



From left: Derrick Lente, David Benavides, Fred Hennighausen.



From left: DL Sanders, Steven L. Hernandez, Sherry Tippett (moderator).

PANEL DISCUSSION

HOW DOES WATER LAW AFFECT MANAGEMENT OF NEW MEXICO'S WATER DURING TIMES OF DROUGHT?

David Benavides is director of the water rights project for Community and Indian Legal Services of Northern New Mexico, a position he has held for ten years. Prior to attending law school, he worked in a number of positions in public interest organizations, including the Southwest Research and Information Center, the Montana Public Interest Research Group, and four years as the Director of the New Mexico Public Interest Research Group. David received both his B.S. and J.D. from the University of New Mexico in Albuquerque, and upon graduating from law school in 1990, was awarded a Skadden, Arps Public Interest Law Fellowship to begin his work on land and water rights in northern New Mexico. His work involves representing low-income persons and communities in

gaining legal recognition for their water rights and their historic water-use customs. Working primarily with acequias, David also advocates for the rights of acequias in various judicial and administrative proceedings, and to have a greater voice in local water planning and water management decisions. He lives in Santa Fe, New Mexico.

Fred H. Hennighausen received B.S. degrees in general engineering and mechanical engineering from Duke University in Durham, North Carolina. He graduated from the University of Tulsa College of Law in 1983, and was admitted to the practice of law in New Mexico in September 1983. From 1948 to 1980, Fred was an engineer with the New Mexico Office of

the State Engineer, including 24 years as District Supervisor, with responsibility for water resource investigations and water right administration in southeastern New Mexico. Fred currently is a partner in Hennighausen and Olsen, attorneys for the Pecos Valley Artesian Conservancy District. He is a certified legal specialist in water law and a registered professional engineer.

Steven L. Hernandez, Esq. earned a B.S. in business administration in 1974 and his law degree in 1977 from the University of Arizona. In 1979, he was a water attorney for the City of Tucson dealing with Central Arizona Project issues and the implementation of the new Arizona Groundwater Act. From 1980-1981 Steven served in the Solicitor's Office, Department of Interior in Washington, D.C. dealing with water issues. In 1982, he moved to Las Cruces, NM to represent Elephant Butte Irrigation District in the El Paso groundwater export litigation. He is the senior board member of the New Mexico State Bar Section of Natural Resources, Energy and Environmental Law and the attorney for the New Mexico Section of the National Water Resource Association. He also serves as the legal representative on the governor's Blue Ribbon Water Task Force. He has testified before the New Mexico and Arizona legislatures on water issues. Steven has lectured and written on topics including the Endangered Species Act, Federal Facility Transfers, Water Right Ownership in Reclamation Projects, Subsection I Revenues from Reclamation Projects and State Stream Adjudications.

Derrick Lente is a Native American from the Pueblos of Sandia and Isleta, located in central New Mexico. He works for the Pueblo of Sandia as their water resources manager, and serves in another capacity as the Chairman of the Six Middle Rio Grande Pueblos Water Coalition, (Coalition). The Coalition comprises six Pueblos including Pueblo de Cochiti, Pueblo of Santo Domingo, Pueblo of San Felipe, Pueblo of Santa Ana, Pueblo of Sandia, and the Pueblo of Isleta. Mr. Lente is a huge advocate of Indian water rights, and has given many talks regarding Pueblo water rights. Mr. Lente truly believes that education is the key to understanding and respecting the premise of Pueblo Indian water rights.

DL Sanders is General Counsel to the New Mexico State Engineer and Director of the Litigation and Adjudication Program as well being commissioned as a Special Assistant Attorney General. He manages all New Mexico water rights adjudications and provides legal counsel to the state engineer on water rights matters. DL is a product of the New Mexico public education system, including the UNM School of Law. As always, after 12 years, he still only knows three things about adjudications, they: 1) last a long time, 2) cost lots of money, and 3) create few friendships. New to his understanding are the added complexities that a drought can create in keeping anyone satisfied.

Sherry Tippett holds a B.S. from George Washington University and a J.D. from the University of South Dakota. She served as Special Assistant Attorney General for the New Mexico Office of the State Engineer for seven years, working primarily on water adjudications in Northern New Mexico. She was also the City of Santa Fe's Water Attorney for seven years (A VERY LONG TIME TO SURVIVE THE SANTA FE POLITICAL SCENE), where she was originally hired to work on the purchase of the water company from PNM. For the past two years she has served as County Attorney for the County of Grant where she has been very active in the southwestern regional water plan.

Editor's Note: The following abstracts were prepared by panelists prior to the conference. A videotape of the discussion is available from the WRRI.

How Does Water Law Affect Management of
New Mexico's Water During Times of Drought?

How Does Water Law Affect Management of New Mexico's Water During Times of Drought?

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Many entities have long-established internal systems for dealing with drought conditions that should continue to be affirmed by state officials and state law. In the absence of such established systems, the most obvious feature of New Mexico water law in drought management is priority administration. However, the state's reluctance to implement that process, forcing senior water right holders into costlier forums, poses problems of equity and justice in a state like New Mexico where many senior water right holders are poor. Some observers see promise in utilizing various statutory forms of water right transfer, but

those mechanisms may also disproportionately impact poor communities to the extent individuals are permitted, over the objection of the local community, to sever water rights needed for the local area's long-term resource base. Some combination of more aggressive state involvement in priority enforcement and assertion of district regulatory authority over transfers would probably create a favorable climate for inter-community partnering in water transactions. This would most likely simultaneously address the issues of water supply, protection for rural communities, access to justice, poverty, and underdevelopment.

Drought and New Mexico Water Law

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New Mexico water law can be effective in management of its water in several ways. Three significant ways are as follows:

1. **Enforcement of existing water law** - water laws need to be enforced to prevent illegal diversions, use of water, and waste of water.
2. **Conservation** - existing laws can be utilized to enforce conservation measures to prevent misuse, conserve and reuse existing supplies, and increase

efficiency; included in such procedures should be metering of all water use and maintaining favorable conditions for water flow in the national forests.

3. **Priority administration** - while the concept is set out in the New Mexico Constitution and Statutes, application of the policy, particularly in groundwater and interrelated stream systems, can be difficult, if not impossible, to implement to achieve the desired result.

THE PECOS RIVER EXPERIENCE

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I. Implementation of House Bills 417 and 225 and its effect on the Pecos River adjudication of CID Senior Water Rights and the Pecos River Compact.

- A. Purpose of the legislation.
 - 1. Achieve compliance with the Pecos River Compact.
 - 2. Establish a base flow of the Pecos River of 50 cfs at the Artesia Bridge.
 - 3. Provide a reliable annual irrigation supply of 90,000 acre-feet of water for delivery to Carlsbad Irrigation District.
 - 4. Provide adequate water to fulfill delivery requirements to the Texas state line pursuant to the Pecos River Compact.
- B. Stay of the Proceedings of the Carlsbad Section of the Pecos River Stream Adjudication.
 - 1. Six-month stay in the ongoing litigation of Carlsbad Irrigation District Project Offer granted until mid January 2003.
 - 2. Four major parties are conducting settlement negotiations regarding the priorities of the Carlsbad Project Offer.
 - 3. Junior users are litigating priority dates and quantities of the Carlsbad Project.
- C. Water Banking Regulations.
 - 1. Water Banking is really targeted at giving junior users a way to acquire senior water rights that will allow them to continue to pump water even though they may be shut down by a priority call.
 - 2. ISC developing regulations on water banking in the Pecos Stream system.
- D. OSE is drafting regulations on how the state will manage a priority call.

II. Carlsbad Irrigation District leasing program with the Interstate Stream Commission.

- A. Purpose of the lease program was to ensure Pecos Compact River deliveries were made to Texas.
- B. If there is a short fall, then the state is instructed to comply with prior appropriation to make the necessary water deliveries to Texas.

III. Other Upstream Issues affecting Senior rights.

- A. Dispute between the Fort Sumner Irrigation District and Carlsbad Irrigation District over stored water.
- B. Release of stored water by the United States as by-pass flow.
- C. Filing of suit by Forest Guardians regarding “discretion” of the United States in managing Carlsbad Project water in reservoirs for the Pecos Bluntnose Shiner.

How Does Water Law Affect Management of
New Mexico's Water During Times of Drought?

**Why New Mexico Fails to Administer
Water Rights in Times of Drought**

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Parker's ruling [in the Silvery Minnow case] could force New Mexico to face the realities of administering a limited water supply in an arid state. Em Hall, *Albuquerque Journal* (Sept. 20, 2002)

The Problem

As evidenced by the handling of shortages in the Pecos River and the Rio Grande, apparently New Mexico water law is not an effective tool in administering water rights during a drought. New Mexico water law is founded upon the prior appropriation doctrine: "first in use, first in right." However, if there is no administration or enforcement of priorities, the water code merely masks an underlying chaos.

One must ask whether it is beneficial to continue the enormous expense of adjudicating water rights in New Mexico if the political, appointed officials, or the courts do not have the desire or backbone to ensure the allocation of water to the rightful owners during times of shortage. At a time when New Mexico is at the bottom of the barrel in every category, from child health to per capita income, we should consider whether the millions of dollars spent annually by the New Mexico Legislature in adjudicating water rights is a waste of money.

Below are several examples of how New Mexico has failed in the administration of water and the protection of senior priority water rights.

Pecos River. The Carlsbad Irrigation District made a priority call against upstream junior water rights in 1972. The State Engineer determined that the effective administration of a priority call would require the adjudication of all water rights in the stream system. Surface water rights in the mainstream of the river had been adjudicated by a federal court decree in 1933. The ground-water rights in the Roswell Basin had been adjudicated in a state court decree in 1966. The State Engineer determined, however, that the priority

call would require the adjudication of all water rights in a single suit. Thirty years later that suit is still pending. In the meantime, the state has been purchasing the water rights from junior Pecos River surface water pumpers upstream from the Carlsbad District to ensure Pecos River Compact compliance.

Rio Grande. The silvery minnow litigation clearly demonstrates the underlying chaos in New Mexico's water rights administration. The demands for water within the Middle Rio Grande Valley are great – not just that for the minnow, but also for future Pueblo, and municipal uses. This is the most critical area in the state requiring the administration of water rights. The Middle Rio Grande Water Budget estimates an existing deficit of 65,000 acre-feet/year. And yet there has been no effort to try to administer or apportion water in the middle valley.

Efforts to adjudicate water rights in the *Upper Rio Grande* have also failed to produce enforceable decrees. In the Taos Valley adjudication suit, the rights of two community acequias in Arroyo Hondo appear to be the oldest rights, but they are at the bottom of the stream system. They have not been able to obtain water even in the past year of severe drought and even though some of the upstream rights have very junior priorities. Their claims have been pending for over twenty years without relief from the judicial system.

Mimbres River. A final decree adjudicating water rights has been entered in the Mimbres Valley adjudication suit. It is the only state court adjudication in which a final decree has been entered in the past thirty years. The court has appointed a watermaster to enforce and administer the decree. On several occasions in the past few years, a community acequia with the oldest priority water right has requested the curtailment of upstream junior rights. It appears that prior rights cannot be enforced because few irrigation

ditches have headgates and no ditches have measuring devices. Isn't the state's responsibility to ensure that priorities can be enforced in adjudicated stream systems?

Possible Solutions

If water right adjudication suits are not providing a means for the priority administration of water rights, what other methods might work?

- Can the permitting system be used to administer priorities?
- Can the Water District Act in Article 3 of the water code be used?
- Can State Engineer administration of water banking by districts and acequias protect prior rights in conjunction with strict limits on new domestic well rights?