

Identification of Law and Policy Options for Best Water Management Practices

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As the Director of the Utton Transboundary Resources Center at the UNM School of Law, Adrian works to develop meaningful legal and policy solutions for natural resource challenges facing New Mexico. Before graduating from the UNM School of Law, Adrian managed environmental cleanup projects. He has since run a successful law firm that provided legal counsel to tribes, farmers, and NGOs on water and environmental issues. He also represented the New Mexico Interstate Stream Commission on the Pecos River and he established and managed a river protection program for The Nature Conservancy in New Mexico. He is currently the Vice Chairman of the Middle Rio Grande Conservancy District Board of Directors, President of the New Mexico Riparian Council, Chair Elect of the Natural Resource Section of the State Bar, Chairman of the Mid-Region Council of Government's Water Resource Board, and a member of the Tamarisk Coalition's Board of Directors.



Good morning, my friends. I'm going to set a timer as I've been asked to give a 90-minute talk in six minutes. First off, I want to thank Heather Balas for her presentation. This will be a bit of déjà vu as I'm going to say a lot of the same things Heather said.

Let me thank WRRI for keeping Al Utton's legacy alive. The Utton Transboundary Resources Center also is trying to keep Al's work going. Al was a big influence on me as a first year law student, so it means a lot to me that WRRI is continuing to host the Utton Memorial Water Lecture. Thank you, John Hawley, for such a great Utton Lecture yesterday.

I also want to take this opportunity to recognize the folks that help me so much at the Utton Center. We have Darcy Bushnell in the audience who is our Adjudications Ombudsman. I saw Susan Kelly here yesterday; she is a former director of the Utton Center and did some tremendous work during her time at the Center.

I'm very lucky—I don't have to teach, but I get to work with students. I have five or six students working for me at any one time. I've found that the students who are interested in water, and who come to the Utton Center, are the cream of the crop. They are some of the best students that we have. For those of you who are in the Water Resources Program at UNM and are here today, feel free to come visit us at the Utton Center. We

hire from that program as well, at a generous rate of \$12 an hour.

The Utton Center held a by-invitation-only conference, partially funded by WRRI, to bring together legal scholars from around the West. At our conference, we had folks like of Dan Tarlock, David Feldman, and Stephen McCaffrey—big wigs in western and national water. We employed the Chatham House Rule, which means that we agreed that everyone could speak freely, and outside of the conference, without their permission we would not attribute anything to any particular individual. This allows folks to speak a lot more freely we have found. We are going to put together a conference report and it should be on our webpage soon. Go to the Utton Center webpage and you will find information on the Water Matters document we produce every year and which has become, essentially, an encyclopedia on New Mexico water issues. We are revising the current document and hopefully we will have it ready in a month or so.

The title for my talk on the agenda is Identification of Law and Policy Options for the Best Water Management Practice. That's a little cumbersome. I'm going to adopt a term John Fleck used regarding that type of discussion—he refers to it as, "Tinkering with the Immutable." I think that is very appropriate because so much of New Mexico's water law feels immutable, and it often feels like we can't do much more than tinker around the edges. I'm going to suggest that we

do a bit more than that. Hopefully I'm not going to lose any friends in the audience today, but we are going to say a few things that may rattle a few people. That is our intention and that is what we need in New Mexico.

Our conference was focused around the concept of resilience—a new buzz word the last few years. You know, we talked about sustainability for so long with the hope that we could keep things going and live in a way that would last for our children. Well, we are kind of giving up on sustainability. We are just going to talk about resilience, which means that we want to survive heavy impacts. We want to be able to bounce back from drought and survive climate change in a way that at least somewhat maintains the current lifestyles that we all enjoy. Sandia Lab sponsored a conference two years ago on transformational solutions. I think they are a bit ahead of us all. The next step after giving up on resilience is to talk about transforming. So maybe we are a bit behind the times already on that one. What we are looking for is the capacity to change and capacity to adapt. Law and policy is a difficult place to do that.

I'll start with some of the mushier topics. One thing that is really important, we find, is that process is very important and your attitude as you go into process is very important. Again stealing a term from John Fleck this is reflected in the concept of, "social capital." Social capital is the notion that if you can build your social capital before you need to be resilient—if you have your network of associates, friends, and people you work with well in line and in place before the crisis hits, you are going to survive that crisis a whole lot better. The example that comes to mind for me is my next door neighbors who have a well, solar panels, and a nice storage of food. I have nothing, and when the crisis comes, I am going to count on my social capital with them so that they open the door and let me in.

On that note, my personal small effort to build social capital in the water world is that every four to six weeks or so, I try to host a happy hour, and we refer to it as the Stansbury Hour, after Melanie Stansbury who got it started years ago, and is now at OMB at the White House working on water issues, making us proud here in New Mexico. You are all invited to the Stansbury Hour. I have a list of email addresses that I have been slowly compiling over the years. If you are not on the list, feel free to email me or catch me in the hall.

That gets me to the topic of what I think John Fleck has termed, "dark social capital." I got so excited about this idea. I love collaboration. I love working with people and John said, "You know, be careful, there is dark social capital out there." These are the forces that want to maintain the status quo. I complained, "John, we don't have enough social capital to make changes in New Mexico." That's because there is so much social capital in place to maintain the status quo. Any of you have spent a day or 12 years in the Middle Rio Grande Endangered Species Collaborative Program know exactly what I am talking about. We have this new impact, the fish, and we have spent 12 to 15 years now trying to maintain the status quo. We have been very successful at it, and we don't have any fish. There is room for improvement in that process I will say. I'll credit the folks at Sandia Labs who hosted the Transformational Solutions conference and Howard Passell and his colleges who put out the report from that conference. They point out that disrupting the status quo takes courage. At our conference, we gave people courage by giving them anonymity, but you all need to have courage in your day-to-day life to make these kinds of changes.

The other aspect beyond individual relationships are institutional relationships, of course, and one thing that became very clear to us from our conference discussions was the importance of institutional integrity. Just like great men keep their word, great agencies should keep their word. Agencies need to work in a way that develops public trust and confidence, or else they are just not going to be successful. I live a wonderful example of that. Some of you know that I am on the Board of Directors of the Middle Rio Grande Conservancy District. For five years we have been working hard to reform the district. One of my fellow directors was here yesterday, Karen Dunning. I owe a lot to Karen for her partnership with me on that Board. We have made tremendous reforms at the conservancy district.

About four or five years ago an outfit called the Atalaya Institute did a qualitative study on why farmers sell their water rights. As part of the study they were looking at confidence in institutions, and what became clear was that the MRGCD ranked a little bit below used car salesmen, and, unfortunately, the state engineer ranked a little bit below the MRGCD. So we've all got room for improvement, and it takes a lot of hard difficult

work. I can attest to that from the last five years I've spent at the conservancy district. We hope that you will see the changes that have happened there and we hope they are for the better of New Mexico overall.

On the note of public integrity and trust, we talked a little bit about the public process of the three I's which is very common: you invite people, you inform people, and then you ignore people. We want to get away from the three I's, we want to really listen to people because they are the ones who elect us at the end of the day. They are the ones whose water we are playing with.

Let me get to the specifics of our proposals, and again, you are going to hear a lot of the same ideas that Heather Balas threw out. We went back through as many conference reports as we could find, as many water recommendations we could find, and compiled all of the ideas. We presented those to our conference participants and then let them winnow out their own ideas. The one report that we didn't look at ahead of time was the report from the Sandia Labs Transformational Solutions conference. If you look at that report, you'll note that we had a lot of the same participants, and I actually regret not seeing that report first. It would have saved me a whole lot of time.

Money. I will start off with the hard one. We must pay for this stuff. We are not paying for water in New Mexico as it is—we pay for operations, maintenance, and construction, but we don't pay for the water. There are many different ideas on how to generate recurring capital for water projects and water management. The idea that rose to the top for us was severance fees, charges on withdrawals for non-renewable resources, and user taxes on withdrawals from renewable sources. We contemplated starting small so we could get the administration in line with taxes and revenue; we would want to scale it across industries—maybe something along the lines of \$1 per acre for agriculture, \$10 per acre foot for municipalities, and \$15 for industries. Of course, the details would be hashed out.

It is time we start paying for our water. How we measure would be related directly to how we would collect these fees, and that raises other challenges. It's something that has been tried before. We have seen legislation try to do this in the past but that has failed, and we are at a stage

now where we cannot continue to rely on capital outlay. The price of oil right now is about \$72 a barrel. Most of you know that every time the price of a barrel of oil changes by a \$1, the impact to New Mexico's economy is \$6 million. We need to be looking at other sources and I'll let you think about that for a bit.

Heather Balas talked quite a bit about water planning and so did we during our conference. I want to start my somewhat critical discussion of water planning by saying how much I admire Angela Bordegaray and the work she does at the Interstate Stream Commission. She has a very difficult job and to have only one water planner at the state level in New Mexico sends a very strong message, not only to New Mexicans, but to people who are thinking about investing in New Mexico. Not having robust water planning is the signal that we are not taking water seriously, especially when you see how much is being invested in planning by our sister states.

We talked a lot about the scope of expanding regional water planning. The criticisms that you hear around the state are the same ones that we raised: a lack of inclusion and climate change data. There also is a lack of use of consumptive use data. There is the lack of consideration of environmental issues. As we go around from region to region, these concerns are echoed and it is something that we will encourage the folks who are involved in regional water planning to consider including. In the Middle Rio Grande, we have a Water Assembly that may actually work on a parallel but separate track to do their own water planning because of their lack of faith in the current process—and again, that goes to institutional integrity.

I don't want these criticisms to be seen as attacks. Again, I sit on the Board of the Middle Rio Grande Conservancy District and it has been one of the most broken agencies in New Mexico, with some horrendous stories that I can tell you out in the hall about mismanagement, inequitable water delivery treatment and such. I guess my message is that we all need to do better, and this message comes from a place of love.

Concerning the Middle Rio Grande, I am told we will be getting \$15,000 for next year's water planning. This is the economic center of New Mexico and we will be getting \$15,000 for water planning. That sends a signal to me.

The other suggestion that came out of our conference concerning water planning—and I don't mean to kick an agency while they are down—but it was suggested that we reform the Interstate Stream Commission. The Interstate Stream Commission is currently composed of representatives of major agricultural sectors—that's what the statute says. I know we haven't followed that statute precisely, but it is largely the flavor of the Interstate Stream Commission (ISC). Our conference participants felt that the ISC commission might do well to transform to look more like the Colorado Water Conservation Board, to have a broader mandate, to get more involved in water issues statewide, and to have a broader and wider representation of the citizenry. And perhaps to have a broader range of expertise on the commission as well so that it's not just the agricultural sector being represented, but that you might have a few scientists, and an economist; that you might have a broader range of intellect to guide the commission staff. I am a former ISC employee myself. I love this agency. I think it has amazing potential, and I'm really looking forward to seeing where it goes in the future. Those of you who have watched the ISC in the last 10 or 15 years have seen that it has grown in a dynamic way and it has tremendous potential.

Let me talk a bit now about water rights administration. We have participated in previous efforts and discussions about how to reform the adjudication process. In fact, there was an organized effort several years ago, and my understanding is that a report came out and the ideas in it were very controversial. I cannot get a copy of that report from its authors. We all know the adjudication process is impracticable and interminable; our suggestions did not touch upon mucking around with the ongoing adjudications. These are processes that a lot of people are putting a lot of time and effort into. Judges are running those processes. We are going to defer to them to do their best, keep making progress, and get them wrapped up. Concerning the Middle Rio Grande, we have talked about concepts like limiting our adjudications to large blocks of water like the Conservancy, the Pueblos, and the cities. Let's do those first.

Another idea that came up: a conservancy district like my own is authorized under statute to conduct internal adjudications. If we did a block adjudication, just draw circles around the

conservancy districts and—with a little funding—do our own internal adjudication. This may speed things up because we understand the system better than anyone else. A suggestion came up that we only adjudicate pre-1907 water rights, that we let permits speak for themselves. On the permit front, there was discussion that perhaps we could go to a renewable license system that is reviewed on a periodic basis. Every ten years everyone's water licenses are reviewed to make sure that there is no waste involved, that best technologies are being used, and that people are informed about best practices. That was a pretty interesting concept.

A suggestion was made to do what has been done in other states, which is to exclude or summarily adjudicate *de minimis* water rights; for two acre-feet or less, you use a standard process that deals with those rights. Another thing—which hopefully our State Engineer Scott Verhines will be enthused about—would be to empower the state engineer, encouraging the state engineer to enforce priorities or alternative management agreements even without priority calls. What that really boils down to was everyone getting behind Scott Verhines as he tries to develop basin-specific regulations for Alternative Water Resources Management (AWRM). AWRM is a wonderful opportunity for us to adapt prior appropriation. You may have heard Reed Benson's comment yesterday, "Prior appropriation is alive but irrelevant." I attended a conference a few years ago hosted by the Getches Center, which is a really great law and policy center up in Colorado, and they opened the meeting by saying, "Prior appropriation is dead." I'm more of the mind like Reed—it's irrelevant, but it is alive, and we need to deal with it. It is a guiding principle, so let's try to support the state engineer as he grapples with it.

Another concept that we talked about was non-consumptive uses of water. Yesterday Steve Harris confirmed that we all believe that in-stream flows are legal in New Mexico. There is a lot of ambiguity about these uses. We think that it would bode well for New Mexico to develop a system for recognizing and administering non-consumptive uses of water with policy guidance, and some basic information. We all struggle with this concept, and we work around the edges to implement our in-stream flows. It would be nice if we could do it in a straightforward, candid way—a way that would provide certainties for the communities where these flows run. Along those lines, another one

of our recommendations was to encourage local municipalities to get involved in the acquisition of in-stream flow rights in order to benefit their local economies. That's something we observe in Colorado where we see river parks within cities. It would spread the load out a little bit as well and keep some of the pressure off of the state.

We talked about changes in water storage and moving water up or down the system. Can we move more water upstream? Can we keep more water in Cochiti, in Abiquiú, in Heron? Can we move our water down into our aquifers? We strongly encourage research on the institutional barriers that keep us from doing large scale aquifer storage in New Mexico. We believe this is a big part of the future. We see our neighboring states doing this and we need to get serious about it. We do have some exciting pilot projects going on, but we don't have the momentum that we need on this topic yet. Of course, there is a little something called the Rio Grande Compact. Herman Settemeyer from Texas was here yesterday, and I am looking forward to talking with him about how Texas might help us better consider aquifer storage and alternative reservoir arrangements.

Along those lines, we are also hoping that we will see a National Academy study of the Rio Grande reservoir system that would eventually lead to reauthorization of all our reservoirs as multifunction reservoirs and to move away from being single reservoir systems. For example, Cochiti is currently being used for flood control and recreation. The Middle Rio Grande can't use Cochiti to regulate irrigation water. We have a three-day transit time from El Vado to get water to our farmers. If it rains during those three days, we lose that water. If we could hold it at Cochiti, all of a sudden things would look more flexible and more fun.

We talked a little bit about shallow aquifer storage and reuse where appropriate for agriculture. I won't go into the details on that. We talked about small scale storage, perhaps storage within drains within our conservancy district, and opportunities to regulate small amounts of water in irrigation districts; this is something we used to see in New Mexico often, but it is a concept that has kind of gone away. And there is preservation of agriculture, of course, something close to my heart. We had a lot of suggestions in this realm, but I'm going to touch on just one.

As we go through buy-and-dry programs like we did on the Pecos, we are being strongly encouraged to fallow agricultural land and lease water to the river and the Rio Grande. I want people to think about taking water from the least productive lands. Go out and find those lands that are taking the most water to produce the least crop. What we did on the Pecos is we went out and first targeted the senior best water rights and bought up some of the best farm land. Of course, you've seen that the state is now struggling to move the water back to those great farm lands. These buy-and-dry program have great potential to leave nothing but marginal agriculture in place, because you want to buy that best water right. There are a lot of great ways of finding which lands are using the most water to produce the least amount of crop. I'll let some of you technical folks catch me up on that later in the hall.

Let me wrap up with talking about some of our non-consumptive uses: recreation, and tourism. We see that New Mexico is lagging behind on encouraging these very important economic sectors. Birding in particular is really interesting. If a rare bird in Mexico comes up into the Bootheel region, we get people flying down from Seattle to stay at expensive lodges, and rent cars, and go down and try to find these birds. Hunting is a wonderful revenue generator as is fishing and rafting, but birding is a real money maker, and it is something that we could really highlight here in New Mexico even though most of us don't think about it. We want folks to start thinking about the economic value of those non-consumptive uses. As we try to bring industry and business to New Mexico, many want to know about secure water supplies. These are ways to protect our beautiful rivers while we maintain our culture, and make a little bit of money. It's a lot of fun to do.

On the bigger environmental picture, the recommendation that you have all heard before and are all going to hear again is: Let's stop managing for single species. Let's stop managing the Rio Grande for the silvery minnow. Let's start managing it to support the ecosystems that all of the species depend upon. We need to save the minnow. We need to save the cuckoo. We need to save the little flycatcher. If we are only managing the river for one of them, we are going to do damage to others. We are going to do damage to ourselves. We want to look at this in a holistic way.

Take a look at Heather Balas's work at New Mexico First. Go to our Utton Center website. Take a look at our conference report that should be up in a month or so. Take a look at Howard Passell's report from the Transformational Solutions conference. You will see that a lot of these ideas are running in parallel and are running together. Take courage in your own positions because these changes won't happen without each one of you taking courage, making bold moves, and ruffling feathers. If it comes from a place of love, I think it is going to be alright.

With that I'll thank you, and hopefully I'll see you on the river.