

**New Mexico Regional Water Planning
Governance Study Group
Issue Paper**

**Water Rights Adjudication
DRAFT December 4, 2015**

The process of water planning is ultimately a discussion regarding various management strategies for given scenarios. The overarching assumption is that there will be increasing demand constrained by static or decreasing resource availability. This results in a state of tension across stakeholders and entities that ideally would be reduced through water planning. However, the failure to ascertain quantity and quality of water rights prevents water planning from achieving this goal.

Baseline facts

- NM Constitution, Article XVI, Sec. 2. [Appropriation of water.] The *unappropriated* water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. *Priority of appropriation shall give the better right.* [emphasis added]
- The Treaty of Guadalupe Hidalgo establishes protections to pre-1848 water rights: Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the United Mexican States Concluded at Guadalupe Hidalgo, February 2, 1848, Article VIII: ... In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.
- The Office of State Engineer considers the Rio Grande (and likely other surface waters) to have been fully appropriated since at least 1907.
- The vast majority of senior (pre-1907) rights are agriculturally based.

Water Planning Assumptions

Regional water planning processes have failed to effectively analyze and incorporate water rights. To a large extent, this is a problem of governance in regional water planning processes. In the past, the ISC has noted that resident participation tended to be higher in rural areas because those people generally feel more threatened by water planning as a reallocation of their property rights. Now, in the update process, participation in the water planning update process has been heavily weighted toward governmental entities and organizations that represent urban populations.

This emphasis on urban regions has led to assumptions about growth in demand and the availability of water from the agricultural sector, as agriculture is frequently referenced as using 80% of the water statewide. Nowhere is it acknowledged that this agricultural water is owned by people and used to produce food for people. Nor is the regional variation in that percentage acknowledged, or the very real limitations on surface water availability that constrains much of the agricultural sector. Additionally, the many indirect values of the use of that agricultural water are not quantified in monetary terms. Water planning has been approached in economic terms rather than hydrologic terms overall, with the planning for reallocation to “higher” monetary value uses of water. This is reflected in various documents describing particular land development projects, and the emphasis on specific

projects in the current round of regional water planning by the ISC.

Impacts

The failure to effectively incorporate water rights limits the validity of planning, and ultimately the range of options available for management of the state's limited water supplies.

- *Failure to adjudicate constrains water transfers and leases*
While transfers do occur under the OSE review process, these are subject to invalidation by a judicial process. This method of review is piecemeal, and places the burden of proof on the individual, thus limiting application. For environmental purposes, including compliance with the Endangered Species Act (ESA), the lack of adjudication limits the ability of the federal entities to engage "forbearance" programs. The Bureau of Reclamation, as the entity responsible for providing water for ESA compliance, can and does lease water for environmental flows. Former Area Manager Connie Rupp was succinct in her description of the government's stance: the federal government cannot acquire property that does not have clear title. There is definitely interest in leasing directly from rights holders, but without adjudication that cannot be done.
- *Without adjudication there is no quantification of valid water rights, or no baseline*
Without adjudication, there is no quantification of available supply, so there is no way to actually balance supply and demand. This has special meaning when considered along with the quantification of pueblo rights. Until there is some adjudication or settlement of pueblo rights, the future availability of state water currently used is uncertain. Setting the uncertainty of the tribal rights aside, without adjudication, there is no way to actually balance permitting with the water actually available. An example is the fact that in the MRG, permits for groundwater pumping would require more water than can be offset by drying nearly all irrigated lands from Cochiti to Elephant Butte. Without adjudication, lands with ancient rights are difficult to protect from uncompensated takings, which frequently take place as groundwater depletions affect available supply. In the Albuquerque area alone, that depletion number is about 60,000 af/yr of induced seepage from ditches. That 60,000 af/yr would be a huge boon to farmers and the ecosystem alike.
- *Adjudication provides accountability*
Without adjudication, there is great resistance to metering and measuring because of the risk of diminishing property rights. Additionally, the incentive of being able to assure a full delivery by metering is absent when there is no established quantity of right to water. Frequently water is delivered on a parity basis without regard for priority or quantity of right. This also means that in water short years, those with senior rights are curtailed at times that might not have been necessary under priority delivery. This also removes the ability for senior rights holders to lease to other agricultural water users. While many water plans call for low water use crops, not only do these ignore the fact that farmers grow what they can sell, but without adjudication the often higher value, high water use crops carry no penalty for consumption beyond a water right. Absent adjudication, there is no accounting for riparian and other uses of water that fall outside the permit system but are included in the total water consumption of the river basin. Accountability would also be of benefit for water currently delivered to stream flow for federal purposes without any compensation to the owners of those water rights. An example is that when the ABCWUA provides water for federal purposes, the utility is compensated. When MRGCD changes operation to provide water for those same federal purposes, there is no

compensation despite the fact that these changes have a detrimental impact on farms. Because there is no accounting for ownership of these waters, the state is losing the economic benefit of federal dollars compensating rights owners.

- *Planning without adjudication will/has led to conflicts*
Urban plans are based on the use of water rights currently owned by people who may be unaware that their water rights have already been allocated to a different use. When and if these plans come to fruition, people will protect their rights, through litigation, legislation, or whatever methods are available. Should water rights be quantified through administration rather than adjudication, constitutional issues will surely continue to arise.
- *Impact of non-action affects us all*
Further, should the promises already made be fulfilled, the impacts to the rest of us will be enormous. The loss of irrigated farmland means the loss of food security, groundwater recharge, habitat, greenbelt, view-shed, air quality enhancements and future choices, and will have a huge negative impact on us all -- our quality of life, our health and the state our children and grandchildren inherit. Often, the greatest value in land is in its potential. In NM, land without water is worthless, not useful for helping us to adapt to changing climate and changing priorities.

Recommendations

In order to ensure valid data and meaningful management options for regional water planning, adjudication must move forward. The following recommendations address adjudication.

- Explore alternative agencies for adjudications
One example is the MRGCD. In the Conservancy Act, MRGCD has the authority to conduct a judicial process for quantifying the rights of lands to which it delivers waters. The MRGCD is the source of documents the OSE depends upon for transfers of water rights. The 2003 State Water Plan called for a schedule of adjudications, and the MRG was not included even in the ten year plan. While this is not statewide, the failure to adjudicate the basin in the most populous area puts the State's economy at risk.
- Explore removing the OSE to expert status only in adjudications.
While the OSE houses attorneys doing the legal work for the state, it is also the technical expert and, under the new AWRM regulations, it is acting in a judicial capacity in determining water rights in times of shortage where court adjudications have not been completed. There is certainly significant discomfort around the state with the conflicts inherent in one agency fulfilling all roles.
- Make adjudications a legislative priority, with restructuring the process so the “easy” claimants are handled first.
There is at least a perception that adjudications are not handled by the OSE in a manner that is most efficient and economical because of the institutional support of administrative allocation rather than adjudication. Given that 2016 is a short session, support a memorial which focuses on completing adjudications.
- Respect and enforce prior appropriation doctrine, rather than avoiding it administratively.

Each time adjudication comes up, there are statements about how it is too complicated, it would be different if we'd done it 20 years ago. . . We are 20 years ago from future generations wishing we'd done better to follow the constitution and treaty. We seem to be in a water demand pause, with population decreasing. This is the very time to fully engage in better water administration -- including adjudication and priority administration. Texas began their process fairly recently, and has made great strides in bringing junior users, including municipalities, into compliance with priority administration. Their pursuit of adjudication and New Mexico's failure to adjudicate has become a point in interstate litigation. Without adjudication, New Mexico's water cannot be fully protected.