

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, 18 N.M. 681, 140 P. 1044, 1050 (1914).

Background

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

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

Insert OSE table: “Table for Adjudications article (dsb 12-18-07).doc”

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

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

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

Process of an Adjudication

The process of adjudication is complex and lengthy, mainly due to the large number of claimants involved. For example, it is estimated that in the Lower Rio Grande adjudication there are 16,000 claimants, in Aamodt there are approximately 2,000, and the estimated number of potential claimants in the Middle Rio Grande when it is eventually adjudicated, ranges from 100,000 to 180,000. The complexity of adjudication is illustrated in the chart showing the adjudication process on [the following page or at page ____ \(insert New Mexico Adjudication Process flow chart, Flow_Chart.tif, with caption, “Courtesy of the Administrative Office of the Courts” \)](#)

Hydrographic Survey

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

Note: this quotation of the Water Code should go in a block.

Upon the completion of the hydrographic survey of any stream system, the state engineer shall deliver a copy of so much thereof as may be necessary for the determination of all rights to use of the waters of such stream system together with all other data in his possession necessary for such determination, to the attorney general of the state who shall, at the request of the state engineer, enter suit on behalf of the state for the determination of all rights to the use of such water, in order that the amount of unappropriated water subject to disposition by the state under the terms of this chapter may become known, and shall diligently prosecute the same to a final adjudication: provided, that if suit for the adjudication of such rights shall have been begun by private parties, the attorney general shall not be required to bring suit: provided, however, that the attorney general shall intervene in any suit for the adjudication of rights to the use of water, on behalf of the state, if notified by the state engineer that in his opinion the public interest requires such action.

NMSA 1978, Sec. 72-4-15.

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

Subfile Phase

In the subfile phase, individual claimants are first joined as defendants and then water rights claims are adjudicated between the State and the claimants. The process may involve an offer of judgment followed by a subfile order if the State and the claimant reach an agreement. An expedited process being used in some adjudications combines the two documents into a consent order. A subfile order may contain all of the elements of the water right (ownership, quantity, priority, place of use, purpose of use, point of diversion); or the court may decide in a procedural

order that a determination of certain elements will be delayed until other rulings which effect all parties are complete. It is helpful to think of subfile orders as bricks which are building the final decree. If the OSE and a claimant cannot reach agreement, the disputed matter may be mediated and/or litigated (see below). The subfile phase can be one of the lengthiest phases of an adjudication.

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

Consent Orders

If both the OSE and a claimant agree as to the elements of a water right, then both parties sign the consent order and it is submitted to the court for review and entry. If the court agrees, then it signs the order and enters it into the record. Entry of a consent order is a major step for each defendant/claimant, but the whole adjudication remains open and the water rights are not finalized until the court conducts the *inter se* phase and enters the final decree into the record.

Disputed Claims

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

Global Issues

Global issues are matters that affect the stream system as a whole, or a large group of claimants. These issues may be addressed at any stage of the adjudication. This choice depends upon the judge's preference or when an issue arises. Global issues can involve matters such as the priority date for all of the parciantes on an acequia, or the farm delivery requirement (duty) applied to a stream system. In the Lower Rio Grande adjudication, the Court has ordered that all parties be joined before rulings on global issues such farm delivery requirements and issues between Elephant Butte Irrigation District and the State are made.

Inter Se

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

Partial Final Decrees & Final Decrees

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

New Mexico Supreme Court Ad Hoc Committee

On October 15, 2002 the New Mexico Supreme Court established an ad hoc committee to examine and study the promulgation of rules of procedure for water litigation and stream adjudications in New Mexico. The ad hoc committee researched the following issues: *Ex parte* contacts; prohibitions on changing rules of procedures in pending cases; the legal nature of water rights; the inherent procedural difficulties in adjudications; the accuracy and updating of records; and standardizing procedures for all adjudications.

On June 13, 2007 the Supreme Court of New Mexico issued new rules on the procedures for adjudications. The rules are open for public review for one year and then go into effect. The rules address such issues such as: service and joinder of water rights claimants; stream system

issues and expedited *inter se* proceedings; an annual joint working session; *ex parte* contacts; general problems of administration; and excusal or recusal of a water judge.

Joe Stell Water Ombudsman Program

In 2007 the Legislature funded the Joe Stell Water Ombudsman Program at the Utton Center at the University of New Mexico School of Law. Attorney Darcy Bushnell has been hired to direct the Program.

The Ombudsman Program provides information to *pro se* claimants (water rights claimants not represented by counsel) so that they may understand and participate more fully in the adjudication process. The Ombudsman acts as a third party neutral and is able to help self-represented claimants understand the options available in responding to pleadings and offers of judgment or consent orders from the State. The Ombudsman is not to provide legal advice.

Water Natural Resources Committee

The 2007 Interim Water and Natural Resources Committee created a subcommittee on adjudication reform, chaired by Senator Mary Kay Papen. This subcommittee held meetings to discuss how adjudications can become more efficient and effective. A working group of representatives of the Administrative Office of the Courts and the OSE compared the process in several other states and continues to develop ideas for improving the process and will make recommendations to the Legislature. This effort is focused on future adjudications – primarily looking at how to approach the Middle Rio Grande – and not on existing, on-going adjudications.

By Brigette C. Buynak

**Sources Consulted
and Other Contributors**

CLE INTERNATIONAL, WATER LAW, STREAM ADJUDICATIONS & THE NEW WATER JUDGES (Aug. 16-17, 2004).

N.M.S.A. 1978 § 72-2-9 (1907).

N.M.S.A. 1978 § 72-4-15 (1907).

N.M.S.A. 1978 § 72-4-19 (1907).

NEW MEXICO ACEQUIA ASSOCIATION, ACEQUIA GOVERNANCE HANDBOOK (2006).

NEW MEXICO OFFICE OF THE STATE ENGINEER AND NEW MEXICO INTERSTATE STREAM COMMISSION, 2005-2006 ANNUAL REPORT (2006).

State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699 (1983).

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

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