

John D'Antonio, State Engineer, Office of the State Engineer
Estevan Lopez, Director, Interstate Stream Commission
Rick Martinez, Chief of Client Services, New Mexico Finance Authority

ISSUES FOR HEARING

Various Lower Rio Grande Issues and Water Trust Board Update

- The State Engineer notes that The Litigation and Adjudication Program acts as the legal advisor to the agency. The attorneys prosecute all water right adjudications brought on behalf of the State of New Mexico in state and federal courts and are commissioned special assistant attorneys general. The program has an FY11 operating budget of \$6.7 million that includes \$1.4 million from the general fund. For FY12 the total drops to \$6.4 million with \$500 thousand from the general fund. For both fiscal years the program has 71 authorized FTE. The TOOL dated 6/1/2011 reports a total of 22 program lawyer positions with 7 vacancies.
- The Lower Rio Grande consists of approximately 17,800 defendants and 100,000 stream system acres. Based on the State Engineer Key Measure Quarterly Report something on the order of 30 percent have been judicially determined leaving about 70 percent open.
- Obviously, navigating so many defendants through seven layers of process is bound to take an inordinate amount of time and, as in almost all endeavors, time is money. And, this is just the tip of the ice berg with the Middle Rio Grande area looming in the future as an Antarctica. It is incumbent on both the court system and the State Engineer to recommend, shepherd and champion simplifying statutes to make this a process that will play-out in far less than what could be another 25 years or more. With a 3 percent annual increase over the 25 years and based on the current \$6.7 million OSE program adjudication operating budget, the State Engineer alone will expend over \$245 million on this process in the absence of money saving innovation.
- The Rio Grande Project was the genesis for the Elephant Butte Irrigation District. The project includes the Elephant Butte and Caballo Dams, 6 diversion dams, 139 miles of canals, 457 miles of laterals, 465 miles of drains, and a hydroelectric power plant.

- Up until the early 1980s, The Bureau of Reclamation (Reclamation) managed the entire project and had responsibility for water delivery, mainly used for irrigation.
- Subsequently, Reclamation removed itself from active management and turned the responsibility over to EBID and EPWID1 with the mandate to create a sharing agreement. Unfortunately, this was a charge much easier to mandate than to accomplish. Finally, on February 14, 2008 an agreement was completed and executed.
- Unfortunately, not all find the agreement acceptable and New Mexico water authorities express concern the terms are tilted in favor of EPCWID1 at the expense of EBID.
- This is contrary to the interest of New Mexico water usage which the State Engineer is expected to protect.
- NMFA reports that since 2002, 90 entities have received almost \$198 million of funding through the Water Project Fund process.

LFC HEARING BRIEF

AGENCY:

Office of State Engineer and
New Mexico Finance
Authority

DATE: Thursday, June 16,
2011

PURPOSE OF HEARING:

Update on topical New
Mexico water issues

WITNESS:

John D'Antonio, State
Engineer, Office of the State
Engineer

Estevan Lopez, Director,
Interstate Stream
Commission

Rick Martinez, Chief of Client
Services, New Mexico
Finance Authority

PREPARED BY:

Mark Weber, Principal
Analyst

EXPECTED OUTCOME:

General information that may
be valuable, especially in a
drought year like 2011.

BACKGROUND INFORMATION

Lower Rio Grande Adjudications. The State Engineer notes that The Litigation and Adjudication Program acts as the legal advisor to the agency. The attorneys prosecute all water right adjudications brought on behalf of the State of New Mexico in state and federal courts and are commissioned special assistant attorneys general. They also provide legal representation to the other agency programs as well as in all water right administrative hearings and to the State Engineer in appeals of decisions to district court.

Litigation and Adjudication Program attorneys also seek injunctions on the State Engineer's behalf against illegal uses of water or over-diversions of water. Hydrographic surveys are important facets of adjudication proceedings so this technical function is integrated into the program.

The program has an FY11 operating budget of \$6.7 million that includes \$1.4 million from the general fund. For FY12 the total drops to \$6.4 million with \$500 thousand from the general fund. For both fiscal years the program has 71 authorized FTE. The TOOL dated 6/1/2011 reports a total of 22 program lawyer positions with 7 vacancies.

Adjudications are required by statute and determine who owns what water rights and in what amount. The State Engineer notes the purpose of adjudication is to obtain a judicial determination and definition of water rights within each stream system or underground basin so that water rights administration can be effectively performed and help meet New Mexico's interstate stream obligations. The Engineer separates the active adjudication cases into three geographic areas:

- Lower Rio Grande;
- Northern New Mexico; and,
- Pecos.

These high level divisions are then subdivided so that the geographic scope of each case is generally described by a stream system and occasionally by groundwater basin. Appendix 1 from the State Engineer website shows the adjudication areas and completed or active status. Also shown are the stream systems for future adjudications which include what is probably the most difficult and largest project, the middle Rio Grande. There are currently 12 active

Out of the FY11 total operating budget of \$6.7 million, \$1.4 million, 21 percent, is allocated for contracts. Of this total \$1.1 million is described as expert legal services. These legal services are contracted in addition to the services provided by the 22 lawyer positions, although 7 are vacant. Approximately \$500 thousand is described as earmarked for "negotiations with the tribes and in the adjudications".

The following thumbnail for each phase is from the Utton Transboundary Resource Center publication *Water Matters*.

The complaint may be filed by any interested party and initiates the adjudication.

The hydrographic survey is required under the state Water Code, involves collecting information about each water right and may be conducted before or after the complaint is filed. The survey is performed by the OSE technical staff.

In the subfile phase, the state's attorneys present findings about the elements of each water right to each claimant.

Global issues are matters that affect the stream system as a whole, or a large group of claimants.

The errors and omissions phase is conducted after all subfile orders are entered. It is designed to clean up the adjudicated information prior to entering a final decree.

The court conducts the inter se phase of an adjudication to resolve issues arising between water right owners.

adjudications when the subdivisions are taken into account. For example, the Lower Rio Grande has four active subdivisions; Rincon Valley, Northern Mesilla, Southern Mesilla and Outlying Areas. A smaller fifth area, Nutt Hockett, is reported as fully adjudicated.

The adjudication process tends to be painstakingly slow and onerous. The process consists of seven phases; 1) the complaint, 2) the hydrographic survey, 3) the subfile phase, 4) the global issues phase, 5) the errors and omissions phase, 6) the inter se phase and 7) the final decree. Any interested party can file the complaint and start the process. Part of the difficulty arises from the number of claimants involved in a suit. The Center notes with October 2010 information from the State Engineer that for the current active adjudications, just from the three areas mentioned above, that there are a total of over 75,000 claimants for approximately 445,000 acres of land in the stream systems. Some of the cases were filed in the 1960s with the oldest being the Pecos area dating back to 1956. The third quarter FY11 State Engineer Key Measure Performance Report indicates for all active adjudications 51 percent are settled. This compares to 48 percent a year earlier. At this pace it will require over 15 years to settle the remainder.

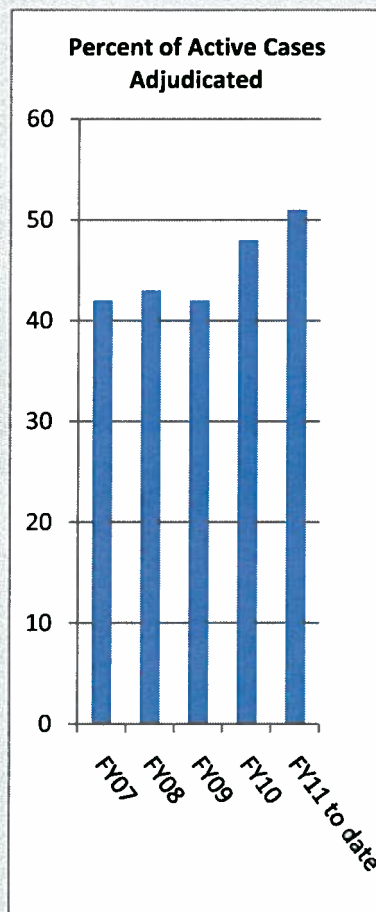
The Lower Rio Grande consists of approximately 17,800 defendants and 100,000 stream system acres. Based on the State Engineer Key Measure Quarterly Report something on the order of 30 percent have been judicially determined leaving about 70 percent open.

Obviously, navigating so many defendants through seven layers of process is bound to take an inordinate amount of time and, as in almost all endeavors, time is money. And, this is just the tip of the iceberg with the Middle Rio Grande area looming in the future as an Antarctica. It is incumbent on both the court system and the State Engineer to recommend, shepherd and champion simplifying statutes to make this a process that will play-out in far less than what could be another 25 years or more. With a 3 percent annual increase over the 25 years and based on the current \$6.7 million OSE program adjudication operating budget, the State Engineer alone will expend over \$245 million on this process in the absence of money saving innovation.

The inter se phase is often cited as an area that could particularly benefit from streamlining. As the adjudication process moves along in a stream system effectively individual claimants' complaints are satisfied. However, none are finalized until the process has worked its way through the entire system. At that point all claimants can question the rights of others and reopen the process for further

Finally, a court enters a partial final decree or a final decree. The final decree describes the rights adjudicated and once entered, ends the case.

The Utton Transboundary Resource Center has a detailed description of each adjudication phase and can be found at http://uttoncenter.unm.edu/WaterMatters!_articles.html.



evaluation. This creates a circle without an end and greatly slows the finalization of the entire adjudication. So, when one region of the stream system is tentatively adjudicated it must wait and wait and wait until all regions are in agreement. So, those at one end of the system are waiting for those at the other end to finish before the inter se even begins. There may be relatively long distances involved and even greater time periods which cause hardship for the claimants in the finished sections that may want to sell their rights or change their usage, but can't, or don't, due to uncertainty of the final decree.

This is not a recommendation to eliminate the inter se phase but rather an example of why the adjudication process tends to be long and arduous. Court representatives recognize difficulties exist and were invited to personally share potential changes with the Committee. However, they declined due to concern their recommendations were not complete enough and could be misunderstood at this point. However, court participation is an essential element in any improved adjudication changes.

Elephant Butte Irrigation District Concerns. The Rio Grande Project was the genesis for the Elephant Butte Irrigation District. The project furnishes a full irrigation water supply for about 178,000 acres of land and electric power for communities in the area. Project lands occupy the river bottom land of the Rio Grande Valley in south-central New Mexico and west Texas. About 60 percent of the lands receiving water are in New Mexico and 40 percent are in Texas. Water is also provided for diversion to Mexico to irrigate about 25,000 acres in the Juarez Valley.

The project includes the Elephant Butte and Caballo Dams, 6 diversion dams, 139 miles of canals, 457 miles of laterals, 465 miles of drains, and a hydroelectric power plant.

In the late 1800s settlement and irrigation development in southern Colorado added to central New Mexico's existing settlements and caused the Rio Grande to frequently run dry at El Paso. Several small river management projects were proposed but consensus could not be reached and none were developed. Another conflicting interest was Mexico's claim to water in addition to New Mexico and Texas. A 1904 report detailed the possibility of a dam at Elephant Butte that could satisfy the water demand, including the Mexico claim.

The federal Reclamation Act was enacted in 1902 with the goal of developing the dry western states by promoting farming opportunities for families. The Rio Grande Project was among the first to receive recognition under this new act and was authorized by the Secretary of

A short but interesting 34 page history of the Rio Grande Project can be accessed on the internet at:

http://www.usbr.gov/projects//ImageServer?imgName=Doc_1305577076373.pdf.

the Interior on December 2, 1905. Construction began in 1906 on smaller supporting diversion projects with the main dam, Elephant Butte, starting in 1908. Delays pushed back meaningful progress until 1912 with completion in 1916.

Up until the early 1980s, The Bureau of Reclamation (Reclamation) managed the entire project and had responsibility for water delivery, mainly used for irrigation. The users are the Elephant Butte Irrigation District (EBID) in New Mexico and the El Paso County Water Improvement District 1 (EPWID1) in Texas. Additionally, up to 60,000 acre feet of water is designated for Mexico. Reclamation basically delivered a pro rata water share to the districts in proportion to the irrigable land each possessed. Historically the breakdown has been approximately 43 percent for EPWID1 and 57 per cent for EBID.

Subsequently, Reclamation removed itself from active management and turned the responsibility over to EBID and EPWID1 with the mandate to create a sharing agreement. Unfortunately, this was a charge much easier to mandate than to accomplish. Fortunately, for many of the almost 30 subsequent years the lack of a formal agreement was masked by bountiful water supplies resulting in less need for formality. However, by 2003 drought years began causing friction between the districts bringing them not only to the negotiating table but also the judicial system for relief. The need to move forward did not provide an instant agreement but the fact that the drought persisted for several more years continued to pressure the parties forward. A 2010 State Engineer report points to other factors as well including:

- The general growing demand for water;
- Growing population;
- Pumping of groundwater, and;
- Salinity issues.

Of particular concern is the pumping of ground water in dry years to offset the lack of surface water. The groundwater depletion results in surface river water “seeking its own level” and recharging the underground supply leaving even less surface water available for irrigation. This is the proverbial “vicious circle” with less surface water creating demand for even more groundwater pumping. In an effort to address these concerns, as well as eliminate lawsuits from Texas, finally, on February 14, 2008 an agreement was completed and executed.

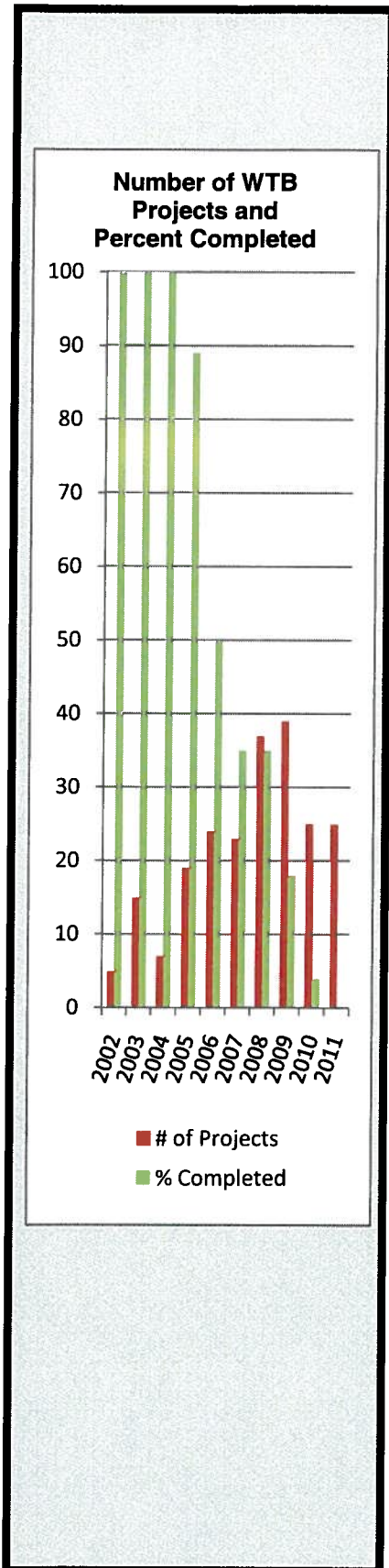
Unfortunately, not all find the agreement acceptable and New Mexico water authorities express concern the terms are tilted in favor of EPCWID1 at the expense of EBID. Estevan Lopez, Interstate Stream Commission director, described the situation as follows:

“The 2008 Operating Agreement has dramatically changed the proportion of water delivered to the two districts. Between 1951 and 2005, on average, 57% of the Project deliveries charged to the districts went to EBID and 43% went to EP1. This distribution was proportional to Project lands in each District. However, from 2008 through 2010 the allocation of Project Water was split approximately 38/62 in favor of EP1, while actual deliveries were split 50/50 between the districts since EP1 did not call for all of its allocated water. In low supply years, such as 2011, it is expected that EBID will receive even less than that.”

The issue raised is that the operating agreement allows a disproportionate amount of water delivery to EPCWID1 that will create a hardship for New Mexico irrigators. In addition, it is expected reduced surface water delivery would incentivize greater use of groundwater for irrigation and negatively impact other regional New Mexico water users. This is contrary to the interest of New Mexico water usage which the State Engineer is expected to protect.

The 2011 General Appropriations Act contains a \$1.5 million special appropriation “To support legal work relating to interstate water conflicts.” These funds may be used in the same effort to ensure an equitable operating agreement with the Texas EPCWID1.

WATER TRUST BOARD. In 2001, the Legislature passed the Water Project Finance Act. The Legislature recognized the continuing need for water infrastructure and improvements in a dry climate with a growing population. The statute’s stated purpose is to provide for water use efficiency, resource conservation and protection and fair distribution and allocation of the scarce resource to all users. The board is composed of the following sixteen members: (1) the state engineer or the state engineer's designee; (2) the secretary of finance and administration or the secretary's designee; (3) the executive director of the New Mexico finance authority or the executive director's designee; (4) the secretary of environment or the secretary's designee; (5) the secretary of energy, minerals and natural resources or the secretary's designee; (6) the director of the department of game and fish or the director's designee; (7) the director of the New Mexico department of agriculture or the director's designee; (8) the executive director of the New Mexico municipal league or the executive





The current balance of the Water Trust Fund is \$50.2 million.

director's designee; (9) the executive director of the New Mexico association of counties or the executive director's designee; (10-14) five public members appointed by the governor and confirmed by the senate and who represent defined water related interests; (15) one public member appointed by the Indian affairs commission; and (16) the president of the Navajo Nation or the president's designee.

By statute, the Water Trust Board may fund five types of projects:

- Storage, Conveyance and Delivery of Water;
- Implementation of the Endangered Species Act Collaborative Programs;
- Restoration and Management of Watersheds;
- Flood prevention; and
- Conservation, Recycling, Treatment or Reuse.

The board has an application evaluation procedure and uses the following criteria:

- Cost-Effectiveness of Water Project
- Water Rights Scientific, Hydrologic & Biological Studies
- Comprehensive Solution/Measurable Outcome
- Immediate Threats to Public Health, Safety & Welfare
- Regional Dispersion
- Local Effort
- Ability to Pay
- Ability to Leverage Federal Funds
- Priority
- Readiness to Proceed
- Life of Water Project
- Urgency

The Water Trust Board application process is staffed by the New Mexico Finance Agency. The process is described as follows:

- The application process follows an annual cycle.
- The Project Management Team evaluates applications and makes recommendations to the Water Trust Board's standing committee (Project Review Committee).
- These applications are ranked using Water Trust Board approved criteria and the projects are recommended to the Legislature. Legislative authorized projects are then eligible for funding.
- The Water Trust Board determines funding on terms and conditions established by the Water Trust Board and the New Mexico Finance Authority.

The largest awards for 2011 all at \$4.3 million include:

Lower Rio Grande Public Water Works Authority- Dona Ana County

Eastern NM Water Utility Authority-Curry County

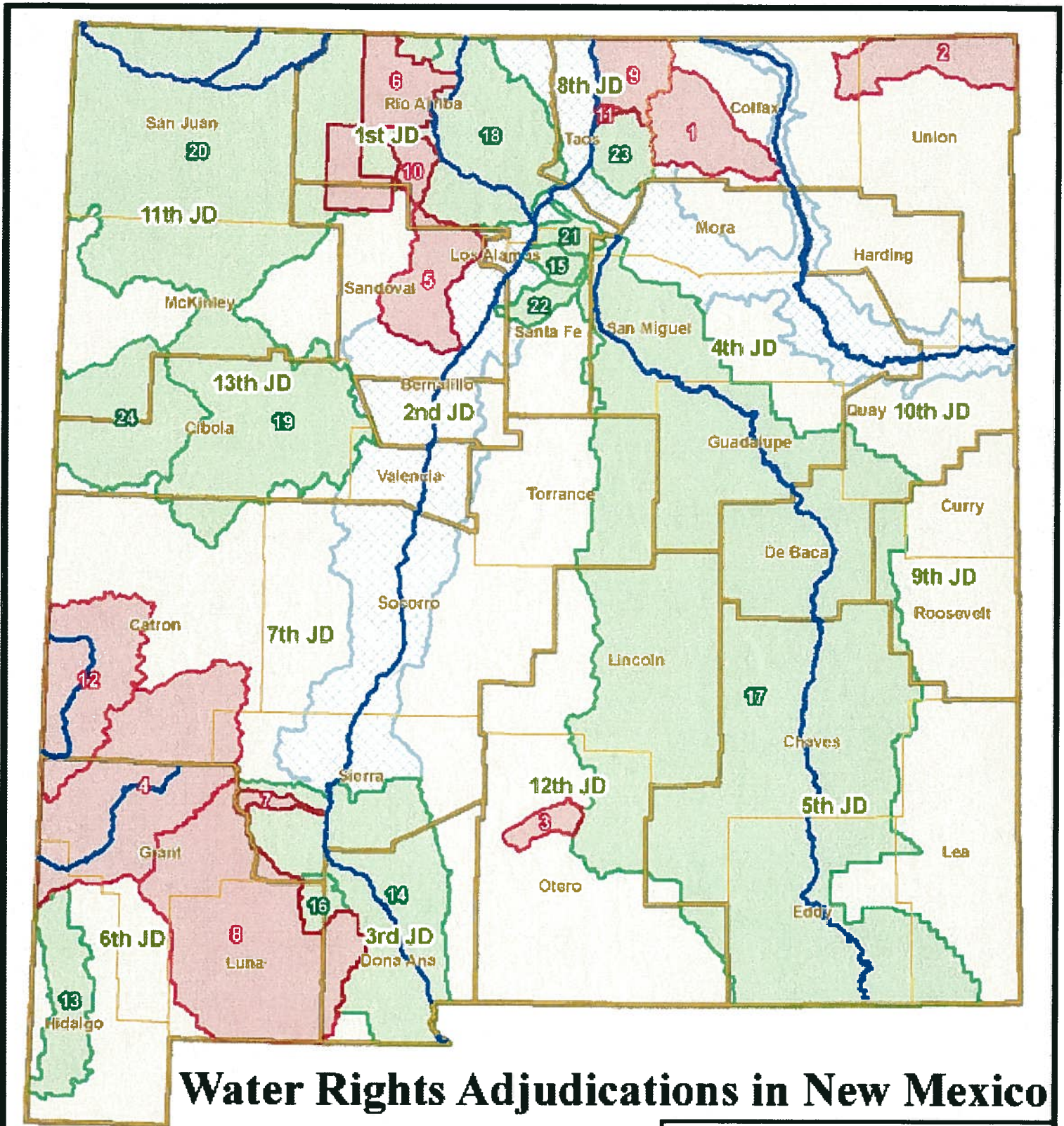
City of Gallup-McKinley County

- New Mexico Finance Authority then makes loans and grants to qualified entities for projects prioritized by the Board and authorized by the Legislature.

The statute calls for the creation of two funds, the Water Trust Fund and the Water Project Fund. The Water Project Fund is structured to consist of a distribution from the Water Trust Fund (a minimum of \$4 million per year) and 10% of the severance tax bond proceeds distributed annually. The money in this fund does not revert to the general fund at the end of any given fiscal year. In 2005, the Act was amended to specify that 10% of the funds in the Water Project Fund shall be dedicated to the State Engineer for water adjudications and 20% of the money dedicated for water rights adjudications shall be allocated to the Administrative Office of the Courts to pay for the courts' costs of these adjudications.

Appendix 2 is a NMFA summarization of all Water Trust Board projects. NMFA reports that since 2002, 90 entities have received almost \$198 million of funding through this process. The included map notes the location and number of project in each area. On June 1 the 2011 recommendations were announced and Appendix 3 recaps the awards. These projects take on a special importance in a year where there may be few or no other capital appropriations.

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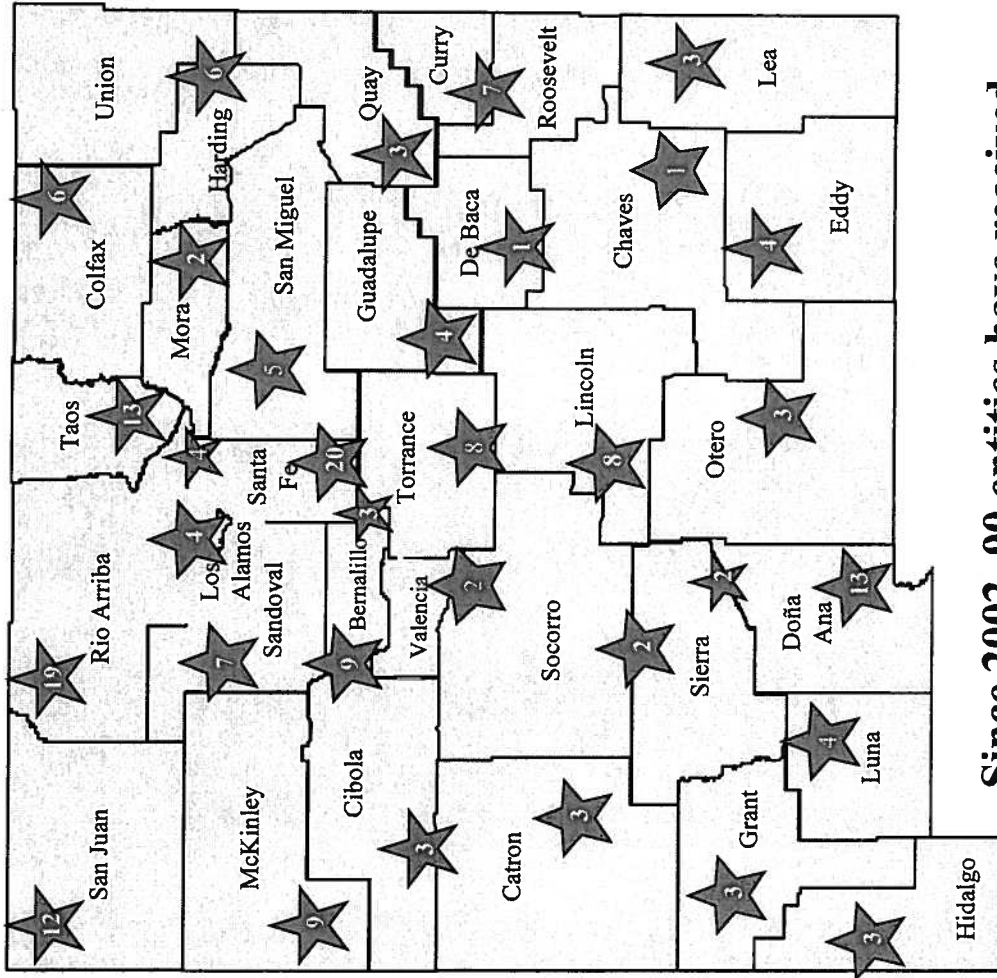


Water Rights Adjudications in New Mexico

Completed Adjudications		Active Adjudications	
Number	Name	Number	Name
1	Cimarron / Rayado	13	Animas Valley Underground
2	Dry Cimarron	14	Lower Rio Grande
3	Fernal / La Luz	15	Nambe / Pojosque / Testique
4	Gila River	16	Nult / Hookett
5	Jemez	17	Pecos
6	Jicarilla Apache	18	Rio Chama
7	Las Animas Creek	19	Rio San Jose
8	Nimbres Basin	20	San Juan
9	Red River / Cabresto Creek - West Ladr	21	Santa Cruz / Truinas
10	Rio Gallina	22	Santa Fe
11	San Cristobal	23	Taos / Hondo / Grande
12	San Francisco	24	Zuni

Legend	
	Major_Stream
	County
	NM Judicial Districts
	Completed Adjudications
	Active Adjudications
	Stream Systems for Future Adjudication

Water Trust Board Projects



Since 2002, 90 entities have received approval for 195 funding awards totaling \$197,973,488



County	# of Awards	Amount
Bernalillo	9	\$9,369,740
Catron	3	\$449,731
Cibola	3	\$811,097
Chaves	1	\$340,000
Colfax	6	\$2,994,800
Curry	7	\$18,372,228
De Baca	1	\$385,000
Doña Ana	13	\$13,753,716
Doña Ana & Sierra	2	\$1,020,000
Eddy	4	\$2,860,000
Grant	3	\$798,000
Guadalupe	4	\$3,643,944
Harding	6	\$3,057,143
Hidalgo	3	\$1,402,781
Lea	3	\$2,916,150
Lincoln	8	\$5,149,000
Los Alamos	4	\$2,037,860
Luna	4	\$2,131,000
McKinley	9	\$17,149,407
Mora	2	\$1,312,377
Otero	3	\$7,835,000
Quay	3	\$2,002,400
Rio Arriba	19	\$13,676,496
San Juan	12	\$12,549,135
San Miguel	5	\$2,367,521
Sandoval	7	\$7,018,821
Santa Fe	20	\$33,805,512
Santa Fe & Rio Arriba	4	\$5,982,885
Sierra	2	\$1,853,751
Taos	13	\$15,270,156
Torrance	8	\$5,146,200
Torrance, Bernalillo & Santa Fe	3	\$902,000
Valencia	2	\$859,971

Prepared by NMFA Staff September 2010

2011 Water Project Funds as Approved by the Water Trust Board June 1, 2011

App ID #	Entity	Project Name	County	Funding Approved	Project Scope Recommendation
FLOOD PREVENTION					
117	Los Alamos County	Los Alamos Canyon Dam Public Safety Upgrade	Los Alamos	\$ 1,500,000.00	Recommended for Construction.
1	Total Project			\$ 1,500,000.00	
Funding recommendation is 5% of total funds available.					
Per Policy: Flood Prevention funding guideline is up to 10% of total funds available.					
WATER CONSERVATION, TREATMENT, RECYCLING OR REUSE					
128	Las Vegas, City of	Rodriguez Park Effluent Water System and Improvements	San Miguel	\$ 330,000.00	Recommended for Construction.
160	Clayton, Town of	Town of Clayton Waste Water Re-use Project	Union	\$ 2,000,000.00	Recommended for Construction.
171	Cimarron, Village of	Wastewater Treatment Facility - Water Reuse & Zero Discharge	Colfax	\$ 350,000.00	Recommended for Planning & Design.
101	Los Alamos County	Effluent Reuse Project	Los Alamos	\$ 350,000.00	Recommended for Planning & Design.
163	Lower Rio Grande Public Water Works Authority	Mesquite-Del Cerro/Berino Water Project	Dona Ana	\$ 4,371,629.75	Recommended for Construction.
5	Total Water Conservation, Treatment, Recycling or Reuse Projects			\$ 7,401,629.75	
Funding recommendation is 25% of total funds available.					
Per Policy: Conservation, Treatment, Recycling or Reuse funding guideline is 15-30% of total funds available.					
Funding Limit: WTB policies state that no more than 15% of the available funds in any given year may be awarded to an applicant for one or more projects.					
WATER STORAGE, CONVEYANCE, & DELIVERY					
100	Albuquerque Bernalillo County Water Utility Authority	Carnuel Water System Improvements	Bernalillo	\$ 1,600,000.00	Recommended for Planning, Design & Construction.
122	Las Vegas, City of	Taylor Well # 2 Replacement	San Miguel	\$ 1,546,162.00	Recommended for Construction.
92	Eastern NM Water Utility Authority	Eastern New Mexico Rural Water System (ENMRWS)	Curry	\$ 4,371,629.75	Recommended for Design/Construction.
142	La Asociacion de Agua de los Brazos	Water System Improvements	Rio Arriba	\$ 488,665.00	Recommended for Construction.
190	Truth or Consequences, City of	Ground Storage Tanks Rehabilitation	Sierra	\$ 1,280,000.00	Recommended for Construction.
180	Gallup, City of	Gallup Regional System Project 5	McKinley	\$ 4,371,629.75	Recommended for Engineering & Construction.
176	Thoreau WSD	Well # 4	McKinley	\$ 681,739.00	Recommended for Planning, Design & Construction.
151	El Valle de los Ranchos WSD	Water Project	Taos	\$ 968,332.73	Recommended for Construction.
191	Rio Embudo MDWCA	Regional Water System Infrastructure Improvements	Rio Arriba	\$ 450,000.00	Recommended for Planning, Design & Construction.
109	Albuquerque Bernalillo County Water Utility Authority	Large Scale Recharge Project Facility Design	Bernalillo	\$ 158,386.00	Recommended for Planning & Design.
188	Los Lunas, Village of	Los Lunas East Side Water Supply	Valencia	\$ 353,000.00	Recommended for Planning & Design.
182	San Ysidro, Village of	Water System Improvement Ph. II & III	Sandoval	\$ 492,940.00	Recommended for Planning, Design & Construction.
165	Questa, Village of	Village Water Line Replacement	Taos	\$ 282,084.35	Recommended for Planning, Design & Construction.
13	Total Water Storage, Conveyance, & Delivery Projects			\$ 17,044,568.58	
Funding recommendation is 58% of total funds available.					
Per Policy: Storage, Conveyance, & Delivery funding guideline is 60-75% of total funds available.					
Funding Limit: WTB policies state that no more than 15% of the available funds in any given year may be awarded to an applicant for one or more projects.					

App ID #	Entity	Project Name	County	Funding Approved	Project Scope Recommendation
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WATERSHED RESTORATION & MANAGEMENT

143	Claunch-Pinto SWCD	Estancia Basin Watershed Health, Restoration and Monitoring Project	Torrance	\$ 600,000	Recommended for Planning, Design, & Construction.
136	Isleta, Pueblo of	Island Removal Project	Bernalillo	\$ 1,000,000	Recommended for Construction.
166	Canadian River SWCD	Canadian River Riparian Restoration Project	Quay	\$ 602,000	Recommended for Planning, Design, & Construction.
116	Upper Hondo SWCD	Management of the Rio Hondo Watershed	Lincoln	\$ 500,000	Recommended for Planning, Design, & Construction.
113	Carrizozo SWCD	Management of the Tularosa Basin Watershed	Lincoln	\$ 450,000	Recommended for Planning, Design, & Construction.
150	Santa Fe County	Rio Quemado Watershed Restoration	Santa Fe	\$ 46,000	Recommended for Planning, Design, & Construction.
8	Total Watershed Restoration & Management Projects			\$ 3,198,000	

Funding recommendation is 11% of total funds available.

Per Policy: Watershed Restoration & Management funding guideline is 5-15% of total funds available.

Funding Limit: WTB policies state that no more than 15% of the available funds in any given year may be awarded to an applicant for one or more projects.