

OFFICE OF THE STATE ENGINEER AND INTERSTATE STREAM COMMISSION

PRESENTATION TO THE WATER AND NATURAL RESOURCES COMMITTEE June 1, 2011

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1. Drought

- John D. will complete

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2. Quality Improvement

- Agency continues to build on quality improvement efforts initiated as part of its 2009 Quality New Mexico (QNM) Piñon Recognition Award work:
 - Water Rights Division now collects satisfaction data from customers at all district offices.
 - Agency staff were surveyed about agency leadership and management.
 - Quality Council of senior managers has been created to analyze survey results, recommend follow-up actions, and to guide ongoing improvement efforts.
- Next steps
 - Analysis of survey data to identify opportunities for improvement in customer service and leadership/management practices.
 - Internal assessment that builds on Piñon Recognition feedback to set priorities for work systems improvement.
 - Review and revise strategic planning processes to better align with the QNM/Malcolm Baldrige National Quality Award Criteria for Performance Excellence.

3. Indian Water Rights Settlements

- Navajo Nation – Federal authorizing legislation signed on March 30, 2009. Pre-construction activities on the Pipeline have commenced. Construction will begin in earnest in 2012. The ISC is currently negotiating an agreement with the United States for New Mexico's \$50 million cost share Pipeline obligation. The target date for execution of the cost share agreement is July 30, 2011.
- Taos Pueblo – Federal authorizing legislation passed was given Congressional approval under the Claims Resolution Act of 2010, Public Law 111-291 and signed by the President on December 08, 2010. The parties are now in the implementation phase: ie, negotiating an Amended Settlement Agreement and other tasks.
- Aamodt (San Ildefonso, Nambe, Pojoaque and Tesuque Pueblos) – Federal authorizing legislation was given Congressional approval under the Claims Resolution Act of 2010, Public Law 111-291 and signed by the President on December 08, 2010. The parties are now in the implementation phase: i.e., negotiating an Amended Settlement Agreement and other tasks.
- Continued need for state cost-share funding through the Indian Water Rights Settlement Fund (Estimated need of \$130 million over the next 10 years).
- Jemez, Zia, and Santa Ana Pueblos, the non pueblo parties including the State may reach a settlement in which the State refuses to make any financial contribution. While all parties agree Congressional approval will be required.

- On January 7, 2011, the ISC certified to the Board of Finance the sale of bonds from the Indian Water Rights Settlement Fund in the amount of \$10 million—approximately \$8.6 million for Navajo Settlement implementation and up to \$1.4 million for the acquisition of water rights by the non-Indian Parties to the Taos Settlement.

4. Ute Pipeline Project

- Federal authorizing legislation signed on March 30, 2009.
- State legislation creating the Eastern New Mexico Rural Water Authority signed in March 2010.
- After a multi-year planning process, the ISC approved the Ute Reservoir Shoreline Management Plan on September 29, 2010.
- Environmental and Biological Assessments are complete. FONSI signed January 2011.
- Phase I of the water Intake Structure for the Eastern New Mexico Rural Water System is scheduled to begin construction in fall of 2011.
- To date, state support for the water system is approximately \$20 million in grants and loans and over \$150 million in today's dollars invested in Ute Dam.
- An Interim Intake Structure to serve the 12 Shores development (formerly Ute Lake Ranch) is to be constructed this summer.

5. Pecos River Settlement

- Due to extreme drought in the Pecos Basin, ISC has been pumping groundwater to augment surface water supply as specified in the Settlement since March 1st.
- Pecos River water supplies are diminishing faster than ISC can pump; consequently, ISC is behind in meeting the Settlement's target supplies for the Carlsbad Irrigation District
- ISC is doing everything it can to increase its augmentation pumping rates, including replacing three failing wells in Lake Arthur.
- The Settlement continues to have positive impacts on Pecos Compact compliance— as of the end of 2010 New Mexico's cumulative Compact credit remained at a historic high of ~100,000 acre-feet which will serve New Mexico well in getting through dry years such as this one.
- Continued funding for operation and maintenance of well fields will be needed.

6. Rio Grande Compact Status

- As of the end of 2010, the Rio Grande Compact credit was ~165,000 acre-feet.
- Given the low water levels in Elephant Butte Reservoir, Article VII of the Compact is in effect prohibiting storage of native water, in part or whole, in reservoirs in New Mexico upstream of Elephant Butte constructed after 1929.
- Elephant Butte pilot channel and river maintenance efforts have been instrumental in helping to build and maintain that credit.
- New Mexico's credit water is stored in Elephant Butte Reservoir. It is what is holding the reservoir water level up right now. It also serves at the bank account for the middle valley of New Mexico to offset possible future compact under-deliveries.
- In March, the Texas Rio Grande Compact Commissioner requested that New Mexico relinquish 100,000 acre-feet of compact credit.
- Relinquishment of credit water can have significant effects on New Mexicans—both positive and negative. In considering a relinquishment, the NM Rio Grande Compact Commissioner, John D'Antonio must take into account those effects and do what is in New Mexico's overall best interest.
- Under the 2008 operating agreement, such a 100,000 acre-foot relinquishment would have had more downside for New Mexican's than upside.

- In April John D'Antonio countered with a proposed relinquishment specifically designed to help southern **New Mexico** farmers beginning May 1, 2011 without significantly affecting Elephant Butte Reservoir water levels this spring or long-term compact compliance for the middle valley of New Mexico. Additionally, the proposed process would have allowed time to evaluate and clearly describe and communicate to stakeholders the impacts of a possible second relinquishment this year.
- As of May 25, 2011, the Texas Commissioner had not officially responded to the proposal but indicated it was being discussed by EBID and EP No.1 and a counter proposal was being considered.

7. 2008 Rio Grande Project Operating Agreement

- The 2008 Operating Agreement has resulted in annual reallocations of about 150,000 acre-feet of water from EBID to the El Paso No. 1, the Texas irrigation district.
- This year, while the drought is very bad, the current low water allotment to EBID is the primarily due to the 2008 Operating Agreement.
 - Because of the new agreement, EBID only recently was able to allot 4 inches of water per acre to its members.
 - At the same time, the El Paso County Water Improvement District No. 1 (EP No. 1) in Texas has enough to provide nearly a full supply to its members.
 - In comparison, if the Rio Grande project were still operated the way it was most recently before the 2008 Operating Agreement, EBID would now be able to provide its farmers over 13 inches of water per acre.
- The Operating Agreement is not sustainable for New Mexican's and needs to be modified.
- The OSE/ISC is in discussions with Texas, the US Bureau of Reclamation and, indirectly, the Districts about modifying the 2008 Operating Agreement to make it more equitable and sustainable.

8. Middle Rio Grande Biological Opinion – Rio Grande silvery minnow & Southwest willow flycatcher

- Existing Biological Opinion provides compliance with the Endangered Species Act (ESA) for all Middle Rio Grande water users until the beginning of 2013.
- Federal agencies developing a new Biological Opinion by 2012, because of expiration of current Biological Opinion and reduced availability of water.
- Requires active involvement by state and other non-federal agencies.
- Long-term, sustainable water operations regime is the goal.
- Non-federal participants are advocating for a program that focuses on recovery, is long term (i.e., 30 + years), and provides protections for all water users.
- Possibility of new endangered species litigation.
- Need for continued funding and legislative support.

9. Colorado River Collaboration

- Seven Colorado River Basin States (AZ, CA, CO, NM, NV, UT & WY) are working to develop drought management strategies.
- Lower Basin Shortage Sharing.
- Collaboration with Mexico to share shortages, augment supplies.
- Basin Study – basin-wide supply/demand analysis.
- This work is very time and travel intensive.
- Need support for continued engagement/participation or risk jeopardizing New Mexico's Colorado River entitlements.

10. Gila River Planning (Arizona Water Settlement Act 2004)

- Under the AWSA, up to 14,000 acre-feet of additional water and between \$66 - \$128 million of federal funding available.
- In 2011, the legislature approved creation of the New Mexico Unit Fund for state receipt and management of the federal AWSA funds.
- The state should receive the first \$6.6 million increment in 2012.
- The planning process to determine the use of the available money and water is continuing.
- A two tier selection process for evaluating potential projects has been proposed and will be decided upon by the ISC.
- Interested individuals have submitted project proposals for initial screening. These will be screened and several will be selected for further refinement and NEPA alternative review.
- Need a state endorsed plan by 2014.

11. Strategic Water Reserve

- The ISC designated the Middle Rio Grande, Lower Pecos and the Canadian River as Priority basins for Strategic Water Reserve activities in 2011.
- Vaughn pipeline project on the Pecos has been very successful.
- In January 2011, the ISC entered into a lease agreement with the Village of Los Lunas for approximately 1,000 acre-feet consumptive use pre-1907 surface water rights to be used in the Middle Rio Grande Reserve. A water right transfer application will be submitted this summer.

12. State Water Plan/Regional Water Plans

- State Water Plan Update is in progress.
- Complete draft of the updated Plan to be ready for public review by July-August 2011.
- The updated plan will be presented to the Interstate Stream Commission and Water Trust Board in public settings.
- Publish updated State Water Plan ~ September 2011.
- Regional Water Plans: once State Water Plan update is done, turn focus on revising the regional water planning template to resolve inconsistencies between regional plans and in relation to the State Water Plan.

13. Active Water Resource Management (AWRM) Initiative Progress

- Statewide readiness to proceed (7 priority basins): **90%**
 - Establishment of Water Master District & Water Master: 100%
 - Water rights files abstracted into WATERS database: 90%
 - Implementation of metering: 96%
 - Technical and legal preparation: 76%
- Current number of Water Masters Hired: 29 (18 are AWRM water masters, others court appointed).
- Continued emphasis on Alternative Administration agreed upon by basin stakeholders in lieu of strict priority administration.
- Continuing to develop protocols and guidelines defining Water Master authority and activities in the field.
- Continue working with Acequia community to increase ditch/acequia efficiencies.
- Working with Acequia community on statewide funding issues.
- Continue communication with Acequia community and public.

- Ongoing metering of surface and groundwater statewide and attaining metering agreements between OSE and Acequias.
- Successes in Gallinas Basin, Nambe-Pojoaque- Tesuque Basin, Chama Basin, Mimbres and Lower Rio Grande (Groundwater).
- Lower Rio Grande Basin: 2,517 Groundwater meters have been installed by owners of wells within the basin. This represents over 90% compliance with the Lower Rio Grande Metering Order. Efforts are focused on preventing illegal diversions, over-diversions and on waste of water.
- Gallinas Basin: 12 surface water stations (meters) installed. Spent to date: \$420,000.
- Nambe-Pojoaque-Tesuque Basin: 36 surface water stations (meters) installed; Spent to date: \$1,476,000.
- Chama Basin (Lower): Replaced old/outdated equipment on 12 stations. Completely replaced 3 measurement stations. Waiting ditch agreements on 6 additional ditches so we can install new metering stations. Replaced shelter and stilling well on 2 ditches.
- Chama Basin (Upper): 3 surface water stations (meters) installed; Spent to date (Upper & Lower): \$244,450.
- Cimarron: Replaced 1 station (meter) completely and replaced outdated/old equipment in 4 stations (meters). Spent to date: \$74,000.

14. Critical Management Areas (CMA)

- Recent focus was on eastern part of the state (i.e., Hobbs, Clovis and Portales).
- Looking at Regional Drawdown effects on aquifer and limited aquifer thickness.
- Goals:
 - Protect existing water users;
 - Prolong life of High Plains Aquifer;
 - Adopted Lea County Basin Guidelines on September 16, 2009;
 - Curry/Portales Basin Guidelines finalized May 2010.
 - Mimbres Basin Guidelines finalized May 2011.
- Rules and Regulations:
 - Finalizing agency Groundwater Rules and Regulations for public release.
 - Dam Safety Rules and Regulations updated December 2010. (New Legislation & other improvements)
 - Domestic Well Rules and Regulations hearing set for July 21, 2011 in Santa Fe. (Settlement w/petitioners i.e. Rio Arriba County & Acequia's)
 - OSE Administrative Hearing Rules and Regulations (New Rule set)

15. Dam Safety

- 165 deficient dams statewide.
- Estimated cost is \$5 million per year for 10 years to address these dams.
- Capital Improvement Project (CIP) funding for dams taken back during 2009 legislative session (\$4.5 million) and during the recent legislative session (\$3 million). Note: A total of \$2 million appropriated (new \$\$) to OSE for Dams during the 2009 and 2010 sessions combined. No new CIP funding appropriated to OSE, Dam Safety during recent legislative session.
- Dam Safety Rules and Regulations updated to conform to recent legislative changes to 72-5-32 NMSA (height and storage limits increase).
- Levees – Big federal push to address unsafe levees nationwide. New Mexico has hundreds of miles of levees.
- Dam Safety Bureau Workload:

- Existing Dams, Safety Inspections;
- Review of Emergency Action Plans & Breach Analysis of Dams;
- Review of Operation and Maintenance Manuals for existing Dams;
- Provide Project Management of CIP funds for statewide Dam repair and new construction
- Focus of Dam Safety Bureau has recently changed. The focus is on the review of design plans for new projects thus reducing the frequency of Dam inspections of existing Low and Significant Hazard Dams. (Note: High Hazard Dams inspected on the same frequency as before.)
- Cabresto Dam rehab project:
 - All pre-bid permits in place prior to Advertisement.
 - Advertised as Request for Proposal to Construct on January 6, 2011.
 - Deadline to submit proposal was February 25, 2011. Two proposals received from (ASI Contractors Inc and Kiewit NM Inc).
 - Both proposals exceeded the Engineer's Estimate of Probable Cost and of available funding.
 - ASI Contractors Inc was chosen based on a higher qualification score and they had the lower cost of the two proposals.
 - Notice of award issued to ASI Contractors and Notice to Proceed. Work to performed over a two year period. Work scheduled to begin on June 1, 2011.

16. Major Litigation and Appeals Update

- *Tri-State Generation, et al. v. D'Antonio*, NMSC No. 32,704, AWRM ("Tristate"): challenge to the state engineer's frame work rules for implementing priority administration, whether the water rights to be administered have been adjudicated or not, as directed by this Legislature pursuant to 1978 NMSA, § 72-2-9.1. The New Mexico Court of Appeals, affirmed in part and reversed in part, both the State Engineer and Tristate granted certiorari by the New Mexico Supreme Court and Briefs-in-Chief have been filed.
- *Bounds, et al. v. The State of New Mexico, et al.*, NMSC No. 32,713 and *New Mexico Farm & Livestock Bureau v. The State of New Mexico, et al.*, NMSC No. 32,717, Domestic Well Statute ("Bounds"): challenge to the constitutionality of the domestic well statute, 1978 NMSA, § 72-12-1.1. The New Mexico Court of Appeals held that the domestic well statute is constitutional. Bounds and the Farm Bureau were both granted certiorari by the New Mexico Supreme Court and their Briefs-in-Chief have been filed.
- *Headen v. D'Antonio*, NMCA No. 28,695 April 19, 2011: New Mexico Court of Appeals held that the State Engineer can determine the validity of water rights. Decision resulted from Headen's effort to transfer water rights he suspected the State Engineer would find to be invalid.
- *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (2010): On April 21, 2010, the United States Court of Appeals for the Tenth Circuit ruled on the appeal over Plaintiffs environmental groups scope-of-consultation claim under the ESA. Plaintiffs claimed that the Bureau of Reclamation has discretion to allocate Rio Grande Project water from agricultural and municipal water users to maintain stream flows for the benefit of the minnow and that its failure to weigh that discretion in ESA-required consultations violated the Act. The court ruled that intervening events, namely the 2003 Biological Opinion, mooted Plaintiffs claim. Consequently, the court dismissed the appeal and remanded to the district court with orders to vacate several of its memorandum opinions and orders, and to dismiss Plaintiffs ESA claim. The state was a Defendant-Intervenor-Appellant in the case.

17. Water Rights Adjudications Status Report

- New Mexico has twelve water rights adjudication suits pending in the state and federal courts. These cases involve a combined total of over 72,000 defendants.
- In July, Special Assistant Attorneys General from the OSE Litigation and Adjudication Program (LAP) will present to the courts the State's FY 2012 Rule 71.3 Report on New Mexico's pending water rights adjudication suits. The Rule 71.3 Report summarizes the State's priorities, available resources, and resource allocations across all twelve pending adjudications for FY 2012.
- The state engineer would welcome an opportunity during the interim to present this report to the committee, in light of the committee's past interest in improving New Mexico water rights adjudications. The information from this report would enhance the committee's ability to evaluate any proposed reform for potential benefits and possible negative consequences.
- LAP is currently experiencing a 35% vacancy rate in the core technical and legal positions dedicated to adjudication work. LAP's remaining hydrographic survey staff and Special Assistant Attorneys General nonetheless continue to work to move all twelve pending adjudications forward towards the entry of final decrees.
- In addition to ongoing work to resolve individual water right "subfiles," proceedings in the Lower Rio Grande ("LRG") water rights adjudication are currently focused on four separate "Stream System Issue Sub-proceedings." These are proceedings to resolve issues which could directly affect the water rights of all or a significant number of water right owners in the LRG stream system. The four pending stream system issue proceedings are:
 - *SSI 101: Irrigation Water Requirements* – Trial is scheduled for early June in this proceeding to determine the amount of water to be adjudicated for irrigation water rights in the LRG. Issues include the determination of a basin-wide consumptive irrigation requirement ("CIR") and farm delivery requirement ("FDR") for all crops, and whether mature pecan orchards should be adjudicated, based on beneficial use, a CIR and FDR that are different from the basin-wide CIR and FDR. In addition to the State, the main parties to this proceeding are the New Mexico Pecan Growers, the Southern Rio Grande Diversified Crop Farmers Association, and the Elephant Butte Irrigation District (EBID).
 - *SSI 103: Domestic Wells* – This proceeding will address the priority date, transferability, and amount of water to be adjudicated for domestic wells in the LRG. This issue was raised by EBID, apparently in part to challenge the constitutionality of the domestic well statute. Since that question is a matter pending on appeal in the *Bounds* case, the adjudication court declined to consider it. Proceedings in SSI 103 are currently stayed while the parties focus on other stream system issues.
 - *SSI 104: Interests of the United States* – This proceeding will determine the interests of the United States deriving from the establishment of the Rio Grande Project in the LRG. This SSI was designated in response to claims of some water right owners to priority dates senior to the Rio Grande Project. It was also prompted by the collapse of an agreement in principle announced in 2009 between the State and the United States on the rights of the United States for the Rio Grande Project. Negotiations on this SSI are at an impasse as the result of the United States' unwillingness to address concerns raised by the State regarding the 2008 Operating Agreement between EBID, EP#1, and the Bureau of Reclamation. The parties are currently negotiating a schedule to bring this SSI to trial.
 - *SSI 105: Claims of the Estate of Nathan Boyd* – This is an expedited *inter se* proceeding on the claims asserted in the LRG adjudication by Scott Boyd, the administrator of the estate of Nathan Boyd, his grandfather. The Boyd estate claims that in the 1890s Nathan Boyd acquired a right to a major portion of the water later appropriated by the United States for the Rio Grande Project. Several parties urged the LRG adjudication court to designate this SSI because the Boyd estate claims large amounts of water currently

utilized by the Rio Grande Project. The court adopted a trial schedule for this SSI beginning with dispositive motions to be heard on August 18, 2011.

18. OSE/ISC Cost Cutting Measures

- Generate savings through frozen vacant positions and only requesting exceptions to hiring when detrimental to key agency processes.
- Travel has been curtailed to immediate travel required to address critical issues.
- Mandating use of state vehicles for travel, reducing mileage reimbursements.
- Require carpooling when multiple employees traveling to same destination.
- Realigning priorities in contractual services to address most critical areas.
- Scrutinize/curtail supply orders.
- Discontinue non-essential hardware and software maintenance agreements.
- Migrate information systems to lower cost hardware platforms.
- Renegotiating equipment lease costs.
- Utilize electronic publishing instead of printing of documents.
- Utilize teleconferencing and videoconferencing in lieu of travel where possible.
- Eliminated unnecessary vehicles and cell phones.