

**MINUTES
of the
SECOND MEETING
of the
WATER AND NATURAL RESOURCES COMMITTEE**

**July 14-15, 2016
New Mexico State University-Alamogordo
Tays Auditorium
Alamogordo**

The second meeting of the Water and Natural Resources Committee was called to order by Representative Candy Spence Ezzell, chair, on July 14, 2016 at 10:20 a.m. in Tays Auditorium at New Mexico State University-Alamogordo in Alamogordo.

Present

Rep. Candy Spence Ezzell, Chair
Sen. Peter Wirth, Vice Chair
Rep. Paul C. Bandy
Sen. Joseph Cervantes
Rep. Randal S. Crowder
Rep. Matthew McQueen
Rep. Andy Nunez
Sen. Cliff R. Pirtle
Rep. Jeff Steinborn
Rep. James R.J. Strickler

Advisory Members

Sen. Ted Barela
Sen. Lee S. Cotter
Rep. Bealquin Bill Gomez
Sen. Ron Griggs
Rep. Idalia Lechuga-Tena
Sen. Cisco McSorley (7/15)
Sen. Nancy Rodriguez
Rep. James G. Townsend
Rep. Bob Wooley
Rep. John L. Zimmerman

Absent

Rep. Dona G. Irwin
Rep. James Roger Madalena
Rep. Javier Martínez
Sen. Sander Rue
Sen. Benny Shendo, Jr.
Sen. Mimi Stewart
Sen. Pat Woods

Rep. Cathrynn N. Brown
Sen. Pete Campos
Sen. Carlos R. Cisneros
Rep. Sharon Clahchischilliage
Rep. George Dodge, Jr.
Rep. Brian Egolf
Rep. Nora Espinoza
Rep. David M. Gallegos
Rep. Jimmie C. Hall
Sen. Stuart Ingle
Rep. D. Wonda Johnson
Sen. Gay G. Kernan
Rep. Larry A. Larrañaga
Sen. Carroll H. Leavell
Rep. Tim D. Lewis
Rep. Rick Little

Sen. Linda M. Lopez
Rep. Bill McCamley
Sen. Steven P. Neville
Sen. Gerald Ortiz y Pino
Sen. Mary Kay Papen
Rep. G. Andrés Romero
Sen. John C. Ryan
Rep. Tomás E. Salazar
Sen. William E. Sharer
Sen. John Arthur Smith
Rep. Don L. Tripp

Guest Legislators

Sen. William F. Burt
Rep. Yvette Herrell

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

Staff

Jon Boller, Legislative Council Service (LCS)
Gordon Meeks, LCS
Jeret Fleetwood, LCS

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written testimony can be found in the meeting file or on the New Mexico Legislature's website at www.nmlegis.gov.

Thursday, July 14

Representative Ezzell began the meeting by having members of the committee, staff and audience introduce themselves.

Effect of Meadow Jumping Mouse Listing on Access to Water

Representative Ezzell asked that parties affected by the listing of the New Mexico meadow jumping mouse speak first, after which representatives from the United States Fish and Wildlife Service (FWS) and the United States Forest Service (USFS), as well as the Office of State Engineer (OSE), would address the committee.

Kelly Goss, Sacramento Grazing Association, Inc., explained that the fences erected to protect the mouse habitat directly affected her family's cattle operation. She noted that the

electric fences put up by the USFS were larger than stakeholders had been told they would be and did not leave enough room to work cattle. Ms. Goss also said that the water lanes that had been dug to move water outside of the fenced area were not sufficient and would be dry soon. She also suggested that the fences were protecting a larger area than was necessary. Ms. Goss went on to say that federal agencies have been taking water from citizens for years without due process and that temporary arrangements rarely turn out to actually be temporary.

JudyAnn Medeiros said that the Aqua Chiquita Creek runs through her family's land and is a good source of water. She noted that her family has been ranching in the area since the 1950s and that while federal fencing began to appear in the 1990s, there has been more fencing since the mouse was listed. Ms. Medeiros said that the federal government has been taking water from ranchers and land users bit by bit, despite efforts by the USFS to work with them.

Ernie Torres, New Mexico Cattle Growers' Association, said that the federal government had fenced off portions of a waterway in New Mexico to protect the mouse before, on the La Jara ditch in the Jemez area. He explained that fences were erected between Jemez and Cuba to protect jumping mouse habitat. Mr. Torres went on to explain that while the fences are designed to protect the mouse and its habitat from cattle, elk in the area also cause damage to the habitat. He said that ranchers in New Mexico are losing patience with the federal government, particularly regarding the federal Endangered Species Act of 1973. Mr. Torres also said that while the federal government has fenced off portions of land and offered drinking areas elsewhere, some of the affected parties have water rights that go back to the Treaty of Guadalupe Hidalgo and should be protected. He noted that it seems as though mice are currently more important than people, going on to suggest that continued taking of water will lead to bad attitudes. He urged the legislature to protect New Mexico's citizens before they are forced to protect themselves.

Colt Howland, Otero County Cattlemen's Association, said that listing the mouse has had effects on private property and states' rights, pointing out that fences keep other land users, such as hunters, campers and birdwatchers, off of public land, too.

Gary Stone said that designation of critical habitat has the effect of denying water to industries that need it. For example, he said that hunters and trappers are now unable to get to traps. Mr. Stone said that the decision to protect the spotted owl's habitat had a significant negative effect on the logging industry and local customs and culture, eventually forcing sawmills and schools to close and devastating families. He went on to say that the science on some decisions to list a species as endangered is based on suspect science because the FWS is caving in to organizations such as the Center for Biological Diversity. Mr. Stone explained that some federal laws that were initially designed to protect ranchers are now serving to help eradicate them because federal bureaucrats are willfully misinterpreting court decisions, laws and the constitution to suit their own agendas.

Jim Upchurch, deputy regional forester, Southwest Region, USFS, introduced Steve Hattenbach, director of range land management, USFS, and Wally Murphy, FWS. Mr. Upchurch explained that the USFS has a very broad mission to maintain forest resources for present and future generations and that it can be difficult for the agency to balance all of the needs and resources, which can lead to controversy. He said that there are 1,350 grazing allotments in Arizona and New Mexico, with 600 allotments in New Mexico. Fourteen allotments, three in the Lincoln National Forest, six in the Santa Fe National Forest and five in Arizona, are affected by the listing of the New Mexico meadow jumping mouse, he explained. Mr. Upchurch went on to say that the mouse was listed as an endangered species in 2014, with critical habitat identified in 2016. He emphasized that the USFS has no intention of affecting grazing permit holders if at all possible, noting that the agency prefers to seek collaborative solutions. Mr. Upchurch said that the number of cattle allowed to graze has not been reduced but that the USFS has been forced to alter some grazing practices. He noted that the USFS has met with several of the people whose cattle have been affected by the fences put up to protect the mouse's habitat and that the USFS is willing to be flexible and discuss moving some of the fences. However, he said that the USFS would have to visit each site to determine if moving fences is feasible or not. He said that the USFS is currently in the process of moving some fences and trying to reach agreements with cattle owners and that in 13 of the 14 allotments, consensus has been reached. Mr. Upchurch emphasized that settling upon workable solutions is incumbent upon all parties involved.

Questions and comments from the committee included the following:

- a letter from Governor Martinez was recently sent to the USFS urging that a solution be developed to both protect the mouse and maintain the ability of cattle to graze;
- the importance of grazing as a valid land use;
- the fences erected have not prevented access to any diversions, so the OSE was not contacted before the fences were put up;
- the USFS tried to work with local ranchers on initial fence locations;
- the meadow jumping mouse has a relatively restricted range and small habitat area, but it hibernates for about nine months and feeds on seeds in long grasses that tend to grow in wet soil;
- the draft biological assessment for the mouse identified between 220 and 290 acres of critical habitat to be enclosed by temporary fencing, but that number could change once the National Environmental Policy Act of 1969 (NEPA) process is completed;
- there is limited historical information available for the mouse;
- the USFS does erect erosion control structures but not diversions;
- the last count of the mouse population was done about 10 years ago;
- by law, a recovery plan for the mouse must be developed within the next five years;
- the NEPA process allows for input from the public and grazing permit holders;
- the USFS intends to complete fencing and the NEPA process in 2016, but it depends upon reaching workable solutions with stakeholders;
- development of reachable solutions often involves USFS staff and grazing permit holders walking together along fence lines and negotiating the fence's location;

- the FWS is responsible for protecting a species once it becomes listed as endangered;
- while cattle grazing has affected mouse habitat, other grazing species have had some impact, too;
- there is not enough information to determine the effect of elk on the mouse habitat or the effectiveness of temporary fencing on elk behavior;
- it is difficult to predict how much land will ultimately have to be fenced off to adequately protect the mouse habitat;
- protecting endangered species' habitat is more about protection of an ecosystem than any one species;
- federal encroachment on New Mexico water resources extends beyond fencing off the mouse habitat; and
- fences will likely also affect other types of land users, such as those who hike and fish.

Tom Blaine, state engineer, explained that the OSE has been aware of the issue for years and has toured area ranches and the areas enclosed by fencing to try to better understand the issue.

Questions and comments from the committee included:

- the fencing is more of a streambed management issue than a diversion issue;
- that the OSE has worked with some affected parties to develop off-channel drinking areas to deliver water to cattle;
- stock watering rights versus other types of water rights;
- blocking access to points of diversion could be considered a taking;
- acquisition and application for water rights for beneficial use; and
- the OSE cannot force federal agencies to tear fences down but can provide mechanisms to help deliver water to cattle.

Department of Game and Fish (DGF) Report on Elk Population and Taxation and Revenue Department (TRD) Report on Gross Receipts Tax Collections from the Elk-Private Lands Use System (E-PLUS) Program Activity

Alexa Sandoval, director, DGF, briefly discussed the work of a subcommittee formed by the House Agriculture, Water and Wildlife Committee to discuss New Mexico's elk population and gross receipts taxes (GRT) on the E-PLUS program.

Demesia Padilla, secretary, TRD, and Ron Scott, audit and compliance director, TRD, explained that all goods and services in New Mexico are subject to the GRT unless a specific exemption exists. Mr. Scott explained that landowners who sell private land authorizations or elk hunting licenses are subject to the GRT. He briefly discussed the GRT itself and what types of goods, services and property are subject to the tax. Mr. Scott went on to explain that the TRD had been conducting managed audits of landowners subject to the tax but who not have paid it. He said that the department had conducted 269 managed audits and collected \$837,000, noting

that managed audits mean that taxpayers must pay the taxes they owe but are not subject to penalties.

Questions and comments from the committee included:

- between 2,000 and 4,000 landowners have not taken advantage of managed audits and could still be subject to additional taxes;
- about 5,000 landowners are part of the E-PLUS program;
- DGF issues about 20,000 authorizations for elk each year, but 33 percent to 35 percent are not turned into game licenses;
- it is difficult to determine how many landowners are not in compliance with their tax liability;
- estimates for unreported income are about \$15 million for landowners and \$16 million for outfitters, which should equal about \$3.3 million in uncollected GRT, or \$31 million over the past six years;
- some outreach has been conducted to let landowners know that the managed audit program exists;
- landowner authorizations are generally not considered income until a landowner sells that authorization to a third party;
- the DGF is trying to stabilize or reduce the elk population in New Mexico, in part by increasing the number of hunting licenses and landowner authorizations;
- the difficulty in estimating the size of elk herds;
- the depredation program awards additional licenses to landowners for damage caused by wildlife;
- the potential downside of forcing authorization sales underground to avoid taxes;
- the number of depredation cases has steadily gone down each year; and
- the TRD is increasing compliance with the tax code in every area, not just landowner permits.

On a motion made, seconded and passed, the minutes of the committee's June 14, 2016 meeting were approved as submitted.

Bear Attack Policy

Karen Williams, a New Mexico marathon runner, explained that she was near the end of a marathon in the Valles Caldera National Preserve on June 18 when she encountered a bear that charged and attacked her, causing significant injuries. She explained that bear attacks tend to happen because bears act either defensively or in a predatory manner. Ms. Williams went on to note that the law states that bears that attack humans must be destroyed immediately, mostly out of concerns that the bear could carry rabies. She said that the bear that attacked her was acting defensively because Ms. Williams had stumbled onto the bear and her three cubs. She said that there is some evidence that black bears, which are the most common type in New Mexico, may be fairly resistant to rabies. Ms. Williams suggested either creating an exception for bears in the law that states that animals that attack must immediately be euthanized or for developing a rapid

response team to be able to assess whether animals exhibiting defensive behavior actually need to be killed.

Ms. Sandoval, explained that her department worries constantly about employees or the public having a bad interaction with wildlife. She pointed out that a rapid response team is already in place. Ms. Sandoval also explained that while significant research has been conducted on how to determine whether an animal has rabies, the only sure test currently available is to kill the animal and take a small sample of its brain for testing.

Dr. Michael Landen, state epidemiologist, Department of Health (DOH), explained that state agencies would prefer not to have to kill bears, noting that an average of about one bear per year has to be killed. He contrasted that number by pointing out that almost 500 bears are killed each year by hunters. Dr. Landen went on to explain that while it is relatively uncommon, rabies has been found in black bears. He also noted that there is no canine variant of rabies, so bears have contracted the disease from other species, such as skunks, foxes or bats. Dr. Landen also pointed out that rabies is fatal and that while observation periods of about 10 days can work to determine whether dogs and cats may have the disease, no such period exists for wildlife. Instead, he explained, a fluorescent antibody test conducted on brain matter is the only definitive test. Dr. Landen explained the treatment for rabies in humans, involving a series of painful shots over several weeks, costing \$3,500 to \$4,000, which may not be covered by insurance companies and carries significant side effects, sometimes serious. He explained that forcing humans to decide between painful treatment and an animal's life is not sound policy. Dr. Landen also said that 11 of 12 states in the West confirmed they would do the same as New Mexico in this type of case, and four of the 12 states require by statute that the attacking animal be killed.

Questions and comments from the committee included:

- the requirement that attacking animals be killed exists in regulation, not statute, but no plans exist to change the regulation;
- the fluorescent antibody test requires a slice of the brain, so merely tranquilizing an animal will not be sufficient to conduct it;
- of the 12 western states surveyed by the DOH, four have mandatory requirements to kill attacking wildlife and eight treat attacks on a case-by-case basis;
- the states in the eight case-by-case incidents all agreed that killing the bear in Ms. Williams' case was the correct response;
- the attacking animal is rarely available after the attack occurs, but doctors tend to resist prescribing unnecessary courses of treatment such as the one required for rabies; and
- even in states that do not automatically kill attacking animals by law or regulation, in practice, state policy almost always results in the animal's death.

Report and Committee Tour of Brackish Groundwater National Desalination Research Facility

Members of the committee toured the Brackish Groundwater National Desalination Research Facility in Alamogordo.

Friday, July 15

Water Infrastructure Financing Working Group; Briefing on the Federal Clean Power Plan; Gold King Mine Spill Update

Ryan C. Flynn, secretary, Department of Environment (NMED), discussed the federal clean power plan and the legal challenges facing the rule. He explained that implementation of the rule was stayed by the United States Supreme Court and that the stay will remain in place at least until the United States Court of Appeals for the District of Columbia Circuit rehears the case en banc some time in September. Secretary Flynn also noted that New Mexico Attorney General Hector Balderas has joined with attorneys general from several other states in supporting the clean power plan and that while the attorney general did not initially discuss the matter with the NMED, communication between the NMED and the attorney general has since improved. He also said that New Mexico has already taken steps that will result in greenhouse gas reductions by 2017 that will be in compliance with the regulations, regardless of the outcome in court. Secretary Flynn acknowledged that although the clean power plan is on uncertain legal ground and could likely threaten some jobs in New Mexico, the safest course for the state is to move forward with compliance. He said that while the department supports the idea, there are problems with the plan, particularly the ozone regulations, with which it will be difficult for some western mountain states to comply.

Secretary Flynn and Dennis McQuillan, chief scientist, NMED, also provided the committee with an update on the Gold King Mine spill. Mr. McQuillan explained that some contamination is still present in the Animas River and that contaminant levels appear to spike during storm and other high river flow events. Secretary Flynn discussed efforts to monitor contaminant levels in the river, noting that the NMED does not have sufficient funding to conduct the monitoring that the department believes is necessary. However, he said that the United States Environmental Protection Agency (EPA) refuses to fund additional monitoring, in part because the EPA appears to be manipulating data to suggest that contaminant levels are lower than they actually are. Secretary Flynn also discussed the communication among New Mexico, Colorado and the EPA regarding the process of listing the mine spill as a Superfund site.

Questions and comments from the committee included:

- whether the EPA was invited to appear before the committee;
- the standard used by the EPA to determine acceptable contaminant levels in waterways;
- use of potentially contaminated water for agricultural use;
- cleanup efforts at the source of the spill;

- direct and indirect costs associated with the spill and ongoing monitoring and clean-up efforts;
- the declaration of a state of emergency by the state and whether existing conditions constitute an ongoing emergency;
- the testing of water samples taken from waterways located in Colorado;
- that New Mexico has already spent about \$2 million on monitoring water quality in affected waterways, but additional monitoring is necessary and should be funded with federal money; and
- that New Mexico needs about \$6 million to continue monitoring water quality, while litigation costs can be determined later.

Drought Update/Seasonal Outlook; Bradner Reservoir Project Status

Mr. Blaine provided the committee with an update on New Mexico's drought status. He said that the state's drought status remains similar to one year ago, although some parts of the state are experiencing slightly more pronounced drought conditions. Mr. Blaine also said that late summer monsoon rains should offer some drought relief. He said that the regional outlook calls for slightly below normal precipitation through fall and that ocean temperatures suggest that New Mexico could be facing a La Niña weather pattern during the winter, which may mean below-average snowfall. Mr. Blaine went on to discuss reservoir levels in the state, noting that while reservoir levels statewide are below average, three northern reservoirs, El Vado, Abiquiu and Cochiti, have slightly above-average water levels. He did point out, though, that Elephant Butte Reservoir levels are much below average, which is of concern.

Chuck Thompson, chief, Dam Safety Bureau, OSE, discussed the project to rehabilitate the dam at Bradner Reservoir. He explained that the City of Las Vegas owns two reservoirs, Bradner and Peterson, both of which have dams with deficiencies. Mr. Thompson went on to say that Las Vegas was able to secure capital outlay funding in 2014 to rehabilitate Bradner Dam and that the city has drained the water from the reservoir. He noted that construction will begin in 2017 and should be completed by 2018.

Questions and comments from the committee included:

- the special master assigned to the Texas versus New Mexico water case issued his ruling on New Mexico's motion to dismiss the case, recommending in his 254-page decision that the case proceed to the U.S. Supreme Court;
- review of the special master's report is on the committee's September agenda;
- the special master's report is a draft, and both parties can comment on it before the final report goes to the U.S. Supreme Court;
- the OSE reduced the backlog of permit requests by 50 percent in 2015 and is still working to reduce the current backlog;
- the OSE does not regulate Army Corps of Engineers dams, but the agency does work with the corps, particularly on the permitting process;

- the Army Corps of Engineers will raise the dam level at Santa Cruz Dam while the OSE will work on the permitting process; and
- the OSE maintains a database that contains information on ownership of dams in New Mexico.

The presentation on water infrastructure financing was postponed until the August meeting of the committee.

Adjournment

There being no further business, the committee adjourned at 12:00 noon.