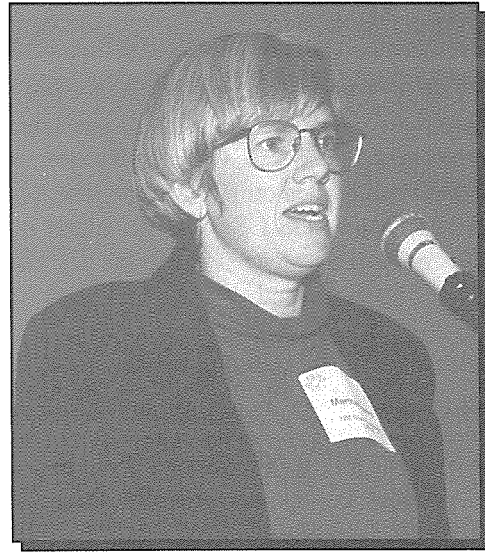


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RIO GRANDE TASK FORCE CONCLUSIONS

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Around February of 1994, the State Engineer convened a task force to examine water problems in the middle Rio Grande area. Two triggering events caused this to come about. One of them was the application of the Intel Corporation for a large amount of water in the Rio Rancho area. The other was the U.S. Geological Survey (USGS) report on the hydrology of the Albuquerque area, which seems to indicate that there might be considerably less water available for use than the State Engineer Office had once thought.

The task force that the State Engineer convened was multidisciplinary; that is to say, we had representatives from most of the divisions of the State Engineer Office. We met frequently as a group. We divided into committees, however, to reflect some of our special expertise. Each committee then brought back to the whole group its specialized recommendations on six particular

topics. The task force also held a public meeting down in Albuquerque prior to finishing the initial report. That report was submitted to the State Engineer on March 8, 1994. For the remainder of my talk, I will go through the March 8, 1994 report and discuss it topic by topic.

Impairment

The first major topic the task force considered was impairment. That word includes a wide array of issues, all the hydrological issues connected to the kind of information that arose in the USGS report. Very broadly, the USGS report suggests not only that there is a smaller aquifer beneath Albuquerque, but also that there is less of a connection between the river and the aquifer than had once been thought. The State Engineer Office had once thought, essentially, that if you took water out of the aquifer, you would affect the river almost im-

mediately. The USGS report raises some doubts about this.

The conclusions of the USGS report have not been wholly and uncritically accepted by the State Engineer Office. One of the recommendations of our task force was that the state needs to put a lot of time into researching the USGS conclusions. Already, since we published our first report, there has been some indication the USGS conclusions may need to be revised, or at least the basis for them may need to be strengthened.

In the light of the fact, however, that the USGS work does suggest that we have a lot less water than we once thought, one reasonable consequence is that we have to be a lot more prudent about how we look at applications. Very specifically, this suggestion that the river and the aquifer are not perfectly connected makes a big difference in how we look at applications. In the past our concern has almost entirely been to protect the river, under the assumption that anything taken out of the aquifer fully affected the river. Our concern was to make sure the river stayed whole, and we were less concerned with the aquifer because we thought it to be so large. The task force suggests that in light of the possibility that the river and the aquifer are not perfectly connected, this policy may have to change.

The task force recommended that the State Engineer consider protecting the aquifer as a separate matter from the river. In other words, our report suggests that we consider treating the Albuquerque aquifer not just as if it were part of the river but as if it were a mined aquifer. A mined aquifer is so called because it has a limited amount of water in it, and must be regulated with a view to a limited lifetime for the supply. When you finish that lifetime the water is simply gone. Our task force suggested to the State Engineer that he consider treating the Albuquerque aquifer as if it were a mined aquifer, and that means that we have to consider what kind of lifetime we give that aquifer. An alternative, and this was another suggestion by the task force, the State Engineer might consider so limiting the pumping of the aquifer that it becomes true that the Albuquerque aquifer is, in fact, recharged by the river and its various other sources, which would, of course, mean that the lifetime we were considering could be forever. That latter possibility is what we

have called the sustainable yield of the river and the aquifer. It would call for a lot of belt tightening. That's the hope that we see for our present supplies of water supporting a city indefinitely. If we can't reach that sustainable yield then we have to be talking about a lifetime for the aquifer and consider what the city would do when the lifetime comes to an end.

Treating the aquifer as a mined basin means that there will be certain areas within the aquifer that should be treated as critical areas. The task force report defines those areas in fairly specific and technical ways; broadly and oversimply, the definition of a critical area is an area within which the water level under present pumping is dropping rapidly enough that we're concerned, within the fairly short-term, about the ability of present pumping to continue. So when a new application comes in that might only increase that drawdown, we have suggested to the State Engineer that he consider forbidding that new use.

How much drawdown is too much drawdown is, of course, entirely within the discretion of the State Engineer. The task force did make some recommendations on that, and we have a map of suggested critical management areas for the middle Rio Grande aquifer. Since we published our report we've held further public meetings and in the course of those public meetings we've found some indication that the information on which we relied in the USGS report would not be the information that the final USGS report will contain. The particular recommendations as to the boundaries of the critical management areas may change. But, we do have a tentative map of such areas and it is available in the State Engineer Office.

In the course of our recommendations on impairment we considered a few other suggestions. One of them, for example, is well-construction standards. The task force considered that we needed to get very specific about minimum well depth with respect to the water-table level in certain areas, sanitary seals for wells and certain standards of grouting that would help to keep return flow at shallow sources from the deeper levels which are often for the drinkable water. In this, as in other areas, we felt that one of the overriding concerns was that we need more information. All of the matters we considered within the broad subject of

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impairment would benefit from further technical research, although the task force was also concerned that we not postpone action on these pressing matters indefinitely. The obvious accommodation of these two opposing considerations is to act with a wide margin of error, estimating available water supply very conservatively. This perhaps unnecessary prudence may provide an incentive to research.

Dedications

The second broad, general area that the task force considered has been in the news a lot. That is the State Engineer's past policy of allowing dedications. Water-rights dedications involve an applicant who wishes to make a new appropriation of water, but that new appropriation of water will at some point have an effect on present sources, perhaps not immediately. If the effect is immediate, the applicant might just as well transfer the water, but if the effect is delayed, then the applicant could be allowed to dedicate rights to offset that effect. In other words, the new appropriation could be made immediately and then, whenever the effect of the new appropriation is actually felt, the owner of the new right would, at that later time, retire enough water rights to offset the effect and keep the river whole. There was controversy around that practice because the delay between the application and the retirement requirement meant that there was no notice to the public about what rights would be retired. The public had no opportunity to raise their hand and say, "I don't think that will do it. Retiring these rights won't, in fact, keep the river whole." Because of this notice problem, the State Engineer directed us to look very specifically at the practice of dedications.

The State Engineer ultimately decided, based partly on the task force's report, and partly on the information gathered at further public hearings, to promulgate a regulation on the subject of dedications. That regulation proposes to retain the dedication policy but to require that in cases where the effect would occur on the river in less than 10 years, the rights to be retired must be in hand at the time of application. In cases where the effect would be more than 10 years away, the rights to be retired must be in hand by the seventh year. There is a third category of cases where the effects are more

than 20 years away, in which the deadline for retirement rights in hand is the seventeenth year. The regulation is a compromise, where the dedication policy is retained but public notice also is given.

Conservation

The third broad category which the task force considered was conservation. The task force by and large deferred to the work of other bodies in the office in considering the conservation question. Very generally, the task force recommendations contemplate that in the course of an application for a water right or transfer, the applicant would be required to make a statement in one of two ways on the conservation practices the applicant either has in place or intends to put in place, and which in turn could be made a condition of the permit. For larger applicants there would be required fairly extensive descriptions of conservation measures. For smaller applications, a checklist would be sufficient, that the State Engineer Office would issue on a simple form.

Planning and Inventory

The recommendations of the task force under this topic were not controversial. The recommendation of our report is only that the State Engineer work with as many people as possible and obtain as much legislative funding as possible to learn as much as possible about these aquifers. The more we know the better off we are.

The State Engineer presently has in place a program to try to get a global information survey of New Mexico's water. We have a vision that people will be able to sit down to a computer in the State Engineer's Office, possibly even their own computer at home, and plug into a system which will enable them to look at a map of New Mexico on which will be an overlay map of the hydrology and a map of what we know about the water rights. They will be able to zoom in on it and investigate for themselves what it is that we know about New Mexico's physical disposition of water and the disposition of New Mexico's water rights. The accomplishment of that hope is still fairly far in the future, despite the fact that there is nothing the least bit technically difficult about it. It's just a question of people and money.

In addition to this, New Mexico has had since 1987 at least the embryo of a state water plan. A regional water plan process exists whereby regions have obtained grants of money to do their water planning. Ultimately we hope that these regional plans can be compiled, and form the basis for a statewide New Mexico water plan. The regional water plans would not, of course, be the only source of information for a statewide water plan. We would have to fold into the regional plans statewide considerations such as compact obligations. Still, to base the planning process on regional plans, locally created, has the benefit of getting as many people as possible interested in the future of New Mexico's water.

Public Welfare

Statewide local consideration is particularly important, the task force felt, on the vexed topic of public welfare. The issue of public welfare became important in the water world because beginning in 1985 the legislature amended the New Mexico laws to include a requirement that the State Engineer, when considering an application, must consider whether the application is in the public welfare of the state. The problem with the phrase "public welfare" is that nobody really knows what it means. In fact, determining public welfare is precisely what the political process is addressed to. It's not the same thing as a factual inquiry like hydrology. It's not even water related in the way that conservation is. Just the use of that phrase, unconnected to notions of water, makes the reach of the statute so broad that it sits oddly as part of an agency's or the executive of an agency's discretion. What this means in practical effect is that the public welfare has been very hard to define. Some people, for example, are quite sure that public welfare means preserving the acequia culture. Other people are quite sure the public welfare means as much development as possible. Both sides are impassioned about it.

The meaning of the phrase "public welfare" was thus a very difficult question for the task force and we spent a very long time on it. There are about four possible approaches. The State Engineer could issue a regulation which simply chooses between possible definitions, say, for example: "I, in my capacity as an appointed executive, have decided

that the public welfare means maximum development and that is the way we will proceed." Such a pronouncement would serve the goal of getting people on notice of exactly what public welfare will be held to be in the State Engineer Office, and how to couch their applications. It does, as I say, have the difficulty that it's a little odd for the State Engineer, with his expertise in water, to be making a decision that development is best for New Mexico. It would be similarly odd for the State Engineer to make the decision that development is not what's best for New Mexico, and should be stopped in favor of acequia culture, or endangered species. The point is that an administrator should not be making legislative pronouncements about the public will.

The State Engineer could, in the alternative to a defining regulation, issue a regulation which listed a large number of possible items that could be considered in a public welfare inquiry. Some states have pursued this possibility, and so have some idea what such a list would look like. The list will contain 10 or 20 items like health, education, welfare, the environment, the economic consequences, etcetera, all of which the state engineer must consider when he looks at public welfare. My own view, and I have expressed this at various public meetings, is that the promulgation of these lists has not proven helpful in other states. All they provide is a long list which carefully avoids any real definition. People can spend a lot of money carefully addressing every item on the list when many of them might be irrelevant. In other states where this strategy has been tried, the last item on the list is always "and anything else the state engineer wants to consider." Thus, in the end, the list provides nothing. The State Engineer is free to consider whatever seems important.

A third type of regulation would be very tightly tied to water. Some people on the task force were very attracted to this idea. Such a regulation would define public welfare in almost the same terms as we define impairment. The State Engineer Office would presume that a use of water which does not cause impairment was in the public welfare. There are problems with this in that it gives the statute requiring the State Engineer to look at public welfare, very little meaning. If we confine the meaning of public welfare to issues that he already

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looked at before the statute was enacted, then the statute has been made to be a nullity.

There are two other possibilities. One is to do nothing. That would mean that public welfare would be considered on a case by case basis in the courts. This option is attractive since the courts have at least a slightly better claim to be looking at public policy in the light of legislative actions than does the State Engineer. Court process takes a long time, however, and often means that those people who begin to fight out the definition spend a lot of money spearheading the meaning of the phrase. It is a disservice to the public that we can't define the phrase "public welfare" in advance, distributing the burden more fairly.

The last possibility for defining public welfare is the one that the State Engineer has several times suggested to the public that he prefers. That is that he take the position that he will consider, in the public welfare analysis that he makes with every application, what is said about public welfare in the regional water plans. The regional water plans would shape the State Engineer's understanding of the phrase. This option has several good effects from the State Engineer's point of view. It puts the definition of public welfare policy on the shoulders of the public, which is a good deal more appropriate. It also suggests to those who are very much concerned about the definition of public welfare and what it might do to how water applications are treated, that those people would do well to join the planning process and to try to shape the understanding of public welfare that is going to come out of the regional water plans. This last option was the recommendation of most of the task force, although we were much divided on this issue.

Final Recommendations

Beyond that, there were just a few matters. I won't call them smaller matters because they are enormously important, but there wasn't much controversy about them. For example, the task force recommended greater attention to the enforcement of water rights. The State Engineer Office when considered next to its statewide duties is very small, and does not have a separate enforcement division. The enforcement of existing water rights is at the tail of the ditch on everybody's job. If it were given more attention, funding and personnel, there might

be more faith in the efficacy of the adjudication and dedication processes. Within an adequate enforcement division, we could feel confident that people who owned water rights were held to those rights, and people who were required to dedicate were in fact held to that requirement.

The task force also recommended that the State Engineer Office needed to have more streamlined procedures and more user friendly application forms that would help people get a better sense for what we do and why we do it.

Conclusion

That was the substance of our March 8 recommendations to the State Engineer. After these recommendations had been submitted, the State Engineer requested that the task force hold further public meetings in a more extensive area of the Rio Grande, and incorporate suggestions of the public into the task force report. We held those meetings, which were completed in July of 1994. By the end of this month we hope to provide to the State Engineer any changes from our original recommendations that will come about because of the public comments that we heard at those meetings. I would like to say that I found those public meetings extremely valuable and interesting. It was a great pleasure to see people being interested, and I think it served both for the task force and for the public as an occasion for education about water rights. It gave an opportunity of exchange not only between the state engineer personnel and the public, but also among the members of the audience, some of whom, I think, had not fully appreciated the power of the positions of others. So it was an extraordinarily valuable experience; I believe it is one the State Engineer feels strongly should continue.