

**MINUTES
of the
FIRST MEETING
of the
WATER AND NATURAL RESOURCES COMMITTEE**

**August 6, 2020
Video Conference Meeting**

The first meeting of the Water and Natural Resources Committee was called to order by Representative Matthew McQueen, co-chair, on August 6, 2020 at 9:10 a.m. by video and audio conference via an online platform.

Present

Rep. Derrick J. Lente, Co-Chair
Rep. Matthew McQueen, Co-Chair
Sen. Joseph Cervantes, Vice Chair
Rep. Abbas Akhil
Rep. Gail Armstrong
Rep. Christine Chandler
Rep. Joanne J. Ferrary
Rep. Angelica Rubio
Rep. Larry R. Scott
Sen. Benny Shendo, Jr.
Rep. Nathan P. Small
Rep. Melanie A. Stansbury
Sen. Jeff Steinborn
Sen. Mimi Stewart
Rep. James R.J. Strickler
Rep. Candie G. Sweetser

Absent

Rep. Paul C. Bandy
Sen. Craig W. Brandt
Sen. Sander Rue
Sen. Pat Woods

Advisory Members

Sen. Pete Campos
Rep. Candy Spence Ezzell
Sen. Roberto "Bobby" J. Gonzales
Rep. Susan K. Herrera
Sen. Linda M. Lopez
Rep. Greg Nibert
Sen. Gerald Ortiz y Pino
Sen. Mary Kay Papen
Sen. Nancy Rodriguez
Rep. Patricia Roybal Caballero
Rep. Tomás E. Salazar
Sen. Antoinette Sedillo Lopez
Sen. Elizabeth "Liz" Stefanics
Sen. Peter Wirth

Rep. Anthony Allison
Rep. Jack Chatfield
Rep. Randal S. Crowder
Sen. Gregg Fulfer
Sen. Ron Griggs
Sen. Stuart Ingle
Sen. Gay G. Kernan
Rep. Tim D. Lewis
Rep. Javier Martínez
Rep. Rodolpho "Rudy" S. Martinez
Sen. Steven P. Neville
Rep. Jane E. Powdrell-Culbert
Rep. William "Bill" R. Rehm
Rep. G. Andrés Romero
Rep. Debra M. Sariñana

Sen. William E. Sharer
Sen. John Arthur Smith
Rep. James G. Townsend
Rep. Martin R. Zamora

Staff

Shawna Casebier, Legislative Council Service (LCS)
Jeret Fleetwood, LCS
Sara Wiedmaier, LCS
Pam Stokes, LCS

Handouts

Handouts and other written testimony are in the meeting file and posted on the legislature's website.

Thursday, August 6

Status of the Gila and Federal Arizona Water Settlements Act Issues (9:17 a.m.)

Rolf Schmidt-Petersen, director, Interstate Stream Commission (ISC), updated the committee on decisions and issues related to the federal Arizona Water Settlements Act. The handout for the presentation can be found here:

<https://www.nmlegis.gov/Committee/Handouts?CommitteeCode=WNR&Date=8/6/2020&ItemNumber=1>.

Answers to questions and comments from committee members followed the presentation (9:39 a.m.) and included the following:

- knowing that the state is heading into a challenging budget situation, there will be extreme competition for water project funding, including in areas of the state that have no running water, particularly in the Navajo Nation. It will be unfair and unacceptable if residents in desperate need in those areas have to compete with residents across the state;
- quickly moving to expand representation of the New Mexico Central Arizona Project Entity (CAP) to include stakeholders in the four-county area would be very beneficial;
- the terms of the CAP joint powers agreement require approval of two-thirds of the 14 local governments that are members of the CAP as well as from the ISC to amend the agreement;
- many people that should be a part of the process are not part of the joint powers agreement; and
- the CAP has failed to perform, and it is time to start fresh. If we are legally required to coordinate with the CAP, then start a new CAP. If the CAP is the Southwest New Mexico Water Study Group's successor, then there needs to be a new successor.

The State of the State's Waters: Updates from the Office of the State Engineer (OSE) and the ISC (10:04 a.m.)

John R. D'Antonio, Jr., P.E., state engineer, and Mr. Schmidt-Petersen provided an update on the operations and activities of the OSE and the ISC, including each agency's essential services; the status of Indian water rights settlements; water planning; a drought outlook for the state; discussions about the basins in the state; Rio Grande water storage and emergency release issues; the lower Rio Grande water conservation pilot program; and the solvency of certain trust funds of the agencies. The handout for the presentation can be found here:

<https://www.nmlegis.gov/Committee/Handouts?CommitteeCode=WNR&Date=8/6/2020&ItemNumber=2>.

Answers to questions and comments from committee members followed the presentation (11:27 a.m.) and included the following:

- the oil and gas industry uses three percent of water used in the state; and
- the main issue before the United States Supreme Court is that if New Mexico had not stored water at Brantley at Texas's request, the water would have flowed downstream and been counted as a New Mexico delivery. But for trying to help Texas at that point in time, New Mexico would have gotten credit for that water. The water master was correct in determining that New Mexico should get credit for that action.

Irrigation and Stored Water Release Issues on the Rio Grande (11:47 a.m. and 12:25 p.m.)

Tim Seaman, president, Rio de Chama Acequia Association, Inc.; Gary Esslinger, treasurer-manager, Elephant Butte Irrigation District (EBID) (11:47 a.m.); and Mike Hamman, chief engineer, chief executive officer, Middle Rio Grande Conservancy District (MRGCD) (12:24 p.m.), discussed irrigation and water release issues for areas on the Rio Grande during a year with low water supplies. Handouts for the presentation can be found here:

<https://www.nmlegis.gov/Committee/Handouts?CommitteeCode=WNR&Date=8/6/2020&ItemNumber=3>.

Answers to questions and comments from committee members followed the presentation (12:12 p.m. and 12:42 p.m.) and included the following:

- the budget of the EBID is about \$8 million, funded from assessments on farmers. Applications for federal grants over the last 20 years have resulted in \$15 million in grants through the United States Bureau of Reclamation;
- the MRGCD asked the EBID for help for the middle Rio Grande farmers. EBID farmers are sympathetic to farmers up north, but the EBID board recommended that water not be sent down because the EBID is in a dire situation and the hole would have gotten deeper and created a water supply debt due to uncertainty of what will happen in 2021 with runoff;

- the budget of the MRGCD is \$22 million, including \$18 million for operations, employees and maintenance, funded by an ad valorem tax base in all four counties and a service charge to water users. The MRGCD is not supported by the state; and
- in regard to working with the EBID on a fallowing program, the OSE's intent is to work with the EBID on a fast track to share plans for such a program and get a bid process going. While the EBID is an amici supporter of El Paso on the Texas litigation side, the OSE is working with the diversifying row croppers and pecan growers, who are a subset of the EBID and are amici supporters of New Mexico's position. The OSE is trying to get technical information on how a fallowing program will work in that area. The state engineer's earlier presentation discussed the bid process, tiered bidding rates, dollars per acre, continuous farming so that a desired parcel of land could be fallowed, that the land would need to be at least irrigated in the last five years and other penalties for breaking terms. The special master in the litigation ordered mediation to occur after the discovery period in August. The state engineer expects that the discussions will begin in approximately three weeks based on the discovery period ending and the ability to start talking about a settlement as the parties move on.

Intrepid Potash Water Rights and Pecos River Update (2:06 p.m.)

A. Nathaniel Chakeres, attorney, ISC; Steven Hernandez, attorney, Carlsbad Irrigation District; A.J. Olsen, attorney, Pecos Valley Artesian Conservancy District; and Charles T. DuMars, attorney, Law & Resource Planning Associates, P.C., discussed the history and current litigation regarding the water rights of Intrepid Potash, a potash mine in Eddy County that claims 19,836 acre-feet of licensed water rights. Intrepid Potash has filed applications for temporary changes of place and purpose of use of its water rights, which have been protested by multiple parties. Handouts for the presentations can be found here:

<https://www.nmlegis.gov/Committee/Handouts?CommitteeCode=WNR&Date=8/6/2020&ItemNumber=4>.

Answers to questions and comments from committee members followed the presentation (2:43 p.m.) and included the following:

- in response to a question regarding Intrepid Potash's claim that water meter readings were understated, Mr. DuMars replied that an argument was made in a deposition stating that the physics of the dissolution of salt indicated that a higher amount of water would have had to have run through the ditch. The company does not believe the number of acre-feet was that small because it would not have worked to get the salt. When asked whether there have been other situations in which someone claimed substantial understatement of meter readings, Mr. DuMars replied that it is rare that the physics is inconsistent with the amount of salt that shows up on a meter; and
- Intrepid Potash does not intend to do a priority call on any other users.

Report on Prescribed Fire Pursuant to House Memorial 42 (2019) (3:16 p.m.)

Laura McCarthy, state forester, Forestry Division, Energy, Minerals and Natural Resources Department; Emily Hohman, director, U.S. Fire Learning Network, The Nature Conservancy; and Dr. Doug Cram, extension forest and fire specialist, Cooperative Extension Service, New Mexico State University, presented the final report requested by House Memorial 42 from the 2019 session that asked the Energy, Minerals and Natural Resources Department, with a working group of experts and stakeholders, to explore ways to expand the practice of prescribed fire on private lands in New Mexico. Handouts for the presentation can be found here:

<https://www.nmlegis.gov/Committee/Handouts?CommitteeCode=WNR&Date=8/6/2020&ItemNumber=5>.

Answers to questions and comments from committee members followed the presentation (3:39 p.m.) and included the following:

- the working group had no consensus on whether it would be better to have "negligence" defined in the law and applied to everyone or to have a two-tiered liability system in which certified burners would be subject to a gross negligence standard. Across the country, there is a range of two-tiered liability systems, all gross negligence or simple negligence. The working group is interested in feedback from legislators about what would work best;
- a liability standard defined in state law would not apply to federal land, which is why the working group only focused on private lands in the report;
- without a liability standard, it is difficult for a private landowner to get insurance. The group learned from the superintendent of insurance that uncertain liability status is a real barrier to obtaining insurance in the private market. There is a benefit to private landowners in this state in having insurance companies look more favorably on policies in this state; and
- fire departments would prefer statewide rules regarding prescribed burns.

Executive Session (Closed Meeting): Briefing on *Texas v. New Mexico* (3:55 p.m.)

The committee went into executive session to discuss ongoing litigation.

Adjournment

There being no further business before the committee, the meeting adjourned at 5:14 p.m.