

**STATEMENT OF PROF. REED D. BENSON**  
**UNIVERSITY OF NEW MEXICO SCHOOL OF LAW**  
**BEFORE THE INTERIM WATER AND NATURAL RESOURCES COMMITTEE**  
**NOVEMBER 9, 2012**

Thank you for inviting me to address the Committee on the recent decision in *Tri-State Generation and Transmission v. D'Antonio*, in which the New Mexico Supreme Court upheld the State Engineer's Active Water Resource Management (AWRM) rules. A 2003 statute had directed the State Engineer to adopt rules for priority administration of water rights; the Legislature saw such rules as necessary because "the adjudication process is slow, the need for water administration is urgent, [and] the need for compliance with interstate compacts is imperative ...." N.M. Stat. § 72-2-9.1. My views on the statute, the rules, and the *Tri-State* decision can be summarized as follows.\*

- The years immediately preceding the 2003 legislative session were unusually hot and dry, which surely helped convince the Legislature that the need for priority administration was indeed urgent. Given that New Mexico has now endured two years of serious drought, with no relief in sight, we are once again facing shortages that call for a stronger state role in managing what little water we have.
- The Supreme Court's decision in *Tri-State* was faithful to the Legislature's specific direction to the State Engineer to develop rules for priority administration. Several recent court decisions have emphasized the crucial role of the Legislature in crafting New Mexico water law and policy, and the Supreme Court decision gave appropriate respect to the important policy decision reflected in § 72-2-9.1.
- New Mexico water law—of which the AWRM rules are a small but significant part—offers considerable protection for water rights. This protection includes substantive standards and procedural requirements of the AWRM rules themselves; judicial review of the State Engineer's decision under the constitutional *de novo* standard; and adjudications as the final, definitive determination of water rights.
- The *Tri-State* litigation focused on the State Engineer's authority for priority administration, but the AWRM rules do not dictate that juniors be cut off in times of shortage. The rules authorize "replacement plans" whereby out-of-priority uses may continue temporarily by offsetting their depletions, and encourage water users to develop local solutions that may involve various forms of voluntary shortage sharing.

The AWRM rules and the *Tri-State* decision are important, but as a practical matter the actual implementation of the rules will be much more important. It is too soon to tell how that implementation will go, especially because the rules envision a localized approach with significant input from affected water users. I would expect the Office of the State Engineer to be extremely cautious in using this new authority, especially in the early going, so it may take some years before we understand how some of its provisions will work. Still, I believe the AWRM rules represent a valuable new tool for water management in New Mexico, and if the current drought continues, we may soon learn how useful that tool really is.

---

\* These views are my own, not those of UNM or any other state entity.