

New Mexico Water Dialogue 24th Annual Statewide Meeting

Balancing Our Water Needs: Adjudication and Alternatives

Summary by Kathy Grassel

Rummaging through the dusty trunk in the attic

Adjudication—one of those words that very few people anywhere can define or describe except those in the realm of western water, and even among those involved in actual adjudication—there can be varying degrees of knowledge. That’s because, according to Reed Benson, Professor at the UNM Law School, who led off the Dialogue’s annual meeting, adjudication is a metaphorical dusty trunk in the attic, passed down to you by several predecessors, going back to the turn of the 20th century. “Those of us who inherited the dusty trunk are not sure what’s in it anymore,” he says, “Plus we don’t have the key.” With any adjudication, because of so much information, so many parties, and so many issues, it’s easy to get bogged down in detail. Leaving that part to the speaker who followed him, Reed’s stated goal for the day was to talk about what is in that trunk, how it got there, and what its contents mean for New Mexico.

Between adjudications and conventional wisdom, there’s an internal conflict. One part of conventional wisdom dictates that it’s got to be done. “You really can’t manage water in a prior appropriation system, in principal,” he says. The other part of conventional wisdom is actual practice: “They take so long.” He bluntly calls them “a huge pain in the butt.” Reed isn’t looking to downplay the work that goes into adjudications. Many are ongoing; that’s

the work that is proceeding under the law of this state.

Stepping back in history, in the early days, before water codes, you could appropriate water without the state. It was ben-



eficial use and rule of capture. When water codes came along starting in 1890, at some point there needed to be determination of existing water rights—the pre-1907 water rights. “We had water rights preceding the water code,” Reed says. “That was the original idea behind adjudication and it’s totally logical.” So why the concerns? It’s not just in New Mexico’s experience; in other western states—Arizona, Montana, and Idaho—adjudications take place in what seems like geologic time. They are very expensive, taking in the cost of government and cost to users, of experts, reports, processing, roles of agencies, and the greater cost to the public. They’re contentious and divisive. The State against the water user community; tribes against the State—there’s lasting resentment around adjudications. “And even after all that time, money, and acrimony, do we get

want we want?” asks Reed. Not necessarily. Even with the finality of records, they don’t necessarily include key issues. In the Klamath basin, for example, adjudication was not going to deal with the Endangered Species Act. Adjudication is not a particularly inclusive proceeding; i.e., you have to be a claimant in order to play. Adjudications have not proven their effectiveness in better water management even where they’ve been done. (Colorado may be the exception.) From an efficiency standpoint, the cost is high. “This did not sneak up on you,” says Reed. “States want and have been doing them for a while. Why?” Reed lists a few reasons. The idea we need to do this is to have a complete system of pre- and post-code rights. In the era of big water projects, especially those of the Feds, the Feds are not willing to proceed until an adjudication is complete, letting them know if their project will have adequate water rights. “So some adjudications got authorized and launched to pave the way for water projects,” Reed says. “The same holds true for municipal projects, such as when a city wanted to build reservoir. Then there are tribal reserved water rights. When Congress passed the McCarran amendment, Federal and tribal claims would now be heard in state courts, so in the 1970s, there was a rush of adjudications in order to get home court advantage.” So there has to be motivation in order to get these underway, Reed concludes. But the 1970s was a long time ago; since then many Indian tribes have opted

DUSTY TRUNK—CONT. FROM PG. 1

to quantify their rights through negotiations rather than adjudication. Water rights adjudication in state court held less than optimal results for tribes.

So what about today? What purpose do adjudications serve in the modern era? Despite apprehension coming from some ag and community users, what is the goal that makes adjudication necessary in this state? “Priority administration, we haven’t done,” says Reed. “I don’t think we’ll do priority administration even with adjudication. I’m not sure priority administration is even good for New Mexico to do what’s necessary.” As for tribes, now the reservations work out their water rights through settlements—much preferred over litigation by both the courts and parties involved. “We have water transfers and informal water markets. In 2003, the legislature directed the state engineer to set up rules for leasing and transfers, saying we need to proceed with water management without waiting.” That was Active Water Resource Management. Finally, according to Reed, adjudications are backward-looking, only looking at individual water rights. How does that help us look forward to address the challenge of 21st century? How do adjudications help? Answering this question, decisions should follow from that.

Professor Reed Benson is chair of the UNM Law School Natural Resources & Environmental Law Program. He joined the UNM law faculty in July 2008. In addition to teaching natural resources classes, he serves as Faculty Editor-in-Chief of the Natural Resources Journal. Benson's writing focuses on water law and environmental issues facing the West. His publications examine the application of the Endangered Species Act to federal water projects, the efforts of western cities to ensure adequate water supplies for recreation, and the scope of federal deference to state laws governing water allocation and management.

New Mexico Adjudication Practices and Developments

Can adjudication allow for creative solutions? It's complicated.

Arianne Singer, Deputy General Counsel of the Office of the State Engineer, has been working on adjudications since 2001. She reports 11 active suits—five are in federal court and six in state court. These include 72,000 water rights claims.

Singer begins by explaining the basics of water law in New Mexico. The original purpose of water code was to determine water rights in existence in 1907. Adjudication in New Mexico is complex and long because its history is so long; the earliest records date back to 1598 in Chama, going back to the Spanish. Under the 1907 water codes, it’s a right to use water, not to own water. After 1907, water in New Mexico is owned by the public. You can lose your 1907 water right if you do not keep using it. These are the elements of water rights and continuity of use.

Adjudication is the legal process that determines that right. Water use belongs to individuals rather than districts, so you have to go to every individual; that’s why it takes decades. “I’m usually up here asked why adjudications take so long. The legislature complains and asks why they take so long. They ask why the Aamodt case took 51 years. It’s not because we weren’t doing our jobs,” Singer explains. “This adjudication was delayed because it involved Pueblo water rights. We were able to adjudicate the non-Pueblo water rights, but not the four pueblos. Pueblos do not have a history of treaties and the

law is not certain. We ended up settling.” Singer says settlement agreements have advantages. They address local needs, are forward-looking rather than backward-looking, and they bring money to the state. She cites the Navajo settlement which brought in \$1.2 billion in federal money, with New Mexico’s cost share only \$15 million, benefits going not just to Navajo chapters but also to the City of Gallup. Indian water rights

settlements turn out to be a great benefit for New Mexico. However, the biggest uncertainty is always: what are the water rights of the Pueblos? “These are existing claims for rights that



predate all the rest of the state,” Singer says. “Once we know what the water rights are, then they can be administered. Adjudication doesn’t allow for creative solutions; I don’t know how to determine Pueblo water rights without adjudication. How do you bind non-Indian water users outside adjudication?”

Negotiations themselves took five or six years. Once there’s a settlement, then it goes to Congress for funding; Congress puts in its requirements, so there’s a re-draft, re-execution, and then implementation. “Then we needed to adjudicate domestic wells, requiring individual field checks of each well,” she continues. “As time goes by, more water rights are developed. It takes many more years to check every well. A hydrographic survey for livestock wells also takes longer than irrigation districts. Due process requires notice, we can’t get around that. It’s a judicial process. It’s a formal legal proceed-

ADJUDICATION—CONT. FROM PG. 3

ing wherein you must describe your water right.”

The adjudication process can be intimidating. The State Engineer conducts a hydrographic survey, issues a report, which has to be approved. The attorney general files the suit and makes the offers. The State mails a thick packet of documents to each claimant. One of the documents is a judgment describing the claimant’s water rights per the hydrographic survey. The claimant can agree, sign the judgment and send it back to the State, or if he thinks the state got it wrong, he signs an objection and returns that to the State. A claimant may also object to another’s claim in the basin. Or the lawsuit frightens people and they don’t respond at all. “When the *inter se* objections are resolved, a final decree is issued,” Singer says. “This *inter se* phase

takes a long time. It can take years, and be contentious and litigious. One says US law doesn’t apply to me, only Spanish. Or New Mexico law doesn’t apply. But everyone is entitled to due process.”

The central question is: What is the purpose of adjudication? Is it to merely describe water rights in a stream system? “It’s decades before you finish. Wells have been brought in only recently. Some irrigation rights may have been transferred. The state engineer has that information apart from any adjudication process. A decree assists the state engineer who then administers it; the court does not administer water rights. We now have rules promulgated for alternative administration.”

Singer contends that we can look for ways to streamline and make it less a judicial process. Priority administration is the nuclear option. Could we do domestic

wells as a group? Can we find ways to administer water rights, build new projects, protect seniors, and administer for new uses without adjudication? How can we do this together in terms of shortage? The Middle Rio Grande has the biggest water market in the state—MRGCD, water off-sets, appropriations of groundwater—do we need adjudication for that?

Arianne Singer came to the OSE in 2001 where she serves as Deputy General Counsel. Before beginning her career at OSE, she practiced law at the firm of Sutin, Thayer and Browne. She is a graduate of the UNM School of Law.

Return of the Breakout Sessions

Last year, the Dialogue substituted a panel with breakout groups with two rounds. It was such a success that the breakout groups were repeated this year with 10 questions plus “rogue tables” where participants chose their own topics. The issues discussed this year were Tribes and the State Water Plan; Shortage Sharing Strategies; Instream Flow; Meaningful Public Involvement; What Does “Impairment” Mean?; Infrastructure in Settlement Agreements; Data Acquisition and Management; “Adjudication Lite”; Policy Considerations in the 2018 State Water Plan; and What Does it Mean to Own a Water Right?”



Lucy Moore, the Dialogue’s co-founder and facilitator, who we rely on for her wisdom and insights, guided the leaders and groups, prepared a 9-page report summarizing the discussions. You can find that report at the Dialogue homepage <http://nmwaterdialogue.org/>. From here, under Notes and Updates, you can click on “Jump to Breakout Session Summaries.” Or on the events page, select “The Dialogue’s 24th Annual...” and scroll down through the agenda to the blue “Breakout Sessions Reports.” Click on that. As you will see from the report, the dialogue was rich and dedicated

to working out challenges collaboratively. As Lucy notes, the Dialogue’s annual meeting has developed “a special culture based on mutual respect, appreciation for the needs of others, and commitment to open, inclusive, creative dialogue.” Thank you Lucy for your contribution to that culture.



The Panel: Adjudications and Alternatives



Law, earth science, and engineering. The panel speakers' areas of expertise covered the spectrum of New Mexico's water resource administration: The Law: When nothing short of adjudication will accomplish tribal claims. Earth Science: When adjudication has little meaning in a geologically complex groundwater basin. Engineering: When the efforts to increase efficiencies in an over-appropriated system can function to achieve hydrologic balance.

So you know your right. Then what?

Peter Chestnut is an attorney whose career has been representing Pueblos in stream adjudications. He cites the complexity of *State v Aamodt*: four pueblos, eight governments, 1,000 surface users, 300 domestic wells. Then *Acoma v Kerr McGee*: six governments, two pueblos. The challenges have been that surface users are usually senior to domestic and municipal users. In any of these cases, the biggest uncertainty is tribes and pueblos and how to secure recognition of their water rights. One of big accomplishments is giving up priority calls in return for federal infrastructure so pueblos can put water to use. Even though adjudications are valuable from the Pueblo

standpoint, Kerr McGee was filed in 1983, and there's not yet a hydrographic survey. Surveys take years. Tesuque took five years, and 50 years later had to be done again. "It used to be quarter-quarter, now it's xy coordinates to so many decimal places," he says. "At the State Engineer's office, it meant a dozen people working for a year--a huge burden, particularly on the state." Another argument for alternative administration, according to the Chestnut, is the fact that electric pumps replacing windmills can pump a lot of water from great depths, and these are often junior users. "But if you turn off pump today, water is not available to a surface user immediately," he says. "If you litigate



to the end, you can know what everybody's right is, but how do you administer it? These alternative agreements are the future. The big uncertainty is tribal. Congress has recognized Indian and Pueblo

water rights as prior and paramount, and they have to be factored into any plans for the future; the challenge will be for the junior users such as Albuquerque."

Over-appropriation. Now what?

Phil King since 1990 has been a professor in the NMSU civil engineering department, and since 1991 a consultant to the Elephant Butte Irrigation District (EBID) where he specializes in flow measurement and telemetry. In 1998, he was "pulled into court mediation with El Paso District No. 1, Bureau of Reclamation, and EBID." [to become *NM v US*]. Then the Lower Rio Grande Adjudication was started in 1996 and got underway in early 2000s. [*NM v EBID*]. And the case now in the Supreme Court *TX v NM*. ("All I know is that it will be 5-4," King jokes). Adjudication of the LRG may be more complicated here than elsewhere given how water over the many years has been divided, first by the 1906 Convention, then the Rio Grande Compact and the Rio Grande Project. Proposed alternatives to adjudication, according to King, are allowing people to understand what they can live with instead of priority administration, which he describes as an extremely blunt instrument. "Things

have gotten bad enough in the Lower Rio Grande that we're having conversations that we couldn't have had a couple years ago," King says. Participating in those conversations have been the city of Las Cruces, NMSU, PNM, the Camino Real Utility, Santa Teresa, and two farmers groups--pecan growers and row croppers. "Missing is EBID, but for the past year we have been working cooperatively to get an aquifer plan to get us out of the Supreme



Court and bring us back into hydrologic balance," King says. "We are clearly over-appropriated." King accepts that the growers groups are understandably defensive because that's their livelihood. One of the constraints all operate under is maintaining the agricultural culture and character. "We could wipe out ag and we would balance, but nobody wants that, even M&I [Municipal and Industrial]," he says. King lists methods to increase efficiency, including laser leveling, irrigation schedules, system level improvements, reducing losses, and capturing stormwater for the aquifer instead of flushing it downstream. One obvious place to reduce depletions is through irrigated ag. "So we're going to M&I who need to offset," he says. "EBID has a pilot called Depletion Offset Program to avoid buy-and-dry by paying farmers to fallow. The project also studies similar mechanisms to prevent runaway buy-and-dry, one being water leases, which, while inconvenient, maintains the viability of agriculture." All that said, the outlook is bleak, King says. "We have a significantly more arid climate than even in the 1950s, so will expect to see higher depletions in Rio Grande project and area units." King says that while water users become more productive faced with impending doom

from the Supreme Court, in these brutal years, buy-and-dry probably will be necessary. EBID is the one who has to reduce releases from 3 afa to 3.5 inches, while pecan and M&I pump what they want.

From the water table to the negotiating table. Geoscience meets the rangeland.

Kate Ziegler is a consulting geologist for Union County in the Clayton Groundwater Basin. When she arrived at the Northeast Soil and Water Conservation District, no one had any idea what its groundwater resources were. The area is almost all farming and ranching located in the far northeast corner of the state. "What I saw happening was neighbors had started fighting because of having to get a permit now that we're a closed groundwater basin," Ziegler says. One of biggest lawsuits was against an irrigator who wanted to drill an 800-ft. irrigation well. Neighbors figured such a deep well would dry them up. "From data coming out of Bureau of Geology, we were able to demonstrate that the geology was very complicated, and that most folks were operating in separate little bathtubs,"



Ziegler says. "Some wells may be drying up and others not." Results of carbon dating to determine recharge indicated little or no recharge. Even during the area's worst drought, farmers were still trying to water corn because it was their only source of income. "In winter 2016 we undertook well-measuring. After seeing levels dropping 5-7 feet per year, traditional farmers collectively sat down, looked at data sets, and decided their techniques were not sustainable. They decided not to plant high-grade corn and switched to different crops or went back to grass, and then saw

a positive change in the water table. Our team took time to explain so they could agree to change." Zeigler says they are not finished working out how to farm with low-water, but now five counties in New Mexico and three in Colorado are trying to mimic the same project so they can move to sustainable ag, and also understand how regional water works. "One, there's not much water, and two, water doesn't stop at county lines or state lines. We're starting to see farmers and ranchers come to the table in a bigger community effort to discuss how to find best ways to go forward. They don't want their families to have to leave. There was lots of heartburn and screaming matches, but there was no other way except to compromise. It comes with shock and bad news. They are extremely resilient and extremely creative. Ag users can find way to balance water use."

Peter Chestnut, owner-attorney, has been practicing law since 1975. He received his J.D. from the UNM School of Law. He serves as general counsel for several Pueblos for the last 25 years. His firm focuses on civil law with an emphasis on Indian Affairs and Water Resources, primarily representing Pueblo Indian tribal governments and businesses.

Phil King is a hydrology and engineering consultant. He obtained his Ph.D. in Agricultural Engineering from Colorado State University in 1990. His current projects include irrigation design and operation, crop water requirement estimation, and canal instrumentation. Prior to coming to New Mexico, King worked in irrigation and drainage engineering as a Peace Corps volunteer in Malawi, Africa.

Kate Zeigler obtained her Ph.D. in 2008 from the Earth & Planetary Sciences department at UNM. She has conducted field research in New Mexico, Arizona, Utah, Montana, North Dakota and the People's Republic of China. She currently heads her own consulting company, Zeigler Geologic Consulting, LLC. ZGC now offers custom groundwater resource plans for ranches and farms.

New Mexico First Releases Report on the State Water Plan Town Hall

In December 2017, New Mexico First convened a “State Water Planning Town Hall” to provide a forum for New Mexico residents to have input into the 2018 State Water Plan. There were 225 participants from 33 New Mexico counties representing many diverse interests.

Participants worked in discussion groups, organized by topics called for by the State Water Plan Act: “Striking a Balance: Increasing Water Supply and Reducing Demand”; “Protecting Precious Resources: Water Quality, Watersheds and Natural Environments”; “Making Improvements: Building and Maintaining Water Infrastructure”; “Gatekeeping: Water Rights and Legal Matters”; “Bridging Gaps: Collaboration, Improved Water Planning, and Information-Sharing”; and “Preparing for a Changing New Mexico: Open Topic, Climate Change, Land Use and Economic Development.”

The result is 33 recommendations from the discussion groups that have been submitted to the Interstate Stream Commission which is expected to issue an updated State Water Plan this year.

As noted in the Executive Summary of the final report:

A common thread in many group conversations was the importance of developing productive and collaborative water management practices. Additionally, throughout all groups were discussions on the value of water to all regions of the state, and ensuring that local communities are aware of and involved in water decision-making. Data was at the forefront of many group conversations and recommendations. Five recommendations identified data needs and most groups voted their data recommendation as a top priority. Additionally, of these data recommendations, participants ranked three data recommendations as the top three most impactful recommendations of the entire town hall. Ideas focused on the need for improved data acquisition and management. At their core, these recommendations spoke to New Mexicans’ strong belief that clear facts can provide the basis upon which we should make water decisions. Funding was another common and highly ranked recommendation topic. Town hall attendees advocated for reforms to the current water project funding processes to ensure more available and continuous funding streams. The types of projects this funding would support were captured in a highly recommended and prioritized recommendation – calling for the development of innovative water infrastructure that increases efficient

water use. Another popular and prioritized recommendation stated the need for the funding and implementation of management strategies to address the impacts of climate change on our state’s water supply. Town hall attendees also expressed interest in reform for water policies that allow for flexibility for users, increased water-use efficiency and environmental protections. Many groups also discussed the water planning regions – advocating for realigning the watershed boundaries, as well as encouraging a more active role for regions in water planning and decision-making processes regarding water. Several recommendations also centered on encouraging more collaborative relationships between the state, regions and communities.

To view the entire report, see the New Mexico First Report:

<http://nmfirst.org/event-details/state-water-planning-town-hall-advancing-new-mexico-s-water-future>

Click on the Reports tab, then open "State Water Planning Town Hall Final Report."

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The New Mexico Water Dialogue relies entirely on memberships and the occasional larger donation to finance its work. The Dialogue has no staff and relies on its board of directors and a few wonderful people to pull together the annual meeting and occasional more focused meetings when dialogue is helpful, and to work on the bi-yearly newsletter. We keep the fees for the annual meeting as low as possible to cover costs and do not charge for the newsletter.

BUT, we need your help. We need to reduce our costs. PLEASE email john.r.brown2@gmail.com and request that you receive your newsletter electronically only and not by paper copy, which must be printed and mailed requiring postage. In addition, the electronic version has color photographs and live links. This is not say that we don’t welcome donations to support the newsletter. (Checks can be sent to Consuelo Bokum, 1300 Canyon Rd., Santa Fe, NM 87501).

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Update on the State Water Planning and Town Hall

Kelsey Rader



Lucia Sanchez, Water Planning Program Manager for the Interstate Stream Commission, gave the audience a quick history of regional and state water planning. It's been since 2003 that the legislature enacted a statute authorizing the Interstate Stream Commission to prepare a comprehensive state water plan that integrated regional water plans into the state water plan. Round One was well-funded, she reports, and took a long time. Round Two updates have been on a fast track of three years. Her question for all: What are we going to do to make the State Water Plan better, as it was intended to be? The plan has

Lucia Sanchez



both a policy and a technical component. "Before drafting the policy portion, we had to understand the public's priorities," she says. "We engaged the public with two big town halls for a broad perspective for the most pressing issues. That has been our major public involvement." Sanchez says she is anxious to get out on the road after the SWP is finished. "We don't want to be top-down."

Kelsey Rader of New Mexico First followed Sanchez to report the recommendations that issued from the Town Hall held on December 13-14. More than 200 people came together to add their voices to a suite of topics. Some of the results were surprising. See that story on page 7 above!