**MINUTES**
**of the**
**JOINT MEETING**
**of the**
**WATER AND NATURAL RESOURCES COMMITTEE**
**and the**
**COURTS, CORRECTIONS AND JUSTICE COMMITTEE**

**August 4-5, 2008**
**Las Cruces**

The joint meeting of the Courts, Corrections and Justice Committee and the Water and Natural Resources Committee (WNRC) was called to order by Representative Andy Nunez, chair, WNRC, at 8:10 a.m. on August 4, 2008 in the New Mexico State University (NMSU) Golf Course Club House in Las Cruces, New Mexico.

**Present**
Rep. Andy Nunez, Chair
Rep. Paul C. Bandy
Rep. Elias Barela
Rep. Ray Begaye
Rep. Joseph Cervantes
Sen. Mary Jane M. Garcia
Rep. Dona G. Irwin (August 5)
Rep. Larry A. Larrañaga
Rep. Kathy A. McCoy
Sen. Cynthia Nava
Sen. Steven P. Neville
Sen. Mary Kay Papen
Rep. Don L. Tripp

**Absent**
Sen. Phil A. Griego, Vice Chair
Sen. Sue Wilson Beffort
Sen. Dede Feldman
Sen. Clinton D. Harden, Jr.
Rep. Mimi Stewart

**Advisory Members**
Sen. Carlos R. Cisneros
Rep. Anna M. Crook
Rep. Nora Espinoza (August 4)
Rep. Candy Spence Ezzell
Sen. Gay G. Kernan
Sen. Cisco McSorley
Sen. Leonard Lee Rawson (August 5)
Rep. Henry Kiki Saavedra
Rep. Peter Wirth

Sen. Rod Adair
Sen. Vernon D. Asbill
Sen. Timothy Z. Jennings
Rep. Ben Lujan
Rep. James Roger Madalena
Rep. Danice Picraux
Sen. Nancy Rodriguez
Sen. John C. Ryan
Rep. James R.J. Strickler
Rep. Eric A. Youngberg

**Guest Legislator**
Rep. Nathan P. Cote

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

**Staff**
Jon Boller
Jeret Fleetwood
Maha Khoury
Gordon Meeks
Aldis Philipbar

**Guests**
The guest list is in the meeting file.

**Monday, August 4**
Waded Cruzado-Salas, interim president, NMSU, welcomed the committee to NMSU and thanked the members for coming.

**Alamogordo Desalination Project**
Karl Wood, director of the Water Resources Research Institute at NMSU, provided the committee with an update regarding desalination technology. He explained that water problems in New Mexico fall into one of four categories: it is available in the wrong place, at the wrong time or in the wrong quantity, or it is of poor quality. Dr. Wood went on to explain that while there are significant ground water resources beneath New Mexico, the water is of particularly poor quality. He noted that one way of taking advantage of those resources is through desalination. Dr. Wood pointed out that trying to make use of brackish water resources is not a problem unique to New Mexico and discussed the various challenges associated with desalination, such as energy requirements, scale buildup on filters and, most of all, disposal of the leftover concentrate.

Dr. Wood went on to explain that a federally funded program to study desalination technology has been established in Tularosa. He went on to provide the committee with some of the features of the facility built to house the program, including testing areas, bench-scale system testing, a laboratory, chemical storage facilities and renewable energy as a partial power source. However, Dr. Wood pointed out that the facility is still not operational.

Finally, Dr. Wood noted that not all of New Mexico's water problems will be solved through desalination and discussed several of the water-related study programs being conducted at NMSU. For example, Dr. Wood indicated that there are hydrogeology, surface-to-ground water interaction, irrigation efficiency and water and wastewater treatment programs available at NMSU.

Questions and comments included:

- money granted to Lea County for research on produced water;
- late summer rainfall as an example of water being available at the wrong time;
- whether the costs associated with desalination make it unattractive as a municipal water source;
- how much more federal money is required to make the Tularosa facility operational;
- reverse osmosis is the technology of choice for desalination;
- possibility of New Mexico purchasing water from a desalination plant operating in El Paso, Texas; and
- deep injection wells operating in Texas along the New Mexico border.

**Food Security and Farm Sustainability**

Jeff White, College of Agriculture, NMSU, provided the committee with testimony regarding the recent outbreak of salmonella and its suspected origin in jalapenos grown in Mexico. He pointed out that although New Mexico had not even harvested its jalapenos, many buyers may shy away from New Mexico products, which could have a tremendous impact on New Mexico's agricultural economy.

Mr. White went on to discuss the training and exercises that the College of Agriculture undergoes to help ensure that New Mexico's food is safe. He did point out, however, that recent federal Department of Homeland Security regulations concerning the registration of chemicals, including those used by farmers, could pose problems for the agricultural industry.

Janet Jarratt, a dairy farmer, explained that food security issues cover a wide range of topics, including availability. She explained that as land use trends continue to move toward the gentrification of farmland, many farmers, particularly small-scale ones, are being squeezed out of business. Ms. Jarratt went on to note that water issues are closely tied to agriculture and the issue of food availability. She pointed out that constant transfers of water rights, and their purpose, puts increased pressure on farmers. She also cautioned the committee to examine the ability of municipalities to condemn water rights. Ms. Jarratt went on to indicate that while there is a movement afoot to highlight locally grown produce, farmers' markets are simply not a viable means of distributing produce to the public. She also suggested that one way of getting more value out of agricultural products is to create regional brands, such as marketing chile grown in Hatch.

Edward Avalos, New Mexico Department of Agriculture, provided the committee with testimony regarding the various ways the state can aid local farmers in marketing their products. For example, he noted that international marketing strategies have helped New Mexico farmers and ranchers sell their products to China, Mexico and several other nations. Mr. Avalos also noted that label and marketing assistance, particularly the "Taste the Tradition" label, helps to brand products as produced in New Mexico. He also discussed how trade show, commodity and retail promotions conducted by the New Mexico Department of Agriculture can help New Mexico farmers and ranchers sell their products.

Questions and comments included:

- salmonella issues;
- the possibility of New Mexico losing its bovine tuberculosis-free designation;
- mixed effects of NAFTA on New Mexico's agricultural economy;
- regulatory barriers confronting farmers and ranchers;
- the source of funding for the "Taste the Tradition" label promotion;
- the power of the Bernalillo County/Albuquerque Water Utility Authority to condemn water rights in New Mexico; and
- the potentially devastating effects of the salmonella outbreak on New Mexico's agricultural economy.

**Why Water Rights Adjudications Are Important**

Former Representative Joe M Stell provided the committee with testimony regarding the history of water rights in New Mexico, explaining that the prior appropriation doctrine has roots in Spain and North Africa. He went on to discuss the effects of the Treaty of Guadalupe Hidalgo on water rights, pointing out that it was that treaty that tied water rights to property rights. Representative Stell went on to note that there are basically two kinds of water rights in New Mexico: pre-1907 and post-1907. He also discussed the relationship between ground water and surface water, and how that relationship came to be understood in New Mexico.

Representative Stell also discussed the recent court case concerning the Mimbres River and its potential effect on the future of water rights in New Mexico. He also discussed the fact that there are several rivers in the state that have not been fully adjudicated, including the Rio Grande. Representative Stell emphasized that completing those adjudications is important, because trying to administer water rights without a thorough understanding of how much water each user is entitled to is similar to spending money without really knowing how much money is available in the bank account.

Tom Turney, former state engineer, also provided the committee with testimony regarding the importance of water rights adjudications. He began by explaining that the state has a finite amount of water in the state, and that it is the state engineer's job to administer water rights in the state. Mr. Turney also explained that the tools available to the engineer to administer those water rights are licenses and adjudications. He highlighted the benefits of adjudications, particularly that they allow the engineer to adhere to the constitution and that they provide certainty to water users. He also provided the committee with a brief history of adjudications in the state and an overview of the ongoing ones and the issues associated with them.

Questions and comments included:

- whether the courts have adequate funding the carry adjudications out;
- whether separate courts dedicated to adjudications along the middle Rio Grande would work;
- the status of the silvery minnow;

- the use of claims-based adjudications in other states;
- why a lack of pressure to adjudicate makes adjudications take such a long time to complete;
- compact delivery issues;
- Native American water issues and their effect on adjudications; and
- the possibility of dedicating money for adjudications at the upcoming special legislative session.

**AOC-OSE Work Group Status Report**

Celina Jones, Administrative Office of the Courts (AOC), provided the committee with an update on the progress of the work group made up of representatives of the AOC and the Office of the State Engineer (OSE) who are tasked with improving the adjudications process. She explained that while it is unlikely that large changes will be made to the process, some changes to streamline the process will probably occur. Ms. Jones indicated that the work group has had meetings with representatives from other states, and the meetings have been particularly helpful. She did caution, though, that keeping the adjudication process moving forward will require recurring funding.

Bill Hume, Office of the Governor, also updated the committee on the work group's progress. He indicated that while the work group still has some work to do, it is nearly finished and will issue a report detailing its work and will present that report to both the executive and the legislature.

Questions and comments included:

- why it may be necessary to re-adjudicate some areas;
- number of disputed claims along the middle Rio Grande;
- representation of special river masters on the work group;
- competition among water court judges and other judges for funding from the legislature; and
- whether water courts have a special line item in the unified judiciary budget.

**Texas Litigation: Status of Appropriation**

Frances Bassett, Office of the Attorney General, provided the committee with an update regarding money the legislature appropriated to defend New Mexico against threatened litigation by the State of Texas on the Rio Grande. She began by explaining that Texas claims that New Mexico has violated the Rio Grande Compact in two ways: first by depleting surface flows and then by delivering overly salinated water to Texas. Ms. Bassett then detailed the steps New Mexico has taken to address those claims, beginning with drilling wells equipped with monitoring devices that detect the effects of ground water pumping and water quality.

Ms. Bassett went on to note that still more money had been spent on development of a ground water computer model, which also took four years to complete. She emphasized that, for the time being, the efforts undertaken to this point have averted a potentially costly lawsuit. Ms.

Bassett also noted that Texas's claims regarding New Mexico farmers increasing the salinity levels of the river have been refuted. However, Ms. Bassett cautioned that an agreement between the Elephant Butte Irrigation District and its El Paso counterpart, which helped avert any lawsuit with Texas, could have long-term ramifications for the region.

John Draper, a water rights attorney with Montgomery and Andrews, discussed several other interstate lawsuits over water and how they could affect New Mexico. He explained that each of the cases he has worked on has cost the losing state millions of dollars. Mr. Draper noted that although none of those cases translates exactly to New Mexico's situation, there are similarities in that they all involve upstream states underdelivering water to downstream ones by curtailing surface flows. He emphasized that New Mexico should endeavor to avoid this type of lawsuit.

**Pre-1907 Water Rights Status and Acequia Adjudications**

Richard Trujillo and Hilario Rubio, both of the OSE, provided the committee with testimony regarding the OSE's communication plan, which is designed to improve communication between northern New Mexico water stakeholders and the OSE during the adjudication process. They explained that the plan was developed during the adjudication of the Rio Gallinas to help keep the lines of communication open between claimants and the OSE. Mr. Trujillo and Mr. Rubio outlined the core messages of the communication plan, which include fairness, an emphasis on the increasing demand for water resources and their decreasing availability and the notion that there is no simple solution to the problem of water availability.

Mr. Trujillo and Mr. Rubio explained that there is an element of mistrust among acequia users toward the OSE and that the communication plan is, in part, an attempt to address that. They noted that the adjudication on the Rio Gallinas went well and that the development of a line of communication between stakeholders and the OSE probably helped.

Questions and comments included:

- development of a procedural order by the OSE that reflects the successes experienced on the Rio Gallinas;
- a shift in focus by the OSE to smaller geographic areas for adjudications;
- success of the OSE field office in keeping lines of communication open throughout the adjudication process;
- whether any statutory changes are necessary to help the OSE implement the communication plan and field office approach; and
- source of historical data used by the OSE.

Tessa Davidson, Rio Grande Water Rights Association (RGWRA), provided the committee with testimony regarding the makeup and history of the RGWRA and issues related to the OSE's administration of water along the Rio Grande. She explained that the RGWRA is a grass-roots group of water users along the middle Rio Grande.

**The Role of Ombudsman and Intervenors in Water Adjudications**

Darcy Bushnell, director of the Joe M Stell Ombudsman Program at the Utton Transboundary Center at the University of New Mexico Law School, provided the committee with an overview of the ombudsman program, its past work and its ongoing needs. She began by noting that the program began as a pilot program in 2005 to ensure continued service to the water rights adjudication community. Ms. Bushnell went on to discuss the services provided by the program, including outreach, toll-free phone help lines, a detailed web site and instructional DVDs. She went on to note the work the program has done to aid claimants on the Rio Grande and San Juan rivers, the Nambe-Pojoaque-Tesuque area (for the *Aamodt* settlement), the Zuni and Jemez basins and the Rio Gallinas. Finally, Ms. Bushnell emphasized that the program is composed of a relatively small staff whose needs are quickly outgrowing their resources.

Questions and comments included:

- funding needs for the program and the Utton center;
- work the program has done on adjudications in Lea and Curry counties; and
- that the program is currently funded with nonrecurring revenue.

**Tuesday, August 5**

**Gila River Planning**

Allison Williams, Interstate Stream Commission (ISC), provided the committee with an update regarding the planning process for the Arizona Water Rights Settlement and the Gila River. She reminded the committee about the parameters of the settlement, which dictate that New Mexico must have a plan in place by 2012 regarding any water project along the Gila before the state can begin receiving federal funding from the settlement. She also reviewed the makeup of the stakeholder group that must begin developing such a plan and noted that several studies are currently being conducted by the stakeholder group to ensure that the best possible science is available to the stakeholders. She also noted that the stakeholder group has hired a public outreach employee to ensure that the public is adequately notified of any meetings or developments.

Adrian Oglesby, Nature Conservancy, also discussed the work of the stakeholder group, noting that some disagreement still exists among stakeholders about exactly what the desired future condition of the river is. He also acknowledged that any public planning process generally moves slowly, and that this one is no different. Mr. Oglesby went on to note that, in addition to a public relations person, the stakeholder group has also employed an information contractor to help organize the information and studies already gathered by the group.

Howard Hutchinson, Gila/San Francisco Study Group, echoed Mr. Oglesby's comments, explaining that the information contractor would help to determine the studies the stakeholder group had already requested to get a better understanding of the questions that still need to be answered.

Estevan Lopez, director of the ISC, reviewed the 2004 Arizona Water Rights Settlement Act, explaining that New Mexico receives both the right to develop some of the water on the Gila River and at least $66 million in federal funding to do so. He pointed out that New Mexico does not need to develop a project, but that if the state does decide to do that, it must have a plan in place by 2012. Mr. Lopez noted that a project could be construed as any diversion of water along the Gila. He also acknowledged that a number of people are concerned about moving forward with any type of dam or diversion on the Gila.

Questions and comments included:

- the timetable for making a decision about whether or not to proceed with a project on the Gila;
- there is no requirement that New Mexico make use of any of the water offered to it under the settlement;
- the Consumptive Use and Forbearance Agreement dictates that New Mexico may only receive water during peak flows, so there is a potential need to store water if the state wishes to use it;
- the definition of a stakeholder;
- the nearest dam on the Gila River is 60 miles past the Arizona/New Mexico border;
- the desire of the executive to have the best possible science available before any kind of decision is made;
- the value of the water that would go to Arizona if New Mexico fails to use it somehow;
- the location of stakeholder meetings and notification for them;
- Endangered Species Act issues on the Gila River; and
- average and peak flows of the Gila River.

**Domestic Well Legal Status**

Mr. Hume provided the committee with a basic overview of the issues involved in a recent court case concerning domestic wells. He explained that the statute governing domestic wells allowed the OSE to issue permits for domestic wells. However, a senior water rights holder on the Mimbres River sued on the grounds that the domestic wells statute is unconstitutional in that it curtails senior water rights holders. Mr. Hume indicated that a district court and then the court of appeals ruled in favor of senior water rights holders. He pointed out that the OSE has attempted to address the issue of domestic wells through various other means, such as the Active Water Resource Management (AWRM) regulations, the promulgation of domestic well rules and declaring certain areas of the state as domestic well management areas. However, Mr. Hume pointed out that the AWRM regulations were challenged in court almost immediately. He also indicated that the OSE would likely appeal the court of appeals decision because the issue is of statewide importance and also because appealing would probably give the legislature time to address the issue. Mr. Hume acknowledged that it could be time to develop a new approach to domestic wells.

Steve Hernandez, the attorney representing senior water rights holders in the court case involving domestic wells, explained that the continued issuance of domestic well permits by the OSE will cause problems for water rights holders on the Pecos River and the Rio Grande, although he pointed out that there will likely be fewer problems in other areas of the state. He went on to note that while the state engineer has tried to manage domestic wells, his clients simply could not wait for their water rights to be impaired and took their case to court. Mr. Hernandez indicated that he felt that the reluctance of the state engineer to issue a priority call was probably a dereliction of duty. He went on to note that the decision in the case should hold up to further appeal. He finished by stating that there is a pressing need for water rights stakeholders and the OSE to develop an approach to the issue of domestic wells that addresses the problems yet ensures due process.

Questions and comments included:

- how a priority call by the state engineer would actually bring the domestic well statute back into compliance with the constitution;
- the status of adjudications on the Mimbres River and the Rio Grande;
- the number of new domestic wells drilled each year;
- allowing the OSE to issue well permits only when there is no other option;
- involvement of the legislature in any kind of plan to address the domestic well issue; and
- whether the OSE is still issuing well permits in the Sixth Judicial District (where the domestic well court case was originally heard).

**Lower Rio Grande Adjudication Status Report**

Judge Gerald A. Valentine, Third Judicial District, provided the WNRC with an update regarding the work his court is doing to adjudicate the water rights of the state. He presented the committee with statistics showing the overall number of existing subfiles, the number of cases with offers of judgments, the total number of claimants and the number of claimants joined. Judge Valentine also provided the committee with breakdowns by basin of those same statistics. He pointed out that almost all of the water rights claimants in the lower Rio Grande have been joined.

Judge Valentine went on to indicate that court personnel and OSE staff have been working together with representatives from other states, particularly Idaho, to identify efficient adjudication procedures that New Mexico can adopt. He also provided the committee with a preliminary list of suggestions that might help streamline the adjudication process. Judge Valentine's suggestions included maintaining online deed records, exploring the importance of hydrographic surveys and further study of the claims-based adjudication process that several other states employ.

Questions and comments included:

- use of the ombudsman program to mediate adjudications claims;
- the possibility of appropriating additional money for adjudications at the planned

special legislative session;
- funding and staffing needs of the ombudsman program; and
- the possibility of drafting legislation based on Judge Valentine's suggestion for endorsement by the WNRC.

**Elephant Butte/El Paso Water District Settlement**

Gary Esslinger, manager of the Elephant Butte Irrigation District (EBID), provided the committee with testimony regarding the settlement reached between the EBID and El Paso Water Improvement District Number 1. He explained that the settlement, which divides water between New Mexico and Texas, was signed on February 14, 2008. Mr. Esslinger went on to discuss several key points of the settlement, such as that it:

- ties Texas's water allocation to storage levels in Elephant Butte and Caballo reservoirs;
- protects both Texas and Mexico from the impacts of ground water pumping in New Mexico;
- eliminates the threat of litigation between New Mexico and Texas over ground water pumping;
- provides New Mexico flexibility to conjunctively manage its surface and ground water without outside interference;
- costs New Mexico nothing; and
- allows New Mexico to capture and use, store or recharge to the aquifer any storm water without changing allocations to Texas or Mexico.

Mr. Esslinger also discussed the poor condition of the lower Rio Grande's flood control infrastructure and provided the committee with an overview of the various functions that the EBID performs.

The WNRC adjourned at 12:30 p.m.