

# Adjudications

## Background

Adjudications are lawsuits in state or federal court to resolve all claims to water use in the state of New Mexico including those of pueblos, tribes and the federal government. These cases are required by statute to create a formal inventory of water uses and to facilitate administration of New Mexico's surface and groundwater. The geographic scope of each case is generally described by a stream system and occasionally by groundwater basin. By statute, the State of New Mexico is always the plaintiff. The mission is to formally identify and recognize all valid water rights in each area being adjudicated. For expeditious and effective case management, a court may allow the case to proceed by smaller geographic sections: for example, the Pecos adjudication has twelve sections and the Lower Rio Grande has five sections.

### Acres Adjudicated, Subfiles, and Defendants in Pending New Mexico Adjudications

Totals and Estimates as of October 2011

Courtesy of the New Mexico Office of the State Engineer

“ It was the evident design of the Legislature, by chapter 49, S. L. 1907, to have adjudicated and settled by judicial decree all water rights in the state, to have determined the amount of water to which each water user was entitled, so that the distribution of water could be facilitated, and the unappropriated water to be determined, in order that it might be utilized.”

*Snow v. Abalos*, 18 N.M. 681, 140 P. 1044, 1050 (1914)

## Non-Indian Subfile Summary

### Northern New Mexico Adjudications

Stream System	Total Acres	Adjudicated Acres	% Acres Adjudicated	Subfiles	Defendants
San Juan	37,829	4,347	11%	9,000	11,400
Jemez (decreed)	2,033	2,033	100%	1,011	1,095
Red River (decreed)	12,185	12,185	100%	1,202	1,605
Zuni	980	-	0%	950	1,000
Rio San Jose	undetermined	-	0%	1,800	2,000
Rio Chama	34,852	34,437	99%	3,654	4,630
Taos/Hondo	13,756	13,692	100%	4,026	5,224
Santa Cruz/Truchas	7,218	7,218	100%	3,446	5,139
Nambe/Pojoaque/Tesuque	2,755	2,747	100%	3,430	5,598
Santa Fe	827	612	74%	1,284	1,550
<b>Northern NM Subtotals</b>	<b>112,435</b>	<b>77,271</b>	<b>69%</b>	<b>29,803</b>	<b>39,241</b>

### Southern New Mexico Adjudications

LRG Section or Underground Basin	Total Acres	Adjudicated Acres	% Acres Adjudicated	Subfiles	Defendants
Nutt Hockett	11,554	11,554	100%	43	73
Rincon Valley	21,991	17,180	78%	1,230	1,429
Northern Mesilla	20,013	3,502	17%	5,928	7,504
Southern Mesilla	54,009	10,134	19%	5,353	7,260
Outlying Areas	3,798	424	11%	1,275	1,798
<b>LRG Subtotals</b>	<b>111,365</b>	<b>42,794</b>	<b>38%</b>	<b>13,829</b>	<b>18,064</b>
Animas Underground	15,989	-	0%	300	500
<b>Southern NM Subtotals</b>	<b>127,354</b>	<b>42,794</b>	<b>34%</b>	<b>14,129</b>	<b>18,564</b>

### Pecos Adjudication

Pecos Section	Total Acres	Adjudicated Acres	% Acres Adjudicated	Subfiles	Defendants
Gallinas	8,164	7,200	88%	1,674	1,998
Upper Pecos(Ground Water)	695	677	97%	100	93
Upper Pecos(Surface Water)	undetermined	-	0%	undetermined	2,000
Pecos Supplemental/Misc.	4,651	365	8%	49	100
Hondo Basin	6,748	6,739	98%	588	657
FSID	6,500	-	0%	undetermined	480
Fort Sumner (Ground Water)	7,444	7,444	100%	80	44
PVACD	128,274	123,032	96%	1,900	2,522
River Pumpers	6,063	6,063	100%	19	22
Carlsbad Underground	11,350	320	3%	320	240
Carlsbad Irrigation District	26,913	26,913	100%	1,106	1,328
Peñasco	undetermined	-	0%	undetermined	5,000
<b>Pecos Subtotals</b>	<b>206,816</b>	<b>178,753</b>	<b>86%</b>	<b>5,840</b>	<b>14,484</b>

<b>ACTIVE GRAND TOTALS</b>	<b>446,605</b>	<b>298,818</b>	<b>67%</b>	<b>49,768</b>	<b>72,289</b>
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From October 2011 OSE report to the Legislative Interim Committee on Water and Natural Resources

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**Pending Adjudications and the dates they were filed**

Currently, twelve adjudications are pending in the State of New Mexico. Below is the summary table of the active adjudications, prepared by the Office of the State Engineer (OSE).

Further information is provided in the following table, which indicates where each adjudication is pending, the judge assigned and the original date of filing.

Adjudications are complex and lengthy, mainly due to large numbers and types of claimants, vast areas and considerable individualized time required to investigate the claims involved. For example, it is estimated that

- the Lower Rio Grande adjudication, filed in 1986, has 18,000 non-Indian claimants, one federal irrigation district, 14,000 subfiles, and 111,365 irrigated acres;
- the *Aamodt* adjudication, filed in 1966 has 5,600 non-Indian claimants, four Pueblos, one irrigation district, 3,400 subfiles and 2,750 irrigated acres; and

- the Pecos, filed in 1956, has 14,500 non-Indian claimants, one tribe, three federal and state irrigation or conservancy districts, 6,000 subfiles and 207,000 irrigated acres.
- In all the 12 active adjudications, there are an estimated total of 72,300 non-Indian claimants, 18 tribes or Pueblos, 50,000 subfiles, 446,700 irrigated acres of which 67% of the acreage has been adjudicated.

**Role of the Court, Attorney General and Office of the State Engineer**

In New Mexico, adjudications require concerted effort on the part of the courts, the state attorneys and the OSE. Each adjudication is assigned a judge. Adjudication judges may also serve as district court or appellate judges. They may or may not be the designated water judge for a particular judicial district. Even if the geographic scope of an adjudication spans more than one judicial district, only one judge is assigned to the case. The judge can elect to have a special master appointed to carry out specific aspects of a case and/or to conduct the day-to-day operations of the case. New Mexico does not have a separate water court designated to hear water disputes.

The Attorney General conducts adjudications for the state through attorneys commissioned as Special Assistant Attorneys

Stream System	Court	Judge	Date Filed
Animas Valley Underground Water Basin	6 <sup>th</sup> Judicial District	Judge J.C. Robinson	2005
Jemez ( <i>Abousleman</i> )	Federal Court	Judge Martha Vasquez	1983
Lower Rio Grande	3 <sup>rd</sup> Judicial District	Judge James Wechsler	1985
Nambe/Pojoaque/Tesuque ( <i>Aamodt</i> )	Federal Court	Judge Martha Vasquez	1966
Pecos River ( <i>Lewis</i> )	5 <sup>th</sup> Judicial District	Judge James Wechsler	1956
Rio Chama ( <i>Aragon</i> )	Federal Court	Judge Martha Vasquez	1969
Rio San Jose ( <i>Kerr McGee</i> )	13 <sup>th</sup> Judicial District	Judge James Wechsler	1983
San Juan	11 <sup>th</sup> Judicial District	Judge James Wechsler	1975
Santa Cruz/Truchas ( <i>Abbott</i> )	Federal Court	Judge Martha Vasquez	1968
Santa Fe River ( <i>Anaya</i> )	1 <sup>st</sup> Judicial District	Judge James Wechsler	1971/74
Taos/Hondo ( <i>Abeyta</i> )	Federal Court	Judge Martha Vasquez	1969
Zuni ( <i>A&amp;R</i> )	Federal Court	Judge Martha Vasquez	2001

General. These attorneys are members of the OSE adjudication teams, work directly with OSE staff and are generally officed in State Engineer facilities. They may also be contractors hired by the OSE.

The OSE assigns hydrographic staff associated with each Bureau. The staff investigates the history of water use, assembles technical information and prepares abstracts and maps for each water right claim. The technical staff work closely with the attorneys to develop a complete picture of each water claim.

The attorneys and technical staffs are assigned to adjudication teams. The teams are organized into three groups: the Northern New Mexico, the Pecos and the Southern New Mexico Bureaus. Members of each team may work on more than one adjudication. There are presently twelve active adjudications.

### Adjudication Process

The New Mexico adjudication process consists of seven general phases: 1) the complaint, 2) the hydrographic survey, 3) the subfile phase, 4) the global issues phase, 5) the errors and omissions phase, 6) the *inter se* phase and 7) the final decree. The complaint may be filed by any interested party and initiates the adjudication. The complexity of adjudication is illustrated in the chart showing the adjudication process on the following page.

#### *Hydrographic Survey*

The hydrographic survey is required under the state Water Code, involves collecting information about each water right and may be conducted before or after the complaint is filed. The survey is performed by the OSE technical staff. It identifies who should be joined as claimants to the case and provides the information necessary for making offers of judgment to claimants. The information used to produce the hydrographic survey report comes from several sources. These include aerial and satellite photos from multiple years which are analyzed to

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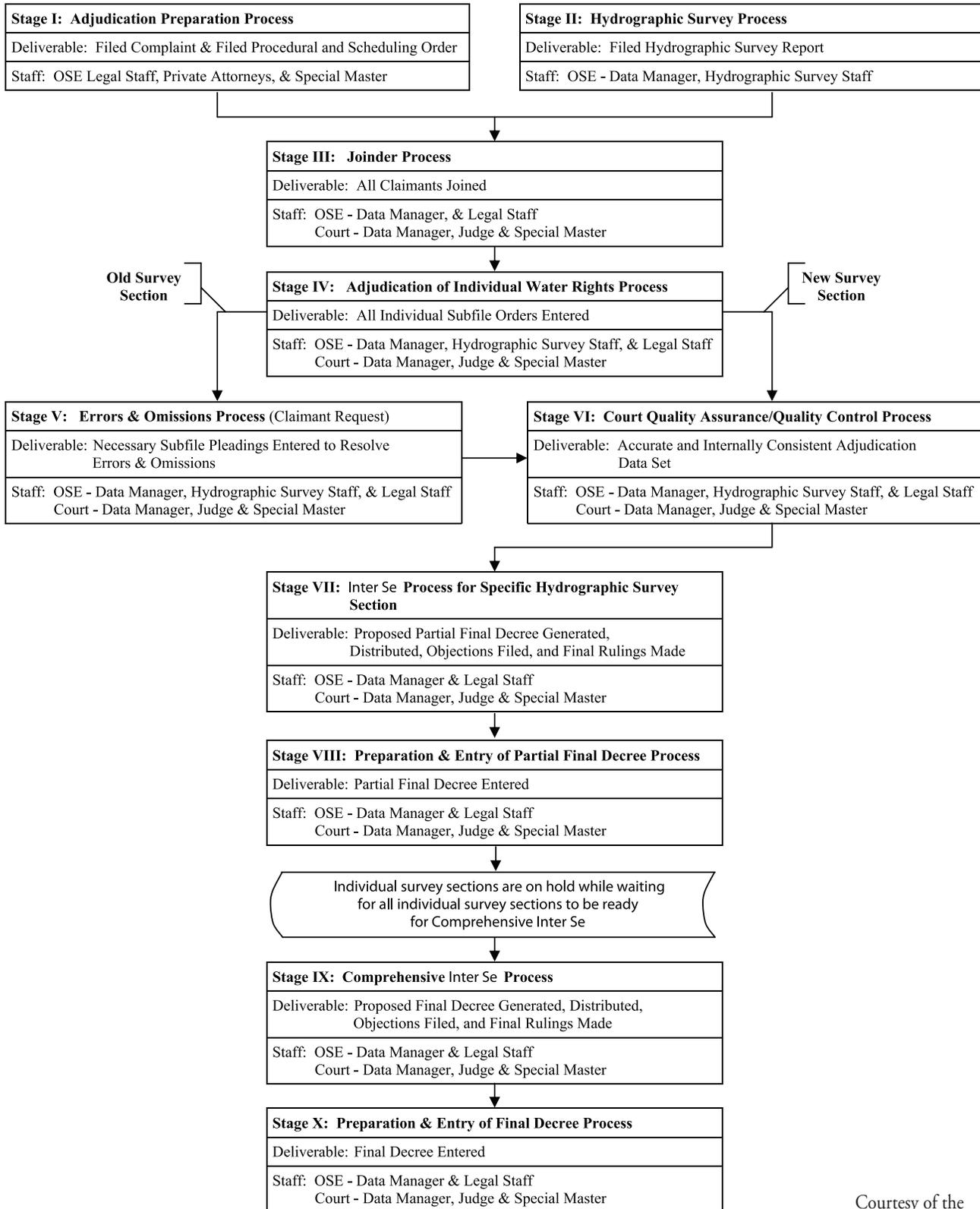
At the conclusion of the investigation, the State Engineer produces a hydrographic survey report containing water right abstracts, maps and general information used in describing the rights. The completed hydrographic survey report is filed with the adjudication court.

#### *Subfile Phase*

During the subfile phase, the state's attorneys present findings about the elements of each water right to each claimant. The elements are listed in the state's Water Code and include quantity, priority, place of use, purpose of use, point of diversion and any other matter the court deems necessary. A subfile may involve one individual, one city, or one tribe. It may include all or some of the water rights of a claimant, depending on how the court and parties decide to manage the case.

The subfile phase involves joining claimants, conducting meetings in the field, presenting an offer to each claimant, and negotiating and participating in mediation as necessary. If agreement is reached, a subfile order is entered resolving the claim between the state and the claimant; if not, the parties go to trial. The State Engineer adjudication team makes every effort to resolve water right claims before requesting a trial. A subfile order may contain all of the elements of a water right or the court may decide, for case management purposes, to reserve certain elements until other rulings are made. The subfile phase can be the most time consuming phase of an adjudication.

### New Mexico Adjudication Process



Courtesy of the  
Administrative  
Office of the Courts

Once the state and claimant have agreed, the proposed order is sent to the court. If the court agrees, the order is signed and entered into the record. Entry of a consent order is a major step for each defendant/claimant, but the whole adjudication remains open and the water rights are not finalized until the court conducts the *inter se* phase and enters the final decree into the record.

*Global Issues Phase*

Global issues are matters that affect the stream system as a whole, or alternatively, a large group of claimants. These issues may be addressed at any stage of the adjudication depending on the judge’s preference or when an issue arises. Global issues can involve matters such as the priority date for the participants on an acequia, or the duty of water, that is, the amount of water right delivered to each acre for an entire stream system.

*Errors and Omissions Phase*

The errors and omissions phase is conducted after all subfile orders are entered. It is designed to clean up the adjudicated information prior to entering a final decree.

*Inter Se Phase*

*Inter se* is Latin for “among themselves” and it is a time when any defendant may challenge the water rights of any other defendant. Following the entry of orders for each subfile in an area, the court conducts the *inter se* phase of an adjudication to resolve issues arising between water right owners. These challenges may go to mediation or receive a hearing. By resolving the challenges of any member of a community, the water rights are made final as against every other right as well as the State. If necessary, a court can conduct an expedited *inter se* before all orders have been entered. For example, the Jicarilla Apache Tribe’s water rights to the Rio Chama were resolved before all the non-Indian rights had been determined. In order to complete this part of the adjudication, thus preserving it from the challenges of time, the Court conducted an expedited *inter se* and thereafter entered a partial final decree.

*Partial Final Decrees & Final Decrees*

Once the *inter se* phase is complete, a court enters a final decree or a partial final decree. The final decree describes the rights adjudicated and once entered, ends the case or a significant segment of the case. If an adjudication is divided into segments by geographic region or type of right, these segments can be conducted in full or in part, sequentially or concurrently, depending on the case management choices of the court and the parties. Thus a case may have several partial final decrees which together resolve all of the water rights in a stream system.

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*Expediting the Process*

Water rights adjudications throughout the West take decades to complete. Over the last ten years, the New Mexico courts and the Legislature have explored ways to expedite these proceedings. Studies have been conducted, rules developed and programs implemented to further this cause.

*New Mexico Supreme Court Rules*

In 2002, the New Mexico Supreme Court established an *ad hoc* committee to develop and examine rules of procedure particular to water litigation and stream adjudications in New Mexico. The *ad hoc* committee researched several issues including: *ex parte* contacts; prohibitions on changing rules of procedures in pending cases; the legal nature of water rights; the inherent procedural difficulties in adjudications; the accuracy and updating of records; and standardizing procedures for all adjudications. Recommendations were submitted to the Supreme Court of New Mexico.

In 2007, the Supreme Court issued provisional procedural rules for adjudications. These rules addressed the issues of service and joinder of water rights claimants; stream system issues and

expedited *inter se* proceedings; an annual joint working session; *ex parte* contacts between the state and the court on procedural matters; general problems of administration; and excusal or recusal of a water judge. These rules are in use today.

#### *Joe M Stell Water Ombudsman Program*

The Ombudsman Program provides information to *pro se* claimants (water rights claimants not represented by counsel) so that they may understand and participate more fully in the adjudication process. The Ombudsman is able to help self-represented claimants understand the options available in responding to pleadings and offers from the State. The Program offers toll-free helplines, educational publications, and public meetings. The Program also reaches out to individuals who have not responded to the state's mailings, and those who object to offers of judgment on grounds unrelated to substantive issues. The Ombudsman does not provide legal advice.

#### *Water and Natural Resources Committee*

The Interim Water and Natural Resources Committee has put forth considerable effort and attention to expediting adjudications.

In 2007, the Committee created a subcommittee on adjudication reform, chaired by Senator Mary Kay Papen. This subcommittee held meetings to discuss how adjudications can become more efficient and effective. A working group of representatives of the Administrative Office of the Courts (AOC) and the OSE compared the process in several other states and worked on developing ideas for improving the process. The goal was to make joint recommendations to the Legislature. This effort was focused on

future adjudications – primarily looking at how to approach the Middle Rio Grande – and not on existing adjudications.

In October 2008, the AOC and the OSE submitted separate reports to the Committee. The AOC offered several suggestions to streamline future adjudications. Among other recommendations, they suggested replacing the hydrographic survey approach with a “claims-based” system for identifying and evaluating water rights. Other key AOC recommendations included: changing the OSE’s role from that of a party to that of a neutral expert; limiting the amount of time for raising objection to the state’s offer of judgment and requiring other claimants to raise any objections during that same time period; changing the method of notifying claimants of adjudication developments; and adjudicating claims on a rolling basis. The AOC recommended that before legislative action is taken, other input and suggestions for improvement should be obtained from stakeholders and water experts.

The OSE’s report stated that the working group had not sufficiently analyzed their research to the point of being able to recommend comprehensive legislative or judicial changes. The OSE promoted licensing of water uses to obtain certainty prior to adjudication. It raised concerns about changing laws to accommodate a Middle Rio Grande adjudication without a full assessment of the implications of cost, time and the legal process issues; further, they were not convinced of the urgency of the adjudication of the Middle Rio Grande. Instead, the OSE felt that administrative proceedings – such as licensing – could address the practical needs of Middle Rio Grande water rights administration without precluding adjudication reform.

In the 2009 session, the Legislature adopted Senate Joint Memorial 3. It required the Institute of Public Law (IPL) at UNM to conduct public meetings around the state and to obtain public comment on the water rights adjudication process. The IPL report

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concluded that: 1) most participants support existing law and worry about the consequences of changing it; 2) most participants want fairness, accuracy, and certainty over speed in adjudications; 3) tweaking the current system will accelerate adjudications; 4) greater decision-making role for local authorities where possible will

help; and 5) a neutral state-funded entity to provide objective data, education, and assistance is strongly desired.

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(2010-2011)

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