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THE WATER RIGHTS ADJUDICATION PROCESS IN NEW MEXICO

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I'd like to begin by talking about the adjudication process, and then look at some specific cases and the issues that have arisen in those adjudications. Then I will talk a bit about the hopes and possible cures for the difficulties that have emanated from the adjudication process.

Professor DuMars talked this morning about how the adjudication process was conceived as a kind of quiet title suit. He noted that this meant that an adjudication does not confer title; even without an adjudication people still own their water rights. What adjudication means is that each person gets a piece of paper with which you can prove your rights to your neighbors. When the adjudication statutes were passed, we hoped that all rights in the state could be determined, and we would know exactly how much water everybody owned. That, of course, would provide several benefits; it would make water much easier to administer, it would give everybody their fair share of water, it would provide us with information on what water supplies exist, and also it would enable us to meet our obligations to other states consistently.

THE PROCESS OF AN ADJUDICATION

The Hydrographic Survey

To achieve these goals, a hydrographic survey must first be developed. Statute requires that the state engineer produce or accept a hydrographic survey covering the entire state. This is designed to provide as much information as possible prior to any adjudication. You want to go out into the field, see what people have been doing, talk to people, look at records, and take aerial photographs to determine as much as you can about actual water use; then draw a hydrographic survey. In several cases, particularly in the Jemez case, we were very careful not only to do the hydrographic survey, but also to conduct many interviews with people in the area to try to

resolve legal questions in advance. That effort was only partly successful as you will see.

Having completed a hydrographic survey, and with the advice of his legal division, the state engineer must determine whether to file an adjudication suit in the area. It is possible for a private party to initiate an adjudication suit. More often, however, the State Engineer Office (SEO) has commenced the suit, only because hydrographic surveys are outdated quickly if they are not enshrined in the law, and the SEO is in a position to coordinate the hydrographic survey with the lawsuit. The state statutes direct the state engineer to apply limited resources for adjudications in those areas which need it the most, which has been construed to apply to irrigated areas.

Who Participates

Because one goal of an adjudication is to determine water supply, all water uses affecting that supply may be included. However, there are in practice a few exceptions, some of which have become controversial. In some cases, for example, we have persuaded the court to exempt *de minimis* uses from adjudication. As a practical matter, this exemption applies mostly to domestic wells. We do not want to join in an adjudication lawsuit all the thousands of people who have drilled wells in an area. In one case that argument was accepted; in another case, the special master rejected that argument as unconstitutional. We also do not adjudicate stock ponds of less than 10 acre-feet or tracts too small to map.

The state traditionally has not tried to adjudicate non-diversionary uses, that is, rainfall farming or flood-plain farming. The use in this category causing the most controversy has been instream flow. You probably are aware of the contention over that issue. The state customarily has taken the position that if nobody is diverting the water, there is no basis for a water right. Under this analysis, an instream flow right cannot be recognized under state law. Some federal statutes, such as the Wild and Scenic Rivers Act, specifically reserve water for instream flows, however, in some cases, we have had to confront the difficulties in administering non-diversionary use that state law recognizes. I think that resolving these differences is possible and is on the way.

Technically, every water user in a basin is a party to the adjudication. Usually, however, an adjudication suit shakes down to a few very active players. The first is the state. The state views itself as the stake owner who holds title until determined otherwise by the courts. Second, the United States is usually, if not always, a major player in adjudications. Other players for whom the United States holds the brief are the Indian tribes and pueblos across the state. As a formal matter, tribal and pueblo claims are simply subfiles within the adjudication. As a practical matter, the controversy surrounding those particular types of subfiles have a huge effect on how the adjudication proceeds. Third, in some parts of the state, acequia associations have banded together to promote common interests. Finally, irrigation districts also are big players in water rights adjudications. As you see, we have a large crowd of fairly diverse interests. That alone makes some of these lawsuits difficult to handle.

What Happens

After the SEO has completed the hydrographic survey, and someone has filed suit, the determination of rights begins. Ordinarily the court appoints a special master because the court does not want to spend the time required by each of the many subfiles.

The state then, based on its hydrographic survey, makes offers of judgment to all water users asking the water user to agree with the state's assessment of their rights. We have a pretty good record of acceptance of these offers. Upwards of 80% to 90% of our adjudications are resolved through acceptances of our judgment offers.

When water rights disagreements exist between the state and a water user, the disagreement goes to a hearing in front of the special master. In addition to this, a certain percentage of defendants neither formally disagree nor sign their offers, and at that point we enter into what is called a default judgment.

When disagreements are worked out and default judgments have been entered, the case is ready for the *inter se* phase when people talk about their neighbors' water rights. It is unquestionably a very divisive time. It is difficult to see how to drop this phase because it is true in water, unlike land, that if my neighbor gets more, I get less, provided our priority dates are equal or mine is later. All water users involved in the lawsuit really do have an interest in how much water their neighbor gets. Also all people are not straightforward about their water rights. Many people are, but inevitably there are a certain number of people who ask for whatever they think they can get. The best check we have on those people is their neighbors' testimony. So while I sympathize with the desire to avoid the divisiveness of this phase of the adjudication process, it is very difficult to see how to correct it.

When we finish the *inter se* phase—and a considerable amount of time has passed in most cases—the court enters a final decree which sets forth the water rights. The court appoints a water master, often a State Engineer Office staff member, and from that point it should be easy street. The water master administers the rights as determined in the final decree.

REASONS THE PROCESS DOESN'T RUN SMOOTHLY

By way of illustrating when the adjudication process does not work very well, let me discuss a few cases and the kinds of issues that have developed. One is that New Mexico, in terms of water rights, is a huge state and the State Engineer Office is a fairly limited agency without the resources to give these cases the time and effort they deserve. It is very frustrating to get pushed around by court deadlines from this case to that case, forced to forget about one case in trying to deal with another. It is very difficult to juggle these cases and get much done. I am sympathetic to the public who find it very irritating when a motion is filed and a great deal of time passes before any action is taken. In one case, the special master wrote a report on a motion that was made four-and-a-half years ago, and we still do not know what the court will do about it. It is especially difficult when individuals are paying lawyers to monitor these cases.

Limited state engineer resources play a role in McCarren Amendment issues. The McCarren Amendment is a federal statute which dictates whether or not the United States will be an active player in a case, based on the inclusiveness of the adjudication. We argue over that issue a lot.

One thing which matters a great deal in terms of settlement and negotiation is the peculiar evidentiary problems that are connected to water rights. For example, if the state's research shows that a priority date of 1850 was appropriate for a water right but a claimant believes, without any evidence that seems persuasive to us, that 1800 was the priority date, we do not have any discretion to split the difference at 1825 because there is no evidentiary basis for that middle date and because the difference hurts the claimant's neighbors. It limits the state's effectiveness in that there are some issues on which it is really not possible to compromise.

The same problem arises with respect to the negotiation of Indian water claims, an issue that people are very serious about these days and trying very hard to accomplish. We had one successful negotiation in New Mexico with the Jicarilla Apache tribe. That negotiation was successful because the Jicarilla settled for San Juan-Chama water. The water they get under the negotiation does not come from private water users on the two streams involved. It is a rare situation where we have a "chunk" of water with which to negotiate. Most of the time, whatever water the tribes and pueblos get, just like whatever water anyone else gets, is going to come out of the pool that is available to everybody. What that means for settlement purposes is that everybody has to sign off on the settlement because everybody is affected by it. That is very hard to accomplish when you are dealing with cases having hundreds, maybe thousands, of defendants and all their signatures are required on a compromise document. It is, in fact, impossible. We look for ways to settle the case which avoids that necessity without compromising anybody's rights.

You are aware of the cloud we have hanging over us because of the Texas vs New Mexico decree in the Pecos case that requires New Mexico to have a certain amount of water at the state line on a regular basis to meet our compact obligations. We have been engaged in an adjudication of the Pecos River since 1956. I do not know how much closer we are to achieving the ability to get water to the state line under the prior appropriation system. The prior appropriation system posed many problems to administering the water in such a way as to meet this compact. Shutting down the junior users, which are largely wells, does not effect the river much; it doesn't produce water at the state line within a reasonable time. Of course shutting down the senior—largely surface water—users, which would actually give us water at the state line, is contrary to the prior appropriation system. We are finessing the prior appropriation system through the ISC purchasing legislation. In a way we kind of shrugged and gave up when we started the program, which enables the Interstate Stream Commission (ISC) to purchase water rights and simply keep them in the stream. This may, by the way, have a de facto effect of having an instream flow on these parts of the river.

Concerning Indian water rights, when the Pecos adjudication arose, the water rights claims of the Mescalero Apache tribe were analyzed by the court under a federal reserved rights quantification doctrine called "Practicably Irrigable Acreage" or PIA. This doctrine means that the tribe will be awarded enough water to irrigate as much of their reservation as could be irrigated practicably. The heart of the problem is defining "practical." The courts have said they meant "economically" practical, but that is very hard to determine. It is difficult to tell whether that includes analyses on markets and crop shortages and just how much the funding source should be taken into account. In the Mescalero subfile, the state presented a case which would require the tribe to comport with certain federally produced economic standards for determining what irrigation projects are sufficiently economically feasible as to merit federal funding. The tribe pointed out correctly that the set of standards used is extremely difficult, maybe impossible, to meet. In today's economic climate, large irrigation projects simply don't do well. To tie an Indian water right's award to a requirement of economic feasibility of these projects, therefore, is disastrous to the Tribe. Yet, to relieve the Tribe of the stringency of the appropriate standards is to render the PIA measure subjective. The court went along with the state's argument. We are still struggling with what the Mescalero case's outcome will mean.

The New Mexico Court of Appeals upheld the district court's decision in that respect, although they changed the priority date. The New Mexico Supreme Court recently has refused to consider the appeals that were filed by practically everybody. We are now in the time period within which people can ask the United States Supreme Court to review these appeals. That case may provide more guidance on Indian water rights from the United States Supreme Court. Indian water rights claims usually present a situation where one of the claimants in the basin is claiming a good deal more water than they have ever used historically. Where a lot of water is going to come out of the basin that has not before been part of people's accommodations and arrangements, there will be disruption, bad feelings and bitter litigation.

One issue in the Taos case demonstrates the difficulty of the settlement of water questions. Sometimes people along two or three ditches will get together and say, "Let's forget our priority dates, let's share the shortages." Often these agreements have been in place for years when an adjudication suit comes along. Within the adjudication context, it is hard to know what the state should do. Our statutory mandate is to determine people's priority dates. We are in the position of saying to people, "We don't care that you're getting along. In fact, some of you have better rights than others and could take it all." That is undoubtedly divisive. We are working very hard to accommodate customs whenever possible and very much encourage people to negotiate with each other to recognize historic custom whenever possible. This is one of the clearer instances

where what we are trying to do under adjudication just does not conform to the kind of right that people think they have. We are trying to obtain a prior appropriation right when, in fact, people have not been using the prior appropriation system. In this case, and in Indian water rights cases generally, the prior appropriation system is not part of people's understanding when they use the water.

Another example is pueblo water rights, entirely different from Indian water rights. The "Pueblo Water Right" is a claim made by the City of Las Vegas, and proffered by the City of Santa Fe, that because these cities—pueblos—were part of grants from the king of Spain, they have an expanding and virtually unlimited right to use whatever water they need for municipal purposes. Such a right is alleged to be both prior and paramount to every other right in the basin. It is a type of water right that does not fit within the state law prior appropriation system.

CONCLUSION

SEO adjudications are a vast subject to talk about and even more so to conduct. The central endeavor is to tabulate, describe and try all water rights suits in the state, but it is not at all clear at this point after decades of experience, with new kinds of water rights being raised, that this task is even possible. It is certainly not possible for all the water right owners to see their rights recognized because the prior appropriation system does not accommodate some of the kinds of rights people are requesting, such as informal agreements among ditches to share shortages. Ownership of project rights is another instance where it is not clear how it fits into the state's understanding of individual property right ownership of water rights. The Indian claims and pueblo water rights are other examples. Finding a common denominator for all the disparate types of claims would enable us to administer rights under state water law. It is very hard to see how this can be done and it certainly can not be done without seeming enormously unfair to someone.

So is there an alternative? The state water plan is an enormous step forward in finding an alternative, and we hope to get support from the legislature this year. That essentially would be a global settlement that ignores all these legal problems and helps people agree on how to effect a realistic parceling of water rights. It will not depend greatly on legal rights in my view. It also would require a specific task force to focus on alternatives to adjudication.