

The Future of Water Adjudications in New Mexico

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Good morning. Before I start, I first would like to say a word of thanks to Judge Valentine. We just heard that the Judge is retiring at the end of the year, after presiding over the Lower Rio Grande water rights adjudication for over a decade. I have appeared before Judge Valentine myself many times. I have also worked with Judge Valentine on many matters relating to adjudications over the years, and I've always appreciated the strength of his commitment to improving adjudications in New Mexico, and his tireless efforts to do so. So I would like to thank him on behalf of all New Mexico water right owners – and all the citizens of the state – for his distinguished service in this challenging but very important field. Thank you, Judge.

As we all know, New Mexico state government is in an era of tight budgets. Today I will discuss what that means for water rights adjudications. The resources available to work on adjudications will be the most important factor in the next few years on how much progress we make in these cases. I will address four specific topics today: first, provide a brief overview of adjudications; second, review the budget of the Litigation and Adjudication Program (LAP) of the Office of the State Engineer (OSE) and what that means in terms of people and other resources available to work on adjudications; third, introduce the annual Rule 71.3 Report, which describes the State's priorities and resource allocations for pending water rights adjudications in the coming fiscal year; and finally, wrap up with a brief discussion of lessons we have learned from

our experience prosecuting adjudications and how we can work smarter to achieve lasting incremental progress in adjudications.

Adjudications Overview

In the handouts we passed out you should have received a copy of this map (Fig. 1); on the back of the map you'll see there is a chart presenting some summary statistics (Fig. 2). These provide a very high-level overview of water rights adjudications in New Mexico. The map shows in red adjudications that over the years have been completed to a final decree, and in green the adjudications that are currently pending. There are 12 water rights adjudication suits pending today in the state and federal courts, half in the state courts and half in the federal courts.

Let me take a moment here to explain what a water rights adjudication suit is, because I don't think this is always clearly understood. Although adjudications get a fair amount of attention from the press and the legislature, the public is often unclear on the difference between adjudications and other litigation involving water rights. The State Engineer supervises the appropriation of the waters of the state largely through permits that he issues. If someone is unhappy with the permit they receive then they can request an administrative appeal before the State Engineer, and if they don't like that decision then they can appeal that to the district court. We have attorneys and hydrologists and other technical staff who work on those



Figure 1. Map of New Mexico water rights adjudications

appeals from State Engineer permits, and those appeals can involve litigation in district court, but those suits are not adjudications. Adjudications are distinct, specialized legal proceedings in district court to comprehensively determine all water rights in a given stream system. Whereas the parties to an appeal of a State Engineer permit are typically the permittee, the State Engineer, and perhaps a handful of protestants, the parties to a water rights adjudication are the hundreds or thousands of owners of water rights in the stream system being adjudicated.

Figure 2 shows just how large these suits are: the 12 pending adjudications have a combined total of around 72,000 defendants. These are big and cumbersome cases, and they take a lot of time as a result. The Pecos is by far the largest in terms of geographic area, while the Lower Rio Grande has the largest number of defendants and water rights involved. Figure 2 shows the differences in the number of defendants in each of the 12 suits. These suits also vary greatly in terms of age – the Pecos adjudication has been pending for over 50 years, while the Animas, the newest, is only a few years old. The handout also provides statistics on the number of acres and subfiles adjudicated in each case that show the varying stages of completion of the different suits.

Figure 1 shows the locations and different geographic areas covered by the 12 pending adjudications. Probably the most notable thing shown on this map is something that Judge Valentine mentioned: there is no adjudication currently pending for the Middle Rio Grande. The area cross-hatched in blue on the map along the Rio Grande from Cochiti down to Elephant Butte shows the likely geographic scope of a future Middle Rio Grande adjudication. Periodically over the years we have heard calls to initiate this adjudication. There is no debate that it is the most significant area of the state where an adjudication suit has yet to be filed. When it is eventually started it will be the most challenging and resource demanding adjudication New Mexico has ever attempted. It is precisely because it will demand so many resources that the State Engineer and his Chief Counsel DL Sanders and I have consistently made clear in our public statements over the years that we need to finish several of the currently pending adjudications before we will have the resources available to be able to take on a new adjudication of the magnitude of the Middle Rio Grande.

When discussing the progress that New Mexico has made in adjudications, an estimate frequently cited is that about 20 percent of water rights in the state have been adjudicated. I think that estimate is too low. On the map in Figure 1, the completed adjudications shown in red cover about 20 percent of the geographic area of the state that needs to be adjudicated. Beyond these completed adjudications, the only geographic areas of the state left to be adjudicated are the 12 pending adjudications shown in green and the areas for future adjudication shown in blue cross-hatching. The 12 currently pending adjudications cover over 60% of the geographic area of the state that needs to be adjudicated. (Areas on the map that are not outlined in either red, green, or blue do not have significant numbers of water rights developed from surface water, and therefore will not need to be subject to a stream system adjudication suit.) The statistics in Figure 2 show that of the total irrigated acreage at issue in the 12 pending adjudications, about 67% has been adjudicated with a subfile order. So by that measure, at least, the 12 pending adjudications are about 2/3 complete. If we put that together with the adjudication suits that have already been completed to a final decree (shown in red on the map), I think a better estimate is that we have adjudicated between 40 and 50% of the state's water rights that need to be adjudicated.

Another gauge of progress in water rights adjudications in recent years is provided by the performance measures set by the legislature for LAP. The next two figures present these performance measures. Figure 3 shows over the last seven years how many people in the 12 pending adjudications have been served with what is known as an offer of judgment to determine their water right. Service of this document initiates the process before the court that culminates in an individual subfile order adjudicating a water right. Beginning in fiscal year 2004, a total of a little over 2,000 people had been served with an offer of judgment. Over the last seven years we have raised that total to 13,000. So in seven years, the adjudication process was initiated for 11,000 people who own water rights. Figure 4 presents our results for the performance measure that measures the number of subfiles in the 12 pending adjudications that have received individual subfile orders that adjudicate a water right. This figure shows the steady progress we have made over the last seven years; by this measure, by fiscal year 2010 close to 50% of all water rights in these pending suits have been adjudicated by final subfile order.



STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER

Acres Adjudicated, Subfiles, and Defendants in Pending New Mexico Adjudications
Totals and Estimates as of June 30, 2010

NORTHERN NEW MEXICO ADJUDICATIONS

Stream System	Total Acres	Adjudicated Acres	% Acres Adjudicated	Subfiles	Defendants
San Juan	37,829	3,991	11%	9,000	11,400
Jemez	2,033	2,033	100%	1,011	1,095
Red River	12,185	12,185	100%	1,202	1,605
Zuni	980	-	0%	950	1,000
Rio San Jose	undetermined	-	0%	1,800	2,000
Rio Chama	34,889	34,329	98%	3,655	4,626
Taos/Hondo	13,756	13,692	100%	4,026	5,224
Santa Cruz/Truchas	7,218	7,218	100%	3,446	5,139
Nambe/Pojoaque/Tesuque	2,755	2,747	100%	3,430	5,598
Santa Fe	827	612	74%	1,284	1,550
Subtotals	112,472	76,807	68%	29,804	39,237

SOUTHERN NEW MEXICO ADJUDICATIONS

Stream System or LRG Section	Total Acres	Adjudicated Acres	% Acres Adjudicated	Subfiles	Defendants
Animas Underground	15,912	-	0%	300	500
Nutt Hockett	11,554	11,554	100%	43	73
Rincon Valley	21,964	17,180	78%	1,227	1,429
Northern Mesilla	20,032	3,493	17%	5,884	7,422
Southern Mesilla	53,923	10,140	19%	5,320	7,203
Outlying Areas	3,801	283	7%	1,233	1,738
Subtotals	127,186	42,650	34%	14,007	18,365

PECOS ADJUDICATION

Section	Total Acres	Adjudicated Acres	% Acres Adjudicated	Subfiles	Defendants
Gallinas	8,162	6,841	84%	1,680	1,994
Upper Pecos(Ground Water)	685	660	96%	99	92
Upper Pecos(Surface Water)	undetermined	-	0%	undetermined	2,000
Pecos Supplemental/Misc.	4,651	365	8%	49	100
Hondo Basin	6,748	6,739	100%	588	657
FSID	6,500	-	0%	undetermined	480
Fort Sumner(Ground Water)	7,444	7,444	100%	80	44
PVACD	128,274	123,032	96%	1,900	2,522
River Pumps	6,063	6,063	100%	19	22
Carlsbad Underground	11,350	320	3%	320	240
Carlsbad Irrigation District	27,053	26,912	99%	1,109	1,328
Penasco	undetermined	-	0%	undetermined	5,000
Subtotals	206,930	178,376	86%	5,844	14,479

ACTIVE GRAND TOTALS	446,588	297,833	67%	49,855	72,081
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Figure 2. New Mexico adjudication summary statistics

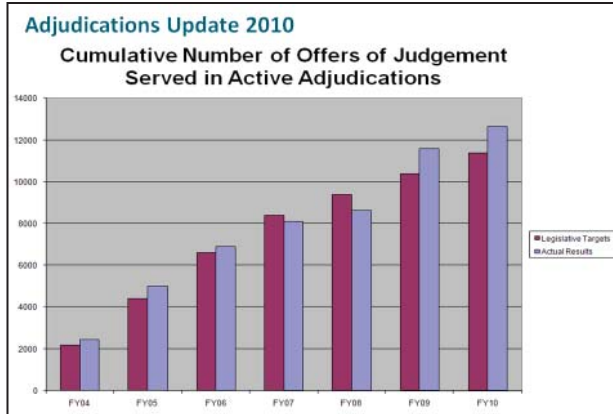


Figure 3. Offers of judgment served in 12 pending adjudications

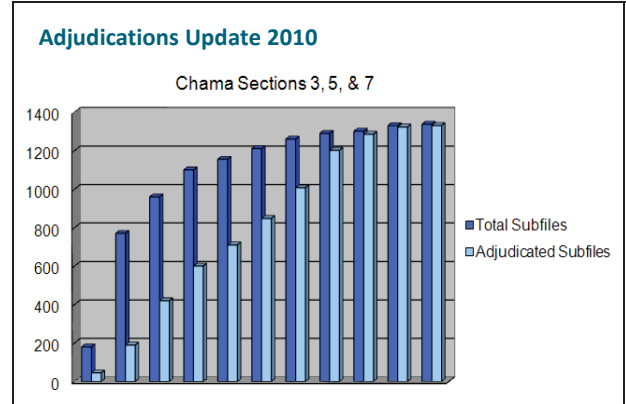


Figure 5. Subfiles adjudicated in Chama sections 3, 5, & 7

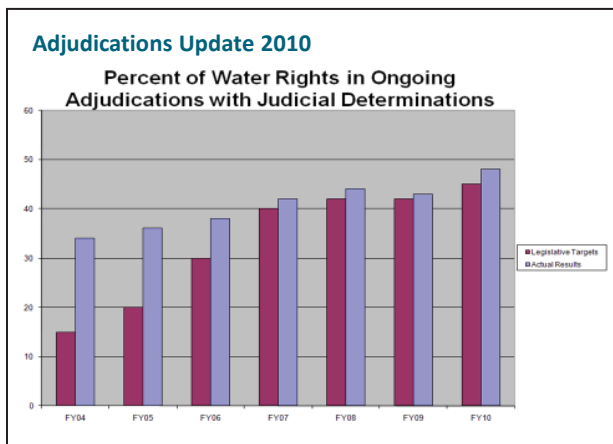


Figure 4. Percent of water rights adjudicated in ongoing adjudications

Figure 5 shows the progress we can make when we are able to focus resources on a single adjudication without interruption. The data are for sections 3, 5, and 7 of the Chama adjudication, where for the last ten years we have been able to dedicate a single attorney, supported by hydrographic survey staff, to move the suit forward. The darker blue bars show the total number of subfiles in these three sections of the adjudication, while the light blue bars show the subfiles that have been adjudicated by subfile order entered by the court. As you can see on the right side of the chart, subfile work is now almost complete, and this year and next we will be focusing on *inter se* proceedings and the entry of partial final decrees for these three sections of the Chama.

OSE LAP Budget and Resources Available for Adjudications

The difficult budget climate and its impact on LAP staffing levels is limiting our ability to make progress in adjudications, and likely will continue to do so in the next few years. But the resource problems we have encountered are more complicated than a simple matter of the dollar amounts budgeted by the legislature.

The budget amounts set by the legislature for the current fiscal year have not significantly affected the resources available to LAP for adjudication work. Figure 6 compares LAP’s budget for the current fiscal year 2011, which began July 1, 2010, to our budget for the previous fiscal year 2010. The legislature appropriates LAP’s budget in three basic areas: salary and benefits, contracts, and all other expenses. You can see that the budget amount for salary and benefits – the amount budgeted for LAP to pay employees – is basically flat. It was not reduced in FY 2011 from the amounts budgeted in FY 2010. You can also see that the amount budgeted to LAP for contracts was reduced in FY 2011 by 15% from the FY 2010 level. That has had an impact, because we employ contract attorneys to work on adjudications. The majority of our attorneys working on adjudications are salaried agency employees, but we do employ some contract attorneys with specialized expertise in areas like Indian water rights. The reduction in our contractor budget has directly reduced our ability to use contract attorneys to work on adjudications. But because LAP’s salary and benefits budget has not been reduced, the overall impact of the budget reductions has been only moderate.

LAP Budget and Staffing

Budget Appropriation Amounts - FY11 compared to FY10

Salary & Benefits	Flat
Contractors	<15%>
All Other Costs	< 4%>

Figure 6. LAP budget - FY11 vs. FY10

Our real resource problem has been that even though we have enjoyed close to flat budgets on paper over the last two fiscal years, we have suffered significant shortfalls in actual funds received to pay those budgeted amounts, and these shortfalls have left us unable to fill vacancies when staff leave the agency. This problem started with House Bill 1110 passed by the legislature a few years ago. The idea of that bill was to provide additional funding from the water project fund to the OSE to work on adjudications, over and above our base general fund budget. Unfortunately, the moment that additional funding was added to our budget, the legislature took away an equivalent amount of general fund money. This left our overall budget flat, which doesn't sound so bad, but Figure 7 shows the real problem it caused. Our budget for salary and benefits in the current fiscal year was \$4.86 million. Of that total, \$3.4 million was appropriated from severance tax bond proceeds in the water project fund. But because those severance tax bonds only generated \$2.7 million, we were left with a shortfall of \$700,000.

LAP Budget and Staffing

- HB 1110
- FY11 LAP Salary & Benefits budget shortfall

Total Budget:	\$4.86 M
STB Proceeds (Budgeted):	\$3.40 M
STB Proceeds (Actual):	\$2.69 M
Shortfall:	<\$ 700 K>
	(14.5% of \$4.86M)

Figure 7. LAP FY11 salary and benefits shortfall

Because of that \$700,000 funding shortfall, we have not been able to fill vacancies as agency employees leave for other opportunities. Since November, 2008 the Governor has imposed a hiring freeze on state agencies. While there has been a lot of reporting in the press that this hiring freeze has been very porous, that has not been the case for LAP. Because of the \$700,000 funding shortfall, we have not been able to request an exemption to the hiring freeze, and so we have not been able to fill any vacancies. Figure 8 shows the resulting impact over the last 18 months. On the left is fiscal year 2010 and the right is fiscal year 2011. These little icons represent the attorney and hydrographic survey positions in LAP. These are not all the positions in LAP, just the core technical and legal positions that are assigned to our four main adjudication bureaus. We have a total of 43 of these adjudication positions in LAP. At the beginning of fiscal year 2010, only four of these 43 positions were vacant – a nine percent vacancy rate. Those four vacancies are shown as the little “ghost” icons in gray on the end of the rows. Today, in the middle of fiscal year 2011, we have a lot more ghosts: 14 of the 43 positions are now vacant – a 33% vacancy rate. With 33% of our core adjudication technical and legal positions now vacant, our capacity to work on adjudications has been reduced by almost 25% over the last 18 months. That has had an unavoidable, direct impact on our ability to make progress in adjudications.

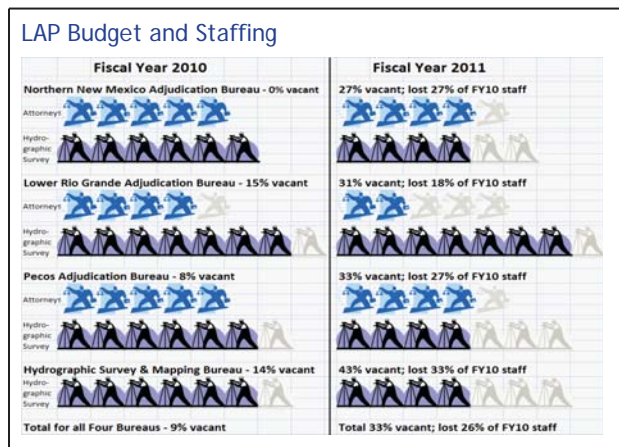


Figure 8. Vacancies in LAP technical and legal positions

Rule 71.3 Report

Rule 71.3 is a rule of civil procedure recently adopted by our Supreme Court. It requires all the state court judges presiding over adjudications and the attorneys representing the state in those suits to get together once a year for a working session. The purpose of the working session is to discuss the state's resources available to prosecute adjudications and the state's priorities for adjudication work in the coming fiscal year. For this meeting the state's attorneys prepare a report that outlines all the resources we have to work on adjudications and how those resources are going to be allocated in the coming fiscal year. Figure 9 shows a sample of a page from that report. This report is the most detailed description we provide every year on resources and the prioritization of adjudication work. It is an essential tool for communicating these matters to the public and the courts.



Figure 9. Rule 71.3 report

Of course, things change, and at the time the report is compiled at the beginning of the fiscal year we cannot anticipate every development during the year. For example, we received some wonderful good news this week. On Tuesday, November 30, 2010, the House of Representatives passed the legislation authorizing and funding the federal portion of the Aamodt and Taos Pueblo Indian water rights settlements. (On December 8, 2010 President Obama signed the bill, the Claims Resolution Act of 2010, into law as Public Law 111-291). This is wonderful news for New Mexico and an extraordinary achievement by our congressional delegation. But it is also one of those “be careful what you ask for” situations, because those settlements are now going to impose new deadlines

upon the Aamodt and Taos adjudications to get things done to be able to get those decrees entered. That may require some reallocation of resources to achieve those new deadlines.

Lessons Learned

Finally, let me present some lessons we have learned from our experience prosecuting adjudications. This is adapted from a talk I gave to the adjudication judges at our Rule 71.3 working session earlier this year. It is an attempt to boil down our experience to a set of principles that describe the best way to make lasting, incremental progress in adjudications, regardless of the amount of resources we have available. Given the nature of adjudications in New Mexico and the resource limitations we face, I think these principles are going to be important for years to come. This presentation is structured as a light-hearted parody of “All I Really Need to Know I Learned in Kindergarten,” but the principles it tries to present are serious.

1. The first and most important principle is that we need to finish what we started before moving on to something new. By that we mean that we must focus on achieving incremental progress by resolving discrete matters with finality before we move the resources involved on to other matters. For example, when we start subfile work in a section or subsection of an adjudication, we need to complete the adjudication of all rights in that section or subsection before we move those resources elsewhere. It has been a recurring problem over the decades that after starting work on one adjudication or section of an adjudication, another pressing matter forces us to pull those resources away. When we finally are able to allocate those resources back to the first adjudication, we have to do even more work to bring matters back to where they were when we left it. This principle also applies at the highest level. As I mentioned earlier, we can't afford to start a new adjudication now for the Middle Rio Grande until we have finished several of our pending adjudications.

2. Second, cookies are best warm out of the oven, by which we mean that we need to schedule both hydrographic survey and adjudication subfile work to minimize the chance that the data and information in the hydrographic survey will grow old and become stale. Judge Valentine made this point very well and I agree with him that this is something we need to do better. We need to work smarter and schedule our survey work so that

as soon as it is completed we are ready to begin working on the adjudication of subfiles.

The Judge's comments also touched on another point related to this one. We've learned that when we join individual defendants to the adjudication, we should not join defendants en masse, thousands at a time. Instead, we should be joining them only when we are ready to work on their individual subfile. Joining water right owners as defendants and then taking no other action in the adjudication on their subfiles for months or years only creates confusion, misunderstandings, and more problems down the road.

3. Third, don't bite off more than you can chew, by which we mean that we must focus our limited technical and legal resources and avoid over-committing those resources. This principle applies both across adjudications and within each adjudication. Across adjudications, we strive to focus our resources on a few adjudications rather than spreading our resources thinly across all pending adjudications. The annual Rule 71.3 working session with the judges is an important opportunity to communicate to the judges and adjudication defendants where we plan to focus our adjudication work in the coming year. Within adjudications, we divide the adjudication into sections and focus our resources on one or two sections at a time.

4. The last principle is to play fair, share, and not hit people. We have advocated this approach before the legislature several times in recent years; this is sometimes referred to as the "Chama adjudication model." The idea here is to promote the informal, out-of-court resolution of subfile disputes over the formal litigation of those disputes. We do that by minimizing the adversarial aspects of water rights adjudications. These are civil lawsuits, and so they are necessarily adversarial at some level. It's intimidating to the average person, for example, to receive a summons and be forced to answer the State's adjudication complaint. But we have learned we can make more progress in adjudications when we minimize the formal litigation of disputes and instead work to resolve disputes informally and promote an atmosphere where there is an open exchange of information between the state and individual defendants. We can do that by a variety of techniques, including public outreach and education, mandatory field offices where the State's legal and technical representatives meet with individual defendants, and follow up field checks by hydrographic survey staff when requested by

defendants.

To conclude, I've outlined the fundamental principles we have identified that promote the achievement of incremental and lasting progress in adjudications. Today, at a time where resources are at a premium, it is more important than ever to work smart. These principles are scalable – they can be applied at different levels of resources and they will produce results in any budget climate – but they are even more important in our current difficult budget climate.