

Water Matters!

Background on Selected
Water Issues for Members of the
48th New Mexico State Legislature
2nd Session • 2008

With a tribute to
Senator Carlos Cisneros

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The Utton Transboundary Resources Center
University of New Mexico School of Law
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**Utton Transboundary
Resources Center**

Sanford Gaines, Director

Susan Kelly, Associate Director

Darcy Bushnell, Omb. Program Director

Ruth Singer, Administrator

Torild Kristiansen, Administrative Assistant

MSC 11-6070

1 University of New Mexico

Albuquerque, NM 87131-0001

Tel: 505-277-7809 • Fax: 505-277-3319

E-mail: uttoncenter@law.unm.edu

Web site: <http://uttoncenter.unm.edu>



Foreword

Last year's edition of *Water Matters!* (the first) was dedicated to Representative Joe Stell upon his retirement after 20 years of service to New Mexico in the State Legislature. This year, we honor Senator Carlos Cisneros, Stell's long time co-chair of the Interim Water and Natural Resources Committee and sponsor of many water initiatives.

The Utton Center, with research and writing by Brigette Buynak*, has updated the papers from last year and added papers on several topics, including adjudications and acequias. Historian and researcher Jerold Widdison** also contributed to the articles, including several maps for the publication.

The purpose of *Water Matters!* is to put water issues in broad context and provide background on how they have evolved. The papers are overviews and not intended to substitute for legislative analysis. Further, the papers are intended for all legislators, including those whose focus is not water law and policy.

We have not attempted to address all the water matters that the legislature will consider this session or in those to follow. We anticipate that every year papers will be updated and additional subjects will be added so that eventually the compilation will be an encyclopedia of water legislation in New Mexico. The purpose is to be factual and illustrate varying perspectives, yet be concise.

Many people helped review the text and provided information. They are gratefully acknowledged at the end of *Water Matters!*

Susan Kelly, Editor of *Water Matters!*
Associate Director
Utton Transboundary Resources Center
UNM School of Law

* Brigette Buynak is an attorney in private practice, focusing on water law, policy and adjudications.

** Jerold Widdison is a noted New Mexico researcher, historian, writer and cartographer

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Carlos R. Cisneros

His Life, Career, & Contributions

In his own personal way, State Senator Carlos Cisneros links New Mexico's past, present and future. On the one hand, he strongly hews to traditional ways of life in rural northern New Mexico. He still lives in Questa, the village where he grew up, and he loves the life of the people there. Like most of his neighbors he is a descendant of early Hispanic settlers.

On the other hand, Carlos works as a professional in modern-day corporate industry, and he has long had a leadership role in the affairs of state government. There his interest is clearly in New Mexico's future. Much of what he does in both Questa and Santa Fe has to do with bridging not only from past to present, but from present to future. His is plainly a life of both traditions and transitions.

In his work in the Legislature, Senator Cisneros is a thoughtful student of the contrasts that exist in today's New Mexico. He has been a member of the Senate for 22 years, now ranking fourth in seniority. "No one could be in the Legislature that long," he says, "and not know a lot about the problems, issues, and challenges that exist within our government and that surround our citizens." Cisneros' own interests in legislative matters have been widespread and forward looking, often focusing on such basic concerns as education, the use and conservation of natural resources, and state finance and taxation policies. In such matters, his colleagues acknowledge that he knows both sides of almost every issue, or as some have stated, "he understands the *many* sides of *many* issues."

Personal History

Carlos Cisneros was born in Questa, New Mexico, three years following the end of WW2 and just at a time when New Mexico was more fully entering the "national life" of the United States, especially its economic life. At that time, pressures on people and governments were intensifying in many ways. There were job opportunities, but rural people often faced especially difficult situations.

Carlos was inspired by his father, a long-time rancher and farmer in northern New Mexico. His father helped create the Kit Carson Electric Cooperative and he felt strongly about agriculture and the acequias in the economy and fabric of community life. Carlos himself now emphasizes many of the same concerns that his father had.



Following his graduation from high school, young Carlos started to work at the Molycorp Mine near Questa. The mine—operated by an international company—produces molybdenum, an uncommon metal used as an alloy to harden steel. Carlos eventually worked in many jobs at the mine, rising from beginning miner to Human Resources Manager—what used to be called Personnel Manager. He is now HR Development Advisor, which includes the training of employees and a program for guiding students just out of high school into careers in the industry. The program includes scholarships and mentoring activities, along with employment commitments.

For twenty years Carlos was also president of the mine employees' union, Local 4-659 of the Oil, Chemical and Atomic Workers. Thus nearly every aspect of the mine's sizable operation is known to Cisneros. He has been with the company, now known as Chevron Mining Questa, throughout his adult life.

In the Legislature

Cisneros began getting involved in politics and public affairs when he was in his 30s. Governor Bruce King appointed him to a five year term on the Board of Directors of the New Mexico Miners' Hospital in Raton. By 1985 he was Chairman of the Taos County Board of Commissioners, at which time he was appointed to the State Senate by Governor Toney Anaya, to fill an unexpired term. His District 6 represents parts of Taos, Santa Fe, Rio Arriba, and Los Alamos counties.

Having been continuously re-elected since his appointment, he is now in his fifth term in the Senate, and he has announced that he will run for a sixth term in November 2008. Over the years, he has served on a dozen or more committees and interim committees. He has been chairman of most of them, most notably the Education Committee, the old Ways and Means Committee, the Revenue Stabilization and Tax Policy Committee, and the Conservation Committee. For six years he and Representative Joe Stell were nominally co-chairs of the joint Interim Water and Natural Resources Committee, and when Stell retired in 2006, Cisneros also stepped down. In 2007 he left the chairmanship of the Senate Conservation Committee to become vice-chairman of the Senate

Finance Committee. This allowed Phil Griego, representing part of the Taos area, to become chairman of the Conservation Committee, and in 2007 Representative Andy Nuñez chaired the Interim Committee with Griego. Cisneros says, "I'm still playing an integral part in Water and Natural Resources, but not as its chair. That's probably good. It lets some fresh ideas come to the fore."

Being vice-chairman of Senate Finance will still enable Cisneros to be a critical player in water matters, he believes. "Senate Finance is integral to water projects," he says, "to the extent that this is where the money comes from."

Education and "Tax and Rev" are still important to Senator Cisneros, but water, in his mind, is an exceedingly important natural resource, demanding attention. In the remainder of this overview of his life and career, the emphasis is on Carlos' involvement with state water issues—and his views about them.

Water Rights Adjudications

Senator Cisneros sees water issues in broad perspective, while at the same time he knows their complexities. When he speaks of "water rights adjudication," for example, he has partly in mind the several litigious adjudications that were centered on watersheds where water rights were related to the San Juan-Chama Diversion Project. These involved tributaries of the Rio Grande that served both Pueblo Indian and non-Indian lands. Included were *New Mexico v. Arellano* for the Rio Pueblo de Taos and Rio Hondo, and, most notably, the *Aamodt* case.

Such adjudications are appropriate and necessary, though in themselves they may not provide more water than was already present. Unfortunately, too, adjudications cause concern and disagreement. "It's a prevalent issue among folks across the state," Cisneros says, "but particularly in northern New Mexico where folks have historically been under the impression—because they have used and had the option to use the water—that it literally belongs to them, and to some degree it does..."

Cisneros points out that the "legislative process" is not greatly involved in such adjudications, other than providing funding in some cases for the

adjudication processes. The Legislature may wish, however, to make some procedural changes in how adjudications are done.

Settlements

Part and parcel of some adjudications is the “settlement issue” with Indian tribes. The settlement matter now at the forefront is the proposed Navajo-Gallup Project. This project has to do with settling the rights to San Juan River water of both the Navajo Nation and the Jicarilla Apache tribe (discussed in this issue of *Water Matters!*). The Governor and the tribes have reached a written settlement, the cornerstone of which is the pipeline project itself. The next step is to encourage the federal government to sign on and provide major funding. To that end, New Mexico’s U.S. senators have introduced a bill called Northwestern New Mexico Rural Water Projects Act. And the project would provide potable water not only for the tribes but for the city of Gallup.

Increasing Demand for Water

Related to these matters is the vast topic of the increasing demand for water. This finds expression in such things as transfers of water rights and long-term water supply for urban and suburban development projects. “You can’t advocate for growth unless you meet the challenge of long-term water,” Cisneros says.

“What we see today,” he continues, “is the need and desire to transfer water from northern New Mexico to the Middle Rio Grande; we have seen a lot of transfers from Taos County to Santa Fe County where the demand lies. The temptation for making those transfers is there.” Transfers from acequia systems are one aspect of this, although recent legislatures have enacted restrictions on such transfers. “Aside from that, we haven’t met the challenges of increasing demand for water. We still don’t have enough to meet those demands.”

Acequias

Senator Cisneros is a champion of the traditional acequia organizations in the state. He is a *parciante* of the El Llano community ditch association and has a deep understanding of the pressures facing the

acequias—water transfers, changing land use, and aging infrastructure. Improvement of small dams and reservoirs is an aspect of water supply that interests Cisneros. Through his role on the Senate Finance Committee, he has been instrumental in acquiring \$15 million in state-wide capital outlay funds for dredging and raising the elevation of Santa Cruz Dam. He also obtained \$800,000 for renovation and restoration of Cabresto Dam, but more money is needed for that project. In addition, Cisneros is very concerned about the backlog of dam safety improvements needed throughout the state.

Regional Planning

Regional planning for water supply projects is one avenue to be pursued, Cisneros has said. “We passed the state-wide water plan, you know, but it was feel-good legislation, though it was well intended. Regional planning is something that has value because it provides for collective funding of large-scale projects... . What happens when you do a regional versus an individual project or a local project, is that regionals can leverage a lot more funding, whether it’s state or federal... . I think regional planning is a concept that folks have been talking about, but I’m not sure that legislatively there is a lot of momentum and desire to move in its direction... . I think the Governor’s direction has been to fund the larger projects, and people in general recognize that you’re better off pushing for a collective initiative rather than a localized project. I think the feds are heading that direction as well. So I think there’s going to be a trend, but I don’t think it’s going to be led by legislative initiative per se. I think it’s going to be led by a groundswell of local initiatives—they are recognizing that they’re better off doing water development collectively. I know the Pojoaque Pueblo has been pushing for a regional water project for several years.”

Cisneros has also spoken of the limitations that individual legislators face, especially with the high costs of water projects. “While we may represent a multi-county constituency, the costs of regional projects are almost prohibitive for any one legislator to advocate. Again, I think the Governor, administratively, has pushed. For example, the Water Trust Board traditionally has funded the larger projects and the regional type of projects... . Furthermore, when you look at the overall demand

for water projects across the state versus the amount of funding that we have provided, we're very short of what we need... . We're growing as a state, but we're doing nothing to sustain that growth and keep it going."

Conserving Water

Water conservation by reducing use will be no more than a partial remedy for the future, Cisneros believes, but it is something the Legislature should address. The most immediate topic here is "domestic well permitting." At the State Engineer's recommendation, the Legislature debated new requirements for new wells, but failed to enact anything. Thereupon, the State Engineer issued regulations under his own authority. Unfortunately, from the viewpoint of several legislators, the matter has become mired in a lawsuit.

At least one other approach is advocated by Senator Cisneros—a requirement that land developers

provide assurances that their projects have 100-year water supplies instead of the currently required 40-year supplies. Cisneros introduced legislation to this effect in 2007, "but it didn't pick up a lot of momentum. Ultimately we went with a memorial that didn't quite make it through the last hours of the legislative session."

In all these matters, Senator Cisneros notes, there are differences of opinion. Sometimes this has to do with problems and attitudes in different parts of the state. Certain topics, as he is acutely aware, especially the loss of water, are "at the forefront of activity within my district." He also knows, however, that the entire state's future prosperity requires wide and deep consideration by all members of the Legislature. "Water is an important issue for the state," he emphasizes, "an important issue for all of us—individually, and collectively as the Legislature."

By Susan Kelly and Jerold Widdison

Basic Water Law Concepts

History of New Mexico Waters: A Brief Overview

Water issues have always plagued New Mexico. Its inhabitants have struggled with how to survive in a land thirsty for water from before recorded history. As past leaders of this arid land have implemented policies and laws to distribute the precious resource of water, so will its present and future leaders wrestle with these issues.

Water law is historically based. A brief overview of the peoples who have inhabited New Mexico provides the landscape of current water law. Concepts, attitudes and the language found in today's constitution and statutes addressing New Mexico's water law have long-standing historical roots set forth by previous inhabitants.

Pueblos

New Mexico's water use rights and practices predate statehood by several centuries. Ancient canals winding throughout the modern lands of New Mexico were initially constructed in pre-recorded history. The pueblo Indians placed water to historical, beneficial use and thus, have an early priority date to their water rights. Early settlers noted the growing of corn, beans, melons and other crops which depended upon a wide variety of irrigation methods.

Spanish Influence

For decades water primarily supported local subsistence-based economies. The governing principles came from Spanish practices, including those of certain local controls over land and water and usufruct rights (the right of use). Developed by the Moors and Berbers, the acequia was a water conveyance system common in fifteenth-century Spain. Spanish settlers brought this system into the New World where it matured into the community acequia which became the generally accepted basis for water administration in New Mexico. The first acequias were constructed in New Mexico by the earliest Spanish colonists in about 1598 at Chamita on the lower Rio Chama.

Under both Spanish and Mexican rule, the equitable distribution of water was the most frequently contested issue. Most disputes were resolved at the local level, but provincial governors sometimes determined the outcome of more difficult cases. During times of shortage, locally imposed interim measures allowed contending groups to share the shortage until precipitation brought increased stream flow. Although not everyone was happy with the process, it provided community participation and reflected time-honored

“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”

– Constitution of the State of New Mexico, Article XVI, Irrigation and Water Rights

procedures for water management. According to historian John Baxter, the goal seemed to be healing rifts within the community rather than determining a legal winner and loser.

Becoming a Territory

Under the guise of ‘Manifest Destiny,’ the United States began to look to the lands of New Mexico. In 1846, when Stephen Watts Kearny led his army into the territory, he brought with him a document declaring protection to the inhabitants of their life, property and religion. Subsequently, the Kearny Code stated that the “laws, heretofore in force concerning water courses, ... shall continue in force.”

In 1848, the Treaty of Guadalupe Hidalgo transferred the Mexican Cession lands over to the United States. Five years later, the strip of land in the most southern parts of New Mexico and Arizona was added under the Gadsden Treaty. Under both treaties inhabitants’ pre-existing rights were to be respected.

Water law began radically changing in the 1880s with the coming of the railroad and outside investors. The territorial laws, written in the late

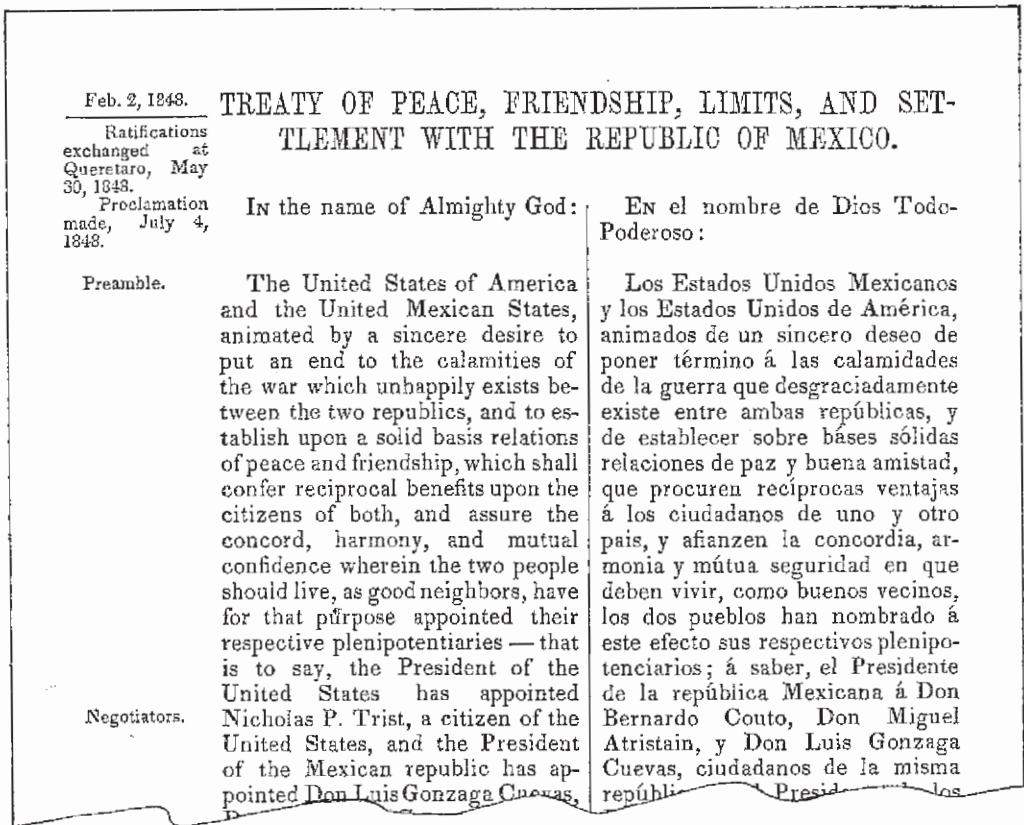
nineteenth century and later adopted by the State through its constitution and statutes, were based on Western mining laws and embraced the concept of prior appropriation. Miners who staked claims needed to use water, and with that need came the question of how to determine rights to the stream flow diversions. Since titles to mining claims were based on “first in time, first in right,” the same principle was applied to the appropriation of water, resulting in the prior appropriation doctrine.

In a New Mexico territorial Supreme Court case in 1891, the Court specifically declared prior appropriation the law of New Mexico. In *Trambley v. Luterman*, 6 N.M. 15, 27 P. 312 (1891), the Court found that the prior appropriation of water for a grist mill on the Gallinas River takes precedence over a subsequent riparian owner’s assertion of a water right based on common law doctrine. The Court’s rejection of riparian rights in favor of prior appropriation was a precedent consistently followed in New Mexico thereafter. In 1905 the territorial assembly reduced existing practices of water use concerning appropriation of surface water to statutory form

without substantial alteration. New Mexico’s system closely paralleled the appropriation doctrine developed by Anglo settlers in western states and territories.

In 1907 New Mexico’s territorial legislature passed a comprehensive code of water law, which still forms the basis for the State’s water laws and regulations today. Although lawmakers intended to protect the community acequias and other traditional institutions, after 1907 the Anglo sociocultural framework increasingly dominated water policy. Besides codifying certain rights and practices, the Legislature centralized the administration of water with the creation of the

Treaty of Guadalupe Hidalgo



territorial engineer. This official had the authority to allocate water in various streams and approve applications for new irrigation projects.

Statehood

When New Mexico became a state in 1912, its constitution employed the principles of public ownership of water, the doctrine of prior appropriation and beneficial use. All of which were found in the 1907 Water Code. Early in its statehood, New Mexico entered into three compacts with neighboring states. These compacts attempted to minimize conflicts over the Colorado and La Plata rivers and the Rio Grande. Compacts were seen as an alternative to litigation with neighboring states.

The federal government played a significant role in early New Mexico water law, entering into a Treaty with Mexico for delivery of Rio Grande waters in 1906 and building Elephant Butte Dam to serve the Rio Grande Project in 1916. Federal-state relations continue to be significant when issues surrounding New Mexico's waters are being addressed, especially in regard to financing water infrastructure projects.

Legal Concepts: A Brief Overview

Prior Appropriation

Prior appropriation means that the right to water is determined by the chronological order in which claims (appropriations) to the water are made. The first person to use a quantity of water from a water source for a beneficial use has the right to continue to use that quantity of water for that purpose. Subsequent users from the same source can use the remaining water for their own beneficial purposes, provided that they do not impinge on the rights of previous users. The key word is "use" and the doctrine awards a water right to a person actually using the water. The idea is that if a senior water user no longer needs the water, the right to use the water can be freed up for someone else to use. In a water short year, junior appropriators may not receive any water. An irrigation water right is appurtenant to the land and is tied to a specific use, source of the water, place of diversion, amount, and priority date. Water rights can be conveyed with real property or severed from the property and sold separately.

Pre-1907 Water Rights

After 1907, a permit from the State Engineer was required for any new appropriations of surface water. A pre-1907 water right is a right that was in existence prior to 1907. One may claim pre-1907 surface water appropriations by filing a declaration of use with the Office of the State Engineer (OSE). A limited review of a declaration is performed to be sure there is no overlap with another declaration. However, under current practice, outside of the adjudication process, the State Engineer will not recognize pre-1907 water rights until a transfer or change of use is proposed, at which time the OSE will undertake a validity study. The practice for determining the validity of pre-1907 rights may vary from basin to basin according to the type of records available.

Beneficial Use

Fundamental to maintaining water rights under a system of priority administration is the requirement that a holder apply water rights to beneficial use. The New Mexico Constitution states that "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." (Article 16, Section 3)

The New Mexico Constitution does not further define beneficial use, but a series of judicial decisions characterize it as including irrigation, domestic, commercial and industrial uses. It does not include the wasteful use of water. There is no priority scheme *by type of use* for allocation of water during droughts.

Non-use is protected for certain water users by allowing certain public water providers a forty-year planning period in which they would not be subject to forfeiture for non-use. While New Mexico is the only western state that does not statutorily recognize "instream flow" as a beneficial use, an Attorney General Opinion issued in 1998 did indicate that New Mexico law allows the State Engineer to provide legal protection for instream flows in certain circumstances.

Article 16 of the New Mexico Constitution provides that the unappropriated water of every natural stream, perennial or torrential, within New Mexico belongs to the public and is subject to appropriation for beneficial use. A property right for surface or groundwater is actually a use right to

“beneficial use” of the water, not ownership of it. When a water right is sold, it retains its original appropriation date and is limited to the amount of water historically consumed for that use.

Appropriation

A person may appropriate unappropriated water by filing a permit application with the State Engineer. The Engineer must find that there is unappropriated water available and that approval of the application will not impair existing rights, be detrimental to the public welfare of the state, nor be contrary to water conservation. The State provisions for public welfare and conservation, although not defined, were added to the law in 1985. A water right is subject to “forfeiture” or loss of that right for failure to “use” the water right. These constitutional and statutory terms and concepts are fundamental to the State’s water laws.

Groundwater

The State did not regulate groundwater use until 1931 when the Legislature declared underground water to be public and subject to appropriation for beneficial use. In basins that are ‘declared,’ that is, areas where the State Engineer deemed it necessary to limit the unregulated and unlimited use of groundwater, the State Engineer may require permits for new groundwater appropriations, too. The State Engineer makes these designations based upon the source aquifers being non-rechargeable or connected to streams. The criteria for issuance of groundwater permits are essentially the same as for surface water claims. There are currently thirty three declared basins, covering about ninety two percent of the state.

Priority Administration

In a system of prior appropriation, each water rights holder has a yearly quantity and an appropriation date. Each year, the user with the earliest appropriation date (known as the “senior

appropriator”) may use up to the full allocation (provided the water source can supply it). Then the user with the next earliest appropriation date may use his or her full allocation and so on. In times of drought users with junior appropriation dates might not receive their full allocation or even any water at all. Legally, shortages do not result in sharing of the resource or any diminishment of the amount the senior appropriator can take, if sufficient water is available. But historically there are many examples of shortage sharing among all users in a drought. Also, priority administration can be technically challenging. For instance, in years of low runoff it is difficult to prevent the delayed effects on senior water right holders, of pumping that has occurred in previous years by junior groundwater users.

Adjudication

The State’s statutes charge the State Engineer and the Interstate Stream Commission with the management of the State’s waters and its attendant responsibilities. A water rights adjudication produces a single decree that defines all competing demands on the stream system’s water supply so that the State Engineer can effectively carry out his statutory mandate to apportion and administer water to satisfy those demands. These adjudications result in the quantification and legal determination of surface water rights that predate the State’s adoption of the 1907 water code; the quantification and legal determination of groundwater rights that predate the State Engineer’s assertion of administrative authority over a groundwater basin; and the quantification and legal determination of the relative priorities of all water rights, both Indian and non-Indian, that share a common hydrologically connected source. These adjudications help the State define its existing water rights, meet its interstate compact obligations, and protect the State’s waters.

By Brigitte Buynak

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Adjudications

Background

Adjudications are lawsuits in state or federal court to determine all claims to the use of the water in a given stream system in order to facilitate the administration of both appropriated and unappropriated waters. Water adjudications in New Mexico cover both surface and groundwater. Geographically they cover a stream system, but for expeditious and effective case management, they are typically broken into smaller geographic units.

Currently, there are eleven (11) adjudications pending in the State of New Mexico. Below is a summary table of the active adjudications.

Northern New Mexico Adjudications			Total Defendants: 27,000 (approximate)*		
Basin	Total Acres	Adjudicated Acres	% Acres Adjudicated	Court	Date Filed
San Juan	37,829	HSR Incomplete	0	11th Jud. Dist.	1975
Jemez (Abousleman)	2,033	2,033	100%	Federal Court	1983
Zuni	980	HSR Incomplete	0	Federal Court	2001
Rio San Jose (Kerr McGee)	26,849	HSR Incomplete	0	13th Jud. Dist.	1983
Rio Chama	34,233	28,568	83%	Federal Court	1969
Taos/Hondo (Abeyta)	13,684	13684	100%	Federal Court	1969
Santa Cruz/Truchas (Abbott)	7,218	7,218	100%	Federal Court	1968
Nambe / Pojoaque / Tesuque (Aamodt or NPT)	2,735	2,716	99%	Federal Court	1966
Santa Fe River	816	595	73%	1st Jud. Dist.	1971/74
Sub-Total	126,377	54,814	43.37%		
Lower Rio Grande Stream System Adjudication (LRG)			Total Defendants: 20,000 (approximate)*		
				Court	Date Filed
				3rd Jud. Dist.	1985
Sub-Basins	Total Acres	Adjudicated Acres	% Acres Adjudicated		
Rincon Valley	21,649	17,014	79%		
Northern Mesilla	20,004	3,404	17%		
Southern Mesilla	53,883	7,596	14%		
Outlying Areas	3,790	62	2%		
Sub-Total	99,326	28,076	28.27%		
Pecos River Stream System Adjudication (Lewis)			Total Defendants: 18,000 (approximate)*		
				Court	Date Filed
				5th Jud. Dist.	1956
Sub-Basin	Total Acres	Adjudicated Acres	% Acres Adjudicated		
Gallinas (pt of Upper Pecos Basin)	7,805	3,144	40%		
Fort Sumner	14534	7,444	51%		
PVACD (pt of Rowell Artesian Basin)	128,274	123,032	95%		
Hondo Stream System	6,748	6,739	99.9%		
CID (pt of Carlsbad Underground Basin)	19,508	16,681	87%		
Peñasco		HSR Incomplete	0		
Sub-Total	176,869	157,040	88.79%		
Totals	402,572	239,930	59.60%		

Based on Office of State Engineer chart presented to the Interim Water & Natural Resources Committee (9-24-07) HSR = Hydrographic Survey Report. This chart describes the amount of acreage completed in the adjudication rather than percentage of defendants.

* Total Defendants is an approximate number because tracts are split and ownership changes on an ongoing basis.

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

New Mexico does not have a separate water court designated to hear only water disputes. Instead, New Mexico has a judge assigned to hear water matters in each judicial district and special masters who assist the judges by conducting the day-to-day operations of the case.

The attorneys working for the Office of the State Engineer are given authority by the Attorney General to represent the state of New Mexico in adjudications. They are granted special commissions by the Attorney General and are called Special Assistant Attorneys General.

Process of an Adjudication

The process of adjudication is complex and lengthy, mainly due to the large number of claimants involved. For example, it is estimated that in the Lower Rio Grande adjudication there are 16,000 claimants, in Aamodt there are approximately 2,000, and the estimated number of potential claimants in the Middle Rio Grande when it is eventually adjudicated, ranges from 100,000 to 180,000. The complexity of adjudication is illustrated in the chart showing the adjudication process on the following page.

Hydrographic Survey

Under current procedures, the first step in the process is a hydrographic survey. The Water Code of New Mexico directs the State Engineer to conduct hydrographic surveys and investigations for preparation of adjudication.

Upon the completion of the hydrographic survey of any stream system, the state engineer shall deliver a copy of so much thereof as may be necessary for the determination of all rights to use of the waters of such stream system together with all other data in his possession necessary for such determination, to the attorney general of the state who shall, at the request of the state engineer, enter suit on behalf of the state for the determination of all rights to the use of such water, in order that the amount of unappropriated water subject to disposition by the state under the terms of this chapter may

become known, and shall diligently prosecute the same to a final adjudication: provided, that if suit for the adjudication of such rights shall have been begun by private parties, the attorney general shall not be required to bring suit: provided, however, that the attorney general shall intervene in any suit for the adjudication of rights to the use of water, on behalf of the state, if notified by the state engineer that in his opinion the public interest requires such action.

NMSA 1978, Sec. 72-4-15.

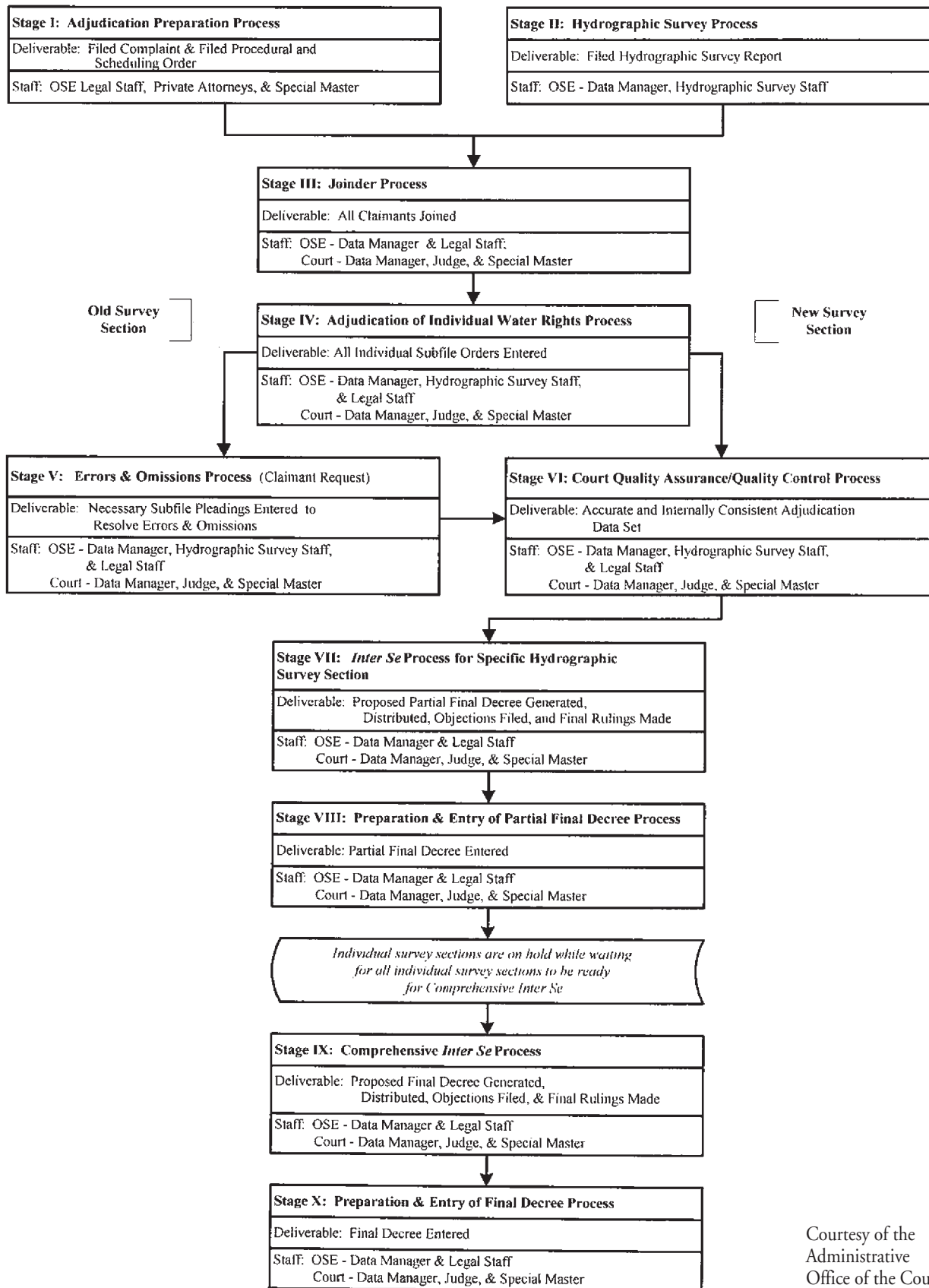
Aerial and satellite photos from multiple years are analyzed by the OSE in order to determine beneficial use. Historic records and existing water rights files are consulted and field investigations by OSE staff verify current water use and irrigation practices. The OSE generates a final report that captures this information. Pursuant to NMSA, Sec. 71-4-15, the hydrographic survey is filed with the court. The hydrographic survey forms the basis for the state's description of the water rights presented to the claimant.

Subfile Phase

In the subfile phase, individual claimants are first joined as defendants and then water rights claims are adjudicated between the State and the claimants. The process may involve an offer of judgment followed by a subfile order if the State and the claimant reach an agreement. An expedited process being used in some adjudications combines the two documents into a consent order. A subfile order may contain all of the elements of the water right (ownership, quantity, priority, place of use, purpose of use, point of diversion); or the court may decide in a procedural order that a determination of certain elements will be delayed until other rulings which effect all parties are complete. It is helpful to think of subfile orders as bricks which are building the final decree. If the OSE and a claimant cannot reach agreement, the disputed matter may be mediated and/or litigated (see below). The subfile phase can be one of the lengthiest phases of an adjudication.

Portions of the stream system of the adjudicated area are usually addressed in stages. For example, in the San Juan adjudication, the La Plata section of the stream system contains nine ditches. The OSE

New Mexico Adjudication Process



Courtesy of the Administrative Office of the Courts

started by sending claimants consent orders for water rights on the first four most northern ditches. As of the summer of 2007, over 100 consent orders had been sent out for surface water rights. Close to 70 were signed and roughly 20 were sent back and disputed. Once all the consent orders for the La Plata Section are filed with the court, then work will begin on the main stem of the San Juan stream system. By addressing the particular portions of the stream system in this systematic way, the OSE has the opportunity to work with small groups and individuals in a more focused and expeditious manner.

Consent Orders

If both the OSE and a claimant agree as to the elements of a water right, then both parties sign the consent order and it is submitted to the court for review and entry. If the court agrees, then it signs the order and enters it 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.

Disputed Claims

If a defendant/claimant disputes the water right as it is described by the OSE, the defendant and OSE may negotiate for changes. For example, a more senior priority date may be requested or more irrigated acreage may be sought. The State considers evidence offered by the defendant in reconsidering the water right. Even old family photos with an irrigated field in the background can be of assistance in showing that beneficial use of water has occurred over the years on the land in question. The OSE meets with claimants to hear their claims and many times, changes to the water right are made and the dispute is settled. Disputed claims may also go to mediation and, if still unresolved, be heard by the court or special master. This choice depends upon the procedures the judge has adopted.

Global Issues

Global issues are matters that affect the stream system as a whole, or a large group of claimants. These issues may be addressed at any stage of the adjudication. This choice depends upon the judge's

preference or when an issue arises. Global issues can involve matters such as the priority date for all of the parcientes on an acequia, or the farm delivery requirement (duty) applied to a stream system. In the Lower Rio Grande adjudication, the Court has ordered that all parties be joined before rulings on global issues such farm delivery requirements and issues between Elephant Butte Irrigation District and the State are made.

Inter Se

The *inter se* phase of the adjudication process is conducted by the court to resolve issues arising between defendants. Defendants may challenge the water rights of other defendants. These challenges may go to mediation or receive a hearing.

Partial Final Decrees & Final Decrees

Once the *inter se* phase is complete, the court enters a partial final decree or a final decree. Partial final decrees include a portion of the finalized rights of an adjudication, such as non-federal water rights with Pueblo and other federal claims omitted or may include all the right in a section of a stream system. Final decrees involve all parties and all water rights to an adjudication.

New Mexico Supreme Court Ad Hoc Committee

On October 15, 2002 the New Mexico Supreme Court established an ad hoc committee to examine and study the promulgation of rules of procedure for water litigation and stream adjudications in New Mexico. The ad hoc committee researched the following issues: *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.

On June 13, 2007 the Supreme Court of New Mexico issued new rules on the procedures for adjudications. The rules are open for public review for one year and then go into effect. The rules address such issues such as: service and joinder of water rights claimants; stream system issues and expedited *inter se* proceedings; an annual joint working session; *ex parte* contacts; general problems of administration; and excusal or recusal of a water judge.

Joe Stell Water Ombudsman Program

In 2007 the Legislature funded the Joe Stell Water Ombudsman Program at the Utton Center at the University of New Mexico School of Law. Attorney Darcy Bushnell has been hired to direct the 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 acts as a third party neutral and is able to help self-represented claimants understand the options available in responding to pleadings and offers of judgment or consent orders from the State. The Ombudsman is not to provide legal advice.

Water Natural Resources Committee

The 2007 Interim Water and Natural Resources 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 and the OSE compared the process in several other states and continues to develop ideas for improving the process and will make recommendations to the Legislature. This effort is focused on future adjudications—primarily looking at how to approach the Middle Rio Grande—and not on existing, on-going adjudications.

By Brigette C. Buynak

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Darcy Bushnell, Program Director, Joe M. Stell Water Ombudsman Program, Utton Transboundary Resources Center.

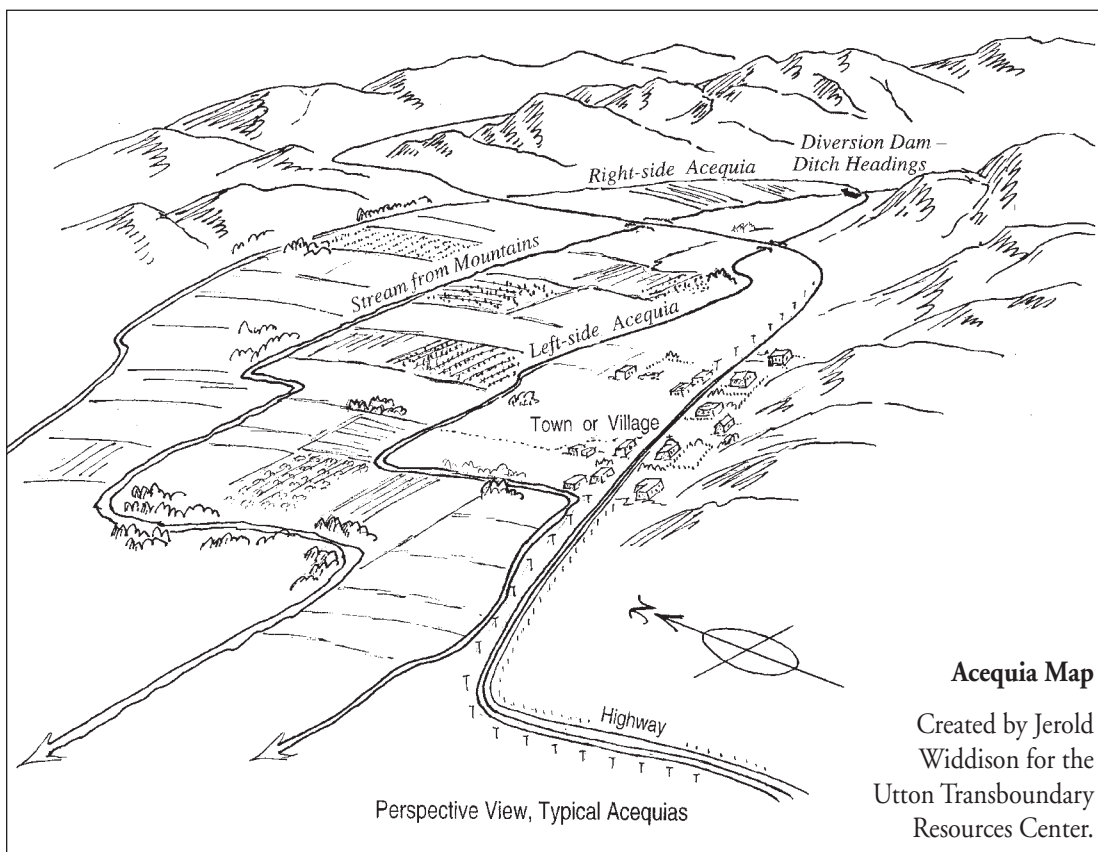
Acequias

Acequias are community irrigation systems in the villages and pueblos of New Mexico, primarily in the northern part of the state. The term *acequia* applies to both the physical structure of a water conveyance system dating back to well before New Mexico became a state, and to the political entity which manages the system. Acequias are the lifeblood of many communities.

The ditches of each system bring water from a river or mountain stream to the community. The acequias include the diversion dams, headgates, flumes, and other features needed to transport water to irrigate fields, gardens, croplands and pastures. Each acequia, however, is more than only its water-distribution facilities. As local organizations, the acequias are important in providing social and economic cohesion to their communities. The acequias are historic, integral parts of the culture and heritage of New Mexico.

“Thousands of families continue to derive all or part of their subsistence or livelihood from their ranchitos, small-scale farms and ranches. More importantly, *acequias* endure in large part because of attachment to place, the miracles made possible with water and the cultural longing to continue ancestral practices and pass them on to future generations.”

– Paula Garcia,
Executive Director,
New Mexico
Acequia Association



Acequia Map

Created by Jerold
Widdison for the
Utton Transboundary
Resources Center.

History

The acequias have a long history, reaching back to Juan de Oñate's earliest Spanish settlers. By 1846, when General Stephen Watts Kearny claimed New Mexico as a territory of the United States, acequia irrigation practices in the province had been prevalent for more than two centuries. The Kearny Code decreed that the "laws heretofore in force concerning water courses ... shall continue in force." The Treaty of Guadalupe Hidalgo, which followed in 1848, also recognized the rights and property of Hispanic New Mexicans. It pledged that "property of every kind" would be "inviolably respected" by the United States (Article VIII).

In fact, the acequia system did continue with little change, as was noted by the Territorial Engineer in 1909: "In a great many cases the people [Pueblo Indians and descendants of the Spaniards] still pursue their ancient methods of irrigation... . When the legislature took up the matter and enacted its first irrigation laws, these were based entirely upon the old customs in vogue on the small community ditches" (*Acequia Culture*, p. 50). In another report by the State Engineer, in 1928, economist Wells Hutchins concurred that the early legislators of the Territorial period "did little more than crystallize and adopt an amalgamation of long-established Moorish, Spanish, and Indian customs" (*Acequia Culture*, p. 50).

As time went on, it was found that the Treaty's simple wording was complex in its application. For example, a question arose over how communal property rights under Spanish, and later Mexican, law could be honored under a new system of United States law based on private property rights.

Statutes Recognizing and Regulating the Acequias

Notwithstanding its original custom, almost every aspect of the acequia system has come to be the subject of state laws. Most of these laws only confirm the traditional structure and give legal status to the acequia system within Anglo-style law-making. Some laws may be said to reconcile the acequia system with other provisions and principles of law that might conflict, or seem to conflict, with it. Other laws wrestle with emerging problems that affect or impinge upon the acequias, mostly having

to do with water and water rights. Thus over a period of years, various statutes have been enacted to protect the rights and integrity of the acequias of New Mexico. Several court decisions have also been important.

The major statute pertaining to the acequia system is the "Acequia Act," NMSA 1978 Chapter 73, Articles 2 and 3. Therein the acequias are declared to be political subdivisions of the State of New Mexico. They are "community ditches" distinguishable in that they are historically governed by elected commissions, and they usually serve more than three landowners.

Acequias are grassroots democratic organizations, governed by their members, known as *parciantes*. For example, every two years members vote for commissioners and a mayordomo. In past years, a dispute arose whether voting should be on a "one-member-one-vote" basis or a "one-acre-one-vote" basis. In *Wilson v. Denver*, 125 N.M. 308, 961 P.2d 153 (1998), the New Mexico Supreme Court found that Sec. 73-3-3 provided for alternative methods in calculating "interest" in an acequia for voting. Thus, in its bylaws, an acequia can adopt either method.

The Acequia Act also provides that the rights of a member may be suspended if the member fails to provide labor or payment of assessments to maintain the ditch. Further, the mayordomo can collect a civil penalty in magistrate court from *parciantes* who fail to provide either labor or payment. Similarly, members are prohibited from damaging the irrigation works or taking water contrary to order of the mayordomo or commissioners. Such offenses are criminal misdemeanors that may be prosecuted in magistrate court, and injunctive relief may also be sought.

Reconciliation with Other Laws

"Prior appropriation" is the basic concept in New Mexico's water law, but acequias have typically taken different approaches and have developed sharing agreements in times of water shortage. Acequias have long realized that the blunt application of the prior appropriation doctrine does not make for good neighbors. Such agreements have found legal backing, resting on statutory and constitutional authority. Chapter 72 states that local or community rules and customs "shall not be

molested or changed.” Section 72-4-19 states that adjudication decrees shall also include “such other conditions as may be necessary to define the right and its priority.” Finally, the State Constitution, at Art. XVI, Sec. 1 states, “All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.” Thus, if the custom of an acequia predates the Treaty of Guadalupe Hidalgo, the custom also falls within the protection of the Treaty.

Another legal aspect of acequias has to do with *non-use* of water. In 2003, the New Mexico Legislature enacted a new section to the Acequia Act, Sec. 73-2-55.1. This section of law codifies the acequia’s use of water when that water isn’t being put to beneficial use. The water may be temporarily reallocated to a water bank to augment the acequia’s system. It is not subject to loss for “non-use,” and the water bank is not subject to recognition or approval by the State Engineer. Hence the water is not subject to appropriation by other parties, as long as no change in the point of diversion nor a change of purpose of use has occurred.

Challenges and Concerns

Water Rights Transfers. The potential loss of acequia water rights through market transfers has been a major concern of acequia associations, especially in recent years. If water is transferred out of an acequia system, then the system may no longer be functional. To address these concerns, in 2003 the Legislature enacted Secs. 73-2-21, 73-3-4.1 and 72-5-24.1, creating a way for acequias to have control over such water right transfers.

By incorporating necessary language into its bylaws, an acequia can confer on itself decision-making authority over proposed water transfers of acequia water rights. If the acequia denies a transfer proposal, the denial must rest upon a finding by the commissioners of the acequia in question that the transfer would be detrimental to the acequia or community ditch or its members.

If an acequia does not change its bylaws, then the transfer process will be within the purview of the State Engineer, just as with transfers not involving acequias. Under the new statute, the State Engineer must honor the decision of the commissioners. The Office of the State Engineer may not approve an application for a transfer into or out of the acequia

until receipt of documentation that the acequia commission has approved the transfer. The commissioners of the acequia have 120 days to make a determination.

Easements. Another matter has to do with easements for lands over which ditches lie. If an irrigation ditch has been in use for five years, it is “conclusively presumed” that an easement for it has been granted by the landowner. In 2005, the Legislature amended Sec. 73-2-5 to provide for prosecution and penalties for interference with such an easement. It is unlawful to interfere with an easement or to prevent access to the ditch, and interference is punishable as a misdemeanor and in addition, a civil complaint may be filed by the mayordomo or the commissioners.

Tort/Contract Immunity. Acequias and their officers have also been given tort immunity. As political subdivisions of the State, acequias fall within the protection of New Mexico statutes at Sec. 37-1-23, which provide immunity for governmental entities. Moreover, the Tort Claims Act expressly provides tort immunity for acequia members acting within the course of their duties. In 2006, the Legislature amended the law to protect officers, volunteers and employees of community ditches or acequias from tort claims while acting within the scope of their duties. They may request insurance and self-insurance coverage from the Risk Management Division of the General Services Department.

Liaison and Assistance

Acequia Commission. In 1987, the Governor created an Acequia Commission. This commission advises the governor and the Interstate Stream Commission, as well as the U.S. Army Corps of Engineers. The commission considers issues involving rehabilitation, state funding, and federal funding. It acts as a liaison between local acequia organizations and state and federal governments. In 1993, the Legislature established the Acequia Commission by statute. It is attached to the Department of Finance and Administration.

Liaison at the State Engineer’s Office. Within the OSE there is an Acequia Liaison who assists acequias and *parciantes* with their water rights in adjudications. During 2004–2005, the Acequia Liaison focused on the Rio Gallinas and Rio Chama

stream systems. The Liaison has also worked extensively in the Taos and Santa Cruz adjudications with lesser involvement in the Jemez, Aamodt and Red River adjudications. Specifically, the Acequia Liaison may assist acequias with water allocation issues and governance questions. The Liaison also works with the Interstate Stream Commission, the Water Resources Allocation Program and the New Mexico Acequia Commission.

Acequia [Adjudication] Fund. In 1998, the Legislature created the Acequia and Community Ditch Fund, which provides funding to community ditches and acequias for legal representation and expert assistance in adjudications.

Acequia Rehabilitation Programs. Acequias may be provided with operational and maintenance assistance by certain state and federal funding programs.

- (1) **Technical Assistance.** Starting in 1961, the U.S. Department of Agriculture provides technical and financial assistance to acequias for rehabilitation projects. As administrations change over the years, funding cuts have ensued leaving the State Engineer's Office as the primary grant source. Technical assistance involves planning, design, engineering and supervision of construction projects.
- (2) **State Engineer Grants.** These grants provide financial assistance for acequia projects. The funding formula changes year to year, depending on the money available.

- (3) **ISC Loans.** The costs that an acequia needs to put forward for a construction or rehabilitation project may be covered by a loan from the Interstate Stream Commission. The loans are funded from the Irrigation Works Construction fund. This funding is provided by the Legislature on an annual basis.
- (4) **Corps Program.** A major source of funding for acequia projects is the federal Water Resources Development Act of 1986. Because of the acequias' cultural and historic values, the U.S. Congress authorized the Secretary of the Army to ensure funding for diversion structures at an estimated \$40 million. These federal monies are matched at the state and local levels.

Conclusion

Acequia members historically fought for their rights to use the water of New Mexico. The voices of many acequia members have long been heard in the halls of the legislature. The New Mexico Acequia Association (NMAA) was formed in the 1990s. It is governed by the Congreso de las Acequias, a federation of regional associations of acequias. According to the NMAA, over 500 acequias are represented by the regional delegations. The NMAA has actively mobilized to define and press for passage of much of the recent legislation to protect the acequias.

By Brigette C. Buynak and Jerold Widdison

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Indian Water Rights

Overview

Water rights issues are deeply complex, as competing interests and doctrines about who owns water are compounded by serious concerns about the long term sustainability of growth and development in the West. Theories about ownership and use of water are also contentious because federal Indian law in general is such an amalgam of often conflicting interpretations of treaties, executive orders, and aboriginal rights recognized by Spain, Mexico and the U.S. The nature of sovereignty, upon which land and water ownership and control is based, complicates these matters as tribal, state, and federal sovereigns often duel to see whose authority will trump in making critical decisions about water.

One or more pueblo or tribe is located within every stream system in New Mexico. Each has claims to rights to use the water in the stream. In New Mexico, their rights are significant either due to their early priority dates or to the large amount of water rights claimed, or both. In some instances, such claims have the potential to displace a significant number of junior water rights.

Pueblos and Indian tribes in New Mexico assert aboriginal, federal reserved, and state law based water rights claims, which, they argue, are not subject to forfeiture or abandonment. Some pueblos and tribes also assert claims to storage rights and contract water rights. While pueblos and tribes often own state or federal law based water rights, “Indian water rights” generally refers to rights established, recognized or created by the courts. These common law theories or doctrines continue to be refined and evolve, so discussing the nature and extent of “Indian water rights” is a complex topic.

Prior Appropriation

For historical reasons, Indian tribes are not required to conform wholly to state systems of water allocation. Largely due to interstate river compacts that did not include Indian tribes, and U.S. government irrigation projects subsidized by the Bureau of Reclamation, many non-Indians were able to put water to use before most Indian nations. It would thus be unfair to force a system of prior appropriation on tribes who have more senior rights to water, but did not have as much political or economic power as non-Indians during the era of big dam building in the West.

The Winters Doctrine

The leading reservation treaty rights case is *Winters v. U.S.*, 207 U.S. 564 (1908). A dispute over Montana's Milk River between non-Indian irrigators and Gros Ventre and Assiniboine Indians on the Fort Belknap Reservation led the Supreme Court to announce that, when Congress establishes a reservation, it implicitly reserves water sufficient to provide a permanent agricultural homeland for the Indians. This reserved right of Indians to unappropriated water appurtenant to their land vests on the date of the creation of their reservation, and is a superior claim to the rights of future appropriators. Further, the Court stated that the U.S. reserved these waters "for a use which would be necessarily continued through years," meaning that the "use it or lose it" notion under the prior appropriation doctrine does not apply to Indian reserved water rights. In a related case, *U.S. v. Winans*, 198 U.S. 371 (1905), the Supreme Court recognized that Indians also have aboriginal rights from "time immemorial" to use certain natural resources—including outside their current tribal lands—except when those rights have been extinguished by sovereign act.

Quantification

A final quantification of senior tribal water rights is vital, so much so that New Mexico declared the resolution of tribal claims as a critical statewide priority (State Water Plan 2003). The unsettled nature of the law in this area makes accomplishing this task very difficult, however. In the McCarran Amendment, 43 U.S.C. § 666, the federal government waived its sovereign immunity to allow adjudication and administration of federal water rights in state courts. This paved the way for an exercise of concurrent state and federal court jurisdiction over adjudications of tribal water rights as well. Thus, many state courts are involved in comprehensive stream adjudications, but federal standards still provide the substantive law in this area.

PIA Standard

As discussed below, Pueblo Indian land grants currently remain out of the mainstream of federal Indian water law. For the various Indian reservations, though, the Supreme Court case of *Arizona v. California*, 373 U.S. 546 (1963),

announced that water quantification should proceed using the "Practicably Irrigable Acreage" standard (PIA). In accord with *Winters*, the Court saw enough water being reserved to irrigate all the practicably irrigable acreage on the reservations, and to serve the current as well as future agricultural needs of the Indians.

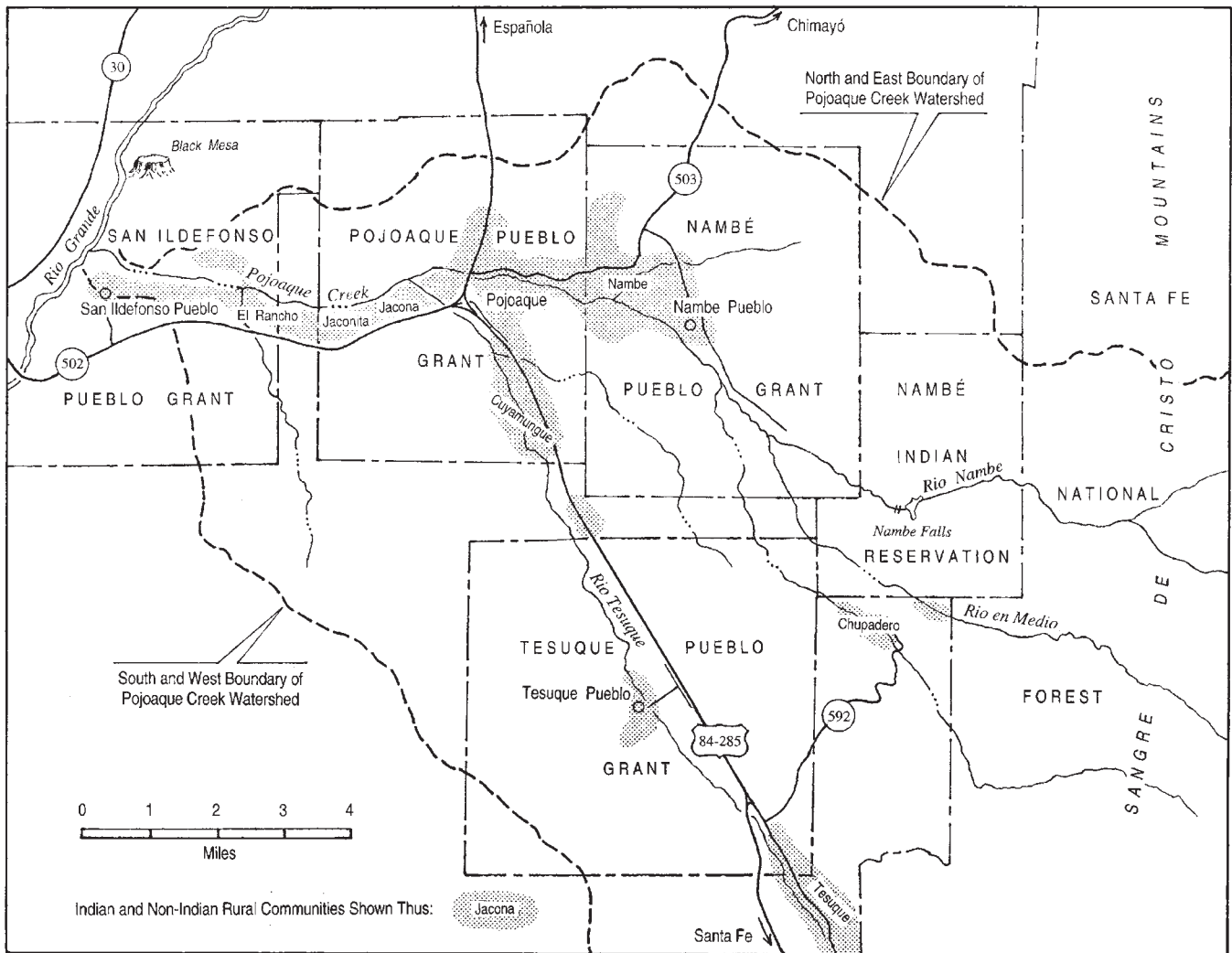
Replacements for the PIA standard have been proposed. In a draft opinion before her recusal in the Big Horn Adjudication in 1988, Supreme Court Justice O'Connor advocated a doctrine to require courts to apply reserved rights with "sensitivity" to state water users. The Arizona Supreme Court in 2001 proposed the "Homeland Standard," a balancing test which would weigh all of a tribes economic activities, agricultural and non-agricultural, to decide the amount of water needed for their well-being. In the meantime, however, PIA survives as the measure of how to quantify Indian reservation water rights.

Pueblo Water Rights

Pueblo Indians hold aboriginal rights to their land and use of water under Spanish and Mexican laws, and by the U.S. through the Treaty of Guadalupe Hidalgo in 1846. The U.S. District Court has thus far not applied *Winters* rights to Pueblo land grants, but the priority dates for Pueblo water users are still considered senior to all others. A proposed quantification standard for Pueblo water is the HIA, or Historically Irrigable Acreage. This judge-made doctrine (developed by the federal district court in the *Aamodt* adjudication) would recognize prior rights of Pueblo Indians to water necessary for domestic uses and for irrigation of all acreage under cultivation between 1846 and the passage of the Pueblo Lands Act of 1924.

Government-to-Government Relations

Indian nations claim inherent sovereignty and treaty rights as the basis for many of their positions on water policy. Concerns about compromising sovereignty and senior water rights have kept some tribes away from the negotiating table, but reliance on litigation is inescapably complex, costly, and time consuming. All sides are beginning to emphasize the importance of government-to-government consultations on water issues. For example, both state and tribal entities support negotiated shortage sharing agreements as an alternative to priority



Pojoaque Creek Watershed ("Aamodt . . ." Adjudication)

administration, provided that the tribal or Pueblo's senior water rights are recognized.

The State Water Plan points out the need for the state to commit the necessary funds and resources to settle Indian water rights claims. In 2005–2006, the State entered into three settlement agreements to resolve the water rights claims of six tribes and pueblos: the Navajo Nation in the San Juan River adjudication; Taos Pueblo in the Taos adjudication (the *Abeyta* case); and Pojoaque Pueblo, San Ildefonso Pueblo, Nambé Pueblo and Tesuque Pueblo in the *Aamodt* adjudication. In 2006 it was estimated that the cost to the federal government would be approximately one billion dollars and the state's share would be one hundred million dollars over the period of construction for the various infrastructure projects needed to implement these

three settlements. In June 2007, Senator Pete Domenici introduced a ten year funding plan to raise an estimated \$1.37 billion to pay the federal share of pending Indian water rights settlements in New Mexico, including the Navajo, Aamodt and Abeyta agreements. The bill would make money available to build the infrastructure required by these agreements. In 2007, the New Mexico Legislature appropriated \$10 million to the Indian Water Rights Settlement Fund, a fund established for the State to pay its share in Indian water rights settlements.

Finally, any workable settlement of competing rights to water in New Mexico must involve more than quantification of those respective rights. Appropriate and predictable rules for the administration of all water rights must also be

Pojoaque Creek Watershed

Created by Jerold Widdison for the Utton Transboundary Resources Center.

developed. Unless the State and tribes work cooperatively, courts will continue to have power to impose rules from the bench. This may be a greater cession of authority than either sovereign would like.

By Michael Osborn,
University of New Mexico School of Law (2007)

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Navajo-Gallup Water Supply Project

Introduction

The northwestern section of New Mexico, an arid section of the state, is in the midst of a water crisis. Navajo Nation communities and the city of Gallup rely on a rapidly depleting groundwater supply that is inadequate to meet present needs and anticipated growth. Other water sources are needed to meet current and future M&I demands of more than 43 Navajo chapters, including the communities of Fort Defiance and Window Rock in Arizona, the city of Gallup, and the Teepee Junction area of the Jicarilla Apache Nation. The proposed project would convey a reliable M&I water supply to the eastern section of the Navajo Nation, the southwestern part of the Jicarilla Apache Nation, and the city of Gallup via diversions from the San Juan River in northern New Mexico.

In the view of the Navajo Nation, a poverty rate of greater than 50% and a growing population combined with a lack of infrastructure, particularly for water, on a vast, arid reservation with widely dispersed communities and households has created an urgent need for adequate water supplies. Economic development, needed to break the cycle of sustained poverty, is dependent upon a reliable water supply and infrastructure. The city of Gallup's position is that its groundwater is being depleted faster than it is being recharged, and the quality does not meet secondary water quality standards. Severe water shortages are anticipated within the next decade. The Jicarilla Apache Nation asserts that it needs a reliable, high quality water supply in areas outside Dulce, New Mexico to continue diversifying their economy for on-reservation employment and to live in a more dispersed manner as they did traditionally and have stated a desire to do so in the future.

The San Juan River

The San Juan River, an upper basin tributary of the Colorado River, drains nearly 16 million acres in the Four Corners area before flowing into Lake Powell. Under the Upper Colorado River Compact, New Mexico was allocated 11.25% of the Upper Colorado River basin's yield, amounting to 669,000 acre-feet of depletion annually. This is a relatively large share, in part, for the State to address the needs of the Native Americans in that region.

Settlement Agreement

This river basin is the subject of a water settlement agreement entered into on April 19, 2005 between the Navajo Nation and the State of New Mexico, and it is the proposed water

“ There would be watering stations all along the way for the convenience of the Navajo Nation. Some of the people out there have to haul water for miles and miles. The water stations would be used to ease the burden of those people.”

– Joe M. Stell,
former member of the
New Mexico House of
Representatives and co-chair of
Interim Water and Natural
Resources Committee

source for the Navajo-Gallup Water Supply Project. The proposed settlement agreement (San Juan River Settlement) would resolve the Navajo Nation's water rights without litigation, supply water to the city of Gallup, New Mexico, and recognize existing and authorized uses of water in the San Juan River Basin including the San Juan-Chama Project. Water development projects for the Navajo Nation would be provided, in exchange for a release of Navajo claims to water that could otherwise displace non-Navajo users in the San Juan Basin.

Federal Reserved Water Rights

The Navajo Nation asserts a substantial claim to water in the San Juan with a priority date of June 1868 under the *Winters* doctrine. The *Winters* legal doctrine is the cornerstone of American Indian water rights. It implies a reservation of water for the Indians' present and future use and exempts Indian reservations from state water law. The *Winters* doctrine declares that when Congress reserved land for Indian reservations it also reserved water needs to fulfill the purpose of the reservation.

Because the Navajo Nation was not a party to the compact that grew out of the Colorado River Conference in 1922, its claim has been unquantified even though its rights are senior to other rights on the river. This failure of quantification has cast a shadow of uncertainty over all the water rights in the San Juan system. In recent years, the Navajo Nation encouraged the state of New Mexico to negotiate a settlement rather than using litigation to resolve the issues among the various water users in the region. The Office of the State Engineer agrees that litigation is costly, divisive, and much more time-consuming than negotiation, especially when the issues are so complex.

Infrastructure to Supplement Inadequate Water Supplies

Navajo Nation

Between 30% to 40% of households on the Navajo Nation do not have direct access to public water systems, while its population is expected to increase to nearly 500,000 by 2040. Realizing that adequate water is a necessary condition for prosperity, the Diné leaders are determined to improve water supply to their people and have an ambitious and

far-reaching water development strategy that includes proposals for several large regional water supply projects.

The City of Gallup

The city of Gallup, on the other hand, sits on geologic formations that, in theory, may contain enough water to supply the area for thousands of years. However, only a tiny fraction of that water can economically be made available for municipal water needs. The city currently has a well field north of it at Ya-Ta-Hey where the water table is declining by 20 feet per year and water quality is declining. The city is mining the water that it is currently using, that is, depletions are exceeding recharge. Recent cost estimates show it would take \$7 million just to drill and equip new replacement wells. This cost estimate does not include necessary additional pipelines or treatment costs. Because of the prohibitive cost to access the underground water, Gallup's citizens have become painfully aware that if something is not done very soon, their source will go dry in the next ten to fifteen years.

Treatment Plant

The project also includes the largest water treatment plant in New Mexico, which the plan proposes to locate just outside Kirtland, New Mexico. The project pipeline crosses Farmington to the Shiprock Pipeline creating the opportunity for regional conjunctive operation.

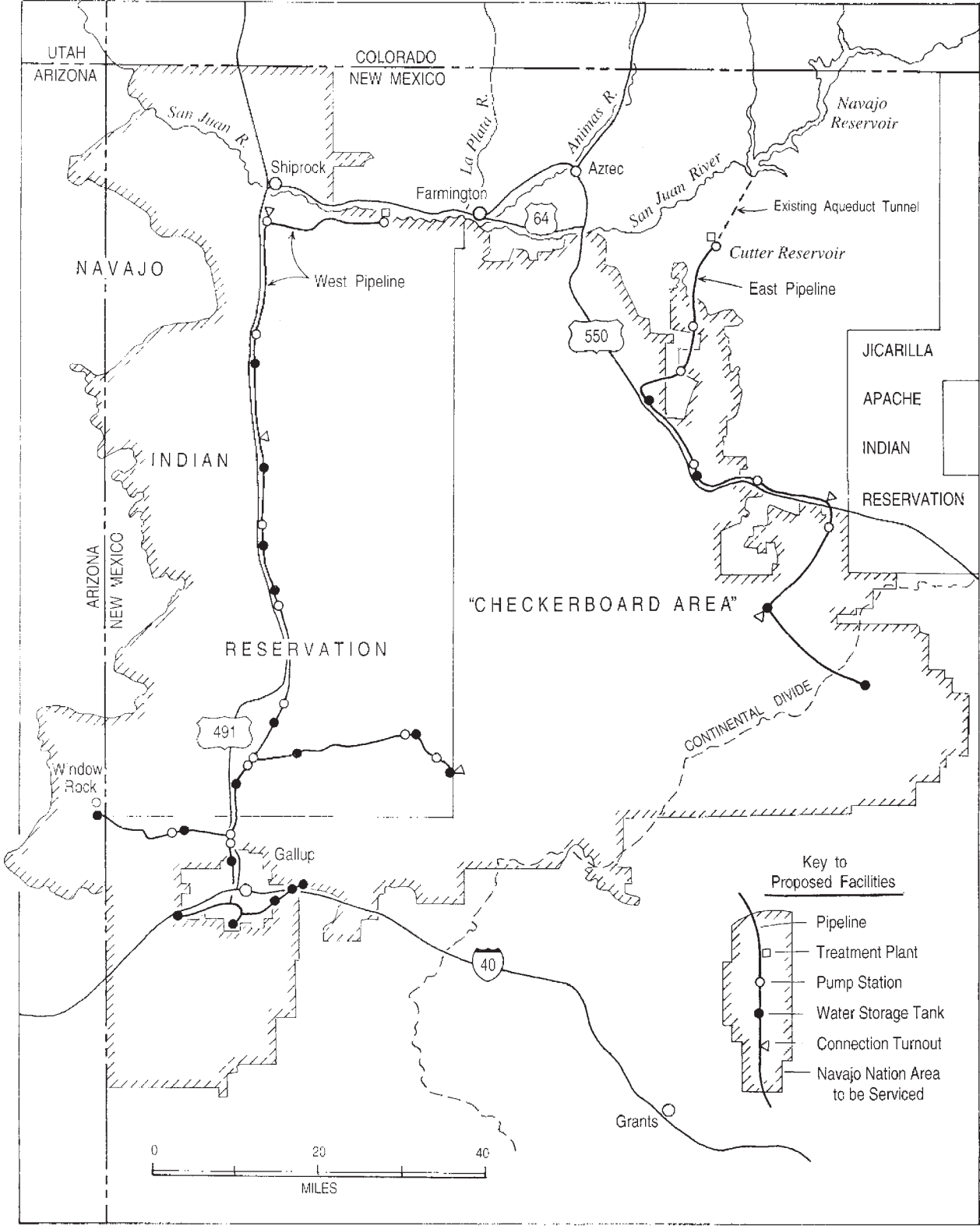
Arizona

The project serves Window Rock, Arizona, which is the capital of the Navajo Nation and one of the larger Navajo communities. The water for this part of the pipeline, however, comes from the Central Arizona Project, as included in a U.S. Senate bill which specified a diversion of approximately 6,411 acre-feet for this purpose.

Diversions and Laterals

The proposed project includes two separate laterals. The Cutter Lateral begins at the existing Cutter Reservoir and conveys water south along U.S. Highway 550 and serves the southern part of the Jicarilla Apache Nation. The main Navajo-Gallup San Juan Project lateral diverts water from the San Juan River at the existing PNM San Juan Generating Station Diversion, and conveys water along Highway 491 south toward Gallup. Along

the way, a pipeline would be built to serve Window Rock, Arizona. See map below.



NAVAJO-GALLUP WATER SUPPLY PROJECT

Created by Jerold Widdison for the Utton Transboundary Resources Center.

Costs

In 2003, it was estimated that the cost of the project would be \$432 million. In 2007, the cost is up to \$800 million. The cost is prohibitive for any one municipality or community. If done in concert, it is anticipated to garner substantial federal funding—possibly as much as 80%.

Amount of Water

The proposed San Juan River Settlement allocates approximately 55% of the water available for use in the State of New Mexico from the San Juan River to the Navajo Nation and includes almost \$800 million in monetary resources to put all of this water to practical use. However, the proposed settlement clarifies that much of the Navajo Nation's share of the 669,000 acre-feet of water diverted from the San Juan under the settlement is already in use by the Diné or already allocated. The only major new water use is the amount designated for the Navajo-Gallup Water Supply Project. This project would deplete approximately 35,893 acre-feet of water annually from the San Juan River. The proposed allocation is as follows: Navajo Nation—27,193 a-f; Jicarilla Apache Nation—1,200 a-f; and the City of Gallup—7,500 a-f.

Concerns

Not everyone in the Four Corners area favors the settlement. Concerns have been voiced about the quantity of water allocated to the Navajos in the settlement. The San Juan Agricultural Water Users Association wonders whether it is likely the Navajo Tribe will market the water downstream to states like California and Nevada.

Federal Legislation

While federal legislation was introduced this year to implement the San Juan River Water Rights Settlement, the cost of the project is a significant stumbling block. In April, New Mexico senators Pete Domenici and Jeff Bingaman introduced the Northwestern New Mexico Rural Water Projects Act

(S. 1171) that would contribute funding over two decades to construct the Navajo-Gallup Water Supply Pipeline and take other steps to settle the Navajo water rights claim on the San Juan River. But representatives from the Bureau of Reclamation and the Department of Interior had this to say about the bill in testimony before the Energy and Natural Resources Committee:

If enacted, the cost of S. 1171, alone, is estimated to exceed 1 billion dollars. If the other two proposals from New Mexico, Aamodt (involving the Pueblos of Nambe, Pojoaque, San Ildefonso, and Tesuque) and Abeyta (involving the Pueblo of Taos), about which the Administration also has raised serious concerns, were to be enacted as currently envisioned by their proponents, total expenditures for Indian water rights settlements in New Mexico alone are likely to exceed \$1.5 billion... . The Administration did not participate in the drafting of the water rights settlement embodied in S. 1171, and does not support a water settlement under these circumstances.

Not to be deterred, New Mexico Senator Pete Domenici then came up with a plan to fund all three negotiated New Mexico Indian Water Rights settlements: Navajo Nation, Aamodt, and Abeyta. In June he introduced the Reclamation Water Settlements Fund Act of 2007, which would authorize a 10-year funding source to generate an estimated \$1.37 billion to pay for the three settlements after all the issues have been resolved and they are signed into law. The fund would be used for planning, designing, or construction activities of the U.S. Bureau of Reclamation. The NM State Legislature appropriated significant funding for Navajo and non-Indian clean water supplies in the checkerboard area in 2007.

By Brigitte Buynak and Jerold Widdison

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Eastern New Mexico Rural Water System (Ute Pipeline Project)

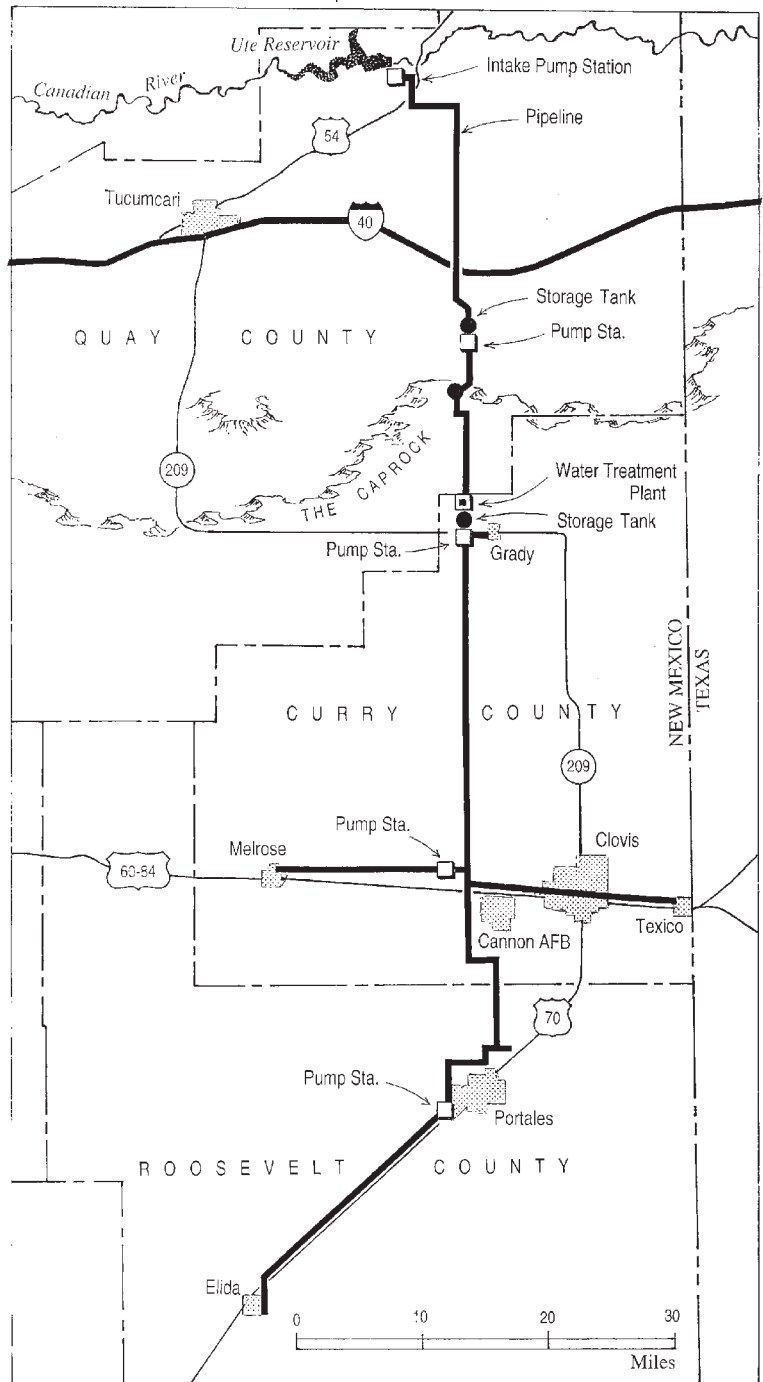
The Ute Pipeline project, officially known as Eastern New Mexico Rural Water System, is a proposed 151-mile-long project to augment the domestic water supply of several eastern New Mexico communities. Water will be pumped from Ute Reservoir to the cities and towns of Clovis, Portales, Melrose, Texico, Grady, and Elida, as well as to Cannon Air Force Base and Curry and Roosevelt counties. (See map)

Background

The State created Ute Reservoir by damming the Canadian River near Logan in Quay County. The dam's purpose was to retain the water of the Canadian that New Mexico was allowed under the three-state Canadian River Compact (New Mexico, Texas, Oklahoma). From the beginning there was an intention to use the water by means of a project such as the one currently proposed.

To pursue such a project, an organization known as the Ute Dam Municipal Water Association was formed, including cities from Tucumcari south to Artesia. Eventually in 1987 a new organization was formed through a joint powers agreement, the Ute Reservoir Water Commission (URWC). Ten years later the New Mexico Interstate Stream Commission, which "owns" the water in the reservoir, allowed the URWC a first right of refusal on 24,000 acre-feet of water—the reservoir's annual "firm yield"—for \$36,000 annually through December 31, 2008. Unless that date is extended—which may well

“ Anticipating the potential water needs in eastern New Mexico and in the interest of maximizing New Mexico’s use of water from the Canadian River stream system, the New Mexico Interstate Stream commission completed construction of Ute Dam and Reservoir in 1962 at a present day cost of over \$125 million.”
— John D’Antonio,
New Mexico State Engineer



Eastern New Mexico Water System

Created by Jerold Widdison for the Utton Transboundary Resources Center.

happen if the pipeline project makes adequate progress—the URWC will be obligated to *purchase* up to the same amount of water for \$25 per acre-foot, or about \$600,000. These costs would be shared among the dozen entities, which have a combined population of about 73,000 residents.

In 2001, eight entities currently involved in Curry and Roosevelt counties, with State approval, formed the Eastern New Mexico Rural Water Authority (ENMRWA) and charged it with actually planning, designing, funding, and overseeing the construction of the pipeline. In 2003, the ENMRWA added the Quay County members mentioned above. Two years later, however, those members withdrew, although they continued to reserve their portions of the 24,000 acre-feet of reservoir water for other purposes, including supplying water for the “Ute Lake Ranch” development on the south side of the reservoir. Hence the pipeline project now involves the proposed delivery of 16,450 acre-feet per year.

The Project as Proposed

The main water line will run almost due southward from Ute Reservoir as far as Portales. A number of “laterals” off the main line will bring water to Clovis and the other communities, and to some outlying areas of the counties. The plan is to pump the water from the reservoir to the 4,500-foot rim of the Caprock, and then to a water treatment plant near Grady which will serve the entire system. From the water treatment plant, the system will operate primarily by gravity flow, although three booster pump stations will be needed. Each participating entity will pay a share of the construction costs and the operation and maintenance costs of the pipeline and facilities, as well as the costs of the water itself, depending on how much water each has reserved. Aside from construction costs, the benefited entities can expect to receive water at about \$31 per acre-foot.

As of October 2006 the project had a price tag of \$436 million—a \$50 million increase over the cost discussed at the ENMRWA’s meeting two months previously. Twelve years ago the cost estimate was \$220 million. According to Scott Verhines, an engineer and program manager for the Authority, numerous studies regarding the various future water supply scenarios for eastern New Mexico, done over the last forty years, show the Ute project to have the greatest benefit/cost ratio and the lowest net present

value, including consideration of a “no project” alternative. The “no project” alternative implies no additional groundwater development in the region. The need for the project, now as in the past, lies in the need to reduce the volume of municipally pumped groundwater to protect and reduce the drawdown of the Ogallala aquifer.

Numerous projects of this kind in other states have been paid for largely by federal funds. If the cost allocation is similar to other federally supported water projects, the federal government would pay 75 percent, with the State paying 15 percent and the ENMRWA 10 percent.

Current and Upcoming Actions

New Mexico’s U.S. senators are expected to introduce a bill for federal funding of the project in the second session of the Congress to begin in January 2008. (Introduction in 2007 was prevented by administrative conditions accompanying the political changeovers of the 110th Congress.) Governor Richardson’s “Year of Water” initiatives included \$5 million for the project in 2007, of which only \$1 million was appropriated. As expected, however, the 2007 Legislature approved a \$2.3 million capital outlay request for the project through the New Mexico Water Trust Board. That amount was appropriated, though with a 20 percent loan requirement in accordance with Board policy—the local entities must pay 20 percent of the \$2.3 million. In other recent years the Legislature has provided more than \$7 million for planning and engineering services.

At a field hearing of the U.S. Senate Energy and Natural Resources Committee in Clovis, August 14, 2007, testimony was taken on the need and importance of the project. Senator Bingaman is chairman of the committee, and Senator Domenici is ranking minority member. The senators felt that the project is currently ready and appropriate for federal funding.

Meanwhile, Authority members have authorized Albuquerque consulting firm CH2M HILL to conduct a feasibility study for a wind energy plant, the revenues of which would help offset the pipeline project’s cost. Progress is also being made on the project’s “30-percent design” level, which includes aspects of engineering design and NEPA environmental documentation.



Photograph of
Ute Reservoir

Incidentally, the creation of the Water Trust Fund and Board in New Mexico is in no small part owed to the early planning and fact-finding efforts on the Ute project, dating back to 2000/2001. A team from eastern New Mexico visited other states having similar regional and rural water projects, to investigate and learn from their experiences. Other successful state models included significant investment to leverage local and federal funds to

implement large-scale rural regional projects that could not otherwise be completed. The team brought these ideas back to New Mexico, and the eastern New Mexico legislators—Pat Lyons and Joe Stell in particular—picked up the ball and ran with it. Over the next two years the Water Trust Fund (WTF) and its managing Board became realities.

By Brigette Buynak and Jerold Widdison

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Salt Basin

Introduction

The Salt Basin, officially called the Salt Underground Water Basin, runs under Chaves and Otero counties in New Mexico and into the northeast corner of Hudspeth County in Texas. The majority of the Basin is located in Otero County with most of its water likely originating in the Sacramento Mountains in New Mexico and flowing underground south from the northern Salt Basin, Otero Mesa, and Diablo Plateau toward the salt flats near Dell City, Texas. The salt flats are characterized by numerous dry lakes and ponds, gypsum dunes, and extensive salt deposits. The central area of the salt flats is largely devoid of vegetation, most of which is found on the edges of lakes.

Declaration of the Salt Basin

The State Engineer declared the Salt Underground Water Basin in 2000; studies in the subsequent two years following the declaration indicate the potential for 15,000–100,000 acre-feet of sustainable water withdrawal annually from this underground source. The groundwater flow from Otero Mesa and the Sacramento watershed is believed to be toward a highly fractured region known as the Otero Break.

“The Salt Basin is a misleading name for the quality of water on the New Mexico side; it’s good fresh water and it’s to be valued.”

– Joe M. Stell,
former member of the
New Mexico House of
Representatives and
co-chair of Interim
Water and Natural
Resources Committee

Salt Basin

Created by Geoff Klise using
NM OSE geodatabase and USGS
Hydrography Dataset



Hydrologic Studies

There are two hydrologic studies regarding the Salt Basin which show the potential for a significant amount of untapped groundwater. In 2004, John Shomaker & Associates Inc. conducted a study on the aquifer below Otero Mesa. In 2006, Sandia Labs, the U.S. Geological Survey (USGS), and the ISC authored *Knowledge and Understanding of the Hydrogeology of the Salt Basin in South-central New Mexico and Future Study Needs*. These two reports show the need to further study the area in order to better understand the hydrology of the Salt Basin, its potential as a water resource and the potential threats to the resource.

In 2006, the State began a three-year study that will allow the State to make better decisions on development and protection of Salt Basin water resources. The study will significantly reduce uncertainty in the quality, quantity, and location of Salt Basin water resources.

Oil and Gas Exploration Controversy

Controversy over Otero Mesa oil and gas exploration has been in the news for some years. In the past the controversy has been over protecting the wild and beautiful Chihuahuan Desert grassland. Now the debate has expanded to protecting groundwater. The Salt Basin aquifer is highly fractured limestone, which could be susceptible to contamination from the injection of oil and gas related waste into underlying rocks or from spills and leaks from pits and materials on the land surface.

In 2002, a leak was discovered in a 6-inch crude oil gathering line near Monument, NM just south of Hobbs, NM. Approximately 2,100 barrels of oil leaked from the pipeline, contaminating five acres of soil and polluting groundwater. The pipeline was only two years old.

In 2005, the New Mexico Oil Conservation Division compiled information regarding groundwater effects from leaks, spills and releases from oil and gas operations. There were close to 1,400 groundwater pollution instances that are attributed to oil and gas activities over the past decade. If oil and gas exploration is to occur, protection of potential water resources need to be insured.

Applications to Appropriate Water

Currently there are three applications pending before the Office of the State Engineer—all of which received protests during the process. The three applicants include: 1) Salt Basin ranchers in New Mexico—working together as Last Chance Water Co. Last Chance applied for 100,000 acre-feet of water rights that they would plan to sell to other users; 2) The Interstate Stream Commission—the ISC applied for a total of 90,000 acre-feet of water from three applications for possible use in New Mexico communities like Ruidoso, Cloudcroft and Alamogordo and/or to help meet interstate compact obligations on the Rio Grande and Pecos River; and 3) Cimarron Agricultural Ltd., a subsidiary of El Paso-based Hunt Building Co. Cimarron applied to develop and transfer more than 17,000 acre-feet of agricultural water rights to municipal and commercial use in West Texas, southern New Mexico, and Ciudad Juárez, Mexico. One of the protestors is the New Mexico Land Commissioner, Pat Lyons, who is urging changes in policy so the Land Office can derive revenue from the water under the State Trust Lands. The three applications are pending at the Administrative Litigation Unit at the Office of the State Engineer.

Moving Water from One Basin to Another

One enormous hurdle facing all the applicants is the cost of delivering water from the sparsely populated Salt Basin to areas where the current need for water exists. One estimate puts the price anywhere between \$120 million to \$400 million, depending on facilities and market locations.

Federal Legislation

In January 2007, Senator Pete Domenici and Senator Jeff Bingaman introduced the New Mexico Aquifer Assessment Act of 2007. This bill calls for the Interior Department to study several aquifers of New Mexico, including the Salt Basin. The bill seeks a study to look at aquifer recharge rates, the relationship between surface and groundwater flow and the vulnerability of aquifers to contamination. Representative Heather Wilson introduced a similar bill in April, 2007.

By Brigitte Buynak

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The Gila River

The Balance between Human and Environmental Needs

The Gila River is a tributary to the Colorado River. It begins in the high mountains of the Gila Wilderness and flows southwesterly through Arizona. The Gila River is highly prized by the citizens of New Mexico, neighboring communities, conservationists and other people who love and appreciate the wilderness. There are longstanding differences between those who would like to have the Gila River remain in its free-flowing state and those who would like to see its waters dammed or diverted for other uses.

During the 2007 regular legislative session, the Governor vetoed an appropriation of \$945,000 earmarked for planning in the Gila basin. The Governor stated “I vetoed the appropriation because the language did not include the balance I felt it needed—that is, it appeared to presuppose that the funds would be used solely to support a diversion or dam project.”

Following is an historical overlay of the compacts, acts and agreements which provide the policies and legal guidance for the Gila River.

The Compacts on the Colorado River (1922 & 1948)

The 1922 Colorado River Compact between Arizona, California, Nevada, New Mexico, Wyoming, Colorado, and Utah, divided the water of the Colorado River Basin between Lower and Upper Basins. The San Juan Basin in New Mexico is part of the Upper Basin and the Gila Basin in New Mexico is part of the Lower Basin. In 1948 the Upper Colorado River Compact apportioned Upper Basin water among Colorado, New Mexico, Utah, Wyoming, and Arizona. The Lower Basin water is apportioned between California, Arizona, New Mexico, Nevada and Utah.

“The Gila and San Francisco Rivers are the last wild and free-flowing rivers in the Southwest. New Mexico is a state with abundant natural resources and these rivers stand out as crown jewels. I want to protect them for future generations.”

– Governor Richardson’s
Statement on the Gila and
San Francisco Rivers, June 27, 2007

Gila River



Colorado River Basin Project Act of 1968

In addition to the two Compacts, Court decisions and federal statutes comprise what is known as the “Law of the River.” Certain components of the Law of the River affect the Gila River. In 1964 the U.S. Supreme Court in *Arizona v. California*, 376 U.S. 340 (1964), limited New Mexico’s annual depletions in the Gila basin to no more than 30,000 acre-feet.

In addition, the Colorado River Basin Project Act of 1968 authorized the Central Arizona Project (CAP) and provided New Mexico the opportunity to develop an additional 18,000 acre-feet from the Gila. The CAP is a multipurpose water resource development and management project that delivers Colorado River water, either directly or by exchange, into central and southern Arizona. The project was designed to relieve groundwater pumping and provide water to nearly one million acres of Indian and non-Indian irrigated land in Arizona, as well as municipal water for several Arizona communities, including the metropolitan areas of Phoenix and Tucson.

History of Water Development Proposals

Long before these judicial and legislative actions in the 1960s, however, New Mexico citizens and politicians were proposing the construction of a dam and reservoir on the Gila. Their intention was to provide reliable water for the land that was already irrigated from the river in New Mexico, and to add more irrigated acreage. Of several dam sites that were proposed, the “Hooker Dam” site became the one most favored. In 1946, the Bureau of Reclamation recommended that Hooker Dam be built as a part of the then-proposed Central Arizona Project, and a 1961 study proposed the same. The dam site was in the canyon where the Gila emerges from the Mogollon Mountains, approximately at the boundaries of the Gila National Forest and Gila Wilderness. Half a dozen alternative sites were considered, but all were rejected except possibly Connor Dam site some 30 miles downstream from the Hooker site.

Hooker Dam was controversial from the first. Considered by its proponents to be the means by which the Gila River could bring greater prosperity to southwestern New Mexico, it also attracted the attention of many who would protect the river and its environment from development. The Wilderness Society and the Sierra Club, among other organizations, were concerned that the reservoir’s inundation of a part of the Gila Wilderness would presage even more serious invasions of wilderness areas elsewhere. It didn’t help the dispute that the size of the dam and reservoir remained unclear.

Altogether, the Gila River-Hooker Dam controversy has alternately boiled and simmered for at least fifty years. And now, the Arizona Water Settlements Act of 2004 seems to be adding new heat to the matter. The Act’s offer of federal money for development of 14,000 acre-feet of water (whittled from 18,000) is an incentive for some sort of project. The planning and environmental compliance procedures that are mandated may be viewed—or not—as an attempt to encourage some sort of middle-ground compromise.

The Arizona Water Settlements Act of 2004

In 2004 Congress approved the Arizona Water Settlements Act. In a global sense, it settled major Indian water issues in Arizona, limits Arizona’s repayment of obligation for the CAP, and provides for infrastructure improvements in Arizona. Title II of the Act authorizes a contract between the United States and New Mexico water users for the use of additional Gila basin water by amending the 1968 Colorado River Basin Project Act to allow New Mexico to develop up to 14,000 acre-feet of water. New Mexico has until 2014 to notify the Secretary of the Interior of its intent to execute the contract.

The 2004 Arizona Water Settlements Act appropriates at least \$66 million of non-reimbursable federal funds for water related purposes in southwest New Mexico, including the construction of facilities, environmental planning, environmental compliance activities, mitigation, and restoration, and an additional \$62 million if New Mexico water users choose to execute the

contract. The 2004 Act designates the New Mexico Interstate Stream Commission (ISC) as the administrative agency for those funds, and any expenditure of funds must be approved by the ISC, in consultation with the Southwest New Mexico Water Study Group or its successor.

The Act calls for a contract among Arizona water users and the U.S. Secretary of the Interior that enables New Mexico to develop the additional 14,000 acre-feet of water from the Gila basin without objections by senior Arizona water rights holders. The agreement allows the Secretary of the Interior to provide CAP water to downstream users in exchange for the diversions of the users in the Gila basin in New Mexico, assuming other conditions are met, such as “pre-banking” of water, compliance with bypass flow requirements, and the existence of certain levels of water in the San Carlos Reservoir in Arizona.

Regional Water Demand

Those in opposition to a dam on the Gila argue that given the population in the region, sufficient additional sources of water are available without the development of the Gila River waters. They believe conservation and off-river wells to be viable mechanisms to meet projected regional water demands. Additionally, Phelps-Dodge Corporation owns a substantial amount of water rights which may be available in the future. The ongoing planning will result in base-line studies to identify current and future water supply and demand conditions and the consequences of each.

Endangered Species

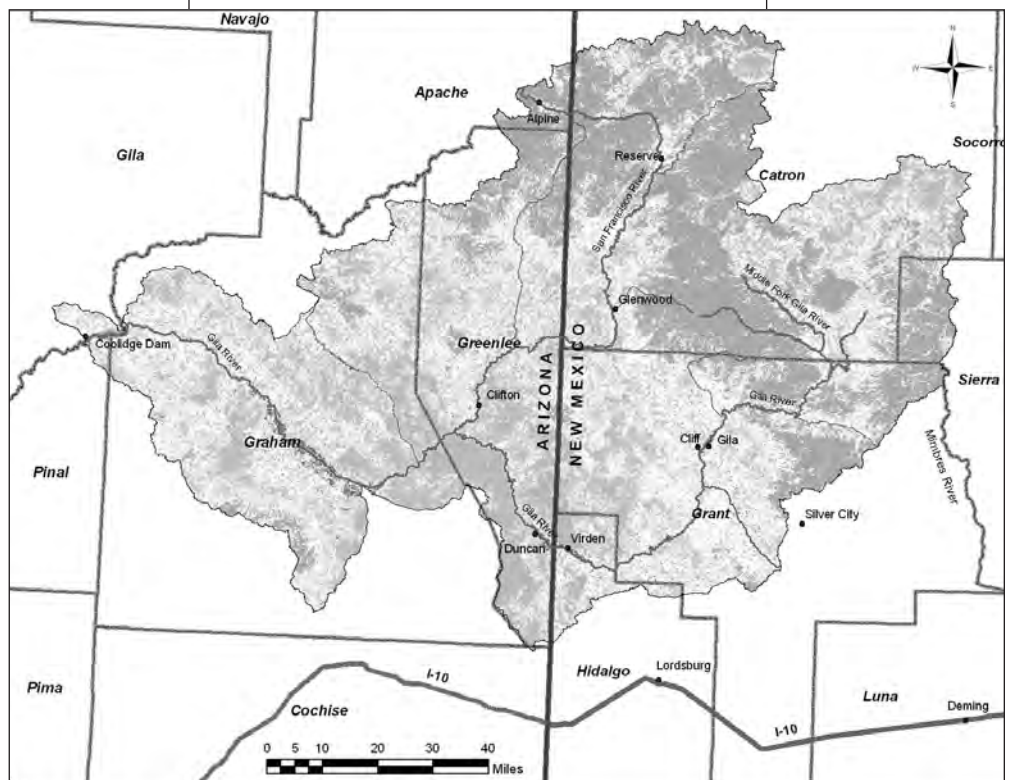
There are a number of federally protected endangered species in the ecologically rich watershed, including the southwestern willow flycatcher, Gila trout, Gila topminnow, and Gila chub (proposed). Federally listed threatened species are the Chiricahua leopard frog, bald eagle, spike dace and loach minnow. A number of other species are state-listed, such as the common blackhawk, the roundtailed chub and the Mexican garter snake.

Current Undertakings

On December 7, 2007, the second in a series of Arizona Water Settlement Act Planning Workshops was held in Grant County. The group has developed consensus on the goals and structure for the planning process.

Following the Governor’s veto, the State is working with all stakeholders to come up with a balanced approach to resolving the issues surrounding the Gila River. Studies are being undertaken to evaluate the possibility of meeting the requirements of the 2004 Act. Thus, an analysis of the situation will address a range of water supply/demand management alternatives to

Gila-San Francisco Basin



meet future water needs rather than just focusing on diversion alternatives. This is consistent with the intent of the Senate Energy and Natural Resources Committee, which stated in its report accompanying the Arizona Water Settlements Act: *“any consideration of water use under Section 212 will be accompanied by the consideration of a full range of alternatives that apply to address water supply needs in southwest New Mexico.”*

The Arizona Water Settlements Act permits New Mexico to use the \$66 million on any water utilization or development project or activity that

meets a “water supply demand.” This funding does not have to be used to develop a diversion project. Conservationists believe that the future water needs of southwestern New Mexico can be met cost-effectively by using the \$66M subsidy while also conserving the Gila River.

Examination of the range of alternatives will identify cost-effective solutions to the region’s future water supply needs. Currently, broad participation in the planning workshops is a positive step forward.

By Brigette Buynak and Jerold Widdison

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Water Trust Board

Current Undertakings

In the 2007 Year of Water, the process for planning, funding and monitoring water and wastewater infrastructure in New Mexico was scrutinized, leading to new policies from the Governor's office set forth in an Executive Order dated November 2, 2007. A new Division of Water and Infrastructure Development in the New Mexico Environment Department was created by the Governor. The Drinking Water Bureau and Construction Bureau of NMED are located in the new Division. This new division is to lead an interagency effort to bring consistency and coordination to the process of funding water and wastewater infrastructure and to create a uniform application which will streamline the process for communities seeking state or federal funding. The Water Trust Board adopted new policies and criteria implementing these new policies on November 7, 2007.

Background

The Water Trust Board (WTB) came into existence with the passage of the Water Project Finance Act in 2001. The Legislature made the following findings:

- New Mexico is in a desert where water is a scarce resource;
- The economy depends on reasonable and fair allocation of water for all purposes;
- The public welfare depends on efficient use and conservation of water;
- New Mexico must comply with its delivery obligations under interstate compacts; and
- Public confidence and support for water use efficiency and conservation are based on a reasonable balance of investments in water infrastructure and management.

The Legislature stated that the purpose of the 2001 Act is to provide a financing mechanism to promote water use efficiency, water resource conservation and protection, and fair distribution and allocation of water to all users. The purpose of the Water Trust Board is to: 1) oversee and administer the Water Trust Fund and Water Project Fund; 2) review and recommend funding for qualifying water projects to the Legislature; and 3) pursue additional funding opportunities. Further details on the history of the legislation and funding are described below.

Membership of the Board

The Board is composed of fifteen members, over half of whom are State officials. The State officials or their designees are as follows:

- State Engineer;
- Executive Director of the New Mexico Finance Authority;
- Secretary of Environment;
- Secretary of Energy, Minerals and Natural Resources;
- Director of the Department of Game and Fish;
- Executive Director of the New Mexico Municipal League;
- Executive Director of the New Mexico Association of Counties;
- President of the Navajo Nation;
- Director of the Department of Agriculture.

Six members of the public represent the following stakeholders and are appointed by the Governor and confirmed by the Senate:

- the environmental community;
- an irrigation or conservancy district that uses surface water;
- an irrigation or conservancy district that uses ground water;
- acequia water users;
- soil and water conservation districts; and
- one public member appointed by the Commission on Indian Affairs.

Water Projects Funded

By statute, the Water Trust Board may fund five types of projects:

1. Storage, conveyance and delivery of water
2. Implementation of the Endangered Species Act collaborative programs
3. Restoration and management of watersheds
4. Flood prevention; and
5. Conservation, recycling, treatment or reuse.

Prioritization of Projects

The Water Trust Board is charged with prioritizing projects for recommendation to the Legislature for financing from the Water Project Fund and the Water Trust Fund. It adopts rules and regulations governing the terms and conditions of grants or loans made from the Water Project Fund. The law requires the Board give priority to projects that have urgent needs identified in a regional water plan. Through established criteria, the Board encourages projects to have matching contributions from federal or local funding sources.

NMFA's Role

The New Mexico Finance Authority (NMFA) makes loans or grants to qualifying entities for qualifying projects authorized by the Legislature. The NMFA serves as staff for the WTB, assists in the process for applications and multi-agency technical review, and suggests the financing structure for qualifying water projects.

NMFA's new set of criteria for project prioritization (November 7, 2007) provides priority to those projects which are ready to put 'the shovel in the ground' with all water rights, funding and design requirements in place at the time of award. Priority is given to regional projects and projects that share services to achieve operating efficiencies. Priority is also given to those projects which leverage state funding with local and federal funds. Projects categorized 'urgent' are given a priority. These criteria are designed to insure the implementation of a sustainable infrastructure for the water structures of New Mexico.

Legislative History

Water Trust Fund: The 2001 Act established the Water Trust Fund in the state treasury. It is invested by the State investment officer as land grant permanent funds. The WTF is designed to provide approximately \$4 million a year to the Water Project Fund for the next five calendar years. The WTF is designed to receive appropriations, donations, or money that would be calculated in the annual distribution to the WPF. In 2006, the WTF received its first appropriation of \$40 million. In addition, the voters passed a constitutional amendment to make the WTF a dedicated fund.

By making the WTF a constitutionally created fund, like the Severance Tax Fund, the fund cannot be raided for other uses in periods of State budgetary crises or shortfalls. Currently the State has four permanent funds.

Water Project Fund: The Water Project Fund is structured to consist of the distribution from the Water Trust Fund and 10% of the severance tax bond proceeds distributed annually. The money in this fund does not revert to the general fund at the end of any given fiscal year, but guidelines establish a three-year expenditure term.

In 2005, the Act was amended to specify that 10% of the funds in the Water Project Fund shall be dedicated to the State Engineer for water adjudications and 20% of the money dedicated for water rights adjudications shall be allocated to the Administrative Office of the Courts to pay for the courts' costs of these adjudications.

The WPF may be used for loans and grants to qualified entities and projects approved by the Legislature. The Act authorizes the New Mexico Finance Authority to issue revenue bonds payable from the proceeds of loan repayments into the WPF if the NMFA deems it necessary to replenish the principal balance of the fund.

Appropriations

In 2002, the State appropriated \$10 million from the capital projects fund to the WPF for expenditure in fiscal years 2002 through 2007. It also appropriated another \$7.5 million from the capital projects fund for authorized water projects for expenditure in fiscal years 2002 through 2007. In

2004, an amendment to the Act created the Acequia Project Fund in the State treasury, which the NMFA will administer. The Board produces an annual report to the Legislature no later than the first of October in each calendar year outlining the total expenditures from the WPF, their purposes, and an analysis of the accomplishments of the expenditures.

Funding

In the fiscal year 2004 application cycle, the Water Trust Board received almost \$537 million in requests through Letters of Interest for water projects. In fiscal year 2005, the WTB received nearly \$132 million worth of requests to fund water projects. Since its inception the WTB has awarded approximately \$69 million for seventy-four projects in twenty-nine local entities statewide. Estimates for water projects in the next several decades range between \$2 and \$5 billion.

The State funding through the WPF has continued to leverage more than \$50 million of local and or federal funding. The WPF received \$32,830,755 from the 10% severance tax bond distribution last year. In addition, the WPF received a direct legislative appropriation of \$6.5 million and \$4 million from the Water Trust Fund distribution making the total amount available for projects, net of mandatory adjudication set asides, \$38,997,680 available for projects for fiscal year 2007. As of this date (Jan. 2008) the Water Trust Board awaits notification from the State Board of Finance on the estimated severance tax bond distribution.

By Brigette Buynak

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Strategic Water Reserve

Introduction

As pressures upon New Mexico's valuable water resources have mounted over the years, the concept of a strategic water reserve emerged within the water community. In 2003, *Think New Mexico* issued a policy report entitled, *Rio Vivo! The Need for a Strategic River Reserve in New Mexico* and became the leader of an initiative to create a publicly-held water reserve. *Think New Mexico* modeled the proposed legislation on the federal Strategic Petroleum Reserve created by Congress in 1975 in response to the oil embargo of 1973-74, and on the negotiations taking place concerning the Pecos River Compact which resulted in a water banking plan to meet the compact needs on that river (see Section 72-1-2.2 through 2.5 NMSA 1978).

The Strategic Water Reserve established in 2005 transforms New Mexico's policies regarding river management. The Strategic Water Reserve is a pool of publicly held water rights dedicated to keeping New Mexico's rivers flowing to meet the needs of river-dependent endangered species and fulfill our water delivery obligations to other states. It is a tool for New Mexico to achieve sensible and sustainable water policies by balancing water use between cities, industry, agriculture, and the rivers of the state.

History of Legislation and Funding

Representative Joe Stell and Senator Carlos Cisneros introduced legislation to create a Strategic River Reserve in the 2004 legislative session, where it was expanded to include groundwater and renamed the Strategic Water Reserve (SWR). This bill passed the State House 47-6, but ran out of time as it awaited a hearing on the Senate floor in the final hours of the session. In 2005 the sponsors brought the legislation back with the unanimous endorsement of the Interim Water and Natural Resources Committee and the strong support of Governor Richardson, who called for it in his 2005 State of the State address. This time the Strategic Water Reserve legislation passed the House 58-9; the Senate 40-0. The State appropriated \$2.8 million to the SWR in 2005, \$2 million in 2006 and \$500,000 in 2007.

What does the Strategic Water Reserve Do?

The Strategic Water Reserve legislation (SWR) is found in Chapter 72-14-3.3 NMSA 1978. It allows the Interstate Stream Commission (ISC), on behalf of the

State of New Mexico, to purchase or lease water or water rights from willing sellers or lessors. Water or water rights may also be received by donation of surface and underground water rights. 72-14-3.3 has some important provisions:

- The ISC must purchase rights that have sufficient seniority and consistent, historic beneficial use to contribute effectively to the purpose of the Strategic Water Reserve.
- The ISC may not acquire or sell the water or water rights at more than the appraised market value.
- The ISC may not acquire these rights from an acequia or ditch association nor from an irrigation district established under Section 73, Article 10 NMSA 1978 except through contractual agreement with the board of directors or the establishment of a special water users association.
- The ISC shall not acquire water or water rights by condemnation.
- The sale, lease, or donation of underground water rights for the SWR may only be used for the purposes of cessation of pumping or for limited short-term stream augmentation.
- Water and water rights in the SWR shall remain within the river reach or groundwater basin of origin and cannot result in any net depletions to that basin.
- The acquisition of water or water rights for the SWR cannot interfere with the ISC's obligation to implement the Pecos River Carlsbad Project Settlement Agreement.
- The ISC must pay the annual assessments due to conservation and irrigation districts in connection with the lease, sale, or donation of water rights to the Reserve.
- The ISC may not sell the water or water rights to the United States.

The list above captures some, but not all, of the provisions of the Strategic Water Reserve Act.

River Reach/Groundwater Basins

The ISC, in consultation with its commissioners, the OSE, and the Attorney General's Office, determines river reach or groundwater basin priorities. In January 2006, the ISC declared the lower Pecos, the Middle Rio Grande, and the Canadian River below Ute Lake as priority basins. In 2007, the Lower Pecos and the Middle Rio Grande were the priority river reaches and basins.

Acquisition Status

In the Pecos Basin, the ISC has completed two water rights purchase transactions in the Ft. Sumner area and has the right to consumptively use a total of approximately 1,500 acre-feet of water rights for river augmentation (instream flow) purposes. Consistent with the intent of the Strategic Water Reserve legislation, the ISC will lease those water rights to the Bureau of Reclamation so that the Bureau can ensure river flows will continue in areas prone to drying for the benefit of the Pecos Bluntnose Shiner as required by a biological opinion for that river.

Projects

A pipeline project was completed on July 25, 2007. The two-mile long pipeline will deliver the water acquired for the Reserve (as described above) to the Pecos River. The project adds a valuable water management option by enabling water managers to temporarily increase river flows directly above a stretch of the Pecos River that has been designated as critical habitat for the bluntnose shiner. In addition, the water will benefit New Mexico's compact status and will satisfy elements of the Settlement Agreement in the Pecos adjudication suit.

Overall, the Strategic Water Reserve is a significant tool in the active management of New Mexico's water. Ultimately, the water acquisitions will give New Mexico the ability to balance water use between cities, industry, agriculture, and our rivers.

By Brigitte Buynak

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Acknowledgments

2008 Water Matters!

Myron Armijo, Office of the State Engineer

David Benevides, New Mexico Legal Aid

Jana Egbert, New Mexico Finance Authority

Torild Kristiansen, Utton Center

Gordon Meeks, Legislative Council Service

Hilario Rubio, Office of the State Engineer

Beth Salvas, Gila Conservation Coalition

DL Sanders, General Counsel, Office of the State Engineer

Tanya Trujillo, General Counsel, Interstate Stream Commission

Scott Verhines, GC Engineering, Inc.

Dominique Work, Office of the State Engineer

