on getting implementation tools in place: metering; inventorying water rights; and developing GIS-based databases, including aerial photography, which will be used to evaluate and determine the validity of water rights.
It may be that negotiated agreements for sharing of shortages are the only legally viable alternative to adjudication in hydrologically-complex basins with thousands of water rights holders such as the Middle Rio Grande. The Legislature may do best in trying to support those efforts, rather than develop a detailed regulatory framework, sure to be challenged.

By Paul Bossert, J.D. (October 2008)
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Sources Consulted and Other Contributors:


DL Sanders, Chief Counsel, Office of the State Engineer.