

Legislative Perspectives

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Thank you all for attending today. I was asked to talk a bit about my own perspective on legislative issues on both federal and state and government fronts.

I would like to start with an anecdote about an interaction that Senator Peter Wirth and I had during the legislative session this year that illustrates in a nutshell what is wrong with our legislature. I apologize for beating up on you Peter, but Peter is doing what ended up being the most interesting water legislation I think in the 2013 legislative session. I was trying to interview him, and legislators during the session are incredibly busy. We kept exchanging text messages and phone calls trying to find a time in his schedule. Finally, Peter said, “Why don’t you come down tomorrow afternoon? The Senate will be in session, but I don’t have to be on the floor all of the time.” So I went up to Santa Fe and into the hallway behind the Senate chamber and sent in a note with a messenger to search for Peter saying, this is John come talk to me. What ensued over a period of probably 45 minutes was the strangest interview that I have ever conducted. We start talking about very complicated water policy issues. We talk for about five minutes and then the Sergeant at Arms let out the doors of the Senate chambers into the hallway and shouted “voting!” This is the ritual of the Senate. When the voting is happening, legislators try to run in and vote. So, Peter comes back out and we try to pick up the conversation. We had this conversation in a series of three, four, and five minute chunks. The point here is that the state legislators of New Mexico have to deal with an enormous range of issues.

I spend a lot of time in the legislature watching water policies. Some are quite significant and

largely go nowhere, with the exception of Senator Wirth’s bill on domestic wells double dipping. The key problem I saw was this issue of legislative capacity. Legislators are in a 30-day or 60-day session, and there are an enormous amount of issues these folks have to deal with like the education of our children plastered with dealing with state pension funding problems—really big complicated issues. Each legislator only has one brain and has so many issues that they have to be knowledgeable about. There are only so many legislators able to focus on so many issues. Water to everyone in this room is an incredibly important thing, but in the legislature it is only one of many very important issues. It is hard for them to have the institutional capacity and to have the time and energy to focus on the hard policy questions. We are hearing a lot of talk about water in the legislative session for 2014 which starts January 21. It is a narrow 30-day session this year in the legislature. The legislature alternates between 30-day sessions dealing with relatively narrow issues and then has 60-day sessions that are open for broader issues.

The governor held a news conference on Tuesday suggesting a broad initiative to use capital outlay money for a substantial amount of capital infrastructure improvements. The legislative reaction was very interesting. The part that I found really interesting is that I was the one calling the democratic leadership to get their comments. They didn’t know about it until a reporter called after a press conference. I’ll leave you folks to judge whether that is a good way of doing broad policy initiatives, in a press conference versus working collaboratively, which is the main premise of the legislature. But that is the reality. The Governor’s

initiative has some interesting potential because it uses capital outlay money. For those of you who are unfamiliar with the legislative process, capital outlay is the way that individual legislators get to build senior citizen centers, bridges that cross rivers, and ball fields for little league in their districts. Usually we have a big pile of capital outlay money that is roughly divided up into thirds. The governor gets about a third of it, the House gets about a third, and then there is a third for the Senate. That is the traditional way of dealing with capital outlay money. Governor Martinez has suggested that 60 percent should go to her water initiatives. That sort of action by the Governor has always been met with resistance from legislators, but this is a very clever thing that she is doing because it has the possibility of doing a bunch of water legislation in all of the districts, and that I support. It will be interesting to see how her initiative progresses. So far, we are not seeing evidence of any big policy initiatives being dealt with more broadly in the 30-day session.

Yesterday you heard a couple of comments about some water policy issues that a lot of people think require attention. John Shomaker talked about prior appropriation and said the question wasn't whether prior appropriation was dead, it's just really boring. Em Hall, who I think is the poet laureate of New Mexico water, said there have been a couple of recent Supreme Court decisions that have shifted the angle of repose of prior appropriation. I want to quote from one because I think it is a very interesting observation. This is from the Supreme Court decision in the case of *Bounds vs. New Mexico*. It involved the question of prior appropriation and the impact of domestic well drilling on senior appropriators based on wherever the domestic wells are drilled. The Supreme Court said yes, prior appropriation applies here, but we are not sure exactly how that should be carried out. [transcriber note: speaker reads a couple of sentences but they were inaudible] Seen in the court of appeals is that citizens must look to the legislature and the State Engineer for relief of these problems. Here is the great line: "We urge our legislature to be diligent in the exercise of its constitutional authority and responsibility for the appropriation process. We equally encourage the State Engineer to fulfill its superintending responsibility by applying priority administration for the protection of senior water rights users."

What the Supreme Court is saying essentially is that prior appropriation is the law here in New Mexico and somebody needs to do something about that. It's not a specific piece of water policy, it is finding a way of expanding this sort of institutional capacity of our state legislature, the expansion of staff. There were many people I talked to who would really like to see a full-time legislature. I don't think that is going to happen, but an expansion of staff so that we have some broader ability for the legislature to work with these kinds of problems would be helpful.

I'm going to specifically make a few comments about Congress and the congressional process, which is hopeless right now. That has important implications for water policy, because they are stuck on a whole bunch of issues that involve really big issues and cultural wars in our nation. They are spending a lot of time and energy on those issues. They have much more institutional capacity, but they are spending all of their time on these issues. There are a bunch of things with water policy that aren't being paid attention to. I am going to give you two examples that have plagued us specifically in New Mexico. These are small things; they are below the radar, but they are good examples.

There is an effort underway to figure out a reasonable mechanism, here in the Rio Grande Valley, whereby agricultural water could be leased by someone for purposes of instream flows. There was a lot of opposition to this yesterday. Some really interesting ideas are being done in other places. The institutional mechanisms to make that happen doesn't work here. Senator Tom Udall, who is a member of the Appropriations Committee, included some language in the Senate's Energy and Water Appropriation Bill for 2014 that would kick off this discussion. That bill is dead. So, what you see is Senator Udall being forced by congressional failure—I'm going to use some baseball analogy here—to play "small ball" You don't hit "home runs" you "steal bases." You make small amounts of progress over time. So, this is incredibly "small ball" action. He put back into the Appropriations Bill report language. The bill will never pass, but at least it sends a message, and the Bureau of Reclamation got the message. This is really legislation by inches because bigger things can be done.

There is a second example that is going on right now that also deals with flow into the valley. Cochiti Reservoir, run by the U.S. Army Corps of Engineers, was built for control purposes. There are people who would like to use Cochiti, and they have tried to do this over the past several years, in the spring to change the timing of the flow in the Rio Grande to benefit the flows for the Silvery Minnow. Catch a little bit of water early in the spring, then release it and cause a spike in flow for the minnow later in the spring. It's a pretty straightforward plan in terms of hydrology. We have a dam. It sits there. It doesn't pass. We can do it, but authorization doesn't allow it to happen. Change in the authorization takes an act of Congress so we are stuck with this thing that could be and should be a legitimate policy sketch. There are others who think it is a bad idea and would argue about it, but we can't even get to that point because Congress can't deal with this.

I think we are really hamstrung by Congress's failure and I think it is interesting to watch the clever water managers, the clever congressional staffers, and member of the Senate and House figure out how to work around these problems and play "small ball" because Congress can't do big things. I don't expect on either legislative front big things. I would love to be proven wrong about that by these people here who are smarter than me, but in the meantime, the federal and state governments do have a process of appropriation debt.

Thank you.

