

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

**September 21-22, 2009
Grant County Business Center
Silver City**

Present

Sen. Phil A. Griego, Chair
Rep. Andy Nuñez, Vice Chair
Rep. Paul C. Bandy
Rep. Joseph Cervantes
Sen. Mary Jane M. Garcia (September 21)
Rep. William J. Gray
Sen. Clinton D. Harden, Jr. (September 21)
Rep. Larry A. Larrañaga
Sen. Gerald Ortiz y Pino (September 21)
Sen. Mary Kay Papen
Sen. Sander Rue
Rep. Mimi Stewart

Advisory Members

Sen. Rod Adair
Sen. Vernon D. Asbill
Rep. Anna M. Crook
Rep. Nora Espinoza
Rep. Candy Spence Ezzell
Sen. Cisco McSorley
Rep. Jeff Steinborn
Rep. James R.J. Strickler
Rep. Don L. Tripp
Sen. Peter Wirth

Guest Legislators

Rep. Andrew J. Barreras
Sen. Linda M. Lopez
Sen. Richard C. Martinez
Rep. Rodolpho "Rudy" S. Martinez

Absent

Rep. Ray Begaye
Rep. Thomas A. Garcia
Rep. Dona G. Irwin
Rep. Kathy A. McCoy
Sen. George K. Munoz
Sen. Steven P. Neville

Sen. Carlos R. Cisneros
Rep. Brian F. Egolf, Jr.
Sen. Dede Feldman
Sen. Timothy Z. Jennings
Sen. Gay G. Kernan
Rep. Ben Lujan
Rep. James Roger Madalena
Rep. Danice Picraux
Sen. Nancy Rodriguez
Rep. Henry Kiki Saavedra

(Attendance dates are noted for members not present for the entire meeting.)

Guests

The guest list is in the original meeting file.

Staff

Jon Boller

Jeret Fleetwood

Monday, September 21

Representative Martinez, also the mayor of Bayard, welcomed the committee members to southwestern New Mexico and thanked them for coming.

James Marshall, mayor of Silver City, also welcomed the committee to Silver City. He provided the committee with an overview of some of the economic development initiatives currently underway in Silver City and in southwestern New Mexico.

Wolf Reintroduction Problems in Catron County

Ed Wehrheim, a Catron County commissioner, provided the committee with testimony regarding reintroduction of the Mexican grey wolf in Catron County. He explained that while the program costs about \$400,000 per wolf, the price paid by area landowners is much steeper, estimating that wolves will kill 7,000 animals in the area over the next five years. Mr. Wehrheim went on to explain that about 300 documented cases of wolf depredation or contact with humans have been reported over the past three years and stated that wolves have even gone so far as to invade homes and kill household pets.

Mr. Wehrheim then noted that a petition had been filed with the federal Department of the Interior to designate critical habitat areas for wolves and afford them full protection offered to endangered species. He indicated that the driving force behind the petition, and wolf reintroduction in general, was the Center for Biological Diversity in Tucson, Arizona.

Questions and comments included:

- wolves are roaming well outside their estimated range;
- critical habitat issues;
- whether landowners are compensated for property damage caused by wolves;
- the U.S. Fish and Wildlife Service and the Department of Game and Fish (DGF) are the agencies spearheading wolf reintroduction, with the DGF a full partner in the program;
- the wolf reintroduction program began in 1995;
- the influence of environmental groups on policy that affects small, rural communities;
- use of the federal Endangered Species Act for uses other than its original purpose; and
- lack of decline in deer and horse populations in Catron County.

Michael Robinson of the Center for Biological Diversity also provided the committee with testimony regarding wolf reintroduction. He pointed out that while he is the author of the

petition submitted to the Department of the Interior, he is also a Grant County landowner with some understanding of multiple sides of the issue. Mr. Robinson went on to explain that while the petition does call for critical habitat for the Mexican grey wolf, it also seeks to have the wolves designated as their own species, rather than as part of a larger listing, which allows for eventual delisting of protected species. He also indicated that the large number of depredation cases cited by Mr. Wehrheim are not confirmed, and that there are, in fact, compensation programs for landowners. Finally, Mr. Robinson noted that there is significant public support of wolf reintroduction and that most of the public money spent on wolf reintroduction programs actually goes toward tracking and trapping wolves rather than on habitat.

Questions and comments included:

- memorandum of understanding between the U.S. Fish and Wildlife Service and four other entities, including the DGF;
- Wildlife Defenders helps pay for some depredation compensation, and its funding comes from membership dues;
- potential changes to New Mexico law to encourage or limit wolf reintroduction;
- wolves have been proven to have killed livestock;
- solutions such as outdoor zoos, while well-intentioned, may actually frustrate efforts to preserve original ecosystems;
- Research and Polling, Inc., conducted the poll that revealed that 61 percent of those asked supported wolf reintroduction; and
- dues payments also help fund the Center for Biological Diversity.

Dam Liability Issues

Elaine Pacheco, bureau chief of the Dam Safety Bureau of the Office of the State Engineer (OSE), provided the committee with testimony regarding dam safety issues. She explained that the OSE is responsible for dam safety and annually lists those dams with hazard potential. She pointed out that the rating system changed in 2008, which has resulted in many more dams being rated as in poor condition, though several dams are listed as being in poor condition simply because of insufficient documentation.

Ms. Pacheco went on to discuss the problem of hazard creep, explaining that many dams originally built to protect farmland now have subdivisions beneath them, which dramatically increases risks to businesses, homes and lives. She noted that hazard creep often occurs when county and municipal governments approve developments on lands lying below existing dams that were originally designed to protect agricultural lands, without making the developer take responsibility for any needed improvements to flood control facilities. In the case of Piedra Liza dam, just to the east of the Town of Bernalillo, neither the county nor the city has taken responsibility for the dam, and yet developments downstream of the dam have been approved. Only the Coronado Soil and Water Conservation District has stepped up to help with an emergency management plan for the area and maintenance of the dam. Ms. Pacheco pointed out that current statutes do not allow the bureau or soil and water conservation districts to prohibit, or place conditions on, construction below dams, and cities and counties have no incentive to take responsibility for dam safety or make developers do so. Roger Ford of the Natural

Resources Conservation Service (NRCS) agreed that there is no rule or law that requires developers to improve or pay for infrastructure, such as dams, and added that that may have to change.

Debbie Hughes, executive director of the New Mexico Association of Soil and Water Conservation Districts, discussed dams owned or sponsored by soil and water conservation districts, noting that most of the dams classified as being in poor condition are listed as such because of the lack of critical design information about them. Many of these dams, she said, were originally constructed by the NRCS 40 or 50 years ago, on condition that local governments take responsibility for maintaining the dams. Approximately 60 of the 102 dams constructed by the NRCS are owned by soil and water conservation districts across the state, according to Ms. Hughes. She also addressed a dam managed by the Coronado Soil and Water Conservation District, located above land that Bernalillo wants to annex and a developer has plans on which to build a shopping mall. She explained that new construction just beneath the dam will alter the dam's outflow and create additional liability problems due to the increased number of people that will come and go from the area. The required emergency action plans for dams cost between \$20,000 and 450,000, which the soil and water conservation districts can ill afford.

Ms. Hughes then explained that soil and water conservation districts do not receive much funding from the state and most are too small to be able to generate income through mechanisms like mill levies. She went on to explain that soil and water conservation districts recently received invoices from the state's Risk Management Division (RMD) of the General Services Department for insurance premiums, despite the fact that they have historically been covered. Ms. Hughes noted that while soil and water conservation districts are political subdivisions of the state, with members paying state health insurance premiums and contributing to the Public Employees Retirement Association, they receive minimal funding from the state and simply do not have enough money to start paying the RMD for insurance coverage.

Al Duran of the RMD explained that the division does provide insurance coverage to public bodies, but indicated the recordkeeping by the division is somewhat spotty. For example, Mr. Duran noted that the division recently became aware of a number of state-owned vans that no one in the division knew existed. In addressing the issue of soil and water conservation district insurance, Mr. Duran explained that the districts have historically been covered by New Mexico State University's policy, but the school recently informed the RMD that soil and water conservation districts would no longer be covered by the policy. Mr. Duran emphasized that the resulting situation came as a bit of a surprise to everyone and that the RMD is working to fix the problem.

Questions and comments included:

- problems that will arise if the RMD pays for tort claims coverage for entities that do not pay into the division's funds;
- the ability of soil and water conservation districts to obtain insurance coverage, either through the RMD or commercially;

- the cost of insurance coverage for districts will be about \$1,000 per district;
- conservation district vehicles will only be covered if premiums are paid;
- the methodology for determining how much premiums cost;
- the potential for loss of life if dams are not maintained;
- that nothing currently requires developers to explore potential dangers present in adjacent or upstream land;
- probable maximum precipitation in determining likelihood of dam failure and resulting damage;
- the role of the U.S. Army Corps of Engineers in dam maintenance is limited to the dams it owns;
- local governments are currently powerless to require developers to help maintain dams located above their lands; and
- the RMD is working with the Acequia Commission to obtain insurance coverage for member acequias.

The Joe M Stell Water Ombudsman Program Update

Darci Bushnell, program director for the Joe M Stell Water Ombudsman program, provided the committee with testimony regarding the ombudsman program. She began by reviewing the program's history and went on to provide the committee with an overview of the program's function and current and planned projects. Ms. Bushnell pointed out that while the program provides adjudication information and procedural guidance to water rights claimants, it does not offer legal advice. She went on to note that the program works closely with the OSE so that the program's workload is closely tied to the number of packets mailed out by the OSE. Ms. Bushnell indicated that the program made contact with almost 3,000 individuals in fiscal year 2009, in addition to speaking to various groups and producing a DVD. She went to explain that plans for 2010 are tied to several slated events, including a mailing to all the claimants on the lower Rio Grande, opening of the adjudication on a major portion of the San Juan River and ongoing work involving the Aamodt and Rio Gallina section of the Rio Chama.

Questions and comments included:

- Judge Gerald A. Valentine has indicated that the program has been extremely helpful in adjudications along the lower Rio Grande;
- the history of the program and its move to the University of New Mexico to keep it independent of the OSE;
- methods employed by the program to identify and contact people;
- a list of individuals who have received packets from the OSE is provided to the program;
- difficulty in contacting people with unlisted cell phones; and
- the necessity for continued funding for the program.

Arizona Water Settlements Act: Gila River Planning Process Status

Craig Roepke of the Interstate Stream Commission (ISC) provided the committee with an update on the planning process for the potential use of federal funding to develop water resources on the Gila River as allowed by the Arizona Water Rights Settlement Act. He

explained that the act provides for between \$66 million and \$120 million for New Mexico to develop up to 14,000 acre-feet of water on the Gila River, noting that New Mexico must inform the secretary of the interior of any intent to use any water by 2014. Mr. Roepke pointed out that the 2014 deadline is approaching quickly and noted that while some progress toward developing a plan to use some of the federal money and water resources had been made, it is less progress than the ISC had hoped for. He also provided the committee with a report on how funds appropriated by the legislature have been spent to date. Finally, Mr. Roepke emphasized that the ISC does not have, or even favor, a plan to use federal money and Gila River water. Instead, he discussed the collaborative process, featuring area water stakeholders, being used to develop a plan.

Topper Thorp, co-chair of the Arizona Water Settlements Act Planning Process and a Gila Basin irrigation commissioner, also provided the committee with testimony regarding the use of federal money to develop water in the area. He explained that the agricultural industry is an important asset to the economy and environment of the Gila Basin. Mr. Thorp expressed some regret that area water users have not had the foresight to secure enough water resources to allow for the area's future needs. He went on to emphasize the importance of developing some sort of plan to make the best use of available water, rather than not be able to come up with any plan at all and end up losing the water to Arizona.

Adrian Oglesby, co-chair of the Arizona Water Settlements Act Planning Process and a representative of the Nature Conservancy, also provided the committee with testimony regarding the use of federal money to develop water in the area. He began by giving the committee an overview of the work performed by the Nature Conservancy, noting that it identifies endangered ecosystems and works to preserve them, often by forming partnerships with area stakeholders. Mr. Oglesby also listed some of the area projects with which the Nature Conservancy has been involved. He went on to review the progress made by the Arizona Water Settlements Act Planning Process, noting that the legislature funded a community-based planning process in 2008. Mr. Oglesby indicated that about half of the initial \$800,000 originally appropriated had been expended so far. He also explained that there are a number of competing viewpoints at work in the planning process, but that the goal remains to make a consensus decision based on science, rather than a politically driven decision. Finally, Mr. Oglesby noted that the planning process group hopes to review all of its options in November and come to the legislature with a plan in 2010.

Howard Hutchinson of the Gila San Francisco Water Commission also spoke about the settlement and the plans to use the money and water. He noted that there are a number of entities involved in the planning process, resulting in constant meetings that do not seem to accomplish very much. Mr. Hutchinson suggested that it would probably be best to put the federal money into projects that will help utilize water for future use. He also listed some of the studies that have been conducted as part of the planning process and noted that he does not believe that further studies are necessary.

Questions and comments included:

- the structure of the settlement makes it difficult to get things done;
- plans for remaining money appropriated by the legislature;
- the necessity of understanding the interaction between surface and ground water in the area before making decisions about how to use water resources;
- money set aside for the planning process must flow from the legislature to the Department of Finance and Administration to the ISC, and the planning group must write a letter to the ISC specifically requesting funds in order to begin the process;
- New Mexico will receive \$66 million from the settlement for anything that helps meet water demand issues; any funding in excess of that must be for water project construction and be approved by the secretary of the interior;
- potential projects that combine water storage, distribution and diversion;
- there is little demand, population-wise, for area water resources, but agricultural uses account for significant demand;
- most water users in southwestern New Mexico would probably benefit from increased water supply in the area; and
- a combination of projects, rather than one large one, is the most likely outcome of the planning process.

Regional/State Water Plans Update

Estevan Lopez, director of the ISC, and Angela Schackel-Bordegaray, a water planner with the Planning and Communication Division of the ISC, provided the committee with an update on the regional water planning process. They explained that the initial law mandating regional water planning calls for the statewide water plan to be updated every five years. Ms. Schackel-Bordegaray went on to note that 22 public meetings had been held earlier in the summer regarding regional water plans. She said the meetings focused on four basic concepts:

- population and demand changes;
- conservation efforts;
- climate change planning; and
- necessary water infrastructure.

She indicated that some region-specific data were discussed at each meeting, notes of which are available online. Ms. Schackel-Bordegaray provided the committee with several of the recommendations that were developed after the public meetings for updating regional water plans, including:

- development of consistent methodologies;
- stronger linkage between regional water plans and 40-year water plans;
- enhanced communication between regions;
- increased emphasis on environmental and energy impacts in plans;
- quicker implementation of plans; and
- annual reports.

Questions and comments included:

- local meeting attendance and issues;
- water plan procedures employed by neighboring states;

- the low amount of money spent developing regional water plans in New Mexico compared to spending in surrounding states;
- the need for meaningful public participation to make the planning process work; and
- implementation of regional water plans and infrastructure plans.

Water Trust Board Report

John D'Antonio, state engineer and co-chair of the Water Trust Board, provided the committee with an overview of the Water Trust Board. He began by providing a brief history of the board, created in 2001 by the Water Project Finance Act. Mr. D'Antonio went on to note that the board is charged with prioritizing projects for recommendation to the legislature for financing from the Water Project Fund. He also provided the committee with the makeup of the Water Trust Board, discussed the origin and oversight of the Water Trust Fund, the Water Project Fund and the Acequia Project Fund and what kinds of projects may be funded by the funds. Finally, Mr. D'Antonio discussed funds paid out of the various funds, noting the amount paid for various types of projects, and walked the committee through the process a project must go through in order to obtain funding.

Questions and comments included:

- Water Project Fund project managers are selected by technical employees from executive agencies because the Water Trust Board is essentially an executive board;
- increased funding for adjudications over the past few years are likely to shrink again since that money came from severance tax bonds;
- infrastructure needs in the state are enormous — at least \$1 billion for new projects and another \$1 billion for maintenance;
- New Mexico's infrastructure needs are similar to those in other states; and
- potential funding sources for water infrastructure.

Tuesday, September 22

Environmental River Flows

Steve Harris of Rio Grande Restoration provided the committee with testimony regarding the value of rivers to New Mexico and the importance of trying to both use and protect them. He explained that New Mexico has no real policy or agency to guide or even address river conditions, noting that this is primarily because the water in rivers is treated more as a commodity than anything else. However, Mr. Harris emphasized that rivers represent much more than a commodity, suggesting that their somewhat intangible cultural and environmental value establishes them as icons in the New Mexico landscape that merit special attention and protection. He offered four river protection goals to the committee:

- maintaining high water quality;
- engineering infrastructure that utilizes water while minimizing the impact to the rivers themselves and nearby wildlife;
- ecological infrastructure that maintains or restores natural habitat for more species than those listed as threatened or endangered; and
- river flow management that provides water at times and places appropriate for both

environmental maintenance and human use.

Mr. Harris noted that initial steps toward these goals were laid out in House Joint Memorial 3, introduced during the 2009 session, which called for using scientifically derived information to manage stream flows so as to protect the environmental integrity of rivers. He pointed out that while the measure received bipartisan support and was developed in conjunction with multiple stakeholders, it died awaiting final passage. However, he offered to convene a workshop to continue addressing stream flow issues.

Questions and comments included:

- benefits of managing an entire ecosystem rather than for particular species that tend to lead to unintended, and sometimes undesirable, consequences;
- invasive species control issues;
- the movement toward reservoir releases emphasizing water user rotation, instead of a free-for-all approach, seems to be helpful;
- decision support and infrastructure improvements, such as automatic gates and water user metering, have already helped improve stream flow management in some areas;
- the value of river flow modeling;
- the time frame for a stream flow workshop is still a year away without state resources; and
- Texas' efforts to address environmental river flows, first through executive order, then through sweeping legislative initiatives.

Federal/State Support of Drinking Water Systems

Karen Gallegos, director of the Water and Wastewater Infrastructure Development Division of the New Mexico Department of Environment (NMED), provided the committee with testimony regarding financing of drinking water systems. She explained that there are a number of federal and state programs in place to help communities establish and maintain drinking water systems, including the Public Water System Supervision Grant program; expense reimbursement grants and counterterrorism grants at the federal level and the Water Conservation Fund, the Corrective Action Fund and general fund appropriations at the state level. Ms. Gallegos went on to provide the committee with further details about each fund.

Jim Perry, director of the Administrative Services Division of the NMED, provided the committee with testimony regarding the use of federal American Reinvestment and Recovery Act of 2009 (ARRA) funds to help communities finance drinking water systems. He noted that while some funding is available for such purposes, contractors are not likely to receive funds before January or February 2010.

Questions and comments included:

- the use of counterterrorism funds for drinking water systems is primarily to ensure the safety of existing infrastructure through the placement of security measures such as fences, locks and barbed wire;
- consolidation of rural drinking water systems can help to make things cheaper and

- more efficient;
- some rural water systems, while not able to take advantage of regionalized water system infrastructure, can still enjoy more centralized accounting and bookkeeping services; and
- policy goals of regionalization of drinking water systems involve working to take better advantage of the expertise of technical institutions such as universities and national laboratories.

Interbasin Changes of Place of Use of Water

DL Sanders, chief counsel for the OSE, provided the committee with testimony regarding changes in place of use for water rights. He explained that interbasin water rights transfers involve moving water from one drainage basin to another, even if there is a confluence of the drainages, pointing out that there are eight places in New Mexico where water moves from one basin to another already. Mr. Sanders went on to explain that such transfers were contemplated in laws dating back to 1907, if only to establish penalties regarding such transfers. He also noted some of the other noteworthy interbasin transfers, such as the San Juan/Chama project and the Rio Bonito to La Luz transfer that moves water from the Ruidoso area to Alamogordo. Mr. Sanders noted that while there are eight existing interbasin transfers, another three are planned, plus another six applications for such transfers pending with the OSE. He said he is unable to go into much depth about pending applications.

Mr. Sanders also discussed the difficulty of the OSE's role in administering water rights in basins such as the Pecos River and the Gila, where all available resources are already appropriated, areas featuring competing federal and state jurisdictions and basins such as those served by the San Juan/Chama project, which are already so heavily contested that special masters have been appointed to administer water rights.

Questions and comments included:

- out-of-basin transfers require a change in the point of use, but not a change in the point of diversion;
- out-of-basin transfer applicants must prove that no impairment will be caused to downstream users by the transfer;
- a proposed transfer from the Pecos Basin to the Rio Grande Basin must demonstrate no increase in depletions on the Pecos;
- concerns expressed by downstream water users over the proposed Pecos to Rio Grande transfer; and
- there are three applications involving the transfer of water from the Salt Basin to the Rio Grande.

Senator Asbill provided the committee with an update regarding data concerning elk herd size in New Mexico and neighboring states, noting that a full report would be provided to the committee in October.

There being no further business, the committee adjourned at 11:10 a.m.

