



Middle Rio Grande Water Assembly

P.O. Box 25862 Albuquerque, NM 87125-5862

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'Adjudication' Theme of 2006 Annual Assembly

How valid is a market if you don't know what you have to sell? How can you 'bank' what may not be yours? How do you know if you are impacting on the privileges of others when there is no ledger that defines everyone's right? These are the questions that prompted the Middle Rio Grande Water Assembly's 2006 topic, "Adjudication: Curse or Salvation?" The program, presented last June in Albuquerque, marked the 10th annual gathering of Sandoval, Bernalillo and Valencia County citizens interested in regional water resource issues.

Water planning in the MRG has essentially been a lesson in deficit spending. In 1999, middle basin residents learned they are using more water than they are entitled to, an overdraft that comes at the expense of a vulnerable aquifer, a threatened stream system, and a set of legal promises about priority administration in New Mexico.

Adjudication is a legal process to determine the validity, quantity and priority of each water right in a specific basin, and past Assembly president Janet Jarratt framed the Middle Rio Grande issue as, "a situation where over-allocation creates a water-short situation every year, and drought just exacerbates that... The way you get *wet water* is through a high quality water right, and adjudication can lay all question to rest. It provides the basis for budgeting, it provides the scope and

scale for water markets and water banks—how can you market or bank something that is nebulous in nature? Without adjudication, it *will* be nebulous in nature."

DL Sanders, Chief Counsel to the State Engineer, and Director of the Litigation and Adjudication Program, admits that adjudication was intended to be prerequisite to priority administration, a basic premise of New Mexico's water code, but for a number of reasons, not all of the state's river basins have been adjudicated. "It is my belief that you could never have anticipated in 1907 that you would have Pueblo claims, federal reserve claims, endangered species claims, clean water claims—it was not anticipated that these complexities would bog down the process and make the distribution of water all the more difficult than when it had just been allocated among users. By not getting [adjudications] done in 1907 and dragging them out to this point, we've created a morass of problems for ourselves, among them, how are you ever going to get around to administering water? The prior appropriation system means nothing if you can't use your priority..."

The OSE began in 2005 to institute a program of Active Water Resource Management that will eventually be tailored to each of the state's river basins. In the Middle Rio Grande, Sanders explained, licenses [to use water] will be issued "for

every right that we have a record of. If they're not licensed already, which we've had the authority to do when we issued a permit—we're going to license those permits. If you have a declaration on file, we're going to license those declarations. Then we're going to...try to find out who else is left." Sanders said they hope to consider a small section of the basin at a time, moving downstream, and that they will consider each Pueblo separately.

Settling Pueblo water rights in the Middle Rio Grande will be one of the most difficult issues facing the state. Ernest Coriz of the Pueblo of Santo Domingo reminded listeners that the region's indigenous peoples have surrendered fertile land and precious water to succeeding waves of immigrants, in spite of legal agreements that guarantee Native Americans protection and priority. "Our pueblos are no different than Kirtland Air Force Base, Los Alamos, Livermore, and other points in the southwest that are located on federal land. They have a federal water right. What DL was talking about was a *state permitted* water right. And there are some areas where these kind of intermingle, and there are other areas where they are very different. The main value of a federal water right is that it cannot be lost through nonuse. If you don't use it, you can't lose it."

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adjudication...

And yet, absent adjudication and with new water uses increasing daily in the basin, prior right holders may actually be in possession of little but a piece of paper.

Third Judicial District Court Judge Jerald Valentine gave conferees a look at how adjudications might be done differently. "I can tell you an easy way to expedite adjudications. In the Lower Rio Grande, the hydrographic survey has been completed. If I gave the State Engineer a few months to do some field surveys and make sure it was updated, and had them put it in the form of a Final Decree, we would get finished within a year. But that is the equivalent of saying in a criminal case, 'Well, we're going to give him a fair trial, and then we're going to hang him.' If you're going to hang him, why worry about the trial? We have to worry about due process. This is a very important part; we cannot do it arbitrarily, and we cannot do it [by] ignoring the rights of everybody that has an interest in the stream adjudication."

Other possibilities for streamlining the adjudication process were offered by Peter Schoenfeld, who served as an attorney with the Office of the State Engineer from 1967 to 1969. "Let's take a look at what the goals of adjudication are," Schoenfeld said. "In the statutes, the purpose of an adjudication is said to be that the court would 'determine the amount of unappropriated water subject to disposition by the state.' If, as we all pretty much agree, there *isn't* any unappropriated water, do the courts have any jurisdiction at all under the statute if this is the purpose of the whole action? *There is no unappropriated water—we all know that.* Maybe we should consider that

the way to streamline this process is to abandon it, and come up with something else."

Susan Kelly, associate director of UNM's Utton Transboundary Center, said individual claimants, particularly *pro se* (self-argued) litigants in a large adjudication, are simply overwhelmed with the process. "They're served with pleadings from the State Engineer and they just put them aside, out of fear, or mistrust, or misunderstanding. That's a real problem. We need to get folks joined in the lawsuit so that global issues that affect everyone [can be addressed]." Utton Center's Ombudsman Program, created two sessions ago by the State Legislature, provides a neutral, third party expert to make the adjudication process more understandable to *pro se* litigants.

Finally, Water Assembly attendees were treated to the video, "Voices of the Jemez," a 2004 film sponsored by the Utton Transboundary center about Pueblo and *acequia* litigants in the Rio Jemez Basin, who, in 1996 negotiated a shortage-sharing agreement that eventually became part of the Abouselman adjudication. Based on necessity and neighborliness, their on-the-ground solution for sharing water in hard times nevertheless required the accounting that adjudication brings to water right ownership. *Acequia* mayordomo Gilbert Sandoval called the 1996 drought "an act of God" that brought him out of the Dark Ages which began thirteen years earlier with a letter that read, 'You are being sued by the federal government on behalf of the Pueblos of Jemez, Santa Ana and Zia for the illegal use of water for two or three hundred years. You owe these Pueblos \$80 million!' "We were consumed with antagonism and

blamed all our agony on the Pueblos," Sandoval said. Then in '96, he and other Jemez Valley irrigators were given a tour of Zia's tribal irrigation system, "to see what we were doing to them by our use of the water." Sandoval learned that in nine out of ten years, there was insufficient flow in the Rio Jemez to meet the Pueblo's needs. "I realized how fortunate I was in having the use of that upstream water. I simply had not realized what the lower basin users were going through... Until you walk in your neighbor's shoes, you don't know what he's encountering."

Zia Pueblo member and tribal administrator Peter Pino agreed that, "nature forced us to come together to work out an agreement. We were able to address the problem locally. I like to think we're proof you *can* come together... History is history, and we can't change it, but we have in our control the future of our children and our grandchildren. I encourage you to stick with this path you're on to quantifying the water rights. Without that, there will be a state of confusion, and it would be an injustice to our children to leave that kind of mess for them to deal with."

*A complete transcript of the
10th Annual
MRG WaterAssembly can be
found at
www.WaterAssembly.org.*

Past Year Active For Water Assembly Volunteers

Consistent with an overall theme of encouraging implementation of the Regional Water Plan while expanding efforts at outreach and education on water issues in the MRG, Water Assembly volunteers have been busy in 2006-07. Here are some highlights of the past year.

The Assembly continued to be represented on the Water Resources Advisory Committee (WRAC), appointed in 2004 to help set a course for the Albuquerque/Bernalillo County Water Utility Authority. WRAC's Interim Report, approved by a super majority in October, 2006, suggested a new focus for the Authority—to balance use with renewable supply—and that a set of policies and strategies be enacted to prepare the Authority to meet future water challenges. Overarching recommendations included (a) continuing programs to encourage water conservation and setting new conservation targets; (b) balancing water use with renewable supply, possibly through a 'cap and trade' program to restrict total consumption to 2005 levels and establishing a mechanism to trade consumption as new uses arise, and by *not* reallocating conserved water; (c) linking land use planning with water management to protect open space and recharge potential, and taking water supply availability and cumulative impacts into account when making land use development decisions; and (d) placing a greater emphasis on the regional context within which the Authority and all other water users in the Middle Rio Grande operate by establishing benchmarks for balancing the regional water budget, with an action plan to attain them and a contingency plan to deal with shortfalls. The WRAC was disbanded after submission of the report, but a

new group, the Customer Advisory Committee (CAC) is now reviewing an edited version of WRAC's recommendations.

The Water Assembly attended a series of 'Upstream Downstream' workshops sponsored by the New Mexico Water Dialogue and the Interstate Stream Commission, in which representatives from the middle basin's three neighboring water planning regions met to discuss conflicts between their separate plans in the interest of avoiding a Compact default. One overarching concern that emerged from the multi-regional forum is the need for water providers to report supply and demand in the same format, making basin-wide understanding and management easier. UNM's Utton Center offered to help the group focus ideas into a work plan and proposal to take further steps.

Representatives of the Water Assembly also served on the Interstate Stream Commission's ongoing Ad Hoc Committee, along with other regional water planners from around the state. Among the critical topics discussed was how to revise the current water rights transfer process to protect "transfer-to" and "transfer-from" locales, and updating the Public Welfare Statements in Regional Water Plans.

Assembly participation also continued in the Middle Rio Grande-Albuquerque Reach Watershed Group, established through a Section 319 grant from the Surface Water Quality Bureau (SWQB) to the Ciudad Soil and Water Conservation District (CSWCD). The Water Quality Group was instrumental in developing the Watershed Restoration Action Strategy for the Albuquerque reach of the Rio Grande; approving the TMDL

for fecal coliform in stormwater; funding and overseeing the Bacterial Source Tracking Study; understanding the processes used for setting water quality standards by the State of New Mexico, the Pueblo of Isleta and the Pueblo of Sandia; and helping to promote understanding of water quality issues and treatment technologies. 2007 goals include improving the draft WRAS and the Phase II work plan, and determining how to encourage voluntary adoption of watershed improvement projects.

Assembly members attended other water-focused groups as well, including the New Mexico Water Dialogue, and the MRG Endangered Species Act Collaborative Program. Representatives were also invited to discuss the Assembly's work with students in UNM's Water Resource Program Contemporary Issues class.

In 2007, a calendar was added to the *WaterAssembly.org* website to promote upcoming water events and provide ongoing links to valuable water and planning-oriented sites, particularly in the MRG. In addition, Water Assembly list serve readers now receive summary lists of recent water-related articles from regional newspapers.

In an effort to interface with local governments, the Water Assembly supported all ten of Bernalillo County's public sessions on the Water Conservation Ordinance (two rounds of 5 sessions each). An Assembly representative spoke in favor of the ordinance before the Bernalillo County Commission, and also attended several sessions with the Sandoval County Planning and Zoning Commission, recommending that

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active year...

Sandoval follow unincorporated Bernalillo County’s lead in developing a conservation ordinance. Previously, the Assembly encouraged Sandoval County to pass a set of water-oriented goals, based on the Regional Water Plan. Valencia County, too, has been urged to pass a water conservation ordinance.

Beginning with an op ed urging the State Legislature to fund water projects other than infrastructure needs, (specifically, a hydrographic survey for adjudicating the MRG; the State’s Permanent Water Trust Fund; updates of Regional Water Plans; a broad water education program; and support for key local implementation projects,) the Water Assembly prepared and submitted a series of water-related articles for publication in regional

newspapers. The series is currently running in the *Albuquerque Tribune*.

The Assembly also appealed to Governor Richardson in this ‘Year of Water’, recommending that (1) the OSE declare all waters in New Mexico, including brackish waters and groundwater below 2500 feet; (2) the State negotiate an agreement with other Rio Grande Compact signatories to reduce storage at Elephant Butte to lessen evaporative losses; (3) the OSE require a sustainable supply of wet water for all subdivisions, with recognition of cumulative effects of neighborhood pumping; (4) the State make OSE assessment of sufficient water supply for subdivisions mandatory rather than advisory; (5) the State ensure more robust water transfer criteria through legislation or regulation; and (6) the State exclude

water rights from condemnation by eminent domain.

Finally, the Assembly hosted its second Annual Rio Grande Compact Forum in April of 2007. Guest speakers were Interstate Stream Commission Rio Grande Basin Manager Rolf-Schmidt Peterson, and UNM water law professor Em Hall, who cautioned, “There are a lot of mysteries in this system and we know they all have Compact implications.” The Middle Rio Grande is “in hock to the river,” he said, and any number of issues—unquantified water rights, population growth, ‘double-dipping,’ proliferating water transfers, new diversions and domestic wells—could be the trigger that causes the basin “to tank.”

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