

The Future of Water Adjudications

Judge Jerald A. Valentine, Third Judicial District Court



Judge Valentine has been the presiding judge in the Lower Rio Grande Adjudication since 1995. He is a native New Mexican and earned a BS in mechanical engineering from NMSU and a law degree from the University of Texas, Austin. Judge Valentine has been District Judge, Division IV, 3rd Judicial District Court since 1993 and Chief Judge, 3rd Judicial District Court from 1999-2002, and again from October 2008 to the present. He is a contributor to the soon to be published book, One Hundred Years of Water Wars in New Mexico 1912-2012. This book is part of the New Mexico Centennial History Series and Judge Valentine has contributed a chapter on "Managing Water Wars in New Mexico."

The following is an outline of Judge Valentine's presentation.

Schema of the Water Code

Statutory Procedure: (Surface Water Code [Code] effective 1907. Before the Code, diversion and application to beneficial use established the priority and other elements of the right)

Administrative duties of Office of the State Engineer (OSE).

The state engineer is an expert not a litigant

1. Permit process through license

A. Application

§72-5-4. Notice; publication, opportunity for others to object.

B. Objections

C. Evaluation

The state engineer "shall determine," from the evidence presented by the parties interested, from available surveys of the water supply and from the records, whether there is unappropriated water available

§72-5-7. If there is no unappropriated water available, state engineer rejects application.

D. Deadlines

E. Licenses

§72-5-13. (1907)

If the state engineer determines there is unappropriated water and accepts the application, on or before the date set for the

application of the water to a beneficial use, the state engineer inspects the diversion works.

The state engineer shall issue a license to appropriate water to the extent and under the condition of the actual application to beneficial use, but in no manner extending the rights described in the permit.

Before the 1907 Water Code

The 1912 New Mexico Constitution declared unappropriated water of every natural stream to belong to the public and to be subject to appropriation for beneficial use. Priority of appropriation will give the better right. For New Mexico, this did not establish new water law but merely incorporated the existing "prior appropriation doctrine" which pre-dated the Constitution.

To establish a water right, claimant would divert unappropriated water and apply for beneficial use. No governmental approval required. There was no express law authorizing adjudications. Water disputes generally arose between conflicting claims of specific water users and did not require joinder of all claimants on a stream system. The prior appropriation doctrine did require, in a manner similar to the subsequent code, "diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use." NMSA §72-1-2.

State Engineer's Permitting Process After the Surface Water Code of 1907

The Code established the Office of the Territorial (now State) Engineer and authorized the state engineer to supervise the apportionment of water belonging to the public "according to the licenses issued by him and his predecessors and the adjudications of the courts." NMSA §72-2-9 (1907).

After the Surface Water Code became law, anyone who wanted to acquire a water right in unappropriated water had to file an application for a permit with the state engineer NMSA §72-5-1.

When he receives the application, the state engineer must first make an administrative determination that there is unappropriated water. §72-5-7. He must also determine if the proposed appropriation is not contrary to the conservation of water within the state and is not detrimental to the public welfare of the state. NMSA §72-5-6.

The permitting process includes publication of notice of the application and an opportunity for other water right claimants to object to the state engineer's issuance of a permit. NMSA §72-5-4 and §72-5-5.

If the state engineer finds that there is unappropriated water that can be applied to beneficial use by the applicant, he will issue a permit and the permit will authorize the applicant to prepare diversion works to divert water up to a maximum amount stated in the permit. NMSA §72-5-6.

On or before the date set for the application of the water to a beneficial use, the state engineer must inspect the diversion works and, if appropriate, he will issue a license for the applicant to appropriate water for application to beneficial use up to a maximum of the rights described in the permit. The licensed right could be less than that described in the permit. The amount stated in the permit establishes a ceiling. NMSA §72-5-13. Although the Water Code indicates that the licensing process is mandatory, relatively few licenses have been issued by the state engineer.

A similar permitting process for underground water exists. §72-12-1 et seq. In a hydrologically connected stream system, the state engineer manages surface stream water and underground stream water conjunctively as one stream. §72-5A-2. See *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, 141 N.M. 21, 150 P. 3d 971 (2006).

Statutory Duties of the State Engineer

All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. §72-1-1.

For water right claims before the date of the Surface Water Code, the water right relates back to the initiation of the claim. All water right claims initiated thereafter will be the date of the receipt of an application filed with the Office of the State Engineer in compliance with the Water Code and the rules and regulations that are established. §72-1-2.

When an owner conveys the water right to another, the new owner of the water right must file a change of ownership form with the state engineer. 72-1-2.1.

Any owner of a water right that was vested prior to the Surface Water Code, may file a declaration in the Office of the State Engineer describing the water right. §72-1-3.

The state engineer has general supervision of waters of the state and of the measurement, appropriation, and distribution plus other duties as required. §72-2-1.

The state engineer has the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts. §72-2-9.

The Office of the State Engineer must purchase, install, and study prototypes of alternative devices that accurately measure the flow of river water. §72-2-9.2.

The state engineer has authority and power to formulate rules and regulations. The state engineer promulgates rules and regulations with regard to hearings to be conducted before examiners. §72-2-12.

The state engineer may and in some circumstances must appoint a water master for water districts. The water master has charge of the apportionment of waters in the district under the general supervision of the state engineer, and the water master shall so appropriate, regulate, and control the waters of the district to prevent waste. §72-3-2.

The state engineer hears appeals from the acts or decisions of the water master, his decision is final unless an appeal is taken to the district court. §72-3-3.

To get a water right after the Surface Water Code, a person has to apply for a permit. The filing of an application for a permit initiates specific administrative duties of the state engineer. §72-5-1 et seq. and §72-12-1 et seq.

Any applicant or other party dissatisfied with any decision, act, or refusal to act by the state engineer may appeal to the district court of the county in which the work or point of desired appropriation is situated. The proceeding upon appeal is *de novo* as cases originally docketed in the district court. Evidence taken in a hearing before the state engineer may be considered as original evidence subject to legal objection, the same as if the evidence was originally offered in the district court. §72-7-1, Art. XVI, Section 5, New Mexico Constitution. The courts therefore are the final arbiters that determine the water right.

Adjudications

The state engineer is directed to make hydrographic surveys and investigations of each stream system for the determination, development, and adjudication of water supply for the state. NMSA §72-4-13. Under the Water Code as drafted, the state engineer has limited involvement in an adjudication. He must prepare and file a hydrographic survey and request that the attorney general file an adjudication. Implicitly the state engineer is the state's expert. When a hydrographic survey is completed, the state engineer will deliver a copy of the survey to the attorney general who brings an adjudication suit on behalf of the state for the determination of all rights to the use of such water and to determine the amount of unappropriated water. NMSA §72-4-15.

This has been modified in practice. The attorney general does not prosecute an adjudication. He appoints the legal staff of the Office of the State Engineer as deputy attorneys general. Regardless of the legal effect of the attorney general deputizing state engineer legal staff, the Office of the State Engineer typically files adjudications, not the Attorney General *ex rel.* for the State of New Mexico. The Water Code directs that the attorney general file adjudications on behalf of the State of New Mexico when the state engineer requests the adjudication and files a copy of a hydrographic survey. In actual practice, it is the state engineer who is the plaintiff. The only action taken by the attorney general is to deputize the state engineer's legal staff.

General Stream Adjudications require joinder of "all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence. . . ." NMSA §72-4-17.

When the Court has adjudicated the water rights, the clerk of the Court must prepare and file a certified copy of the decree in the Office of the State Engineer. The decree declares the priority, amount, purpose, periods, and place of use, and as to water used for irrigation, the specific tracts of appurtenant land. §72-4-19.

Purpose of Adjudications

1. To determine if there is unappropriated water on a stream system (The Lower Rio Grande [LRG] stream system is considered to be "over appropriated" but this has not been legally determined. Over-appropriation may be the case for most stream systems in New Mexico.)
2. To give the state engineer the information necessary to supervise and manage the public waters. (The state engineer can also supervise the public waters by licenses.)
3. To adjudicate and clear the title of individual water rights.

Completed adjudications will give the state engineer the fundamental information necessary for him to supervise and manage our public waters. They will materially reduce the possibility of New Mexico being sued by another state or other sovereigns for their equitable share or treaty share. They will reduce uncertainty of ownership, priority, and quantity and other elements of a water right. Water right owners who want to sell their rights and purchasers of those rights will have substantially better information that should simplify the water rights market.

Territorial and state engineers have not always followed the procedures set out in the Water Code.

Lessons Learned from the Lower Rio Grande Adjudication

1. Train the judge
 - Water law
 - Complex cases
 - Great concern with constitutionally required due process when there are thousands of litigants

2. Train the OSE lawyers
 - Need consistency as judges change and OSE legal staff change
3. Better integration of data
 - A. Internally the OSE needs better integration of data between administrative activities and adjudicatory activities
 - B. Between the Court and the OSE
4. Pre-adjudication suit education of water users
5. Judge has the duty to control the pace of litigation and must have case management orders in place for that control
6. The Code requires the hydrographic survey before suit is filed (controversial; there should be some formal way to bring the Court in before and during the hydrographic survey so that the Court can begin development of case management orders)
5. To the extent practicable, within available budget, and without delaying an adjudication, the OSE should investigate permitted usage and issue licenses
6. With input from hydrologists, divide the stream in coherent sections based on watershed or common or similar issues; these divisions should be large to include 5,000 to 15,000 users; schedule adjudications for each of these divisions so that the entire MRGCD Adjudication could be completed within 15 or fewer years.

If the legislature can provide adequate resources.

1. Work with legislature for adequate funding for hydrographic surveys and adjudications
2. Bifurcate the hydrographic surveys
 - A. Identify addresses of water users; join all users in each section promptly even before the hydrographic survey is completed and filed
 - B. Encourage water right users to file claims with adequate description of the parameters of the claim
 - C. Identify stream system issues as soon as they can be reasonably done; the Court should take the lead and encourage identification and focus the description of the stream system issue
 - D. The state engineer should make prompt field surveys of current usage, encourage water right users to come forward with a description and information regarding their claims and the state engineer should issue licenses when appropriate

The state engineer should evaluate needed resources and plan to do hydrographic surveys on sections or sub-sections into which the stream system has been divided as swiftly as possible. The OSE should serve offers of judgment in sub-sections to claimants as soon as a section or sub-section of the hydrographic field survey is completed to minimize the possibility of the hydro-survey becoming stale.

Tri-State Generation and Transmission Association, Inc. et al. v. John D'Antonio, Jr. NM St Engr

Constitutional Separation Challenge to Sec. §72-2-9.1.

§72-2-9.1 Priority administration; expedited water marketing and leasing; state engineer. (2003)

Issues

1. Pace of the adjudication
2. Evaluation of resources needed both by the OSE and the Court

What Can be Done to Expedite and Control the Pace of Litigation

1. Should all parties be joined immediately?
2. Should stream system be segmented by geography, water shed or common issues?
3. Should sub-file adjudication be done in small batches?
4. How and when should legal issues be addressed by the Court?

Recommendations for the Middle Rio Grande Conservancy District (MRGCD)

Before an adjudication is filed:

1. OSE and MRGCD work to coordinate information in their respective databases
2. Require that wells, including domestic wells, be metered
3. Begin an intensive educational program for anticipated *pro se* parties
4. Fund and expand the Stell Ombudsman Program

- A. The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative, and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.
- B. The state engineer shall adopt rules for priority administration to ensure that authority is exercised:
- (1) so as not to interfere with a future or pending adjudication;
 - (2) so as to create no impairment of water rights, other than what is required to enforce priorities; and
 - (3) so as to create no increased depletions.
- C. The state engineer shall adopt rules based on the appropriate hydrologic models to promote expedited marketing and leasing of water in those areas affected by priority administration. The rules shall be consistent with the rights, remedies, and criteria established by law for proceedings for water use leasing and for changes in point of diversion, place of use and purpose of use of water rights. The rules shall not apply to acequias or community ditches or to water rights served by an acequia or community ditch.
- D. Nothing in this section shall affect the partial final decree and settlement agreement as may be entered in the Carlsbad Irrigation District Project offer phase of (*State of New Mexico ex rel. State Engineer v. Lewis, et al.*,) Nos. 20294 and 22600 (N.M. 5th Jud. Dist.).

Court of Appeals Held

“The New Mexico Constitution contains nothing to indicate that determination of the elements of water rights is consigned exclusively to the judicial branch; it merely provides for *de novo* review.”

Referring to Water Code, the Court of Appeals said,

“... Statutory authority enables the State Engineer to determine certain elements of water rights as part of this supervision.”

§72-2-9.1 does not grant additional authority for the state engineer to administer water allocations. “We infer that the legislature believed that the State Engineer already had the necessary authority to

adopt rules.” And the legislature did not need to expand upon the state engineer’s authority.

None of the statutory provisions nor any published decision addressing them suggests that the state engineer has authority to engage in an *inter se* process or to determine priorities for the purpose of curtailing rights from evidence other than adjudication decrees or licenses.

Licenses are issued in the final stage of the water right permitting process, which involves an initial application to the state engineer publication of the application, a protest period, evaluation by the state engineer, an administrative hearing, and an appeals process to the courts.

There can be no administration of junior rights as against senior rights until the parties have had an opportunity to contest priorities *inter se*.

Case Management Orders

Sixth Amended Order (Order) Regarding Stream Adjudication Procedures filed September 14, 2009

The first case management, entered by the Court in the Lower Rio Grande Adjudication, set out sub-file procedures. A seventh iteration of the original case management order is now in effect. The procedure is designed to ease the uncertainty and concern of claimants who do not have attorneys to assert their individual claims. It gives individual claimants the option to combine with other claimants to minimize costs. It requires the state to notify the Stell Ombudsman Program and for the Program to contact claimants to provide them with information important to the assertion of the claimants’ rights. It provides for simplified forms to respond to the service of the complaint, and explains the consequences of failing to respond.

This Order covers both sub-file and *inter se* proceedings, and controls when specific water rights are to be determined. The Order begins with definitions of terms. It defines stream system issues, *inter se* proceedings and expedited *inter se* proceedings. The Rules of Civil Procedure apply except as expressly modified.

The Order provides for simplified forms for water right claimants to use when served with a summons and complaint; coordination with the Stell Ombudsman Program; the state to make offers of judgment that are the state’s proposal to stipulate to claimant’s water rights; explanation of stipulated sub-file orders, sub-file orders-implied consent and sub-file orders-default; directions

to claimants regarding objections to the offer of judgment; explanation that claimants can negotiate with the State to determine whether their water rights can be resolved by stipulation; direction to mediate through the Court-annexed mediation program if initial negotiations are unsatisfactory; trial before either a special master or a judge, if the claimant cannot resolve issues by mediation with the state; and explanation that stipulated sub-file orders, implied consent sub-files and default sub-files are not appealable or modifiable except as permitted under Rule 1-060 (b) NMRA, or as may be necessary after *inter se* issues are decided.

The Order further provides that several parties may be represented by one attorney if there is no conflict of interest; corporate entities may answer and file updates of their address and ownership records without an attorney and, when a corporate entity wants the Court to take action or grant relief, it must retain an attorney. Individual claimants may form an independent, non-governmental, voluntary, corporation or other appropriate corporate entities to act on behalf of its members to resolve issues between its members and the State. There must be written confirmation that its members have authorized the corporate entity to act on their behalf.

First Amended Case Management Order for Stream System Issues and Expedited Inter Se Proceedings Authorizing Notice by a Monthly Report and Setting Procedures, filed September 14, 2009.

The Court has entered a case management order addressing service of process. This case management order is on its second iteration. The ordinary rules of civil procedure require service by first class mailing after parties have been joined. When motions on stream system issues are filed, the cost of mailing notice to all claimants would be high. The state engineer has identified the names and addresses of almost all of the water right claimants in the hydrographic survey. First class mail should be sufficient for due process.

This Order provides for notice to claimants through a quarterly report for matters of general concern to the adjudication, stream system issue proceedings and expedited *inter se* proceedings. The Order explains how a stream system issue or expedited *inter se* proceeding may be initiated. The quarterly reports are posted on the New Mexico judiciary's website, www.nmcourts.gov (click on Lower Rio Grande Adjudication). The posting of the quarterly

report and the posting of documents on the website is effective service on all claimants.

Parties must file timely notices of intent to participate in stream system issue proceedings. Lists of parties with their addresses, who have filed notices of intent to participate, are published on the website. The ordinary rules of civil service of documents apply to parties participating in a stream system issue proceeding. A final decision by the Court on a stream system issue, or in an expedited *inter se* proceeding, will bind all parties whether or not they have participated in the proceeding.

To date, four stream system issue proceedings have commenced. There are approximately 30 parties participating in each of the following stream system issue proceedings.

SS 97- 101: Consumptive Irrigation and Farm Delivery Requirements for All Crops in the Lower Rio Grande Basin.

SS 97-102: Elephant Butte Irrigation District's Claim to Underground Waters on 90,640 Acres of Its Members' Lands.

SS 97-103: Priority, Transferability, and Beneficial Use Elements of a Domestic Well Water Right.

SS 97-104: The United States Interests in the Stream System.

SS 97-101 has been set for trial June 6, 2011. The Court has recently received notice that SS 97-102 has been resolved by stipulation. Scheduling deadlines are currently being considered in SS 97-103. SS 97-104 has been partially stayed pending mediation.

The Order provides an opportunity for all claimants to participate in stream system issue proceedings, but has the practical effect of reducing the number who will actually participate to those represented by knowledgeable attorneys, or parties who are familiar with rules of litigation. Participating parties must follow the rules of civil procedure with respect to other participating parties. The Order provides an inexpensive method of giving notice to claimants who are not participating parties by posting activity on the judiciary's website. This protects the due process rights of those who choose not to participate and will greatly reduce the cost of service, and will allow the Court to ensure that stream system issues are resolved promptly.

Order for a Hydrology Committee

In 1999, the State of New Mexico, Elephant Butte Irrigation District (EBID), the United States, the City of Las Cruces, the City of El Paso, New Mexico State University, joined by Stahmann Farms, Inc. and Amicus Curiae El Paso County Water Improvement District No. 1 established a hydrology committee. The purpose of the committee was to promote cooperation among the parties and their experts and to provide technical assistance to the parties. The protocol expressly provided that the hydrology committee would not act as a technical advisor to the Court.

The Court has recently entered an Order for the hydrology committee that materially changed the function of the committee. The committee will now operate in a manner similar to a court expert as described in Evidence Rule 11-706, NMRA. The changes to the hydrology committee were based on procedure and rules adopted by the Colorado Supreme Court. Any party may name, but is not required to name, a hydrologist to the committee.

The members of the hydrology committee must disclose their expert reports to each other and discuss the matters of fact and expert opinions. Thereafter, they jointly submit to the presiding judge a written statement setting forth the disputed matters of fact and expert opinion that remain for trial. No claimant is required to name an expert to the committee. Any claimant may retain an expert, who need not be a member of the hydrology committee, to testify at trial.

The hydrology committee should narrow the issues that need to be addressed by the Court. This Order encourages parties' experts to have open discussion on matters that require the expertise of hydrologists and to advise and explain hydrology issues to the Court that are actually disputed. This should reduce the overall expense litigating complex hydrological questions.

Most duties of the state engineer are administrative functions, and he can supervise the apportionment of water in this state according to the licenses issued by him administratively. The state engineer may also supervise the apportionment of water according to adjudications.

Why does the Code allow the state engineer to alternatively select either licenses or adjudications?

Other water right claims may assert an earlier priority date or larger quantity that may be adverse to licensed water right holders. Therefore,

they have a right to challenge administratively determined licenses. Adjudications provide the mechanism to assert that right.

The state engineer has the administrative duty to make hydrographic surveys and investigations of each stream system and source of water supply in the state, beginning with those most used for irrigation, and obtaining and recording all available data for the determination, development, and adjudication of water supply of the state. NMSA §72-4-13. Although there is no reference to when the surveys should be done, hydrographic surveys on all stream systems in New Mexico are mandatory. Nevertheless, state engineers have delayed initiating hydrographic surveys and in some cases have actively resisted attempts require the state engineer to make the surveys.

The hydrographic surveys are the evidentiary basis for court adjudications to determine water rights on the stream system. NMSA §72 4 15.

As the Code is drafted, when the state engineer completes a hydrographic survey of a stream system, the state engineer delivers a copy of the survey to the attorney general, who, when requested, will begin an adjudication suit on behalf of the State. The adjudication is to determine ownership of water rights in the stream. When these rights are determined, the state engineer will know the amount of unappropriated water subject to appropriation and can supervise the public waters the apportionment of water.

Modifying this procedure, the attorney general deputizes the legal staff of the Office of the State Engineer and they prosecute the adjudication. Most water disputes filed in District Court are brought as State, ex rel. state engineer, or a variation. This is the correct form if the state engineer is the party. Regardless of the legal affect of the attorney general deputizing the state engineer's legal staff, the overwhelming majority of water right claimants know that the state engineer's legal employees are prosecuting the adjudication and perceive that the state engineer is an adversarial plaintiff and not just an expert.

An interpretation of the Code as originally written is that the state engineer is an expert for the state, not the real party in interest.

