

REPORT TO THE WNR INTERIM COMMITTEE ON
HOUSE MEMORIAL 99 & SENATE MEMORIAL 124

Background

In 2017, the New Mexico House and Senate passed identical Memorials “requesting the Governor to convene meetings of the Attorney General and General Counsels of State Agencies that participate in the planning or funding of watershed restoration projects in the state to develop a consistent application of the law governing the use of public funds for such projects.”

The Memorial was triggered by ambiguity in the anti-donation clause of the New Mexico Constitution, and the interpretation of incidental private benefit. For example, forest and watershed restoration projects are vitally needed across land ownerships in New Mexico because of the increase in wildfire intensity over the last decade and high fuel loads. Wildfires burn across land ownerships without regard to boundaries, and in New Mexico we have 9.4 million acres of federal forests, 7.2 million acres of private forests, and other state and tribal lands. Extensive research documents the important functions of headwater forests for all downstream water users. Sometimes private lands are the most strategic locations to reduce forest fuels and restore watersheds for the benefit of all. However, state agencies have differed in their interpretation of the anti-donation clause effect on their ability to expend State funds on such projects because of concern over incidental benefit to private lands.

Summary of Activities in the Interim

Individual meetings were held with each state agency in June and July 2017. These included the Office of the Attorney General, Energy, Minerals and Natural Resources Department, New Mexico Environment Department, State Land Commissioner, and the New Mexico Game and Fish Department. Each meeting included an overview provided by members of the Wildfire and Water Source Protection coalition, represented by The Nature Conservancy (TNC) and New Mexico Forest Industry Association (NMFIA), and discussions with the respective general counsels about the anti-donation clause as it applies to use of State funds on private lands.

The Attorney General requested that TNC and NMFIA prepare a background paper with citations to document the science establishing the risks of wildfire to the public and the public benefits of forest and watershed restoration. TNC and NMFIA compiled the information and transmitted it to the Attorney General’s staff in June 2017.

The agencies listed above were invited to a meeting on August 22 to discuss the issues and possible solutions. The meeting was attended by Lansing Adams, Office of the Governor; New Mexico Environment Department, Secretary Butch Tongate and General Counsel Jennifer Hower; State Land Commissioner Aubrey Dunn and General Counsel Chris McNeil and Jack Sullivan; Ken Salter, General Counsel, Office of the Attorney General; and members of the WAWSP coalition including Dale Dekker, Kim Kostelnik, Brent Racher, Laura McCarthy, Joe Thompson and Bianca Gutierrez.

The meeting opened with a description of the need for cross-boundary management of forests and watersheds and the critical role of State funding investment in protecting water sources. The public benefits were described, ranging from community fire protection to forest thinning jobs to rural economic development and the avoid costs of wildfire. The perceived limitations of the anti-donation clause and the agencies’ difficulty defining incidental benefit were the main topics of discussion. Two information

needs were identified: quantify the public benefits that accrue from State funding used on private land; and define incidental benefits specifically for forest and watershed restoration.

Recommendation

Request the Attorney General provide an opinion on the limitations, if any, imposed by the Anti-Donation Clause of the State of New Mexico Constitution as it relates to forest and watershed restoration.