

DIVIDING THE WATER

BY DARRELL J. PEHR

Clearing up who owns water rights has caused turbulence for some New Mexicans. The process, called adjudication, begins at the mailbox with a half-inch-thick packet containing enough legal paperwork to challenge even an accomplished farmer turned water expert.

The busiest part of the state is the Lower Rio Grande Basin, where water rights owners began receiving packets from the state engineer's office in October 2000. Mailing is still under way in an effort expected to take years.

The contents include an offer spelling out the state's description of the owner's water rights.

Reactions to adjudication vary. About half find the process straightforward and accept the state's offer. Others are baffled by the packet and may set it aside rather than deal with it.

"They're just bewildered," says Valerie Beversdorf, resource/engineering specialist with Elephant Butte Irrigation District. "It is intimidating, especially for someone who has not followed the process."

Beversdorf says her office helps people plow through the packet. "We're trying to give them information, not really guidance," she says. "We're trying to give them enough information, an explanation of the process, so they can make a decision." Those who need more help can consider an attorney.

Assistance also is available through a special office of the state engineer set up in Las Cruces for the adjudication process.

The Las Cruces office helps people understand the process and the terminology of the offer, says Rasool Ahadi, Lower Rio Grande Adjudication Bureau supervisor.

Adjudication to define ownership and amount of water rights



within a river or groundwater basin is under way across much of New Mexico (with some adjudications now decades old). Only 20 percent of the water rights in the state have been settled.

Keeping up with what is going on as the huge adjudication process grinds along is not easy, according to Fairacres farmer Jeff Graham. He sent his packet and protest back to the state engineer more than a year ago and only recently received a reply.

As the farmer of more than 10 acres of pecans, vegetables and herbs, Graham wants a fair shake on his water. The main discrepancy he saw in the state engineer's offer was that land left fallow several years ago, now back in production, was not included.

When he received his packet, he took on the challenge himself.

"I had to sit down and study it for about a week," Graham says. "I went ahead and waded through it." But if he had to do it again, he would take it to EBID first so he could get a thorough knowledge of the process before proceeding.

"That's the one thing I did not do," Graham says.

But others are not finding the packets so onerous.

"For me, it was very understandable, reasonable and acceptable," Arnold McMillan says. "It's a very smooth process."

McMillan farms 26 acres of pecans about three miles north of Las Cruces.

When he received his packet about a year and a half ago, he responded right away. It took the state engineer's office about four months to get back to him.

"As I looked at what they allowed me, it was very fair," McMillan says. "I had no problem with it." McMillan says the only point of contention was the date a

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Adjudication ramification: Jeff Graham, a pecan, vegetable and herb farmer in Fairacres, checks the progress of his white sage crop. The sage is harvested, dried and tied into smudge sticks used in Native American ceremonies. The drought has had an impact on Graham's farm, and with water so scarce, he's concerned about how he'll be treated in the Lower Rio Grande adjudication.

well was added to his farm. After that was settled, he accepted the state's offer.

How does adjudication work?

The first step in the adjudication process is to survey the water's purpose, priority, location and quantity.

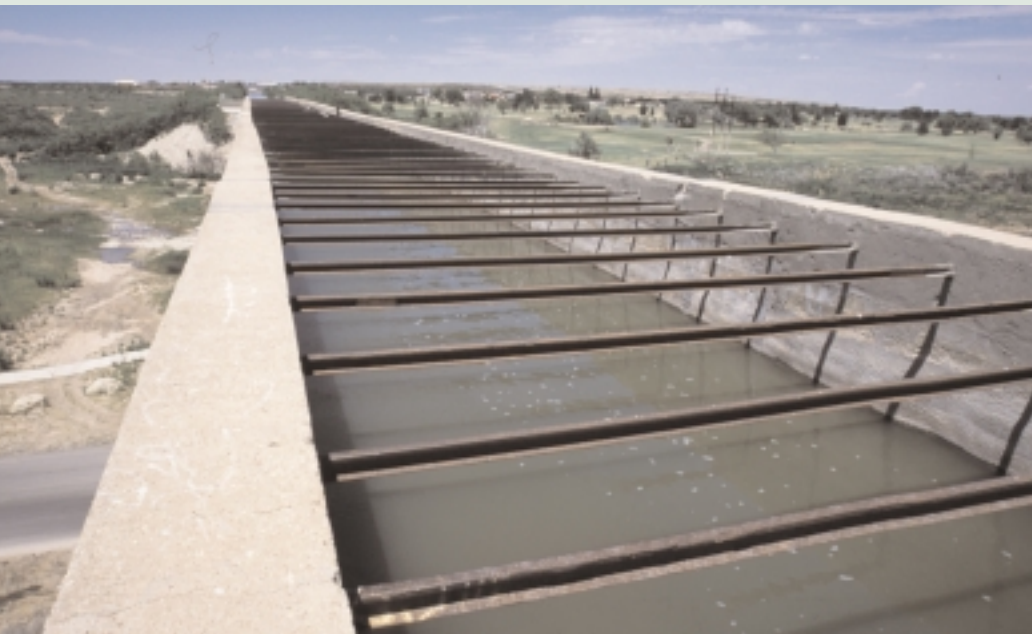
The second step brings water rights owners together in a lawsuit that generates an offer of judgment from the state engineer to each owner. The offer defines the amount, date and ownership of each water right.

For many, the adjudication process becomes real only when the packet arrives, so it may take some time to analyze the offer. Beversdorf says it is important that the offer is made to the current owner of the water right,

and that the owner's understanding of the water rights matches the offer. The water right owner may accept, object or claim no rights to the water described in the offer.

If the owner objects, the state engineer's technical team goes into the field to investigate the owner's concerns. The team's findings are evaluated, and if the offer is found to be incorrect or incomplete, a revised offer is sent. If the owner still is not satisfied, mediation is the next step, followed by a district court referral, then a hearing before a special master, if the court allows, or the judge may choose to hear the matter.

"If the claimant objects to the offer of judgment, it may take weeks or years to complete the process," Ahadi says.



Carrying water for a century: The flume at Carlsbad transports Pecos River water from Lake Avalon to a network of irrigation canals. The flume was constructed of wood in 1890, then rebuilt with concrete after a 1902 flood destroyed the original structure.

Owners are required to respond to initial offers within 60 days. Those who fail to respond may face a default judgment.

When all the issues in all the offers have been negotiated, individuals or groups in the basin can challenge one another. Challenges are resolved at hearings, and when everything is settled, a final decree is written, defining all water rights in the basin.

With basins taking decades to adjudicate, and many not yet started, some say this challenging task could last centuries.

The Lower Rio Grande adjudication includes more than 13,000 water rights claims. So far, about a fifth of the claims representing 28 percent of the acreage have been completed in the first phase of the adjudication.

“With the current approach to the adjudication, staffing level and equipment, we estimate about 15 more years before completion,” Ahadi says.

Beversdorf says having access to

the Las Cruces office has been good for people involved in the Lower Rio Grande adjudication, and her office is trying to work together with the state in the process.

“The state engineer’s office has been given an almost impossible task,” Beversdorf says. “It is difficult for everybody. This is a huge undertaking.”

The Lower Rio Grande office staff is available to meet with claimants from 8 a.m. to 5 p.m. Monday-Friday, or by appointment. Attorneys from the Lower Rio Grande legal team in Santa Fe can be contacted by claimants and can provide legal information about the process. The attorneys also frequently travel to Las Cruces to assist claimants in person.

It boils down to water rights

When it comes to water rights, New Mexico and other states where water is scarce follow the principle of prior appropriation. Rights are given to the first person who puts unappro-

priated water to a beneficial use.

NMSU’s Water Resources Research Institute defines a water right as “a legal right to divert water to a specific beneficial use.” In New Mexico, the state owns the water and assigns water rights, which have a value.

“A water right is a property. In order for others to use it, they have to be willing to buy it,” says Craig Runyan, coordinator of NMSU’s Water Task Force and a water quality specialist with NMSU’s Cooperative Extension Service.

To establish a water right, users must divert it from its original course—using an irrigation ditch, for example. The diverted water must be put to some beneficial use, such as growing crops or supplying water to a community.

One of the most important aspects of a water right is its age. The first user of water from an underground supply, river or lake generally has a senior right to those who come along later and tap the same water source.

The initial division of water rights holders came with New Mexico’s 1907 Water Code. Established water users received vested water rights. Others had to apply for permits. The older the water right, the stronger the user’s claim to water.

But things are not that simple. New Mexico’s water rights mix contains federal reserved water rights that ensure water on federal lands; Indian water rights that guarantee Native American water use now and for future purposes; pueblo and *acequia* (community irrigation ditch) water rights that were established long ago; and eight interstate compacts with New Mexico’s neighbors.

How much water is right?

Setting the amount of a water right is critical because it should reflect

the precise amount needed to satisfy the beneficial use.

“It’s not how much you divert, but how much do you need,” Runyan says. Other factors also have an impact, such as return flows and environmental considerations.

NMSU scientists studied how much water a crop actually consumes to help quantify the need, as well as researching problems such as salt buildup in the soil.

“Occasionally you must flush salts below the root zone of crops,” Runyan says. “When you’re irrigating in the West, you have to irrigate a little more to get the salt below the root zone. So a plant may need so much water in a lab, but more in the field.”

With agricultural use, does a water right apply only to the land that is actually cultivated, or also to the land that is needed for a farm’s roads, buildings and irrigation ditches? That’s another issue being debated in the Lower Rio Grande Basin, and it concerns large farm operators.

“The farmers in the district feel that all of their land is eligible,” says EBID’s Beversdorf. If all the land could take water and receive irrigation, farmers believe it all should be entitled to water rights. “We side with the farmers in that determination.”

Defining water rights and adjudicating water resources will occupy New Mexicans for a long time. The biggest challenge is to ensure a just and reasonable outcome for all.

“You have to be fair in these decisions and allocations,” Runyan says. “You have to recognize those who were here before others, and you have to recognize that claim on water. There has to be some fair and equitable way to distribute that resource.” **R**

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