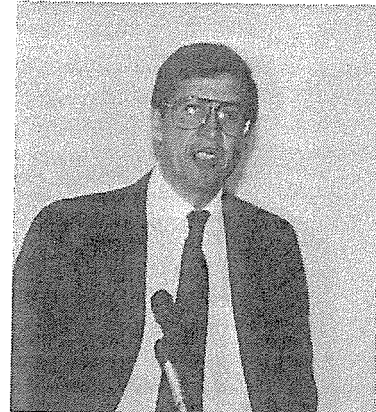


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## CURRENT IDEAS FOR NEW MEXICO WATER PLANNING

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New Mexico is one of only a few states that continues to invest all responsibilities for the state's water rights administration and water rights policy in one individual. As I reach the end of my first two-year term as state engineer, I have begun to reminisce about my work for the State Engineer Office over the past 20 years. For most of those 20 years, I dealt with instate water issues. When I became state engineer, I was forced to deal with regional and national water issues. It is at the regional and national levels that much innovation is occurring and those effects will be felt in New Mexico.

In terms of water planning, as state engineer I have grappled with the term "public welfare" and conservation, and with water statutes detailing my responsibilities in administering the state's water resources. Prior to the 1987 change in the law resulting from the El Paso litigation, when an application was filed for a water appropriation or for a change in place and/or use of water, the state engineer considered only impacts to existing water users and whether those impacts constituted an impairment. The revised statutes required the state engineer to consider the public welfare and conservation of water when allocating surface and groundwater. However, the legislature failed to

define and provide criteria on what those terms really meant.

In the El Paso application, Steve Reynolds did not address the public welfare issue because he was able to deny the application through a provision of law that said if a municipality has a 40-year water supply, it does not need additional water. Attorneys for the City of El Paso filed an appeal, but the judge dismissed El Paso's applications because of El Paso's failure to properly appeal from the state engineer's decision. Thus the courts never really ruled on the public welfare issue nor did the state engineer.

I knew that some of the first applications I would face as state engineer would contain public welfare issues and I began to address seriously those concerns. I talked with Chuck DuMars of UNM's School of Law about my concerns. He suggested that one of the law students compile a report describing what other western states have done with respect to public welfare—the laws, criteria, administrative decisions, and so forth. After reviewing the report, I thought I would be able to adopt a list of criteria for New Mexico. However, what was interesting was that all these lists of various states' criteria had a final provision that required the state engineer to consider all the foremen-

tioned issues plus any other relevant issues. So for all practical purposes, the lists did not provide much guidance.

I next turned to several staff members who had been giving some thought to the issues. One attorney suggested New Mexico emulate California and other states in requiring a state water plan. The plan would give direction to the state engineer and the courts on what was meant by the term public welfare with respect to different regions of the state. Thus, the regional planning process came about due to a need by the state engineer to have a basis on which to make decisions on public welfare and conservation that would not be considered arbitrary. It was hoped the courts would be more willing to uphold state engineer decisions if those decisions were made on the basis of a state water plan. We are now in the process of formulating a state water plan and have brought together representatives of all relevant state and federal agencies. Later we will meet with all water user groups throughout the state.

For the past four or five years the legislature has been funding the Interstate Stream Commission to provide regional water plans and to update New Mexico's water resources assessment. In 1976 the ISC, in conjunction with federal agencies, first published an assessment of the state's water resources and projected future water needs. It's now 1992 and we still have not updated the assessment completely. Along with updating the state assessment, we decided that regional plans could serve as building blocks to a comprehensive state water plan.

One of my concerns when I became state engineer was that the agency needed to make the transition from the "water buffalo era"—the era of building dams, irrigation works and making the water resources available for maximum benefit of New Mexicans—to a period where water transfers are the primary mechanism for making better use of our current water supply. Issues such as instream flow, water quality, and environmental conservation of water will dominate this new era. When I became state engineer I was primarily concerned with taking the State Engineer Office from where it was to where I perceived it should be. Some will differ with me and I accept that, but I knew the transition needed to be made.

The water planning process is helping in that transition. The state water plan will develop from the grassroots level where water users from their communities will determine future water uses in New Mexico and how water concerns will be addressed. We are now at a crossroads—we don't know whether a new

state engineer will continue this approach or whether the Interstate Stream Commission will continue its support.

Today, I would like to talk more specifically about the water transfer process of changing existing uses to new uses. In the West, water transfers will be the mechanism for supplying water for new uses, unless some magical way of creating water is discovered. New Mexico and other western states are focusing not on project development but on the wise use of its existing water resources.

Water use transfers have significant third party effects. Whenever water is transferred from one use to another, you are going to affect existing uses and users. Prior to 1987, the state engineer principally looked at impairment of existing water rights. Since 1987, the state engineer has had to look at third party effects and some of those who are affected are water users with no water rights—fishermen, the duck hunters, those with water quality or riparian concerns, and so on. They may not hold water rights, but because of the change in the law, they have a voice in how New Mexico administers its water resources.

Economics drove water transfers in the past but economics will not be the sole basis for the transfer of water rights in New Mexico in the future. Other considerations must be made such as maintaining the traditional cultures of western communities, protecting water quality, and protecting the fisheries environment. From an economic standpoint, how do you measure the costs and benefits associated with water transfers from agricultural uses in traditional communities to new uses, such as for subdivisions? This is a problem the town of Taos is facing. The state engineer is being asked to consider denying transfers of existing water uses to new uses because it is changing the character of some areas. A decision I made on a water application in Taos was appealed recently. However, the judge dismissed the appeal because of a failure on the part of the applicant to serve proper parties. We won't know whether the decision I made was correct unless that applicant comes back before the state engineer and my decision is appealed again and ruled upon.

Public welfare issues were addressed in some decisions I made on the Pegasus gold mining application in Santa Fe County. An appeal of those decisions might not be carried forward. We may need to wait until the next application dealing with public welfare issues comes before the state engineer to see where we are headed.

## Current Ideas for New Mexico Water Planning

Another concern is instream flow. Elsewhere in the west and in New Mexico where water is fully appropriated, it is a fact that water for instream flow can only come from the acquisition of senior rights. Opinions vary, depending on which part of the state one is from, on whether water should be appropriated for certain purposes or not. For example, if a water appropriation for mining purposes in Santa Fe County comes before the state engineer, you can count on packing a large room with people against that use. They consider that use to be against the public welfare. However, in Silver City or areas dependent on mining, you can pack that large room with people supporting the application. Therefore, is it proper for one individual to sit in Santa Fe and decide what is best in terms of public welfare for the entire state? I submit to you as state engineer that it is not in the best interest of the state of New Mexico for the state engineer to make those decisions unilaterally. Those decisions should come through the planning process and hopefully that's what the state water plan will help us do.

What can we look toward in the future? Does New Mexico provide for broad public input in the transfer process? If it does not, how can we reach that goal? In terms of the public welfare issue, the state engineer has taken the position that he will allow just about anybody to participate in the process—participants do not have to own a water right. Should that be changed? Is that going to constrain the transfer process? In other words, are you going to allow 5,000 people to get up and say the same thing and delay the water transfer process? Should New Mexico allow governmental entities or private individuals or private parties to acquire water rights for instream flow purposes? This issue is very important. As state engineer, I do not believe that the issue of instream flow in New Mexico is going to go away. We are either going to deal with it or it will deal with us. I can guarantee you that with the new federal administration, the instream flow issue is going to come to the forefront. Either the state takes the initiative or somebody else will.

With respect to water rights transfers, there are costs involved. When a transfer occurs from an agricultural use to a nonagricultural use, what is affected other than the cultural aspect of the community? The transfer diminishes the base of the resources on which the community acequia depends to maintain the ditch. If you take water out of irrigation, you take land out of irrigation. You have fewer uses for the ditch but you still have to have ditch maintenance expenses. That applies also to irrigation ditches. Should the state

engineer, under the public welfare criteria, require perpetual payments from the new owner of the water right to continue maintaining the ditches? Some states have addressed this concern. Should the state engineer and the courts require a continuing tax base to the counties from which you take irrigated lands when you transfer water rights elsewhere? New Mexico and the state engineer will have to deal with these issues.

Also, should the public welfare language in the law be clarified? Should New Mexicans allow the state engineer, through the water planning process or through his decisions, to define public welfare? Or should the citizens of New Mexico ask the legislature to define the term public welfare? If we consider New Mexico's traditional Indian and Hispanic communities to be unique and that people visit here because of the Indian and Hispanic communities, should we consider state legislation that permits or establishes historical zones around these communities that makes it more difficult to transfer water rights out of those communities? Who would establish historical zones—the courts in decisions similar to Judge Encinia's ruling in the *Sleeper* case, or the legislature? Should New Mexico promote and enact laws dealing with water conservation and the salvage of water?

Water banking is another current topic. From what I have read, water banks have been established in areas with surplus water available to bank. In a state like Idaho that has a water banking statute, farmers are voting surplus water into the bank. New Mexico is not a state with surplus water, so the water banking concept would have to work differently here.

The reuse of sewage effluent is another issue with which I am concerned. Arizona, California, and some other states are really gung ho on the reuse of sewage effluent. I think it is fine as long as you import the water from, for example, the Central Arizona Project, the Colorado River, or the San Juan/Chama River. If you deplete 100 percent of the water you bring in, it makes all the sense in the world to reuse the effluent. But in New Mexico where the reuse of the effluent is going to diminish the flow to an existing prior user, you have a different problem. Where interstate compacts exist, effluent reuse increases the depletion and causes a different kind of problem. What works well in other states may not work in New Mexico.

To what extent should water quality be considered in the water rights administrative process? In the past, water quality was not given much thought except for salt water encroachment. Should the state engineer under the public welfare criteria consider water quality issues? For example, suppose a subdivision is pro-

posed for an area above fractured granite and it is likely that septic tanks will leak and cause groundwater contamination. Should the state engineer take the position that the Environment Department should deal with what is a water quality problem and deny the permit, or should the state engineer deny the water rights application in the first place?

We are entering an interesting era of water rights management. Many of you in this audience are knowledgeable and experienced players in water rights management. I am not going to be state engineer for 35 years like my predecessor. I will probably move on in a year or two. But I have staff members who will probably be here ten or fifteen years down the road providing direction for water resources administration. As long as I am state engineer, I will provide my staff with the opportunity to make changes to the system. I am also open to your input. If you have concerns and suggestions on how to improve water rights administration in New Mexico, I welcome those comments.

In closing, I would like to say that it is different being the water rights administrator for the state and being an individual who has philosophies about how water should be administered. The buck stops with me. I do not have the luxury that others have—my decisions are subject to judicial review. In some areas, the law provides me with no guidance, I glean from what other states have done, from my own personal experiences and perspectives, and from my experience sitting at Steve Reynolds' side for 19 years.

My final thoughts concern whether New Mexico should continue to vest its water responsibilities in one individual in the future. I feel it is just too much responsibility for one individual, and those of you familiar with New Mexico's water law and how water is administered know of what I am talking. The state engineer was the Interstate Stream Compact Commissioner, served on seven of the eight interstate compacts, directed the staff of the ISC, and directed the State Engineer Office. I am not sure whether it is in the best interest of the state in the long run, especially given that the legislature sets the state engineer's appointment for a two-year term. Theoretically, you could have a new state engineer every two years.

Thank you for your attention and I will appreciate your comments.