

Legislative Perspective: The State View

Peter Wirth
New Mexico Senator



Senator Peter Wirth is a first-term State Senator elected during the 2008 General Election. He spent four years as a Representative in the State House from 2004 through 2008 replacing Max Coll who retired from the seat. Peter is a lawyer in Santa Fe. He graduated from Stanford University in 1984 with a BA degree in economics and Spanish. He attended law school at the University of New Mexico where he obtained a JD in 1990. Peter was a law clerk for the Honorable Oliver Seth, a Federal Judge with the Tenth Circuit Court of Appeals. His current civil law practice emphasizes mediation and alternative dispute resolution.

During his two terms in the State House, Peter carried a variety of legislation signed by Governor Bill Richardson. Some of Peter's legislation includes laws to expand an open space tax credit, to restrict the use of eminent domain for private economic development, to allow local governments to enact water conservation ordinances, and to better protect homeowners from property damage caused by government action.

Prior to his service in the legislature, Peter served on a number of boards including the St. Vincent Hospital Foundation from 1991 to 2000, the Santa Fe Children's Museum from 2000 to 2004 where he was board chair for two years, and the Historic Santa Fe Foundation from 1991 to 1995 where he returned to serve as board president from 1997 to 2003. Since 2000 Peter has been a member of Rotary International.

He is married to Carol Romero-Wirth, also a lawyer, and they have two children.

Good morning everyone, and thank you, Sam, for the invitation to be here today. Thank you certainly to John Fleck for the introduction. I get worried when someone starts telling war stories about legislature interviews. I thought John might talk about something I said, so I was happy to hear his story was about the process. I think that is an important piece of any discussion about the legislature and I appreciate John going in there with eyes wide open. As he mentioned, I don't spend a lot of time in the legislature and it is an eye opening process for sure. We'll talk about that a bit today.

During the heat of the 2013 legislative session, a longtime person in the building sector with the New Mexico Home Builder's Association said something that I think to me represents a significant shift in direction of our building. It was a simple statement. He said, "Things have changed." It might sound obvious to all of the experts in the room, but I think it is the start of a different direction in the state legislature.

Let me say something about the legislature itself. I'm going to focus on a couple of the key target concern areas that we are looking at, and the successes we had last session. Then I'm going to

talk about what I really think of as a potential path forward for our state.

In the past session I served—and this will be my tenth session coming up—I wore a variety of different hats in the Senate. I was on the Finance and Energy Committee, and for the first four years in the House, I focused on the Judicial Committee and the Rules Committee. One constant has been that I have always served on the Water Committee. This year, about two days into the session, the leadership came to me and asked that I chair the Senate Conservation Committee. So, obviously that was another shift in direction and John is absolutely right that we are a true citizen legislature. As he mentioned, I am a lawyer and I basically call the legislature my part-time full-time job. We are supposed to become experts in all types of areas. I am not a water lawyer, but I am a lawyer. Over 20 years ago at UNM, I took a wide range of water law classes including advanced water law. Interestingly, my paper in advance water law dealt with the San Luis Valley and a native gentleman who in the 1980s wanted to drill massive wells in the San Luis Valley because of the nearly unlimited groundwater supply in Colorado. I think he would be very interested to see what is happening in the San Luis Valley today and we will talk about that.

I want to touch on a few of areas of the state that I think really have the legislature's attention. Obviously first and foremost, is the situation in the Lower Rio Grande. Many folks here today are participating in that situation and the litigation in that area obviously has everyone's attention. From my perspective, what really jumped out at me this past session was the scope of the problem. There are 4.5 acre-feet of water rights in a good year with between 3 and 3.5 acre-feet coming from surface water rights from Elephant Butte. This year 3.5 inches was the allotment. The figure that was stunning to me, and continues to blow people away in my Santa Fe district, is that in 2011, 280,000 acre-feet of water was pumped out of the aquifers. During this session, we had a range of testaments on the sustainability of that aquifer, and I can tell you that no one we heard from thinks this could go on for more than ten years—it can even range down to only three to five years.

We have an unsustainable system; mix in multiple levels of litigation, and you get the legislature's attention pretty quickly when we have discussions about the state's water resources. One of the things we heard a lot in the 2013 legislative session was that we better pray for rain. Fortunately, we have had some rain and I think John Fleck has been terrific in making sure that everyone in the state does not automatically think that their water problem is solved, because clearly it is not. We also heard in the session, which I thought was interesting, a lawyer saying we better pray we win that lawsuit, because the ramifications of losing are extremely significant.

The other kind of real hotspot that has triggered a lot of focus on water is the Pecos situation. I think that Greg Lewis, the Pecos River Basin Manager, is probably the happiest person in the room with all the water that has come down, and the fact that there is water now, for at least a year anyway, and the State has been able to stop pumping its wells. We are creating channels to deal with this, but the irrigation district's problem is a classic situation. What is interesting is that it is in an adjudicated area—and we will talk about adjudication much more—but this is in an adjudicated area with a senior water rights user at the bottom of the river not getting the water to which it is entitled. The Carlsbad Irrigation District brought a bill to the legislature stating that it needed \$2 million or it would make a priority call. I think we will continue to see legislation that essentially looks at

buying our way out of the problem. We did that to a large extent on the Pecos and set a process for buying out rights. Senator Cervantes will continue to focus on the issue; he carried legislation last year to appropriate \$150 million or so to continue the discussion of what direction we need to go.

What I think is interesting about the Pecos situation is the fact that even if we did a priority call on the Pecos, it wouldn't necessarily solve the problem. We have heard a lot about a new doctrine called the "Futile Call" which I think is important to understand. I'll talk a bit about the priority system, but the reality is that even if you do a call and you shut off all the junior water rights users upstream, the water can't simply get to those senior users for a number of years. The economic consequences are significant.

John mentioned two water bills that passed the legislature last session. No one was more surprised by those bills being passed by the legislature and signed by the governor than me. They both dealt with domestic wells. The legislature has been up, down, and around on the domestic well battle, and the Home Builders were a part of that fight. One of the bills, as John mentioned, stopped the practice of double dipping. If you sell all your water rights off of an agricultural piece of land, you shouldn't come back and put in a subdivision using domestic wells unless you bring in water rights or hold back water rights for a new subdivision. The other bill is one that has been around for quite some time. I was the House sponsor of the bill in 2006 or 2007. That bill dealt with new subdivisions and domestic wells; subdivisions of more than ten units with one of the parcels of land with an area of two acres or less. Basically, what this bill said was that you have to bring in new water rights or hook up to a system. You can't simply drill domestic wells.

The Home Builders initially were neutral on these bills, and then actually participated on the pass. There was some opposition. This is an important lesson: when the bills came to the floor in the House, I received a panicked text message from members of the House on what was being debated because there was an effort to kill both of these bills by legislators from Valencia County. The person in the House who stood up and changed the whole direction of the debate was Representative Candy Ezzell from Roswell. She, of course, has lived with the situation on the Pecos and was instrumental in assuring that after the State bought all of the water rights in the Pecos to make Compact compliance,

you didn't have the same kind of double dipping. We actually passed some legislation along those lines. To have her stand up and support these bills was a very important signal because this must be a bipartisan discussion and we get into partisanship when we discuss water. We are not where we need to be. I was certainly honored to have her support. The Governor signed both of these bills. I met with the Governor for quite some time to talk about the bills and I think there was opposition from the southeastern part of the state. Obviously there is a huge housing crunch in the Hobbs area and Lea County, but we got those bills signed. They are small steps, I will admit, but at least there is some progress moving forward.

In terms of moving forward, I want to talk about a couple of things. Our acequia system in New Mexico, especially in the part of the state that I represent, is the fabric of many cultures and communities, and certainly a part of the water discussion. Their philosophy of collaborating and working together in terms of water storage is a signal and a model that the state can look to.

I want to talk again about the priority system and share a quote from a Kansas farmer that I thought was interesting and demonstrates the challenges of water adjudication even assuming we are fully adjudicated: "In the past, farmers could call a chief engineer to administer water rights based on the priority system in which older users are protected and junior users cut off. That force of action could enrage neighbors and ripple destructively to the local economy. If surface water was cut off completely, the result would be economic paralysis and unchecked declines in the water table."

What we have in New Mexico is a situation where our water rights are over-appropriated. They have been adjudicated, but we have more rights than we have water, and that water supply is dwindling. The challenge becomes how to adjust for the economic component in the system? We have junior rights, many of which are in municipalities, which obviously play into this. How do you balance for the economics of determining how you shut off systems? The reality is, shutting off water rights is an extraordinarily hard thing to do and something we haven't really done in New Mexico. The State Engineer is being faced with this dilemma pretty much for the first time.

Going back to the San Luis Valley, last week we had a presentation before the Water Committee about what is happening in the San Luis Valley. It had to do with something we are also doing here in New Mexico—Active Water Resource Management. We discussed this a lot in the legislature. In the San Luis Valley, the groundwater irrigators realized the same thing that New Mexico has realized. They were basically pumping, as one of our farmers said, the entire system into a "death spiral." They now realize they are over-appropriated in a fully adjudicated system. They went to their legislators and said they wanted to fix the problem themselves. They created legislation that in some districts gives them the ability in their sub-districts to allocate the water and most importantly, the ability to tax the use of water and charge up to \$75 an acre-foot for groundwater pumping in those districts. Interestingly when we had this discussion with one of the farmers that was instrumental in setting this up, and the \$75 an acre-foot figure was mentioned in the water committee [transcriber note: speaker does not complete sentence].

Senator Cervantes is a good friend, a former law school classmate, and we were work partners 20-plus years ago. He has a big farming operation in the Lower Rio Grande area in the Las Cruces area near the border. He basically said that \$75 an acre-foot ends up being around half a million dollars for them for water they pump on their land for their farm.

What that money does, though, is to allow the district to make economic decisions. If there are areas where land is going to be fallowed, they would be able to write that farmer a check to fallow that land. We certainly have irrigation districts in our state; we have Active Water Resource Management (AWRM)—and I think our State Engineer did a good job during this hearing of standing up and saying that New Mexico's AWRM is the equivalent of what Colorado has done. The question becomes, what is the hammer that makes this happen? What happens when everyone sits down at the table and how do you make this allocation happen amongst close water users? This is something I am looking at as AWRM becomes implemented. In my opinion, it is the direction the state is going in the next five to ten years. We simply cannot get the adjudication done in that period of time. Let me say also that even if

we do get the adjudication, we still have the issue of the effectiveness of the priority call. Are we going to litigate our way out of this? I just don't see that happening.

We need to figure out collaboratively how to develop a culture of conservation. It is dealing with a resource that is dwindling, and it is figuring out how the users, those being impacted, are put into positions themselves to be able to make these decisions. During the session, Senator Cervantes brought in a member of one of the very large pecan groves in the Elephant Butte Irrigation District. He sat down with me and said something that really stuck with me. He said, "You know Peter, I realize that things have changed. I just want to be the one making those changes. I don't want it just hammered at me." This is one of the things in the legislative process that is particularly difficult. We need to be able to sit down and create a framework that provides a constructive way to help water users move forward and that involves a collaborative approach. It is interesting that in my line of work I do a lot of mediation. In Senator Cervantes's practice, he does a lot of litigation, so he jokes it is the mediator in me vs. the litigator in him. There will be both; there is no question, but I think one of the things moving forward is creating that culture of collaboration.

The 2014 legislative session is a short 30-day session. You may have seen the press release on the capital outlay proposal. I was sitting with Senator Smith in a meeting and I couldn't help but smile thinking here we go again with the capital outlay fight. Every year, no matter who the Governor is, the administration wants all of the capital outlay. Interestingly, this capital outlay has 60 percent going toward water. That definitely changes the discussion a bit. It is an ongoing issue though because these funds are allocated among legislators. There are many other priorities besides water, but I think it is good that we have the discussion focused on water in the capital outlay, which is a bit different.

We may see some water bills in the upcoming session. I have talked with the State Engineer about a couple of bills I may introduce dealing with the Gila. We have had a number of presentations in the Water Committee about the Gila settlement and obviously the big decision is coming up about a second allocation of money that could come from the federal government if we do a diversion in

the Gila. The list of non-diversionary options on the Gila is interesting. I think they are a roadmap for our state moving forward in terms of what we need to do from a conservation standpoint. I am hopeful that we won't spend all of the money to build a diversion structure, which at the end of the day when you factor in the different pieces, is about 7,500 acre-feet of water. Again, I realize it is a separate basin, but when I hear about 280,000 acre-feet of water being pumped from the aquifer below Elephant Butte, and putting in a dam in the Gila for 7,500 acre-feet, you look at the numbers and ask if it is this really the best use of those dollars.

Again, I appreciate the chance to share a few thoughts. Thank you.