

A Water Court for New Mexico Perspectives from the Bench

Institute for Court Management
Court Executive Development Program
Phase III Project
May 2003

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Abstract

This paper evaluates the New Mexico stream adjudication process and how New Mexico Courts can timely resolve them. Drought, compact delivery requirements on the Pecos River and concern regarding interstate disputes on the Lower Rio Grande have given timely resolution of stream adjudications high political priority in New Mexico. Stream adjudications can involve thousands of water right owners. If the process is expedited, this can greatly impact the resources of the court.

The goal was to identify an efficient and cost- effective structure for the court considering the magnitude of stream adjudications and limited resources. There are few testable objectives. Although most western states which have some version of the Prior Appropriation Doctrine have statutory procedures for stream adjudications, the manner that each state has tried to address the problems inherent in the process has vary substantially. There are also very significant historical differences among states which minimize the value of precedent of other jurisdictions and make comparisons difficult.

Whether the recommendations will satisfy the objectives cannot be determined presently. The New Mexico Supreme Court has not yet adopted the recommendation of the paper to judicially establish Water Court Divisions within the present structure of the court although they have approved the concept. The Legislature must adequately fund both the courts and the State Engineer. Inadequate funding has been the major cause of the delays in stream adjudication, and without prudent action by the Legislature, the ability of the court or the State Engineer to improve the time to disposition of stream adjudications is restricted regardless of what choices are made for a Water Court.

Summary of Conclusions and Recommendations:

- A. The Supreme Court should establish a Water Court Division within the court existing court structure by designating a Chief Water Judge to oversee stream adjudications in the state, designate a Water Judge in each judicial district, provide for adequate training and education in water law, and establish an appropriate administrative structure within the current hierarchy of the court.
- B. There should be no any major revisions of the Water Codes or modifications of the administrative or adjudicative duties of the OSE. Any legislative changes should be focused on reducing specific impediments to efficient adjudications and not to any change of institutional structure.
- C. Representatives of the Executive, the Legislative and Judicial branches should review and determine adequate funding and resources for the OSE and the courts to effectively, efficiently and timely complete stream adjudications.

A Water Court for New Mexico

Perspectives from the Bench

“Law is the written experience

of the people

“Wise for being slow to change,

Courage for the changing

“In the strength of individual experience,

one Nation

“Joined to the community

of individuals,

“Judges must be students

of the experience of the community.”¹

INTRODUCTION

“Come, let us reason together.”

Isaiah, Chapter 1, Verse 18

Drought and controversy between New Mexico and Texas regarding New Mexico’s water deliveries under the Rio Grande Compact and the Pecos Compact have combined to give water

¹Greg Hobbs, “Judges Must Be Students” in I’ve Seen the Mountains Falling, Poems of Colorado, Philmont, Southwest (1995) (Justice Hobbs is a member of the Colorado Supreme Court and a nationally recognized expert in water law.)

issues and stream adjudications great urgency in New Mexico. This urgency has led to considerable discussion of how the present system should respond. This paper recommends that the New Mexico Judiciary establish a Water Court Division within the present administrative structure of the court. This form of Water Court would be the most cost-effective and efficient structure for a Water Court and would be less subject to constitutional or other legal attack than competing structures.

Conclusions and Recommendations for a Water Court begin this paper. Then, it is organized into three parts. The first part analyses the need for change; the second part explains water law and stream adjudications; and the third part discusses the role of the courts. Appendices are provided for those unfamiliar with these issues. Appendix A lists all stream adjudications in state and federal courts currently pending in New Mexico. Appendix B explains the hydrologic cycle and scientific aspects of water. Appendix C is a review of the functions of the Office of the State Engineer. Appendix D is a review of the structure of the New Mexico Judiciary. Appendix E is a comparison of New Mexico Water Codes with those of Colorado.

Water issues, particularly stream adjudications, confront the state with a clear need to look at new ways to manage limited resources to effectively and timely address the multiplicity of those complex issues. However, it is also important that public officials in all three branches of government, responsible for evaluating and implementing an institutional structure for stream adjudications, understand the science and law underpinning these issues before making any structural changes in the courts or any statutory or rule changes. Without a clear understanding of the substance and process of water law, changes can delay and complicate rather than expedite stream adjudications.

CONCLUSIONS:

1. The current water codes are sufficient to timely resolve water disputes including stream adjudications, if the Office of the State Engineer, hereinafter referred to as OSE, and the courts are funded adequately.
2. Care should be taken to avoid any legislative changes that ignore the constitutional, legislative and judicial precedents of New Mexico water law. Any legislative changes should focus on reducing specific impediments to efficient adjudications and not on changing institutional structures or modifying stream adjudication procedures. Other states' adjudication procedures should be reviewed carefully to identify ways to improve the process in New Mexico but should not be adopted without thorough consideration of all consequences.
3. A Water Court should be integrated into the current administrative structure of the New Mexico Judiciary.
4. The Supreme Court should designate water judges for each judicial district and a Chief Water Judge to coordinate activities statewide. This system would be similar to the specialized Children's Courts that exist in the First, Second and Third Judicial Districts. A Supreme Court committee can promulgate rules of procedure for stream adjudications and explore constitutionally permissible ways to expedite the process.
5. A Colorado-type Water Court is not an effective model for New Mexico. The OSE should retain all of the administrative duties under the present Water Codes, including hearings for new appropriations and for changes in existing rights. Removing any of the administrative functions from the State Engineer would require a major, costly restructuring of the

judiciary, increased costs to the litigant and material increases in caseloads for district and appellate courts.

RECOMMENDATIONS: THE PARAMETERS OF A WATER COURT FOR NEW MEXICO

The following suggestions are made to establish a Water Court structure for New Mexico. These suggestions would establish a more efficient stream adjudication process, preserve due process for all litigants and minimize the disruption to the judiciary. Compared to other options that have been discussed, this form of Water Court would also minimize the economic burden on the state while addressing the urgent need to complete adjudications in a timely fashion.

1. The Supreme Court should establish a Water Court Division within the court by designating a sitting judge in each judicial district as a water judge who will be trained in water law and assigned cases involving water issues arising in the district. When water right claimants appeal from administrative decisions, or when individuals file a dispute, the water judge may transfer the matters to a court presiding over a stream adjudication which includes the county where the water right is located, if he or she determines that a decision may have an effect on the stream adjudication.
2. From the list of water judges designated, the Chief Justice of the Supreme Court should either designate a one of the district water judges as Chief Water Judge for the state or designate a Supreme Court Justice as Chief Water Judge.

3. Upon request of the Chief Judge of the Judicial District, the Supreme Court, in lieu of a designated sitting judge, should appoint a judge *pro tempore* as a water judge where a stream system adjudication has been filed.
4. The Administrative Office of the Courts, the Chief Water Judge, the assigned sitting judge or judge *pro tempore*, and the Chief Judge of the Judicial District should determine what additional resources are needed for each adjudication. At a minimum, each judge *pro tempore* should be provided with adequate staff including a Trial Court Administrative Assistant and a law clerk.
5. The funding of a judge *pro tempore* assigned to a stream adjudication should be separate from the funding for other judges *pro tempore* to ensure adequate and consistent funding from year to year.
6. The Chief Judge of the Judicial District where a stream adjudication is pending should have general administrative authority over the water judge or a water judge *pro tempore* and staff.
7. The Supreme Court should establish a standing rules committee to continue the work of the *ad hoc* water rules committee to develop district and appellate court rules for stream system adjudications
8. The Chief Water Judge should chair a Judicial Water Committee consisting of the Water Judges, the Chief Judges and the Court Administrators in judicial districts where stream systems have been filed, and an employee of the Administrative Office of the Courts.
9. The Judicial Water Committee working with the OSE should establish a global litigation schedule for all stream adjudications in New Mexico, and each court should enter a scheduling order consistent with the litigation schedule.

10. The Judicial Water Committee, within the limits of the Code of Judicial Conduct, annually should consult with the OSE and jointly review the litigation schedule for all stream adjudications and address common issues for each stream system.
11. Each Chief Judge, Court Administrator and water judge presiding in districts where stream system adjudications are pending should annually forecast the need for judicial resources, including the need for court facilities. This forecast should be reviewed by the Judicial Water Committee.
12. The Judicial Water Committee should establish an annual budget for all state stream adjudications, and make recommendations to the Chief Judges' Council to efficiently operate the Water Court Divisions.
13. The Judicial Water Committee should establish a statewide judicial budget for stream adjudications which would then be submitted to the Budget Committee of the Chief Judges' Council in the same manner as other judicial agencies, and made part of the unified budget. The budget should be in two parts. One part should include funds to cover the impact that water disputes have on the normal operation budget of the judicial agency. The budget for this part should be determined by the usual budgeting process for the needs of that Judicial District. The other part should be a non-reverting fund to pay for contract employee expenses specifically related to water disputes, such as Special Masters, experts and mediators. Where a judge *pro tempore* presides, this non-reverting fund should also be sufficient to pay for a court reporter or tape monitor, a law clerk and a bailiff. A non-reverting fund ensures that judicial resources are timely available to respond to fluctuating demands for court action. Following current practice, the monies appropriated to stream

adjudications should be included in a fund within the Administrative Office of the Courts and distributed to the Judicial Districts as appropriate.

14. The Judicial Water Committee should develop a statewide, coordinated alternative dispute resolution process for stream adjudications with due consideration for unique circumstances in each stream adjudication.
15. In conjunction with the Judicial Education Center, the Judicial Water Committee should develop a program to educate judges, special masters and staff in water law.
16. The Chief Water Judge should consult annually with federal courts to minimize conflicts and develop a joint strategy to manage stream adjudications
17. The Legislature should establish an office of ombudsmen and hold periodic public forums to educate stakeholders about the law.

Except for paragraph 17 and legislation to appropriate adequate funding the foregoing can be established by Supreme Court rules, not by legislation. Any legislative action should be limited to remove impediments to existing adjudication procedure rather than focused on substantive changes to the Water Codes.

There are limits to what the Judiciary, the Legislature or the Executive branches can do to change existing legislation or rules of procedure to expedite the process. “No act of the Legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.”² This constitutional provision applies to court rules.³ Any rules

²New Mexico Constitution, Art. IV, Sec. 34,

³State v. DeBaca, 90 N.M. 806, 568 P.2d 938 (Ct. App. 1977)

changes would have to be consistent with this constitutional restriction.⁴ Modifying the current adjudication system or the structure of the court without careful analysis to avoid unintended consequences may make the process slower, more cumbersome and more expensive. Substantive changes to the Water Codes would be far more likely to generate attacks on the legislation's legality than implementing the recommendations by rules. It would be easier to modify rules that were determined to violate the constitutional proscription than to repeal or modify legislation. At the present time in New Mexico, there are no published court rules specifically for water issue disputes, although by order dated July 2, 1999, the Supreme Court authorized special rules for service of process in stream adjudications. Neither are there specialized district or appellate courts designated as Water Courts to address only water issues.

In some states, legislative changes in the law have created a climate of uncertainty and contribute to the delay in ongoing, pending adjudications. Major legislation can produce litigation and stall progress. For example, litigation followed the adoption of the Colorado Water Rights Determination Act of 1969, the revised Montana adjudication statute in 1979, and the Arizona general stream adjudication statutes in 1979. In Idaho, the United States challenged the legislation passed in 1994 to modify the Snake River adjudication. This caused an eighteen-month delay and the holding by the Idaho Supreme Court that certain portions of the legislation were unconstitutional.

Consistent with the Mission and Goals of the Strategic Plan of the New Mexico Judiciary, the form of the Water Court being recommended addresses the urgent need for expediting stream adjudications while protecting the rights of water users, within the limited resources of the state.

⁴ New Mexico Constitution, Art. IV, Sec. 34

This structure should avoid the delays and litigation that other states faced when they modified their stream adjudication procedures.

Methodology

As originally conceived, the methodology was to consist of the following:

Review of government web sites of selected western states, state engineer's offices and judiciaries for adjudication statutes, description of court structures for water adjudications, and descriptions of rules and procedures used.

Review and evaluation of the constitutional and statutory provisions and rules addressing water adjudications in various western states.

Organize an *ad hoc* committee of judges handling stream adjudications and members of the bar who commonly handle water issues to review and propose rules changes appropriate for water adjudications.

The sampling technique anticipated was the following:

Short questionnaire to the attorneys of New Mexico State Engineer's Office. Then, a questionnaire to attorneys regularly representing parties in water cases, and other stakeholders in water adjudications to identify perceived problems and proposed solutions.

After receipt of the answers, a short questionnaire to judges, administrative offices of courts, and state engineers of selected western states regarding the court structure and procedures and problems of water adjudication suits in these states.

The sampling techniques proved to be impractical. The questions sent to the General Counsel of the State Engineer were not answered until very late because the election of a new governor resulted in the change of the State Engineer. This caused reluctance of the General Counsel for the State Engineer to respond to the questionnaire. A meeting was scheduled of attorneys regularly representing litigants in water disputes, but the problems discussed related to very narrow, specific questions immediately confronting the attorneys rather than a broad overview of the problems of stream adjudications.

Although rules of other jurisdictions were not studied in depth, it was determined that most states relied on the regular rules of civil procedure and did not have rules specific to stream adjudications.

It became evident that there would not likely be any consensus, since, within New Mexico, no person or entity had made a careful review and critique of the overall process. Like the parable of the six blind men trying to describe an elephant, each stakeholder perceived the problem from a limited perspective and did not see the complete elephant. The initial conception of questionnaires to stakeholders could not be focused on a target audience in a potentially fruitful way to be completed within the allowed time frame.

Therefore, the paper attempts to accurately describe “the elephant,” to wit, a stream adjudication, and give perspectives of the problems limited to that of the court. Informal discussions with Judge Pro Tempore and federal Special Master Harl D. Byrd and federal Special Master Vickie Gabin were critically necessary to look at the problem statewide rather than from the parochial view of the author as presiding judge of the Lower Rio Grande Basin Adjudication. Both Judge Byrd and Special Master Gabin provided copies of Orders in the Pecos adjudication

and federal adjudications regarding procedures adopted specifically for those cases. Both added valuable suggestions to this paper. Ms. Gabin also provided excellent editing.

This study entailed an in depth review of New Mexico Water Codes and case law as well as federal legislation and case law and the water codes of other states.

The methodology evolved into the following:

1. Evaluating Water Court proposals of the gubernatorial candidates.
2. Evaluating the critique of the Office of the State Engineer in an Audit by the Legislative Finance Committee.
3. Evaluating a discussion draft of proposed legislation addressing adequate resources for adjudications.
4. Addressing recommendations of New Mexico First.
5. Evaluating public comments of the General Counsel of the State Engineer identifying problems that he perceived.
6. Review of the statutory process of stream adjudications in New Mexico and other states that have adopted the Prior Appropriation Doctrine and the interrelated jurisdiction of state and federal courts.
7. Review of relevant literature.
8. Review of the structure of the New Mexico Judiciary and the role of the courts in stream adjudications.

After beginning this paper, the Supreme Court appointed an *ad hoc* committee, which the author chairs, to review and propose rules changes appropriate for adjudications.

Review of Relevant Literature

This paper is substantially influenced by the literature review and is footnoted to identify the literature that establishes the basis of its conclusions and recommendations. The literature review points to the conclusion that each state must look to its own history, legislative development of water law and case law interpretation as well as available resources to identify appropriate choices in expediting stream adjudications.

The judiciary is the third branch of government and the ability of the government to function adequately is dependent on the ability of the judiciary to perform its constitutional duties. The burden of expediting adjudications can impact the ability of the court to complete its other functions unless there is adequate funding and careful use of its limited resources. There are alternatives to court structure to complete adjudications. Which alternative is best depends on many factors. Factors include, resources available to the state to fund any institutional structure to expedite the process, the impact of the pace of the adjudications on basic resource needs of the population and the economic consequences of the uncertainty caused by unadjudicated water rights.

Considering the present structure of New Mexico courts, creating a specialized Water Court separate and apart from general jurisdiction courts will create a heavy budgetary burden on the state without a corresponding increase in efficiency or effectiveness. Robert W. Tobin in Creating the Judicial Branch: The Unfinished Reform, published by the National Center for State Court in 1999, argues for the need for a unified court. The American Bar Association's Standards of Judicial Administration, Vol. I Standards Relating to Court Organization also supports the concept of an unified court. Specialized expertise is needed in stream adjudications, but this can

be afforded under the general administrative structure of courts of general jurisdiction.

Establishing Water Court Divisions within in the existing structure of the court is not antagonistic to a unified court. This would permit judges assigned to Water Court Divisions to gain the necessary expertise with minimal disruption to the court.

All Prior Appropriation states face similar problems, to a greater or lesser extent, but there has not been one common answer among state jurisdictions to determine which one of the myriad choices is the most cost-effective and efficient way to resolve the legal and factual issues inherent in stream adjudications. The immutable past of each jurisdiction determines to a great extent present choices and limits possible futures.

The adjudication statutes of western states that have adopted the Prior Appropriation Doctrine give the legislative structure of stream adjudications for each state. Comparison discloses both similarities and differences with the New Mexico Water Codes. Many Water Codes, such as Idaho and Colorado have set out procedure in minute detail. Others such as Nevada as well as New Mexico do not contain detailed procedures but authorize the State Engineer to develop rules and procedures.

How can the institution of the court timely address the increasingly critical need to complete adjudications with ever diminishing resources? A review of the legislative history and the case law annotations of other states' statutes show that many states have struggled with establishing an efficient system of stream adjudications. When major substantive changes have been made, litigation follows challenging the legality of the changes. Arizona, Colorado, Idaho and Montana all have endured substantial litigation after major changes in their Water Codes. Delay, rather than expedition, is the rule when substantive changes are made to Water Codes. The travails of other states that have attempted to change their Water Codes lead to the conclusion that

judicially established Water Court Divisions and specialized judicial rules would present less of a risk of protracted legal challenges than legislative changes. If challenges are made, rules can be modified easier and more quickly than statutes.

American jurisprudence is conservative and backward looking. *Stare decisis* makes changes in the law ponderous. Legal action is based on the historical foundation of the law within a particular jurisdiction. Water Codes follow this paradigm. Any study of water law always requires an historical perspective. Ira G. Clark's comprehensive work, Water in New Mexico, A History of its Management and Use, (University of New Mexico Press, 1987) is without parallel in New Mexico. Also useful is John O. Baxter's Dividing New Mexico's Waters, 1700-1912, (University of New Mexico Press, 1997). G. Emlen Hall's book, High and Dry, The Texas-New Mexico Struggle for the Pecos River, (University of New Mexico Press 2002) looks at a United States Supreme Court case involving interpretation of a river compact.

Each of these publications reveal the great difficulties of administering water and the fundamental importance of water and water rights to a functioning society. The past is truly prologue. An understanding of how those responsible for supervising and administering water in the past addressed problems helps us chart a course to meet the limits and the difficulties of the problem and to identify the possibilities we have to improve the process. Ramsey L. Kropf, in her article cited below, quotes Fedric William Maitland, "Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."

There can be a huge budgetary impact on the state. This impact can result either from allocating resources to expedite completion of the adjudications or from uncertainty from the delay in completing them. Common problems of stream adjudications identified in literature and procedural orders filed in specific cases include the difficulty of prompt joinder of all those who

claim an interest, water right owners' lack of understanding and fear of the process, difficulty of water right owners in accumulating evidence, scientific uncertainty in hydrology, lack of common rules and procedures within a state, no adequate procedure to update and maintain the accuracy of the adjudication once it has been initially determined. Several adjudications in New Mexico are decades old. The reasons for the delay can be specific to a case or inherent in the process. Legislatures are reluctant to appropriate adequate monies. Complex legal issues are common. Federal reserved rights are perplexing to all.

John Thorson has been a thoughtful voice in identifying problems common among adjudications in several states. "Clarifying State Water Rights and Adjudications: Two Decades of Water Law and Policy Reform: A Retrospective and Agenda for the Future" from the Natural Resources Law Center, University of Colorado School of Law (2001) and "State Watershed Adjudications: Approaches and Alternatives", 42 Rocky Mtn. Min. L. Inst. (1996) are two of his articles. Mr. Thorson brings a wealth of experience to his publications and is particularly adept at placing stream adjudications in historical perspective, explaining the state and federal relationships in water law and analyzing the purposes of stream adjudications.

A comparison of adjudication procedures in different states is set forth in A. Lynne Krogh's "Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems and Solutions," Land and Water Law Review, Vol. XXX, No. 1, (1995). Ms Krogh analyzes both the similarities and the differences among western Water Codes. She has characterized Water Codes as falling within three classifications: those which describe primarily administrative systems; those which describe primarily judicial systems; and those in the middle which she labels as "integrated." New Mexico falls within the integrated systems. She has provided an analysis of the advantages and disadvantages of the various adjudication systems.

Ramsey L. Kropf, is a Special Master for the Big Horn River and has shared a wealth of practical experience in “Basin-Wide Adjudications in the West: What Works, What Doesn’t,” Strategies in Western Water Law and Policy, Courts, Coercion and Collaboration, Natural Resources Law Center, University of Colorado, School of Law, June 8-11, 1999. She points out the impact of the shift from agricultural use to municipal use and the role adjudications play in market activity in water rights. She has made several very astute suggestions to improve the process of adjudications. Several of her suggestions were helpful, particularly, “Don’t complicate the statutory set-up, simple is better.”

The National Water Commission, in 1973, published, A Summary-Digest of State Water Laws in the Nineteen Western States, edited by Richard L. Dewsnup and Dallin W. Jensen. This is a helpful, though outdated, summary of water law in all of the states.

How other jurisdictions have attempted to address problems inherent in stream adjudications is instructive. In spite of similarities of stream adjudications, each face different circumstances. Montana statutes establish a water court separate from the courts of general jurisdiction. This is more appropriate for Montana than it is for New Mexico because Montana is attempting to adjudicate all stream systems in the state. Idaho faces similar circumstances. Colorado has a Water Court that is integrated with the courts of general jurisdiction, but assigns to such courts most of the administrative duties and responsibilities that, in New Mexico, are performed by the State Engineer. This is consistent with Colorado history of adjudications but has no precedent in New Mexico. Colorado has completed adjudications on nearly all of its surface water rights although a substantial amount of groundwater has yet to be adjudicated. Most of the issues reaching the water court in Colorado are post-adjudication transfers or changes in use. This

presents very different problems than the problems in New Mexico where, in most streams, both surface and groundwater have not been adjudicated.

Any study of Colorado water law leads one to Colorado Supreme Court Justice Gregory J. Hobbs, the poet laureate of western water law. He has authored many articles on this subject. Prominent among them is, “Colorado Water Law: An Historical Overview, Vol. 1. No. 1, U. Denv Water L. Rev. 1 (Fall 1997). Vranish’s Colorado Water Law, Rev. ed. (1999) edited by James N. Corbridge and Teresa A. Rice is a comprehensive and authoritative treatise on this subject. A review of Colorado water law demonstrates very substantial historical differences when compared with New Mexico. The primarily judicial Colorado process has no precedent in New Mexico. Though it is an expensive process, it apparently works well for Colorado. The different problems faced in a jurisdiction where most streams have been adjudicated lead to the conclusion that it would be difficult to adapt the Colorado system to New Mexico.

Washington is currently studying their system to identify ways to improve. Several reports have resulted from this review. See, Jim Pharris, Mary Sue Wilson, Alan Reichman, “Federal and Indian Reserved Water Rights”, A Report to the Washington State Legislature, October 2002. Complicated federal reserved water rights plague adjudications in several states, but many problems stem from circumstances particular to each state.

Although there are similarities in stream adjudications, and review of other states’ procedures is instructive, each state faces different circumstances and problems that demand different solutions. In New Mexico, the limited resources, the presence of a substantial amount of federal reserved rights, laws of sovereigns that predate the current sovereign, (in New Mexico, acequia law is derived from Mexican and Spanish law), unique compacts, the relative scarcity of water and resources available all affect and limit options. The ways that other states approach the

problems inherent in stream adjudications are instructive, but each state must look to its own history, legislative development of water law and case law interpretation as well as available resources to identify appropriate choices in expediting stream adjudications.

I. THE NEED TO CHANGE - PROBLEMS AND POSSIBLE SOLUTIONS

“What is the use of running when we are not on the right way?”
German Proverb

A. The Political Context

“I’d just like to know what in hell is happening, that’s all I’d like to know, what in hell is happening! Do you know what in hell is happening?”
Caption of a cartoon in New Yorker Magazine

Drought, increased population growth and threatened litigation with Texas focused attention on the need in New Mexico to timely complete stream system adjudications.

“Texas Prepares to Launch Legal Battle for Water Rights,” proclaimed a headline in the *Las Cruces Bulletin* of June 14-20, 2001. The article reported, “The governor of Texas signed into law \$6.2 million for legal proceedings specifically earmarked to acquire water for Texas from the Rio Grande below the Elephant Butte Reservoir.”

In 1983, the United States Supreme Court addressed a dispute between New Mexico and Texas that continues to have a significant effect on the management of water throughout New Mexico and not just on the Pecos River.⁵ The former State Engineer, Thomas Turney, indicated

⁵Texas v. New Mexico, 462 U.S. 554 (1983), See G. Emlen Hall, High and Dry, The Texas-New Mexico Struggle for the Pecos River, University of New Mexico Press (2002)

that a priority call on the Pecos may be necessary to meet New Mexico's delivery obligation to Texas.

Recently, the Legislative Finance Committee of the New Mexico Legislature prepared an Audit of the OSE.⁶ The Audit reported that inadequate planning and problems caused by unadjudicated surface and groundwater basins have resulted in a situation where the amount of water available is uncertain. Further, the Audit reported that the backlog of pending administrative actions has been unsatisfactorily addressed because of the failure to follow statutory and regulatory deadlines and inadequate file management.

The Audit focused on problems with the administrative processes of the OSE and made no review of the stream adjudication process. However, it recommended that a water court be established "similar to the water court system in Colorado dedicated strictly to water right issues to assist in expediting adjudications."⁷

Gubernatorial candidates made water an issue in the campaign. Republican candidate John Sanchez proposed adding water judges to the OSE to adjudicate water rights cases and adding three judges to the state Court of Appeals to handle appeals arising from the water judges' decisions. Water judges would be like worker compensation judges. The proposed water judges would take over administrative hearings within the OSE involving disputed water right permits. Appeals would go to the Court of Appeals rather than the district court.⁸ Bill Richardson, the Democratic candidate, proposed the creation of a Water Court to expedite the settlement process.

⁶Legislative Finance Committee, "Office of OSE and Interstate Stream Commission, Audit of Operations," April 29, 2002.

⁷Id at page 7

⁸Las Cruces Sun News, Aug. 23, 2002

He would staff the new courts with judges specializing in water law and with sufficient clerks and filing systems. Water right disputes of all types would be filed with this Water Court. He proposed to fund the Water Courts out of general fund recurring revenue by reallocating existing appropriations.⁹ In November, 2002 Bill Richardson was elected, and in January 2003, he appointed a new State Engineer.

New Mexico First, a well-respected citizens' organization, recommended the following approach to the Legislature:

“The Imperative for Adjudication

“Knowing who has the rights to use what water is essential for planning; yet only a small percentage of claims to water rights have been adjudicated. The current adjudication process is slow, cumbersome, and expensive. Recent efforts to accelerate adjudication have begun but need to be sustained and enhanced.

...

“Recommendations [of New Mexico First]

1. Adjudicate Water Rights For The Entire State Of New Mexico With The Goal Of Completion Within The Next 15-25 Years

“Enforcement of water rights and usage, protection against losing New Mexico's water to neighboring states and Mexico, and an effective system for transferring water rights and for water banking that consider the impacts on existing rights, all depend on an accurate accounting of who has the right to use what quantities of New Mexico's water and how they may use it. To date, only a small portion of water rights claims have been adjudicated, due to the painfully slow and inefficient process and the lack of resources to comprehensively address its many components, including hydrological surveys, preparation and negotiation of offers of judgment, and litigation and contested offers. The Town Hall urges the following actions to ensure that all claims now underway and those yet to begin are adjudicated in timely fashion, as a first step in improving enforcement and assembling comprehensive and accurate information to assist in water resource planning.

“The Legislature should authorize and fund the creation of a system of New Mexico water courts to allow development of specialized judicial consideration of complex water rights cases and to improve the efficiency and timeliness of adjudications and administrative appeals from the OSE. The water court system should include rights administration and law and a mediation process to resolve disputes in the context of adjudication or the permitting and transfer process.

⁹Richardson Campaign Position Paper (2002)

“Funding will be needed for additional staff, contractors, technical experts, new data acquisition and interpretation, and model development.”¹⁰

The New Mexico First recommendations rely on assumptions that should be questioned. The reason why so few water claims have been adjudicated lies primarily with the historical lack of resources for action by the OSE. Until recently, the OSE has been unwilling to initiate stream adjudications, and in some instances, has resisted actions to compel stream adjudications.¹¹ The State Engineer finds it difficult to allocate resources to prosecute the large number of pending stream adjudications and simultaneously meet the demand for administrative action.

A priority call on the Pecos River may be unavoidable in the very near future to meet New Mexico’s obligations under the Pecos River Compact. Three adverse consequences could flow from such a call. First, a call could result in severe economic consequences to junior appropriators. Secondly, it could generate strong political reaction to the Prior Appropriation Doctrine, which could hamper the operations of the OSE. Thirdly, the increase in litigation which could result from such a call could tax the present resources of that office as well as the court.

Neither a separate Water Court nor a wholesale restructuring of water rights administration will address problems with managing the state’s water resources. The lack of resources, not the existing institutional structure, is the root cause of the delay in completing stream adjudications.

¹⁰New Mexico First: “New Mexico’s Water: Perceptions, Reality and Imperatives, Report of the Twenty-Eighth New Mexico First Town Hall,” May 16-19, 2002

¹¹See the OSE’s Motions and Briefs filed in State of New Mexico, ex rel Office of the OSE v. Elephant Butte Irrigation District, In the District Court of Dona Ana County, CV 86-888, CV 96-888

B. The Point of View of the State Engineer

Before an effective solution can be devised, the parameters of the problem must be clearly identified. Last year, the OSE contracted with two retired judges who proposed draft legislation providing for the appointment of district water judges *pro tempore*, special water masters and other personnel under a two-year pilot project to expedite water rights adjudications in critical stream systems of the state.¹² The draft legislation neither modifies the structure of the court nor changes the present authority of the Supreme Court to designate judges *pro tempore* or district judges to appoint special masters. It does, however, include appropriations over and above the regular budgets of the court and addresses the issue of adequate resources for judges *pro tempore*.

On two separate occasions, the General Counsel for the OSE identified problems. The following discussion consolidates them and interprets his concerns:

1. The General Counsel expressed concern that state adjudication judges *pro tempore* lack adequate staff. He identified the need to “[c]reate a funding mechanism that could be flexible to meet future demands on the adjudication courts where trial activity becomes more regular and predictable and to respond to litigation arising from a priority call or other water management issues.”

This requests the Legislature to adequately fund stream adjudications, particularly to provide adequate staffing for judges *pro tempore*. This also suggests that there should be a mechanism to ensure that funds should be available when needed. The Legislature typically

¹²William R. Federici, Thomas A. Donnelly, “Legislation Discussion Draft” dated November 21, 2001

requires reversion of funds to the state if an agency does not spend all monies allocated in the fiscal budget. This request asks that stream adjudication funds not be subject to reversion.

2. The OSE wants a system that would ensure the continuing accuracy of adjudicated water rights. This would preserve the integrity and utility of completed adjudications and avoid the need to readjudicate water rights in the future.

Under the current statutory scheme, one duty of the OSE is to maintain accurate records. Effective water administration is dependent on centralized water right records which are complete and accurate so that existing demands on the stream system can be evaluated and the availability of unappropriated water assessed. Accurate records also aid the statutory adjudication process by identifying existing users and uses. These statements suggest that the OSE lacks resources to address forfeitures, abandonments, and other changes in water rights over time. The OSE should review its internal procedures and analyze the resources it would need to maintain current records and request adequate funding from the Legislature.

The inability of the OSE to maintain accurate records is caused partially by lack of resources and/or disorganization, but it is also exacerbated by an institutional defect in water law. Consider the institutional structure for land titles. Deeds and mortgages are filed at the county clerks office. When a property is sold, the seller gives the buyer a deed which the buyer must file to give protection to his or her title. The County Assessor assesses taxes based on the deed records. The County Treasurer bills the record owner of the property and if *ad valorem* taxes aren't paid, the land can be sold at a tax sale. If a record owner dies, a probate action can be filed to pass title to devisees or heirs at law, or the property can escheat to the state. Quiet title actions

can clarify and remove clouds on the title. A complete history of the ownership of land can be obtained by researching the deed records.

Contrast that institutional procedure with the lack of an institution to determine the history of water rights. Until there is a stream adjudication, there is ambiguity of title. The permit records of the OSE do not establish title. A stream adjudication can establish title as of a particular time, but there is no mechanism to insure timely updates to the judicial decree. New Mexico needs an institutional structure that insures the continuing accuracy of adjudicated water rights.

3. The adjudication court should have exclusive jurisdiction over all appeals of OSE administrative decisions, both during the active adjudication and after the entry of a final decree, to ensure consistency in water rights decisions

This relates to venue of administrative appeals, and this could be addressed by modifying the venue statute. It also suggests that stream adjudication suits should not close after a decree is entered. In order to avoid the judicial decrees becoming stale as a result of changes in circumstances over time. This also implicitly raises the issues of the knowledge, experience and qualifications of a judge assigned a water dispute who is not a presiding judge in a stream adjudication. The State Engineer is concerned that judges not assigned to the stream adjudication can resolve appeals or individual disputes inconsistently with the adjudication. The argument is as follows: A stream system can traverse several counties. Judges in one county may succumb to regionalism and decide issues in favor of the local constituency, contrary to the interests of water users in another county or district and inconsistent with the way the issues were decided in the entire stream system adjudication. Whether or not this occurs, the perception that it does occur is a

matter that could be addressed by a program of continuing judicial education and by a venue statute that transfers water disputes to the court presiding over the stream adjudication.

4. There should be prioritization of the active state adjudications to allocate limited resources efficiently among the adjudications.

Prioritization is a discretionary decision of the OSE. In New Mexico, there are five stream adjudications in state court at present; and six stream adjudications are in federal court.¹³ Judges have the duty to timely manage the cases assigned to them and do not ordinarily consider a litigant's cases in other courts unless there is a direct conflict with a scheduled hearing. A judge presiding over a stream adjudication has a duty to see that the judge's specific adjudication proceeds timely without regard to other stream adjudications that the OSE is prosecuting. *Ex parte* contacts between the court and litigants is proscribed by the Code of Judicial Conduct, but there should be a procedure that permits communication between the OSE and the court without running afoul of the Code. This indicates a need for the OSE to coordinate resources among stream adjudications in both state and federal courts. There should be some mechanism among the courts and the OSE to assist in the appropriate allocation of limited resources.

5. There should be coordination of activity among the various adjudications, standardization of rules for stream adjudications and standardization of forms of final decrees to simplify water rights administration."

This is a suggestion that specialized rules for stream adjudication should be formally adopted and be consistent among all state adjudications. The Supreme Court has appointed an *ad hoc* committee specifically to address this. A final decree always serves as the basis for water

¹³Appendix A Pending Stream Adjudications in New Mexico

rights administration. This may be a reference to ambiguity in past decrees or failure to timely update the decree due to changing circumstances.

C. Problems Identified

1. Both the OSE and the courts should be adequately funded for stream adjudications.
2. The state and federal courts and the OSE need a procedure to communicate regularly to identify problems best addressed jointly, including issues of priority, resource allocation and coordination of budget needs.
3. The courts and the OSE need to establish criteria for new judicial decrees that are compatible and integrated with earlier decrees. Additionally, an institutional structure should be established to update Judicial Decrees to incorporate changes over time and recommend legislative action, if necessary.
4. The court needs a training program to educate judges, special masters and other court personnel in water law.
5. The court needs to establish consistent statewide rules and procedure for stream adjudications including statewide record keeping among courts and with the OSE.

D. Can a Water Court Improve the Efficiency and Timeliness of Adjudications and Administrative Appeals?

“Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least, but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in . . . [the suit] without

knowing how or why; . . . but Jarndyce and Jarndyce still drags its dreary length before the court, perennially hopeless.”¹⁴

Although stream adjudications have typically been pending in both state and federal courts in New Mexico for many years, it has not been the inability of the court to process cases that has caused delay. There can be complex procedural and substantive matters such as removal from state court to federal court, remand from federal to state court, jurisdictional disputes and interlocutory appeals. Due process dictates that the court provide adequate time in order to properly resolve the issues among the parties. The adjudication of the stream system must be comprehensive and the task of joining thousands who claim the right to use waters necessarily takes time. Many disputes may relate to hydrology. If the dispute becomes a battle of experts, this can be costly, time-consuming, and can require substantial court resources.

The recommendations of New Mexico First, the positions of the candidates for governor and the proposal of the Legislature assume that establishment of a Water Court could expedite adjudications and administrative appeals from the OSE. That assumption may not be completely correct.

The most significant delay in resolving water disputes outside stream adjudications has been the delay by the OSE in making decisions in administrative hearings. The administrative hearings in that office are backlogged.¹⁵ The establishment of a Water Court would not address these administrative delays. By contrast, there has been no delay in the courts resolving appeals

¹⁴Charles Dickens, Bleak House at 20 (1853) as cited in an unpublished manuscript of John E. Thorson, Ramsey L. Kropf, Dar Crammond and Andrea Gerlack

¹⁵Legislative Finance Committee, “Office of OSE and Interstate Stream Commission, Audit of Operations,” April 29, 2002.

from administrative decisions. Judicial statistics demonstrate very few appeals to the district court from these administrative decisions.¹⁶

Water disputes that do not arise in stream adjudications, including both appeals *de novo* from administrative decisions of the OSE to the district court and those among individuals, have involved historically only a very small part of a district court's caseload. These cases are not identified specifically as water disputes in the caseload reports, but are grouped into civil miscellaneous or civil appeals and are resolved in the ordinary course of the court's work within time frames established for civil disputes.

Under current procedure, the time for the disposition of administrative appeals and disputes between individual water claimants varies in the same way as other pending cases of the assigned judge. The time for disposition for cases depends on the resources that the Legislature has provided to the court, a judge's total pending caseload, the complexity of the case, the diligence of the parties and the assigned judge's efficiency in handling his or her total caseload.

By contrast, some stream adjudications have been pending for many years. A Water Court would not necessarily eliminate delays. In pending stream adjudications, the courts have frequently been faced with strong assertions from the OSE that it does not have the resources to proceed in a timely manner.¹⁷ Because of the expense associated with a stream adjudication, the Legislature has been reluctant to adequately fund the OSE. Obtaining adequate legal staffing to prosecute thousands of water rights claims has been a persistent problem.

¹⁶See generally the Annual Reports of the New Mexico Judiciary

¹⁷See the OSE's Motions and Briefs filed in State of New Mexico ex rel Office of the OSE, et al v. Lewis, et al, Nos. 20294 and 22600 Consolidated, Fifth Judicial District Court, State of New Mexico

SCRA 1-16 of the New Mexico Rules of Civil Procedure requires a judge to set a civil case for trial in a timely manner, 18 months after filing if no Pre-trial Order is entered, 24 months if a Pre-trial Order is filed. The court has discretion for good cause shown to extend the time for the commencement of trial beyond the express deadlines. Stream adjudications are not expressly excluded from these time limits. However, if SCRA 1-016 were applied, the consequence would overwhelm both the OSE and the courts.

To illustrate, the OSE has indicated that there are 25,000 water right owners claiming rights to use the waters of the Lower Rio Grande Basin. If SCRA 1-016 deadlines were applied, 25,000 matters regarding issues between the OSE and individual claimants would have to be resolved by settlement or trial within either eighteen months or two years. If ten percent require a special master hearing, numerous special masters, court tape monitors or court reporters, and a substantial increase in clerical help to process the large number of pleadings would be required. Additionally, the vast majority of water rights claimants appear *pro se*, which can materially increase the time necessary to resolve disputes.

This scenario would also require additional district court judges to review each of the special masters' report and to conduct hearings if there were objections. A very substantial increase in the number of courtrooms would be required.

The OSE would have to allocate substantial resources to prosecute each dispute. There would be a potential of several thousand additional suits in the *inter sese* phase.¹⁸ Water right owners may proceed without an attorney but they are entitled to attorneys. However, the number of private attorneys knowledgeable in water law is very limited. If disputes were tried very close

¹⁸See page 23 hereinafter

in time, defense attorneys would be unavailable to handle the vast majority of those litigants who want legal representation.

Although current procedures in stream adjudications can correctly be characterized as slow, cumbersome and expensive, some, perhaps most, of this result is inherent in the need to adjudicate the entire stream system. The adjudication must be comprehensive, and all who use waters on the stream system must be joined.¹⁹ All parties are entitled to due process. Establishing a Water Court does not abrogate the need to join all parties whose interests may be affected nor eliminate the right of litigants to their access to court. Neither would a water Court reduce the complexities faced by the OSE in managing the waters of the state.

It is unlikely that the Legislature can appropriate the hundreds of millions of dollars from the general fund to pay for the tremendous increase in resources that would be needed if adjudications were completed within the express deadlines of SCRA 1-016 or some other arbitrarily determined deadline. The resources of the state will always restrict what can be done to expedite adjudications. The task must be to search for an efficient and fair process within the limited resources of the state.

¹⁹ Sec. 72-4-15, -17, NMSA, 1978 Comp.

E. Suggestions That Could Improve the Timeliness of Adjudications:

“Whiskey’s for drinking, water’s for fighting.”²⁰

Much of the contentiousness of stream adjudications result from lack of understanding of the law and of the process. With adequate legislative funding, the following could inform all stakeholders and reduce delays inherent in stream adjudications:

1. The state could establish an office of ombudsmen. A high percentage of water users come before the court *pro se*. Ofttimes, a water user’s reluctance to accept an offer of judgment from the OSE stems from lack of understanding. A knowledgeable ombudsman could be a resource for water users to seek the information from an unbiased source that could resolve many differences with the OSE. Even if all issues could not be resolved, this resource could reduce the disputes that the courts must resolve to those with material issues of law or fact.
2. The office of ombudsmen or the court could organize periodic public information programs to educate the public and disseminate accurate information to citizens, governmental organizations and non-governmental organizations to alleviate the anxiety caused by uncertainty and misunderstanding.

²⁰Mark Twain

3. The court could establish a statewide alternative dispute resolution process for stream adjudications and adapt the process to circumstances unique in each stream adjudication.

II. WATER LAW AND STREAM ADJUDICATIONS

A. Federal - State Relationship in Water Issues

“A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.” Oliver Wendell Holmes

The shared sovereignty between the federal system of the United States and the individual states, and the overlapping of state and federal water laws, affect the supervision and regulation of water.

The United States Supreme Court frequently handles water disputes between states. “. . .[A]ll non-navigable waters . . . should be reserved for the use of the public under the laws of the states and territories named.”²¹ Stream systems can be interstate and in some instances, such as the Rio Grande, can be international. Nevertheless, water rights are generally determined by state law subject to federal preemption in some instances.²²

1. Equitable Apportionment

When a stream system traverses among several states, disputes between states can arise regarding a state’s use of the water. Neither the state district court nor federal district court has

²¹California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), Nebraska v. Wyoming, 325 U.S. 589 (1945)

²²Arizona V. California, 283 U.S. 423 (1931)

jurisdiction to decide this dispute. These are conflicts between sovereign states which must be resolved by the United States Supreme Court.

The United States Supreme Court has resolved disputes between states regarding the use of waters of an interstate stream by equitable apportionment. The basis of equitable apportionment arises out of the Prior Appropriation Doctrine and states that each interstate basin state is entitled to an equitable share of the waters of a common stream system.

Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas, if a limitation is imposed on the former – these are all relevant factors. . . .²³

. . . [E]quitable apportionment will protect only those rights to water that are reasonably acquired and applied. Especially in those Western states where water is scarce, there must be no waste of the treasure of a river. Only diligence and good faith will keep the privilege alive. Thus wasteful or inefficient uses will not be protected. Similarly, concededly [sic] senior water rights will be deemed forfeited or substantially diminished where the rights have not been exercised or asserted with reasonable diligence.

We have invoked equitable apportionment not only to require the reasonably efficient use of water, but also to impose on states an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream system.”²⁴

²³Wyoming v. Colorado, 259 U.S. 414 (1922)

²⁴Colorado v. New Mexico, 459 U.S. 176 (1982), 467 U.S. 310 (1984)

According to Richard A. Simms, the United States Supreme Court has indicated that the Equitable Apportionment Doctrine may be in transition and that priority of appropriation might be varied to supplant existing uses with new uses of higher economic value.²⁵

[I]n [Colorado v. New Mexico, 467 U.S. 310,315 (1984)] Justice O'Connor noted the Court's continuing belief "that the flexible doctrine of equitable apportionment extends to a State's claim to divert previously appropriated water for future use." The Court also noted that an apportionment for a new use on a fully appropriated river could result from "clear evidence that a project is far less efficient than . . . other projects.[at page 312]" Consequently, the . . . opinions seem to indicate a new direction in equitable apportionment, a direction that will necessarily undermine expectations long settled under state law.²⁶

2. Federal Legislation

The United States Congress had established a policy of transferring the public domain to private interests. The Homestead Act encouraged any person older than twenty-one years of age to settle, cultivate, and acquire ownership of 160 acres of public lands.²⁷ The Desert Land Act granted 640 acres of land to those who developed water to irrigate the lands within three years.²⁸

The most significant federal legislation affecting regulation of water is the Reclamation Act of June 17, 1902, 43 U.S.C. Sec. 371. The Act provided for the examination and survey of lands and for construction and maintenance of irrigation works for the storage, diversion, and

²⁵Richard A. Simms, "Equitable Apportionment-Priorities and New Uses", 29 Nat. Resources L. J. 549 (Spring 1989)

²⁶Id at page 563

²⁷Act of May 20, 1862, Ch. 75, 12 Stat. 392 (1892)

²⁸Act of Mar 3, 1877, Ch. 107, 19 Stat. 377, 43 U.S.C. Sections 321-23 (1994)

development of water for the reclamation of arid and semi-arid lands.²⁹ The basic goals of the reclamation law included creation of family-sized farms in areas irrigated by federal projects.³⁰

Under the Reclamation Act, the Bureau of Reclamation may not furnish any water except for beneficial use, and must distribute available water according to priorities among different users which are established by state law.³¹

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or use of water in, to or from any interstate stream or the waters thereof.³²

3. The McCarran Amendment

Stream adjudications are incorporated into the law of most western states and most have adopted the Prior Appropriation Doctrine.³³ If the United States has any claim to waters in a stream system, the McCarran Amendment of the federal Reclamation Act applies.³⁴ The McCarran

²⁹Henkel v. U.S. 237 U. S. 43, 35 S. Ct. 536, 59 L. Ed. 831 (1915)

³⁰United States v. Tulare Lake Canal Co., 535 F.2d 1093 (1976), cert. denied 429 U.S. 1121, 97 S. Ct. 1156, 51 L. Ed. 2d 571 (1976)

³¹Fox v. Ickes, 137 F.2d 30, cert. denied 320 U.S. 792, 64 S. Ct. 204, 88 L. Ed. 477 (1943)

³²Reclamation Act, 43 U.S.C. 383 (1994)

³³ARIZ. Rev. Stat. Ann Sections 45-251 to -264 (1994 & Supp. 1996-97); COLO. REV. STAT. ANN. Sections 37-92-101 to -602 (West 1990 & Supp. 1996); IDAHO CODE Sections 42-101-to -1428 (1996); MONT. CODE ANN. Sections 85-2-211 to -243, -701 to -705; NEV. REV. STAT. ANN. Sections 533.090-320, 534.100 (Michie 1995); OR. REV. STAT. Sections 539.005 to .240, .300to -350, 541.310 to .320 (1995); TEX. WATER CODE ANN. Sections 11.301 to .341 (West 1988); UTAH CODE ANN. Sections 73-4-1 to -24 (1989 & Supp); WASH. REV. CODE Sections 90.03.110 to -.245 (1994 & Supp. 1995); WYO. STAT. Sections 1-37-106, 41-4-301 t -331 (1988 & 1995)

³⁴Reclamation Act, 43 U.S.C. Sec. 666 (1994)

Amendment waives federal sovereign immunity in general stream adjudications so that stream adjudications with federal claims may be brought in state court.

Because of extensive federal interest in New Mexico with federal reserved and state-based water rights, including substantial reserved rights of Native American populations, most stream adjudications brought in state court must meet the requirement of the McCarran Amendment that the adjudication be comprehensive. What constitutes an entire stream system pursuant to the McCarran Amendment can be a hotly disputed jurisdictional issue.

Subject to the McCarran amendment, federal courts in any state have concurrent jurisdiction with state courts for stream adjudication suits.³⁵ Stream adjudication suits may be brought initially in federal court or may be removed to federal court from state court following required federal procedure for removal.³⁶ Six New Mexico stream adjudication proceedings are pending in federal court. Sometimes the federal district court abstains from exercising jurisdiction to avoid piecemeal adjudications when there is a parallel state court adjudication pending. This is known as the Colorado River Doctrine³⁷

If the OSE files a stream adjudication suit in state court, but the requirements of the McCarran Amendment for the waiver of immunity for federal claims cannot be met, the case may be removed to the federal court³⁸. The Rules of Civil Procedure for state courts and the federal courts in New Mexico are similar but not identical.

³⁵Cappaert v. U.S., 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976)

³⁶28 USCA Sec. 1441 et seq.

³⁷Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)

³⁸Id

4. Federal Preemption

Both federal courts and state courts must apply state water law to stream adjudications, except where there are federal laws which preempt state law.³⁹ In a stream adjudication, the United States can claim both state law-based water rights and federal reserved water rights on behalf of its agencies and in its trust responsibility for Indian tribes.

[T]he primary basis for the [Federal] Reserved Rights Doctrine lies in federal sovereign ownership; and the power to manage federal property- - concepts stemming from the original cession of territory in the semi-arid and arid West to the United States by previous sovereigns. These Reserved Rights [do not] rest . . . on rights derived from use, constrained by an obligation not to harm downstream interests. . . .⁴⁰

Federal reserved rights acquire priority dates differently than most rights. It is the date of the federal reservation, not the date the water was first put to beneficial use, that establishes the priority date. Many federal reserved rights were established before the 1907 New Mexico Water Code. Federal reserved rights are not limited by the requirement that water rights must timely be applied to beneficial use or be forfeited, but are water right determined to be reasonably necessary to achieve the purposes for which the reservation was created.⁴¹

“‘[R]eservations means national forests, trial lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the Unites States, and withdrawn, reserved, or withheld from private appropriations and disposal under the public land laws;’⁴² Un-adjudicated federal reserved rights can cause considerable

³⁹Rio Grande Silvery Minnow, et al, Plaintiffs v. Keys III, et al, Defendants. and Middle Rio Grande Conservancy district, *et al.* Defendant-Intervenors, CIV 99-1320 JP/RLP-ACE, U.S.D.C. New Mexico (2003)

⁴⁰Norman Wengert, “Reserved Rights and Federal Claims to Water,” Legal, Institutional and Social Aspects of Irrigation and Drainage and Water Resources Planning and Management, published by American Society of Civil Engineers (1979).

⁴¹Winters v. United States, 207 U.S. 654 (1908)

⁴²FPC v. Oregon, 349 U.S. 435 (1955)

uncertainty in determining the quantity of water available and can be a primary driving force to adjudicate a stream system. If the McCarran Act requirement of a comprehensive adjudication is met, federal reserved rights may be adjudicated in state court.⁴³

There are other federal laws that preempt state laws. Most significant are the Endangered Species Act⁴⁴ and the Clean Water Act.⁴⁵

B. New Mexico Water Law⁴⁶

“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. . .”⁴⁷

New Mexico, along with most Western states, has adopted the Prior Appropriation Doctrine as the basis of its water laws.⁴⁸ This is sometimes referred to as, “First in time, first in right.” Beneficial use is the basis, the measure and the limit of the right to the use of water.⁴⁹

There are important requirements of beneficial use. The first is maximum utilization.⁵⁰ New Mexico has only enough water to supply its most urgent needs and water conservation is of

⁴³Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 103 S. Ct. 3201, 77 L. Ed. 2d 837 (1983)

⁴⁴Endangered Species Act, 16 U.S.C.A. Secs. 1531-1544

⁴⁵Clean Water Act, 33 U.S.C.A. Chap. 26

⁴⁶See Appendix C, the Administrative and Adjudicative Functions of the OSE

⁴⁷New Mexico Constitution, Art. XVI, Sec. 2

⁴⁸New Mexico Constitution, Art. XVI, Sec. 2

⁴⁹New Mexico Constitution, Art. XVI, Sec. 3

⁵⁰Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981)

utmost importance.⁵¹ It is not the ownership of water that is at issue in water disputes; ownership of water remains public. The interest that an individual owns is a “usufructuary” interest.⁵²

Therefore, it is the use of the surface and groundwater which the hydrologic cycle and the weather provide that the state regulates. A water right is a legally recognized property right to use water.⁵³

The New Mexico Water Code originated in the Bien Code, versions of which are followed in North Dakota, South Dakota and Oklahoma. The distinctive features of Bien Code derived water law are as follows:

The state administrative agency makes hydrographic surveys and delivers them to the state Attorney General. The state Attorney General brings a stream adjudication suit and joins all water users in the basin. In New Mexico, the OSE is the plaintiff. At the conclusion of the litigation, the court issues a final decree which is enforced by the administrative agency. Under Bien Code water laws, the administrative agency has the authority to permit applications for new uses.⁵⁴

The Reclamation Act of 1902 was a major factor in the Territorial Legislature’s promulgation of the New Mexico Water Code of 1907. The Legislature wanted to comply with the statutory requirements of the Reclamation Act to be eligible for federal reclamation projects. The

⁵¹Kaiser Steel v. W. S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970)

⁵²Yeo v. Tweedy, 34 N.M. 611, 286 P.970 (1929), Holguin v. Elephant Butte Irrigation Dist., 91 N.M. 398, 575 P.2d 88 (S. Ct. 1977)

⁵³N.M. Products Co. v. N.M. Power Co., 42 N.M. 311, 77 P.2d 634 (1937), N.M. *ex rel.* Reynolds v. Holguin, 95 N.M.15, 618 P2d 359 (1980)

⁵⁴*Id* at pg. 3

Rio Grande Project was among the first projects under the Reclamation Act.⁵⁵ Investigation surveys were begun in 1903, and the project was approved on December 2, 1905.

Before 1907, New Mexico did not have an administrative structure to administer either surface or groundwater resources. Water rights were determined under the Prior Appropriation Doctrine.⁵⁶ Surface water rights were acquired by diverting water from a stream to beneficial use. The Water Code of 1907⁵⁷ established the office of the Territorial Engineer, and defined the responsibilities of the Engineer regarding the appropriation of rights to use surface waters.⁵⁸ New Mexico became a state in 1912, and the Office of Territorial Engineer was continued with the OSE. In 1931 the Groundwater Code⁵⁹ was adopted, bringing groundwater basins with ascertainable boundaries within the authority of the OSE.⁶⁰

The State Engineer has general supervision of waters of the state including the measurement, appropriation and distribution⁶¹ and the right and duty to supervise use of water according to permits and licenses issued by him and the adjudications of the court.⁶² The duties of the State Engineer fall into to separate categories: administrative duties and adjudicative duties.

⁵⁵U.S. Department of the Interior, Bureau of Reclamation, "Upper Colorado Region, Legal and Institutional Framework for Rio Grande Project Water Supply and Use. . . a legal hydrograph," Chap. III, pg. 1 (October 1995)

⁵⁶Sec. 72-1-2, NMSA, 1978 Comp.

⁵⁷Sec. 72-1-1, *et seq.* NMSA, 1978 Comp.

⁵⁸Sec. 72-2-1, NMSA, 1978 Comp.

⁵⁹Sec. 72-12-1 *et seq.* NMSA, 1978 Comp.

⁶⁰Sec. 72-12-20 NMSA, 1978 Comp.

⁶¹Sec. 72-2-1 NMSA, 1978 Comp.

⁶²Sec. 72-2-9, NMSA, 1978 Comp., Sec. 72-12-1, NMSA, 1978 Comp.

Applicants who dispute the OSE's administrative decisions can appeal *de novo* to the District Court.⁶³ The venue for appeals *de novo* is the district court of the county in which the work or point of desired appropriation is situated. Evidence taken in a hearing before the OSE may be considered as original evidence subject to legal objection, the same as if the evidence was originally offered in the district court.. The court may submit any question of fact arising therein to a jury or to one or more referees at its discretion.⁶⁴

1. Stream Adjudications⁶⁵

A stream adjudication is initiated when the Attorney General representing the OSE files suit in state or federal district court. Ordinarily the Attorney General deputizes the legal staff of the OSEs as assistant attorneys general. Sometimes parties other than the State Engineer initiate a suit to compel the OSE to proceed with a stream adjudication.⁶⁶ The Water Code requires that "all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties."⁶⁷ Stream adjudications are legal proceedings brought to determine the right to use the waters of a stream system and to aid in

⁶³New Mexico Constitution Art. XVI, Sec. 5, Sec. 72-7-1, NMSA, 1978 Comp.

⁶⁴Sec. 72-7-1 NMSA. See Also, Albert E. Utton, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," 7 Nat. Resources J. 599 (1967)

⁶⁵See Appendix C Administrative and Adjudicative Procedure of the OSE

⁶⁶OSE v. Elephant Butte Irrigation District, et al., CV 86-888, CV 96-888, Third Judicial District Court, State of New Mexico

⁶⁷Sec. 72-4-15, NMSA, 1978 Comp.

the distribution of waters already appropriated.⁶⁸ A right to use the waters of a stream system, a “water right” is a property right and an adjudication by a district court will establish the best title.

The OSE must make or furnish a complete hydrographic survey of the stream system.⁶⁹ The hydrographic survey is to obtain and record all available data for the determination, development and adjudication of water supply of the state including the location and survey of suitable sites for dams and reservoirs and the determination of the approximate water supply, capacity and cost of each. Because of the expansive requirements of a hydrographic survey, a survey can cost millions of dollars.

When all disputes between the OSE and individual water claimants are resolved, the second phase begins. An individual owner or group of owners may challenge the water rights of others. This is called the *inter sese* phase. The court resolves any disputes between individual claimants in *inter sese* proceedings and enters sub-file orders.⁷⁰

All sub-file orders of both phases are incorporated into a judicial decree for the entire stream system. The final decree defines the rights of every water right owner within the stream system or groundwater basin. The State Engineer is charged with supervising and enforcing the Decree.⁷¹ Post-adjudication disputes are brought in the district court in the same manner as pre-adjudication disputes.

⁶⁸Sec. 72-4-15, NMSA, 1978 Comp.

⁶⁹Sec. 72-4-13, NMSA, 1978 Comp.

⁷⁰Office of the OSE, (Sent with Offers Of Judgment) “Notice of Water Rights Adjudication and Explanation of the Process for the Lower Rio Grande Stream System Adjudication”, Office of the OSE v. Elephant Butte Irrigation District, et al., CV 86- 888 and CV 96-888, Third Judicial District

⁷¹Sec. 72-4-19, NMSA, 1978 Comp.

2. Purposes of General Stream Adjudication ⁷²

- < The State Engineer is charged with responsibility to manage and supervise water resources and needs reliable information about water supply and demand.

Establishing existing water use is essential to consider water permit applications and long-term water resource planning.

A stream adjudication is more akin to an inventory than a usual dispute filed in district court. Individual water users are joined to clarify and determine each users right to use waters of the stream system. There may not be any actual dispute with an individual user; but with a limited supply of water available for use, it is necessary to eliminate any ambiguity in the right to use and the priority and amount of that right. A stream adjudication can centralize water use information that will facilitate water management by the OSE, local agencies and individual water users.

- < Stream adjudications recognize, quantify and prioritize all water rights. General stream adjudications confirm valid, existing water rights, those vested by beneficial use before the establishment of the OSE by the New Mexico Water Code of 1907,

⁷²See generally, A Lynn Krogh, "Water Right Adjudication in the Western States: Procedures, Constitutionality, Problems and Solutions," 30 Land and Water Law Review, No. 1 John E. Thorson, "Clarifying State Water Rights and Adjudications," Two Decades of Water Law and Policy Reform: A Retrospective and Agenda for the Future, Natural Resources Law Center, University of Colorado, School of Law, June 13-15, 2001; John E. Thorson, "State Watershed Adjudications; Approaches and Alternatives," 42 Rocky Mtn. Mining L. Institute, Chap. 22 (1996), Ramsey L. Kropf, "Basin-Wide Adjudications in the West: What Works, What Doesn't?," Strategies in Western Water Law and Policy, Courts, Coercion and Collaboration, Natural Resources Law Center, University of Colorado, School of Law, June 8-11, 1999

and those rights that were obtained after the 1907 Water Code established a permit system. Stream adjudications clarify the title of individual water claimants to their water rights.

Delay in completing the stream adjudication makes proof of pre-1907 rights and groundwater rights difficult. The 1907 Water Code requires a permit from the OSE to appropriate water, and the date of the application for the permit establishes priority. Before 1907, proof of priority date depended on whatever testimony and documentary evidence that a water claimant could produce as to when a diversion was made and in what quantity. Fading memories and ancient or missing records make it difficult to obtain evidence for proof of a pre-1907 right. There is also ambiguity in groundwater appropriations that occur before the OSE declares a groundwater basin. The pre-basin groundwater rights are not quantified or prioritized until they are adjudicated.

- < The Prior Appropriation Doctrine establishes a procedure to determine who will obtain water during periods of shortage. If there are insufficient waters to distribute to all water rights owners, then those with the early priority dates, generally referred to as “senior appropriators,” will receive water in order of the priority dates until the supply is exhausted. This is referred to as a “priority call.” When the OSE makes a priority call on a stream system, appropriators with a more recent priority date, referred to as “junior appropriators,” will not receive water

until the supply increases sufficiently to deliver to all appropriators with an earlier priority date.

If there is a need for a priority call because of shortage, without an adjudication decree from the court, the OSE will have difficulty determining which senior appropriators should receive water and which junior appropriators should not receive water.

- < Stream adjudications weed out “paper rights.” “Paper rights” cause substantial uncertainty regarding the amount of water available to be appropriated for beneficial use because they are insufficient to establish whether someone has a right to use water and has applied that water to beneficial use.

After the OSE issued a permit, the owner of the water right may have abandoned or forfeited the right without this being reflected in the agency’s records. The permitted amount shown by the records of the OSE can be considerably larger than the amount to which the owners have a legally enforceable right. These then are “paper rights” and not “wet water rights.”

- < Determination of equitable apportionment of an interstate stream system is impacted by the beneficial use of the stream waters by each state. Stream adjudications in each state can clarify the beneficial use and the amount, quantity and description of the use of water to determine the equitable apportionment

between the states. The disputes between New Mexico and Texas on the Pecos and Rio Grande are compelling reasons to proceed expeditiously.

- < A stream adjudication can integrate and clarify federal reserved rights, including Indian reserved rights, with state-based rights. Federal reserved water rights need not be put to beneficial use within a definite time frame and the amount reserved can be very difficult to determine. Un-adjudicated federal reserved rights can cause substantial difficulty for the OSE to manage the public waters. The difficulties in resolving federal reserved rights, particularly federal Indian reserved rights, has been a primary cause for delay in some adjudications.

Stream adjudications are unlike any other action that can be brought in the district court. Because of the numbers of potential defendants, they are sometimes confused with class actions, authorized in New Mexico Rules of Civil Procedure, SCRA 1-023.

Under SCRA 1-023, one or more members of a class may sue or be sued as representative parties on behalf of all only if:

- < the class is so numerous that joinder of all members is impracticable;
- < there are questions of law or fact common to the class;
- < the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- < the representative parties will fairly and adequately protect the interests of the class.

A stream adjudication cannot meet these criteria because Sec. 72.4-17 NMSA requires joinder of all who claim the right to use waters of the stream system. While there may be

questions of law or fact common to the class, the great majority of the disputes that must be decided are very fact-specific to individual claims. Determination of one claimant's right may have an adverse affect on all other claimants; therefore, each claimant is potentially adverse to all others. There may be some claims or defenses that are common to a large number of water right owners, but there may be others where the interests of each of the water right owners are adverse to all others.

III. THE ROLE OF THE COURTS⁷³

“[T]he judiciary has ever been the poor man's shield against oppression, the rich man's defense against the mob. . . . It will save the minority from the tyranny of the majority and protect both from the ruthless hand of the demagogue. It is the saving quality that will make this government one of laws and not a government of men.”⁷⁴

“The Mission of the New Mexico Judiciary is to provide access to justice; resolve disputes justly and timely; and maintain accurate records of legal proceedings that affect rights and legal status in order to independently protect the rights and liberties guaranteed by the Constitution of New Mexico and the United States.”⁷⁵

The present administrative structure of the judiciary should be considered in evaluating the efficacy of a Water Court. As noted above, some of the suggested forms of a Water Court could cause disruption and inefficient administration resulting in considerable expense to the taxpayers of New Mexico. A court must function as an institution and should have a consistent and logical

⁷³See Appendix F for a review of the structure of New Mexico Courts

⁷⁴Glenn Terrell, Florida Judiciary, “The Judiciary in a Federal Republic”, in The Florida Handbook, 164, 167 (Allen Morris ed., 3rd ed. 1952)

⁷⁵Strategic Plan of the New Mexico Judiciary (2003)

administrative structure. If a Water Court is not integrated into the present institutional structure of the court, a parallel administrative structure would need to be created. An understanding of the present structure of the judiciary can clarify the form of a Water Court that could function most effectively.

The New Mexico Constitution and Water Codes have charged the courts with a major responsibility to identify and protect water rights. The focus of this paper is to identify ways for the state to do this efficiently, effectively and justly.

A. The Constitutional Responsibilities of the Courts

Under the constitutional Separation of Powers Doctrine, courts have the inherent power to carry on their functions so that they may operate independently and not become dependent upon or a supplicant of either of the other branches of government.⁷⁶ The Supreme Court has general administrative authority over the courts which includes the administrative authority to designate judges to handle specific kinds of cases such as water disputes, to develop procedure and to coordinate budgets.⁷⁷

N. M Const. Art. III, Section 1 provides that the powers of the government are divided into three distinct departments, the legislative, executive and judicial . No person or collection of persons charged with the exercise of powers properly belonging to one of these departments may exercise any powers properly belonging to another.⁷⁸

⁷⁶Mower, et al v. Rusk, et al, 95 N.M. 48, 618 P.2d 886 (1980)

⁷⁷Sec. 34-9-3 NMSA, 1978 Comp.

⁷⁸Mower, et al v. Rusk, et al, 95 N.M. 48, 618 P.2d 886 (1980)

Under the Separation of Powers Doctrine of the Constitution,⁷⁹ district courts review laws passed by the Legislature after the issue is properly raised under governing procedure. Legislative acts are presumptively valid and normally are subjected to a rational basis test.⁸⁰ The rational basis test requires legislative classifications to be based on substantial or real distinctions and be rationally related to the legislative goal.⁸¹ The party objecting to the legislative classification has the burden of demonstrating that the classification bears no rational relationship to a conceivable legislative purpose.

Some statutes are reviewed with “heightened scrutiny.” This test is aimed at legislative classifications infringing important but not fundamental rights, and involving sensitive but not suspect classes.⁸² Under heightened scrutiny, the party maintaining the validity of the classification must prove that the classification is substantially related to an important governmental interest.⁸³

A court may be asked to review the constitutionality of statutes in a limited number of cases. The court must address the question of whether the statute infringes upon any fundamental right explicitly or implicitly guaranteed by the constitution.⁸⁴ A very small number of statutes are determined to be unconstitutional.

⁷⁹New Mexico Constitution, Art. III, Sec. 1

⁸⁰Richardson v. Carnegie Library Restaurant, Inc. et al, 107 N.M. 688 at page 693, 763 P. 2d 1153 at page 1158 (1988)

⁸¹Id, 107 N.M. at 695, 73 P.2d at 1160

⁸²Id, 107 N.M. at 694, 73 P. 2d at 1157

⁸³Id , 107 N.M. at 695, 73 P.2d at 1156

⁸⁴Id, 107 N.M. at 696, 73 P.2d at 1161

The New Mexico Constitution contains two provisions relating specifically to water law. “The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. . . .”⁸⁵ “In any appeal to the district court from the decision, act or refusal to act of any state executive officer or body in matters relating to water rights, the proceeding upon appeal shall be *de novo* as cases originally docketed in the district court unless otherwise provided by law.”⁸⁶ Eminent Domain is another constitutional provision that must be considered.⁸⁷ The state cannot take or damage private property without just compensation. Because a water right is a property right, changes in the Water Codes could result in a taking of private property.⁸⁸

Further, the right of access to the courts is one aspect of the right to petition for redress of grievances. This right is guaranteed by the First Amendment to the federal Constitution and also protected by both the United States and New Mexico Constitutions by the prohibitions against “depriving a person of life, liberty or property without due process of law.”⁸⁹ Any substantive or procedural changes to try to expedite the process may raise issues of right of access to the courts and could be challenged on a constitutional basis. Because of the constitutional issues, there is substantial risk of legal challenge when procedure or substantive law are modified.

⁸⁵New Mexico Constitution, Art. XVI, Sec. 2,

⁸⁶New Mexico Constitution, Art. XVI, Sec. 5

⁸⁷New Mexico Constitution Art. II, Sec. 20

⁸⁸Miller v. Hagerman Irrigation Co., 20 N.M.604, 151 P.763 (1915)

⁸⁹Jiron v Mahlab, 99 N.M. 425, 426, 659 P.2d 311, 312 (1983)

B. Integration of a Water Court Into Present Court Structure

“The devil is in the details.” Old Proverb

What institutional framework would most efficiently complete a judicial task that is critical to the welfare of the citizens and residents of New Mexico? A Colorado-type Water Court has been suggested. The Colorado statutes, however, are not a good model for New Mexico. Materially different constitutional and statutory history between the two states would make changes difficult and very expensive.⁹⁰ A completely separate court similar to the Worker’s Compensation Court has been suggested.⁹¹ If a separate court with a separate administrative structure were established, expenses would escalate substantially. Thus, any Water Court established for New Mexico should be integrated within the existing administrative structure of the judiciary.

1. How water disputes reach the court.

Water disputes reach the court as typical civil disputes, appeals *de novo* of administrative decisions of the OSE and stream adjudications. Litigants invoke the jurisdiction of district courts to resolve water issues in four ways. Ranked in order of judicial resources necessary to resolve issues they are:

- a. A suit for a general stream adjudication by the Attorney General (or the OSE’s legal staff commissioned by the Attorney General).⁹² The venue is

⁹⁰See Appendix E

⁹¹Republican Candidate for Governor, John Sanchez’ Proposal (2002)

⁹²Sec. 72-4-15, NMSA, 1978 Comp.

any court having jurisdiction over any part of the stream system, i.e., a district court in any county where the stream system is located.⁹³

- b. A dispute among individual water right owners concerning the validity of the rights, the seniority of the rights, the quantity of the rights or the potential impairment of one right caused by the exercise of another right. The OSE may be a litigant, either a plaintiff or defendant, outside a stream adjudication or as a result of a *de novo* appeal. Venue and procedure is the same as in any civil suit.⁹⁴
- c. An appeal *de novo* from an administrative decision of the OSE regarding the permitting, management and enforcement of water rights.⁹⁵
- d. A claimed impairment of existing water rights due to an appropriation of non-potable water.⁹⁶

2. Court Structure:

The structure of the judiciary is not conducive to innovative change. As Robert W. Tobin has observed, “In courts, where the resistance to novelty is deeply rooted, the pace of change can be glacial.”⁹⁷ The Supreme Court’s rules committees continually review the court’s rules and procedures, but the basic structure of the court has continued over decades with minimal change.

⁹³Sec. 72-4-17, NMSA, 1978 Comp.

⁹⁴New Mexico Constitution, Art. VI, Sec. 13

⁹⁵Sec. 72-4-1, NMSA, 1978 Comp.

⁹⁶Sec. 72-12-28, NMSA, 1978 Comp.

⁹⁷Robert W. Tobin, Creating the Judicial Branch: The Unfinished Reform, Pg 119, National Center for State Courts (1999)

Institutional and legal constraints enforce this stasis. The doctrine of *stare decisis* requires the court to look to the past to follow case law precedent. The Legislative branch passes laws, establishes policy and controls the budget. The Executive Branch enforces the law. The Judicial Branch interprets the law, but does so only when litigants, in compliance with express procedures, properly raise issues before the court. Courts do not decide issues that are not “ripe.” Courts do not give advisory opinions.

Court Unification: In the past half century, there has been a judicial reform movement to create an organizationally coherent judicial system. Observers concluded that:

“Before 1950 . . . state trial courts were externally dominated, highly disorganized, often unprofessional, and poorly managed, to the point where the integrity of the state courts was being seriously undermined.” . . . [T]he state courts were not simply seizing management control of their own domain but literally creating a third branch of government. They sought this objective by integrating the various components of the state judiciary into a more coherent whole and generally upgrading the level of professionalism and the quality of justice.”⁹⁸

Court unification has been the guiding principal of court reform although it has its drawbacks.⁹⁹

If a Water Court is established separate from the existing structure, with jurisdiction limited to water issues, organizational confusion and judiciary costs would likely increase. For example, in the structure of the courts of lesser jurisdiction below district courts in New Mexico, there is organizational confusion caused by accommodation of court structure to local government structures and to local legal cultures. The management structure of these courts causes difficulty, and they are subject to the whims of local politics. Funding and caseload distribution is frequently

⁹⁸Id

⁹⁹Id at page 133

determined by the political strength of local legislators rather than a rational analysis of need. A Water Court should be unified with and integrated into the current administrative structure of the district court.

C. Stream Adjudications require expertise in hydrology and water law

“It’s a scientific fact that if you shave your moustache, you weaken your eyes.”
William “Alfalfa Bill” Murray; former Governor of Oklahoma

The need to have judges knowledgeable about both the legal and scientific basis of water rights is cited as a reason to establish a Water Court. The court must understand the limits of the engineer’s scientific and empirical techniques used to develop factual findings, and not attempt to extrapolate results beyond the limits of the accuracy of the data and the formulas used by the engineer.¹⁰⁰ The fitness of judges to evaluate scientific testimony or evidence in stream adjudications has been questioned.¹⁰¹

A district judge is not required by rule or statute to have particularized expertise in any type of case. In most judicial districts in New Mexico, district judges handle a general docket with all types of cases. Other judicial districts, the larger judicial districts such as the Second and Third Judicial Districts, are divisionalized, into broad areas of expertise such as a civil division, a criminal division, a domestic relations division, and a Children’s Court division.. There is no formal specialized training or education in water law for judges. Therefore district judges

¹⁰⁰Id at pg 20

¹⁰¹Maryann Wasiolek, Goundwater Flow Models as Scientific Evidence, (1996), See also, C. Bruce Loble, Chief Water Judge Montana Water Court and Colleen Coyle, Water Master Montana Water Court, “Settlement in General Stream Adjudications - Fairness Standards”, 18th Annual Water Law Conference, San Diego, California, February 24 -25, 2000.

assigned water disputes, including general stream adjudications, obtain expertise in water law by on-the-job experience or from their law practice prior to assuming the bench..

The University of New Mexico based Judicial Education Center provides continuing education for justices, judges, magistrates and court personnel.¹⁰² There is an annual Judicial Conclave organized by the Judicial Education Center for continuing education. The topics at the Conclave include updates on civil and criminal law and will generally address topics of current interest to the judiciary. Therefore, water law has not been included in the topics at the Conclave. If there is sufficient demand, the Judicial Education Center could include education in water law and procedure. In addition to the Judicial Conclave, the Judicial Education Center has a limited budget to pay for additional judicial education and training. Judicial Districts may include in their budget request monies for judges who need to attend seminars.

One important conference has been “Dividing the Waters” held approximately every eighteen months. This conference is limited to judges, masters, and referees involved in western general stream adjudications and has been funded by grants from the Ford Foundation and the Hewlett Foundation. The conference has been a very useful forum to educate judicial officers in water law and has provided a forum for those involved in stream adjudications in Western states to discuss problems inherent in stream adjudications and exchange ideas on how to improve the procedure.

The OSE’s determination of water available for appropriation has always involved estimates based on a scientific and engineering analysis. The science has improved over the years and so too have the estimates and predictions. However, because of what has been described as

¹⁰²Sec. 34-13-2 NMSA, 1978 Comp.

the daunting cascade of uncertainty, the estimates still contain a very large margin of error. Decisions of issues in a stream adjudication are filtered through the very uneasy interface between uncertain science and legal process which seeks finality. Judicial decisions on most matters are final and are considered *res judicata*. However, the scientific uncertainty of water rights makes finality problematical.¹⁰³ Changing scientific knowledge has the potential for bringing into question the bases for previous decisions.

The New Mexico Rules of Evidence provide, “If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.”¹⁰⁴ The New Mexico Supreme Court followed the United States Supreme Court ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁰⁵ that it is error to admit expert testimony involving scientific knowledge unless the party offering such testimony first establishes the evidentiary reliability of the scientific knowledge.¹⁰⁶

New Mexico’s *State v. Alberico* required three prerequisites for the admission of expert testimony: (1) experts must be qualified; (2) their testimony must assist the trier of fact; and (3) their testimony must be limited to the area of scientific, technical , or other specialized knowledge in which they are qualified.¹⁰⁷

¹⁰³A. Dan Tarlock, “The Illusion of Finality in General Water Rights Adjudications,” 25 Idaho L. Rev. 271 (1988-89)

¹⁰⁴New Mexico Rules of Procedure, SCRA 11-702

¹⁰⁵509 U.S. 579, 135 L. Ed. 2d 469, 113 S. Ct. 2786 (1993)

¹⁰⁶State v. Alberico, 116 N.M. 156,861 P.2d 192 (1993)

¹⁰⁷State v. Alberico, 116 N.M. at 166, 861 P.2d at 202(1993)

The New Mexico Supreme Court further expanded this *Daubert* standard of reliability and directed that the trial court should consider the following factors:

“(1) whether a theory or technique “can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known [or] potential rate of error in using a particular scientific technique and the existence and maintenance of standards controlling the technique’s operation; and (4) whether the theory or technique has been generally accepted in the particular scientific field.”¹⁰⁸ “[E]videntiary reliability is the hallmark for the admissibility of scientific knowledge.”¹⁰⁹

Although these rules apply to all expert testimony, they take on added significance in stream adjudications, because one erroneous decision regarding hydrology can affect all water users in the basin.

Both the law and the engineering applied to water rights change with time. The law changes through new legislation, court decisions, administrative interpretations, and in response to social, economic and political conditions. The engineering techniques and methods used change with advances in technology, including adoption of research findings, availability of more sophisticated instrumentation, improvements in aerial photography and remote sensing techniques, accumulation of more complete and accurate data, and the lessons of experience.¹¹⁰ There should be continuing training and education for judges and special masters to ensure that they have the knowledge and skills to resolve water disputes fairly.

¹⁰⁸State v. Anderson, 118 N.M. 284, 881 P.2d 29 (1994)

¹⁰⁹State v. Torres, 127 N.M. 20, 976 P.2d 20 (1999)

¹¹⁰Leonard Rice, Michael D. White, Engineering Aspects of Water Law, pg 19, Krieger Publishing Company (1991)

D. Allocation of Judicial Resources

The analysis of the form of any Water Court established should include a review of the additional resources a sitting judge or a judge *pro tempore* needs to do the job efficiently.

1. Sitting District Judges

A sitting district judge is assigned a dispute involving water issues following the usual procedures in the judicial district for assigning civil cases. Typically this is by random assignment in multi-judge districts. By Supreme Court rule, one of the duties of a Chief Judge is to “assign, reassign or consolidate cases among the several judges as equitably as possible.”¹¹¹ The manner by which judicial assignments are made may vary among the districts.

The district judge assigned a stream adjudication ordinarily has an additional caseload that include an allocated share of all cases that may be brought or appealed to district court. Supreme Court rules assign duties to a Chief Judge of a Judicial District that may impact establishment of a Water Court. These include the duty to supervise court finances, including financial planning and preparation and presentation of court budgets and the duty to coordinate the use of space, equipment and facilities of the court.¹¹² Only recently has there been an attempt to analyze the impact of a stream adjudication on available resources that a stream adjudication has on a court. A judicial needs assessment should be completed to reflect an appropriate evaluation of the need for judicial officers and staff.

2. Judges *pro tempore*.

. . . If any district judge is disqualified from hearing any cause or is unable to expeditiously dispose of any cause in the district, the chief justice of the supreme court may designate any

¹¹¹New Mexico Supreme Court Rules SCRA 23-110(10)

¹¹²New Mexico Supreme Court Rules SCRA 23- 110(8),(9)

retired New Mexico district judge, court of appeals judge or supreme court justice, with said designees' consent , to hear and determine the cause and to act as district judge *pro tempore* for such cause.¹¹³

This authority is not specific to stream adjudications, but the Supreme Court from time to time has appointed a judge *pro tempore* to preside over stream adjudications. Typically a stream adjudication is the only matter assigned to the judge *pro tempore*. Apart from judges *pro tempore* assigned to stream adjudications, judges *pro tempore* are typically designated when a district judge resigns or retires, takes medical leave or the sitting judges in the district are unable to timely address their caseloads for whatever reasons. Typically judges *pro tempore* serve for a relatively short period of time until the a judge is replaced, returns from sick leave or the caseload is brought under control.

The term “*pro tempore*” itself indicates a limited service, and the funding is similarly limited. An amount is appropriated for the Supreme Court to allocate as needed among all judicial agencies. A higher than average number of judicial vacancies caused by retirement, illness or resignation can quickly deplete the available funds. At present, a judge *pro tempore* assigned to a stream adjudication must compete for limited funds with other demands for judge *pro tempore* services. This is an uncertain and inadequate method of funding a judge *pro tempore* presiding over a stream adjudication for an extended period of time.

In contrast to the limited service expected of typical *pro tempore* judges, judges *pro tempore* assigned to stream adjudications may sit for an extended period of time. The Honorable Harl D. Byrd has been the presiding judge in the Pecos adjudication for ten years. A judge *pro tempore* in a stream adjudication does not replace a judge in an authorized judicial position. As a

¹¹³Id, Sec. 15

consequence the administrative structure and support staff can be problematical. Judges *pro tempore* are not provided court reporters or tape monitors and must arrange with court administration for the service. Each county is statutorily required to provide adequate facilities for the district court, but there never has been a needs assessment to determine the facilities requirement for a judge *pro tempore* presiding over a stream adjudication. The funding of a judge *pro tempore* assigned to a stream adjudication should be separate from the funding for other judges *pro tempore* for adequate and reliable funding.

3. Special Masters:

The Rules of Civil Procedure authorize a district judge to appoint a special master in any case deemed appropriate,¹¹⁴ including stream adjudications. The powers of a special master are set out in the order of appointment and the rule allows a broad range of powers.¹¹⁵ If the number of individual disputes become numerous, it is common practice for the court to contract for a special master. Ordinarily, the compensation of a master is fixed by the court and charged to the parties or paid out of any fund or subject matter of the action. The one special master in pending state stream adjudications is paid by the OSE. Because all persons claiming interest must be joined as parties, it would be more logical if compensation for masters were paid by the court by appropriation from the general fund.

The master must prepare a report to file with the court. In non-jury matters including adjudications the court accepts the master's findings of fact unless clearly erroneous. If there are

¹¹⁴New Mexico Supreme Court Rules SCRA 1-053

¹¹⁵New Mexico Supreme Court Rules, SCRA 1-053 C

objections to the report, the court after hearing may adopt the report, modify it, reject it in whole or in part, or receive further evidence, or recommit it with instructions.

If special masters are appointed in stream adjudications they must be knowledgeable in water law and the science of hydrology or be provided training to become knowledgeable. Under the current rules and statutes, appointment of knowledgeable special masters offers the court the greatest flexibility to handle the multiplicity of disputes efficiently, and the Legislature should appropriate adequate non reverting monies for this purpose. The small numbers of attorneys familiar with water law and potential conflicts because of the comprehensive nature of stream adjudications reduce the availability of competent special masters. Compensation should be sufficient to attract qualified masters.

4. Court Facilities:

Facilities for District Courts are the responsibility of the county.¹¹⁶ If the number of trials and hearings are to increase so that stream adjudications can be expedited, each county where a stream adjudication is pending must be prepared to provide the courtrooms, hearing rooms, judges chambers and office space for additional staff.

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS:

- A. The Supreme Court should establish a Water Court Division within the court by designating a Chief Water Judge to oversee stream adjudications in the state, designate a Water Judge in each judicial district, provide for adequate training and

¹¹⁶Sec. 34-6-24 NMSA, 1978 Comp.

education in water law, and establish an appropriate administrative structure within the current hierarchy of the court.

- B. There should be no any major revisions of the Water Codes or modifications of the administrative or adjudicative duties of the OSE. Any legislative changes should be focused on reducing specific impediments to efficient adjudications and not to any change of institutional structure.
- C. Representatives of the Executive, the Legislative and Judicial branches should review and determine adequate funding and resources for the OSE and the courts to effectively, efficiently and timely complete stream adjudications.

EPILOGUE

“So far as I can find out, the water is what these Indians worship, because they say that it makes the corn grow and sustains their life. . . .”¹¹⁷

Water is a natural resource like no other. It is the *sine qua non* of life itself. The major tasks in water issues are stream adjudications. These need substantial executive and judicial branch resources and require the legislative branch to make a significant allocation of the commonwealth of New Mexico to complete timely¹¹⁸

Efficient strategic thinking calls upon the constitutional duties of all three branches of government of the state to ensure the well-being of the residents and citizens of New Mexico. The

¹¹⁷George Parker Winship, ed. and trans., The Coronado Expedition, 1540-1542, BAE Ann. Rep., 1892-93, part I, p. 561, quoting from letter of Coronado to Mendoza, 3 Aug. 1540, from Water in New Mexico, A History of its Management and Use, Ira G. Clark, University of New Mexico Press, 1987.

¹¹⁸Sec. 72-4-14 NMSA, 1978 Comp.

form of Water Court recommended in this paper should assist the Executive Branch through the OSE to more effectively supervise the water resources of the state. It gives the Legislature direction where resources can be used most effectively to expedite the process. It provides a warning of the perils of legislative or rule change. It integrates a Water Court into the existing structure to efficiently administer the judiciary's responsibility in stream adjudications.

The future will be shaped not only by the past but also by the choices New Mexico makes today. In the federal Indian Reserved Rights Doctrine, there is an echo from the past of the Manifest Destiny Policy of the nineteenth century. The Nation's Founders' decisions regarding the proper division of sovereignty between the state and federal governments as modified by the American Civil War cast giant shadows. Federal legislation of the late nineteenth and early twentieth centuries, such as the Homestead Act, The Desert Lands Act and the Reclamation Act, as well as the more recent Endangered Species Act and Clean Water Act, focus and limit the path we must take.

The welfare of the citizens and residents of the State of New Mexico demands that all the institutions of government act prudently, as well as expeditiously, to ensure continued availability of this increasing scarce resource.

APPENDIX A Stream Adjudications Currently Pending in New Mexico

Federal Court

1. Rio Pueblo de Taos and Rio Hondo, State of New Mexico ex rel. State Engineer v. Abeyta, et al., 69 CV 7896 JEC and 69 CV 7939 JEC, Consolidated;
2. Rio Chama, State of New Mexico ex rel. State Engineer v. Aragon, et al., 69 CV 7941 JEC;
3. Nambe-Pojoaque-Tesuque, State of New Mexico ex rel. State Engineer v. Aamodt, et al., 66 CV 6639 EM;
4. Rio Santa Cruz and Rio de Truchas, State of New Mexico ex rel. State Engineer v. Abbott, et al., 68 CV 7488 JEC and 70 CV 8650 JEC, Consolidated;
5. Jemez, United States v. Abousleman, et al., 83 CV 1041 JEC;
6. Zuni, United States v. A&R Productions, et al., 01 CV 0072 BB.

State Court

1. Lower Rio Grande, State of New Mexico ex rel. State Engineer v. EBID, et al., Third Judicial Dist. No. CV 96-888;
2. Pecos, State of New Mexico ex rel State Engineer, et al. v. Lewis, et al., Chaves County Cause Nos. 20294 and 22600 Consolidated;
3. Santa Fe, Anaya v. PN.M., First Judicial Dist. No. 71-43347;
4. Rio San Jose, State of New Mexico ex rel. State Engineer v. Kerr-McGee Corp., et al., Thirteenth Judicial Dist. Nos. CB-83-190-CV and CB-83-220-CV; and
5. San Juan, State of New Mexico ex rel. State Engineer v. United States, et al., Eleventh Judicial Dist. No. D-1116 CV 7500184.

APPENDIX B The Hydrologic Cycle And Scientific Aspects of Water

1. The Big Blue Marble

“All streams run to the sea, but the sea is not full; to the place where the streams flow, there they flow again.” Ecclesiastes Chapter 1, Verse 7

Basic knowledge of the scientific aspects of water can assist the court in addressing water issues. The earth is in a continual hydrologic cycle. Water occurs in nature in three physical states: gas, liquid and solid (water vapor, liquid water and ice). The ambient conditions of the earth are such that water changes state as it moves throughout the hydrologic cycle within the normal fluctuations of temperature and pressure on the earth.

Although comets and other space debris striking the earth are adding to the total amount of water, and atmosphere escaping from the gravitational pull of the earth is reducing the total amount of water, the amount of increase or decrease is minuscule when considered over the human scale of time. The hydrologic cycle of the earth may be considered a closed system where the total amount of water considered on a planetary scale remains essentially the same

The vast majority of water on earth is the liquid saline water of the oceans and seas. Rivers, lakes, snow and ice packs contain substantial fresh water. Energy from the sun causes some of the liquid water on the surface of the earth in the rivers, lakes, reservoirs, seas and oceans and ice in snow and ice packs to change state to water vapor. Changes in temperature and pressure as water vapor-laden air (air with high humidity) is circulated by the movement of the atmosphere can cause a change of state back to liquid or solid.

When climatic conditions of ambient temperature, pressure and humidity combine in the proper proportions, the water vapor changes state to liquid water which falls to the earth as rain,

or to ice which falls to the earth as snow. Gravity pulls the rainfall and snow melt back to the lakes, oceans and seas where the cycle is repeated. Geology and the location and size of landmass exert substantial influence on local temperature and pressure and also on the amount of water vapor contained in the air. This determines in large measure how much rainfall or snowfall will occur in a local area.

When precipitation returns liquid water to the surface of the earth, the water takes the path of least resistance to return to lakes, reservoirs, oceans and seas. The mass of water at high elevation has potential energy which is converted to kinetic energy as it descends to sea level or its natural level in lakes, reservoirs or basins. The kinetic energy of the descending water can be converted to mechanical or electrical power.

If the geologic condition of the land on which the rain or snow falls is impermeable, the path of least resistance will be primarily on the surface. If the geologic condition of the land is permeable some of the water ordinarily will result in surface runoff with some water sinking beneath the surface and continuing underground as part of the stream system. The amount of liquid water which sinks below the surface can also depend on the slope of the terrain as well as flow resistance of the soil. Some of the water may drain to much deeper basins and become separated from the stream system. Usually, waters return to lakes, seas and oceans in a hydraulically connected stream system consisting of both surface and groundwater.

Because of the resistance of the soil, the flow rate of the groundwater portion of the stream will be slower than the surface portion. Because surface and groundwater are hydraulically connected, reduction of the groundwater of a stream will, over time, reduce the surface water and reduction of the surface water will, over time, reduce the groundwater. The amount of time it takes

for reduction in one to affect the other depends on the amount of liquid water, the permeability of the soil (the resistance of the soil to flow) and the distance from one location to another.

Underground water may be trapped in basins created over geologic time that are not connected to any stream flow and hence are neither naturally part of the hydrologic cycle nor recharged from rainfall or snow melt. Taking water from a basin that is not recharged through the hydrologic cycle is similar to mining a mineral: once it is depleted, it is gone forever.

Most living things depend on liquid water for survival. As part of the life process, liquid water consumed by plant life changes state to water vapor by evapo-transpiration. When liquid water is consumed by animal life, there can be a change of state to water vapor by evapo-transpiration or the living organism can discharge liquid or semi-liquid waste products of life processes. At death, any water contained in previously living carcasses of plant or animal life is returned to the hydrologic cycle.

Water is abundant when observed on a planetary scale of the earth. However, it may be extremely scarce when considered locally. The amount of liquid water at a given place and during a given time period varies with the weather. Climate can be influenced by atmospheric and oceanic events thousands of miles away. The weather has been analyzed under the physical theory of chaos and, pursuant to this theory, physicists have poetically stated that the flapping of butterfly wings somewhere on the Asian landmass can have an effect on the weather in the United States.¹¹⁹ Historical weather patterns can give some measure of predictability of rainfall and snowfall, but the annual variability can be significant.

¹¹⁹James Gleick, *Chaos*, Chap. 1, *The Butterfly Effect*, Penguin Books, 1987

All of these circumstances combine to make the geographic area that includes New Mexico an arid to semi-arid area which is subject to episodic droughts. There is considerable variation in snowfall and rainfall from one area of the state to the other as well as seasonal variations.

2. Human Intervention in the Hydrologic Cycle

A swamp still skirts the mountain chain
And poisons all the land retrieved;
This marshland I hope yet to drain,
And thus surpass what we achieved.
For many millions I shall open regions
To dwell, not safe, in free and active legions.
Green are the meadows, fertile; and in mirth
Both men and herds live on this newest earth,
Settled along the edges of a hill
That has been raised by bold men's zealous will.
A veritable paradise inside,
Then let the dams be licked by raging tide;
And as it nibbles to rush in with force,
A common will fills gaps and checks its course.¹²⁰

In the ancient past of humankind the human species impacted the environment in a way not materially different from most large mammals. The human race then learned to modify the environment to its advantage by diverting streams for irrigation or domestic use. Since this beginning, human society has substantially expanded intervention in the hydrologic cycle to regulate water to its benefit. Without this intervention, the world would be a far less hospitable place for human society.

¹²⁰Goethe, Faust, the Second Part of the Tragedy, trans. Walter Kaufmann (New York: Doubleday, 1961)

Diversion of water for agricultural use in New Mexico pre-dated the arrival of Europeans.

¹²¹ As civilization progressed, groups organized into different sovereigns that established laws regulating group members' rights and behaviors. New Mexico has had several sovereigns and each has had an effect on how society now manages the scarce resource of water.¹²² The federal government and the state government, as two separate but interrelated sovereigns, have both exercised their sovereignty over water. Stream systems can traverse through more than one sovereign state or country. Laws by different sovereigns which regulate water traversing sovereign states can result in complex, difficult-to-resolve issues.

Water is substantially different from any other natural resource in that "use for one purpose at a given time and location does not necessarily displace its use elsewhere, or at a later time for the same or another purpose. A single water molecule is typically used many times as it moves downstream."¹²³

The timing of the availability of water is critical to determine whether it may be used beneficially. A flood can provide a substantial quantity of water, but cannot be used efficiently unless it can be stored and released when needed. For irrigation, water must be delivered at critical times during the growing cycle of the specific crop. Water for municipal uses must be available throughout the year.

¹²¹Steven Trimble, The People: Indians of the American Southwest (1993)

¹²²John O. Baxter, Dividing New Mexico's Waters, 1700-1912, University of New Mexico Press (1997)

¹²³Frank A. Ward, Ari Michelsen, "The Economic Value of Water in Agriculture: Concepts and Policy Applications", Unpublished manuscript, Department of Agricultural Economics, New Mexico State University (2002)

Location of water is also important. Abundant water may exist in lakes, streams and underground basins but if the water cannot be delivered to a place of proposed beneficial use, it may be worthless for that use.

Reservoirs, canals and ditches or any other product of human activity do not create any water. However, they do allow control of the timing of the availability of the water and the location where water can be delivered, and hence can materially increase beneficial uses to which the water can be applied. Many beneficial uses would be impossible to accomplish without means to store and transport water from its source to place of utilization.¹²⁴ Although water is not created by human activities, it might be increased by conservation: reducing losses caused by evaporation from surface water, losses from evapo-transpiration by non-crop, non-native or invasive vegetation (phreatophytes) or losses caused by runoff to basins too deep or too saline to be useful.

Conservation efforts can also include improving the efficiency of irrigation and other uses.

Many possible beneficial uses cannot be obtained with water saturated with salts or other pollutants. New Mexico has basins with high salt content water, which limits its usefulness. The cost of processing saline water required to obtain the necessary quality reduces the uses to which the water can be applied, and some uses add pollutants to the return flows that reduce the downstream usability of the water.

¹²⁴Kaiser Steel Corp. v. W. S. Ranch Co., 81 N.M. 414, 467 P.2d 986 (1970)

APPENDIX C Administrative and Adjudicative Functions of the OSE

1. Administrative Functions

After 1907, to establish surface water rights, an appropriator must file an application with the OSE who decides whether to issue a permit.¹²⁵ After 1931, when the OSE declares a groundwater basin as explained below,¹²⁶ a similar permit application procedure applies.¹²⁷ Water rights are categorized based upon the stage in which there has been compliance with our water laws. When a potential appropriator applies to the Office of the OSE to appropriate water to beneficial use, the application date can establish the date of priority if the OSE subsequently issues a permit.¹²⁸ Application alone without the permit from the OSE does not establish a water right.¹²⁹ If the OSE grants a permit, the applicant has an inchoate right to develop a water right.¹³⁰ If the holder of the right does not act with diligence to take all the steps necessary to apply the water to beneficial use he loses that right.¹³¹ Vested water rights are those perfected by beneficial use.¹³² Licensed water rights are granted by the OSE after proof of application to beneficial use¹³³. An

¹²⁵Sec. 72-1-2, NMSA, 1978 Comp.

¹²⁶Sec. 72-12-20, NMSA, 1978 Comp.

¹²⁷Sec. 72-12-3, NMSA, 1978 Comp.

¹²⁸Sec. 72-5-1, NMSA, 1978 Comp.

¹²⁹Carlsbad Irr. Dist. v. Ford, 46 N.M. 335, 128 P.2d 1047 (1942)

¹³⁰Sec. 72-5-6, NMSA, 1978 Comp.

¹³¹Sec. 72-5-6, NMSA, 1978 Comp., Sec. 72-5-28, NMSA, 1978 Comp.

¹³²Sec. 72-1-3, NMSA, 1978 Comp., Sec. 72-9-1, NMSA, 1978 Comp.

¹³³Sec. 72-5-13, NMSA, 1978 Comp., Sec. 72-12-12, NMSA, 1978 Comp.

adjudication before a district court clarifies title and parameters of the use, and the water right is then an adjudicated water right evidenced by a judicial decree.¹³⁴

There are additional provisions regulating applications for the use of water consumed in the “...watering of livestock, in irrigation of not to exceed one acre of noncommercial trees, lawn or garden; in household or other domestic use, and in prospecting, mining or construction of public works, highways and roads or drilling operations designed to discover or develop the natural resources of the state of New Mexico...”.¹³⁵

To establish a right to beneficially use surface or groundwater, a person must apply to the OSE for a permit to appropriate.¹³⁶ An applicant must follow the rules and regulations established by the OSE and publish notice.¹³⁷ Within ten days after publication, objections or protests to the application may be filed if granting the application would be detrimental to the water rights of the objecting party, conservation or the public interest.¹³⁸

The OSE, at a scheduled hearing, determines whether there is unappropriated water available for use by the applicant. If so, and if the proposed appropriation is not contrary to the conservation of water within the state and is not detrimental to the rights of others and the public welfare of the state, the OSE may endorse his approval on the application which becomes a permit to develop water within a certain time, an inchoate right.¹³⁹

¹³⁴Sec. 72-4-17, NMSA, 1978 Comp.

¹³⁵Sec. 72-12-1, NMSA, 1978 Comp.

¹³⁶Sec. 72-5-1, NMSA, 1978 Comp., Sec. 72-12-3, NMSA, 1978 Comp.

¹³⁷Sec. 72-5-4, NMSA, 1978 Comp., Sec. 72-12-3, NMSA, 1978 Comp.

¹³⁸Sec. 72-5-5, NMSA, 1978 Comp., Sec. 72-12-3, NMSA, 1978 Comp.

¹³⁹Sec. 72-5-6, NMSA, 1978 Comp.

All water used for irrigation purposes is appurtenant to the land.¹⁴⁰ The owner can consent to the right being severed from the land, simultaneously transferred and becoming appurtenant to other land, or transferred for other purposes without losing priority, if such changes can be made without detriment to existing water rights and are not contrary to conservation of water within the state and not detrimental to the public welfare of the state.¹⁴¹ A permitted or licensed appropriator of water may use the water for uses other than the purpose for which it was granted or may change the place of diversion, storage or use under certain conditions. However, any change requires the approval of the OSE.

The 1931 statute applicable to groundwater has a similar permit application procedure; however, there are some significant differences. Water of underground streams and basins are public waters and subject to appropriation for beneficial use.¹⁴² However, until a basin is “declared by the OSE to have reasonably ascertainable boundaries,” the OSE cannot exercise jurisdiction in connection with the appropriation of underground waters.¹⁴³

Once a basin has been declared by the OSE, a person desiring to appropriate underground waters for beneficial use must follow the OSEs regulations and apply to appropriate groundwater. A license from the OSE is required before commencing drilling.¹⁴⁴ After publication of notice, persons contending that the application will impair their water right; that granting the application

¹⁴⁰Sec. 72-5-24, NMSA, 1978 Comp.

¹⁴¹Sec. 72-5-23, NMSA, 1978 Comp.

¹⁴²Sec. 72-12-1, NMSA, 1978 Comp., Sec. 72-12-18, NMSA, 1978 Comp.

¹⁴³Sec. 72-12-20, NMSA, 1978 Comp., *McBee v. Reynolds*, 74 N.M. 783, 399 P.2d 110 (1965)

¹⁴⁴Sec. 72-12-12, NMSA, 1978 Comp.

will be contrary to the conservation of water within the state; or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application can file objections or protests.¹⁴⁵

The OSE may deny the application without a hearing or may order that a hearing be held. The owner of a water right may change the location of his well or change the purpose of use of the water, but only upon application to the OSE and upon showing that the change will not impair existing rights, will not be contrary to the conservation of the water within the state and will not be detrimental to the public welfare of the state. Requirement for notice and hearings are the same as in the case of original applications.¹⁴⁶

After the OSE declares a groundwater basin to have reasonable ascertainable boundaries, surface water and groundwater are managed “conjunctively”, i.e. a stream system includes hydraulically (sometimes referred to as hydrologically) connected groundwater within the basin.¹⁴⁷ The OSE promulgates guidelines for conjunctive management. As an example, there are Guidelines for the Mesilla Valley Administrative Area:

“Applications . . . for groundwater appropriations that impact the surface waters beyond acceptable depletions must offset 100 % of the surface water depletions caused by the appropriation.

“ . . . An offset is achieved by acquiring a volume of water through a water right or other contractual obligation in the affected water source and releasing that water to replenish the affected volume in the source that results from exercise of the permitted groundwater appropriation. Offsets must be made before groundwater withdrawals commence

¹⁴⁵Sec. 72-12-3, NMSA, 1978 Comp.

¹⁴⁶Sec. 72-12-7, NMSA, 1978 Comp.

¹⁴⁷Sec. 72-12-3, NMSA, 1978 Comp., *Templeton v. Pecos Valley Artesia Conserv. Dist.*, 65 N.M. 59, 332 P.2d 465 (1958)

tantamount to surface water effects associated with full exercise of the permit. . . . If offset requirements are not achievable, the application will be denied.”¹⁴⁸

A senior appropriator of surface water can assert a prior right over a junior groundwater appropriator and a senior groundwater appropriator can assert a prior right over a junior surface water appropriator.¹⁴⁹

The right to use surface or groundwater may be forfeited if the party entitled to use water fails to beneficially use all or any part of the water claimed for a period of four years. If the failure to beneficially use the water persists one year after notice and declaration of non-use given by the OSE, the water reverts to the public and shall be regarded as unappropriated public water”¹⁵⁰

There are exceptions to forfeiture for circumstances beyond the control of the owner. Water rights claimants who lawfully begin developing underground water rights in an undeclared basin and complete it with reasonable diligence after the basin is declared, acquire a water right with a priority date as of the beginning of the work.¹⁵¹ This is known as the “Mendenhall doctrine.”

For both surface and groundwater, the amount of water use allowed is based on beneficial use in accordance with good conservation practices. The amount of water that may be used in connection with a right perfected by beneficial use cannot exceed such amount.¹⁵² Appropriating

¹⁴⁸See generally, Office of the OSE, “Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications,” Jan. 5, 1999.

¹⁴⁹City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (1962)

¹⁵⁰Sec. 72-5-28, NMSA, 1978 Comp., Sec. 72-12-8, NMSA, 1978 Comp.

¹⁵¹State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 9988 (1961)

¹⁵²Sec. 72-5-18, NMSA, 1978 Comp., State ex. rel. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957), Jicarilla Apache Tribe v. U. S. 657 F.2d 1126 (10th Cir. 1981)

water in excess of what is required for a specific beneficial use is considered waste and does not establish a water right for the excess usage.

The amount of water necessary for successful cultivation of land, sometimes called “the duty of water,” includes these essential factors: (1) the amount of water diverted; (2) the place of diversion as related to use; (3) the amount of water necessary for a particular beneficial use; (4) the time permitted for use or the season of the year during which water may be used; and (5) general irrigation or water-using practices followed in the area.¹⁵³

2. Adjudicative Functions

The OSE shall make hydrographic surveys and investigations of each stream system and source of water supply in the state, beginning with those most used for irrigation, and obtaining and recording all available data for the determination, development and adjudication of water supply of the state including the location and survey of suitable sites for dams and reservoirs and the determination of the approximate water supply, capacity and cost of each.¹⁵⁴

Upon the completion of the hydrographic survey of any stream system, the OSE shall deliver a copy of so much thereof as may be necessary for the determination of all rights to the use of the waters of such system together with all other data in his possession necessary for such determination, to the attorney general of the state who shall, at the request of the OSE, enter suit on behalf of the state for the determination of all rights to the use of such water, in order that the amount of unappropriated water subject to disposition by the state under the terms of this chapter may become known, and shall diligently prosecute the same to a final adjudication. . . .¹⁵⁵

Although a hydrographic survey gathers information on land ownership, it does not establish legal ownership of land or land or property boundaries. The survey only produces evidence on the

¹⁵³State ex rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (1974)

¹⁵⁴Sec. 72-4-13, NMSA, 1978 Comp.

¹⁵⁵Sec. 72-4-15, NMSA, 1978 Comp.

location, amount and ownership of water rights. Following this work, a field check of all water uses is conducted, and maps and reports are compiled to show all known uses of water in the survey area. Once the report is complete, it is filed with the court and the legal phase of the adjudication process begins.

After the hydrographic survey is completed, the adjudication proceeds in two phases.¹⁵⁶ In the first phase, each water right claimant identified by the hydrographic survey is sent an Offer of Judgment by the OSE. The Offer of Judgment is a proposed agreement between the water right claimant and the State which defines what the State believes is (1) the priority date of the water right; (2) the place and purpose of water use; (3) the point of diversion; (4) the source of the water; (5) the location and size of irrigated acreage, if any; and (6) the amount of water. For domestic, municipal, industrial, or other non-irrigation rights the Offer of Judgment will not include the location and amount of irrigated acreage. The Offer of Judgment also includes the person(s) or entities that the State believes is the owner of the right.

Water right claimants (Defendants) may either accept or reject the Offer of Judgment. Most objections are resolved through further investigations and negotiations. Each claimant, however, has a right to a court hearing. If a water right claimant fails to act within a specified time, the Court may issue a default judgment, adjudicating the water right as described in the Offer of Judgment. When an Offer of Judgment has been signed by both the State and the water right claimant, the Court enters an order confirming the agreement. If the claimant disputes the OSE's determination, the claimant can request a district court trial to determine the claim and after trial, a sub-file order is entered.

¹⁵⁶Sec. 72-4-15, NMSA, 1978 Comp. Sec. 72-4-17, NMSA, 1978 Comp.

When all disputes between the OSE and individual water claimants are resolved, a second phase begins. An individual owner or group of owners may challenge the water rights of others. This is called the *inter sese* phase. The court resolves any disputes between individual claimants in *inter sese* proceedings and enters sub-file orders.¹⁵⁷

For the OSE to manage the water resources of the state, not only the quantity of water is important, but also the timing of the availability of the water and the location where water can be delivered.¹⁵⁸ Factual disputes can arise about each of these although the most contentious disputes relate to quantity (and acreage irrigated) and priority. A stream adjudication can precipitate the filing of probates, suits to determine heirship or quiet title actions to clarify title of appurtenant real property. All of this increases potential for trials. A judicial decree, which results from a stream adjudication, establishes the elements listed above for every water user on the stream system. This is needed for the OSE to manage the State's water resources through enforcement of the State's system of prior appropriation.¹⁵⁹

An owner of a water right cannot use water in a manner that could have an adverse affect on use by an owner with a right that was established earlier. However, since all the stream system is hydraulically connected any change in the quantity of water, the priority date, the place of use, the purpose of use, the point of diversion or the source of the water has the potential for affecting many

¹⁵⁷Office of the OSE, (Sent with Offers Of Judgment) “Notice of Water Rights Adjudication and Explanation of the Process for the Lower Rio Grande Stream System Adjudication”, Office of the OSE v. Elephant Butte Irrigation District, et al., CV 86- 888 and CV 96-888, Third Judicial District

¹⁵⁸See Appendix B The Hydrologic Cycle and Scientific Aspects of Water

¹⁵⁹See Appendix C Administrative and Adjudicative Functions of the OSE

other beneficial uses. Drilling wells and pumping groundwater could deplete surface water. Diverting surface water could lower the groundwater table.

Changing the beneficial use from irrigation to municipal consumption may reduce return flows to the basin in one area and increase return flows in another area. In that circumstance, changing the use might increase the total amount of return flows and, considering the entire stream system, make additional water available for re-use. However this might be impermissible under New Mexico Water codes, if the change severely and adversely impacted a senior appropriator because availability of water was reduced at his specific location. Many times, increasing a supply locally is accomplished at the expense of some other locality.

The hydrologic connections between surface and groundwater in a basin,¹⁶⁰ and uncertainties in the science of hydrology, can make water disputes very contentious. A groundwater appropriation some distance from the surface water stream may take years to affect the surface water and conversely a priority call which stays use by junior groundwater users may take years before the reduction in groundwater use manifests in an increased availability of surface water. This not only makes it difficult for the OSE to manage the water resources of the state but also increases the number of disputes that must be judicially resolved. These hydraulic connections are also the reason why all those who claim a right to use the waters of a stream system must be joined in a stream adjudication. If parties are not joined, they may not be bound by any decision of the court. The attempt to resolve a water dispute between individuals in isolation from the other users of the stream system may increase the difficulties in determining rights of other users at a later date.

¹⁶⁰Appendix B The Hydrologic Cycle

APPENDIX D The Current Structure of the New Mexico Judiciary

1. The New Mexico Judiciary Strategic Plan

The Mission of the New Mexico Judiciary is to provide access to justice; resolve disputes justly and timely; and maintain accurate records of legal proceedings that affect rights and legal status in order to independently protect the rights and liberties guaranteed by the Constitution of New Mexico and the United States.

- Goal 1: Improve case flow management to provide the timely and fair proceedings.
- Goal 2: Provide training to enhance the skills of judges and court staff.
- Goal 3: Provide reasonable and affordable access to justice in safe and adequate facilities.
- Goal 4: Obtain adequate funding and resources for court operations.
- Goal 5: Obtain and use technology to collect, process and share information needed to process cases and manage resources.¹⁶¹

2. The Constitution of New Mexico creates the structure of the Judiciary

The judicial power of the state is vested in . . . a supreme court, a court of appeals, district courts, probate courts, magistrate courts and such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state.¹⁶² The supreme court of the state shall consist of at least five justices One of the justices shall be selected as chief justice as provided by law.¹⁶³

The state shall be divided into judicial districts as may be provided by law. One or more judges shall be chosen for each district as provided in this constitution.¹⁶⁴ The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and

¹⁶¹Strategic Plan of the New Mexico Judiciary

¹⁶²New Mexico Constitution, Art. VI, Sec. 1

¹⁶³Id, Sec. 4

¹⁶⁴Id, Sec. 12

appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. . . .¹⁶⁵

The Legislature shall establish a magistrate court to exercise limited original jurisdiction as may be provided by law. The magistrate court shall be composed of such districts and elective magistrates as may be provided by law. . . . Metropolitan court judges shall be chosen as provide in this constitution.¹⁶⁶ Appeals shall be allowed in all cases from the final judgments and decisions of . . . inferior courts to the district courts, and in all such appeals, trial shall be had *de novo*. . . .¹⁶⁷ The Court of Appeals shall consist of not less than seven judges. . . .¹⁶⁸ (By statute the Court of Appeals consists of ten judges.¹⁶⁹) The Court of Appeals shall have no original jurisdiction. . . . [I]t shall exercise appellate jurisdiction as may be provided by law.¹⁷⁰

Each judicial district and metropolitan court district shall have a chief judge who shall have the administrative responsibility for that judicial district or metropolitan court district.¹⁷¹

The Legislature fleshed out the structure of courts authorized by the Constitution:

Judges of the Court of Appeals elect a chief judge.¹⁷² The Court of Appeals has broad appellate jurisdiction.¹⁷³ The Supreme Court has original appellate jurisdiction and jurisdiction to review by writ of certiorari.¹⁷⁴

¹⁶⁵Id, Sec. 13

¹⁶⁶New Mexico Constitution, Art. VI, Sec. 26

¹⁶⁷Id, Sec. 27

¹⁶⁸Id, Sec. 28

¹⁶⁹Sec 34-5-1 NMSA, 1978 Comp.

¹⁷⁰New Mexico Constitution, Art.VI, Sec. 29

¹⁷¹Id, Sec. 38

¹⁷²Sec. 34-5-2 NMSA, 1978 Comp.

¹⁷³Sec. 34-5-8 NMSA, 1978 Comp.

¹⁷⁴Sec. 34-5-14 NMSA, 1978 Comp.

There are thirteen judicial districts, two of which are two single county judicial districts.¹⁷⁵ A district court in New Mexico is a court of general jurisdiction.¹⁷⁶ The number of district judges in each district vary from one judge in the Tenth Judicial District to twenty-three judges in the Second Judicial District.¹⁷⁷ The district court appoints a district court clerk for each county of the judicial district. Other personnel may be employed.¹⁷⁸ The district courts are agencies of the judicial department of the state government. Personnel of the district court are subject to all laws and regulations applicable to state offices and agencies and state officers and employees. . . .¹⁷⁹

In each county; the district court shall be held at the county seat. Each board of county commissioners must provide adequate quarters for the operation of the district court. The budget of each judicial district, appropriated from the general fund, must provide furniture, equipment, books and supplies the operation of each district court within the judicial district.¹⁸⁰

All money for the operation and maintenance of the district courts . . . [S]hall be paid by the state treasurer upon warrants of the secretary of finance and administration, supported by vouchers of the district judges and in accordance with budgets approved by the administrative office of the courts and the state budget division of the department of finance and administration.¹⁸¹

¹⁷⁵Sec. 34-6-1 NMSA, 1978 Comp.

¹⁷⁶New Mexico Constitution, Art. VI, Sec. 13

¹⁷⁷Sec. 34-6-4, through -16 NMSA, 1978 Comp.

¹⁷⁸Sec. 34-6-19, -20 NMSA, 1978 Comp.

¹⁷⁹Sec. 34-6-21 NMSA, 1978 Comp.

¹⁸⁰Sec. 34-6-24 NMSA, 1978 Comp.

¹⁸¹Sec. 34-6-35 NMSA, 1978 Comp.

Bernalillo County is the only county that meets statutory requirements to establish a Metropolitan Court.¹⁸² The Metropolitan Court constitutes a state magistrate court¹⁸³ with additional jurisdiction over municipal ordinances.¹⁸⁴ The metropolitan judges select and appoint a court administrator.¹⁸⁵ The Metropolitan Court administrator must annually prepare and submit a proposed budget to the Administrative Office of the Courts.¹⁸⁶ “All money for the operation and maintenance of the metropolitan court shall be paid by the state treasurer upon warrants of the secretary of finance and administration supported by vouchers . . . and in accordance with budgets approved by the Administrative Office of the Courts and the state budget division of the department of finance and administration.”¹⁸⁷

The Administrative Office of the Courts is supervised by a director appointed by the Supreme Court.¹⁸⁸ The director may appoint necessary employees.¹⁸⁹ Under the supervision and direction of the Supreme Court, the director supervises all matters relating to the administration of the courts, examines fiscal matters and the state of the dockets of the courts, secures information as to the courts’ need of assistance, prepares and transmits to the Supreme court statistical data and

¹⁸²Sec. 34-8A-1 NMSA, 1978 Comp.

¹⁸³Sec. 34-8A-2 NMSA, 1978 Comp.

¹⁸⁴Sec. 34-8A-3 NMSA, 1978 Comp.

¹⁸⁵Sec. 34-8A-7 (A) NMSA, 1978 Comp.

¹⁸⁶Sec. 34-8A-7 (B) NMSA, 1978 Comp.

¹⁸⁷Sec. 34-8A-7 (C) NMSA, 1978 Comp.

¹⁸⁸Sec. 34-9-1 NMSA, 1978 Comp.

¹⁸⁹Sec. 34-9-1 NMSA, 1978 Comp.

reports as to the business of the courts, and reports to the Supreme Court and the Legislature annually regarding the state of business of the courts.¹⁹⁰

The director of the Administrative Office of the Courts must deal with the problems of finance of courts supported by legislative appropriation (excluding municipal courts¹⁹¹) and be concerned with adequate but economical financing of each court and the equitable distribution of available funds among the courts.¹⁹² The director receives, adjusts and approves proposed budgets submitted by the courts prior to submission of the budgets to the state executive budget.¹⁹³ The state is responsible for the facilities of the Magistrate Courts and the Metropolitan Courts, and the Administrative Office of the Courts administers the Magistrate and Metropolitan Court Capital Fund.¹⁹⁴

The Magistrate Courts operate under the direction and control of the Supreme Court. The director of the Administrative Office of the Courts provides administrative support to the magistrate courts, under the supervision of the Supreme Court.¹⁹⁵ In magistrate districts where two or more divisions operate as a single court, the director of the Administrative Office of the Courts designates a presiding magistrate to perform administrative duties prescribed by regulation of the administrative office.¹⁹⁶ The Administrative Office of the Courts provides facilities for each

¹⁹⁰Sec. 34-9-3 (A), (B) and (C) NMSA, 1978 Comp.

¹⁹¹Sec. 34-9-7 NMSA, 1978 Comp.

¹⁹²Sec. 34-9-3 (D) NMSA, 1978 Comp.

¹⁹³Id

¹⁹⁴Sec. 34-9-13 NMSA, 1978 Comp.

¹⁹⁵Sec. 35-7-1 NMSA, 1978 Comp.

¹⁹⁶Sec. 35-1-37 NMSA, 1978 Comp.

magistrate court.¹⁹⁷ Magistrate Courts are lesser jurisdiction courts that do not have jurisdiction for specific performance of contracts for the sale of real property or matters in which the title or boundaries of land may be in dispute or drawn into question or to grants writs of injunction or civil matters where the amount in question exceeds \$10,000.¹⁹⁸ Water disputes between individuals are brought in the district court because generally the jurisdiction of the magistrate court excludes them.¹⁹⁹ Stream adjudications must be brought in district court.²⁰⁰ Appeals from administration decisions are appealed *de novo* to the district court.²⁰¹ Therefore a water judge for any structure of Water Court must be a district judge.

The Magistrates select, and the Administrative Office of the Courts employ, clerical assistants.²⁰² All salaries and Expenses of the Magistrate Court are paid by the state treasurer upon warrants of the secretary of finance and administration, supported by vouchers approved by the director of the Administrative Office of the Courts and in accordance with budgets approved by the state budget division of the Department of Finance and Administration.²⁰³

¹⁹⁷Sec. 35-7-9 NMSA, 1978 Comp.

¹⁹⁸Sec. 35-3-3 NMSA, 1978 Comp.

¹⁹⁹Sec. 35-3-3 NMSA, 1978 Comp.

²⁰⁰Sec. 72-4-15 NMSA, 1978 Comp.

²⁰¹Sec. 72-7-1 (E) NMSA, 1978 Comp.

²⁰²Sec. 35-7-10 NMSA, 1978 Comp.

²⁰³Sec. 35-7-11 NMSA, 1978 Comp.

3. Unification - The Conceptual Framework

The American Bar Association House of Delegates approved “Standards Relating to Court Organization” in February 1974 and amended in February 1990.²⁰⁴ These Standards advocate a court system that is unified in its structure and administration.

The aims of court organization can be most fully realized in a court system that is unified in its structure and administration, . . . that has uniform rules and policies, clear lines of administrative authority, and a sufficient unified budget.

The structure of the court system should be simple, consisting of a trial court and an appellate court, each having divisions and departments as needed. The trial court should have jurisdiction of all cases and proceedings and direct responsibility and control over all court operations and personnel essential to their management. It should have . . . Specialized procedures and divisions to accommodate the various types of criminal, civil, and family matters within its jurisdiction. . . .²⁰⁵

“Unification is best understood in the light of the problems it was designed to solve.

Structural unification was designed to end the organizational chaos and confusion caused by accommodation of court structure to local government structures and to local legal cultures. It was also necessary to eliminate the profusion of unprofessional limited jurisdiction courts.

Budgetary unification involved state financing of the trial court system and centralized judicial budgeting. This aspect of unification was viewed as a means to bring court employees into a state-funded personnel system, governed by supreme court policy, to effect a more equitable and efficient allocation of resources, to remove judges from local fiscal politics, and to secure a more stable and abundant funding base for court improvement.

Administrative unification was necessary to lend some operational coherence to the trial court system in each state. This aspect of unification was characterized by central policymaking and planning (not necessarily centralized management) and broader use of rule-making power.”²⁰⁶

²⁰⁴American Bar Association, Judicial Administration Division, Standards Relating to Court Organization, 1990 Ed.

²⁰⁵*Id.*, Section 1.10

²⁰⁶*Id.*, at page 133

There is some unification in administrative functions and budgetary functions in the New Mexico Judiciary, but considerably less in structural unification:

Administrative Unification:

The Administrative Office of the Courts was established in 1959.²⁰⁷ The Supreme Court has established a Chief Judges' Council as a statewide body to address the managerial needs of the court. The Chief Judges' Council consists of the Justices of the Supreme Court, presided over by the Chief Justice, the Chief Judge of the Court of Appeals, the Chief Judges of each of the judicial districts, the Chief Judge of the Metropolitan Court and two Magistrates. The Chief Judges' Council meets approximately once per month.

Budgetary Unification:

Approximately six years ago the Supreme Court established a procedure for a unified budget. One of the duties of the Director of the Administrative Office of the Courts was to "be concerned with adequate but economical financing of each of the courts and the equitable distribution of available funds among them."²⁰⁸ The Chief Judges' Council established a budget committee to review the budgets of all judicial agencies (except municipal courts) and recommend a unified budget to the Chief Judges' Council to submit to the Legislature. This procedure has improved the budgeting process, but problems of adequate funding and equitable distribution remain.

²⁰⁷Sec. 34-9-1 NMSA, 1978 Comp.

²⁰⁸Sec. 34-9-3 D NMSA, 1978 Comp.

Lack of Structural Unification:

The New Mexico Judiciary has some aspects of structural unification but faces problems with a piecemeal structure within courts of lesser jurisdiction.²⁰⁹ Facilities for the Supreme Court and Court of Appeals are provided by the state.²¹⁰ Facilities for District Courts are the responsibility of the county.²¹¹ Facilities for the Metropolitan Court and the Magistrate Courts are the responsibility of the state.²¹² Municipal Court facilities are provided by each municipality.²¹³

Metropolitan Court judges, district judges, court of appeals judges and Supreme Court Justices are required to have bar licenses and legal work history requirements, the amount depending on the level of the court, and are selected through a constitutional merit selection process.²¹⁴ Magistrates must have a high school diploma or a GED and are elected.²¹⁵ Municipal Judge's qualifications are determined by local ordinance.²¹⁶ Most municipal judges are required to be members of the bar and are elected in municipal elections. The Administrative Office of the Courts supervises "all matters relating to the administration of the courts,"²¹⁷ but municipal courts

²⁰⁹See Appendix D

²¹⁰Sec. 24-3-1, *et seq.* NMSA, 1978 Comp., Sec.34-5-7 NMSA, 1978 Comp.

²¹¹Sec. 34-6-24 NMSA, 1978 Comp.

²¹²Sec. 34-9-13 NMSA, 1978 Comp.

²¹³Sec. 35-14-1 *et seq.* NMSA, 1978 Comp.

²¹⁴New Mexico Constitution, Art. VI. Secs. 8, 14, 28, 33

²¹⁵Sec.35-1-3 NMSA, 1978 Comp., Sec 35-2-1 NMSA, 1978 Comp.

²¹⁶Sec. 35-14-3 NMSA, 1978 Comp.

²¹⁷Sec. 34-9-1 NMSA, 1978 Comp.

are excluded.²¹⁸ The Administrative Office of the Courts administers the municipal court automation fund.²¹⁹

4. Hierarchy of the New Mexico Judiciary:

Court	Administration
1. Supreme Court	Chief Justice and Supreme Court Director of the Administrative Office of the Courts, under the supervision and direction of the Supreme Court, supervises all matters relating to the administration of the courts. ²²⁰ The Supreme Court has superintending control over all courts ²²¹ and ultimate administrative authority. ²²²
2. Court of Appeals	Chief Judge ²²³ Court Clerk, who serves at the pleasure of the court, ²²⁴ is

²¹⁸Sec. 34-9-7 NMSA, 1978 Comp.

²¹⁹Sec. 34-9-12 NMSA, 1978 Comp.

²²⁰Sec. 34-9-3 NMSA, 1978 Comp.

²²¹New Mexico Constitution, Art. VI, Sec 3

²²²Rusillo v. Scarborough, 935 F.2d 1167 (10th Cir. 1991)

²²³Sec. 34-5-2 NMSA, 1978 Comp.

²²⁴Sec. 34-5-5 NMSA, 1978 Comp.

charged with supervision of
the administration of the court.

3. District Courts

Chief Judge, administrative authority of each
judicial district, supervises performance of
the court's administrative office among other
duties,²²⁵ and has supervisory control over
courts of lesser jurisdiction.²²⁶

Court Administrator, charged
with supervision of the
administration of the court.

4. Courts of Lesser Jurisdiction:

i. Metropolitan Court

Chief Judge, administrative authority
of each judicial district who
supervises performance of the court's
administrative office among other
duties.²²⁷

Court Administrator, charged
with supervision of the
administration of the court.

²²⁵New Mexico Constitution, Art. VI, Sec. 38, New Mexico Supreme Court Rules SCRA 23-109 NMSA

²²⁶New Mexico Constitution, Art. VI, Sec. 13

²²⁷New Mexico Constitution, Art. VI, Sec. 38, SCRA 23-109 NMSA

ii. Magistrate Court

The Administrative Office of the Courts, under the direction of the Supreme Court, provides administrative support to the magistrate court.²²⁸ In magistrate districts where two or more divisions operate as a single court, the director of the Administrative Office of the Courts designates a presiding magistrate to perform administrative duties prescribed by regulation of the administrative office.²²⁹

iii. Municipal Court

Presided over by Municipal Judges.²³⁰ Municipal ordinances govern personnel.²³¹

²²⁸Sec. 35-7-1 NMSA, 1978 Comp.

²²⁹Sec. 35-1-37 NMSA, 1978 Comp.

²³⁰Sec. 35-14-1 NMSA, 1978 Comp.

²³¹Mowrer, et al v. Rusk et al, 95 N.M. 48, 618 P.2d 886 (1980)

Appendix E

Comparison with Colorado Water Courts

The proposals for a Water Court vary from a pure administrative process [The Sanchez' proposal] to a Colorado type court that is based primarily on judicial process [The Legislative Finance Committee proposal]. Colorado has for more than one hundred years managed its water resources through the courts.²³² Colorado has a materially different constitutional, legislative and judicial history than the history of New Mexico's Water Codes or any other state that has adopted the Prior Appropriation Doctrine. Practically all water matters, including those handled administratively in New Mexico, are initially filed in district court. Consequently a far greater burden of managing water resources falls on the district court in Colorado. This also results in a significantly higher appeal caseload.

All states that have adopted the Prior Appropriation Doctrine regulate the use of water in three ways: First, initial appropriation. Secondly, diversion and distribution of water. Thirdly, adjudication or legal determination of the ownership of water rights. Differences in water codes among prior appropriation states vary as to what extent the executive branch or the judicial branch is responsible for each of these.²³³ The state legislative codes for regulation vary from the mostly

²³²Justice Gregory J. Hobbs, Jr, "Colorado Water Law: An Historical Overview", 1 U. Denv. Water L. Rev. 1 (1997)

²³³A Lynne Krogh, Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions, Land and Water Law Review, Vol. XXX, No. 1 (1995), Adjudication Procedures in Prior Appropriation States: ARIZ. Rev. Stat. Ann. Sections 45-251 to -264 (1994 & Supp.); COLO. REV. STAT. ANN. Sections 37-92-101 to 602 (West 1990 & Supp.); IDAHO CODE Sections 42-101 to -1428 (1996); MONT. CODE ANN. Sections 85-2-211 to -234, -701 to -705; NEV. REV. STAT. ANN. Sections 533.090-320, 534.100 (Michie 1995); ORE. REV. STAT. Sections 539.005 to .240, .300 to -350, 541.310 to .320 (1995); TEX. WATER CODE ANN. Sections 11.301 to .341 (West 1988); UTAH CODE ANN. Sections 73-4-1 to -24 (1989 & Supp.); WASH. REV. CODE Sections 90.03.110 to -.245 (1994 & Supp.); WYO.

administrative scheme of Wyoming to the mostly judicial structure of Colorado.²³⁴ New Mexico has a mixture of both administrative and judicial. The water codes of Colorado can be compared to those of New Mexico by analyzing administrative and adjudicative functions and the extent to which the statutes distribute these functions between the OSE or equivalent administrative body and the court.

New Mexico law distributes responsibility between the executive branch (State Engineer) and the judicial branch as follows:

I. Initial Appropriation	State Engineer
	Appeal of Administrative Decision <i>de novo</i> to the District Court
II. Diversion and Distribution of Water	State Engineer
	Appeal of Administrative Decision <i>de novo</i> to the District Court
III. Adjudication of title	District Court (the State Engineer is the Plaintiff)

STAT. Sections 1-37-106, 41-4-301 (1988 & 1995)

²³⁴John E. Thorson, Clarifying State Water Rights and Adjudications, Two Decades of Water Law and Policy Reform: a Retrospective and Agenda for the Future, Natural Resources Law Center, University of Colorado, School of Law (2001)

Colorado water law distributes responsibility as follows:²³⁵

I. Initial Appropriation	District Court sitting as a Water Court
II. Diversion and Distribution of Water	District Court sitting as a Water Court
III. Adjudication of Title	District Court sitting as a Water Court

Note: There are some limited exceptions where the State Engineer makes administrative decisions that may be appealed to the Water Court

In typical cases, the State Engineer acts as the Water Court's expert.

Adopting a Colorado-type stream adjudication would transfer a very large part of the administrative duties of the OSE under the current codes to the district court. This would be a disruptive institutional change.

It could also result in a more expensive system for litigants. The costs of obtaining state approval to transfer water rights from agriculture to other uses has been studied by Bonnie G.

Colby.²³⁶

In Colorado, changes in water use are evaluated in the state water court system in formal judicial proceedings.²³⁷ Fully one-third of all U. S. attorneys specializing in water law are members of the Colorado Bar. . . ."²³⁸

²³⁵COLO. REV. STATS., Sections 37-92-101 to -602,, See generally, James N. Corbridge Jr. and Teresa A. Rice, Vranesh's Colorado Water Law, Revised Ed., University of Colorado Press

²³⁶Bonnie G. Colby, "Transaction Costs and Efficiency in Western Water Allocation," Amer. J. Agr. Econ., page 1184 (December 1990)

²³⁷Id

²³⁸Id at page 1190

In an analysis of “policy induced transaction costs”(PITC) Ms. Colby determined that Colorado averaged \$187 per acre-foot compared with \$54 per acre-foot for New Mexico.²³⁹ “Colorado has much higher PITC and longer time delays for approval than other western states. . . .”²⁴⁰

²³⁹Id at page 1188

²⁴⁰Id at page 1190

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