

SENATE PUBLIC AFFAIRS COMMITTEE SUBSTITUTE FOR
SENATE CONSERVATION COMMITTEE SUBSTITUTE FOR
SENATE BILL 209

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

AN ACT

RELATING TO WATER; AUTHORIZING THE GOVERNOR TO REQUEST FEDERAL
COLLABORATION IN WATER RESOURCE PLANNING AND WATERSHED
RESTORATION, PROTECTION AND MANAGEMENT PURSUANT TO FEDERAL AND
STATE LAW; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. FINDINGS--DECLARATION OF EMERGENCY--GOVERNOR--
ADDITIONAL DUTIES.--

A. The legislature finds that:

(1) New Mexico's watersheds located on federal
lands currently contain excess junipers, conifers, salt cedar
and other woody vegetation;

(2) the continued existence of the overgrowth
serves no legitimate federal or state purpose and poses a
present unreasonable risk to the lives and property of New

1 Mexico citizens;

2 (3) the failure to remove the excess tree
3 overgrowth from New Mexico's watersheds prevents downstream
4 flow to New Mexico in violation of the state's legal
5 entitlement to the diverted waters under both state and federal
6 law;

7 (4) the federal Water Resources Planning Act
8 directs federal land management agencies to collaborate with
9 the states, to assess adequacies of water supplies in each
10 resource region of the country and to coordinate development
11 and conservation of water and related land resources of the
12 states;

13 (5) in the federal Watershed Protection and
14 Flood Prevention Act, congress recognized that watershed
15 damages have threatened the national welfare;

16 (6) the federal Organic Administration Act of
17 1897 found that "no national forest shall be established except
18 to improve and protect the forest . . . or for the purpose of
19 securing favorable conditions of waterflows", and the act
20 further recognizes the preeminence of state water law;

21 (7) the federal Land Policy and Management Act
22 and the National Environmental Policy Act direct adaptive
23 management based on best available science and public input;

24 (8) the Treaty of Guadalupe Hidalgo directs
25 the federal government to protect existing water rights in

1 place at the time of the treaty;

2 (9) in 16 U.S.C. §§ 1001, the Watershed
3 Protection and Flood Prevention Act, the United States Congress
4 found that "erosion, floodwater and sediment damages in the
5 watersheds of U.S. rivers and streams cause loss of life and
6 damage to property, threatening the national welfare. The
7 sense of Congress is that the federal government should
8 cooperate with states and political subdivisions, soil and
9 water conservation districts, flood prevention or control
10 districts, and other local public agencies to: prevent this
11 damage; further the conservation, development, use and disposal
12 of water; further the conservation and use of land"; the goal
13 is to preserve, protect and improve United States land and
14 water resources and quality of the environment;

15 (10) a state of emergency exists in New Mexico
16 due to a shortage, and ever diminishing total supply, of water
17 available to its citizens, communities, livestock, wildlife and
18 wildlife habitats;

19 (11) because of the state of emergency, it is
20 imperative that New Mexico promptly take actions necessary to
21 restore and increase the total supply of water available within
22 the state;

23 (12) the state's total supply of water is
24 significantly dependent upon watersheds located on forested
25 lands. To achieve an increase in the total supply of water in

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1 New Mexico, it is imperative for the state to take all
2 necessary actions that may be available to remedy the current
3 deteriorated conditions of these watersheds;

4 (13) Section 4-36-11 NMSA 1978, enacted in
5 2001, acknowledges the deteriorating conditions of New Mexico's
6 forests;

7 (14) the United States congress expressly
8 provided in 16 USCA 475 that "[n]o national forest shall be
9 established, except to improve and protect the forest within
10 the boundaries, or for the purpose of securing favorable
11 conditions of waterflows" and reaffirmed this directive in the
12 Multiple-Use Sustained-Yield Act of 1960 when it provided that
13 the national forests "shall be administered for watershed
14 purposes";

15 (15) the United States supreme court, in
16 *United States v. New Mexico*, 438 U.S. 696 (1978), stated
17 "Congress has evidenced its continuing concern with enhancing
18 the water supply for non-forest use by specifically authorizing
19 the president to set aside and protect national forest lands
20 needed as sources of municipal water supplies." In that same
21 case, the supreme court also stated that it was the belief of
22 congress that "the states had exclusive control of the
23 distribution of water on public lands and reservations";

24 (16) New Mexico has a legal entitlement to
25 favorable conditions of waterflow from watersheds within the

1 state;

2 (17) the excessive overgrowth on the
3 watersheds located on federal lands is depriving the state of
4 favorable conditions of waterflow in direct violation of the
5 mandates of the United States congress and the rulings of the
6 United States supreme court;

7 (18) to abate the diversion of New Mexico's
8 water, to increase the total supply of water available in New
9 Mexico in the future and to remedy the state of emergency, New
10 Mexico should affirm and assert the supremacy of its right to
11 the ownership and use of the water that is currently being
12 diverted to supply the demands of forest overgrowth on New
13 Mexico's watersheds located in national forests; and

14 (19) pursuant to the Community Forest
15 Restoration Act and the wildlands, wildfire urban interface
16 program, the United States forest service is authorized to
17 actively manage and fund New Mexico watershed restoration in
18 compliance with the federal Land Policy and Management Act and
19 the National Environmental Policy Act.

20 B. The legislature declares that:

21 (1) the deteriorating conditions of watersheds
22 are due to excessive forest overgrowth, which is diverting New
23 Mexico's waterflows and depleting New Mexico's total supply of
24 water available to its citizens, communities, livestock,
25 wildlife and wildlife habitats;

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1 (2) the continued existence of the state of
2 emergency poses a direct threat to the health, safety, well-
3 being and economic viability of New Mexico's citizens and to
4 the continued health and viability of its communities,
5 livestock, wildlife and wildlife habitats; and

6 (3) it is imperative that New Mexico take such
7 actions as may be necessary and appropriate to mitigate or
8 eliminate the deteriorating conditions of the state's
9 watersheds, including:

10 (a) obtaining a transfer to the state of
11 such limited jurisdiction over federal lands as may be
12 necessary to enable the state to restore the watersheds to a
13 condition of health and to maximize waterflows within New
14 Mexico; and

15 (b) upon the transfer of the limited
16 jurisdiction, garnering the public and private resources and
17 services needed to mitigate and ultimately eliminate the state
18 of emergency.

19 C. Pursuant to the provisions of state and federal
20 law, the governor:

21 (1) shall request the United States forest
22 service and the bureau of land management to reconcile their
23 ten-year plans to the New Mexico state and regional water plans
24 and county comprehensive plans every five years;

25 (2) shall cooperate with the United States

1 secretaries of agriculture and the interior to achieve
2 consistency between federal projects and plans and New Mexico
3 water laws, policies and plans to restore and maintain water
4 delivery from the watersheds; and

5 (3) shall request from the United States
6 secretaries of agriculture and the interior any actions
7 necessary for New Mexico to restore its watersheds to a
8 condition of health, increase the waterflows and end the state
9 of emergency created by the damage to New Mexico's watersheds,
10 waterflows and total water supply.

11 D. If, within nine months of the effective date of
12 this section, the United States secretaries of agriculture and
13 the interior have not taken significant actions toward
14 compliance with the request, the governor may, pursuant to
15 Section 19-2-2 NMSA 1978, 7 U.S.C. 2268 and any other
16 applicable law, request that jurisdiction over lands under
17 their control be relinquished to the state and that the state
18 assume primacy for enforcement and administration of federal
19 provisions identified in Subsection A of this section.

20 E. If the governor requests transfer of limited
21 jurisdiction over the federal lands, the request shall include
22 an express provision that any acceptance by New Mexico of a
23 transfer of the limited jurisdiction to restore watershed
24 health on the federal lands shall be conditioned on:

25 (1) New Mexico receiving sufficient federal

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1 funds determined by New Mexico to be necessary to enable the
2 state to perform the actions needed to mitigate or eliminate
3 the state of emergency created by the federal government's
4 impairment of New Mexico's watersheds, waterflows and aggregate
5 water supplies; and

6 (2) the state receiving all revenues from the
7 sale of material from the restoration of the watersheds.

8 F. If, within ninety days after the request made
9 pursuant to Subsection D of this section, the United States
10 secretaries of agriculture and the interior have not taken
11 significant actions toward compliance with the request, the
12 attorney general shall prepare, file and pursue a lawsuit on
13 behalf of New Mexico to:

14 (1) obtain a judicial declaration of New
15 Mexico's right to the waterflows originating from watersheds
16 located on national forest lands;

17 (2) obtain a judicial declaration of the
18 impairment of the state's rights to waterflows originating on
19 federal lands as a foreseeable consequence of excessive
20 vegetative growth; and

21 (3) compel the United States secretaries of
22 agriculture and the interior to take such actions as may be
23 determined by the court to be necessary to eliminate the state
24 of emergency.

25 G. Nothing in this section shall be construed to

1 permit strip logging or clear-cutting of any old growth forest
2 located in New Mexico.

3 Section 2. EMERGENCY.--It is necessary for the public
4 peace, health and safety that this act take effect immediately.

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