> "Priority administration... may be used to determine how water is allocated in times of shortage."
>
> *Bounds v. D'Antonio,* 2013-NMSC-037, 306 P.3d 457.

Priority Administration

Background

Since the turn of the twenty first century, drought conditions have frequently stricken much of New Mexico. Such intervals of extreme dryness have been a permanent, recurring feature of the state's climate for at least two thousand years, according to tree ring data and other scientific evidence. Some of these past droughts lasted for decades, exceeding in severity the Dust Bowl of the 1930s and the great New Mexico drought of the 1950s. Today, climate change models indicate that the Southwest will likely become even hotter, potentially making future droughts in New Mexico more extreme. Managing water shortages promises to become even more critical.

Across the west, water users and state officials have embraced a legal doctrine known as *priority administration*[1] as a tool for dealing with shortages. This process allows state officials to order a temporary reduction in water diversions for some uses so that other water uses can be supplied with the water that is available. However, state authorities seldom use this tool in view of the legal, economic, and political conflicts that would likely result. This article will describe how priority administration works, in theory and in practice. After describing priority administration as a general legal concept, the article then illustrates its practical role in four specific stream systems: the Cimarron River, the Mimbres River, the San Juan Chama Project, and the Pecos River.

The Priority Administration Process

According to the Office of the State Engineer (State Engineer or OSE), priority administration is "the temporary curtailment of junior water rights in times of shortage, so that more senior water rights can be served by the available water supply."[2] Under the prior appropriation system, the rank of a water right within a stream system

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1 It is important to note that many in New Mexico water right holders, such as those in acequias and other traditional communities, have historically found other means to deal with water shortages, such as sharing of available water. This paper, however, specifically addresses priority administration.

2 See New Mexico Office of the State Engineer, FREQUENTLY ASKED QUESTIONS 5. What is "priority administration?" **http://www.ose.state.nm.us/faq_index.html#5**

Priority administration begins when a senior water right owner runs short of water and files a request with the State Engineer to issue a *call on the river* that is, a *priority call*.

is based on its priority date. This date is based on when that a person *begins the process* of putting water to a beneficial use. Examples of beneficial use include using water for agricultural, domestic or commercial purposes. The details of how the priority date is determined vary. (*see below)* But in all cases, the earlier or *senior* priority right has the better legal right to water during shortages. This is the principle of "first in time, first in right." When this principle is applied, the right with the older priority gets its full amount, before any water goes to newer or *junior* rights. If water still remains, the next most senior right gets its full amount, and so on. This distribution process continues until no water is left.

Priority administration begins when a senior water right owner runs short of water and files a request with the State Engineer to issue a *call on the river* that is, a *priority call*. This means that the senior user is requesting that the State Engineer order junior users on the stream or in the basin to stop diverting water until sufficient water has reached the senior. If the request is granted, the Engineer contacts junior right owners and orders the necessary curtailment of diversions. The goal is to ensure that senior water rights get their full water entitlement, as required under the New Mexico Constitution.[3] Thus, for example, under a priority call, a rancher with a priority date of 1899 would get all her water during a shortage before an alfalfa farmer with a priority date of 1917 gets any of his. The State Engineer may continue such curtailment for the duration of the shortage. A priority call does not mean that juniors 'lose' their water rights, but rather that they will be required to cut back during the crisis.

Determining Priority Dates: Before priority administration can be implemented, all priority dates within a stream system must be identified. A court decree of water rights provides the most secure record of priority dates. In New Mexico a water rights adjudication is a court process which results in a decree that legally determines the validity of all water rights and their elements (*e.g.,* priority date, place of use, amount of use) in a stream system. State of New Mexico lawyers pursue the adjudication and the staff of the State Engineer collects and compiles the information about the water rights.

The adjudication process opens with the OSE conducting an inventory of all water rights in the system known as a *hydrographic survey*. The survey compiles all public information and results of field data collection for each right into a report. Later, the OSE mails an offer[4] based on the survey to each water right claimant. The offer describes the proposed elements of each water right as it appears in the public record. Each claimant may negotiate with the State over the elements described by the offer. If they are able to reach an agreement, the court enters the order and the matter is resolved as between the claimant(s) and the State. If no agreement is reached, the court will refer the claimant(s) and State to mediation or the matter is set for trial. An order of the court will finally resolve the water right as between the claimant (s) and the State. Following the resolution of all water rights, the court will hold an *inter se* proceeding in which any claimant can object to the rights of any other claimant. In this way, the matter is resolved as among the claimant(s), the State and the community in which the right is located. The adjudication

3 N.M. Const. Art XVI, Sec. 2, "… Priority of appropriation shall give the better right."

4 The term 'offer' is used generally in this paper. Other document titles that serve that purpose include 'consent order', 'subfile order', 'stipulated subfile order', 'order adjudicating water right' or something similar. The term used depends on the court conducting the adjudication and may vary over time.

process ends with the court issuing a final decree establishing the elements of each water right in the stream system, including all priority dates.

The *basis* for the determination of a priority date depends in part on whether the State Engineer had jurisdiction over water use in the area at the time the water right was initiated. The question of jurisdiction is different for surface water rights and groundwater rights. For surface water rights, the State Engineer has had jurisdiction throughout New Mexico since 1907, when the then-territorial legislature enacted the New Mexico water code. This code requires that someone wanting to make a new surface water diversion file a permit application with the State Engineer. If the application is granted, the priority date of the right will be the date of filing that application. For groundwater rights, the State Engineer has had jurisdiction over a groundwater basin from the date that he formally declared its boundaries. Following that date, the Engineer requires a permit application for all new uses. Again the priority date will be the date the application was filed with the State Engineer. As of 2006, all basins have been declared.

If a water right predates these two types of State Engineer jurisdiction, the priority date can be more difficult to determine. These dates are based upon reliable evidence of intent to put water to a beneficial use. Intent can be inferred from a) physical actions reported in affidavits of people with actual knowledge of a diversion, b) evidence of surveys, construction, reports or photographs, or c) other evidence of notice to other appropriators, such as the posting signs. If there is a disagreement about the whether the evidence is enough to prove a water right element, the adjudication court will rule on the matter.

For more information, please see the "Adjudication" chapter in this edition of *Water Maters!.*

When an adjudication is completed, the final decree allows priority administration to proceed in a relatively straightforward manner because the priority dates are set. The adjudication process, however, is lengthy and often requires several decades to finish. To date, only a few of New Mexico's stream systems have been fully adjudicated. This situation complicates priority administration. Where priority dates have not been formally recognized by a court, there is less certainty about whether they are correct. Correct priority dates are important to knowing whether a water use is senior or junior to another water use. For many years, the State Engineer took a conservative approach and declined to conduct a priority call without an adjudicated stream system.

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Priority Administration Involving Non-Adjudicated Water Rights: In 2003, the New Mexico legislature passed a statute which recognized that the State Engineer needed clear authority to administer priorities before an adjudication had been completed.[5] The Engineer then developed rules known as the Active Water Resource Management (AWRM) regulations.[6] Under the AWRM regulations, the Engineer can use priority dates of water rights based on other evidence of water use. The regulations list a hierarchy of evidence for

5 NMSA 1978, Section 72-2-9.1. Priority administration; expedited water marketing and leasing; state engineer.

6 Active Water Resource Management, Title 19, Ch. 24, Pt. 13.

On paper, a priority call serves as a powerful mechanism for protecting senior rights through the allocation of water in times of shortage. However, the State Engineer has seldom conducted a priority call.

establishing priority dates. This evidence, ranked from most to least authoritative, includes:

1. A final decree from an adjudication court
2. A sub-file order in an adjudication
3. An offer of judgment from the State in an adjudication
4. A hydrographic survey prepared by the State Engineer
5. A license issued by the State Engineer
6. A permit from the State Engineer
7. The State Engineer's own assessment of historic beneficial use, based on "best available evidence."

Where the determination is based on documents that carry less weight than a decree, the determination is provisional, pending a full adjudication of the entire stream system.

Once the final list of water rights and their priority dates in a stream system is assembled, the State Engineer publishes the list. Water right holders may appeal their priority date, or any other element of the water right, to the State Engineer in the first instance and, barring satisfaction, then to a state district court. The Engineer can implement priority administration, even if a court challenge to an AWRM-determined priority date is underway.

For more information, please see "Active Water Resource Management" chapter in this edition of *Water Matters!*.

Priority Administration in Practice

Issues and uncertainties. On paper, a priority call serves as a powerful mechanism for protecting senior rights through the allocation of water in times of shortage. However, the State Engineer has seldom conducted a priority call. State officials and water right owners often mention such action as a possibility when a water shortage strikes a New Mexico stream system. Water right owners have occasionally asked the State Engineer to implement a call—or sought court action to compel one. To date, the Engineer has usually avoided such a course in favor of alternatives, such as water sharing, or because it rained. Legal uncertainty partially explains this long time hesitancy. Additionally, state and federal governments have been able to augment water supplies with reservoir storage reserves or groundwater pumping during much of the twentieth century. These supplies, or unanticipated rain, have made curtailment of junior uses unnecessary for decades.

Alternatives to priority administration have been favored over curtailment for a variety of social, political and economic reasons. There are community conflicts when neighbors wrestle the prospect of some members receiving water and other receiving little or none. Agricultural users have strong political support in the legislature and beyond. Since agricultural interests with older priority dates hold legal rights to most of New Mexico's available water, a priority call would likely pit seniors in sparsely populated rural areas against New Mexico's junior and heavily populated urban areas.[7] Thus, in the event of a priority call, agricultural interests may obtain curtailment of water delivery to cities, towns, commercial, and industrial uses. If a priority call curtails water use among these juniors, serious regional economic effects may be felt. All these reasons will lead to protracted legal strife. Thus, state water managers have long viewed a priority call as a tool of last resort.

7 In 2010, agriculture accounted for 78.62% of all water withdrawals in the state while municipalities, business, and industry accounted for about 15% of withdrawals.

New Mexico courts have supported this position by recognizing the general flexibility of the State Engineer in the administration of priority dates. Critics have pointed to Article XVI, section 2 of the state constitution, which seemingly enshrines the first in time, first in right principle by declaring that "[p]riority of appropriation shall give the better right." The same article, however, states that appropriation must be done "in accordance with the laws of the state." The New Mexico Supreme Court cited this language, in *Tri-State Generation and Transmission Association v. D'Antonio*, as broadly empowering the legislature to delegate administration of water resources to the State Engineer. While upholding AWRM as constitutional, the Court cautioned that the delegation of this authority to the State Engineer does not allow the agency or the legislature to regard priority dates of senior water rights as "nothing more than an aspiration, subject to legislative whim and discretion." Nothing in the *Tri-State* decision or other cases, however, has found a general duty of the State Engineer to issue a priority call when a senior files a request.

General principles of prior appropriation in the western states have supported at least some flexibility in administering priority dates. In many states, for example, if a senior demands a priority call but officials find that the senior doesn't need the water or has not been using it, the officials may decline to enforce the senior's priority date, in the name of preventing waste. Similarly, if state authorities reasonably conclude that a priority call would fail to result in any water actually reaching the senior's diversion structure, they can decline to issue the call. This situation is known as a *futile call* and it allows state officials to refuse to implement priority administration, unless and until stream conditions change. New Mexico law does not define this term, but other western states have developed legal definitions. None-the-less, New Mexico water officials have publicly invoked this concept. For example in 2013, the Carlsbad Irrigation District in southeastern New Mexico filed a formal request with the State Engineer for priority call in the drought-stricken Pecos River stream system. This priority call would have required curtailment of upstream groundwater pumping, which in CID's view, prevented the flow of the river to reach district diversion structures. Those parties who opposed this action, however, maintained that curtailment would result in a futile call, because the system's response to a reduction in groundwater pumping would take many years before water would actually flow to the senior's As the State Engineer worked on addressing the crisis, it rained, a lot, the reservoirs filled, and the need for a call was removed.

The AWRM regulations allow communities and others to develop alternatives to priority administration. These are known as *alternative administration*. This type of administration includes activities such as water rotation, shortage sharing, and forbearance. Water rotation involves water users taking turns on a schedule to use a share limited supply. Shortage sharing involves reductions among water users so that all may receive a portion of a limited supply. Forbearance involves certain water users agreeing to not use water temporarily so that others may have access to more. These tools are characterized by the agreement of water right users, including seniors, to forego full use of the amount of water to which they are legally entitled.

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The remainder of this paper will examine this search for alternatives in specific New

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Mexico stream systems. Thus, although the topic is priority administration, the discussion that follows will focus on planning for and avoiding a process that in practice has rarely been carried out.

The Cimarron River Stream System. The Cimarron River of northeastern New Mexico flows from Eagle Nest Lake in the Sangre de Christo Mountains to just below the town of Springer, 60 miles to the east, where it joins the Canadian River. A number of large water users depend on the Cimarron, including irrigation districts, ranches, the city of Raton, and numerous small landowners. Eagle Nest Lake is a large, man-made reservoir with a capacity of almost 70,000 acre-feet of water. This reservoir is key to managing the water supply in the Cimarron stream system. Many water right owners, including the city of Raton, have storage rights in the reservoir. The Cimarron water master oversees the release and delivery of water from Eagle Nest Reservoir to water right owners. This stream system is one of two under full priority administration. The other system is the Costilla Creek.

The Cimarron River stream system was fully adjudicated by final decree on December 20, 1929. The decree adjudicated about 40,000 acre-feet. On June 1, 1932, the court relinquished jurisdiction for management purposes to the State Engineer. Any priority administration in the area can proceed on the basis of established priority dates. The stream system is fully appropriated and no new diversions are allowed. The State Engineer's district supervisor and water master employ alternative administration strategies allowed under the AWRM regulations. This approach promotes the negotiation and implementation of cooperative water sharing agreements among water right owners in a stream system. Thus, seniors and juniors can meet the challenges of water shortages and minimize the adverse effects of a priority call.

However, even where a cooperative arrangement has been created, a senior water right owner may still decide to request a priority call from the State Engineer. In such a case, the water master's manual for the Cimarron describes how the State Engineer's Office would respond, assuming that river conditions did not result in a futile call. A priority call would begin when a senior water right owner demanded that the water master deliver sufficient water to meet the senior's need. The senior must give 24 hours advance notice of the requested delivery.

However, the water master would not necessarily cut off a junior without warning. The master can adjust the timing of priority call to minimize the effects on juniors, if possible. The water master manual requires OSE staff make contact with the junior so s/he has time to shut the headgate that controls water flowing onto the property. The water master can ask whether the junior only needs one or two more days to finish the current use of water. If the answer is yes, the water master can ask the senior if such a delay would unduly interfere with the senior operation. If not, the water master can allow the junior to complete the current use. After that, delivery to the senior takes place. In practice, this accommodation, however, may not be possible.

Given the problems a priority call can generate, the OSE district supervisor and water master in the Cimarron strive to maintain good relations with water right owners. The goal is to promote cooperation that can avert the need for priority administration entirely.

The Mimbres River Stream System. The Mimbres River flows for 91 miles in southwestern New Mexico, from the Black

Range to a basin just east of Deming. Farmers irrigate about 80,000 acres using surface and groundwater. The State Engineer closed the Mimbres to any new requests to appropriate water in 1972. A 6th Judicial District Court completed the adjudication of Mimbres water rights in 1993. In 2005, the State Engineer declared the Upper Mimbres Water Master District. In 2006, the Engineer published the Water Master Field Manual which included sections on priority and alternative administration. The State Engineer has identified the Mimbres as a priority basin for AWRM implementation.

Historically, accurate measuring devices for stream flows and the water diversions have not been in place in the Mimbres stream system. In 2009, irrigators began installing meters in the middle and lower Mimbres basin. In 2013, the State Engineer ordered all Upper Mimbres ditches to install meters at their diversion headgates. Meters are necessary for measuring how much water farmers divert from the river and groundwater basin. Measuring water use is intended to help prevent a) illegal diversions, either beyond the adjudicated amount or without benefit of a water right, and b) wasteful water use practices. Keeping water use within legal limits reduces the need for priority administration.

Priority administration, however, requires more than accurate water measurement at the senior's headgate. This point is illustrated by a legal battle over priority administration in the Mimbres filed over a decade ago. The San Lorenzo Community Ditch Association has the most senior rights on the stream system and has had its headgates metered since the early 2000's. During the summer of 2003, the Association could not deliver enough water to meet its members' needs. The Association maintained that junior diversions upstream caused the shortage, although it admitted that the shortage could have been caused by drought. In September of 2003, the Association filed with the District Court of Luna County for a preliminary and permanent injunction against upstream juniors to stop their diversions and an order requiring metering at the upstream headgates.

Under the court's order, the State Engineer met with the parties to suggest alternatives, such as rotation of water use among water right owners. The parties were not able to reach an agreement so the water master ordered a rotation schedule in April of 2004. When San Lorenzo did not follow the schedule, the water master asked the court for a hearing to *show cause* (to explain) to justify its actions. Before the hearing could take place, the Association filed a petition asking the district court to order the State Engineer to administer rights by priority. The district court issued the *writ of mandamus*.[8] After a hearing, the court entered an order that concluded that priority administration would require a greater understanding of the water system through "measurements or estimation [of] flows, demands, diversions, and returns".[9] The court then canceled the writ.

Priority administration, however, requires more than accurate water measurement at the senior's headgate,

The Association appealed the district court's decision to the New Mexico Court of Appeals. Responding to the allegations, the State Engineer argued he needed more information than just the amount of water required by the senior before he could curtail juniors. Curtaining juniors required knowing how much water was in the river,

8 A *writ of mandamus* is a court order to a government official requiring the official to properly carry out her/his official duties.

9 *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, 140 P.3d 1117, quoting from the district court's opinion.

In a time of shortage, imported water cushions the effect of drought and threat of a call on a junior who has contracted for that water.

how much was being diverted, and how much water the association members needed to irrigate particular lands and crops. The Engineer reiterated that "effective administration will require a more detailed analysis of the entire Mimbres surface water system, including more comprehensive measurement or estimation of flows, demands, diversions, and returns." Finally Engineer stated that the water master needed access to the Associations metering devices, which the Association refused to grant. The Court of Appeals remanded the case on a procedural issue to the district court. A decade later, the state is requiring the installation of measuring devices to make priority administration a viable framework for managing water.

The case of *Bounds v. State, ex rel. D'Antonio* focused on priority administration in the Mimbres and domestic wells. The New Mexico Supreme Court decided the case in July of 2013. A Mimbres basin rancher challenged, as unconstitutional, a state domestic well statute that makes the issuance of domestic well permits mandatory. Under the statute, the State Engineer grants the permit without requiring notice, consideration of the availability of water, or the opportunity for others to object. The State Engineer closed the basin in 1972 stating that the water was fully appropriated.

The rancher argued that if the basin was closed because the water was fully appropriated, the mandatory issuance of domestic permits results in new wells taking water that should have been available to senior water right owners. Thus according the rancher, the basic principles of the prior appropriation system are violated. The New Mexico Supreme Court disagreed, noting that the new well permits were still subject to priority administration in times of shortage even though the State Engineer issues them automatically. A well permit, in other words, does not guarantee the use of groundwater or exempt the owner from having his diversion curtailed to protect senior rights.

The San Juan Chama Project—Priority Administration and Imported Water. Priority calls apply only to water that naturally occurs in a stream system. They do not apply to imported water. Water can be imported from one stream system into another through pumps, canals, tunnels, and pipelines. Imported water is subject to priority administration only in its basin of origin, not in its basin of use.

The San Juan Chama Project illustrates this circumstance. New Mexico is entitled to a share of the Colorado River under the Colorado River Compacts. Infrastructure built by the U.S. Bureau of Reclamation for the Project diverts water from the San Juan River, a tributary of the Colorado River. The water is transported across the Continental Divide and dumped into the Rio Chama. It is stored in New Mexico reservoirs and released as needed for entities that have contracted for it. Once released from the reservoirs, the water travels down the Chama, along with the river's natural flows to the Rio Grande.

In a time of shortage, imported water cushions the effect of drought and threat of a call on a junior who has contracted for that water. Contract water is not considered when any senior water right owner requests a call on the natural flows of a river. Seniors are legally obligated to let the imported water flow past their points of diversion. Contractors for San Juan Chama Project water include the city of Albuquerque and a number of other towns, cities, and conservancy districts in northern New Mexico. These contracts are governed by federal Reclamation law and various federal statutes which authorized the San Juan Chama Project. Several factors, including the location of some of the contractors above

the point at which the Chama joins the Rio Grande, make the accounting for this water very complex. The priority dates that affect San Juan Chama Project water are found in the interstate compacts governing its stream system of origin, the Colorado River system.

There are some physical barriers to delivery of the San Juan Chama Project water. New Mexico's latest drought dramatically reduced native water flow in the Rio Chama. Thus, much of the stream flow consists of imported San Juan Chama Project water. The Chama river channel absorbed some of the Project water and replenished the underlying aquifer. This situation complicates the water accounting for the contractors because the contracts did not contemplate depletions by the natural system. The imported water also creates some social problems. Although farmers in the lower Rio Chama valley own water rights dating back centuries, they cannot access the imported water flowing to the Rio Grande. It is hard to watch that water pass their headgates when their fields are thirsty.

The State Engineer and the New Mexico Interstate Stream Commission have worked with local irrigators to fashion cooperative agreements for sharing the natural flows of the Rio Chama. In the summer of 2013, for example, the Rio Chama Acequia Association agreed to implement rotating periods of reduced diversions among its members. The result has been to 'stretch' the available supplies so that all the users in the area get access to at least some water. This cooperation has so far averted a priority call by the most senior users.

The Pecos River Stream System—Priority Administration and Interstate Compacts. The Pecos River Compact illustrates another means by which distant downstream water use can affect the application of priority administration. The Compact imposes a federal legal obligation on New Mexico authorities to deliver water to Texas. To meet this obligation, New Mexico must limit water use within the state. State officials could impose priority administration to meet New Mexico's Compact obligations, but work hard to find alternatives to such action.

The history of deliveries on the Pecos River has long generated friction between water right owners in New Mexico, where the river originates, and in Texas, where the river empties into the Rio Grande.

Attempts to resolve protracted disputes between the sister states led to the Pecos River Compact of 1948. Under the Compact, New Mexico must ensure that a certain amount of water is delivered annually to the Texas state line. New Mexico shall not "deplete by man's activities" the amount of river flow into Texas that prevailed in the year 1947. This "1947 condition," as the Compact called it, led to disagreements between the two states over how to calculate it. In 1974, Texas sued New Mexico in the U.S. Supreme Court for failing to abide by the Compact.

The Court decided the case in 1988, finding that New Mexico had in fact violated its delivery obligations. In its amended decree imposing remedies, the Court found that New Mexico had under-delivered water to Texas at an average annual rate of about 10,000 acre-feet over the previous 34 years. For causing this economic loss the Court fined New Mexico $14 million and ordered the state to comply with the Compact in the future, through actual water deliveries. The annual delivery amount, the Court decided, would be calculated by a method that Texas had proposed during the litigation. The Court ordered New Mexico to make up any

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future shortfalls in delivery to Texas within a specified time period (essentially, within fifteen months of the end of the year in which the shortfall occurred).

New Mexico has struggled since 1988 to meet these obligations. Following the Supreme Court amended decree, the state legislature approved what are known as the Pecos compliance statutes, NMSA 1978 §§ 72-1-2.2, 72-1.2.4 and 72.1-2.6. These measures provided roughly $30 million in funding for the Interstate Stream Commission to lease or purchase water rights in the Pecos River stream system and retire them, in order reduce New Mexico's demand on the river and to assure sufficient flows for its Compact obligations. These measures were effective for much of the decade following the Supreme Court decree, but in the early 2000s dry conditions led to a decline in New Mexico's annual deliveries, threatening its Compact compliance.

One possible response to the decline would have been priority administration. A priority call by the State Engineer would have curtailed water use by New Mexico junior water right owners along the Pecos. At the time, however, the Pecos was only partly adjudicated, and the statute that would lead to AWRM as an alternate means to enforce priority dates did not yet exist. In addition, the hydrology of the Pecos seemed likely to result in a futile call. Any curtailment of junior water rights would mainly impact owners who pump groundwater in the Roswell area. A halt in pumping would eventually restore flow in the Pecos River, because the river and groundwater sources are hydrologically connected. Such restoration of river flow, however, would take many years. Because of this long delay, the State Engineer's office has maintained that a priority call against groundwater pumping to restore Pecos River flow would in fact be a futile call.

Yet the urgency of the Pecos situation seemed to require some kind of action. Failing to meet New Mexico's obligations under the Pecos Compact would likely bring further sanctions from the U.S. Supreme Court with uncertain consequences for New Mexico water users. For example, the federal government might take over administration of the river, a prospect that water right owners and state officials in western states have long viewed as disastrous.

The legislature responded in 2003 by enacting the statute, discussed earlier, empowering the State Engineer to implement the regulations that would become known as Active Water Resource Management or AWRM. The statute's preamble set forth a perceived need for giving the Engineer greater authority to oversee water use. It noted that "the adjudication process is slow, the need for water administration is urgent, [and] compliance with interstate compacts is imperative." Under this statute, the Engineer developed statewide AWRM regulations and began work on basin specific regulations. Supporters of AWRM saw the legislation as granting *new* authority for the Engineer to pursue priority administration in the absence of an adjudication decree. Critics of AWRM contend that legislators and their constituents had no intention of endorsing such broad new authority for priority administration. Critics challenged the regulations in the *Tri-State* case in 20*. In 2013* the New Mexico Supreme Court upheld the State Engineer's authority to create the AWRM regulations and to conduct priority administration under them.

Even as the legislature enacted this law, however, it also pursued alternatives that would make priority administration in the Pecos less likely. In 2002, the legislature conditionally approved an agreement among southern New Mexico industries, irrigation districts, and municipalities for further purchase and retirement of irrigation rights to help assure Pecos River Compact Compliance. This agreement also provided, if necessary, for pumping of groundwater into the Pecos to augment its flows. The Interstate Stream Commission developed the Seven Rivers well field to meet this purpose.

The legislature added further conditions, however, beyond those the parties had negotiated. Most importantly, the parties were required to adjudicate or settle major water rights contested by the Carlsbad Irrigation District, the Pecos Valley Artesian Conservancy District, and Reclamation. The parties, along with the State Engineer and the Interstate Stream Commission, reached a settlement signing it in March of 2003. This agreement is known as the Pecos River Settlement Agreement.

State officials have praised the Settlement as crucial for avoiding priority administration to comply with the Pecos Compact. The State Engineer has drafted specific regulations to implement AWRM in the Lower Pecos, including priority administration if necessary. Any such action would be subject to the Settlement Agreement, which limits the ability of the Carlsbad Irrigation District or Reclamation to make a priority call. State water resource managers hope that the settlement terms and the alternatives to priority administration included within AWRM will avert any curtailing of junior water right owners to meet New Mexico's water delivery obligations to Texas.

Conclusion

Priority administration is central to applying the principle of first in time, first in right. The actual use of priority administration in practice, however, is subject to the discretion and flexibility of decision-makers, including state officials and water right owners. New Mexico's experience to date has shown that alternatives to priority administration can be implemented, making curtailment of the diversions of junior water right owners a last resort. A major question for the future will be how to preserve this flexibility, as climate change and a growing population continue to threaten additional pressure on available supplies.

By Ed Merta (2014)

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