The Future of Our Water Agencies: Do We Have the Right Agencies Doing the Right Things?

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Bill was born in Albuquerque, raised and graduated from high school in Socorro, and is a U.S. Army veteran (three years). He began working at the Albuquerque Journal in 1966, and worked there until the end of 2002, at which time he joined the staff of Governor Bill Richardson as director of policy and issues. In Bill's tenure on the governor's staff, his primary areas of responsibility were water matters, Mexican affairs, and Native American issues. Other than service on the Governor's Blue Ribbon Water Task Force, the New Mexico-Chihuahua Commission, and the Commission on Indian Affairs, he has been in retirement since late 2009. Bill has agreed to help out in the final two months of the administration at the New Mexico Border Authority, headquartered in Santa Teresa, NM, but intends to go to full retirement status with the onset of the new year. He is married to Elizabeth G. Hume and they have two adult children, a son and a daughter.

Greetings to you all. It is always my pleasure to be in a concentration of New Mexicans engaged in water law and policy. There is no more important–or stimulating–group in all of New Mexico government and society

I should by rights be intimidated at the thought of talking water issues to such a learned assembly. But, three decades in the ivory tower of a newspaper–topped by seven years among the learned, and less learned, staff of Governor Bill Richardson–have cured me of any virtue of knowing my own limits.

Now, when I agreed to undertake this conversation about the coming evolution of our water institutions, I envisioned comments about lists of record for water rights, mandatory disclosure of appurtenant water or lack thereof in records of land ownership, the continuing saga of adjudication. In other words, my thoughts about the things you all had been wrestling with for years, with greater or lesser progress recorded.

Then, virtually on the eve of this event, the New Mexico Court of Appeals rendered two water matter decisions that work significant change on sections of our water law. I refer, of course, to Tri-State–the ruling on Active Water Resource Management regulations, and to Bounds–the ruling upholding the constitutionality of the Domestic Wells Statute.

I am not a lawyer, so my thoughts that follow are but the musings of a somewhat informed observer, perhaps somewhat hyped by the habits of an unrepentant newspaper editorialist. But looking at those two decisions, in summary, I think the court may have accomplished more than it intended.

As you all know, priority of appropriation is the gold standard of water rights characteristics. The more senior the right, the greater the assurance of access to water. The power of that protection depends on at least the threat of priority enforcement.

However, Tri-State says that the engineer may enforce priorities based only on water rights that have been adjudicated by a court, or licensed by the State Engineer. All others are immune to priority enforcement–which as I read it means there can be NO priority enforcement in any but fully adjudicated basins. How can you enforce priorities when some classes of users are exempt from the process?

But in Bounds, the court finds that the Legislature may instruct the State Engineer to issue domestic well permits without regard to senior water rights, because, as the court put it, priority of rights is only a broad principle.

It seemed to me that the two decisions are contradictory in some respects. The court in Tri-State said that since the Legislature didn't specifically say the State Engineer could enforce

priorities in the manner he wished, he didn't have that power. Yet, in Bounds, the court said that "the priority doctrine is but a broad principle."

"Although priority calls have been and continue to be on the table to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means."

Where the apparent conflict between priority enforcement and domestic well permits is concerned, "We further must presume that the Legislature has determined that it sees the hydrological expertise of the State Engineer as the preferable, IF NOT THE ONLY REASONABLE WAY to attempt to reach the right balance of priorities and needs."

So, the Appeals court has left us with the seemingly inconsistent duality that the State Engineer can use his hydrological expertise to protect the senior agricultural water users from the encroachment of tiny domestic wells–but that protection from the gargantuan Johnny-come-lately municipal and industrial users must await the completion of basin-wide adjudications. The sum of those two approaches provides scant protection for those seniors.

If a water right that hasn't got a priority date blessed by an adjudication or a State Engineer license cannot be considered in a priority call, is it even a water right under New Mexico law? Could the State Engineer enforce priorities among licensed rights holders in an unadjudicated basin, and move all others to the back of the line?

Pre-1907 water rights are deemed valid by the 1907 Water Code. But, if the determination of their pre-1907 status is dependent upon a priority date, which can only be determined by an adjudication or a license, what is their status before that determination?

What legal force or protection may be ascribed to water rights declarations?

The truth is that Tri-State appears to neutralize the authority to protect senior users in unadjudicated basins. Certainly a senior user with the resources to hire a lawyer could ask a court to limit a more junior user from impairing his right. I leave it to the courts to determine whether a court has the authority to do that which the Appeals Court has said can only be accomplished by adjudication or licensing.

Does the State Engineer now have the authority–or perhaps the duty–to refuse any priority call entered in a basin, which is not yet adjudicated?

Given the relative rarity of priority calls, does this change make any difference anyway?

On the other hand, might some behaviors change for the worse if indeed it became clear that no priority enforcement were possible–or at the very least, water uses that were not adjudicated or licensed were immune from priority enforcement? Think growing communities with lagging water rights portfolios.

And what of federal water rights in unadjudicated basins? The water rights of tribes and pueblos? Can protection of their priority be dependent upon an adjudication or a State Engineer license? If not, how are they to be protected from all state-based water rights claimants in a non-adjudicated basin?

How does the State Engineer or the Interstate Stream Commission act to enforce compact deliveries downstream from basins in which there is no authority to enforce priorities?

It appears to me that the Tri-State decision opened more questions than it answered. How the Legislature, the courts, and the State Engineer deal with this in the year ahead could well be the dominant factor in determining how our water agencies do the right thing in the future.

But Bounds and Tri-State aren't the only items on the agenda for our water agencies.

Water rights adjudication, that necessary prerequisite to priority enforcement, is the complex, cumbersome and hugely expensive process that has been much talked about but little changed over recent years.

I participated in discussions of water rights adjudication reform with representatives of the Administrative Office of the Courts and the Office of the State Engineer. In my mind, the problem of reform boiled down to the fact that most changes that increase efficiency of adjudication either shift the burden of acting to the water user or increase the water user's responsibilities. I refer to the claims-based process used in some of our other Western states. Traditional small water users in New Mexico are having no part of that, however. So it is my personal opinion that any substantial

streamlining proposals will founder in that opposition.

Licensing–the second leg of the two-legged Tri-State priority stool–is an interim alternative to full-dress adjudication. But, there is opposition to that as a strategy. Certainly, Tri-State would seem to give some additional strength to the State Engineer's concept of the legal sufficiency and utility of the licensing process.

One question that arose in my mind out of those adjudication reform discussions was the one of who–or what–is the keeper of record for the master list of water rights?

If they are licensed, the record is in OSE files. If an adjudication has been completed, there is a final decree in a court file that provides a snapshot of adjudicated rights at one point in time. But what is the best place, and the best procedure for maintaining the list of lists from an adjudication?

It seems less than efficient to require a court proceeding to alter the list every time Smith sells his water right to Jones. The Office of the State Engineer has long operated under the assumption that OSE is the primary repository for recording changes. I agree. It is the actual list for water rights prior to an adjudication. Post-adjudication changes in ownership, location or use of rights could be recorded there. The court would retain the authority to settle differences.

I think the public interest would also be served by imposing some duties on water rights holders in the system and records of land ownership as well. I haven't thought this through in detail, but I think that it should be required to note on any recorded deed the presence or absence of water rights. Or, in the case of residential properties, the source of domestic water–municipal system, mutual domestic, domestic well, and so on. And, in the case of a domestic well, the new owner would have to affirm that a transfer of the well to new ownership had been accomplished.

Deeds should reflect the presence of acequia water rights. I have heard stories of land buyers clashing with their fellow parciantes over ditch access matters or water use because they don't know–or don't choose to respect–the rights and obligations they acquired along with their land.

The deed description of a farm should not be legally complete without information about its access to water. We make point of diversion and place of use an integral part of a water right; we should make water rights information an integral part of the land record as well.

It must be noted that adjudication reform is likely a dead issue for the immediate future. It can be expected to be one of the processes that ends up largely on the cutting room floor in the budget making process we face in January. Given the dire shortage of funding, things that can be postponed will be.

Another State Engineer function vitally necessary to the smooth functioning of our water allocation system is the efficiency of the water rights transfer system. Additional resources have been allocated in recent years to the State Engineer's processing of transfers, protest hearings, and so on. But the number, complexity, and protests of transfers have grown at a greater rate.

Delays in protested transfers are usually the fault of the parties. But, I fear delays in the processing of all transfers will grow as budget-cutting digs into this area as well.

Help for the thousands of small water systems and mutual domestics across the state never seems to quite keep up with the problems. It, too, depends upon funding–and it will be another place where tightening of budgets will have negative results. In this case, however, failure to perform by the state agencies will be directly reflected in hardship and health risk to New Mexico families.

Another issue that was gaining momentum even while budgets were fat is the issue of dam safety. New Mexico has a daunting number of flood control dams built mostly about 40-50 years ago with federal funding, and designed to protect agricultural lands.

Today too many of those dams are past their useful design lives, were built to more lax engineering specifications than those of today–and are now protecting vast acreages of urban development instead of alfalfa fields. Again, staffing and funding are the keys to progress against this backlog–and neither is likely to be even maintained at current levels in the budget drought ahead.

As the budget makers turn to their splitting-the-baby task, the human services areas–schools and healthcare at the top of the list–have the highest public and legislative priority.

Colorless, bureaucratic functions like water rights administration, and adjudication, become ripe targets for reduction or elimination. It is difficult to make a life-and-death situation out of

whether an adjudication case is completed in five years or twenty. And things that aren't life and death will likely get short shrift in the next few years of New Mexico budget making.

I hope the water agencies will be able to at least maintain efforts in keeping their myriad functions from losing ground. But I am not optimistic. The stresses on agency people and the frustrations of their client group will rise in direct proportion to the cuts in funding.

I don't know which I would least rather be in the years ahead: a customer service person in the Office of the State Engineer, or a member of the Legislature trying to make ends meet.

I am not optimistic about the outlook for the capabilities of our water agencies.

As to the current configuration of the various responsibilities for water-related matters, I think the current system is generally appropriate, with one observation for change.

I think the diverse and specialized nature of the various water agencies makes their separation of functions appropriate. The State Engineer shouldn't be determining the environmental parameters of dairy farms and the Environment Department shouldn't be ruling on changes of point of diversion and use of water rights. The Game and Fish migratory bird expert shouldn't be determining the water needs of pecan trees.

However, institutionalized cross-discipline communication on state water activities is very beneficial. The strengthening of the Water Cabinet would provide the framework and mechanism to accomplish that. Established by executive order, the Water Cabinet is a sub-cabinet of all the department heads concerned with water issues. The goal was to impose top-of-the-silos coordination on all water projects and policies.

Environmental considerations would be considered from the beginning in water use and delivery system planning, for example.

We got the Water Cabinet up and running, and it was instrumental in bringing some standardization in the treatment of applications for water project assistance. But we never got much beyond that initial project.

I think the Water Cabinet approach could superimpose the necessary interagency coordination over all aspects of water policy and implementation, without materially restructuring the existing agencies.

There are more problem areas than bright spots in the outlook for water policy in New Mexico. The backlash from some of the more controversial environmental initiatives of the outgoing administration, coupled with the stands on many of these issues advocated in the campaign, set the stage for some potentially bruising struggles in the Roundhouse come January.

But again, for the immediate future at least, it will be the availability of resources, rather than the structural organization and statutory authority of our water agencies, that will be the primary determinant of future success. I fear it ain't gonna be pretty.