

# Water Rights Management In New Mexico and Along the Middle Rio Grande: Is AWRM Sufficient?

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## Executive Summary

New Mexico has a new waterscape since the New Mexico Supreme Court upheld the Active Water Resource Management [hereinafter AWRM] regulations promulgated by the State Engineer for administration of water prior to adjudication. This paper describes New Mexico's constitutionally established system for determining and managing water rights, a system known as priority administration. It then follows the eight-year journey through the courts of the Legislature's 2003 law directing the Office of the State Engineer [hereinafter OSE] to create an administrative process to manage water, the law that resulted in the AWRM regulations. In addition, this paper reviews the work done by the Legislature, the Judiciary and the Executive Branch to consider alternatives or reforms to New Mexico's judicially based system for water adjudication.

With this information as background, the paper turns to the Middle Rio Grande, the state's population and economic center. Water adjudication has not been commenced in this area, water is currently managed without the formality of the constitutional system of priority administration and AWRM has yet to be and may not be applied. To answer the question of how to proceed in the Middle Rio Grande [hereinafter MRG], it is important to know how this area's water is presently managed and to identify what is not currently considered in the management of the river as the region faces the reality of prolonged or permanent water shortages.

Improvements in water law and policy will be needed to promote the efficient use of water, effectively facilitate reallocation while minimizing negative consequences, protect the natural environment, and provide certainty for water users' future

needs with protection of legal rights. All this must be done at the same time that the State continues to develop mechanisms that assure agreed upon water deliveries between New Mexico and the other Rio Grande Compact states. Clearly, this is no small set of tasks, but there are models described in this paper that we should consider and could employ as we continue to move forward. This paper proposes possible avenues for productive dialogue among the stakeholders in the basin and with the State Engineer to develop strategies for addressing future challenges.

### Priority Administration, Adjudication And AWRM

New Mexico has historically been reluctant to use its constitutional system of priority for allocating water rights in times of water

shortage. Under this system, water officials make a “priority call” on a river basin and curtail junior users in favor of older water rights. On the Pecos River for example, when Texas claimed that it was being shorted deliveries of water under the Pecos River Compact, rather than institute a “priority call” on the river to shut off junior agricultural users, the state Legislature began a now long and storied process of buying water rights to supply Texas water. The OSE website says a “priority call” “should be a measure of last resort.” Priority administration can be technically challenging. In a water short year, it is difficult to prevent the delayed effect on senior water right holders of pumping that has occurred in previous years by junior groundwater users.

## NM Water Law basics:

The NM Constitution at Article 16, Section 2, declares that the state’s unappropriated water from “every natural stream, perennial or torrential” belongs to the public and is available for beneficial use. This section also provides that “priority of appropriation shall give the better right.” The water user with the earliest appropriation date has a senior right and the newer users are considered junior. The senior water users have the first right, and if there is enough water, those with later priority dates also receive water. This concept is sometimes referred to as, “first in time, first in right.” As a factual matter, because of historical settlement patterns municipal groundwater permitted rights are often junior to agricultural surface water rights. Priority administration, therefore, has the potential to pit cities and farmers against each other and in fact has been rarely used.

The State’s Water Code was enacted in 1907. After that date, a permit from the State Engineer was required for any new appropriation of surface water. A pre-1907 water right is a water right that was in existence prior to 1907. The law recognizes that all water rights in existence prior to 1907 are vested in the landowner and are senior to permits issued after that time.

Under the NM Constitution, Article 16, Section 3, “Beneficial use shall be the basis, the measure and the limit of the right to the use of water,” meaning that a water user is entitled to only that amount of water that the water user can put to beneficial use. Beneficial use is not defined, but it is clear that it does not include waste. In addition, the fact that beneficial use is the basis, measure and limit of a water right means that if someone stops using the water, they lose the right. This is sometimes known as the “use it or lose it doctrine.”

Despite this reluctance to manage water by priority administration by issuing a “priority call”, we continue to move forward with water adjudications to determine water rights and priority dates for water users across the state in many different water basins. There are twelve (12) active adjudications in the state; some in federal court and others in state court. The issues are similar regardless of where the lawsuit is filed and many have been going on for generations. The *Aamodt* adjudication is considered the oldest active federal lawsuit in the United States as it was first filed in 1966. The oldest state water right adjudication in New Mexico is the Pecos River adjudication filed in 1956. Historically, water right adjudications have taken decades and consumed substantial resources from water right claimants and governments. A study conducted by the Institute of Public Law, that will be discussed in detail later in this paper, noted that water right adjudications also have not “produced water rights data that can be readily used to enforce water rights.”

### *2003 State Statute to Manage Water Administratively*

As a state, what system or process do we employ to manage our waters if adjudication has proven to be prohibitively time consuming and strict priority administration in many cases is economically, politically and technically unfeasible?

In 2003, in response to a very dry 2002 across New Mexico, the state Legislature passed and the Governor signed, Senate Bill 551, a duplicate or mirror bill of House Bill 604 enacting Section 72-2-9.1 NMSA 1978 entitled “Priority Administration, Expedited Water Marketing and Leasing; State Engineer.”

The Legislature recognized in the statute that “the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and *the state engineer has authority* (emphasis added) to administer water allocations in accordance with the water rights priorities recorded with or declared or

other wise available to the state engineer.” The law requires the State Engineer to adopt rules for “priority administration to ensure that authority is exercised:

- (1) so as not to interfere with a future or pending adjudication;
- (2) so as to create no impairment of water rights, other than what is required to enforce priorities; and,
- (3) so as to create no increased depletions.”

The State Engineer is also directed to adopt rules based on “appropriate hydrologic models to promote expedited marketing and leasing of water in those areas affected by priority administration.” Further, the rules are to be consistent with “the rights, remedies and criteria established by law for proceedings for water use leasing and for changes in point of diversion, place of use and purpose of use of water rights.” Finally, the rules are not to apply to acequias or community ditches or their water rights.

Both bills passed the Legislature with unanimous votes — no legislator registered a vote against the measures although some were excused or absent at the vote. Senate Bill 551 passed the Senate (33-0) and the House (63-0). House Bill 604 passed the House (63-0) and the Senate (30-0). The bills moved forward in the process with “due pass” recommendations from the House Energy and Natural Resources Committee, the House Agriculture and Water Resources Committee, the Senate Conservation Committee and the Senate Corporation and Transportation Committee.

### *Active Water Resource Management*

In December 2004, the State Engineer promulgated regulations in accordance with the statute. Active Water Resource Management was born. (N.M. Code R. Section 19.25.13) AWRM has been the subject of litigation over its constitutionality and the Legislature’s intent over the past eight years, moving from the state district court, to the state court of appeals, to the state Supreme Court. The primary question for the courts has been whether the

The essential strategy for water administration under AWRM is the same as New Mexico's long-existing statutory scheme for water master districts.

Legislature properly delegated authority to the State Engineer and whether the authority granted constituted new authority or whether it was confirming the State Engineer's existing authority in statute to administratively manage water. A decision from the New Mexico Supreme Court was issued in November of 2012, and provides the definitive word from the judiciary about the constitutionality of the statute and the regulations on their face. To analyze the decisions, background about how AWRM works is needed.

The essential strategy for water administration under AWRM is the same as New Mexico's long-existing statutory scheme for water master districts. Existing statutory authority other than N.M.S.A.1978 Section 72-2-9.1 is cited heavily in the AWRM regulations. For example, provisions regarding water master districts and the duties of the water masters track statutes that were enacted as part of the 1907 Water Code. The rules allow for the creation of water master districts provided that the State Engineer finds that "the creation of such a water master district is necessary for the economical and satisfactory administration of water." (N.M. Code R. Sections 19.25.13.11 & 19.25.13.12) Specific rules are required for each district established by the State Engineer as provided in previously existing statute. (N.M. Code R. Section 19.25.13.10) Water masters are to be appointed for each district and tasked with specific duties to manage water within the district. (N.M. Code R. Sections 19.25.13.10 & 19.25.13.16)

## Water Master Duties

*Water masters can also be appointed and are directed to "have immediate charge of the administration of waters within a water master district as necessary to protect the public safety and the interests of water right owners in a district or for the economic and satisfactory apportionment of water to all administrable water rights from the available water supply, and shall so regulate and control the waters of the district as to prevent waste.*

*Administration implemented by the water master may be direct flow administration, storage water administration, depletion limit administration, alternative administration, or any combination thereof, as defined by district-specific regulations, depending on the physical and legal circumstances affecting the water resources and administrable water rights of the water master district."*

*N.M. Code R. Section 19.25.13.27*  
*AWRM - ADMINISTRABLE*  
*WATER RIGHTS*

*The regulations allow for an “administrable water right” to be determined by a water master using a number of different sources:*

- “A. a partial final decree or a final decree entered by an adjudication court of competent jurisdiction, subject to any state engineer permit issued subsequent to entry of said adjudication decree; or, if no decree has been entered, then;*
- B. a subfile order entered by an adjudication court of competent jurisdiction; or, if no subfile order has been entered, then;*
- C. an offer of judgment signed by the defendant in a water rights adjudication; or, if no offer of judgment has been signed, then;*
- D. a hydrographic survey conducted and filed in accordance with Section 72-4-17 NMSA or Section 72-4-16 NMSA; or, if no hydrographic survey has been filed, then;*
- E. a license issued by the state engineer; or, if no license has been issued, then;*
- F. a permit issued by the state engineer, accompanied by proof of actual beneficial use; and*
- G. a determination made by the state engineer based on the best available evidence, consisting of, where available, any filings with the office of the state engineer, field or documentary evidence of beneficial use associated with the right including historical aerial photography, diversions records of historical diversions, historical studies containing evidence regarding water use, and data regarding irrigation and water delivery system requirements.”*

Generally, water masters are directed to manage water according to an “administrable water right” that the water masters establish using evidence laid out in the regulations. The right can be one determined by a court or on an interim basis by the AWRM rules “prior to the commencement or completion of, and during the pendency of, a water rights adjudication.”

The AWRM regulations allow the State Engineer to determine an “administration date” for a particular water master district. It is then the duty of the water master to curtail all administrable water rights that are junior to the administration date. (N.M. Code R. Section 19.25.13.24) Out-of-priority uses can only be made with a “replacement plan” approved by the State Engineer. *Id.*

“Replacement plans” can be approved by the State Engineer for a period of no more than two years (N.M. Code R. Section 19.25.13.33) and are allowed during his “administration of the available water supply to prevent serious and imminent economic harm in response to, and only until water rights are permanently transferred, if necessary.” (N.M. Code R. Section 19.25.13.31) The replacement plans are to be based on hydrologic analyses that in the judgment of the State Engineer “provide sufficient replacement water to fully offset depletions to surface waters caused by out-of-priority diversions in order to prevent impairment of senior water right owners by the junior water right owner that would otherwise be out-of-priority.” *Id.* Owners of an out-of-priority administrable water right can also submit a replacement plan for approval by the State Engineer (*Id.*) and the regulations allow for water right owners to form groups for joint application of replacement plans or to discuss or negotiate shortage sharing agreements or “other forms of administration.” (N.M. Code R. Section 19.25.13.38)

Several methods for objections or review of decisions made as part of administering water rights under AWRM are provided for:

- An objection to a decision of a water master can be made directly to the water master and if the objection is not resolved the objection can be directed to the State Engineer as provided in N.M.S.A. 1978 Section 72-3-3 for review of water master actions. The rules contemplate that each district will set up a streamlined process for prompt hearing by the state engineer for review of water master decisions. (N.M. Code R. Section 19.25.13.23)
- The State Engineer is directed to hear objections to a water master's decision regarding the determination of an "administrable water right" in accordance with N.M.S.A. 1978 Section 72-2-16 providing for an administrative hearing before a *de novo* appeal to the State District Court as allowed by N.M.S.A. 1978 Section 72-1-1. (N.M. Code R. Section 19.25.13.27) The filing of an objection does not stay the administration of the water right while the dispute is being resolved.
- Appeals from approval of a replacement plan must be made within 30 days as provided in N.M.S.A. 1978 Section 72-2-16 allowing for an administrative hearing. The regulations ask that the objection be heard in a prompt manner as required by N.M.S.A. 1978 Section 72-3-3 reviewing decisions of water master actions. (N.M. Code R. Section 19.25.13.40)
- Appeals of decisions by the State Engineer are as mentioned above *de novo* to the state district court as provided in statute at N.M.S.A. 1978 Section 72-1-1.
- The AWRM regulations also underscore that when court decrees are issued as the result of adjudication or other court proceeding, making a water right determination, the court determination supersedes any administrative determination made under AWRM. (N.M. Code R. Section 19.25.13.28)

### *Tri-State Generation and Transmission Files Lawsuit*

Tri-State Generation and Transmission Association and the New Mexico Mining Association filed suit in 2005 in the Seventh District Court in Socorro County to have AWRM declared unconstitutional. The Middle Rio Grande Conservancy District was originally a plaintiff in the suit, but withdrew prior to the ruling by Judge Matthew Reynolds in May 2007. The court ruled that the "hierarchy" of evidence used to determine an "administrable water right" (See box above for list of acceptable evidence allowed under N.M. Code R. Section 19.25.13.27 of AWRM) went beyond the statutory authority given by the Legislature to the State Engineer and therefore violated the New Mexico Constitution, Article 3 on Separation of Powers.

The district court agreed with Tri-State that the Legislature in enacting N.M.S.A. 1978 Section 72-2-9.1 did not grant new authority to the State Engineer. Instead, the court concluded that the Legislature intended the State Engineer to use his existing authority granted in N.M.S.A. 1978 Section 72-2-9. This section allows the State Engineer to apportion waters and determine priorities using only licenses he issues and actions from a water adjudication. The district court, therefore, determined that only final decrees, partial final decrees, subfile orders and offers of judgment resulting from adjudication proceedings and licenses issued by the State Engineer were sufficient evidence to determine a water right. The court reasoned that if the Legislature wanted other evidence used, they would have been explicit in the statutory direction provided in N.M.S.A. 1978 Section 72-2-9.1. A hydrographic survey, a state engineer issued permit to use water and a determination by the State Engineer based on best available evidence were ruled unconstitutional as the Legislature did not explicitly provide the State Engineer with new authority to use these kinds of evidence.

Further, the court determined that the hearing procedure for evaluating objections to decisions of water masters or the State Engineer as set out by the regulations violated due process. An adequate process to satisfy due process concerns must have “guarantees of prompt resolution.” The court was concerned that the appeal process set out in the regulations would create unacceptable delay and therefore would deny parties adequate due process. The district court’s ruling was, therefore, procedural and not substantive. The district court’s ruling did not invalidate all of the AWRM regulations, but it did significantly reduce the power of the State Engineer to administratively curtail junior water rights to protect senior water right holders in times of water supply shortages.

*Interim Legislative Water & Natural Resources Committee – Adjudication Subcommittee*

The State Engineer subsequently appealed the district court decision to the New Mexico Court of Appeals. While the *Tri-State* appeal was pending in the state court of appeals, the Interim Legislative Water and Natural Resources Committee created an adjudication subcommittee in June 2007 to study adjudication reform. In addition, a group of staff from the Administrative Office of the Courts [hereinafter AOC] and the OSE studied the water adjudication process in New Mexico to explore how to improve and speed up the process.

In September 2007, the AOC provided the Legislative Finance Committee [hereinafter LFC] with a memo surveying adjudication laws of other western states stating that there wasn’t one correct procedure for adjudicating water rights. Even so, the AOC summarized some general propositions including a recognition that a general stream adjudication is a “judicially blessed” inventory of water rights and reform requires “techniques for identifying, evaluating and monitoring changes in water rights ownership”; there is no “magic bullet” to make the system “more efficient, less costly

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and less contentious”; there must be a “proper balance between fairness and efficiency” since one effects the other, legal challenges are inevitable in any change of the adjudication process; and finally, reform of one stage of the adjudication process will cause a chain reaction to the other stages of the process, so assessment of any change must be considered for its impact on the whole. The AOC found similarities in the judicial-based adjudication of three states where some satisfaction with the process was reported.

Focus was directed on these three selected states: Idaho, Montana and Colorado. Several aspects of their adjudication procedures have similarities:

- Comprehensive Statutory Scheme: The selected states all had “comprehensive procedural statutory schemes for adjudicating water rights”. New Mexico’s procedure was characterized as “haphazard”, developed over time starting in 1907 using the same procedural rules as regular civil law suits. Water adjudications, however, are different from civil litigation because of the thousands of water claimants, and the fact that a lot of the technical work must be completed by hydrologists, mapping experts and field technicians before the court can do the work of resolving claims.
- Service of Process, Notice of Adjudication & Filing of a Claim: The selected states have “specified an alternative and less burdensome means for giving notice that claimants must file formal water rights claims.” In New Mexico, water right claimants become defendants in a lawsuit where the State is the plaintiff. Water right claimants

One out-of-state judge likened the filing of a water right claim to getting title for your car where the burden is on the car owner and not the state.

are formally notified or served process by the OSE stating what the State asserts is the extent of their right and its priority date based on a hydrologic survey conducted by the OSE. The burden in New Mexico is on the State to notify a water right claimant, rather than on the water right claimant coming forward. The selected states all place the burden of filing a claim on the water right holder with consequences like forfeiting their water rights or priorities for non-compliance. One out-of-state judge likened the filing of a water right claim to getting title for your car where the burden is on the car owner and not the state.

- Role of the State Engineer: In New Mexico, water right claimants are named defendants in a lawsuit initiated by the State. Attorneys “housed” at the OSE are commissioned by the Attorney General’s Office to conduct the legal work on behalf of the State. The OSE is the technical expert conducting the hydrographic survey and proposes the description of the water right including the priority date as well as the amount of a potential water right that can then be refuted by the water right claimant. The AOC found that in the selected states, none of the water agencies “routinely litigated” against a water right claimant. The OSE does not see its role as technical expert and the work of the state’s attorneys housed in its offices as a conflict since it’s not the State’s water right per se that they are pursuing but a determination of whether the public’s water right has been put to beneficial use and maintained as of a particular date by a particular water user in a particular quantity.

- Procedure for Resolving Objections to the Validity of a Water Right: The AOC explains that there are two parts to determining the validity of a water right. The first part is determined by the state examining and possibly objecting to a water right claim and the second part is where each water right claimant must be allowed to object to the validity of all other claimants’ claims. In New Mexico, we do this in two distinct steps. The State determines the validity of a water right claim in the *subfile* phase while the validity of all other claimants’ claims against each other are evaluated in the inter se phase of the adjudication. In the selected states the two phases are combined into one proceeding.
- Water Courts and Role of the Judiciary: In the selected states, the judiciary was found to have a more pro-active role in determining what cases or disputes could not be settled and actually went to a full trial. In addition, the selected states had courts that were dedicated to solving water issues. Judges in these states generally had no other responsibilities or caseloads in other areas of law and they had sufficient administrative support. The same cannot be said in New Mexico.

The report can be found at: <http://www.nmacequiacommission.state.nm.us/Adjudication/AOC-AdjudicationWhitePaper.pdf>

In July of 2007 the AOC identified four areas that needed to be addressed

“(i) reform adjudication procedures, (ii) creation of a workable system of keeping track of changes in water rights ownership, (iii) prioritization and reallocation of resources at the OSE and (iv) court restructuring and reform”

These areas provide suggestions or examples for (i) procedural reform and (ii) court reform. The AOC recognized that there are “political, legal and budgetary” implications of adopting procedures from other states and any change would fail without collaboration.

In October of 2008, the AOC and the OSE made reports to the Interim Committee. At that time, AOC staff seemed to prefer adjudicating water rights through a court process while the OSE staff was comfortable with a more administrative-heavy process. The collaborative work of these two offices subsequently broke down. According to the AOC, a joint proposal was not possible because of differences “over the extent to which water rights should be inventoried administratively.”

The OSE commented in an October 24, 2008 quarterly report on efforts of the AOC/OSE working group on adjudication that there had been “considerable research” done on adjudication reform. OSE believed, however, that the changes identified had not been analyzed to the extent where there could be “any degree of confidence” that the changes would “result in an adjudication process that is more efficient, more accurate, less litigious, and less costly.” OSE continued that making change at that point would have been “making change for the sake of change.” In the OSE’s view, “thorough analysis and careful planning and consensus building” would be needed before adjudication reform could be effective.

### *2009 Senate Joint Memorial 3*

Following the completion of work by the interim subcommittee, where agreement on a proposal stalled, it was clear that the alternatives needed more analysis and study. The 2009 Legislature passed Senate Joint Memorial 3. The Joint Memorial requested the Institute of Public Law and the Institute of Public Policy at the University of New Mexico School of Law [hereinafter IPL] design and conduct a study to acquire public input about the “procedures and process for adjudication of water rights.” In addition, the Legislature directed that one purpose of the study was to “provide the public with an understanding of issues associated with the adjudication of water rights and the possibilities for reforming those procedures” as identified by the work of the AOC and the OSE. The study sought comment on

four approaches in six stakeholder forums held between June 20 and August 5, 2009 in Taos, Las Cruces, Roswell, Albuquerque, Farmington and Socorro. Albuquerque and Socorro (communities in the Middle Rio Grande) did not have pending adjudications while the other areas were in active litigation to determine water rights.

The report can be found at <http://deliberate.nm.com/docs/water.pdf>.

The approaches offered for public input are as follows:

- State Your Claim: Everyone who claims water rights would have to file a claim form with a state agency describing their right. Similar to getting a title for your car – you would have to file a claim to get title to your water right (Currently, the State Engineer conducts a hydrographic study and then presents individually what is determined to be the water right for each claimant to accept or dispute.)
- Licensing First: Before there is a formal lawsuit that begins the adjudication of an area, a state agency would be required to issue licenses for all water rights in the area.
- Get It Done, One at a Time: Disputed issues related to a particular water right claim or among claimants are resolved in one proceeding rather than across multiple stages as is done currently.
- All for One and One for All: Certain organizations (i.e. acequias or irrigation districts) would represent their members in an adjudication rather than current process where every claimant participates individually in the process to determine the water right.

According to the AOC, a joint proposal was not possible because of differences “over the extent to which water rights should be inventoried administratively.”

The methodology for the study was a modified model developed by the National Issues Forum Institute and while it appears the model was sound for soliciting opinions without injecting bias, the study had several shortcomings. By their own admission, limited resources and limited time for conducting the study curtailed the ability of the researchers to fully meet the expectations of Senate Joint Memorial 3. However, while the study was not a scientific one or a representative sample of the public's views those that participated were engaged and held strong opinions. The goal was not to achieve consensus around a particular approach but to determine the range of opinions, the tensions and values behind the positions of the stakeholders for a particular alternative.

The OSE was helpful in recommending participants for the study and offered comments for the background material required to create public understanding so that positions from the public could be solicited. The OSE objected, however, to testing these approaches until analysis could be done to determine whether the approaches might actually improve the adjudication process, as it currently exists. The OSE also did not see licensing as an adjudication reform *per se* but rather an administrative tool to be employed no matter what reform measures were enacted.

A stakeholder assessment for each of the four particular approaches was outlined as well as a statement summarizing support for the status quo. The study characterized tensions and dilemmas, value choices and suggestions for consideration. Finally, commentary was included from experts since they were not generally targeted for inclusion in the study.

The goal was not to achieve consensus around a particular approach but to determine the range of opinions, the tensions and values behind the positions of the stakeholders for a particular alternative.

Formally, the study concluded that: "While the reaction to specific approaches presented was largely critical... latent tensions and dilemmas were revealed. Ultimately, core values and principles were articulated. In a few rare cases, a value choice resolves a dilemma (*e.g.* fairness trumps efficiency, which is really expediency - Stakeholder comment)."

Although the IPL study was provided to the Legislative Interim Committee on Water and Natural Resources in August 2009, it did not result in legislative action. It might still be valuable as a first step in helping policymakers begin to understand the range of views that are held by the broader public about the process we currently utilize in determining water rights.

#### *Tri-State Decision by the New Mexico Court of Appeals*

On October 28, 2010, the New Mexico Court of Appeals ruled on the *Tri-State* case, partially affirming and partially reversing the ruling of the district court. The appeals court was asked to address the validity of two sections of the AWRM regulations. The bulk of the ruling deals with the evidence that can be used to determine a particular water right.

Like the district court, the appeals court considered separation of powers concerns. It was argued that the authority to determine the elements of water rights was solely in the purview of the judiciary and, therefore, the Legislature could not delegate this authority to an administrative agency. The appeals court affirmed the district court and was clear that the state Constitution does not "consign exclusively to the judicial branch" the authority to determine water rights. Therefore, the Legislature is not constitutionally barred under Separation of Powers Doctrine from delegating authority to the State Engineer to make these determinations administratively.

The appeals court, like the district court, ruled that the Legislature in enacting N.M.S.A. 1978 Section 72-2-9.1 did not

expand the authority of the State Engineer to determine water rights and enforce priorities beyond what is provided for in N.M.S.A. 1978 Section 72-2-9. It was the expansion of items that could be used to determine a water priority under the regulations that the court ruled “offended principles of separation of powers.” Further, the court stated that if the Legislature had intended to expand the State Engineer’s authority “it would have done so in direct, clear, and uncertain terms.”

The court of appeals differed from the district court ruling that subfile orders and offers of judgment in adjudications could not be used to determine priority. The court of appeals agreed with the district court that hydrographic surveys, permits and determinations made by the State Engineer based on best available evidence were not permissible forms of evidence. Therefore, the State Engineer’s authority to determine priority was narrowed further to only licenses issued by him and final decrees entered by an adjudication court.

The court of appeals, unlike the district court, did not address the validity of the second section of the AWRM regulations under dispute dealing with due process. N.M. Code R. Section 19.25.12.30 defines the hearing process providing for review of administrative decisions by water masters and the State Engineer. The court determined that under their ruling this section would be applied differently than originally designed and it was, therefore, “speculative” to address.

*Procedural Actions by the State Supreme Court*

In the last eight years, the state Supreme Court ordered a number of important changes that affect court process concerning water issues and adjudications. In January of 2004, prior to the issuance of the AWRM regulations, and as a result of recommendations from the chair of its own *Ad Hoc* Committee to Study Water Litigation and Stream Adjudication, the Supreme Court established a “Water Court

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Division” within the judiciary. Each court district now has a designated “water law Judge” who is assigned cases concerning water law issues in their specific district. These judges also preside over cases in other areas of law. They are not strictly dedicated to water law cases. The Court further ordered the development of mandatory education in water law principles and procedure for judges, special masters and staff.

On November 10, 2009, after the IPL study was presented and as the Legislature’s interim work was wrapping up, the state Supreme Court designated Court of Appeals Judge, James Wechsler, as New Mexico’s water rights adjudication judge. The Court noted that it would be in the interest of “judicial economy” to have one presiding judge. The goal was to promote more consistency and uniformity because differences in nomenclature, procedure and forms were prevalent with multiple judges handling water right adjudication cases. It should be noted that Judge Wechsler’s caseload is not dedicated to water right adjudications but also contains cases in other areas of law.

In June of 2011, after the court of appeals ruling, the state Supreme Court finalized court rules N.M. Sup. Ct. R. 1-071.1 through 1-071.5 that were provisionally implemented in 2007 regarding water right adjudication procedures. The rules allow for expedited *inter se* proceedings, the service and joinder of water rights claimants in a stream system by subsection if the court finds that the division into subsections “would promote the speedy and efficient prosecution of a stream system adjudication.” The court rules also allow for the identification and resolution of “stream system issues.” A stream system

issue is defined as “any issue in a stream system adjudication suit... the resolution of which could directly affect the water rights of all or a significant number of water rights claimants” without regard to the claimants being joined as defendants.

The effect of the Supreme Court ruling is that the AWRM regulations have been determined by the judiciary to be constitutionally sound and can now be taken off the State Engineer’s shelf.

Finally, the new rules issued by the state Supreme Court provide for an annual joint working session for state water right adjudications between judges, special masters, the state, and other stream adjudication parties. Federal judges and special masters assigned to federal water right adjudications are also invited. The purpose of the annual working session is to communicate goals, common issues and the status of resources available to accomplish required work. The working session results in a report that details the State’s priorities and the resources available or needed from the courts and the State for pending state court water right adjudications.

*Tri-State Decision By the New Mexico State Supreme Court*

Following the Court of Appeals ruling, the OSE shelved work on AWRM. Rather than move forward with the regulations, they waited to hear if the state Supreme Court would grant *certiorari* to review the lower court’s rulings.

The state Supreme Court subsequently took the appeal and issued its decision in the *Tri-State* case in November 2012. The Court reversed both of the lower courts’ rulings and held that the AWRM regulations were constitutional; did not violate the constitutional limitations on separation of powers; and, did not violate due process.

Using the title of the bill enacting N.M.S.A. 1978 § 72-2-9.1 and the New Oxford American Dictionary as guidance for Legislative intent, the Court determined that the Legislature had in fact granted the State Engineer new authority “to carry out priority administration responsibilities” and the State Engineer was not limited to the existing authority granted to him in N.M.S.A. 1978 § 72-2-9. The Supreme Court also disagreed with Tri-State’s second separation of powers argument, and agreed with the court of appeals, that the state Constitution does not “consign exclusively to the judicial branch” the authority to determine water rights. It also validated the State Engineer’s authority to apportion water administratively outside of a court adjudication process. The Supreme Court found there was no violation of separation of powers.

Finally, the Supreme Court found that AWRM did not violate the state Constitution on due process grounds. A violation of due process would require a person to be deprived of life, liberty or property. Tri-State argued they were being deprived a water right. The Supreme Court stated that a water right is a “usufructuary” right that allows only for its use; regulation of that use by the State does not amount to a deprivation and, therefore, there could be no due process violation. Tri-State also argued that the appeal process under AWRM would take too long. The court found that the “harm” Tri-State envisioned was “speculative” and it, therefore, lacked standing “to advance arguments based on the hypothetical effect of the regulations.” The Court refused to invalidate the process on due process grounds.

The effect of the Supreme Court ruling is that the AWRM regulations have been determined by the judiciary to be constitutionally sound and can now be taken off the State Engineer’s shelf. The OSE declared in its press release dated November 1, 2012 that the “Active Water Resource Management rules as written in 2004 are now in effect” and would be implemented in

seven priority basins including the lower Pecos River, lower Rio Grande, the San Juan River, the Upper Mimbres, the Rio Gallinas, the Nambé-Pojoaque-Tesuque Basin and the Rio Chama. In addition, basin specific regulations will be promulgated for each of these areas to take in account their unique characteristics and issues.

### Implications for the Middle Rio Grande

Given that adjudication of the Middle Rio Grande has been estimated to involve thousands of claimants, cost millions of dollars, and last for decades, it is reasonable to consider, “Why should the State adjudicate the Middle Rio Grande if the OSE can manage the water to meet the needs of water users?” (Middle Rio Grande or MRG as used in this paper, refers to the portion of the Rio Grande and connected basin aquifers lying below Cochiti Dam and above Elephant Butte.) It should be noted that implementing AWRM in the Middle Rio Grande is not currently a priority for the State Engineer.

But without adjudication or AWRM, how will water shortages be managed? We don’t have a comprehensive process underway. The OSE would like funding from the Legislature to further their work to license rights, work they see as expediting the adjudication process when it is actually commenced in the area. Is a comprehensive process necessary, or is the current approach to pursue licensing and continue on-going practices for administering water rights and managing water deliveries satisfactory for the short and the long term?

Some experts feel we are headed for a train wreck because the MRG is over-committed with regard to water rights, meaning there are more claimed water rights than actual wet water in most years. The OSE describes the situation as “fully appropriated,” because, arguably in a prior appropriation system, it is not possible to over-allocate water rights. But this characterization presumes that the prior appropriation scheme has enforcement

mechanisms that will be employed, including the ability to stop junior water rights from impacting senior water rights in a water-short year.

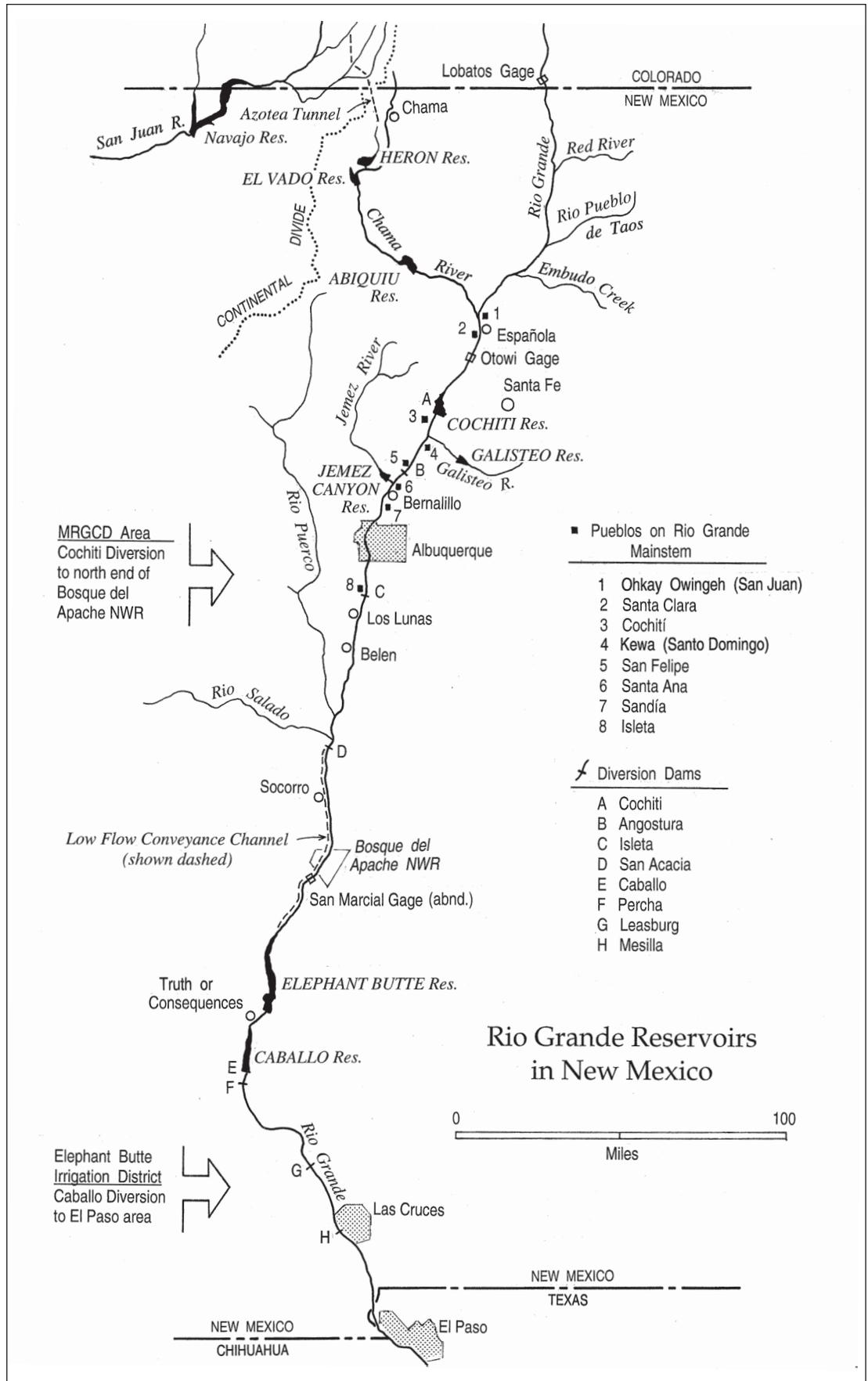
New Mexico has largely been able to provide sufficient flows to meet the requirements of the Rio Grande Compact, in part, due to augmentation of the river with municipal return flow (water that has been diverted, used, treated and returned to the river). Groundwater pumping, however, affects stream flows over time, and a deficit to groundwater is being accumulated, in large part due to pumping in the Albuquerque and Rio Rancho urban areas. In other words, water demand in the MRG exceeds water supply. According to the *Middle Rio Grande Water Supply Study, Phase 3*, the region is projected to experience on average a short-fall of approximately 40,000 acre-feet per year in terms of surface water supply, and an additional deficit of 71,000 acre-feet per year as a result of groundwater pumping.

New Mexico has largely been able to provide sufficient flows to meet the requirements of the Rio Grande Compact, in part, due to augmentation of the river with municipal return flow (water that has been diverted, used, treated and returned to the river).

In order to appreciate the complexity of water issues in the MRG, a brief summary of the region’s supply and current water administration may be useful.

#### *Water Supply and Administration*

The MRG is heavily regulated, controlled and gauged. Highly variable supplies of native water from mountain snowpack and rainfall in the basin are stored in reservoirs and managed for delivery to Texas at Elephant Butte under the terms of the Rio Grande Compact, an agreement between Colorado, New Mexico and Texas. The San Juan-Chama project water is water imported from the Colorado River system across the



**Rio Grande Basin**

by Jerold Widdison  
for the Utton  
Transboundary Resources  
Center. Originally  
published in the Natural  
Resources Journal (2007).

Continental Divide. It is New Mexico's water under the Colorado River Compact and supplements the native flow of the river for use in New Mexico. The "Rio Grande Reservoirs in New Mexico" map provides a useful reference for major features along the river.

Surface water is extensively managed for irrigators in the Middle Rio Grande Conservancy District [hereinafter MRGCD], including members of six sovereign Pueblos. The river also provides water to municipal communities comprising more than 40% of the State's population and a large portion of the State's economy. Although urban areas in the MRG have largely been reliant upon groundwater, the Albuquerque Bernalillo County Water Utility Authority and the City of Santa Fe have recently begun to use treated San Juan-Chama [hereinafter SJC] water, surface water diverted from the river, for municipal purposes. The MRGCD and other entities also use SJC water under contracts with the U.S. Bureau of Reclamation for a portion of their water supply.

The State Engineer manages the MRG to maintain equilibrium between groundwater and surface water, recognizing the hydrologic connection between the two sources. Because the river has been considered fully appropriated since the signing of the Compact in 1938, the OSE requires that if a water right is transferred to a new use, the old use is retired thereby offsetting the new water use and keeping the river whole. Withdrawals from wells have a delayed impact on the river, so Rio Grande surface water rights are required to be in place in municipal permits at the time the effects of groundwater pumping are deemed to reduce flows in the river. The simulated time frame for depletion effects to hit the river is a function of the local hydrogeology. As a result of urban growth, most water right transfers in the MRG have been from agriculture to municipal well permits.

The Middle Rio Grande Endangered Species Act [hereinafter MRGESA] Collaborative

Program is a group of federal, state, and local agencies, sovereign Pueblos and other entities that have helped to manage water and undertake research, habitat restoration, and other activities for the benefit of the Rio Grande silvery minnow and southwestern willow flycatcher. Supplemental water for these species has come from contractors' unused SJC water, a situation that must change as the contractors put this water to full beneficial use. All activities of the Program are simultaneously intended to protect existing and future water uses.

Federal and State agencies, sovereign Pueblos, and many other parties are engaged in activities to manage the Rio Grande. Major on-going river management initiatives include:

- Irrigation metering and measuring
- Pilot channel construction
- River system modeling
- Rotational delivery of irrigation water
- MRGESA Collaborative Program Supplemental water program
- Habitat restoration
- Reservoir Management
- Water Conservation efforts in all use sectors

*Adjudication, AWRM or Stay the Course in the MRG?*

Currently, while there are many efforts underway to improve the management of water in the Middle Rio Grande, there is no active or formal adjudication underway to determine water rights – to answer the question, who owns what? There are problems in managing the river according to the *status quo*, briefly described above as managing the river and reservoirs to meet the Compact, requiring offsets for depletions, and managing to comply with the Endangered Species Act [hereinafter ESA]. Some important categories of water rights exist or water uses occur that are outside of the Compact. Pueblo water rights, withdrawals from domestic wells, water use of the riparian habitat, and pre-basin

groundwater rights. These rights and uses are discussed below.

*Six Middle Rio Grande Pueblos*

Pueblo water rights are, by the terms of the Compact, outside of its operation. The Pueblos in the MRG —Cochiti, Kewa (Santo Domingo), San Felipe, Santa Ana, Sandia and Isleta— have federally recognized water rights and federal contracts with the MRGCD. A portion of these rights are “prior and paramount” to any other rights on the river, and the remainder of the rights share priority with the MRGCD. There are also other Pueblo rights as yet unquantified. As the six Middle Rio Grande Pueblos on the main stem of the Rio Grande fully exercise their water rights, river flows will be affected.

complexities that may point to adjudication as the better framework for resolution.

*Domestic Wells*

Domestic wells are also not covered by the OSE water rights offsetting process, so when a domestic well is drilled and pumped, there is not a corresponding discontinuation of another water use. Although arguably each domestic well’s impact is *de minimus*, cumulatively, the wells will have a significant effect in depleting Rio Grande flows. In 2002, the State Engineer estimated that the annual effect of domestic wells on the Rio Grande, based on permits issued as of that time, was in the range of 6,000 to 17,000 acre-feet. Due to difficulties in how the data is categorized, the estimate is not confined to the MRG, but the State Engineer most likely has data to develop a closer estimate. It should be noted that domestic wells permits have been, and continue to be, approved since 2002, pursuant to N.M.S.A 1978 Section 72.12.1.

Domestic wells are also not covered by the OSE water rights offsetting process, so when a domestic well is drilled and pumped, there is not a corresponding discontinuation of another water use.

There are also legitimate concerns about whether, when water rights are transferred from a farm, the agricultural water use terminates or does the water use actually continue, often by way of domestic wells? This practice is commonly referred to as “double-dipping.”

*Ecosystem*

The Rio Grande Compact did not account for water for the riparian ecosystem along the river, nor were environmental water uses considered in 1938, probably because people didn’t foresee that the river itself would ever be in jeopardy. The *bosque* that residents along the river love, enjoy, and wish to protect, has grown in acreage as a result of man-made improvements to the river (dams and levees) and it uses water that was not included in the accounting system of the Compact.

The water rights of Native American tribes are usually settled in the context of stream adjudication in federal courts, but negotiations can take place outside of adjudication. Both the State and the Pueblos would have to want to negotiate since there is nothing forcing them to the table, and, there may be some disadvantages to this approach. Negotiations can be long and drawn out, just like adjudication. Also, without litigation, it may be more difficult for the Pueblos to get federal funding (usually through the BIA) for consultants, such as hydrologists and attorneys, so that they may participate fully in the negotiations. Another issue is how a negotiated settlement would be finalized. Settlements negotiated in adjudications are generally finalized by the entry of a final decree and passage of federal, and sometimes state and tribal legislation. So, although the water rights of the Pueblos can be negotiated, there are many issues and

A related issue is the ESA. The ESA requires that measures be taken to manage the river for the endangered Rio Grande silvery minnow and the southwestern willow flycatcher; and some of these measures

require water that was otherwise allocated when the Compact was signed. What if the ESA Collaborative efforts now underway fall apart? How will the river be managed to meet the ESA water requirements?

*Pre-basin Groundwater Rights*

Another significant category of water rights outside the Compact are pre-basin vested groundwater rights, which make up a sizable portion of the Albuquerque Bernalillo County Water Utility Authority’s water rights portfolio. In 1956, the State Engineer declared the Rio Grande Underground Water Basin and the City of Albuquerque sued. The State Engineer ultimately prevailed in *City v. Reynolds*, but groundwater rights representing the amount the City was consuming in 1956 were grandfathered into the City’s well permit. Junior municipal wells cannot simply be shut down in a water-short year and result in a same-year increase in river flows. This is because of the delayed impact that groundwater pumping has on the river. How will the State deal with meeting the Compact and respecting the rights of senior water users in this situation?

*Agricultural Water Rights*

Other than the prior and paramount rights of the Pueblos, the most senior rights in the MRG are agricultural water rights. The MRGCD manages water of different categories of ownership and priority, including Pueblo rights, pre-1907 water rights, MRGCD rights and SJC water. It is important to note that the MRGCD’s water rights have not been licensed, because the MRGCD has not filed proof of beneficial use.

As mentioned, the trend has been transfers of agricultural water rights to municipal and industrial use. If agricultural water rights continue to be retired in order to meet the demand of new urban growth, the result will be the eventual near-disappearance of agriculture in the Middle Valley. As noted by New Mexico hydrogeologist, Dr. John Shomaker in 2011:

“Albuquerque’s water came entirely from wells until a little over a year ago when

Thoughtful consideration must be given to the projected effect of this trend from many standpoints: land use, cultural, ecological and food security.

the Drinking Water Project, to divert San Juan-Chama Project water and native Rio Grande rights directly from the river, came into service. Drawdown of water levels in wells had become great enough to cause significant problems, and the source was not sustainable over the long term. Even though pumping has been dramatically reduced now, the full effect on the river due to former pumping is far from being realized, and eventually all of the senior agricultural water rights will be required to offset those effects.”

Stated more broadly from a regional perspective, the Interstate Stream Commission [hereinafter ISC] estimates that it would take the water rights from about 57,000 acres of MRG farmland to totally offset the approximately 230,000 acre-feet per year of groundwater rights already permitted. Estimates of total amount of land currently irrigated within the MRGCD are between 50,000 and 65,000 acres.

Thoughtful consideration must be given to the projected effect of this trend from many standpoints: land use, cultural, ecological and food security.

*Water Planning*

The Regional Water Plans have tried to assess and balance projected supply and demand, but more work is needed to understand and manage the impacts of projected water transfers. The MRG includes portions of three of the State’s 16 regional water planning regions:

- *Middle Rio Grande Planning Region, Region 12.* This planning region is comprised of the greater part of Bernalillo and Sandoval Counties, all of Valencia County, and a small portion of

Torrance County. It includes the population centers of Albuquerque, Rio Rancho, Bernalillo, and Los Lunas. A large portion of this planning region lies within the MRG (the Rio Grande Compact accounting region, as discussed in this paper).

- *Jemez y Sangre Planning Region, Region 3.* A portion of Region 3 lies within the MRG (Rio Grande Compact accounting region). Other portions of Region 3 are above the Otowi gage, in the Espanola Basin, and some of the tributaries above Otowi are in adjudication.
- *Socorro/Sierra Planning Region, Region 15.* A portion of this planning region, the part that lies above Elephant Butte Dam, is part of the MRG (Rio Grande Compact accounting region).

The plans substantially contribute, as do the state's other regional water plans, to a better understanding of each region's projected supply and demand. They recommend alternatives for regional water resources management, water conservation, and protection of the regional public welfare. Although each region has developed a Regional Water Plan, which has been accepted by the ISC, there are challenges to their implementation due to many factors, including the lack of enforcement mechanisms, funding, and in some cases, political will. The possibility of defaulting on the Compact obligations is a shared problem among these planning regions, because it could result in more restrictions on New Mexicans' water use in the Middle Rio Grande.

There is a serious disconnect among the three plans in the MRG: to achieve balance the upstream plans (mainly the Region 12, MRG Regional Water Plan) rely in part on

water transfers from Socorro/Sierra to accommodate their future water needs. In contrast, the Socorro/Sierra Regional Water Plan proposes that those same water rights remain there. Incompatibilities among the three plans make it difficult to understand the implications of future problems.

The three regional plans reinforce the likelihood that water transfers will severely affect agriculture in the Middle Valley. The plans estimate that an additional water demand will exist in the MRG in 40-50 years in the municipal and industrial sector of about 120,000 acre feet per year. If this water is obtained only through the transfer of senior water rights, it would require most of the water rights from the land currently irrigated within the MRGCD.

#### *Climate Change*

The future is full of uncertainty about climate change and its probable impacts on water supply. Initial studies indicate there may be increasing frequency of drought, reduced snowpack, earlier run-off, and a longer growing season. Population growth may result in increasing demands on surface water and groundwater, and, when combined with diminishing supplies, growth will provoke the need to manage shortages. Federal water managers (who control water stored in and released from reservoirs), state water managers and local agencies are all working to determine how to manage given the uncertain, but likely effects of climate change. According to a new report, climate change will most likely have significant impacts in New Mexico in both the Colorado River and the Rio Grande Basins. Scenarios in a recent report by the U.S. Bureau of Reclamation shows an average flow reduction of 12-13% in the Rio Grande and 9% in the Colorado River by midcentury.

#### *Water Shortages Are Here*

The Activity Report prepared for the Legislative Finance Committee dated the week ending October 5, 2012 noted these items on Natural Resources:

The three regional plans reinforce the likelihood that water transfers will severely affect agriculture in the Middle Valley.

“During the 2011-2012 water year, flows of native water, water that naturally flowed south down the river not including San Juan-Chama water, on the Rio Grande past Otowi, a key measurement point near Los Alamos, were 50 percent of the long-term average. Without the supply of the imported San Juan-Chama water, the Rio Grande would be completely dry through Albuquerque now.

Elephant Butte Reservoir, the Rio Grande’s largest storage reservoir, held 113,234 acre feet of water, or 5 percent of capacity.”

In December of 2012, the U.S. Bureau of Reclamation announced to contractors for San Juan-Chama water that there is a projected 20% shortfall in water deliveries if dry winter weather doesn’t produce adequate snow pack.

*How Do We Administer the MRG?*

The OSE has not outlined a plan for licensing water rights in the MRG. How that process unfolds will be critical to whether AWRM can promote more efficient management of water resources without massive litigation. AWRM may not, in fact, be the appropriate framework for managing water on the MRG. AWRM does not apply to the Pueblos, acequias and community ditches. As to other water rights holders, it is sure to be challenged when applied unless implementation is carefully crafted and negotiated. AWRM may, however, be a useful framework for negotiation of agreed-upon shortage sharing.

Some type of adjudication proceedings will most likely be necessary to finally confirm water rights in the region, particularly the Pueblos’ water rights. In any event, more time and resources will be expended and yet the problems, given further water shortages caused by drought and climate change, are with us now.

In the long term, the MRG may be wrestling with a land use problem as much as a hydrologic problem. With urban growth, the

ways in which water is distributed and the places where water is used will change and the choices for the future are hard. The broad choices are described in the following way by hydrologist and water resource engineer, Deborah L. Hathaway:

“Shifting water away from riparian water uses along the river corridor would change the character of the river, reduce habitat, and render difficult the current efforts to collaborate in supporting endangered species and the riparian environment. Shifting water away from agricultural uses will impact the character of the Rio Grande valley and agricultural traditions.”

What do we want the Middle Valley to be like in the future? How will we manage changes in current uses to serve all of the different demands for water?

The OSE has not outlined a plan for licensing water rights in the MRG. How that process unfolds will be critical to whether AWRM can promote more efficient management of water resources without massive litigation.

Potential Steps Forward

Considerable work has been undertaken in the last decade. While the Supreme Court decision in the *Tri-State* case clarifies a lot about our water management system, much remains unresolved. At the Interim Legislative Water and Natural Resources Committee meeting in November of 2012, there was some indication that some legislators are not comfortable with AWRM post-*Tri-State*. From a statewide perspective, is it irresponsible to significantly alter the AWRM regulations? Is it okay to pull the AWRM rug from the State’s living room? Arguably no, given the time and resources employed to reach this point. However, even though AWRM has been determined by the

New Mexico Supreme Court to be constitutional on its face, when the OSE applies AWRM there will almost certainly be more litigation to determine its constitutionality as applied.

stream system and related underground water basin.

Develop with the Administrative Office of the Courts an action plan for the adjudication of water rights in the Middle Rio Grande stream system and related underground water basin.”

Areas currently not in adjudication, particularly the MRG, need a focused examination of how to proceed.

With the Supreme Court decision in *Tri-State*, the OSE and AOC have more information on how to proceed. There should be a focused examination of issues such as:

- Whether and how to adjudicate the MRG;
- Whether and how to implement AWRM;
- Whether there are better frameworks for resolving and managing water rights in the basin; and,
- Whether alternative strategies should be considered for the near term, such as structured negotiations regarding sharing of shortages among water rights holders.

The challenges facing the state generally and the Middle Rio Grande in particular are great. Water law and policy need to improve to address current and future challenges, including: promoting the efficient use of water, effectively facilitating water reallocation while minimizing negative consequences, protecting the natural environment, providing certainty for water users that future needs and legal rights will be protected, and developing mechanisms to insure that agreed-upon deliveries between the states will be met and large scale conflict will be avoided.

The Legislature and the Executive can impact the process as it stands and there are a few things that should be looked at and considered:

*Encourage Collaborative Efforts*

Encourage the AOC and OSE to continue to cooperate in improving the adjudication process. There have been many advances in the past decade and continued improvements are in the best interests of the State and those affected by the adjudication process.

Areas currently not in adjudication, particularly the MRG, need a focused examination of how to proceed. Pertinent to this discussion, the Office of the State Engineer, Fiscal Year 2013 Strategic Plan identifies several related objectives for its Litigation and Adjudication Program:

“Develop and implement with [the Water Rights and Allocation Program] a collaborative action plan for licensing water rights in the Middle Rio Grande

The Legislature could create a task force to research these issues, obtain input, and prepare recommendations on how to proceed. The task force should include not only OSE and AOC staff, but also policymakers and outside experts to insure that a full range of options is examined. The endeavor would be complex and challenging and support would be necessary for technical and policy/legal research. Such an in-depth examination on how to approach the MRG may reveal that there are strategies available to guide or supplement eventual implementation of AWRM, making the regulatory approach stronger and more durable; or result in an action plan for adjudication; or possibly outline a path to negotiating agreements on interim measures for addressing shortages.

*Clarification re licensing process*

During the adjudication reform discussion, the OSE advocated that licensing was an administrative tool necessary no matter what reform measures were enacted. The OSE

refers frequently to a “licensing proposal” but a written proposal does not seem to have been presented yet. Although there are procedures in place for notice and comment upon application for a permit, there are existing permits to which this process was not applied. Procedures for a process to license water rights have not been outlined by the State Engineer and are not currently enacted in statute (see N.M.S.A. 1978 § 72-5-13 for statutory elements of a license). A fair and open process for the licensing of water rights is needed.

*Possibly Conflicting Roles of the State Engineer*

Post-*Tri-State*, the OSE houses attorneys doing the legal work for the state, it is also the technical expert and, under the new AWRM regulations, it is acting in a judicial capacity in determining water rights in times of shortage where court adjudications have not been completed. Water adjudications are not completed for most of the state although twelve are under way. AWRM, according to the State Engineer, will be implemented in seven basins considered priorities, some of which have active adjudications. Whether these roles present a substantive conflict should be reviewed by the Legislature. If there is an actual conflict or discomfort with all these roles being played by one agency, the Legislature could substantively make changes to the duties of the OSE. The IPL study contains many suggestions from study participants that could be considered during the interim including:

1. Completely separating the OSE’s technical role from its legal work by placing technical assistance and evaluation in an independent agency or institution.
2. Don’t initiate the adjudication process “cold” with a lawsuit noticed by mail,
3. Transparently provide information/ education to water right claimants,
4. Designate a water court, or
5. Create a settlement-based system/ collaborative resolution system.

*Science and Planning*

Statewide, there is a wealth of research and science regarding water supply and demand. There are still areas that lack clarity, however, and significant areas of research that are still needed. First, the models and tools that currently exist and provide useful information for decision-making need to be kept up-to-date and supplemented as new research provides better information.

The fact that different planning regions have conflicting views of future water use scenarios in the MRG is problematic in view of the need to manage water for the future.

The fact that different planning regions have conflicting views of future water use scenarios in the MRG is problematic in view of the need to manage water for the future. One approach may be to refine existing models and agree to a water accounting system among the regions, gaining the ability to run scenarios of various future conditions and assess the cumulative impacts of a variety of actions. This activity would require concerted cooperation among many agencies, local governments, sovereign Pueblos and stakeholders, but could provide some baseline information that may contribute to eventual negotiations on sharing of shortages.

*Provide a Forum*

This concept is particularly directed at the Middle Rio Grande, although there may be other basins that have similar needs. In 2010, when the ISC staff proposed a complex, innovative strategy to eventually extinguish Intel’s groundwater permit and gain water rights for the Strategic Water Reserve, “all hell broke loose.” Even though ISC’s attorneys and hydrologists had invested hundreds of hours in developing the agreement and believed it to be in the best interest of Middle Valley water users, there were many stakeholders that were

One insight to come from the uproar was that a forum might be helpful for discussion of issues like this that arise and affect broad groups within the basin.

vehemently opposed to it. The ISC staff was stunned at the reaction. Most of the complaints focused on a lack of notice and a lack of clear understanding of the proposed agreement. Without revisiting the pros and cons—the proposal was ultimately killed.

One insight to come from the uproar was that a forum might be helpful for discussion of issues like this that arise and affect broad groups within the basin. “There is no institutional forum for the discussion of an idea like this, a place where the major players with skin in the state water game—the big municipal utilities, irrigators, the pueblos, the state regulators and legislators—regularly sit down to discuss our water future,” wrote John Fleck in the Albuquerque Journal. Any forum for discussion of water issues in the MRG would need to have an organizational structure, an advisory role and clear guidelines for its purpose. One example might be the Lower Pecos River Basin Committee.

#### *Exploring Other Models*

Major parties have said that they will file suit when AWRM is applied, if they believe it impairs their water rights. Perhaps it would be fruitful now to think about getting organized to begin discussions on what might work and possibly avert a crisis and massive, never-ending litigation? It might serve us to look at how other unadjudicated basins operate. Other models may help inform how AWRM could be implemented and strategies developed that would be inclusive of the many diverse interests in our water basins. Obviously, the devil is in the details, but examples such as the following may have parallels to and provide ideas for managing the MRG Basin and perhaps other basins in the state.

#### *Montana’s Reserved Water Rights Compact Commission*

The Montana Reserved Water Rights Compact Commission may provide a useful example of how settlement of water rights could work. Although the Commission only deals with reserved water rights, there is no reason that it could not be fashioned to facilitate negotiations in a broader context. The key is an independent Commission, with good technical support from legal and political experts, hydrologists and agricultural scientists; and, a negotiation process that is open at critical junctures. The Commission, established by the state Legislature is authorized to negotiate settlements with federal agencies and Indian tribes claiming federal reserved water rights in Montana. The claims of the tribes are suspended from adjudication while they are being negotiated. The Legislature and the federal government approve settlements that are reached. Citizen participation is an essential element of each settlement and ensures that the Commission’s deliberations on behalf of Montana address the concerns of the public and incorporates local solutions to water use problems.

#### *Colorado Water Conservation Board, Basin Roundtables*

These nine roundtables exist under state law. They are similar to New Mexico’s regional water planning groups, except that they are standing committees with designated representation of various constituencies and a liaison to the *Colorado Water Conservation Board*. Each basin roundtable is required to develop a basin-wide water needs assessment, consisting of four parts: 1) Consumptive water needs (municipal, industrial and agricultural); 2) Nonconsumptive water needs (environmental and recreational); 3) Available water supplies (surface and groundwater) and an analysis of any unappropriated waters; and 4) Proposed projects or methods to meet any identified water needs and achieve water supply sustainability over time.

The Roundtables provide an alternative venue to address issues of concern surrounding a major water transfer or project and, notably, they can enter into cooperative problem solving where issues arise between different water basins. The process doesn't replace the jurisdiction of the courts or change the permitting process for water rights and projects, but the time and cost of court proceedings may be reduced.

*Murray Darling Basin Authority, Australia*

This Basin's ground and surface water have been over-committed for some time. In the midst of a terrible drought (starting in 2000) the basin managers had to make politically hard decisions about water resource management. In 2007, they created an independent, apolitical and accountable water authority to do so. The new governance regime is empowered to balance between the needs of the environment and the demands of all other water users; develop a water sharing and licensing system aligned with hydrological realities, and develop consistent water trading, pricing and water accounting rules that impose market disciplines on water storage, water investment, and water-use decisions.

*Model Water Code*

Judge Matthew Reynolds, Seventh Judicial District Court, New Mexico, has offered some ideas. In 2007, Judge Reynolds issued the lower court opinion in the *Tri-State* case. He has presented his ideas about water law in New Mexico on several different occasions. He believes that in New Mexico water judges are being put in the very difficult position of having to decide water issues using outdated legal tools that may not be sufficient to meet the challenges of the present times. He has urged the water law community to examine the Model Water Code (ASCE, 2007) as a touchstone for exploring whether there are opportunities to enact feasible updates to New Mexico's 1907 Water Code, while respecting the prior appropriation doctrine. There are pieces of the Code —such as well thought out definitions and processes— that may provide insight and ideas to assist in

formulating agreements as negotiations occur either within or outside the framework of AWRM.

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Judge Reynolds has also spoken about a UNESCO publication showcasing global case studies in water administration. He found that the case studies revealed four characteristics of successful water policy implementation. These are:

- Wide stakeholder consultation and continuous involvement in defining priority water issues and water policies and laws required to tackle these, are critical elements to ensure the longevity and sustainability of integrated water resources management;
- Central to the success of many integrated schemes is the collation and free sharing of (good) hydrological and other water-related data. Most progress is made when a single authority is mandated and resourced to produce a well-designed and accessible data base;
- Pilot schemes are a very effective way to make progress when tackling the complexity of water resource management issues; and,
- Institutional fragmentation, both scientific and operational, is a major impediment to achieving effective and integrated water resources management. Operational progress appeared to be most successful where a single (central) authority was given basin-wide responsibility for water resources that is backed by appropriate water laws and institutional arrangements.

## Conclusion

As the Legislature sets policy regarding adjudication and active water resource management regulations; and the State Engineer, with input from stakeholders, develops a licensing process and continues to implement and develop water management policies, the characteristics of successful water management structures and models from other jurisdictions may provide instructive guideposts for success. For the Legislature, setting direction to continue improving adjudicative processes, and a focused look at the Middle Rio Grande might be good steps to ensure that New Mexico continues to work toward balancing future projected water supply and demand.

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