Making the Case for Change
Seeking Solutions to Important New Mexico Water Problems

Prepared pursuant to House Memorial 1, 2017 Legislature
7-1-2018

NEW MEXICO IS FACED WITH, BUT HAS NOT FACED UP TO, IMPORTANT WATER RESOURCE LIMITATIONS: DOWNSTREAM DELIVERY OBLIGATIONS, FEDERALLY-MANDATED REQUIREMENTS, AND STATE-PERMITTED WATER USES AND AUTHORIZATIONS THAT SUBSTANTIALLY EXCEED SUSTAINABLE SUPPLIES. WITHOUT ACTION TO ADDRESS ARTICULATED PROBLEMS, NEW MEXICO CITIZENS' CURRENT AND FUTURE WATER SUPPLIES AS WELL AS OUR POCKETBOOKS ARE AT RISK.

Specific significant flaws identified from the most recent attempt at regional water planning were the impetus for 2017 House Memorial 1. The memorial requested the Interstate Stream Commission to convene a task force to address these flaws. That has yet to take place. In response to this memorial, however, a Working Group of volunteer water planners prepared this proposal on how New Mexico should address its water issues.

This Working Group identified four high priority water problems:

1. Rio Grande Compact compliance in the lower Rio Grande, from Elephant Butte to the Texas state line, and the associated US Supreme Court lawsuit;
2. Rio Grande Compact compliance in the middle Rio Grande (Otowi Gage to Elephant Butte);
3. Unsustainable groundwater depletions in many areas of the state; and
4. New Mexico's hands-off approach to water administration.

As solutions to address those problems, the Working Group identified five core initiatives, which are:

1. *Strengthen* water management leadership and increase agency capacity to responsibly manage our water resources;
2. *Administer* water use for compliance with downstream delivery requirements and adherence to legal commitments;
3. *Address* statewide and regional water management problems, unsustainable water use, climate change impacts, watershed health, and water conservation opportunities through effective water planning;
4. *Improve and integrate* water resources and water use monitoring, data collection and data availability to support water planning and management; and
5. *Fund* state and local water management and planning programs so that they can be effective.

These solutions are presented to seek the necessary leadership and pressure by the Executive and the Legislature to cause them to be implemented. All of these problems and solutions have been raised repeatedly, most recently as the ISC's December 2017 Town Hall. But progress has not been made or has stalled. Financial support for water planning has been consistently far less than in neighboring states. Funding, staffing, water resources data collection, and the capacity of agencies to deal with New Mexico's

water problems are all currently diminished from previously inadequate levels, while, at the same time, our water supplies are facing increasing pressures.

One solution — administration of New Mexico's water use to keep it within interstate stream compact limits — Active Water Resource Management (AWRM) became state law in 2003 and was upheld by a 2012 N.M. Supreme Court decision. The Office of the State Engineer (OSE) has not met its commitments to the Legislature to make substantial progress. Another solution — making water planning effective — needs emphasis because the Interstate Stream Commission (ISC) treats water planning as an end in itself, rather than a thoughtful means to seek and implement solutions to problems.

The NM Constitution requires that water be administered by priority, "first in time, first in right". While such priority administration is required, it has rarely if ever been put to use. That has allowed too many demands to be placed upon a shrinking resource. Priorities must be administered so as not to exceed the physically and legally available water within the stream or basin, if planning doesn't result in better solutions.

This summary highlights four important water problems that are being neglected and recommends solutions to address public policy issues impacting most areas and residents of the state.

Priority Problems

1. Rio Grande Compact compliance in the lower Rio Grande, from Elephant Butte to the Texas state line, and the associated U.S. Supreme Court lawsuit

Many observers expect the penalties and costs that the U.S. Supreme Court will impose to hold New Mexico accountable for its past and require its future Rio Grande Compact compliance will be dramatically larger than in the Pecos. Complying will mean our Rio Grande water use will be cut back and our future water use will be explicitly limited. The attendant adverse consequences and risks not only include a demand to deliver more water but carry a potential billion-dollar damage assessment.

Six years after the N.M. Supreme Court upheld the AWRM law and the State Engineer's general rules for its implementation; the OSE has not implemented specific rules in the Lower Rio Grande (LRG). This leaves the State unprepared to limit total water use in the LRG to the Rio Grande Compact requirements. This failure is a strike against New Mexico's good faith and ability to be accountable. Both seem essential components to any settlement of the Texas litigation.

New Mexico's authority over its water and New Mexico's treasury are at risk. The Executive and the Legislature must prioritize remedying the State's failure to deal with its excessive LRG water use.

2. Rio Grande Compact compliance in the Middle Rio Grande (Otowi Gage to Elephant Butte)

New Mexico needs to ensure that its Middle Rio Grande (MRG) deliveries to Elephant Butte comply with Rio Grande Compact requirements so that the U.S. Supreme Court litigation does not also demand penalties and increased deliveries

from the MRG. Regional water budgets show that, on average, the MRG is depleting more water than the Compact allows. Rising temperatures will increase those depletions. Lately, New Mexico's compliance with its Compact obligations to deliver water through the MRG has been tenuous; special one-time measures have been taken to minimize net under-delivery.

Compliance with compact requirements is obligatory. The State Engineer's administration of MRG water uses will be required, either now to assure New Mexico's continued successful compliance or later to regain compliance in response to expanded US Supreme Court litigation. The Office of the State Engineer's AWRM regulations and other preparations necessary for the State's continued compliance should be a high priority.

3. Unsustainable groundwater depletions in many areas of the state

Many areas of the state rely solely on groundwater and are experiencing depletions from current uses that cannot be sustained. Speculators seek pumping permits based on the OSE's permissive groundwater basin rules that allow major depletions over a forty year period. New permits for development of public water resources – from supplies that are inadequately understood, have limited lifetimes, and poorly planned future uses – endanger current uses. Impacted local users face obstacles, including funding their defenses in expensive adversarial proceedings, when faced with applications to increase pumping.

4. New Mexico's hands-off approach to water administration

Neither history, hydrological facts, existing law, recent state law authorizations, nor agency initiative have proved sufficient for New Mexico's state and regional water management and planning agencies to confront our water problems. Left to fester, the problems are doing just that. State water management agencies have authorities fractured, and leadership lacks political support to admit and solve problems. The entire water administration program lacks accountability.

Solutions

The five core initiatives described below are essential elements of solutions to these four problems.

1. Strengthen water management leadership and increase agency capacity to responsibly manage our water resources

Minimizing damages from New Mexico's years of neglect of water resources management and assuring future water supplies will require diligent and competent agency leadership and sufficient professional staff. The appointment process needs to be reformed so that the Interstate Stream Commission is non-partisan, composed of qualified individuals representing the State's diversity and confirmed by the Senate. The Governor's appointments and the Senate's confirmation of the State's new state engineer and ISC director are crucially important.

The new leadership must identify necessary changes to the status quo and implement those changes in a fair and open manner. Making the necessary changes successfully will require management and technical competence and political skill.

The water planning mission of the ISC needs a statutory mandate that focuses on developing and implementing solutions, elevates water planning's priority, and requires increased emphasis and accountability.

2. Administer water use for compliance with downstream delivery requirements and adherence to legal commitments

New Mexico needs the State Engineer to limit our total water use on interstate rivers to our legal entitlement. As the highest of priorities, the State Engineer must complete the rules and prepare to implement AWRM in the Lower Rio Grande and the Middle Rio Grande.

The AWRM alternative administration concept requires an effective, voluntary regional water plan to reduce water demand of a planning region to the amount of water that is legally available due to compact compliance limitations. Alternative administration is intended to be superior to and more effective than priority administration. Thus, AWRM implementation is intended to and must foster localized operational agreements. Formal preparations for alternative administration in the LRG and MRG should be one of the highest priorities.

Other improvements could be implemented by the Office of the State Engineer's use of its regulatory authority to rein in water use: stop declarations; cancel dedications; stop waste; stop reserving water for abandoned uses by implementing forfeiture and abandonment statutes; stop speculation by requiring a publicly adopted regional water plan to contend with it; and manage closed basins to provide a long-term water supply.

Statutory amendments to the water code would provide necessary direction.

3. Address statewide and regional water management problems, unsustainable water use, climate change impacts, watershed health, and water conservation opportunities through effective water planning

State and regional water planning are needed to effectively evaluate and recommend solutions to many of New Mexico's water problems. Planning must be embraced as an essential element of effective water governance. Changes are required to make the state-funded regional water planning programs productive. Plans are needed for compliance with compacts and improved sustainability of groundwater supplies. The State's water planning since the 1987 statutory establishment of regional water planning has not met these needs.

Water planning should strive to protect our water supplies and make our uses of them more resilient. Planning should seek to collaboratively identify and implement balanced realistic solutions to solve real problems. Water plans should integrate goals and policies, including land-use decisions, water quality standards,

recreational needs, environmental protections, agricultural uses, urban growth demands, tribal requirements, and climatic changes.

Water planning at all levels must identify opportunities for conservation and seek to stop waste and non-conserving uses. To minimize the impact of climate change and build resilience, it is imperative that New Mexico plan for dealing with variable water supplies, including a focus on water-energy nexus, drought planning and preparation for extreme precipitation events to minimize their adverse impacts.

Water planning should be an adequately funded, ongoing process seeking to create remedies to identified problems through negotiation. The potential benefits to individuals and to entities must be made clear to assure adequate interest for broad and diverse participation.

Regional geographic boundaries must be congruent with the problems and hydrological realities the region's inhabitants face together. All significant stakeholder interests must be adequately represented and their voices heard. Shared goals and strategies for achieving them must be negotiated. Effective water planning for regions whose inhabitants share a common source of water requires coordination of local water plans at the regional level, to identify and seek to resolve conflicts.

The State must recognize the water interests of the many sovereign tribes through State outreach to New Mexico tribes and government-to-government consultations. Addressing tribal interests is both a constraint on and an integral part of water planning and must be prioritized.

To maintain dedicated involvement, all parties must perceive that benefits to them outweigh the costs of participating. The ISC must change its processes to approve, modify, or reject Regional Water Plan recommendations rather than only 'accepting' submitted plans. Approved recommendations must be implemented. Those charged with carrying out adopted strategies must be able to make credible commitments to do so, and the regional planning entity must have the ability to monitor both implementation and its effect on the water resource.

To enable regional planning bodies to perform these ongoing functions, they should be created and recognized under State law. The State should provide adequate financial and technical resources. To connect regional and State water planning, the State should re-establish a planning advisory council.

4. Improve and integrate water resources and water use monitoring, data collection and data availability to support water planning and management

Reliable data is required - Productive water planning requires knowing the size, nature and locations of the gap between supply and demand. Sound, relevant, credible technical data based upon physical reality is essential. Without such data, the planners cannot quantify their region's shortfalls, their recommendations and their goals, making it impossible to monitor on-the-ground progress against the plans.

Planners must know the gaps between supplies and demand, not just on an aggregate regional basis, but from point to point within regions. We need reliable regional and statewide data over time to understand the effects of drought and climate change on our water availability.

Improvement is needed - Improving the information on which water management and planning relies is a critical need. Improvements include better data coverage, reliable data collection with uniform methods, and strong quality assurance. Efforts are needed to make the data available and useful. Broad long-term monitoring of streamflows and aquifers is essential.

Reformed approach is needed - Agencies must work together toward a common set of goals for improvement. The State must establish uniform definitions and water accounting methods to achieve integrity of data. Programs to fill data gaps need to be planned regionally.

5. ***Fund state and local water management and planning programs so that they can be effective***

Funding Mechanisms Needed - Water management and planning must be adequately and consistently funded. Funding streams should include nominal user fees, grants, and governmental appropriations to provide the necessary, consistent resources. The Legislature should make an adequate initial appropriation to commence implementation of changes recommended by the Water and Natural Resources Committee based upon this report. The Legislature should direct the Executive to submit specific recommendations for sustained funding commensurate with our water's importance by the 2020 legislature.

WITHOUT ACTION TO ADDRESS THESE PROBLEMS, NEW MEXICO CITIZENS' CURRENT AND FUTURE WATER SUPPLIES AND POCKETBOOKS ARE AT RISK.

Further Information:

Please contact:

Bob Wessely
<Wessely@SciSo.com>
(505) 454-0555

Recommended water planning guidance for the Executive to implement is included in "Executive Guidance for Water Planning"

Additional documents relating to the recommendations contained herein can be found at:
http://nmwaterdialogue.org/new-mexico-water-dialogue/library/water-governance