

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

November 30-December 2, 2009
Room 322, State Capitol
Santa Fe

Present

Sen. Phil A. Griego, Chair
Rep. Andy Nuñez, Vice Chair
Rep. Paul C. Bandy
Rep. Ray Begaye
Rep. Joseph Cervantes
Sen. Mary Jane M. Garcia (Dec. 1-2)
Rep. Thomas A. Garcia
Rep. William J. Gray
Sen. Clinton D. Harden, Jr. (Nov. 30, Dec. 1)
Rep. Larry A. Larrañaga
Rep. Kathy A. McCoy
Sen. George K. Munoz
Sen. Gerald Ortiz y Pino (Nov. 30, Dec. 2)
Sen. Mary Kay Papen
Sen. Sander Rue

Absent

Rep. Dona G. Irwin
Sen. Steven P. Neville
Rep. Mimi Stewart

Advisory Members

Sen. Rod Adair (Dec. 2)
Sen. Carlos R. Cisneros
Rep. Anna M. Crook (Nov. 30, Dec. 1)
Rep. Brian F. Egolf, Jr.
Rep. Nora Espinoza
Rep. Candy Spence Ezzell
Sen. Dede Feldman
Rep. Ben Lujan (Nov. 30, Dec. 2)
Rep. James Roger Madalena
Sen. Cisco McSorley
Rep. Danice Picraux (Dec. 1-2)
Sen. Nancy Rodriguez (Dec. 1-2)
Rep. Henry Kiki Saavedra (Dec. 1-2)
Rep. James R.J. Strickler
Rep. Don L. Tripp

Sen. Vernon D. Asbill
Sen. Timothy Z. Jennings
Sen. Gay G. Kernan
Rep. Jeff Steinborn
Sen. Peter Wirth

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

Guest Legislators

Rep. Nick L. Salazar
Rep. Gloria C. Vaughn

Guests

The guest list is in the original meeting file.

Staff

Jon Boller
Gordon Meeks
Jeret Fleetwood

Monday, November 30

Senator Griego called to order the fifth meeting of the 2009 legislative interim Water and Natural Resources Committee at 9:00 a.m. on November 30, 2009 in Room 322 of the State Capitol.

Acequia Report

Paula Garcia and Kenneth Salazar, representing the New Mexico Acequia Association (NMAA), gave a brief history of the organization and then outlined the association's Acequia Governance Program, Food and Agricultural Program and the Acquia Infrastructure Program. Ms. Garcia explained that the NMAA, through its Acequia Governance Program, had conducted 71 workshops on training for 1,309 acequia officials and attended 390 acequia meetings since July 2007 in order to strengthen acequia governance. Through its Food and Agricultural Program, she said, the NMAA is working directly with families to promote acequia agriculture through youth membership and cultural activities. Through its Good Food for New Mexico Families Initiative, she added, the NMAA hopes to strengthen the economic viability of small-scale agriculture in the state and improve availability of affordable, locally grown food to New Mexico families. Ms. Garcia also described various federal, state and local funding mechanisms for acequia infrastructure projects and recommended that the legislature support a more phased approach to funding acequia projects, which could result in a more efficient use of capital outlay.

Solid Waste Management — Landfill Management and Permitting

A summary of the presentation on solid waste management is available in the minutes of the September 2009 meeting of the legislative interim Radioactive and Hazardous Materials Committee. The discussion following the presentation included concerns about the differences in the permitting process for private versus public landfills, staffing levels at the Department of Environment and funding for the permitting and inspection program.

Buckman Direct Diversion Project Status

Rick Carpenter, project manager for the Buckman Direct Diversion Project (BDDP), provided an update on the project and negotiations with the United States Department of Energy (DOE) and Los Alamos National Laboratory (LANL) that were requested in House Memorial

120 (2009). Mr. Carpenter noted that the project was 60 percent complete as of November and is on schedule to be completed within its budget. He said that ensuring water quality has been a major concern of the project and that the BDDP board is continuing its discussions with LANL on how to deal with LANL contaminants being washed into the Rio Grande during storms. The board has asked LANL to take the following steps to address the board's concerns:

- stop migration of LANL contaminants to the Rio Grande and ground water;
- properly monitor the transport of legacy contaminants;
- measure the radioactive and toxic contamination of buried sediments in side channels of the Rio Grande (this was completed by the BDDP and the Department of Environment);
- provide an early notification system for elevated contamination levels so that diversions may be stopped;
- monitor LANL contaminants in BDDP diversions, sand return, residuals and drinking water; and
- provide funding for an independent peer review of LANL-origin contamination of public drinking water sources.

Mr. Carpenter said that significant progress has been made on most of the issues, but the DOE and LANL have not yet committed to monitoring LANL contaminants in BDDP diversions. Discussions are also ongoing concerning the details of the early notification system for elevated contamination levels.

Outstanding National Resource Waters Designation

Ron Curry, secretary of environment, and Marcy Leavitt, director of the Water and Waste Management Division of the Department of Environment, presented the latest (November 20, 2009) draft of the department's proposed outstanding national resource waters (ONRW) designation of surface waters in national forest wilderness areas located in New Mexico. Secretary Curry said he considers this to be a states' rights issue because the designation would allow the state to protect New Mexico's water instead of relying on federal authorities to do so. He said that the state's water quality is not the federal government's primary concern regarding the management of federal lands. Other western states, he noted, such as Arizona, Colorado, Utah and Wyoming, have used the ONRW designation to protect water quality on federal lands located in their states.

Ms. Leavitt explained that the first draft proposal was released in April 2008, and after 21 public meetings and the incorporation of comments, the most recent draft was completed on November 20, 2009 and addresses most of the concerns expressed during the process. She stressed that the latest ONRW proposal is strictly a water quality measure affecting existing wilderness areas (and excluding roadless areas) and that under its provisions:

- there is no reduction in current uses, such as grazing;
- there is no reduction in the current number of grazing permits;
- there are no new requirements on acequias;

- there is a priority placed on forest restoration to reduce fire hazards; and
- it does not violate treaties or impair existing land use activities.

Two areas of the state have previously been designated as ONRW, she noted, and there have not been problems in those areas.

Representative Debbie A. Rodella stated that she had requested in HJM 49 (2009) that the ONRW designation process be canceled or postponed and that several organizations oppose ONRW designation due to concerns about the loss of traditional uses of that land by land grants, acequias, ranchers and others. Michael Nevenson said he was worried that the ONRW designation would allow third-party lawsuits to be filed in federal court, that an environmental impact statement should be done before any designation, that the National Environmental Policy Act may apply and that the logging industry in the state was lost due to third-party lawsuits. Carlos Salazar said that most ranchers are concerned about the way the ONRW issue came about and that no one has shown that water quality is impaired. He also said he felt that the federal government has already taken away many rights and that this process felt like cultural genocide. Representative Rodella added that she thought it was an injustice for the executive to do things without legislative approval.

Elk Depredation Issues in Northern New Mexico

Art Martinez, a hunting and fishing outfitter representing landowners in game management units 6A and 6C, said he has been working with the Department of Game and Fish (DGF) to get equal treatment for small landowners, those with less than 300 acres of land, regarding elk depredation and the issuance of elk hunting permits. The State Game Commission changed the boundaries of units 6A and 6C in September, as requested, but there are still problems with elk depredation and permitting. He said that, currently, the DGF gives more permits to those with more land, instead of giving more permits to those whose land is destroyed by elk. Mr. Martinez said the issuance of elk permits should be based on usage, rather than the number of acres.

Tod Stephenson, DGF director, acknowledged that the boundary changes have not solved the small contributing ranch problem in units 6A and 6C and that elk depredation issues are a problem statewide. In unit 6A for example, 16 percent of elk permits are given to property owners in the area, which amounts to 113 permits, he said. However, there are 310 property owners in the unit, so some owners do not receive permits every year. Installing elk-proof fencing to limit damage to one property usually means more damage is done to adjoining properties, he added. Mr. Thompson stated that the DGF would continue to work with landowners on these issues.

Mid-Rio Grande Levee Task Force Report — Senate Memorial 18

Janet Jarratt, chair of the Middle Rio Grande Conservancy District (MRGCD) board of directors, and Subhas Shah, director of the MRGCD, presented the task force's findings. Several other participants attended the meeting, including Joe Quintana, regional planning manager for

the Mid-Region Council of Governments, and Deb Foley, United States Army Corps of Engineers (USACE) chief of civil works project management for the Albuquerque district.

Ms. Jarratt thanked the members of the task force for their work, noting that it was a cooperative effort by the parties involved in the process. According to Ms. Jarratt, standards for levees are set by both the Federal Emergency Management Agency (FEMA) and the USACE. FEMA requirements affect what areas may be covered by the National Flood Insurance Program, while USACE requirements determine whether federal funds may be used to repair levees damaged by floods. According to the task force report, nearly all of the existing levees or spoil bank sections of levees in the middle Rio Grande study area would not be certified as levees under new federal regulations. This may affect both how much homeowners and others living in the flood plain will pay for flood insurance, what areas are considered to be in a flood plain and whether federal dollars would be available to repair levees after any flooding that occurs. According to the USACE, the estimated cost of rebuilding just the Albuquerque levees is \$120 million.

The task force made several recommendations, including that it should continue to meet in 2010 to further evaluate levee projects and explore funding sources for any proposed projects. Committee members expressed support for the task force's continued work, and further discussion included the following:

- whether FEMA would be moving toward a more risk-based standard for the issuance of flood insurance;
- the possibility of changing vegetation standards for levees to avoid having to remove trees from the bosque in the Corrales/Albuquerque area;
- whether economic impact and cost/benefit studies will be done to help determine if any or all of the levees and spoil banks need to be rebuilt; and
- what sources of funding for projects could be expected from federal sources, local government bodies tasked with flood control or levee maintenance and state agency sources.

Acequia Issues in the Middle Rio Grande

Senator Ortiz y Pino requested the committee's support for reintroduction of Senate Bill 486 (2009), a bill clarifying the management authority of acequias located within the boundaries of the MRGCD. James Maestas, president of the South Valley Regional Association of Acequias, explained that the New Mexico Supreme Court, in *Middle Rio Grande Conservancy Dist. v. Chavez*, 44 N.M. 240 (S.Ct. 1940), had left open the question of what duties remained for the commissioners of some community ditches that are within the MRGCD. Because of this uncertainty, he explained, over \$200,000 in capital improvement projects for six acequias are being held up by the Interstate Stream Commission, which has requested an attorney general opinion on whether it may enter into contracts with these acequias. Robert Kyzer, a Los Padillas Acequia commissioner, said he felt there was a breach of contract on the part of the MRGCD in maintaining the acequia and that passage of the proposed legislation would force the MRGCD to revisit the contract it entered into with the acequia in 1935. Ron Olivas, Pajarito Acequia

commissioner, complained that people are interfering with ditches and turnouts, which has resulted in some *parciantes* being unable to irrigate. He also said that water is being leased by the MRGCD without compensating the owners of the water right.

Andrew Leo Lopez, Conservancy Taxpayers Association, asked the committee to support legislation sponsored by Senator Linda M. Lopez that would redistrict the MRGCD into districts of equal population. Mr. Lopez observed that the South Valley of Albuquerque is not represented on the board of the MRGCD for the first time. He presented a breakdown of the number of voters in each district of the MRGCD, indicating that the number of voters per district varied from 3,774 per director in Socorro County to 22,963 voters per director in Valencia County. Equal representation would require 11,452 voters per district, according to Mr. Lopez.

The committee recessed at 5:40 p.m.

Tuesday, December 1

The committee reconvened at 9:00 a.m. in Room 322 of the State Capitol.

Wolf Reintroduction in the Gila National Forest

Ed Werheim, Catron County commissioner, stated his opposition to the wolf reintroduction program in Catron County. He said the consequences of reintroduction would be catastrophic for cattlegrowers in the area and a death sentence for game. He said that over 1,500 lawsuits have been filed by environmentalists over the years and that the government is having to pay for these lawsuits. The compensation program for depredations will need tens of millions of dollars, not the \$2 million or \$3 million currently projected, he explained. Mr. Werheim asked that a statewide vote be held on whether wolves should be reintroduced.

Bud Fazio, United States Fish and Wildlife Service (FWS), explained that the FWS is the primary implementing agency for the federal Endangered Species Act of 1973 and is responsible for coordination of the Mexican Gray Wolf Recovery Program. The program is at a crossroads, he said, because the old plan is due to be revised, with meetings on the issue starting next week in Albuquerque. An environmental impact statement, including a social/economic impact assessment, will be part of the plan, he added. Congress has just established a demonstration project to compensate ranchers for depredation, he said, which is funded at \$1 million per year for the next five years, and the Defenders of Wildlife have also established a program to compensate ranchers that have sustained losses. Mr. Fazio said the FWS is not discussing or declaring critical habitat for the Mexican gray wolf in New Mexico, and it has not yet addressed the new petition for establishing critical habitat from the Center for Biological Diversity. As for the number of livestock lost to wolves, Mr. Fazio said the FWS had confirmation of 138, rather than 1,500, though he said it was the FWS's responsibility to confirm losses.

Mr. Stephenson explained that the state's Wildlife Conservation Act tells the DGF how it should deal with endangered species and that the DGF has assigned two field officers to work on the wolf program. He noted that the experimental status of the wolf program governs how things

are managed on the ground and that an endangered species designation would change the management protocols significantly. Public involvement in the program is crucial, he said, and ensuring the survival of ranching is critical.

Michael Robinson, Center for Biological Diversity, gave a brief history of the federal Endangered Species Act of 1973 and the natural history of the Mexican gray wolf. Reintroduction of wolves in other areas, such as Yellowstone National Park, has changed ecosystems for the better, he said, resulting in diminished coyote populations and healthier forests. Mr. Robinson explained that millions of dollars were spent eradicating wolves, far more than it is costing to reintroduce them and pay compensation for depredation. The wolf reintroduction program started in 1998, he explained, but because the FWS has failed to follow recommendations from an evaluation study done in 2001, the center filed suit in 2006 to force the FWS to implement the recommendations. Mr. Robinson also noted that the livestock industry has made unconstructive, inflammatory comments on the program.

Utton Transboundary Resources Center Programs

Susan Kelly, interim director of the Utton Transboundary Resources Center, gave a brief summary of current and proposed projects of the center. The new edition of *Water Matters!*, a publication summarizing current water issues in the state, will be distributed to the legislature in January, she said. The Joe M Stell Ombudsman Program, though a statewide program, she explained, is currently focused on three adjudications, the lower Rio Grande, San Juan and *Aamodt*, and functions as a neutral source of information on the adjudication process. Ms. Kelly also mentioned the following projects the center is involved with:

- developing an appropriative rights model water code;
- studying the nexus between land use and water availability;
- meeting on upstream/downstream issues; and
- a river restoration review project.

Indian Water Rights Settlement Fund Annual Report

Estevan Lopez, director of the Interstate Stream Commission, and John D'Antonio, state engineer, summarized the latest developments on three pending Indian water rights settlements: the Navajo Nation settlement; the *Aamodt* settlement; and the Taos Pueblo settlement. Mr. Lopez reported that President Obama signed legislation on March 30, 2009 authorizing the Navajo settlement, including the Navajo-Gallup Water Supply Project, and on July 6, 2009, Secretary of Interior Ken Salazar signed the record of decision, making official the environmental impact statement for the project. The Bureau of Reclamation received \$3 million in federal fiscal year 2010 to begin construction of the project. Mr. D'Antonio reported that partial funding of the *Aamodt* settlement is provided for in the Omnibus Public Lands Management Act of 2009, though federal authorization legislation is still pending in Congress. Likewise, federal authorizing legislation for the Taos Pueblo settlement is still pending. According to Mr. Lopez, there is \$10 million of severance tax bonding authority in the Indian Water Rights Settlement Fund, but the Interstate Stream Commission has not yet exercised its

authority to sell the bonds. Mr. D'Antonio and Mr. Lopez recommended an appropriation of \$15.2 million to the fund for fiscal year 2011.

Proposed Bills for the 2010 Legislative Session

Nine pieces of proposed legislation were presented to the committee for its endorsement. The committee endorsed the following pieces of legislation:

- a bill establishing the Eastern New Mexico Water Utility Authority;
- reintroducing House Joint Resolution 6 (2009) concerning legislative review of executive agency rules;
- an appropriation to the Interstate Stream Commission for water planning; and
- an appropriation for non-native phreatophyte removal and riparian restoration projects.

The committee failed to endorse the following:

- a bill establishing ownership of pore space;
- a bill on game depredation;
- a bill extending authority of the natural resources trustee over contamination of ground water;
- a bill updating the penalties for violations of the Oil and Gas Act; and
- the Farmer Protection Act.

The committee recessed at 6:00 p.m.

Wednesday, December 2

The committee reconvened at 9:00 a.m. in Room 322 of the State Capitol.

Triennial Review of Water Quality Standards

Ms. Leavitt explained that the triennial review of water quality standards is required by Section 303 of the federal Clean Water Act of 1977 every three years. The Department of Environment reviews existing standards, such as how much bacteria is acceptable in water used for recreational purposes, and makes recommendations to the Water Quality Control Commission, which holds public hearings on any proposed modifications to the standards. All Department of Environment proposals and comments are prefiled with the commission and made available to the public. The commission, she said, then makes the final decision on whether to adopt the proposed changes or not, and the Environmental Protection Agency may accept the changes or issue its own standards.

T.J. Trujillo, lobbyist, said that Ms. Leavitt and Pam Homer, the Department of Environment's water quality standards coordinator, have been very accommodating in getting information out to the public. But the system as a whole is problematic, he explained, because the process requires stakeholders to hire people to read and interpret the administrative record,

which is intimidating and discourages public participation. He also noted that the Water Quality Control Commission has guidelines, rather than formal rules, that can be changed on an ad hoc basis. He said his clients are not asking for anything at this point, but that in the future they may be requesting legislation.

The committee approved the minutes from the July and September meetings without objection.

Consumptive Use of Crops, Conservation and the Implementation of SB 461 (2007)

J. Phillip King, civil engineer, New Mexico State University, and Rhonda Skaggs, agricultural economist, New Mexico State University, made presentations on the consequences of implementing conservation measures in the agricultural sector. Dr. King pointed out that there is much confusion about what water conservation is. He explained that water conservation measures, such as lining ditches or precision application of water to plants, may decrease non-consumptive losses to the system, but doing so will actually result in increases in consumptive losses to the system, thus leaving less water in the system for other uses and potentially impairing the water rights of downstream users. The advantage to the farmer is increased crop yield because increased consumption of water by crops resulting from more efficient application of water to the crop should result in increased crop production, he said, but the consequent decreases in return flow (a non-consumptive loss to the system) will impair downstream rights. Implementing the provisions of SB 461, he said, is problematic because research is not available to implement it.

Dr. Skaggs began by pointing out that conservation means different things to different people. If conservation is defined as an act or policy that will result in additional water for other uses or users, then much of what is called water conservation does not qualify as such because it does not make more water available, she explained. She noted that hydrologic reality does not coincide with public perception when it comes to water issues. Conventional wisdom, she said, is that improved agricultural irrigation will make more water available to other users. Instead, she explained, instituting such practices as drip irrigation or optimizing irrigation scheduling will actually increase consumptive use and decrease the amount of water downstream and for other users. Improvement in agricultural infrastructure and technology will likely increase total consumptive use and crop yields, she concluded, but may not qualify as water conservation.

When asked about implementing the provisions of SB 461, the presenters said the bill did not seem to take into consideration the concerns expressed today.

The committee adjourned at 11:45 a.m.