**NEW MEXICO SHOULD GOVERN ITS WATER RESOURCE MORE LIKE A COMMONS AND LESS LIKE A MARKET COMMODITY**

**by John R. Brown**

“We basically have three choices: mitigation, adaptation and suffering. We’re going to do some of each.
The question is what the mix is going to be. The more mitigation we do, the less adaptation will be required
and the less suffering there will be.” – John Holdren (2007)

**The issue: conventional solutions to water scarcity aren’t working.**

Conventional wisdom asserts that what is needed to ensure that water is allocated to its highest and best uses is for governments to “get out of the way” and allow markets to function efficiently. That approach doesn’t seem to be working well for New Mexico’s future, for reasons discussed below.[[1]](#endnote-1) How we govern our water becomes particularly critical in the context of looming disruptive impacts of climate change on our sources of supply.[[2]](#endnote-2) This essay proposes an alternative: to think of our water resource as a commons, and govern it accordingly.

What is a commons? In the sense I’m using the word it’s technically called a “common-pool resource (CPR).” We can treat as a CPR any “good” that, under conditions of scarcity, is subtractable – where one person's use subtracts from another's ability to use it (i.e., it can be depleted) , and where limiting or excluding people from using (or overusing) it is difficult or costly, but at times necessary. People can “free-ride” on a good they have not helped provide or pay for.

Hence, a “tragedy” – where “freedom in a commons brings ruin to all” – is possible. Nearly fifty years ago the evolutionary biologist Garrett Hardin declared it inevitable.[[3]](#endnote-3) The only solutions, he wrote, were: privatizing the resource in question (i.e., commodification and market allocation) or regulation by “the Leviathan” (state control). This has since been shown to be objectively wrong. We the people are fallible learners, but we can be and are often self-governing, creating and following our own rules that regulate our behavior toward each other. Numerous examples exist worldwide of social groups that share a common-pool resource and govern that commons sustainably over long periods – including New Mexico’s acequias.[[4]](#endnote-4)

By contrast, recent (Anglo-American) practice in New Mexico establishes a “private property right” to water. Some assert a maximalist position with respect to “my water.” But in fact these rights are quite restricted. Consider that:

* Rights are “rule-ordered” relations among people with respect to the water resource.
* Those rules limit right-holders’ behavior (what actions are allowed or forbidden).
* No right is absolute – you can’t just do whatever you want with “your” water, and you can’t sell or buy water rights without limits.
* A water right is a *use* right to a certain amount. It’s based on priority in time in NM, but is also dependent on ongoing beneficial use and other conditions: non-impairment of others’ rights, conservation, and consistency with “the public welfare of the state.”

**Conditions that make collective action a better choice than relying only on the market for allocating or reallocating water**

What we may own, and what ownership means, are defined both legally and socially. The idea of “belonging to” means different things in different cultures at different times, and the “bundle” of rights and responsibilities that constitute “owning” something varies with circumstances, and seldom invests absolute control in the “owner.”[[5]](#endnote-5) Rules in every society govern these rights and responsibilities and the operation of markets. Classic conditions for successful markets include:

* the trade of discrete goods and services (pure “private” goods),
* a marketplace of many buyers and sellers (where both have choices),
* buyers and sellers are fully informed about what is being bought and sold, and
* it isn’t necessary to consider the effects of the transaction on other parties.

These conditions don’t often apply to transactions in water rights. In a market, individuals determine value through selfish choices (the price they ask or are willing to pay). Though non-market values (for instance, cultural, esthetic or moral preferences) may enter into an individual’s calculations, a potential buyer’s wealth (ability to pay) can give her an advantage over competing buyers. Market outcomes favor the preferences of the wealthy over those of the poor and those with better access to information over those without such access. For these and other reasons, unrestricted markets fail to allocate water in communities’ long-term interests. A “free, unfettered market” to facilitate transfers of water rights between willing buyers and sellers also risks ignoring third-party effects (or as economists like to say, “negative externalities”), including social and economic impacts on communities from which water rights are moved, and effects on stream flow, riparian habitat and water quality, among others.

So, although they may be considered private goods, property rights in water are limited by public assertion of non-market values associated with water. Policy makers, too, understand that market-based transactions fail to take these fully into account, and have specified criteria that constrain permits or transfers of water rights on account of impairment of others’ rights, failure to conserve, and being contrary to “public welfare.” The last of these, however, has not been adequately defined, and no case law has emerged in NM since 1987 to give substance to those words. Nonetheless, every existing regional water plan (RWP) contains a “public welfare statement” that gives voice to a set of interests and values that cannot – or at least should not – be monetized or sold away without public scrutiny.

For me the question then becomes, “How can such considerations be effectively expressed and incorporated into the policies and the operational decisions that determine how our State’s water resources are allocated (and reallocated), used, and protected?”

At the outset, the State of New Mexico’s Regional Water Planning (RWP) process was designed to involve diverse constituencies in defining “public welfare” and ensuring that its meanings in local contexts are respected in authoritative decisions about water rights transfers. On the premise that individuals have multiple interests and values that can often be reconciled, the process was intended to strengthen the capacity of citizens and stakeholders, including traditionally under-represented groups, to contribute to developing and implementing regional and state water policy by promoting information sharing and collaborative work to build broader communities of understanding.

Policies are implemented through crafting institutional arrangements and structuring incentives to encourage desired social behavior – the “rules-in-use” that people fashion to govern their interactions in recurring situations. Embedded in its earliest (l987) conception of regional water planning was the New Mexico Legislature’s tacit admission that existing rules did not work well. Water rights had been thought to be based solely on priority in time, avoiding any explicit consideration of public interest or welfare. This seemed an inadequate basis for making decisions about how the state’s scarce and unpredictable water resources should be allocated, and in fact “priority” was often ignored. In mandating regional water planning the legislature sought a more flexible criterion that could temper strict application of the priority doctrine and enable adaptation by each region to its own unique needs.

Two decades have elapsed since regional water planning was initiated statewide. It was to be a set of collective efforts within sub-state regions to define how the public interest can be best served and how a scarce and uncertain water supply can be equitably and sustainably shared. Over those years we seem to have lost sight of that goal. It is time to refocus.

**How regional water planning can foster new institutional arrangements to avoid market failures**

Within the context of RWP, much can be done to transform water governance, by focusing our planning on strengthening institutions of local government and civil society, and the relations among them.[[6]](#endnote-6) In this regard the concept of *polycentricity* is helpful for understanding how our water resources might be governed more sustainably and equitably.[[7]](#endnote-7) Governing water as a commons requires a more robust set of institutional arrangements than those that currently exist in New Mexico, involving greater decentralization and sharing of responsibilities, enabling broad participation that promotes collective learning, and cooperation and coordination between and among local governmental entities and members of civil society at all levels. [[8]](#endnote-8)

How can we do this? The ideas that follow are not a blueprint for how water planning in any region should be done or its outcomes implemented. Each region faces different challenges. The Middle Rio Grande (MRG) Water Assembly is the volunteer organization created to formulate the regional water plan in the MRG Planning Region, which includes the Rio Grande basin from Cochiti Lake to Elephant Butte Reservoir. These suggestions for the current round of RWP “updates” arise from the historical context of that effort, but may be broadly useful in other regions as well.

1. Trust is gained among parties with divergent interests through repeated face-to-face interactions. The MRG region’s steering committee (SC) should aim to be as inclusive as possible. Outreach efforts must be extensive and ongoing, not perfunctory.
2. The first priority of the SC should be to revisit the region’s current public welfare statement. Establishing a collective understanding, even if imperfect, of elements of a desired future, would constitute benchmark standards against which proposed policy changes, programs and projects should be measured.
3. The current effort is supposed to be an “update” to the existing regional water plan, which contains over 40 recommended strategies in several categories. The SC should treat these as a baseline – accepting, adding to, revising, or deleting them as needed.
4. New strategies are likely to be proposed as a result of work by the MRG Water Assembly and others to address climate change impacts, new understandings about variability, etc. The SC will need to figure out how to incorporate the latest scientific understandings about the nature of the social-ecological systems upon which we all depend into the planning process.
5. To be relevant and effective, the plan must contain the means for monitoring and measuring the progress of water delivery and management agencies in achieving its goals. Each recommended strategy must be identified as a responsibility for one or more entities charged with its implementation. But coordination mechanisms are also needed. In the MRG region, one possibility might be to reconstitute the Water Resource Board (WRB), currently only an advisory body to the Mid Region Council of Governments (MRCOG). With appropriate membership and limited authority, such a body could undertake this monitoring and evaluation function, and act as a vehicle for “adaptive management” – recommending to their agencies’ principals changes in policies or strategies if goals are not being met or require revision.
6. This approach also suggests an ongoing role in this region for the MRG Water Assembly, to act as an unofficial “watchdog,” that can raise issues of public interest and welfare and have them heard by the WRB.

**Conclusion**

A robust embrace of regional water planning in New Mexico will require political commitment and investment by the  state  legislature, and an Interstate Stream Commission (and State Engineer) capable of providing the support needed to help the regions develop, and make the hard choices to implement, those plans.

Overwhelming evidence persuades me that humanity faces serious global natural and social consequences unless our political and economic institutions can rather quickly muster the political will and develop the capacity to address the cascading impacts of climate change, with effects on water supply being among the most critical in New Mexico. Responding effectively will require both a significant mobilization of public resources and the restoration of a sense of public purpose. The current toxic distrust in our polity bodes ill for the short-term success of such efforts, particularly on a national (or global) scale. But possibilities exist at more local levels, and may provide templates for building the social capital needed to tackle the larger issues (of which assuring a sustainable water supply for New Mexico is only one manifestation) in the longer run.

1. This is of course an extreme statement of the free market position. Given the complexity of the state and federal laws and regulations (including interstate compacts) that restrict the freedom of state and local actors to change them, getting “the government” completely out of the way is impractical. But to an increasing extent, free market- oriented ideology has been driving operational decisions about water right transfers. [↑](#endnote-ref-1)
2. See, for instance, Llewellyn,Dagmar and Seshu Vaddey. 2013. *West-Wide Climate Risk Assessment: Upper Rio Grande Impact Assessment.*Bureau of Reclamation Upper Colorado Region Albuquerque Area Office. [↑](#endnote-ref-2)
3. Hardin, Garrett. 1968. "The Tragedy of the Commons".  *Science* **162** (3859): 1243–1248.  [↑](#endnote-ref-3)
4. See generally Elinor Ostrom, 1990. *Governing the Commons: the Evolution of Institutions for Collective Action.* Cambridge University Press. With her husband Vincent, Ostrom in 1973 founded the Workshop in Political Theory and Policy Analysis at Indiana University, which houses the Digital Library of the Commons (<http://dlc.dlib.indiana.edu/dlc/>) , a gateway to the international literature on the commons. The DLC provides free and open access to full-text articles, papers, and dissertations. [↑](#endnote-ref-4)
5. A bundle of ownership rights to water might include some or all of the following: diversion, non-consumptive use (fishing, swimming, boating), consumption, improving, degrading, excluding others, leasing, and selling or disposing of one’s interest. A society’s rules may assign concurrent responsibilities, such as “beneficial use,” not polluting or cleaning water used, and returning unused water to the resource system. See Schlager, Edella and Elinor Ostrom. 1992. "Property-Rights Regimes and Coastal Fisheries: An Empirical Analysis". In *The Political Economy of Customs and Culture: Informal Solutions to the Commons Problem*, ed. Randy Simmons and Terry Anderson. Rowman & Littlefield. [↑](#endnote-ref-5)
6. Civil society constitutes an arena, separate from the state, the market, and the individual household, in which people voluntarily organize themselves and act together to promote their common interests. (This definition is taken from Swedish SIDA by Harry Blair, currently a Visiting Fellow in Political Science at Yale.) [↑](#endnote-ref-6)
7. The word may be awkward, but it suggests a way of understanding interactions among institutional actors that goes beyond conventional categories of “jurisdiction” and boundaries of legal authority. “Governance does not require a single center of power, and governments should not claim an exclusive responsibility for resolving political issues. Instead, politics should be envisioned as an activity that goes on in many arenas simultaneously, at many scales of aggregation.” Michael McGinnis, Ed. 1999. *Polycentric Governance and Development: Readings from the Workshop in Political Theory and Policy Analysis*. (From the Series Foreword, xii.) [↑](#endnote-ref-7)
8. “Governance is probably the biggest obstacle to a sustainable water supply.” Jacques Leslie, “Los Angeles, City of Water.” *NY Times* Sunday Review, December 6, 2014, quoting Mark Pestrella, who heads flood control for the Los Angeles County Public Works Department. Polycentric governance is difficult but necessary. Leslie cites findings of a 2014 study by Miriam A. Cope and Stephanie S. Pincetl at UCLA that more than 100 entities in Los Angeles County -- private utilities, nonprofit water companies, cities and special districts -- conveyed water. “Some are tiny and will face pressure to consolidate. And some -- agencies with a designated mission like sanitation or flood control -- may be impeded by the Los Angeles city charter from participating in multipurpose projects. Even if they can, they will undoubtedly find it hard to cede some of their authority to carry out multipurpose, multiagency projects.”  [↑](#endnote-ref-8)