

## Making Connections

By John R. Brown, Executive Director

As I was trying to find a thread running through the articles you'll read here that might provide a unifying theme, edging into a corner of my consciousness intruded the awkward word "connectedness." Not quite right, but close enough to trigger a better thought, John Muir's oft-quoted maxim, "When we try to pick out anything by itself, we find it hitched to everything else in the Universe." Or Garrett Hardin's cryptic observation that "You can't do just one thing." Each of the contributions to this issue of *Dialogue* recognizes this reality, and enlarges our understanding of the complex web of connections between water, human purposes, and the biophysical world.

In her commentary on Beth Richards' article in the last *Dialogue* (Summer 2005, available at <http://nmwaterdialogue.org>), **Chris Garcia** connects Beth's findings on major water dispute settlements in New Mexico to the conclusions of an important conference held by the Utton Center last year. Participants at that conference stressed the importance of parties working together toward common understandings of particular local hydrological and biophysical realities as a precondition for building relationships of trust across interests. These insights allow us to understand that underlying a discourse about who has what "rights" in particular circumstances is a deeper one about relationships:

whether and how individuals and communities are able to choose to live together and to share a resource they all require.

**Lisa Robert's** essay is presentation she gave in November at a MRCOG / NMSU conference on "Keys to Keeping NM Agriculture Growing." She was asked to address growth and competition for land and water. The result is an intensely personal yet scientifically informed argument for the multiple values of agricultural water whose importance to all of us and the ecosystem that sustains us we ignore at our peril as "efficiency" and "flexibility" in moving water become watchwords for the forces of economic progress. Though some may find Lisa's argument overstated, it deserves to be thoughtfully considered and taken seriously as the Dialogue considers water transfer policies and conservation incentives. "You can't do just one thing." Indeed.

**Molly McIntosh** reports in these pages on an "experiment" the Dialogue's Board agreed to participate in after the Water Conservation Incentives Project (WCIP) committee met with Professor David Brookshire and some of his

colleagues in the UNM Economics Department. We saw the possibility that the model they were developing for temporary water leasing (described in Molly's article) might provide for us a way of focusing on at least one type of incentive for a water right holder to "conserve" – to use less water or perhaps none – in order to reap an economic benefit from leasing the saved water. Nine of the fifteen participants in the computer simulation were Dialogue Board members, and the others were also well versed on water issues. (The experiment had been run several times before with individuals relatively unsophisticated about water.) The two-hour discussion that followed the simulation was reportedly helpful to the team conducting the experiment, as well as in advancing the Dialogue's interests. It was wide-ranging in its exploration, not only of the realism of the assumptions of the model driving the experiment, but of the potential "third party" implications of supposedly temporary water transfers to respond to permanent demands in a chronic condition of over appropriation. The experiment, partly because of its simplification of a complex reality,

allowed us to make the connections. Most participants in the experiment agreed that the conversation begun there should continue, and this will be the venue for further work on the WCIP. An in-depth report on the results of this work is planned for the next issue of *Dialogue*.

**REGISTER for the New Mexico Water Dialogue 12 th Annual Statewide Meeting on Tuesday, January 10, 2006: Closing the Gap: Ideas and Tools for Strengthening and Implementing Water Planning in New Mexico Page 7 or <http://nmwaterdialogue.org>**



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Kathleen Grassel

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John R. Brown  
New Mexico Water Dialogue  
PO Box 1387  
Corrales, New Mexico 87048 email  
jrb@osogrande.com

**Website:**

<http://nmwaterdialogue.org>

## Can settlement negotiations make adjudication a community-based process?

By Chris Nunn Garcia

**M**any thanks to the New Mexico Water Dialogue for the thoughtful Summer 2005 issue of the *Dialogue* on settlements in New Mexico adjudications. Beth Richards' overview and comparisons among the four water-rights settlements discussed in detail at the statewide meeting is extremely useful. Richards' concluding questions provide a valuable framework for a critical review of the settlement process, and her insights, drawn from the four settlements as applied to those questions, are concise and practical.

In September 2004, the Utton Center held a conference, *Crossing Cultural Boundaries for Sustainable Solutions: A multicultural approach*. A recurring question at that conference was "Is there a role for community building in water settlements?" Because the New Mexico Water Dialogue has from its inception focused on community-based planning and the development of common ground among diverse interests, I wanted to add some of the insights from that conference to Beth Richards' observations. They seem to collect comfortably under her four concluding questions. I have restated her own observations, because they are well worth restating, and labeled them (BR), and then added on those which come from the Utton conference report, labeled (UTRC).

1. How do outcomes of a settlement agreement differ from outcomes of adjudication?

- *Creation of community:* Litigants may be able to shift from the role of opponents to a partner relationship through a settlement process. Pyramid Lake Paiute tribal councilman John Jackson said of the 1996 Truckee River Water

Quality Agreement, "The tribe has moved from seeing Truckee irrigators as opponents to seeing them as partners in protecting the Truckee River." (UTRC)

- *Sustainability:* The relationships built during the settlement process may be a resource for adjustment and adaptation to change as the new allocations are implemented. (UTRC)

2. What precipitates settlement negotiations?

- *Initiating events*, such as state or federal intervention, water shortages, and the threat of loss of water or control over water. (BR)

- *Enabling conditions*, such as the state-facilitated negotiation process in the Pecos, state or federal funding for aspects of the settlement agreement, and transparency in water rights agreements. (BR)

- *Changes in perceptions*, for example perceptions of senior and junior rightholders of the practical benefits of having adjudicated and enforceable water rights and perceptions of the transaction costs of adjudication. (BR)

- *Recognition of community among the litigants:* Gilbert Sandoval told the Utton conference about the day the Jemez negotiating team walked the Jemez's irrigation ditches. When the *acequia* irrigators saw that the pueblo ditches had been bone dry for months, they realized that something had to be done, not just in response to the law, under which the pueblo ditches have senior rights, but in recognition of the needs of neighbors. (UTRC)

3. What are the necessary and sufficient

conditions to achieving a successfully negotiated and signed agreement?

- *Benefits must exceed costs* for each party to a settlement agreement—either in the settlement itself, or through compensating factors such as government funding or expectations of increased value for an adjudicated right or opportunities to acquire needed water in post-settlement water markets. (BR)

- *Appropriate negotiation processes* are needed, that are sensitive to and enable conversation about cultural and community values, that allow incorporation of these values into the agreement, and that are transparent and fair. (BR)

- *Deadlines*, such as court orders, contribute to willingness to negotiate. (BR)

- *Trust and mutual respect* is necessary. Estevan López, Director of the N.M. Interstate Stream Commission, said at the Utton conference, “Preservation of environmental qualities depends on developing trust with one another. The only way to do that is to recognize that the perspectives we bring are valid. ... There is no one view about [water]. The perspectives others value highly shouldn’t be set aside with ‘My view is the right view.’” (UTRC)

- *Hang in there:* If success is supported by healthy ongoing relationships among the basin’s communities, the parties must stay around to implement success. Peter Pino of the Pueblo of Zia put it bluntly. “If you’re going to make an agreement you have to be here when we’re trying to work it out. ... Please stay where you are if you’re going to work on this.” This is often a problem for highly mobile agency

staff. (UTRC)

- *A shared understanding of the facts:* Parties need a common understanding of the law, hydrology, history, ecology, and geology of the basin to reach an agreement that stands up over time. Much of the contentiousness among parties to water-rights lawsuits appears to stem from widely different perceptions of the facts. (UTRC)

4. Under what conditions is negotiating a settlement agreement a better approach than the standard litigated adjudication process?

- *Success is about people:* Many of the speakers at the conference described the success of their agreements, not in terms of how much was won or lost, but in terms of how their constituents feel, now and in the future, about the results. Peter Sly, author of the *Reserved Water Rights Settlement Manual*, said: “When I hear success stories, they often aren’t about money or even water. They’re about people.” (UTRC)

Two final observations:

1. I would like to suggest that the New Mexico Water Dialogue is a fine forum for addressing question #4. As Beth Richards notes, the answer to this class of normative question “requires definitions of ‘better’ and ‘fair’—things that are likely to have quite different mean-

ings depending on the value systems of the different stakeholders in the process.” The Dialogue has a history unique in New Mexico of openness to the expression of diverse values in an environment of trust and mutual respect. I’d love to see this discussion proceed, whether through the newsletter, special forums or another statewide meeting.

2. Based on the experience of the September 2004 conference and requests from participants in the Rio San Jose adjudication, the Utton Center is developing proposals for a pre-negotiation Rio San Jose Community Adjudication Forum to help litigants in this very-early-stage adjudication develop a common understanding of the law, hydrology, history, ecology, and geology of the basin and of one another. I don’t believe this type of pre-negotiation community building has ever been tried, and I personally am both interested in and optimistic about its potential for improving the adjudication process and facilitating settlement farther down the road. It’s not likely to show results within the time frame of Elizabeth Richards’ dissertation, but may be a fine subject for a second-generation study building on hers.

The Utton conference report is available through the Utton Transboundary Resources Center, University of New Mexico School of Law, MSC 11-6070, 1 University of New Mexico, Albuquerque, NM 87131-0001, (505) 277-7809, [uttoncenter@law.unm.edu](mailto:uttoncenter@law.unm.edu) or on its website, [http:// uttoncenter.unm.edu](http://uttoncenter.unm.edu)



## Growth and competition for land and water

By Lisa Robert

**A**s a kid in the South Valley in the 1950s, there were two dreadful things that hung over my head. One was the threat of nuclear war. In grade school, they made us curl up underneath our desks, like that could prevent you from being incinerated. I knew it was just a way to keep us orderly while we died.

The other terrible prospect that I lived with was that farming was a way of life marked for extinction, that the rural lands I loved would eventually give way to houses. I learned this at an early age because I spent every free moment with my grandfather, who farmed five acres as if it was the only worthwhile vocation in the world. On Saturday mornings, I rode with him to deliver fresh eggs to his customers all over the valley, and on every trip, he would note with uneasiness a new footing here, a new fence there, a new road carving up a thriving field. If I asked why this was happening, he would say, "Progress," but I was as suspicious of that answer as I was of the likelihood that my desk might save me from an atom bomb.

It's a good idea to question prevailing wisdom, for 'progress' is repeated proof of how wide of the mark our previous thinking has been.

I have only one visual aid for you today. It's all you need in order to grasp why there is intense competition for land and water in the Middle Rio Grande. This is a satellite photo of the middle basin, and what it tells us is there isn't much arable ground. The thread of green along the Rio Grande and its tributaries represents essentially all the

naturally irrigable land in our region. {View the image at the Dialogue website <http://nmwaterdialogue.org>}

What the photo doesn't show is groundwater, which is concentrated near the surface along these same ribbons. The further away from a floodplain you go, the deeper it is to water. Most of this gray landscape has no water rights. To build there, you have to deduct water from the green stripe by way of a "transfer," and pump it from under ground. This is a requirement because the water table into which wells are drilled is not completely separate from the river, and if you ignore that truth, you get into serious trouble, just as New Mexico did along the Pecos.

In 1999, a water budget was calculated for the Middle Rio Grande as part of the regional water planning process. What it told anyone who was paying attention was that contrary to every prediction and supposition and regulation, we do not have enough renewable H<sub>2</sub>O to meet our current demands, let alone sufficient water for future growth, or to see us through extended drought. The middle

basin is actually in debt by many thousands of acre-feet each year because mining groundwater is a lot like the cat that ate the mouse that ate the cheese: we're pumping more water out than nature can put back in, and that is beginning to affect the flow of the Rio Grande.

This summer, former State Engineer Tom Turney told the Middle Rio Grande Water Assembly that the river has been over-allocated since about the time the Rio Grande Compact was signed in 1939. More water has been promised than there is, or ever will be, because we have never added up the cumulative effect of all the agreements, laws, decisions, regulations and permits that pertain to it. Federal treaties, interstate compacts, transbasin diversion contracts, water right transfers and dedications, domestic well permits, effluent dilution and biological flow requirements—all of these pledges are stacked on top of one basic directive, prior appropriation, which guarantees precedence in times of scarcity to whoever used the water first.

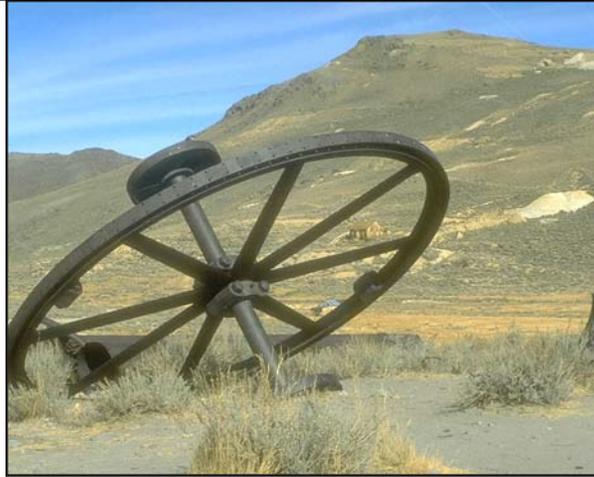
But Native American and pre-1907 water rights have not been adjudicated in the Middle Rio Grande, or even vaguely quantified, and there are those who say it will never happen here. Meanwhile, water is daily being stretched to accommodate more users. Municipal applications to pump additional groundwater and divert surface flows are put on a fast track and approved. Seven thousand new homes go up in the Albuquerque area each year, built mostly on promises to acquire the necessary water rights at some point in the future. The state automatically grants hundreds of domestic wells permits that carry no



security whatsoever: if the water table drops, the well owner will just have to drill deeper. And perhaps most worrisome of all, water transfers often facilitate double and triple dipping.

Let me give you an example. A developer recently bought 96 acres of farmland down near me, with the intent of transferring the historic water rights to a subdivision he is building on the mesa across the river. Stripped of its irrigation rights, the farmland has been subdivided into two-acre lots. Houses will spring up on each of these properties, with water to be supplied by domestic wells. The state will permit each household to pump very nearly the same amount of water per acre that the developer has just 'retired.' That means the river must supply twice the water as before—some to new houses on the mesa, and some to new houses in the valley. And of course, the folks who buy those two-acre parcels will need to water their acreage. To do that, they might apply for an irrigation well; or they might drive one themselves without obtaining a permit; or they might pump more than they're entitled to with their unmetered domestic well; or they might reactivate an existing turnout and get water from a conservancy ditch. In every case, the river is the ultimate source of supply, and it will now be providing three times more water than the original senior right. Without making any value judgments at all, you can imagine where this leads.

Let's talk for a minute about what has kept us from hydrologic bankruptcy thus far. The 1970s and 80s were among the wettest decades on record here. We had good snow packs; all the reservoirs were full. Elephant Butte spilled in 1985 and erased the state's longstanding compact debt. And just in case Nature got cranky again, we bought ourselves a band-aid for the over-allocated Rio Grande. It was called the San Juan-Chama Project, and it represented some 96,000 acre-feet of



water a year, nicked from a neighboring basin to ensure our future growth. With the exception of a couple of permanent pools established at various reservoirs, the bulk of that supplementary water has rolled down the Rio Grande for more than 30 years, enabling the river to meet its many obligations.

The most urgent of those obligations was brought to public attention in 1993, when a USGS study revealed areas of severe decline in the basin aquifer, the result of years of urban pumping. Today it is recognized that those drawdowns are bleeding the Rio Grande of at least 70,000 acre-feet a year. Without a doubt, San Juan-Chama water has helped to keep the river system solvent, just as it was intended to. But now, municipalities that own a large portion of the transbasin water are planning to divert their allotments for direct consumption. That will compound the deficit we face in the middle basin. Without the bonus of San Juan-Chama, the Rio Grande will have to fill the 'holes' created by long term pumping, and it will use the very same water supposedly set aside for Pueblo prior and paramount rights, un-quantified Native American rights, unadjudicated pre-1907 rights, Compact delivery obligations, riparian corridor evapotranspiration, domestic and pre-basin well demands, and Endangered Species and Clean Water Act minimum flow requirements.

At that point, 'competition' becomes irrelevant. Economic rule number one is

that you can't buy what isn't there. Look again at the satellite map and that thin, green stripe. Chances are, even if we dry up every acre of agricultural land in the middle valley, it won't be enough to foot the bill for the past few decades' growth.

I'm glad that we are finally beginning to catalogue the previously unacknowledged and uncompensated benefits of agriculture. I would suggest to

you that there is one among them that deserves top billing, above the ability to produce food, above the amenities of habitat, open space, water quality and clean air. In our basin, more than half of all groundwater recharge occurs through flood irrigated fields or seepage from irrigation ditches and drains. This water, which according to federal and state law belongs to historic users, is providing life support to a failing hydrologic system. Agricultural water is maintaining the connection between the Rio Grande and its floodplain, replenishing the shallow aquifer, and supplementing flows to municipal and domestic wells, yet we have been blind to this silent service.

Instead we have all but accepted that water for continued growth will come from the farm; that agriculture consumes more than its share; and that adjudication is too awful and too costly to contemplate. We surrender to reallocation initiatives like "active water resource management" and "water markets," both of which ignore the reality that vested water rights are holding up a river being drained by junior uses. Conservation, too, is a form of reallocation if the water saved just goes to new development.

I believe it is time to question old assumptions. If we ignore the invisible cornerstone of the Middle Rio Grande's economy, if we can't curb our demand for the desert's most finite resource, we are hiding under a desk, waiting for annihilation.

## A Conversation About the Future of Water Leasing in New Mexico

By Molly B. McIntosh, Attorney at law and principal in Molly B. McIntosh, LLC, Bilingual Mediation, Facilitation and Interpreting Services ([lawmmc@aol.com](mailto:lawmmc@aol.com))

On November 12, 2005, at the UNM Department of Economics, 15 volunteers from the New Mexico Water Dialogue participated in a water leasing experiment and a discussion about their experience. The Dialogue had approached the researchers after hearing about their work in water leasing, a cross-disciplinary research effort between hydrologists, engineers and economists funded by the National Science Foundation through SAHRA (Sustainability of Semi-Arid Hydrology and Riparian Areas). In September, principal investigator Prof. David Brookshire made a presentation to the Board regarding the research effort and the leasing model being developed. The Dialogue decided that a conversation about the research could be relevant to a number of topics of interest to its members, such as: What are the externalities, or third party effects, that would need to be considered in developing a model for water leasing? What are the rules that would be necessary to make it function effectively? What impacts might water leasing have on conservation efforts? How might water leasing function in unadjudicated parts of the Rio Grande? The conversation would also have other benefits. It would give the researchers feedback on the strengths and weaknesses of the model for use in their continuing effort to refine it. It would permit individuals representing a variety of types of water users to express their ideas to the researchers and to each other about the potential of water leasing as a concept. Finally, it would give the Water Dialogue an opportunity to consider the possible contribution that a water leasing model might make to the group's continuing study efforts in the areas of water conservation and water transfers.

The model integrates a physical/engineering model (i.e. climate, surface and groundwater, riparian habitat) with a behavioral/economic model (i.e. lease

trading system, water demand). The stylized template allows for future exploration of different market systems and legal institutions to aid in the designing of water leasing systems. It is also designed to allow behavioral experiments to be conducted with subjects from key water use sectors to test how a voluntary water leasing or water banking exchange process might operate. The model yields price paths for the exchanges and tracks water movements by users and by reach of the river. It utilizes an open market trading system, specifically a double oral auction where buyers and sellers declare their bids and offers to the market. The market is open for leasing water for a fixed amount of time over a series of trading years. In the current stage of the model's development, each participant in the experiment represents a user with one of four distinct types of interests, including agricultural, Native American, urban, and environmental interests. Currently, the model allows trading within reaches of the river and between reaches.

After the Dialogue participants had concluded seven rounds of the experiment at the computer, this author facilitated what turned out to be a lively discussion among them. They raised a number of issues about water leasing, including such topics as legal and physical constraints; potential unintended consequences, third party effects, and secondary economic effects; the potential impact on "voiceless" water users; the role of values in a market; incentives and assumptions in the model; whether an intermediary needs to be involved; how to inject more reality into the model; whether the short term leasing of water to a user with a permanent need is appropriate; and finally, whether a system that permits temporary water leasing might be preferable to one that encourages the permanent transfer of rights. A decision

was made to continue the conversation at a later date.

The researchers plan to make further modifications to the model incorporating some of the suggestions from the group. Most immediately, they plan to correct a source of confusion for the participants by clarifying that the model used in the experiment addresses the short term leasing of water, not the permanent transfer of rights. In addition, they intend to modify the model to explore alternative futures outside of what is possible under the currently existing legal and institutional framework. To the extent funding permits, they plan to model some of the third party effects, to differentiate between leases of water depending on the seniority of the rights involved, to model option trading through time by, for example, banking water for the future in a reservoir, to provide a more realistic representation of farming budgets, and to model some of the secondary effects, such as representing the impact on the local economy when agricultural land is allowed to go fallow.

Further experiments are tentatively scheduled to resume in late spring, 2006. Anyone interested in the preliminary progress report on the results thus far, and/or anyone interested in participating in possible future experiments or discussion groups is encouraged to contact Prof. David Brookshire at [brookshi@unm.edu](mailto:brookshi@unm.edu). Principal researchers on the project include David Brookshire, Department of Economics, University of New Mexico, Don Coursey, Harris School of Public Policy, University of Chicago, Vincent Tidwell, Geohydrology Department, Sandia National Laboratories, Kyle Carpenter, Roman Vasquez and Jesse Roach, Department of Hydrology and Water Resources, University of Arizona. Graduate students working on the project included Craig Broadbent, Frannie Miller and Jake Grandy.

New Mexico Water Dialogue 12<sup>th</sup> Annual Statewide Meeting  
***Closing the Gap: Ideas and Tools for Strengthening and Implementing  
 Water Planning in New Mexico***

Tuesday, January 10, 2006  
 Indian Pueblo Cultural Center – Chaco I & II  
 2401 12<sup>th</sup> Street NW, Albuquerque

## Registration Form

Name(s) \_\_\_\_\_

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The registration fee includes lunch catered by the Indian Pueblo Cultural Center and morning and afternoon beverages and snacks. The early registration fee (pre-paid by January 7) is \$25. Registration at the door is \$30. The fee for panel members who prepay is \$20. Payment may be made by check or purchase order. Send this form to NMWD, PO Box 1387, Corrales, NM 87048 or paste it into an email to [jrb@osogrande.com](mailto:jrb@osogrande.com).

(You'll still have to mail in your payment, however, since we're not equipped to accept plastic.)

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I am adding an additional tax-deductible contribution to the Dialogue of \$ \_\_\_\_\_.

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Our organization will pay. Invoice our P.O. # \_\_\_\_\_ for \$ \_\_\_\_\_.

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By registering for the annual statewide meeting, your name will be added to our mailing list to receive our newsletter, *Dialogue*. If you wish the newsletter to be sent to a different address, or to receive it electronically (by downloading from a Website) provide the following information:

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 electronically.

## 12<sup>th</sup> Annual Statewide Meeting: "Missing Conversations"

The meeting's theme is especially relevant to those who've been working on regional water planning around the state and those who were involved in the development of the State Water Plan adopted two years ago. We will consider the effectiveness of the multi-stakeholder dialogues that were supposed to have taken place in creating the plans, the "missing conversations" that in some cases have left them weaker than they ought to be as expressions of the public interest in their regions, and what we can do now both to strengthen them and ensure that they are implemented effectively. To view the proposed agenda, visit <http://nmwaterdialogue.org>.

Three panels are envisioned. (1) Addressing the "Missing Conversations" in Regional Water Plans, the issues including: • The gap between consensus (what's agreed to in the plans) and action (what's required for effective implementation)– *Conci Bokum* • Effective stakeholder representation (the problem of missing interests)– *Allyson Siwik* • Science – interactions between science and planning (the role of

science in developing common understanding; dealing with data gaps and scientific uncertainty; uses and misuses of science in planning) – *Paul Tashjian, FWS* • Values – "avoided" conversations about value differences and tradeoffs – *Lisa Robert* • Water right ownership – consequences of ignoring the disconnect between "wet water" and "paper water" – *David Benavides* • Relations among regions and with the State: "Upstream-Downstream" issues (inter-regional transfers and conflicts); questions of appropriate scale for policy setting on overarching issues (e.g., compacts, ESA) – *Steve Harris* (2) **Closing the Gap: Making Water Planning Real**, the issues including • What works and doesn't in implementing regional water plans? Lessons from the field. Estancia–*Jim Corbin*; Lea Co.–*Buster Goff* (invited); Lower Pecos Valley–*Fred Hennighausen*; NW NM–*Mark Edwards* (3) **Next Steps in State and Regional Water Planning**, the issues including • RWP/SWP relationships; funding for implementing RWPs; funding for infrastructure tied to RWPs, and "missing" elements such as water transfer policies and conservation incentives– *Estevan Lopez, Director, NMISC and others.*

The luncheon speaker is Ed Hamlyn, Program Manager with the Center for Environmental Resource Management at the University of Texas at El Paso. His talk is entitled "People, Plans and Politics: Developing a Common Vision." His research involves trans-boundary conflicts, sustainable water management, desalination systems, river habitat restoration, and effects of climate change on water resources. He is active in the Good Water Neighbors program of Friends of the Earth–Middle East, which promotes recognition of the shared environment of adjoining Israeli and Palestinian communities.

Please, when you register for the meeting, consider making an additional contribution to the Dialogue, both to keep this publication coming your way, and to enable us to be more effective in our efforts to support "bottom-up" water planning throughout New Mexico. The Dialogue has operated on a shoestring for many years, but only sustained support can make us as effective as we ought to be. We welcome your (tax-deductible) contribution in any amount that works for you. Thanks.

**Continue to check the website <http://nmwaterdialogue.org> for agenda updates**

The New Mexico Water Dialogue  
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