

MINUTES
of the
THIRD MEETING
of the
WATER AND NATURAL RESOURCES COMMITTEE

August 20-21, 2009
Angel Fire Resort
Angel Fire

Present

Sen. Phil A. Griego, Chair
Rep. Andy Nuñez, Vice Chair
Rep. Paul C. Bandy
Rep. Ray Begaye
Rep. Joseph Cervantes (August 20)
Sen. Mary Jane M. Garcia
Rep. Thomas A. Garcia
Sen. Clinton D. Harden, Jr.
Rep. Dona G. Irwin
Rep. Larry A. Larrañaga
Sen. Steven P. Neville (August 20)
Sen. Gerald Ortiz y Pino (August 20)
Sen. Mary Kay Papen
Sen. Sander Rue
Rep. Mimi Stewart (August 20)

Absent

Rep. William J. Gray
Rep. Kathy A. McCoy
Sen. George K. Munoz

Advisory Members

Sen. Rod Adair (August 20)
Sen. Vernon D. Asbill
Rep. Anna M. Crook
Rep. Brian F. Egolf, Jr. (August 20)
Rep. Nora Espinoza
Rep. Candy Spence Ezzell
Sen. Cisco McSorley (August 21)
Rep. Danice Picraux (August 20)
Sen. Nancy Rodriguez
Rep. James R.J. Strickler
Sen. Peter Wirth (August 20)

Sen. Carlos R. Cisneros
Sen. Dede Feldman
Sen. Timothy Z. Jennings
Sen. Gay G. Kernan
Rep. Ben Lujan
Rep. James Roger Madalena
Rep. Henry Kiki Saavedra
Rep. Jeff Steinborn
Rep. Don L. Tripp

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

Guest Legislator

Rep. Nathan P. Cote

Staff

Jon Boller
Gordon Meeks
Jeret Fleetwood

Guests

The guest list is in the original meeting file.

Thursday, August 20

On August 20, 2009, the Water and Natural Resources Committee met jointly with the Courts, Corrections and Justice Committee.

Call to Order and Opening Remarks

Representative Nuñez called the meeting to order, thanked those in the audience for coming and had members of the two committees introduce themselves.

Larry Leahy, mayor of Angel Fire, welcomed the committees to Angel Fire, thanked them for coming and provided them with an overview of the community's history and plans for the future.

Institute of Public Law Report on Adjudications (SJM 3) and Comments

Paul Biderman, director of the Institute of Public Law (IPL), provided the committee with an overview of the process his office used in response to Senate Joint Memorial 3, passed during the 2009 session, which called for the IPL to devise a format for and hold public meetings to obtain public comment on the water rights adjudication process. He began by explaining that the IPL held six meetings between June and August 2009 that were designed to involve water rights stakeholders and focus on four approaches to adjudication reform suggested by the Administrative Office of the Courts (AOC). Mr. Biderman acknowledged that while those goals met with varying degrees of success, some conclusions, based on the discussions held at the forums, could be drawn.

For example, Mr. Biderman indicated that forum participants were generally supportive of the existing law and were generally more concerned with achieving fairness and accuracy of adjudications than with speeding them up. Mr. Biderman also noted that the IPL found a desire among stakeholders to have some type of state-funded entity to provide objective information on the process to the public, mostly borne of a belief among many stakeholders that the Office of the State Engineer (OSE) has conflicting duties that prevent it from being truly neutral.

Finally, Mr. Biderman noted that the IPL believes that it will be difficult to improve water adjudication and administration policies without a joint effort from the OSE and the AOC and relayed its recommendation that the efforts begun in 2008 to examine water adjudication and administration be continued.

John D'Antonio, state engineer, said that while the OSE has chosen not to participate in the process assigned to Mr. Biderman, there are likely valuable insights to be found in the

discussions conducted at the IPL forums. Mr. D'Antonio pointed out what he felt were flaws in the IPL process. He said that the IPL process implies that adjudication processes in other states are better, even though this often has not been borne out by the facts. He also questioned the inclusion of the water rights licensing process as an adjudication reform because that is not an alternative to adjudications. As for greater use of mediation in the adjudication process, Mr. D'Antonio noted that the approach used in the Chama River adjudication is based on the mediation model and has been very successful.

DL Sanders, chief counsel, OSE, explained that while Mr. Biderman's report does reflect a skewed view of the overall issue of water rights adjudications, it was still the result of hard work, and although there are fundamental problems with the process, Mr. Biderman's efforts are nonetheless laudable. Mr. Sanders reminded the committee that in 1998, the legislature was concerned about how long the adjudication process was taking and, in response, commissioned John Thorson to analyze and report on the process. Mr. Thorson's conclusion, Mr. Sanders said, was that it is a basic lack of resources committed to the process that is holding things up. In response, the OSE has tripled the number of personnel working on adjudications, has hired a tribal liaison and an acequia liaison, has added a community liaison in Las Vegas and employed a staff dedicated to adjudications to give consistency to the process and has worked with the legislature to address problems as they arise. Mr. Sanders also noted that the legislature has already created an objective state-funded entity, the Joe M Stell Water Ombudsman Program, that is designed to fulfill many of the functions that stakeholders suggested would help improve the adjudication process in the IPL report.

Bill Hume, special advisor to the governor, provided the committee with some comments regarding Mr. Biderman's presentation, saying that he feels the report is better than he expected. He indicated that the process designed by the IPL and implemented by Mr. Biderman is quite different from the public meetings called for in SJM 3. Mr. Hume noted that the public forums were actually invitation-only meetings and that at times the process gave the impression that the sponsors lacked adequate working knowledge of the complexities and nuances associated with water law. Mr. Hume also complained that the topics of the meetings represented a small, arbitrary sampling of the topics discussed by the adjudication working group, made up of representatives from the OSE and AOC.

Mr. Hume went on to indicate that the OSE has made Mr. Biderman aware first of the potential problems with his approach and later of the errors in his original fact paper. Finally, Mr. Hume noted that he feels that the discussions at the forums focused, fairly or not, on problems and perceptions of the OSE and not on a collaborative process to improve adjudications.

Celina Jones, AOC, thanked the IPL for taking on this very complex issue and noted that the IPL has made a good-faith effort to create a process for public input. She added that the AOC remains committed to adjudication reform and that it will continue to work on the issue.

State District 3 Judge Jerald Valentine gave accolades to Mr. Biederman and the IPL for their work. He said there are no surprises in the report's conclusions and agreed that more resources need to be dedicated to explaining the adjudication process before it starts in a particular river basin. Accordingly, he stressed that the Joe M Stell Water Ombudsman Program is vital to the process and must survive any proposed budget cuts and that cuts in the adjudication process in general would be bad, as would trying to speed up the process. Addressing the report's conclusions, Judge Valentine observed that there is nothing fundamentally wrong with the adjudication statutes — rather, many of the criticisms of the OSE and the process come from the past. As for the use of mediation in the process, he explained that it is already used in the Lower Rio Grande adjudication, but he cautioned that it is not the same as that used in other civil cases because the OSE cannot "give away" water in the process. Finally, the suggestion that associations be able to represent individual water rights holders raises serious legal questions, he said, because they must first have the legal authority to represent a group.

Paula Garcia, executive director, New Mexico Acequia Association, expressed her strong support of the SJM 3 process, though she said the association had hoped to play a larger role in the process. She said that the report's conclusions are consistent with acequia concerns, noting that the hydrographic survey is a positive part of the current process and that the association has serious concerns about proposals to switch to a more claims-based system. The Chama River approach to adjudications, she said, is good, and, though the adjudication process in general is imperfect, the association agrees that no major statutory changes need to be made.

Adjudications Status Report

Greg Ridgely, deputy chief counsel, OSE, provided the committee with an overview of the various adjudications across the state. He began by providing the committee with a map that shows the areas in New Mexico that were already adjudicated, involved in active cases or not yet adjudicated. He then went into detail about several active adjudications, particularly those in northwest and north central New Mexico. He explained how the adjudication process being conducted along the Gallinas River, in the Upper Chama basin, has been modified by the OSE to accommodate the nature of adjudications in the area better and how it has served as a blueprint for adjudications in other basins. However, Mr. Ridgely emphasized that an approach that works well in a small basin might not work as well in a more contentious basin, though he did acknowledge that establishing satellite offices staffed with representatives somewhat familiar with the specific concerns of a given region has helped establish a less adversarial stance than many stakeholders associated with the OSE in the past.

Asked about an end date for the various adjudications, Mr. Ridgely estimated it would take about 15 years. Mr. Sanders replied that the courts all have schedules and that he could provide the committee with a chart of each of the active cases. Vicki Gabin, a federal magistrate judge, cautioned the committee, that although the legislature could give the OSE more money to speed the conduct of adjudications, the OSE is just one party in an adjudication case that also includes tribes, acequias, irrigation districts, the federal government, local governments and individuals. Asked what resources he would need to expedite adjudications, Mr. D'Antonio

explained that the legislature had given the OSE a dedicated source of funding for adjudications with the passage of HB 1110 a few years ago, but later on the OSE's general fund appropriation was cut by an equivalent amount. Asked if the Middle Rio Grande was included in the 15-year estimate, Mr. Ridgley answered no, and he added that, using the entire \$7 million budget of the OSE, it might take 40 years to complete because of the size and complexity of the issues in that area. He explained that no other state has as many adjudications as New Mexico and that because of the difficulty in developing in-house expertise, it is best to finish the current adjudications before starting another one. That way, he said, sufficient resources can be committed to the Middle Rio Grande, and planning can be done before filing, rather than the other way around.

Water Litigation Update

Mr. Sanders provided the committee with an update regarding the status of various cases pending before state courts involving water rights. Mr. Sanders said he would provide a written summary of this testimony to the committee.

Strategic Water Reserve Status

Estevan Lopez, director of the Interstate Stream Commission (ISC), introduced Amy Haas as the new general counsel to the ISC. He then provided the committee with an overview regarding the status of the strategic water reserve. He explained that the legislature authorized the creation of the strategic water reserve in 2005 to provide a buffer between water shortages and the demands of water users. He gave the committee a brief history of the reserve, noting that it was intended to provide the state with a tool to buy and lease water storage rights from willing sellers to be used for two purposes: interstate compact compliance and protection of threatened and endangered species.

Mr. Lopez went on to detail specific projects involving the strategic water reserve, particularly those along the Pecos River and the Rio Grande, noting that the more water the ISC can place in the reserve to cover species and compact needs, the less potential for federal intervention or curtailment of individual water rights. Currently, the funding for the reserve is \$600,000, he said.

Pecos River Settlement Update

Mr. Lopez provided the committee with an update on the status of the implementation of the Pecos River Settlement. He began by providing the committee with an overview of the history of the Pecos River Settlement, explaining that past lawsuits between New Mexico and Texas mandate that New Mexico will no longer be able to under-deliver on its Pecos River Compact deliveries. Mr. Lopez went on to note that in 2001, a compact delivery shortfall was anticipated, which led to a short-term plan to avoid a shortfall in 2001 and the negotiation of a long-term plan to avoid future problems.

Mr. Lopez went on to explain that the Pecos River Settlement was the result of efforts conducted by an ad hoc committee of water stakeholders in the area composed of representatives from the irrigation districts, municipalities, counties, industry and various other water users

along the lower Pecos River. Mr. Lopez explained that the Pecos River Settlement involved sacrifices by many water rights owners along the river, coupled with the purchase of parcels of land and the retirement of water rights associated with those parcels.

Mr. Lopez also discussed the various other aspects of the settlement, including drilling of augmentation wells and their anticipated pumping capacities that would be diverted into surface flows to help meet compact delivery obligations. He also addressed benefits of the settlement to the various irrigation and conservancy districts in the region, including the Pecos Valley Artesian and Conservancy District and the Carlsbad Irrigation District, emphasizing that the settlement provides for short-term protection from priority calls as well as long-term protection of recognized water rights for area irrigators.

Mr. Lopez went on to note other benefits of the settlement, including protection of organisms protected under the federal Endangered Species Act of 1973. He also explained that implementation of the settlement is almost complete, with a ceremony acknowledging complete implementation of the terms of the settlement scheduled for September 10, 2009.

State Engineer Jurisdiction Over Deep Aquifers — Implementation of HB 19 (2009)

Mr. D'Antonio gave a brief history of the statutes governing the appropriation of nonpotable (brackish) water from aquifers located at a depth of 2,500 feet or more. The first deep well drilled pursuant to the original 1967 statute was drilled near Rio Puerco in 1997, he said, and since then, the OSE has received 64 notices of intent to drill 607 more wells with potential appropriations of 1.7 million acre-feet of water annually. Only six or seven wells have actually been drilled so far, he observed. The provisions of House Bill 19 (2009), he explained, require prospective appropriators to follow the normal application process before making any appropriations for supplying drinking water, for example, from a declared deep-water aquifer basin. Most other commercial, industrial and agricultural uses are exempt from the added procedures required by the statute, he added. Asked if the bill really changes anything, Mr. D'Antonio replied that the OSE makes a distinction between a notice of intent to drill and a notice to appropriate water, and this should make a difference once a basin is declared. The OSE is still in the process of promulgating rules to implement the law, he added.

The committee recessed at 5:30 p.m.

Friday, August 21

The committee was called to order by the vice chair, Representative Andy Nuñez, at 8:50 a.m.

Urban-Rural Communities At-Risk Program

Dr. Kent Reid, interim director, New Mexico Forest and Watershed Restoration Institute (FWRI), explained that the institute was established by the federal Southwest Forest Health and Wildfire Prevention Act of 2004 to demonstrate and promote the use of adaptive ecosystem management to reduce the risk of wildfires and restore the health of fire-adapted forest and

woodland ecosystems in the interior of the American West. The FWRI is working on 44 projects in 18 counties in New Mexico, he said, which projects are designed to promote the restoration of the historic structure of vegetation, principally through the removal of small-diameter trees and reintroduction of the historic fire regime in the forest and woodlands of the state.

Ute Pipeline Authorization and Proposed Legislation

Gayla Brumfield, mayor of Clovis, and Scott Verhines, project manager, Eastern New Mexico Rural Water System, presented legislation to the committee that would create a formal authority to construct a pipeline and distribute water from the Ute Reservoir to its members. They explained that they had been operating under a joint powers agreement, but now that federal authorization has come through, a more formal structure is necessary to carry out the project. Mr. Verhines said that members of the authority will be financing 10 percent of the \$436 million capital cost of the project, with 15 percent coming from the state and 75 percent from the federal government.

Controlling Aquatic Invasive Species — Zebra Mussels

Bob Jenks, deputy director, Department of Game and Fish (DGF), and Barbara Colter, coordinator of the DGF's Aquatic Invasive Species (AIS) Program, thanked the committee for supporting legislation last year (SB 467 (2009)) that allows for the regulation of exotic and non-native species, such as quagga and zebra mussels. Ms. Colter stressed that education and awareness of the problems that an AIS poses is vital to programs designed to limit the damage caused by an AIS. The Department of Environment and the Energy, Minerals and Natural Resources Department, she said, are working with the DGF to keep quagga and zebra mussels out of New Mexico's waterways, and, though the DGF currently has no decontamination equipment, it will be purchasing some in the next few months. Though no contamination of lakes in the state has yet been confirmed, Ms. Colter warned that the state is at great risk. Discussion included the possibility of increasing boat registration fees to help pay for the program, the number of staff needed to administer the program and the problems posed by disposal of water used to decontaminate boats.

New Mexico Rural Water Association Concerns

Matthew Holmes, executive director, and Clarence Aragon, president, New Mexico Rural Water Association (NMRWA), presented the association's annual report to the committee. Mr. Holmes explained that the NMRWA assists the state's 400 rural water systems with training of system operators, and it lobbies Congress for continued funding of rural water systems. He expressed the NMRWA's strong support for the state-imposed water conservation fee, which he said is unique in the United States and helps pay for the testing of water, vulnerability assessments of systems and operator training. Without the fee, many rural systems would shut down, he said, something that has already happened in neighboring Texas and Arizona. Current concerns of the NMRWA, he said, include replacement of retiring operators, new ground water rules, system funding and emergency preparedness. Mr. Holmes requested that the NMRWA be allowed to present its annual report to the committee on a regular basis.

The committee adjourned at 1:30 p.m.

