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ADJUDICATIONS: GETTING TO “FINISHED”

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INTRODUCTION

The draft of the Adjudication Rules at this time has not yet been approved by the Stream Adjudication Rules Committee. The Committee consists of judicial officers, a representative of the State Engineer, and private attorneys and engineers expert in water law. There is an ethical prohibition for judicial officers to speak to one party of a pending case about the substance of the case outside the presence of all other parties. Because there are only five stream adjudications pending in state court, it is difficult to discuss problems without skirting the *ex parte* prohibition.

To avoid the possibility or even the appearance of *ex-parte* contact, the Committee has been divided. The Judicial Subcommittee discusses proposed rules in closed session then submits them to the Committee-at-large for their consideration. These meetings are open meetings, and any attorney in a pending case may attend and comment.

The draft which was discussed at the Water Conference was submitted to the Committee-at-large for comments. Since my remarks at the Water Conference, the Judicial Subcommittee has received comments and has redrafted some of the proposed rules. The Committee-at-large will vote on the re-draft soon.

After the Committee-at-large has approved the draft rules, the draft must go to the Supreme Court for its approval before it goes out to publishing for comments, following the same procedure required to obtain approval for all proposed rules. Three members of the rules committee have been speakers at this conference: Chuck DuMars, Em Hall, and John Hernandez. State Engineer John D'Antonio is also a member, but he designated his chief council D.L. Sanders to serve in his stead. We have a very qualified and hard-working committee.

I asked the Supreme Court to establish this committee three years ago almost. When I did, I did

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not think it would take nearly so long as it has taken. We have been faced with very difficult problems.

I was invited to this conference to talk about the status of

the proposed stream adjudications rules. When I received the agenda for this program, the title assigned by the WRRRI for my talk was "Adjudications: Getting to 'Finished.'" I will tell you that I was a little bit concerned about that. I ran across a quote in a different context, but I thought it applied both to stream adjudications and the rule making process: "It is not a safe harbor, a resting place, a final objective, a finished work, but a challenge constantly renewed." I think that as long as you take a pretty liberal interpretation of what the word "finished" means, perhaps these adjudications rules can provide the necessary impetus to complete state stream adjudications in a more timely fashion.

You frequently hear the question "Why is it taking so long to get through stream adjudications. What can we do to speed up the process?" I have a very, very simple answer to both questions. Why does it take so long? Primarily it has been a great concern about the concept of due process. An easy solution that could expedite stream adjudications would be to ignore due process. If we could ignore due process, we could finish this in about a year by the State's updating the

hydrographic survey and the court entering a final decree determining the water rights based on the survey. If you wanted to expedite criminal matters, you could do the same thing. You could hang the accused criminal without the inconvenience of a trial. The Constitutions of both the United States and New Mexico require that the courts afford due process to litigants which necessarily include water right claimants.

What the rules committee has tried to do is to look at the unique characteristics of stream adjudications and see what is needed to preserve due process, yet eliminate obstacles that delay completion of adjudications. The Committee has concluded that several procedures applicable to typical civil cases may be modified or eliminated in stream adjudications without compromising due process.

The New Mexico Water Code is short and concise. The statutes have very little procedural guidance for the court and litigants. In essence, the Water Code says "The State shall enter suit for the determination of all the rights to the use of water in the stream system. All who claim the right to use the water so far as they can be ascertained by reasonable diligence shall be made parties, and the court shall enter a decree that shall declare the water rights adjudged to each party for the priority, amount, purpose, periods, and place of use and ask that irrigation water be specific to pertinent property."

Purpose of Adjudication

Everyone here is familiar with beneficial use being the basis for measuring the right to the use of water. That is a constitutional provision as well as a statutory provision. As a part of the procedure, the statutes require that a hydrographic survey is to be made to obtain and report all available data regarding the usage of the stream system

Sometimes we have been so intent on the process of the adjudication that we forgot what the purpose was. The purpose of the stream adjudications is to adjudicate all rights on the stream system, which then will be incorporated into a final decree. This final decree will provide the State Engineer with accurate, reliable information of all water rights on the stream system. This will enable the State Engineer to manage and supervise the state's water resources as the law in New Mexico requires him to do.

Prompt Court Management

The proposed rules provide that court management of the adjudication commence promptly after the adjudication complaint is filed. Stream system issues must be identified early in the adjudication. There is an initial case management hearing before claimants are joined, and it requires the State Engineer and several of the corporate governmental entities to come in and advise the court about how the matter should be managed. The proposed rules provide the court with information from many knowledgeable sources as soon as the adjudication is filed. Even before the claimants are joined, the court will formulate and file a case management order to manage the adjudication.

Prompt Joinder of All Claimants before or after the Hydrographic Survey

These proposed rules will now require that all water users must be joined promptly. The Lower Rio Grande Basin adjudication was filed in 1986. The adjudication actually began after many legal disputes, primarily regarding jurisdiction of the court, in about 1995. The Court entered an order compelling the State Engineer to commence the adjudication. Tom Turney, the State Engineer at the time, asked the Legislature for monies to do the hydrographic survey. The hydrographic survey was completed in sections. The survey for all sections has been completed for some period of time. However, approximately half of the water users have yet to be joined.

The starting point for most adjudications is a hydrographic survey. Hydrographic surveys can be massive, expensive undertakings. They can take a significant amount of time. Joinder of claimants typically did not occur until the survey of the entire stream system or a specific section of a stream system was completed. The proposed rules require prompt joinder whether or not the survey is complete.

The State Engineer’s attorneys have told me that during this delay in joining claimants after completion of the hydrographic survey, approximately twenty to twenty-five percent of the information acquired in the survey is now stale. The proposed rules will require prompt joinder of all water users, even before completion of a hydrographic survey in some cases. This benefits everyone. With prompt joinder the courts can address and decide issues that may affect the entire stream system or a large number of claimants and the decision will be binding on all.

If all the claimants have not been joined, then it is difficult for the court to make any kind of decisions that affect more than the individual claimants before him because district court decisions are not precedent. If the court decides an issue regarding one water right, each subsequent claimant may decide to assert the same issue. If he does not, he waives the right to assert the issue. If the court could decide an issue one time that would be binding on all, this would reduce the time and resources needed to complete an adjudication. If all claimants can be joined promptly and the State and claimants have a reasonable time to resolve factual issues informally, the court can address legal disputes as they arise, binding all parties to the adjudication. The joinder of the claimants early in the adjudication is an important part of what the committee is trying to do so that the court can timely decide issues that affect more than one claimant in the adjudication or a substantial number of them.

The proposed rules in the draft that existed at the Conference included a provision that claimants were to be joined by first class mailing a claims deadline order to claimants. This has been modified in the current draft. The current draft provides that the claims deadline order will be served by Rule 1-004 (E) through (N). This rule is a recent change in the Rules of Civil Procedure. Among other things, it permits service by mail with return receipt with some restrictions.

Elimination of Summons and Complaint for Joinder of Claimants

In a typical civil case a defendant is joined when he is served a summons and a complaint. The complaint gives a short and plain statement showing that the plaintiff is entitled to relief. A defendant is served with a summons and complaint. The court will enter a default judgment granting the plaintiff’s requested relief unless the defendant responds by filing an answer. The defendant may admit or deny the allegations of the plaintiff’s complaint in his answer. The Rules of Civil Procedure ensure due process by protecting a defendant’s right to notice and an opportunity to respond and to be heard before court decisions are reached. In most civil causes of action, there is a clear adverse relationship between plaintiff and defendant.

In lieu of a summons and a complaint, the proposed rules require the State to serve claimants with a claims deadline order. In lieu of an answer, the proposed rules require the following process:

1. A claimant must serve the State with a water right claim form or be bound by the State's Claims Adjudication Report of claimant's right.
2. After serving the State with a water right claim form, the Claimant must discuss his contentions regarding his water right with the State to try to reach an agreement.
3. If the claimant is unable to agree with the State, he must file an objection to the Claims Adjudication Report.

The dispute then is at issue and the court will conduct a civil matter to resolve the issue.

Stream adjudications have an adverse relationship between the state and a claimant, but in a materially different way from a typical civil case. The State Engineer is adverse to all the claimants on the stream system. There is adversity because the State Engineer is charged with identifying all who have a right to use the water in the stream system and quantifying each water right owner's right. He must, as accurately as he can, determine the elements of the right of each party. Substituting service of a claims deadline order for a summons and a complaint emphasizes the purposes of the adjudications and avoids the implication of the adversity present in typical civil disputes.

Informal Discussion between Claimants and the State, Early in the Adjudication

The proposed rules aim to reduce antagonisms between claimants and the State by providing early informal discussions between claimants and the State. They can share relevant information without the necessity of court processes. The rules provide the State and claimants this opportunity before the court is called upon to resolve the specific dispute with the exacting formal method of litigation resolution. This should be much more efficient. Technical information and hearsay information can be discussed without evidentiary limits. Neither the State nor the claimant needs to concern themselves with evidentiary requirement of foundation. Many factual questions can be resolved without court action.

The State Engineer may send technical staff out to check out contentions of the claimants. Claimants may get a better understanding of their water rights and what they must do to assert them. This process should assist the State Engineer and claimants to reach an agreement without court action and resulting expense and delay.

Benefit of Adjudication to Claimant

In a typical civil case, the litigants may compromise their disputes as they see fit subject to approval of the court. However, the State Engineer must consider all water rights on the stream system. A stream system may be analogized as just one pie where many people claim a legal right to a piece. If the State Engineer concedes a larger piece of the pie to one claimant than the evidence will support, that reduces the pie remaining to divide among the other claimants. It is not the same kind of adversity that you would have in a typical civil case. In fact, most claimants receive the major benefit of a stream adjudication. The adjudication determines water rights and gives claimants the best title to their rights. That is a very big benefit for a water right owner.

That is quite different from the result of most civil cases. In most civil cases if a plaintiff prevails, a defendant loses. Most defendants in a stream adjudication will get their water right confirmed. The court may determine that a claimant does not have all the water right he may think he has. The court also may determine that a few claimants have no water right. However, the very great majority of claims will be adjudicated to the benefit of claimants.

Updating Information During Pendency of Adjudication

The proposed rules give claimants the opportunity early in the adjudication to address with the State the accuracy of the hydrographic survey to enable the State to identify and correct errors. The proposed rules require claimants to notify the court of changes of addresses and new owners to report change of ownership. Additionally, the State is required to notify the court when a water right owner notifies the State of changes of ownership, and the State enters the changes in their records.

As indicated earlier, hydrographic surveys can be massive, expensive undertakings. They can take a significant amount of time. If no court action is taken when the survey is accurate, typically right after the survey has been completed, the accuracy of the information regarding water rights may be compromised or lost. Neither the court nor the State Engineer presently has any effective way to update the hydrographic survey during the pendency of the adjudication. If the court cannot address these matters timely, the amount of resources the court and the State

Engineer needs to insure the accuracy of the survey will grow rapidly affecting timely resolution of the adjudication.

Timely Disposition of Stream System Issues

Issues may arise in a stream adjudication that affect all or a substantial number of claimants. The proposed rules encourage early identification of these issues and timely resolution. Timely may mean early in the adjudication, but the rules provide the court with flexibility to set stream system issues for resolutions at a stage in the adjudication most conducive to expeditious completion of the adjudication.

Adjudication of Water Rights in Mass When No Claim Form and No Objection Is Filed

A circumstance that has contributed to significant delay was that the courts typically adjudicate one right at a time, governed by the standard rules of civil procedure. Each claimant on the stream system is entitled to have his rights adjudicated. Each claimant has a right to contest the State Engineer’s evaluation of his water right. Due process requires claimants receive adequate notice and a meaningful right to be heard. It has been comfortable for the courts and the State Engineer legal staff to use the familiar rules of civil procedure. The standard rules ensured that lack of due process would seldom be asserted.

If claimants do not timely file a claim after receiving the claims deadline order, then they will be adjudicated according to the claims adjudication report which is an updated hydrographic survey after an error correction process required in the draft rules. Pursuant to current procedure, after a hydrographic survey, the State makes an offer of judgment to claimants. The offer is frequently developed with little input from claimants. Experience has shown that it is not uncommon for claimants to either ignore the offer or dispute the offer of judgment without any real understanding of water law and the nature of their rights. Refusing to respond to the offer has sometimes created deadlock. Lack of understanding has resulted in a substantial amount of unnecessary antagonism that the court is frequently called upon to resolve.

The proposed rules are designed to prevent inordinate delay. If claimants do not file claims pursuant to the claims deadline order, they will be bound by the Claims Adjudication Report of the State. If claimants do file claims, the rules require claimants to discuss their rights with the State and try to reach an

agreement with the State. To dispute the State’s *prima facie* evidence, a claimant must file an objection to the report. A claimant must also file an objection to the claims adjudication report of another claimant, if he disputes the claims adjudication report of that right.

Procedure When There Is an Objection

Claimants have a right to their day in court. If an agreement cannot be reached, then after submitting their claim and filing an objection, the matter will be litigated in court. Litigation of individual claims will generally be governed by the standard Rules of Civil Procedure. The Claims Adjudication Report is the updated hydrographic survey and is the State’s *prima facie* evidence of water rights.

The proposed rules aim to reduce antagonisms between claimants and the State by providing early informal discussions between claimants and the State. They can share relevant information without the necessity of court processes.

Claimants must come forward with competent, admissible evidence or be bound by the Claims Adjudication Report. All objections to a water right shown in the claims adjudication report will be consolidated into one trial, whether the objections are filed by the owner of the right or other claimants who dispute the rights. The proposed rules strongly encourage informal resolution, but protect the right to a party’s day in court.

Notice and Service of Papers by the Monthly Adjudication Activity Report

The rules provide for a “monthly adjudication activity report.” In a standard civil case, the court is required to send notices of all hearing to all parties. Additionally Rule 1-005 requires that parties serve other parties copies of all papers they file. Stream adjudications may have thousands of parties. This could become a great burden for both the court and parties. For the most part, individual claimants are interested in their individual claims and have only a passing interest in other parties’ claims and other issues that come to the court. However, due process requires notice and an opportunity to be heard.

The monthly adjudication activity report will give notice to all parties of most matters that are coming before the court without the necessity of mailing a copy of the notice to all parties. If parties follow prescribed procedures, they will have an opportunity to respond regarding any issue that comes before the court.

The rule regarding monthly adjudication reports includes procedures that allow service of motions and

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briefs by listing a description of the document filed, not the document itself. The report will only list the papers that have been filed in the stream adjudication court for the last month in categories. If a motion has been filed, it will describe the relief requested in the

motion. If a brief has been filed, it will give a short summary. If a party wants a copy of the document itself, it must request the copy and pay the court's usual fees for copying. The listing of a document in the monthly adjudication activity report will be effective service on everybody in the stream adjudication. The monthly adjudication activity report will not be personally mailed to any party. Any party may subscribe for a nominal fee. The court will post the report on the internet.

The monthly adjudication activity report is a very significant innovation. All parties must be attentive to the report because listing a document in the report is effective service to everyone. All parties will be bound by the decisions of the court made after notice by listing on the report. Due process is preserved. Claimants will have notice and an opportunity to respond. This will do much to reduce the expense of an adjudication and expedite the resolution of the adjudication.

Document Repositories

Every county district court within the boundaries of the adjudication will be a document repository. The court may also establish additional document repositories. Claimants may go to the district court in the county of their residence and look at and obtain copies of any papers filed in the adjudication. Individual water right claims will not be opened as case files unless there are specific disputes the court must resolve.

IN SUMMARY

1. The court must take immediate and continuing control of managing the adjudication.
2. The State must timely provide the court with information to assist in appropriate case management, and assist in maintaining accurate information to the court during the pendency of the adjudication.
3. Claimants will be joined early in the adjudication by service of a claims deadline order.
4. Claimants are encouraged to work informally with the State to ensure the hydrographic survey is accurate and ensure reasonable opportunities to resolve disputes informally with claimants before direct court involvement.
5. Parties must identify stream system issues promptly as they manifest, and the court must timely resolve them.
6. Claimants must take active steps to assert and protect their rights and object to others rights or be bound by the State's claims adjudication report.
7. Objections to a water right identified in the claims adjudication report by the owner or other claimants will be consolidated and litigated governed by the standard Rules of Civil Procedure.
8. Listing documents in the monthly adjudication activity report provides notice and substitute service of filed papers on all parties to the adjudication.