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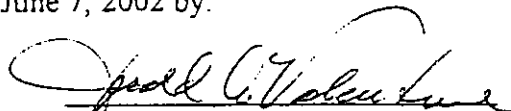
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LOWER RIO GRANDE MEDIATION PROJECT,
THIRD JUDICIAL DISTRICT COURT,
STATE OF NEW MEXICO ;

FINAL REPORT

Submitted on June 7, 2002 by:


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**STATE JUSTICE INSTITUTE
SJI-99-N-069**

**LOWER RIO GRANDE MEDIATION PROJECT
THIRD JUDICIAL DISTRICT COURT**

FINAL REPORT

I. Introduction

The State Justice Institute awarded a grant of \$30,025 to the Third Judicial District Court on February 18, 1999. The Court provided a match of \$15,025, including both monetary and in-kind contributions. Four time extensions were granted, resulting in a final grant end date of March 31, 2002.

II. Project Background

The need for this project arose due to a lawsuit, Office of the State Engineer v. Elephant Butte Irrigation District, et al., CV-96-888, initiated to determine water rights for users of the Lower Rio Grande Basin in Southern New Mexico. In Elephant Butte Irrigation District v. Turney, CV-86-888 (the docket number was changed to CV-96-888 to docket pleadings in the Court's new computer system), the Court ordered the Office of the State Engineer (OSE) to complete a hydrographic survey of the Basin and to proceed with adjudication of water rights claims. The State Engineer estimated that there are more than 10,000 individual water users (not counting approximately 25,000 domestic water users) who have been or will be joined in this lawsuit.

This Lower Rio Grande litigation is general stream adjudication similar to other judicial proceedings underway elsewhere in New Mexico and throughout western states. These cases are usually very large, often having tens of thousands of parties; involve complicated legal, economic, cultural, and historical issues; and are critical to future water supplies in the region. The cases typically involve an entire river system or a major river segment. General stream adjudications are commenced by the Office of the State Engineer to clarify existing water rights based on state law, determine and integrate into one state-law water management system tribal and federal agency water rights based on federal law, and generate water supply and use information for improved water management. The size and complexity of these cases present the court with unique case management challenges, especially because of the variety of parties involved -- cities, governmental agencies, tribes, commercial entities, and individuals (many of whom appear unrepresented).

In New Mexico's adjudications, the active litigation phase commences with a hydrographic survey (a report of water supply and uses.) A hydrographic survey can cost several millions of dollars, which must be appropriated by the legislature. Based on the hydrographic survey, the State

Engineer proposes water right decrees to each potential water right claimant. This proposal takes the form of an Offer of Judgment. If the claimant accepts the offer, the OSE is deemed (subject to the rights of third parties) to have recognized the validity of the claimant's water right as set forth in the Offer. If the claimant rejects, the claimant's water right will be determined at trial, unless the disputed claim is settled prior to trial. Thus, even though technically an adjudication is a single civil proceeding, several thousand trials might be held during the course of a single adjudication.

In the Lower Rio Grande adjudication, the State Engineer estimated that from 10 to 75% of these claimants would object to water rights offers made by the OSE, which could result in a large number of claims being litigated and thus place an undue burden on the Court and delay the resolution of many cases. Recently, the OSE provided adjudication statistics to the Court, including the following:

The total number of water rights claimants (by individual case number) identified by the hydrographic survey is 20,621. Of this number, there are 10,589 claimants in the Rincon and Northern Mesilla Valleys, areas on which the OSE is currently focused. Out of 1788 claimants in Rincon Valley, the OSE has sent offers to 1501. There have been 483 (approximately 32%) acceptances and 584 (approximately 39%) objections. Out of 8801 claimants in Northern Mesilla Valley, the OSE has sent offers to 3042. There have been 1145 (approximately 37%) acceptances and 962 (approximately 32%) objections. (Note: There are a number of claimants who either claim no water right or have not responded to offers. Also, the OSE has advised the Court that these statistics lack some precision because a number of offers were revoked for various reasons.)

The Court asked for and received suggestions from the parties for using mandatory mediation to help resolve these claims. The Court concluded that an alternative dispute resolution process could provide a fair and expeditious process for resolving these disputes.

Court staff and staff of the United States-Mexico Conflict Resolution Center worked together in creating a grant application. The major objective was to reduce litigation by increasing public understanding of the litigation and by making available a well-designed alternative dispute resolution process. This objective would be achieved through public orientation programs and a newly created mediation program involving specially trained mediators.

III. Project Description

As noted in Section I above, the State Justice Institute provided support for this project. The project commenced with the training and selection of mediators. A series of public orientation programs that, among other things, encouraged water right claimants to use mediation, were held. While the adjudication was delayed because of circumstances primarily related to the OSE's lack of resources, which was outside the Court's control, 36 disputed Offers of Judgment have been mediated, resulting in the complete or partial resolution of 35 disputes.

A. Training and Selection of Mediators

The Court designed a mediation training program to train 20 to 30 mediators in both mediation and water law. Funds were needed for consultants to assist in this training. The Court, through bar journal announcements and other means, announced its intent to select a pool of mediators from candidates who completed a court-sponsored water rights mediation training program. The Court divided the training required for mediators into two sessions -- (i) water law and (ii) mediation training. The first session, held on November 13 and 14, 1998 at the New Mexico Farm and Ranch Heritage Museum in Las Cruces, New Mexico, was an introduction to principles of water law. Professor Emeritus Willis Ellis of the University of New Mexico School of Law conducted this training. This presentation was open to all interested individuals and was approved for 18 Continuing Legal Education (CLE) credits. Approximately 64 people attended.

The second session was held on January 21 and 22 at a hotel conference facility in Las Cruces. Presenters Lucy Moore and Steve Snyder trained the 44 participants in environmental mediation, focusing specifically on issues involved in the Lower Rio Grande Adjudication. The session was open to those individuals planning to be part of the pool of water law mediators. This training was approved for 16 CLE credits.

Following these trainings, the Court's ADR Office collected resumes from individuals who wanted to be part of the mediator pool. As the resumes were collected, they were forwarded to the OSE for review of potential conflicts of interest. A total of 26 mediators was selected.

B. Public Information Meetings

Because many water rights claimants in an adjudication are not represented by an attorney, the Court held three public meetings to inform claimants about the nature of the adjudication, provide detailed information about how to respond to an Offer of Judgment, and describe the mediation process the Court had established for resolving disputed Offers. The Court held the meetings on September 18, 1999 (approximately 75 participants), July 21, 2001 (approximately 200 participants), and October 27, 2001 (approximately 30 participants).

At least two of our contract consultants, Lucy Moore, John Thorson (state court Special Master from Arizona), Vickie Gabin (federal court Special Master from New Mexico), and Steve Snyder, all experts on environmental mediation, water issues, and meeting facilitation, conducted the meetings. Representatives of the OSE and Elephant Butte Irrigation District (EBID) were also on hand to answer questions. Judge Jerald A. Valentine delivered welcoming remarks and discussed the workshops' purposes at each meeting, and ADR Coordinator Jeanne Emmerson helped to explain the mediation component of the adjudication. Topics addressed included the purposes of general stream adjudication, adjudication procedures, the Summons and Offer of Judgment package sent by the OSE to water rights claimants, and participating effectively in the adjudication, especially through mediation.

At these meetings, participants voiced these concerns:

- Possible adverse impact of the adjudication on the growth of small businesses and mutual domestic water systems.
- Metering of water use.
- The non-conclusive aspect of the Offer of Judgment based on the omission from the offer of the "duty" (amount) of water per acres.
- Possible adverse impact of the adjudication on property values.
- Effect of the adjudication on the relationship between EBID and individual members.

Participants were also asked for suggestions on improving the adjudication process. Suggestions offered were:

- Include, with the Offer of Judgment mailing, a request for mediation form, with instructions.
- Include, with the Offer of Judgment mailing, phone numbers for the state and local bar associations in the offer packets so that claimants may contact attorneys knowledgeable in water issues.
- Conduct more frequent Court-sponsored public meetings, coordinated with the mailing schedule of Offers of Judgment.
- Appear on public or commercial television shows to summarize the information presented in the public meetings. OSE staff, the ADR Coordinator, and other experts, not parties to the adjudication, could host the programs and answer questions.
- Produce a video to present public meeting information. Video could be shown on television and/or loaned to groups. Such a video has been prepared by the Montana Water Court with reasonable success.

C. Mediation Requests and Orders

The process for assigning cases for mediation is set forth in a stipulated procedural order entered by the Court following extensive negotiations among the OSE, agencies of the federal government, the EBID, and other parties to the adjudication. Among other things, the order (i) specifies the time period for water rights claimants to accept or reject Offers of Judgment, (ii) provides claimants who reject the Offer with an opportunity to resolve their claims through informal negotiations with the OSE, and (iii) requires that each claimant who is unable to resolve his or her claim informally must participate in court-mandated mediation. Water rights claimants who do not

resolve their claims informally must file a formal request for mediation with the Court's ADR Office. Upon receipt of a request, the ADR Office creates an Order of Referral to Mediation, which is filed after it is signed by the judge. This order assigns a mediator to the case. The mediator then contacts the parties to schedule the mediation.

For a variety of reasons (including problems with the hydrographic survey, database problems, and insufficient staff), the OSE has to date served substantially fewer Offers of Judgment than originally anticipated, and those have been served on an erratic basis. Because the rate at which mediations are scheduled is directly dependent on the rate at which Offers of Judgment are served, the number of mediations scheduled is also substantially less than originally anticipated. The monthly breakdown of referred cases during the period of March 2000 through March 2002 is as follows:

<u>Month/Year</u>	<u>Number of Cases</u>
March 2000	2
August 2000	1
January 2001	1
February 2001	3
May 2001	22
June 2001	6
July 2001	1
September 2001	37
October 2001	10
November 2001	27
March 2002	3

The Court ordered a total of 115 cases, representing 79 claimants, to mediation between March 6, 2000 and March 31, 2002. Of these cases, 36 (31.3%) have been mediated. Of these 36 cases, 21 (58.3%) were fully settled during mediation, 14 (38.9%) were either partially settled or some progress was made during mediation, and 1 (2.8%) was settled after mediation. Thus, approximately 97% of cases that were mediated resulted in either a full or partial settlement or some progress was made.

Of the 115 cases ordered to mediation, but where mediation was not needed or has not yet been done, 25 (21.7%) were settled fully before mediation, no outcome report has been received for 49 (42.6%), and 4 (4.3%) were either not mediated for various reasons or orders to terminate mediation were filed.

As noted above, 61 of the 115 cases referred to mediation have been resolved, partially resolved, or progress has been made. If these cases had gone to trial, the Court, litigants, and their attorneys and expert witnesses likely would have spent between 30 and 60 days in trial.

IV. Project Evaluations

A. Participants' Evaluations

The Court's ADR Coordinator asked project participants -- specifically water law claimants, OSE attorneys, and mediators -- to comment about the project. OSE attorneys and mediators submitted their comments by responding in writing to a questionnaire. The Court asked water rights claimants who participated in mediations to complete an evaluation form at the conclusion of their mediations. Over the course of the project, only five completed claimant evaluations were returned to the Court's ADR Office. Because the form is quite long and complicated, claimants may have been discouraged from completing evaluations. To gain additional feedback from water rights claimants, the Court's ADR Office interviewed a number of claimants by telephone.

1. Evaluation of Mediation. An evaluation of the mediation process by water rights claimants, OSE attorneys, and mediators follows, organized in response to four basic questions.

- a. Are you satisfied with the Court's administration of the mediation program? Why or why not? What changes do you recommend?

OSE Attorneys:

Responses from four OSE attorneys were received. While all of the attorneys indicated they are generally satisfied with the Court's administration of the program, they offered several suggestions. One attorney suggested that a separate record keeping system, not part of the official court record, be created to identify claimants who failed to request mediation and track progress on cases referred to mediation. This would help to make the process less burdensome, while requiring the mediation process to be brought to a close within a given period of time. OSE attorneys also suggested that they be given copies of any documents filed by the mediators.

Mediators:

Mediators' comments on the Court's administration of this program ranged from "fine" to "excellent." One mediator suggested that, when dealing with cases that are prolonged for several months, mediators should be paid periodically for work "as earned" rather than when the cases are ultimately resolved. Another mediator suggested the mediation evaluation form (developed early in this project) is too long and complicated and thus discourages claimant participation. She suggested that a one or two-page form could be completed at the end of a mediation session and would result in a very high response rate. Another mediator felt the mediation training was very good. He added that a future meeting with OSE attorneys and mediators to discuss procedures and criteria was suggested at the training, but never held.

Claimants:

Two claimants commented on the Court's administration of the adjudication. Both suggested that the Court inform claimants about the progress of the adjudication through a newsletter or the Internet (the Court does maintain a website for this case).

- b. Are you satisfied with the performance of the Court's mediators (asked only of OSE attorneys and claimants)? Why or why not? What changes do you recommend?

OSE Attorneys:

The OSE attorneys indicated they have been generally satisfied with the performance of the mediators. However, one attorney described an unsatisfactory experience she had during mediation. She reported that the mediator seemed to act as an advocate for the water claimant rather than remaining neutral throughout the process. She added that the mediator displayed a domineering attitude and was lacking in mediation skills. Finally, this OSE attorney suggested that mediators would benefit from additional training.

Claimants:

Two claimants commented on mediator performance. One claimant rated the mediator's performance as "excellent." The other expressed concern that an attorney-mediator acted more like an attorney than a mediator.

- c. Are you satisfied with the performance of the Office of the State Engineer attorneys and other staff (asked only of mediators and claimants)? Why or why not? What changes do you recommend?

Mediators:

The mediators offered a variety of responses. Some were satisfied or very satisfied with the OSE's performance. One mediator felt the local OSE attorneys and engineers have been very helpful, but the OSE office in Santa Fe appears to be understaffed and thus it is difficult to get responses to questions on criteria and basis of approval of acreage and abandonment. However, this mediator also noted that the OSE has recently seemed more helpful and productive. Another mediator stated that OSE attorneys were flexible. A mediator suggested that the OSE should not initiate mediation until they have exhausted their investigation, completed re-surveys, and made a final offer. If these steps are not taken, the scheduling of mediation is often delayed. One mediator stated that two of the OSE attorneys were unwilling to compromise and seemed to "talk down" to the claimants. However, this mediator's experience with a third OSE attorney was more positive in that the attorney provided documents to her on time, came to mediations prepared and ready to discuss matters with an open mind, and followed up in a timely manner.

At the October 21, 2001 Public Information Meeting, two mediators expressed concern about the quality and quantity of evidence the OSE deemed necessary to establish a water right. These mediators stated that the OSE was inflexible with respect to the type and amount of evidence needed and that different OSE attorneys required different types and/or amounts of proof. One mediator suggested that if the inflexibility continued, mediators should receive training in the proof that is necessary to establish a water right. OSE representatives responded that compromise is often difficult in adjudications since the State Engineer must ensure that state law is followed in determining the nature and characteristics of these water rights.

Claimants:

Five claimants commented on the conduct of OSE's attorneys during the mediations. All five claimants voiced concerns about the OSE's inflexible approach to negotiations. One claimant suggested that the OSE visit the claimants' property before proceeding with mediation. Another claimant complained that the OSE attorney used too much "technical jargon" and "talked down to" the claimant.

- d. Is the mediation process an effective way to resolve disputes between water rights claimants and the OSE? Why or why not?

OSE Attorneys:

OSE attorneys suggested that a process be developed whereby a number of claimants with similar objections be brought together for a group mediation. This would streamline the process in that the workload of the Court and the OSE would be reduced, and equally important, the claimants would feel more comfortable and less intimidated because they would deal with the OSE attorneys in a group rather than alone.

Mediators:

Every mediator, except one, who submitted a written evaluation of the program indicated that the mediation process had been an effective way to resolve disputes for these reasons:

- The process allows the parties to come together "in the spirit of problem solving." Even if only partial progress is made, it is progress in a less adversarial way.
- The process can make claimants less intimidated and more comfortable because a third party neutral is present.
- When mediation is used, the time and expense of a trial can be avoided.

One mediator noted that if the parties can't reach an agreement, especially after land has been

resurveyed and documents have been reconsidered, mediation will probably be unsuccessful unless the farmer or landowner decides to accept the OSE's offer to avoid litigation costs.

Claimants:

Six claimants commented on the mediation process. One described the process as "quite helpful" and another described it as "fair." The other four claimants were critical of the process. One critic believed that the process should be "more personalized." Another said, "I wish I hadn't had to go through it." Still another deemed the process "unfair" because he "fought for six months." The fourth critic deemed the process "too long."

2. Evaluation of Public Information Meetings. The OSE attorneys and water mediators who attended the public information meetings offered these comments:

OSE Attorneys:

All of the OSE attorneys who responded felt the public meetings had been worthwhile. Suggestions include:

- Hold short evening meetings rather than longer Saturday meetings to maximize attendance.
- Include brief descriptions of the adjudication process, but focus primarily on answering specific questions about legal procedure and the packets sent to claimants.
- Hold smaller group meetings or small meetings focused more on primary objections, e.g., a meeting for claimants regarding acreage or priority date issues could follow a general meeting about the adjudication process.
- Schedule future meetings to coincide with renewed service of adjudication packets.

Mediators:

All mediators who had attended the public meetings agreed that the meetings were well presented and helpful, in that they provided useful information and an opportunity for claimants to ask questions and voice concerns. One mediator suggested the meetings be scheduled in the evening rather than during the day as it may be difficult for farmers to attend day meetings.

B. Court's Evaluation of Project

Given the high success rate in resolving disputed Offers of Judgment, the Court is pleased with the overall outcome of the project. In addition to the comments mentioned in the participants' evaluations discussed above, the Court has three other concerns about aspects of the mediation

program and is presently considering how to address those concerns.

One concern stems from the low number of evaluations received from the claimants. In the future, a claimant's evaluation should be received shortly after he or she completes the mediation process. While a delayed claimant evaluation might be preferable to an early evaluation in that a delayed evaluation reflects a less emotional perspective, the Court believes early, probably more reactive claimant evaluations are better than no evaluations at all. The evaluation form will be simplified to encourage responses.

A second concern is the inordinate delay in resolving disputed Offers of Judgment through mediation. Much of this delay results from errors in the Offers of Judgment and the inability of many water rights claimants to properly document their claims. Many mistakes in the Offers of Judgment result from errors in the hydrographic survey, errors that are unavoidable given the complexity of the survey process. Staff limitations often prevent the OSE from promptly following up on survey errors identified at mediation. (However, the OSE has recently advised the Court that its staff now routinely meets with each claimant on his or her property to address objections before the case is referred to mediation.) Water rights claimants frequently based their claims on events that occurred decades before the adjudication commenced. For this reason, claimants often have difficulty documenting their claims to the satisfaction of the OSE at the mediations and expend much time and energy after the mediation gathering documentation acceptable to the OSE.

A third concern is the dissatisfaction many claimants have with the mediation experience itself. Much of this dissatisfaction is unavoidable. Most claimants resent being "dragged into" the adjudication. Few understand why the adjudication is necessary and regard it as an effort to deprive them of their water rights. For most claimants, court-mandated mediations are their first encounters with the judicial process. They have no way of comparing the delays and frustrations encountered in mediating their claims with the delays and frustrations they would encounter in proving their claims at trial. Finally, constraints exist on the freedom to settle a disputed water rights claim that do not exist in ordinary civil litigation. In ordinary civil litigation, the litigants are free to settle on whatever terms they deem appropriate. In a water rights adjudication, the OSE cannot acknowledge the validity of a claim absent adequate proof of the validity of the claim. Each claim cannot be resolved in complete isolation from all other claims in the adjudication.

The Court intends to continue the mediation process. The Court will review the process from time to time, get feedback from participants, and make changes and modifications as appropriate.

V. Summary and Conclusions

General stream adjudications, such as the litigation underway in New Mexico's Third Judicial District Court involving the Lower Rio Grande, are underway (in one form or another) in ten other western states. Over time, the water rights serving a majority of westerners will likely be involved in these cases. Because of their size and complexity, these adjudications burden the judicial process and impose enormous transaction costs on all participants.

Many of the disputes in these adjudications can be resolved if more information is exchanged, early on, between the litigants and a routine process is established for litigants to address their differences.

The Lower Rio Grande Mediation Project has explored ways to improve communication and resolve disputes through a combination of public orientation programs and a modest-cost mediation program. The actual, early results of mediation conducted under this program indicate a high proportion of typical disputes can be resolved, saving limited judicial time and litigant resources. The program, with trained mediators, is in place and can be continued throughout the adjudication so long as state or local funding is found. Importantly, the program design can serve as a template for resolving disputes in other adjudications throughout the West. Judge Valentine has discussed this program with judges from other jurisdictions with pending adjudications and plans to do so in the future.

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