

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

**August 27-28, 2012**  
**Ralph Edwards Auditorium**  
**Truth or Consequences, NM**

The third meeting of the Courts, Corrections and Justice Committee and the Water and Natural Resources Committee was called to order by Representative Joseph Cervantes on August 27, 2012 at 9:50 a.m. at the Ralph Edwards Auditorium in Truth or Consequences.

**Courts, Corrections and Justice Committee Attendance:**

**Present**

Rep. Al Park, Co-Chair  
Sen. Peter Wirth, Co-Chair  
Sen. Rod Adair (8/27)  
Rep. Joseph Cervantes  
Rep. Gail Chasey (8/27)  
Sen. Mary Jane M. Garcia (8/27)  
Sen. Clinton D. Harden, Jr.  
Sen. Linda M. Lopez (8/27)  
Rep. Antonio "Moe" Maestas  
Sen. Richard C. Martinez  
Rep. William "Bill" R. Rehm  
Rep. Mimi Stewart (8/27)

**Absent**

Rep. Zachary J. Cook  
Rep. David L. Doyle  
Rep. Nate Gentry  
Sen. John C. Ryan

**Advisory Members**

Rep. Eliseo Lee Alcon  
Rep. Thomas A. Anderson  
Sen. Lisa K. Curtis (8/28)  
Rep. Brian F. Egolf, Jr.  
Rep. Dennis J. Kintigh  
Rep. W. Ken Martinez  
Sen. Cisco McSorley  
Rep. Bill B. O'Neill  
Sen. John Pinto  
Sen. Sander Rue (8/27)  
Sen. David Ulibarri  
Rep. Richard D. Vigil

Rep. Cathrynn N. Brown  
Sen. Carroll H. Leavell  
Sen. William H. Payne  
Sen. Michael S. Sanchez  
Rep. Sheryl Williams Stapleton

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

**Guest Legislator**

Rep. Debbie A. Rodella

**Staff**

Jon Boller, Legislative Council Service (LCS)

Maha Khoury, LCS

Douglas Carver, LCS

Cassandra Jones, LCS

**Guests**

The guest list is in the meeting file.

**Handouts**

Handouts and other written testimony are in the meeting file.

**Monday, August 27**

Members of the committee introduced themselves.

**2008 Compromise and Settlement Agreement Between Elephant Butte Irrigation District (EBID) and El Paso County Water and Improvement District Number 1 (EPD1)**

Steve Farris and Sarah Bond, Office of the Attorney General, presented the state's rationale for challenging the Bureau of Reclamation's release of water from Elephant Butte Dam without obtaining permission from the Rio Grande Compact Commission or the state engineer. Mr. Farris began by noting that, currently, the Rio Grande below the dam is full, that 100% of that water is going to Texas and that 100% of that water is New Mexico Compact credit water that was released without the state's permission. The 2008 operating agreement between the EBID, EPD1 and the Bureau of Reclamation, he said, resulted in an allocation of only 10 inches of surface water per acre this year from Elephant Butte Dam to New Mexico farmers, while giving 30 inches per acre to El Paso farmers. Mr. Farris explained that New Mexico is suing the Bureau of Reclamation because the:

"Reclamation stole 10.9 billion gallons (33,000 acre feet) of New Mexico Compact credit water and delivered it to Texas in 2011;

Reclamation's operating agreement gives more surface water to Texas and forces New Mexico farmers to rely more heavily on groundwater;

Reclamation's operating agreement has taken up to 170,000 acre feet of water from New Mexico farmers . . .; and

Reclamation submitted a 2011 mid-year "water audit" where 65,000 acre feet of water . . . from New Mexico's savings account was relabeled as "Usable Water".

He estimated that the total economic cost to the state of losing the suit would be \$183 million per year, with a loss of 1,000 jobs. Mr. Farris said that in the Lower Rio Grande region, continuing to follow the operating agreement will result in a loss of aquifer recharge, a loss of surface water storage in Elephant Butte, the loss of a sustainable supply of water for farmers, the loss of a sustainable water supply for Las Cruces and the destruction of the aquifer that supports 200,000 people in southern New Mexico. Moreover, he noted, the agreement threatens the state's ability to store water in most of the state's northern reservoirs, which means there will be less water available for farmers and municipalities in the Middle Rio Grande region and less water to deal with endangered species in that region. Finally, he said that losing the suit would mean that the state would continue to lose control of its water to the federal government.

Steve Hernandez and Phil King, representing the EBID, explained how the EBID, the EPD1 and the Bureau of Reclamation reached an agreement on the operation of the Rio Grande Project and how the operating agreement avoided litigation that would have ended up in the U.S. Supreme Court. Mr. Hernandez said that the EPD1 complained that it was not getting its full allocation of project water due to the amount of ground water pumping occurring in New Mexico north of the Texas border. Fearing a lawsuit that would end up in the U.S. Supreme Court and the threat of having all of the EBID's ground water pumping cut off, he explained, the two irrigation districts and the bureau agreed upon a new operating agreement to address the allocation of project water between the two districts. The reduced allocation of surface water to the EBID is made up for by allowing the EBID to use ground water to make up the difference, he explained. Dr. King disputed the attorney general's assertion that the state faces jobs losses and economic damages due to the operation agreement. He noted that agricultural production was up and that drought is the key reason for the EBID's low allotments of water. The reason the EPD1 is receiving more water this year, he explained, is because it had lots of carryover water from previous years, whereas the EBID did not.

### **Truth or Consequences Welcome**

John Mulcahy, mayor of Truth or Consequences, welcomed the committees to Ralph Edwards Auditorium and the city. Mayor Mulcahy informed the committees that the city commission had taken a bold step to preserve the city's hot springs by passing a one-year moratorium on domestic well drilling within the city. He explained that there are a lot of wells being drilled in the city that are not for drinking water, yet that water is being disposed of through the city's sewer system. Some 146 well permits have been issued in an 11-acre area, he noted. The moratorium will allow the city to study the effects of the new wells on the city's existing wells and resources and help ensure that the city can protect its resources in the future. When asked about the effect of low lake levels on the city, he replied that it is always a negative when there is low water in the reservoir. He also said that Spaceport American is a priority for the city.

## **Pecos River Settlement Issues**

Greg Lewis, Interstate Stream Commission (ISC), gave a brief history of the Pecos River Settlement, which was entered into by the parties in 2003 (and was implemented in 2009) to address Pecos River Compact compliance issues and bring the state into compliance with the court's 1988 amended decree. The objectives of the settlement, he explained, were to ensure permanent compliance with the Pecos River Compact and decree; increase and stabilize the water supply for the Carlsbad Irrigation District (CID); and reduce the likelihood of a priority call affecting ground water users in the Roswell Basin and bring the basin back into hydrologic balance. This required the retirement of up to 6,000 acres of irrigation rights within the CID and 11,000 acres within the Pecos Valley Artesian Conservation District (PVACD), along with the augmentation pumping of up to 35,000 acre-feet per year as needed. Mr. Lewis explained that 2011 was the first year that any augmentation pumping was required (with nearly 13,000 acre-feet pumped from March to October), and that the ISC has been pumping continuously since then (approximately 17,000 acre-feet since last November). All pumping has been to augment CID farmers' use; none has been required for deliveries to Texas, he noted. Addressing overall performance of the settlement, Mr. Lewis said that it is working (New Mexico has a supply credit with Texas, and augmentation pumping has provided significant additional supply to the CID), but that the extraordinary drought has precluded meeting settlement supply targets for the CID.

Aron Balock and Bill Netherland, PVACD, said the settlement has to be viewed in context — without an agreement, things could be much worse, even though with hindsight some things could have been done differently. It was local people working together, they noted, that allowed the parties to come to a solution, even if things are not working perfectly.

Charlie Jerva, CID, said that even as a senior water rights owner, he has been hurt by the drought, though on the positive side, 50% more water has been available to him than would have been the case without the settlement. Dudley Jones, CID, described the severity of the drought over the past two years and how this has resulted in allocations of only 1.4 and .9 acre-feet of water per acre in the CID in 2011 and 2012. These allocations would have been half those amounts without the augmentation pumping, he noted, though augmentation pumping has not been able to keep allocations close to the 100-year annual allotment average of 2.41 acre-feet.

## **Water Rights Adjudications Process and Suggestions**

Judge Jerald Valentine outlined what he did in certain court orders to improve the process of adjudications, including deciding certain stream system issues up front, providing notice provisions for posting of issues for nonparticipating parties, updating requirements for address changes of parties and supporting the Joe M Stell Ombudsman Program.

Celina Jones, Administrative Office of the Courts, noted that a lot of what the courts are doing now is based on Judge Valentine's suggestions. She explained that there are now dedicated water judges for all adjudications, improved customer services that make things more accessible to claimants and in the Hidalgo County Animas Underground Basin adjudication, an opportunity to apply a new case management system. She explained that the Animas

adjudication all stream issues will be resolved first and that all claims between the 300 or so claimants will be resolved at one time, rather than later in the process.

Darcy Bushnell, Joe M Stell Ombudsman Program, reviewed the adjudications process from the individual claimant's perspective, from the initial notice of the suit through the final inter se process, and the roles that the courts, the state engineer and the ombudsman play in the process.

Scott Verhines, state engineer, began by noting that the current value of water rights in New Mexico is estimated to be from \$16 billion to \$18 billion and that adjudicating those rights is of prime importance to the state. He went on to list 21 measures that the state engineer, the legislature and the courts have changed over the past 20 years to improve the process. Greg Ridgley, deputy chief counsel of the Office of the State Engineer, outlined seven suggestions for improving the adjudications process, noting that there is always a tension between fairness and efficiency in the process.

### **Spaceport Liability Issues (Draft Bill #3)**

Christine Anderson, executive director of the Spaceport Authority, told the committees that the spaceport is committed to providing a tourist experience for those that stay on the ground as well as passengers. She told the committees that there have been 15 vertical launches at Spaceport America, with two additional launches scheduled in the coming months. Spaceport America anticipates being financially self-sufficient in 2014. Ms. Anderson referred the committee to draft bill #3, a bill that would allow fully informed participants to hold harmless flight companies. The waiver would only apply to the passengers and would not protect flight companies if property or people on the ground were damaged as a result of space flight. New Mexico currently has informed consent legislation that holds the operator of the spacecraft harmless but does not protect manufacturers or suppliers. Current legislation will sunset in 2018.

Robert Desiderio, counsel for Virgin Galactic from Sanchez, Mowrer & Desiderio PC, told the committees that four other states have enacted informed consent legislation: Florida, Colorado, Virginia and Texas. The proposed legislation shares the greatest similarity to statutes in Texas and affords the greatest protection for operators, manufacturers and suppliers. The current New Mexico statute refers to federal law for definitions of terms while the proposed legislation defines the terms. The proposed legislation also extends protections to manufacturers, suppliers, employees, managers, directors and officers.

David Jaramillo from Gaddy Jaramillo Touchet, representing the New Mexico Trial Lawyers Association, told the committees that New Mexico law has traditionally held businesses and people responsible for negligent conduct. He stated that New Mexico tort law provides protections for businesses and people, and additional protections do not need to be imposed by legislation. He told the committees that business should not be conducted at any cost and that the proposed legislation provides a great protection for those that might cause the greatest harm. Mr. Jaramillo told the committees that there is no proof or evidence that companies have chosen other spaceports rather than Spaceport America because of the informed consent legislation.

Currently, businesses and people are only held liable for an accident after a jury of 12 citizens determines that a product or behavior is defective or finds negligence.

Members of the committees and the panel discussed the benefits of and concerns about the proposed legislation. Among other things, members discussed: the contribution of Spaceport America to the economic development of the surrounding areas; the ability of Spaceport America to attract tenants with and without expanded informed consent legislation; tort law and policy issues; state funds appropriated to Spaceport America; and safety concerns associated with space flight.

### **Recess**

The committees recessed at 5:23 p.m.

### **Tuesday, August 28**

#### **Travel to and Tour of Spaceport America**

Christine Anderson and other members of the Spaceport Authority and Virgin Galactic led members and staff of the committees on a tour of Spaceport America.

#### **Adjournment**

There being no further business before the committees, the third meeting of the Courts, Corrections and Justice Committee and the Water and Natural Resources Committee for the 2012 interim adjourned at 1:38 p.m.