

Adjudications*

2014 Status Bar

On May 21, 2014, three legislators filed suit with the NM Supreme Court asking that the Navajo Settlement for the NM San Juan river system be set aside because the legislature did not have an opportunity to approve it. The Court dismissed the case without comment on June 3, 2014.

Background

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

Currently, twelve adjudications are pending in New Mexico courts. The table to the right summarizes the active adjudications.

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

Snow v. Abalos, 1914-NMSC-022, 18 N.M. 681, 140 P. 1044.

Northern New Mexico Adjudications

Stream System	Total Acres	Subfiles	Defendants
San Juan	37,829	9,000	11,400
Jemez (decreed)	2,033	1,011	1,095
Red River (decreed)	12,185	1,202	1,605
Zuni	980	950	1,000
Rio San Jose	undetermined	1,800	2,000
Rio Chama	34,868	3,659	4,636
Taos/Hondo	13,756	4,024	5,220
Santa Cruz/Truchas	7,214	3,446	5,133
Nambe/Pojoaque/Tesuque	2,724	3,159	5,284
Santa Fe	827	1,282	1,556
Northern NM Subtotals	112,435	29,803	39,241

Southern New Mexico Adjudications

LRG Section or Underground Basin	Total Acres	Subfiles	Defendants
Nutt Hockett	11,554	43	22
Rincon Valley	22,027	1,232	1,432
Northern Mesilla	20,360	5,954	7,585
Southern Mesilla	54,165	5,400	7,273
Outlying Areas	3,463	1,318	1,798
LRG Subtotals	111,569	13,947	18,110
Animas Underground	18,254	140	147
Southern NM Subtotals	129,923	14,087	18,257

Pecos Adjudication

Pecos Section	Total Acres	Subfiles	Defendants
Gallinas	8,164	1,674	1,998
Upper Pecos (Ground Water)	695	100	93
Upper Pecos(Surface Water)	undetermined	undetermined	2,000
Pecos Supplemental/Misc.	4,651	49	100
Hondo Basin	6,748	588	657
FSID	6,500	undetermined	480
Fort Sumner (Ground Water)	7,444	80	44
PVACD	128,274	1,900	2,522
River Pumpers	6,063	19	22
Carlsbad Underground	11,350	320	240
Carlsbad Irrigation District	26,913	1,106	1,328
Peñasco	undetermined	undetermined	5,000
Pecos Subtotals	206,816	5,840	14,484

ACTIVE GRAND TOTALS	446,605	49,768	72,289
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Pending New Mexico Adjudications Non-Indian Subfile Summary

Totals and Estimates as of October 2011
Courtesy of the New Mexico Office of the State Engineer

* This article focuses on the adjudications of non-Indians' water rights. For an in depth discussion of the adjudication of tribal/ Pueblo water rights see Chapter 5 American Indian Water Rights.

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

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

- the Lower Rio Grande adjudication, filed in 1986, has 18,000 non-Indian claimants, one federal irrigation district, 14,000 subfiles, and 111,365 irrigated acres;
- the *Aamodt* adjudication, filed in 1966 has 5,284 non-Indian claimants, four, Pueblos, one irrigation district, 3,159 subfiles, and 2,724 irrigated acres; and
- the Pecos River adjudication, filed in 1956, has 14,484 non-Indian claimants, one tribe, three federal and state irrigation or conservancy districts, 5,840 subfiles and 206,816 irrigated acres.
- In all twelve active adjudications, there are an estimated 72,300 non-Indian claimants, eighteen Tribes or Pueblos, 50,000 subfiles, and 448,000 irrigated acres.

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

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

The Attorney General conducts adjudications for the State through attorneys commissioned as Special Assistant Attorneys General. These attorneys are members of the OSE adjudication teams, work directly with OSE staff, and are generally officed in State Engineer facilities. They may also be contractors hired by the OSE.

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

Stream System	Tribes/Pueblos Water Right Adjudication
San Juan	Navajo Nation, Jicarilla Apache Nation, Ute Mountain Ute Nation
Zuni	Zuni Pueblo, Navajo Nation
Jemez	Santa Ana Pueblo, Jemez Pueblo, Zia Pueblo
San Jose	Acoma Pueblo, Laguna Pueblo, Navajo Nation
Chama	Ohkay Owingeh Pueblo, Jicarilla Apache Nation
Taos/ Rio Hondo	Taos Pueblo
Santa Cruz/Truchas	Ohkay Owingeh, Santa Clara Pueblo
Nambé/Pojoaque/ Tesuque	Nambé Pueblo, Pojoaque Pueblo, San Ildefonso Pueblo, Tesuque Pueblo
Pecos	Mescalero Apache Nation

Pending Adjudications

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

Adjudication Process

The New Mexico adjudication process consists of seven general phases: 1) the filing of the complaint, 2) the hydrographic survey, 3) the subfile phase, 4) the stream-wide issues phase, 5) the errors and omissions phase, 6) the *inter se* phase, and 7) the entry of the final decree. The complaint may be filed by any interested party and initiates the adjudication. If the State did not file the complaint, the court will realign the parties so that the State is the plaintiff.

Hydrographic Survey: The hydrographic survey is required under the state Water Code, involves collecting information about each water right, and may be conducted before or after the complaint is filed. The survey is performed by the OSE technical staff. It identifies who should be joined as claimants to the case and provides the information necessary for making offers of judgment to claimants. The information used to produce the hydrographic survey report comes from several sources. These include aerial and satellite photos from multiple years, which are analyzed to determine beneficial use. Historic records and existing water rights files are consulted and field investigations by OSE staff verify historic and current water uses and practices.

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

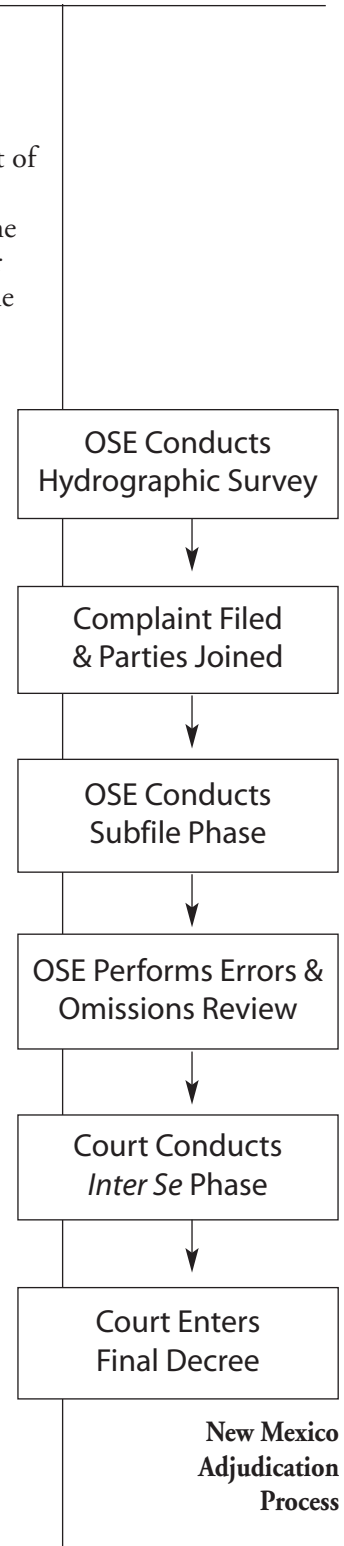
Subfile Phase: During the subfile phase, the state’s attorneys present findings about the elements of each water right to each

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

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

Once the state and claimant have agreed, the proposed order is sent to the court. If the court agrees, the order is signed and entered into the record. Entry of an adjudicating order is a major step for each 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.



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

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

Inter Se Phase: *Inter se* is Latin for "among themselves" and it is a time in the case when any claimant may challenge the water rights of any other claimant. No claimant, however, may revisit his/her own subfile. Following the entry of orders for each subfile in an area, the court conducts the *inter se* phase of an adjudication to resolve issues arising between water right owners. These challenges may go to mediation or receive a hearing. By resolving the challenges of any member of a community, the water rights are made final as against every other right as well as the State.

If necessary, a court can conduct an expedited *inter se* before all orders have been entered. For example, objections to the water rights of the Taos Pueblo to the Rio Taos stream system are being resolved before all the non-Indian rights have been determined. In order to complete this part of the adjudication and to meet deadlines in the "Taos Pueblo Indian Water Rights Settlement Act of 2010, the Court is conducting an expedited *inter se* to determine whether to enter a partial final decree for the Pueblo.

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

Expediting the Process

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

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

In 2007, the Supreme Court issued provisional procedural rules for adjudications. These rules addressed the issues of service and joinder of water rights claimants; stream system issues and expedited *inter se* proceedings; an annual joint working session; *ex parte* contacts between the State and the court on procedural matters; general problems of administration; and excusal or recusal of a water judge. In 2011, the New Mexico Supreme Court made the rules permanent.

Stream system issues are matters that affect the stream system as a whole, or alternatively, a large group of claimants.

New Mexico Supreme Court Rules

- 1-071.1, Statutory stream system adjudication suits; service and joinder of water rights claimants; responses.
- 1-071.2, Statutory stream system adjudication suits; stream system issue and expedited *inter se* proceedings.
- 1-071.3, Statutory stream system adjudication suits; annual joint working session.
- 1-071.4, Statutory stream system adjudication suits; *ex parte* contacts; general problems of administration.
- 1-071.5, Statutory stream system adjudication suits; excusal or recusal of a water judge.

In 2012, the district court in the Animas Underground Basin adjudication, *State of New Mexico v. Rosette, Inc.*, applied the concept of expedited *inter se* addressed in NMSC 1-071.2(B) to all individual subfiles. In the traditional adjudication model, the *inter se* phase occurs after entry of subfile orders for all individual water rights. As a consequence, individual rights may not be fully resolved as between the State, claimants, and the community for decades.

In this case, the State mails a proposed subfile judgment to each water right claimant. The State and the claimant engage in negotiation over differences, if any, in the description of the right for a limited period. When that time has expired, the State files the proposed judgment with the Court. All other claimants receive notice of the filing and the deadline for objections through publication of the Monthly Adjudication Report on the court's website. Once the court resolves all objections, if any, it enters the Final Judgment for the right. In this way, adjudicated water rights become final after a period of months rather than years.

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

Water and Natural Resources Committee: The Legislature's Interim Water and Natural Resources Committee has put forth considerable effort and attention to expediting adjudications. In 2007, the Committee created a subcommittee on adjudication reform, chaired by Senator Mary Kay Papen. This subcommittee held meetings to discuss how adjudications can become more efficient and effective. A working group of representatives of the Administrative Office of the Courts (AOC) and the OSE compared the process in several other states and worked on developing ideas for improving the process. The goal was to make joint recommendations to the legislature. This effort was focused on future adjudications—primarily looking at how to approach the Middle Rio Grande—and not on existing adjudications.

In October of 2008, the AOC and the OSE submitted separate reports to the Committee. The AOC offered several suggestions to streamline future adjudications. Among other recommendations, they suggested replacing the hydrographic survey approach with a "claims-based" system for identifying and evaluating water rights. Other key AOC recommendations included: changing the OSE's role from that of a party to that of a neutral expert; limiting the amount of time for raising an objection to the state's offer of judgment and requiring other claimants to raise any objections during that same time

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period; changing the method of notifying claimants of adjudication developments; and adjudicating claims on a rolling basis. The AOC recommended that before legislative action is taken, other input and suggestions for improvement should be obtained from stakeholders and water experts.

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

address the practical needs of Middle Rio Grande water rights administration without precluding adjudication reform. This subcommittee is now inactive.

In the 2009 session, the Legislature adopted Senate Joint Memorial 3. It required the Institute of Public Law (IPL) at UNM to conduct public meetings around the state and to obtain public comment on the water rights adjudication process. The IPL report concluded that: 1) most participants support existing law and worry about the consequences of changing it; 2) most participants want fairness, accuracy, and certainty over speed in adjudications; 3) tweaking the current system will accelerate adjudications; 4) where possible, a greater decision-making role for local authorities will help; and 5) a neutral state-funded entity to provide objective data, education, and assistance is strongly desired.

Adjudications, by their very nature, are very simple in design and very complex in execution. The parties, the courts, and the legislature strive, and will continue to strive, to make them more expeditious without sacrificing the basic constitutional rights of claimants to notice and due process.

By Brigitte Buynak, Esq. (2008)
Latest Update by Darcy Bushnell, Esq. (2014)

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