

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

August 30-31, 2010
Barbara Hubbard Room, Pan American Center Annex
New Mexico State University
Las Cruces

Present

Rep. Andy Nuñez, Chair
Sen. Phil A. Griego, Vice Chair
Rep. Paul C. Bandy
Rep. Ray Begaye
Rep. Joseph Cervantes
Sen. Mary Jane M. Garcia
Rep. Thomas A. Garcia
Rep. William J. Gray (August 30)
Sen. Clinton D. Harden, Jr.
Rep. Dona G. Irwin
Rep. Larry A. Larrañaga
Rep. Kathy A. McCoy
Sen. Steven P. Neville
Sen. Mary Kay Papen
Rep. Mimi Stewart

Absent

Sen. George K. Munoz
Sen. Gerald Ortiz y Pino
Sen. Sander Rue

Advisory Members

Sen. Vernon D. Asbill (August 31)
Sen. Carlos R. Cisneros
Rep. Anna M. Crook
Rep. Brian F. Egolf, Jr.
Rep. Ben Lujan (August 30)
Sen. Cisco McSorley
Sen. Nancy Rodriguez (August 31)
Rep. Henry Kiki Saavedra
Rep. Jeff Steinborn
Rep. Don L. Tripp

Sen. Rod Adair
Rep. Nora Espinoza
Rep. Candy Spence Ezzell
Sen. Dede Feldman
Sen. Timothy Z. Jennings
Sen. Gay G. Kernan
Rep. James Roger Madalena
Rep. Danice Picraux
Rep. James R.J. Strickler

Guest Legislators

Rep. Andrew J. Barreras (August 31)
Rep. Nathan P. Cote (August 30)
Rep. Mary Helen Garcia
Rep. Rodolpho "Rudy" S. Martinez (August 30)

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

Staff

Jon Boller
Kim Bannerman
Jeret Fleetwood

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written testimony are in the meeting file.

Monday, August 30

Representative Nuñez began the meeting by having members of the committee introduce themselves.

Welcome and Opening Remarks

Barbara Couture, president of New Mexico State University (NMSU), welcomed committee members to Las Cruces and thanked them for coming. She provided the committee with a brief history of the university and an overview of the various water-related programs with which the school is involved. She also discussed her vision for the future of NMSU, such as working to better connect research programs with economic development opportunities. Also presented to the committee was a video highlighting the various programs involving NMSU.

Arizona Water Settlements Act Gila River Update

Martha Schumann and Topper Thorpe, co-chairs of the Arizona Water Settlements Act Stakeholders Group, provided the committee with an update regarding the progress made by the group. They noted that a conceptual project list has been developed, along with a web site providing interested parties with up-to-date information on the workings of the stakeholders group. However, Ms. Schumann and Mr. Thorpe indicated that additional state funding is necessary for the stakeholders group to finish its work because federal dollars will not be available until 2012. In particular, both Mr. Thorpe and Ms. Schumann emphasized the need to fund the communications coordinator and web site, noting that the stakeholders group is already in arrears in paying its communications director.

Vance Lee, chair of the Gila-San Francisco Water Commission, explained that the commission is committed to diverting Gila River water and keeping it in New Mexico. He went on to note that the commission is reviewing the list of projects developed by the Arizona Water Settlements Act Stakeholders Group in order to make its recommendations to the Interstate Stream Commission (ISC). Mr. Lee pointed out that the Gila-San Francisco Water Commission includes representatives from four area counties. He also suggested that because the Arizona Water Settlements Act awards water to New Mexico, it makes sense to try to keep that water in New Mexico.

Howard Hutchinson, also of the Gila-San Francisco Water Commission, emphasized that the Arizona Water Settlements Act addresses a region-wide issue of significant importance. He also pointed out that there are notable differences between the commission, which is mostly composed of elected officials, and the stakeholders group, which solicits input from all interested parties. He also indicated that decades of planning regarding water resources in the region have yielded relatively little field work, and that the area's watersheds are in poor shape.

Craig Roepke of the ISC testified that the planning process continues to move forward and that the ISC anticipates the recommendations from both planning groups.

Questions and comments included the following:

- conceptual projects range from small solar projects to large-scale structures such as diversion and storage sites;
- the settlement allocates \$66 million for any purpose and could include an additional \$62 million for approved projects;
- current funding for studies and stakeholders group meetings has come from the state;
- funding needs for additional planning depend on the recommendations made by the two planning groups;
- the Gila-San Francisco Water Commission is composed mostly of representatives from soil and water conservation districts and local government representatives, while the Arizona Water Settlements Act Stakeholders Group includes any interested parties;
- the time line and deadlines for decisions and project funding; and
- the ISC makes the final decisions on recommended projects.

Conservation of Water and Agricultural Water Use

John Longworth of the Office of the State Engineer (OSE) and Dr. Zohrab Samani of NMSU explained how the application of different conservation practices may or may not result in the creation of transferable water rights in the agricultural sector. They began by explaining that the consumptive use of water, commonly measured by the amount of evapotranspiration that occurs for a given crop, in essence determines the amount of depletions in a stream system attributable to the growing of that crop. Increasing the efficiency of the delivery method to a crop will decrease diversions and corresponding return flows to the system, but may increase crop yield and evapotranspiration, resulting in an overall decrease in water returning to the system and an increase in depletions to the system, they noted. In this case, they explained, there would be no saved water to transfer to another user. This is the challenge in a water-short environment, Dr. Samani explained, because crops often do not receive enough water at the optimum time and actual use is less than the potential use for a given crop. Better delivery methods may help the individual farmer in getting higher yields per acre, but do not necessarily free up water for others to use. Mr. Longworth pointed out that the transfer of any conserved water pursuant to Section 72-5-18 NMSA 1978 would have to be done annually on a farm-by-farm basis, which would require a corresponding increase in staff to oversee the program.

Tessa Davidson, a water attorney, commented that water depletions occur from use, while seepage and evaporation are separate matters. She said that while conserved water may not exist as a recognizable right, she thinks there could be savings that could be put to other uses.

Adjudications Status Update

Greg Ridgley, OSE, provided the committee with an overview of the OSE's efforts to adjudicate water rights in New Mexico. Mr. Ridgley said there are currently 12 active adjudications, six in state court and six in federal court, with a total of 72,081 defendants. He explained that reduced staffing levels within the agency, particularly with regard to legal staff, are delaying the process somewhat, noting that the Adjudications Program has a 30% vacancy rate for fiscal year 2010. The Adjudications Program also has a \$708,000 shortfall in its projected 2010 budget. A more focused deployment of the OSE's somewhat limited resources, he explained, has nonetheless kept the process moving along. Mr. Ridgley also noted that the OSE met with state and federal court judges for a working session under Rule 71.3 in August to help coordinate the hearing process and resource allocation of the active adjudications.

Judge James J. Wechsler of the New Mexico Court of Appeals provided the committee with an update on adjudication efforts with regard to the judiciary branch. He explained that the courts felt that the adjudication process could be made more efficient by making small changes to the process used by the courts. Judge Wechsler said that representatives from New Mexico had visited other states to see what worked there, noting that assigning one judge to an adjudication proceeding seemed to work well. He indicated that he had been appointed to preside over four adjudications: the San Juan, Pecos, Santa Fe and Rio San Jose.

Judge Wechsler went on to discuss adjudication of the San Juan River, explaining that completion of subfiles in the first area to be settled is underway, with *inter se* underway in the next section and determination of the water rights of the Navajo Nation to follow.

Next, Judge Wechsler discussed adjudication of the Upper Pecos River, explaining that the Gallinas section of the river is moving forward well.

Celina Jones of the Administrative Office of the Courts also discussed the significance of the lessons learned during recent adjudications. She explained that focusing on the procedures associated with adjudications, such as use of electronic records and implementation of a new case management system, and ensuring that the public has access to as much information as possible, are keys to streamlining the adjudication process without making major changes to the underlying principles governing it.

Questions and comments included the following:

- about 1% of subfile offers are challenged in a hearing;
- the OSE attempts to settle the non-adversarial cases first, but even simple cases can take time;
- initial components of an adjudication involve a determination of rights offer from the OSE to a claimant; negotiation of that offer; and acceptance or challenge of that offer;

- an ideal OSE budget, regardless of financial realities, would require waiving the hiring freeze in effect for executive agencies;
- improvement of the adjudication process, while essentially a policy decision, would emphasize retention of institutional knowledge and communication with stakeholders and the public; and
- the use of certain historical records in adjudications and the potential problems associated with such records.

Lower Rio Grande Adjudication Update

Judge Jerald A. Valentine of the Third Judicial District provided the committee with an update regarding adjudication of the Lower Rio Grande. He explained that there are currently several stream system issues that the court is hearing and that he has issued orders laying out how such issues should be handled by the court. Asked if he thinks it is realistic to have one judge handling four adjudications, Judge Valentine replied that he thinks this underestimates the amount of work that goes into the adjudication process.

Laurie Knowles, OSE, also discussed adjudication of the Lower Rio Grande. She emphasized the value of negotiation to the overall process. Ms. Knowles also pointed out that the substantial amount of technical and scientific data available from NMSU and local government entities has been particularly helpful in settling claims. She went on to note that mediation is also a constructive instrument in adjudications, but she emphasized that the process does not allow the OSE to negotiate another user's water rights away from them. Ms. Knowles informed the committee that currently there are only two lawyers representing the state in the Lower Rio Grande adjudication. She also noted that the Joe M Stell Ombudsman Program has been an unqualified success in helping smooth the adjudication process, and she urged the legislature to continue to fund the program in the upcoming session.

Lower Rio Grande Public Water Works Authority Issues

Martin Lopez and Karen Nichols of the Lower Rio Grande Public Water Works Authority outlined the process the authority has taken to implement the provisions of House Bill 185 (2009), which requires the merging of five mutual domestic water consumer associations in Dona Ana County. Ms. Nichols explained that a number of challenges have arisen in setting up the authority, most of which have been resolved with the help of Rick Martinez, Robert Apodaca, Ron Curry, John D'Antonio and Annette Morales.

Ms. Morales of the Colonias Initiative highlighted the economic development opportunities that the authority offers, pointing out that economies of scale would save customers money while better infrastructure could help attract new schools and developers to the area.

Mr. D'Antonio, state engineer, pointed out that the project is in line with the emphasis the OSE has placed on regionalization of water systems. He acknowledged that there are still some policy issues that need to be worked out, but he noted that policies are steadily being put into place.

Mr. Lopez explained how matters such as standardization of billing software and digital records of customer information still need to be resolved. Mr. Lopez also pointed out that equipment such as radio-controlled water meters and security upgrades are planned. He emphasized that the authority was designed as a water system, and would operate as such, incurring debt rather than relying solely on state and federal grants.

Several members of the audience expressed concern over the authority. They said that there is a lack of transparency and communication within the authority. They also indicated that not all of the communities served by the authority are included in the decision-making process.

Other members of the audience noted that using the Albuquerque-Bernalillo County Water Utility Authority as a blueprint for the Lower Rio Grande Public Water Works Authority created some problems, as approaches that work in Bernalillo County and Albuquerque do not seem to work as well in Las Cruces and surrounding rural communities.

Tuesday, August 31

Proposal on Regional Flood Control Authority

Joe Delk, president of the Dona Ana Soil and Water Conservation District, provided the committee with some background on the need for a regional flood control authority. He explained that there are nearly 100 flood control dams in the watershed, many of which are over 50 years old. In addition, Mr. Delk noted that the proliferation of subdivisions and unincorporated communities in the area has changed the dynamic, and that many residents in those areas are currently unprotected from flood dangers because the dams were built to protect agricultural land. He indicated that meetings had been held on the issue and several governmental entities in the region are considering entering into a memorandum of understanding to explore the possibility of creating a regional flood control authority. Mr. Delk acknowledged that this would be a big undertaking, and he emphasized the need to get started quickly.

Cliff Terry of the South Central New Mexico Stormwater Management Coalition also discussed the flooding issues in the area. He began by providing the committee with photographs of recent Dona Ana County floods and their aftermath, pointing out that a tremendous amount of silt is carried by floods, which necessitates a significant cleanup effort. Mr. Terry went on to explain that while the region has a number of identified water needs, one particular need is to design flood control infrastructure from a watershed perspective. For example, he noted that street storm water drains would help prevent flood water from entering the river during storms to help stay within the river channel's flood conveyance capacity. Mr. Terry also suggested:

- building regulating reservoirs to store flood water for release later, when it can be put to beneficial use;
- installing pumping systems with large precast culverts to carry off storm water;
- lining storm drainage channels;
- building artificial aquifer recharge systems to carry arroyo water to underground

- storage; and
- maintain existing infrastructure to ensure that it operates properly and does not fail during floods.

Brian Heines, Dona Ana County manager, explained that while most of the dams in the area were originally built to protect agricultural lands, they are now old and sited above developed land. He suggested that capturing and storing storm water could help provide water to the region.

Gary Esslinger of the Elephant Butte Irrigation District (EBID) emphasized the importance of water in the area, noting that the EBID is facing water shortfalls this year. He suggested that storm water could be used to help irrigate in southern New Mexico. Mr. Esslinger went on to explain that area flood control dams need to be rehabilitated, particularly because they are now surrounded by communities.

Michael Johnson, Las Cruces Public Works director, explained that in 1970, the Las Cruces Metropolitan Arroyo Flood Control Authority built the large flood control dam east of the city, which was paid for by a property tax increase to residents of the city. Mr. Johnson noted that the tax is still in place and that the city is using that revenue to develop and implement an updated flood master plan. He pointed out that the new plan allows for identification of problem areas and building flood control infrastructure within the city to meet the needs of expansion. Mr. Johnson went on to indicate that the city has concerns regarding the creation of a regional flood control authority that includes the existing flood control authority and the impact it will have on city residents. He also noted that while the city will not relinquish the current levy it imposes, there are concerns about imposing additional taxes on city residents for a new flood control authority that will fund projects outside of the city limits. Mr. Johnson explained that an agreement that clearly delineates the city's requirements would have to be negotiated before the city considers participating in the memorandum of understanding supporting the creation of a new flood control authority.

Questions and comments included the following:

- whether it is necessary to amend the New Mexico Subdivision Act to address building houses below unsafe dams;
- the necessity of involving the state engineer and the Department of Environment (NMED) in the planning process;
- the challenge of getting cooperation among the various entities that would have to pay for the proposed flood control authority;
- the need to address the concerns of the City of Las Cruces before any legislation is proposed;
- the legal problem of diverting or appropriating water without a state permit, considering that the state did not sign off on the EBID's 2008 agreement with Texas;
- if the EBID claims ownership of runoff and stored flood waters, who gets to decide how the proposed flood control authority taxes the public?;
- whether the project will take into consideration environmental concerns; and

- who is currently responsible for maintaining the existing dams.

New Mexico Rural Water Association Legislative Proposals

Matthew Holmes, executive director of the New Mexico Rural Water Association, and Clarence Aragon, president of the New Mexico Rural Water Association, provided the committee with an update on the activities of the association and two legislative proposals the association is supporting. In particular, they provided the committee with a proposed bill that would include employees of the New Mexico Rural Water Association in the Public Employees Retirement Association and another bill that would make mutual domestic water consumers associations eligible for wastewater facility construction loans.

Questions and comments included the following:

- issues regarding the NMED and the Public Project Revolving Fund;
- the NMED provided the New Mexico Rural Water Association with a one-day notice that its contract was still in place but that no more funding for safe drinking water projects would be made available;
- the New Mexico Rural Water Association is trying to help its members get some funding through the New Mexico Finance Authority;
- some associations can make up the funding shortfalls through fees, but many smaller systems are in trouble;
- whether funding for water improvement projects may also be used for wastewater projects;
- the association frequently pays for system operator training to ensure that operators are well-qualified;
- differences between water well sharing, public water systems and mutual domestic water associations;
- the New Mexico Rural Water Association is funded mostly by fees from its members, but it will provide assistance to anyone who requests it;
- the New Mexico Rural Water Association's operational funds are getting smaller and smaller, and the association lost money last year;
- asset management training for members is just getting underway;
- membership fees for the association are tiered, with members who have a small number of connections paying less than those with a larger number of connections;
- while the association is losing members, it is rare that members leave because they are dissatisfied with the service; and
- most members of the association leave because they simply cannot afford membership fees.

Representative Nuñez asked that the legislative proposals of the association be submitted to the committee at its November meeting. On a motion made, seconded and passed, the minutes of the July 21-22, 2010 meeting were approved as submitted.

Off-Highway Motor Vehicle Act Administration

Tod Stevenson, director of the Department of Game and Fish (DGF), provided the

committee with an update regarding the Off-Highway Vehicle (OHV) Program. He explained that officer training is underway, with the New Mexico Law Enforcement Academy providing training and certification. Mr. Stevenson noted that a lack of funding did not allow for more hands-on training programs, but that online training is now available. He went on to indicate that there are over 102,000 registered off-highway machines in New Mexico.

Mr. Stevenson then explained that his department needs some additional direction from the legislature on the proper use of the Trail Safety Fund, as there have been questions about whether it is appropriate to use that fund to promote OHV use in New Mexico and its associated tourism. He acknowledged that such a use was not anticipated by the original statute.

David Chester, OHV program manager, also discussed the training program and law enforcement with the committee. He explained that the law emphasizes enforcement and safety, and that a hotline has been implemented. Mr. Chester noted that information gleaned from the hotline is used to help prioritize enforcement efforts. He indicated that common violations include no registration and no child safety equipment.

Mr. Chester went on to explain that display of license plates is an issue, but that switching to a decal system should help law enforcement officers. He also noted that safety training is available at various events and online, and that an ethics component has been added to the training.

Questions and comments included the following:

- what the process is for training and displaying proof of training for OHV users under 18;
- the ATV Safety Institute coordinates the training, but it only has 10 instructors;
- some interest has been expressed by OHV dealers in training, but the ATV Safety Institute is a private organization that conducts its own training;
- progress has been made on ranching and grazing allotments by the DGF;
- the need for adequate public notice of DGF board meetings;
- training courses are offered in multiple states, and Colorado's training course is recognized by New Mexico, but Colorado does not yet recognize New Mexico's permits;
- the hotline is promoted through press releases, business cards and advertisements; and
- Senator Griego asked that the DGF come to the October meeting to address concerns expressed about elk permits by a Mr. Martinez and other issues affecting landowner permits.

The committee adjourned at 12:47 p.m.