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Introduction to the Summer 2010 NREEL Newsletter

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In addition to three outstanding student articles, this edition of the NREEL Newsletter contains case summaries of recent court opinions related to natural resources, energy or environmental law, legal updates from relevant state agencies, and a report from a recent NREEL CLE "field trip" at the Spur Ranch near Luna and Reserve, New Mexico.

In the first student article, Keri Hatley delves into the murky world of accounting for and providing water right offsets for water depletions associated with habitat restoration projects. In the next article, Ryland Hutchins pries into New Mexico's dilemma on the Gila River – More water or our last wild river? Then Aaron Martin looks at the produced water exemption and the beneficial use doctrine as applied to coal bed methane production.

I would like to thank all of the state employees who volunteered their

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Re-re-engineering Our Rivers: New Mexico's Biggest Efforts to Save its Smallest Fish

Keri Hatley

In 1994, the Rio Grande silvery minnow[1] was first listed as an "endangered" species.[2] Afterward, New Mexicans watched intense controversy ignite in the Middle Rio Grande,[3] culminating in ten years of litigation between federal agencies, environmental groups, state agencies, local governments, and farmers.[4] Today, New Mexicans watch as the Interstate Stream Commission, Bureau of Reclamation, Fish and Wildlife Service, NGOs[5], and local governments[6] wade into the Rio, creating habitat to restore this tiny fish. The Middle Rio Grande is not the only New Mexico river undergoing habitat restoration; restoration efforts are occurring in many parts of the state, including on the Pecos River to benefit the Pecos bluntnose shiner.[7] Environmental groups have been the driving force behind these environmental efforts by bringing lawsuits that have forced compliance with federal law.

The federal impetus for these extensive habitat restoration measures stems from the National Environmental Policy Act (NEPA)[8] and, famously, the Endangered Species Act (ESA).[9] Forbidding federal agencies to take any action that could jeopardize the survival and recovery of listed endangered species[10], the Endangered Species Act has created significant controversy and crisis throughout the American West. On river systems that have been gagged for flood control and straight jacketed to maximize water conveyance for irrigation, listed species are at risk primarily because of the loss of habitat that resulted from these engineered alterations. [11] To comply with federal law, the Bureau of Reclamation must protect and

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restore the critical habitat of the minnow.[12] Charged with ensuring that interstate compacts are enforced and that the river is kept whole[13], the New Mexico Interstate Stream Commission is lending its support to the federal agencies by helping to fend off environmental suits through better river management practices.

Many of the habitat restoration efforts in New Mexico aim to return affected rivers to a more natural state, recreating and reconnecting the labyrinthine, braided portions which provided suitable habitat for aquatic species before they were remodeled by reclamation and flood control projects. However, liberating these rivers from their current straight, constrictive channels and letting them wander wide and shallow involves increasing open water surface area, which can increase depletions to the river systems due to the resultant increase in evaporative loss. [14] Increases in river depletions could reduce supply to water rights holders and could impact some interstate compact deliveries.[15]

The Rio Grande Compact,[16] and the attendant water delivery obligations to Texas, is a limit on the maximum amount of surface water that can be depleted in the Middle Rio Grande. Similarly, the Pecos River Compact[17] requires that New Mexico deliver water to Texas which, in effect, limits depletions on the Pecos. In a fully appropriated system,[18] increased depletions resulting from enlarging aquatic habitat could impede New Mexico's ability to meet the obligations of the interstate compacts.[19] Accordingly, to keep the hydrologic system whole, the ISC, in conjunction with the New Mexico State Engineer ("SE"), requires[20] that any new man-made depletions resulting from habitat restoration projects on these two rivers must be offset through purchased or leased water rights.[21]

Depletions occurring from habitat restoration projects are non-traditional water uses that are not addressed by existing SE regulations.[22] The SE will review any potential increase in open surface water area for evaporative losses on a case-by-case basis, but has not developed state-wide guidelines for measuring and regulating such depletions. Rather, the State's policy on depletions accounting is emerging as needed because New Mexico's river basins are complex and unique from one another—both legally and hydrologically.

Increased awareness and focus on endangered species issues within the general population has spurred a wave of interest in habitat restoration work. Public interest environmental entities are looking for additional opportunities to affect change on the ground.[23] Federal and state government funding is being made available for private entities who want to initiate habitat restoration projects.[24] Governor Richardson's River Ecosystem Restoration Initiative, for example, is designed to award state grant money to private entities to "sustain, re-establish and rehabilitate the integrity and understanding of New Mexico's river ecosystems."[25] The Initiative has been funded for three years by the New Mexico Legislature and began issuing requests for proposals in 2007.[26]

Despite increased interest and funding for habitat restoration work, the absence of state guidelines to measure and regulate potential evaporative loss makes the process of obtaining state approval of habitat restoration projects unclear to restoration groups. Guidelines on when and how to offset potential evaporative losses would provide guidance to non-governmental organizations considering undertaking a restoration project. This guidance would, in turn, facilitate increased participation in habitat restoration projects from interested non-governmental groups.

In the meantime, the SE, in conjunction with the ISC, are administering depletion offsets and coordinating habitat restoration projects on a case-by-case basis as necessary. Two areas currently undergoing extensive habitat restoration are key to piecing together the State's emerging depletions pol-

icy: the Middle Rio Grande and the Pecos River at Bitter Lake.

Depletion Requirements in the Middle Rio Grande

Cued by increased flows from the snowmelt, the silvery minnow spawn each spring.[27] The minnow's non-adhesive, semi-buoyant eggs rely on wide and shallow floodplain for their rapid embryonic development.[28] In 1947, the Corps of Engineers launched the Middle Rio Grande Project[29] for flood control and to increase the efficiency of conveying water downstream.[30] To that end, the Corps installed a series of levees and jetty jacks that served to completely engineer the Middle Rio Grande. These alterations established and confined this wide meandering river to a fixed channel, making it straighter, narrower, and faster.[31] When Cochiti Reservoir[32] began filling in 1975, much of the sediment that used to move downstream was caught in the reservoir.[33] Unable to stretch out into the floodplain and stripped of much of the sediment, the river began to cut deeper and deeper into its newly fashioned narrow channel.

On the Middle Rio Grande, the ISC, in conjunction with the Middle Rio Grande Collaborative Program,[34] is currently using two basic restoration approaches to mimic historic river conditions: floodplain modification and creation of refugial habitats.[35] First, the ISC is physically scraping layers of sediment out of portions of the Rio Grande's former floodplain, which allows the river to move outside its channel and once again stretch out onto its abandoned floodplain.[36] The shallow floodplain areas created by these efforts are critical nurseries for the minnow's eggs.[37] The ISC has also carved some meandering channels into the historical floodplain that will fill with water and provide critical minnow habitat during high-flow periods, such as during the spring runoff, when the minnow spawns. During normal to low flow periods these channels remain dry, allowing water to be conserved in the main channel. Both of these methods involve allowing the river to stretch back out into portions of its historical floodplain, increasing the open water surface area of the river.

If a habitat restoration project in the Middle Rio Grande involves diversion of water from a waterway or increasing open water surface area, the collaborative program has handled this situation by providing SE with project information.[38] After evaluating the provided information about the project, SE has decided on a case-by-case basis whether to permit the project and what quantity of water will be required to offset depletions.[39] Increases in open water surface area that result in additional net evaporative loss are quantified using a site-specific scientifically-derived open water evaporation rate.[40]

Depletions Requirements on the Lower Pecos River at Bitter Lake National Wildlife Refuge.

Historically, the Pecos River had a dynamic river channel that flooded periodically causing the River's course to change and migrate within the floodplain. Beginning in the nineteenth century, a series of dams, levees and drains were constructed on the Pecos for "irrigation, flood control, and sediment control."[41] This resulted in a large reduction in native riparian habitat which is "critically important for various threatened and endangered species, migratory birds, fish, native wildlife, and plants."[42] After the U.S. Fish and Wildlife Service listed the Pecos bluntnose shiner as a "threatened" species, it became essential to begin habitat restoration projects on the Pecos River to restore quality habitat for the fish and satisfy the federal requirements under the May 2006 Biological Opinion.[43]

The first major restoration effort occurred at oxbow four in Bitter Lake National Wildlife Refuge. After a major flood event in 1942, two channels were carved through bedrock in an effort to straighten the river to reduce damage to adjacent agricultural lands from flooding and bank erosion.[44] These channels cut off five meanders of the Pecos River about seven miles east of Roswell.[45] The Bureau of Reclamation partnered with U.S. Fish and Wildlife, ISC, and the World Wildlife Fund to reconnect Oxbow four, allowing the river to meander through the oxbow, while simultaneously plugging the straight channel the River has been flowing through for the last fifty years.[46] Additionally, the agencies worked to lower the bank levee to encourage interaction between the river and the surrounding floodplain during periods of high flows.[47] Allowing the Pecos to again meander through the oxbow will slow down the flow of the water, encouraging the water to pool and connect to the floodplain.[48] A slower flowing river with lots of floodplain is preferred habitat for the shiner, whose semi-buoyant eggs were being flushed downstream in the fast-moving channel.

The reconnection of the oxbow would result in increased open water surface area, so the agencies involved had to calculate increased depletions from the associated evaporative losses. Applying the average yearly evaporation data for the area to the open water surface area at issue, a depletion value of 1.9 acre feet per year was assessed at Oxbow 4 river restoration project, requiring that water rights be obtained to offset that amount of open water evaporation.[49] Because

any increase in depletions in the Pecos River Basin is a concern for interstate compact delivery obligations, the effects of these depletions will be revisited in five years to ensure that the river is kept whole.[50]

Conclusion

After expending a tremendous amount of federal and state resources to remodel many of New Mexico's rivers, now federal and state agencies are partnering with local government entities and NGOs to restore the rivers to something closer to their natural state—a state which can better support the species whose very existence is dependent upon them. Increasing floodplain and creating refugial habitat in the Middle Rio Grande and connecting oxbows in the Pecos River provides critical habitat for threatened and endangered species, but also serves to increase open water surface area. In fully appropriated systems, does inaccurate depletion accounting have the potential to cause a significant draw on New Mexico's tight water budget? The depletions accounting systems emerging in the Middle Rio Grande and the Pecos River reflect the different legal and hydrologic constraints of each basin. These fact-specific differences make creating a consistent state-wide depletions policy difficult to create and administer. On the other hand, absent a state-wide policy, do NGO's and local governments wishing to undertake their own habitat restoration projects have sufficient information describing how the depletions analysis will be performed?

One thing is certain, unless and until state agencies can be absolutely certain that New Mexico's water budget will not be affected by these depletions, they are committed to closely monitoring them and requiring offsets. The policy of the OSE and the ISC is, simply, "no new depletions." This policy protects New Mexicans, ensuring that our rivers will remain whole.

(Endnotes)

[1] *Hybognathus amarus*

[2] *See* 59 Fed. Reg. 36,988 (7/20/94).

[3] The Middle Rio Grande stretches from the Otowi Gauge, near Espanola, to Elephant Butte Reservoir.

[4] *See* Rio Grande Silvery Minnow v. Keys, 356 F. Supp.2d 1222 (D.N.M. 2002). Litigation in this case finally came to an end on April 21, 2010 when the Tenth Circuit handed down its ruling in Rio Grande Silvery Minnow v. Bureau of Reclamation. 2010 WL 1576433 (10th Cir. 2010) (dismissing appeal and remanding to vacate).

[5] E.g. the World Wildlife Fund

[6] E.g the City of Albuquerque through Albuquerque Open Space

[7] Notropis simus pecosensis

[8] NEPA requires that every federal agency must undergo a detailed study of environmental impacts and alternatives to those impacts for all major federal action that significantly affects the quality of the human environment. 42 U.S.C. § 4332(c).

[9] 16 U.S.C. §§ 1531 et seq.

[10] ESA Section 7(a)(2) requires all federal agencies, including the Bureau of Reclamation and the Corps of Engineers, to "insure that any action authorized, funded, or carried out by such agency…is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2).

[11] For example, the Biological Opinion for the Middle Rio Grande lists several reasons for the decline in silvery minnow population which can be "aggregated under the general heading 'habitat loss'." Programmatic Biological Assessment of Bureau of Reclamation's Water and River Maintenance Operations, Army Corps. of Engineers' Flood Control Operation, and Non-federal Actions on the Middle Rio Grande, New Mexico ("Biological Opinion"), February 19, 2003, at 23. Loss of habitat can occur with channel drying, conversion of habitat caused by the imposition of large water impoundments and levees, channel straightening, and pollution. *Id.*

[12] Section 7(a)(1) requires federal agencies to further the purposes of the Endangered Species Act by carrying out conservation programs for listed species. 16 U.S.C. § 1536(a)(1). "Conservation" is defined by the Act as the use of "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3).

[13] The New Mexico Interstate Stream Commission is required to "investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and streams of this state." N.M. Stat. § 72-14-3 (2010).

[14] New Mexico Interstate Stream Commission Comments to Middle Rio Grande Endangered Species Act Collaborative Program Coordination Committee on Quantifying Depletions Associated with Habitat Restoration Projects in the Middle Rio Grande (Oct. 3, 2007) at 1.

[15] *Id.*

[16] 76 Cong. Ch. 155, May 31, 1939, 53 Stat. 785.

[17] Pecos River Compact, S. Doc. No. 109, 81st Congress, 1st Sess. (1949).

[18] City of Albuquerque v. Reynolds, 71 N.M. 428, 433, 379 P.2d 73, 76 (1963); *See generally* Texas v. New Mexico, 482 U.S. 124, 107 S.Ct. 2279 (1987) (citing New Mexico's water debt to Texas).

[19] ISC Comments to MRGESACP *supra* note 11, at 1.
[20] *Id*. The OSE has authority to regulate habitat restoration projects pursuant to § 72-2-1, § 72-2-8. and § 72-2-9.
[21] *Id.*
[22] *See e.g.* 19.26.2 NMAC. *See also* N.M. Stat. §72-5-1 et seq. (2010). The statutes have broad application over all beneficial uses of water, but do not address specific uses.
[23] For example, the World Wildlife Fund, in partnership with the U.S. Fish and Wildlife Service and the ISC received a $518,500 grant to restore a portion of the Pecos River through Bitter Lake National Wildlife Refuge. U.S. Fish and Wildlife Service, Southwest Region, News Release, Pecos River at Bitter Lake National Wildlife Refuge to be Restored with Grant from State of New Mexico, http://www.fws.gov/southwest/refuges/newmex/bitterlake/pecosriver-2.html
[24] *E.g.* Rio Grande Environmental Management Program, Pub. L. No. 110-114, 121 Stat. 1041. Audubon New Mexico speculates that the Rio Grande has the "potential to receive up to $15 million per year for enhancement of fish and wildlife habitat." Beth Bardwell, *Rivers in an Arid Land*, The River Issue (Audubon N.M.), Spring 2010, at 4.
[25] New Mexico Environment Department, Surface Water Quality Bureau, River Ecosystem Restoration Initiative, http://www.nmenv.state.nm.us/swqb/reri/ (last visited June 23, 2010).
[26] *Id.*
[27] Biological Opinion, *supra* note 10, at 15.
[28] *Id.*
[29] *See* Flood Control Act of 1948, Pub. L. 858, Title II, Section 201 et seq.; Flood Control Act of 1950, Pub. L. 516, Title II, Section 204.
[30] Biological Opinion, *supra* note 10, at 11.
[31] *Id.* at 17 ("The viability of contemporary populations of silvery minnow remains threatened by river engineering efforts to regulate or otherwise alter geomorphic processes in the river. Traditional river engineering activities within the Rio Grande have served to confine the Rio Grande to its channel and isolate it from the land….Channels have been straightened and deepened…reduce[ing] the retention time of water…").
[32] *See* Flood Control Act of 1960, Pub. L. 86-645.
[33] In addition to Cochiti Reservoir, the Corps have constructed and continue to operate several smaller storage facilities on the Middle Rio Grande, including Jemez Canyon Dam and Reservoir which restricts large amounts of sediment from moving downstream. *See* Flood Control Acts of 1948 and 1950, Pub. L. 86-645.
[34] The Middle Rio Grande Collaborative Program is a congressionally-funded partnership involving sixteen entities with a mission to "protect and improve the status of endangered species along the Middle Rio Grande." http://www.middleriogrande.com/
[35] Brochure, Middle Rio Grande Endangered Species Collaborative Program (March 2010).
[36] Project Description: Creation of Rio Grande Silvery Minnow Habitat and Southwestern Willow Flycatcher Habitat Site I-40 6b, New Mexico Interstate Stream Commission, and the U.S. Bureau of Reclamation, http://www.ose.state.nm.us/PDF/ISC/BasinsPrograms/RioGrande/Projects/MRG/MRG-HabitatRestorationInformationI-40.pdf
[37] *Id.*
[38] ISC Comments to MRGESACP, *supra* note 13, at 1.
[39] *Id.* at 1.
[40] To illustrate this calculation, consider this example offered by OSE: "[f]or a 15-acre pond, the contour for average annual evaporation is shown as 55 inches or 4.583 feet per year. Evaporation loss is calculated by multiplying 4.583 feet per year by 15 acres for a result of 68.75 acre-feet evaporation loss per year." *Id.* at 2.
[41] Environmental Assessment, Pecos River Channel Restoration at the Bitter Lake National Wildlife Refuge, Chaves County, New Mexico, January 2009, at 1-3.
[42] *Id.*
[43] *Id.* at 1-9. In May of 2006, in accordance with Section 7 of the Endangered Species Act of 1973, 16U.S.C. § 1531 *et seq.*, the Fish and Wildlife Service issued a final Biological Opinion which specified reasonable and prudent measures that Reclamation must undergo in order to move forward with their proposed Carlsbad Project water operations.
[44] *Id.* at 1-6.
[45] *Id.*
[46] *Id.* at 1-9 and 2-4. This project was completed with some funding from Governor Richardson's River Ecosystem Restoration Initiative (RERI) program. *See* http://www.nmenv.state.nm.us/swqb/reri/
[47] *Id.* at 2-5.
[48] "According to the Biological Opinion, activities that restore and optimize the interaction of river channel and floodplain habitats with available flows will be most successful in mitigating the observed displacement of shiner eggs and in providing a variety of channel conditions favorable to the shiner." *Id*
[49] Letter from Emile Sawyer, ISC Bottomless Lakes NWR Project Manager, and Markus Malessa, ISC Pecos Bureau Staff, to Estevan Lopez, ISC Director (October 20, 2008) (on file with the ISC).
[50] *Id.* at 3.

More Water or Our Last Wild River?
The 2004 Arizona Water Settlements Act and New Mexico's Big Decision

By J. Ryland Hutchins

Southwestern New Mexico's Gila River ("Gila") is a relatively small and largely wild river that flows from its headwaters in the Gila Wilderness, through Southwestern New Mexico, and ultimately across Arizona, where it joins the Colorado River. Over the years, the Gila River has been the source of fierce debate, and this debate is building once again. The State of New Mexico has until the end of 2014 to decide whether to contract to increase its yearly allotment from the Gila and San Francisco Rivers by 14,000 acre-feet. However, the issue is far more complicated than whether New Mexico wants more water, and there are many important issues the state must consider because the decision implicates the future of New Mexico's last free flowing river, and the economic future of Southern New Mexico.

A Legal History of the Gila River

The complexity of the legal issues affecting New Mexico's decision cannot be understood without a brief description of the Gila River's legal history. Although the Gila itself is relatively small, it flows into the Colorado River, which has the dubious distinction of being "the most legislated, most debated, and most litigated river in the entire world."[1] The Gila's inconvenient confluence with the Colorado means that the Colorado River's immense body of law implicates the Gila as well.

A very basic review of the Gila's legal history begins with the 1964 case of *Arizona v. California,*[2] which among other things, quantified New Mexico's apportionment of the Gila's waters at 30,000 acre-feet during any one year.[3] This decree was less than generous to New Mexico who was already using almost all of this entitlement, leaving little water for new appropriations.[4]

The next major stage in the history of the Gila came in 1968 with the passage of the Colorado River Basin Project Act.[5] The most notable effect of the Act was to authorize the Central Arizona Project ("CAP"), an enormous collection of dams, reservoirs, pumping plants, and aqueducts intended to cure Arizona's water woes. In exchange for New Mexico's support of the legislation, the Act gave New Mexico the opportunity to develop an additional 18,000 acre-feet of Gila River water per year in addition to the water allotted in *Arizona v. California*.[6] Since the passage of the Act, many efforts have been made to capture the 18,000 acre-feet, including two proposed dams. However, a combination of environmental and economic factors has prevented construction of the facilities necessary to capture the additional water.

The 2004 Arizona Water Settlements Act

The issue of the additional water slipped to the backburner until it was once again brought to the forefront with the passage of the 2004 Arizona Water Settlements Act.[7] The 2004 Act reaffirmed the offer of additional water to New Mexico; however it reduced the amount from 18,000 to 14,000 acre-feet.[8] This time around the water was backed by federal funds to make the construction of the facilities necessary to capture it more practicable. These facilities were to be called the "New Mexico Unit of the Central Arizona Project" (The New Mexico Unit).

The Act provides a two-tiered system of federal funds for Southwestern New Mexico. First, the Act provides 66 million dollars for construction of facilities, environmental planning, environmental compliance activities, mitigation, and stream and watershed restoration. The federal government will pay the money in installments of 6.6 million per year

for ten years, starting in 2012.[9] New Mexico will get this first tier of funding regardless of whether or not it decides to develop the additional water. Should New Mexico decide to develop the additional water, the State, through the Interstate Stream Commission, will contract with the Secretary of the Department of the Interior.[10] Upon completion of the contract, New Mexico will receive between $34 and $62 million additional dollars towards the construction costs of facilities necessary to capture the additional 14,000 acre-feet of contract water.[11]

"New Mexico's water", as it is often called, does not come for free; New Mexico must contract for the water and fulfill certain obligations before the state receives the additional water. The Act mandates certain provisions that the contract must contain. Many are intended to protect downstream water users in Arizona. For example, bypass parameters obligate New Mexico users not to divert water if it will reduce the flow crossing into Arizona below certain levels, and maximum diversion requirements limit the amount of water New Mexico may divert at any one time.[12] Perhaps the most important requirement mandated by the act is the CAP exchange. Because the Gila River has been over appropriated for at least fifty years,[13]NM cannot simply take the additional water out of the River. The Gila water already belongs to users in Arizona, so any new diversions in New Mexico must not cause economic injury to Arizona users. New Mexico must pay the operating, maintenance, and replacement costs of exchanging the contract water it takes from Arizona users with CAP water.[14] The exchange provision of the Act is an important wildcard because the exact costs to New Mexico are unknown, but they may be substantial.[15]

The Decision Making Process

The Office of the Governor and the New Mexico Interstate Stream Commission ("ISC") will ultimately decide the future of the Gila River. Their decision is by no means an easy one. The ISC has adopted a policy that any decision made would fully protect the environment, and consider present and future water demand.[16] To balance these interests, the ISC is taking guidance from local governments, the Southwest New Mexico Stakeholders Group, and other stakeholders.[17] The player that is conspicuously absent from the decision making process at this time is the mining company Freeport-McMoRan (formerly Phelps Dodge), who owns a substantial portion of the water rights in the Gila River. When Freeport decides to weigh in, the combination of its economic and political clout will make it a formidable force.[18]

Hurdles to Development

If New Mexico wishes to develop the contract water, there are several issues that it must address, or the New Mexico Unit will suffer the same fate as previous projects on the Gila.[19] These issues include: capture and storage of the water, environmental compliance, project cost, less costly alternative sources, and lack of demand for more water.

Capture is perhaps the most controversial barrier to development. A main stream dam is "extremely unrealistic" given the serious environmental impacts.[20] A more ecologically acceptable diversion facility might be a side channel diversion similar to that used in the La Plata Project, or a below ground infiltration gallery leading to a gravity fed pipeline. The most likely storage alternative appears to be some form of off-stream storage, either above ground or possibly in an aquifer.[21] However, opponents of development argue that even these options are not without environmental consequences because the Gila is a fragile flood-dependant riparian ecosystem.[22] The additional water represents a substantial portion of the river's flow,[23] so opponents of development argue that even without a traditional dam, removal of this quantity of water would be devastating to the fragile Gila ecosystem.[24] These environmental concerns are of particular consequence because the Gila is rich in biodiversity and is home to several endangered species, meaning that Endangered Species Act[25] compliance is critical to the future of the project.[26] If the water cannot be captured in a way that is environmentally sound, as some opponents believe it cannot, the project's future is dim.

The next major barrier to development is economic. The cost of the project is unknown at this time, but it may very well be extremely expensive. Opponents of the project often point out that State Engineer John D' Antonio estimated the costs for the project to be 220 million when testifying before congress in 2003.[27] This figure only represents capital costs, so when the operations and maintenance costs for not only the New Mexico Unit, but for Arizona water users is taken into account, the project may not be economically feasible, even with the 2004 Act's injection of federal funds. In fact, Governor Richardson stated in a 2008 policy statement that he had his doubts as to the economic viability of the project.[28]

Another major question is who would use the water? Silver City has turned down proposals for more water, and seems to have plenty in its aquifer.[29] Las Cruces is predicted to grow quickly, but may have alternate sources of water. Water speculators have suggested piping the water all the way up

to the Middle Rio Grande, where water is most valuable, or putting it into elephant Butte to exchange for Middle Rio Grande Water.[30] However, these water exportation options would primarily benefit speculators, not the stakeholders of Southwestern New Mexico, who have considerable say in the final decision.

Finally, the iconic value of the Gila cannot be overstated. The Gila River is the last free-flowing river in the Nation's first wilderness area. To many, it is the very symbol of wilderness, and there is considerable pushback against development from those who believe that the River is most valuable as it is.[31] Even in the face of great political power, the iconic value of the Gila as a wild river has frustrated development of its waters for over forty years. There is a great tension between a western state's desire for more water to foster population growth and economic development, and the need to protect the characteristics of the land that drew people to that land in the first place. All of these considerations must be taken into account in the decision making process, or it, like those before, it will fail. Both the economic future of Southwestern New Mexico, and New Mexico's last wild river may be at stake.

(Endnotes)

[1] MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISSAPEARING WATER 120 (Penguin Books 1986) (1993).

[2] Ariz. v. Cal., 376 U.S. 340 (1964).

[3] *Briefing on the Upper Gila River Decision Making Process* (New Mexico Interstate Stream Comission) July 2006, at 7. http://www.ose.state.nm.us/isc_colorado_gila_sanfran_committee_info.html

[4] Jerold Wilson, Updated by Joanne Hilton and Susan Kelly, *Gila River (Updated), in* WATER MATTERS! 2010 at 90. Utton Transboundary Resource Center (2010), http://uttoncenter.unm.edu/Water_Matters!.html.

[5] Colorado River Basin Project Act of 1968, 43 U.S.C. §§ 1501-1556 (2006). http://www.ose.state.nm.us/isc_colorado_gila_sanfran_committee_info.html

[6] *See* Wilson, *supra* note 4 at 90.

[7] Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004).

[8] Arizona Water Settlements Act, §212 (d)(1), Pub. L. No. 108-451, 118 Stat. 3478 (2004).

[9] *Id.*

[10] *Id.* ("The Secretary shall offer to contract with water users in New Mexico with the approval of Interstate Stream Commission, or with the State of New Mexico through its Interstate Stream Commission.").

[11] *Id.* at § 107(2)(D)(ii).

[12] *See generally,* Consumptive Use and Forbearance Agreement, Final Execution Version, October 21, 2005. http://www.ose.state.nm.us/isc_colorado_gila_sanfran_committee_info.html

[13] *See* Special Master Report, Simon H. Rifkind, 325, 337, December 5, 1960, in *Ariz. V. Cal.,* 376 U.S. 340 (1964).

[14] Arizona Water Settlements Act, § 212(c)(2), Pub. L. 108-451 (2004).

[15] Telephone Interview with Adrian Oglesby, Living Rivers Program Manager, The Nature Conservancy (April 22, 2010).

[16] Telephone Interview with Craig Roepke, Gila Bureau Chief, New Mexico Interstate Stream Commission (March 26, 2010).

[17] *Id.*

[18] *Id.*

[19] For example, Hooker and Conner dams, as well as off stream storage in Mangas Creek.

[20] Telephone Interview with Craig Roepke, *supra* note 16.

[21] Telephone Interview with Craig Roepke, *supra* note 16..

[22] Telephone Interview with Adrian Oglesby, *supra* note 15.

[23] Estimates range from about 7% to as much as 20% of the river's flow, Electronic Mail Interview with Craig Roepke, Gila Bureau Chief, New Mexico Interstate Stream Commission (April 29, 2010), Compare with, M.H. Salmon, Gila Libre!, 123 (University of New Mexico Press 2008).

[24] Telephone Interview with Adrian Oglesby, *supra* note 15.

[25] Endangered Species Act of 1973 (ESA) 16 USC §§ 1531-1544.

[26] *Briefing on the Upper Gila River Decision Making Process* (New Mexico Interstate Stream Commission) March 2006 at 17.

[27] New Mexico State Engineer John D'Antonio, testifying before a joint hearing- Subcommittee on Water and Power of the Committee on Energy and Natural Resources and the Committee on Indian Affairs, ¶ 5, (September 30, 2003).

[28] "I am skeptical that a new diversion will make economic sense" Policy Statement of Governor Bill Richardson (June 2008), http://www.ose.state.nm.us/isc_colorado_gila_sanfran_committee.html.

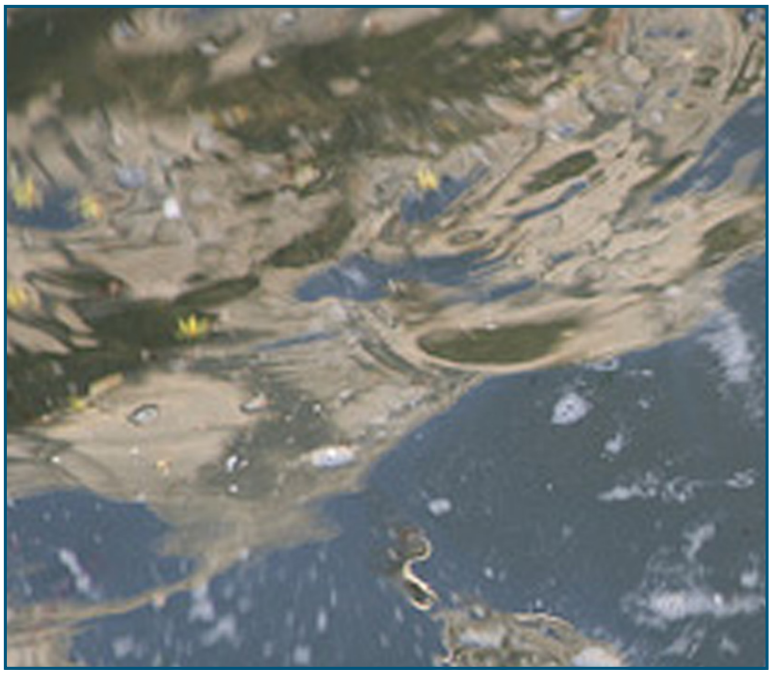
[29] M.H. SALMON, GILA LIBRE!, 125 (University of New Mexico Press 2008).

[30] Telephone Interview with Adrian Oglesby, *supra* note 15.

[31] *See generally,* Salmon, *supra* note 29.

Colorado Supreme Court Decision Illuminates the Disjunction Between New Mexico's Produced Water Exemption and the Beneficial Use Doctrine As Applied to Coal Bed Methane

By Aaron Weede Martin*



Water is one of New Mexico's most precious resources. Its hallowed status within the state is enshrined in the New Mexico Constitution, which establishes state jurisdiction over all unappropriated public waters.[2] The constitution also establishes that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water."[3] As in all of the southwest, New Mexico's development potential will be limited by the availability of a reliable supply of fresh water. In addition to its reliance on water to sustain future economic growth, New Mexico relies heavily upon natural gas production for its current economic prosperity. One-tenth of the nation's natural gas production originates in New Mexico, one-third of which is coal bed methane (CBM).[4] In 2008, New Mexico was one of the top CBM producers in the nation.[5]

While New Mexico currently benefits enormously from CBM production, the hydrological cost is *substantial*. To extract the gas, CBM wells must pump ground water to reduce the hydrostatic pressure that holds the gas in place.[6] CBM water production ranges from 1,050 gallons per well per day in the San Juan Basin to 11,172 gallons per well per day in the Raton Basin.[7] There are 6,137 CBM wells currently operating in the state.[8] Thus, taking the average gallons of produced water from the San Juan and Raton basins as 6,111 gallons, New Mexico CBM production accounts for 37,503,207 gallons of water daily—enough to fill over sixty Olympic swimming pools daily![9] While New Mexico exempts water produced in mining activities from State Engineer ground water permitting requirements by statute,[10] the parameters of that exemption have not been litigated.

Unlike New Mexico, Colorado courts have decided the status of CBM waters. In *Vance v. Wolfe*, the Colorado Supreme Court held that, because CBM water is integral to CBM production, it is distinguishable from other produced water. Accordingly, CBM water extraction constitutes a beneficial use requiring a permit and compliance with the Colorado Groundwater Act.[11] In *Vance*, BP American Production Company, while extracting CBM, reinjected produced water into a separate aquifer.[12] The plaintiffs, ranchers who owned the surface estate on which the CBM wells were located, claimed the removal of water was an out-of-priority diversion that injured their senior water rights.[13] The plaintiffs sued in regional water court, seeking a declaration that the production and reinjection constituted a beneficial use.[14] The water court granted summary judgment for the plaintiffs.[15] The Colorado Supreme Court affirmed.[16] In response to the decision, the legislature passed a bill to provide guidance on CBM produced water to the State Engineer and operators.[17]

What is the status of CBM water in New Mexico? In 2004, the legislature added a provision to the Oil and Gas Act exempting produced water from the water right permitting regime and granting regulatory authority over produced water to the Oil Conservation Division, rather than the New Mexico State Engineer.[18] However, the issue is unlitigated,

and, therefore, unresolved. Under the rationale of the court in *Vance*, CBM waters may not be so easily dismissed from the beneficial use regime—the goal purportedly achieved by this New Mexico statute—because dewatering is an integral component of CBM production.[19]

The United States Geological Survey clearly portrays the integral nature of CBM produced water: "[W]ater in coal beds contributes to pressure in the reservoir that keeps methane gas adsorbed to the surface of the coal. This water *must* be removed by pumping in order to lower the pressure in the reservoir and stimulate desorption of methane from the coal."[20] Reinjecting CBM water into its source aquifer would repressurize the gas, defeating the purpose of the dewatering process. Accordingly, the water is disposed of by evaporation, reinjected into another aquifer or "used for beneficial purpose."[21] In all cases, the water becomes inaccessible to other users of the same aquifer, creating the possibility of injury to those users, as in *Vance*.

Despite New Mexico's current statutory exemption for produced waters, the beneficial use doctrine may preclude the exemption of CBM waters if a court finds such water use is beneficial, as it was found to be in *Vance*. The New Mexico Supreme Court has defined beneficial use as "the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken."[22] In *Vance* the Colorado Supreme Court found that CBM waters are *integral* to CBM production because the gas cannot be produced without their removal. This reasoning is consonant with New Mexico's definition of beneficial use.[23] However, the current New Mexico statutory scheme defines "produced water" as "water that is an *incidental* byproduct from drilling for or the production of oil and gas."[24] But, based on the traditional definition of beneficial use in New Mexico, a New Mexico court may very well agree with the rationale of *Vance* and hold that CBM produced waters are integral to production, not an incidental byproduct. Thus, it can be argued that CBM is not produced water under New Mexico law, but a beneficial use of water.

The unique hydrology of New Mexico has forestalled challenges to CBM dewatering operations,[25] but given water scarcity and expanding CBM development, such a case will inevitably arise. The New Mexico Oil Conservation Commission initiated rulemaking for CBM water in 2005,[26] but it never came to fruition. In a manner similar to the Mine Dewatering Act,[27] the proposed rule would have required oil and gas operators to apply for a permit to apply produced water to beneficial use. That permit would have been "subject to publication notice to allow for a period of protest."[28] In order to validate their water claims, protestants to the produced water permit would have had to meet a two-part test: (1) proving the validity of their claimed water right, and; (2) proving that the oil or gas well producing the water is in hydrologic communication with their source water. A protestant who could meet this threshold could have taken control of the water at the wellhead, presumably at his own expense.[29] As noted above, while a step in the right direction, this rulemaking was never finalized and CBM produced water remains an open question in New Mexico.

While New Mexico lawmakers may elect to await a legislative crisis similar to that achieved by the *Vance* decision, they could enact legislation to avert such a crisis. The legislature could model its bill after Colorado's CBM regime.[30] Or it may adopt the simpler solution of altering the Mine Dewatering Act, which requires an application for a permit, the State Engineer's determination of impairment or non-impairment and mandates a replacement plan if the State Engineer makes an impairment determination.[31] The legislature may address this problem by adopting any of myriad alternatives, but one thing is clear—it must decide how to respond when a challenge to the current exempted status of CBM produced water does arise. Over a century ago, Mark Twain said, "[w]hiskey is for drinking, water is for fighting." Now, when even larger populations compete for a dwindling and over-appropriated water supply, conflict over the coal bed methane produced water exemption is inevitable.

(Endnotes)

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[2] N.M. Const. art. XVI, § 2.

[3] N.M. Const. art. XVI, § 3.

[4] New Mexico Energy, Minerals, and Nat. Res. Dept., 2008 Annual Report, at 55 (2008) *available at* http://www.emnrd.state.nm.us/main/documents/EMNRD-Annual-Report-2008.pdf.

[5] *Id.*

[6] John A. Veil, U.S. Dep't of Energy, Office of Fossil Energy, *Regulatory Issues Affecting Management of Produced Water from Coal Bed Methane Wells*, at 1 (2002) *available at* http://www.ead.anl.gov/pub/doc/cbm-prod-water-rev902.pdf.

[7] Mike Hightower, *Managing Coal Bed Methane Produced Water for Beneficial Uses, Initially Using the San Juan and*

Raton Basins as a Model, *available at* http://wrri.nmsu.edu/conf/forum/CBM.pdf.

[8] New Mex. Oil Cons. Div., New Mexico Well Statistics (current to March 18, 2010), *available at* http://www.emnrd.state.nm.us/ocd/documents/Statistics20100318.pdf.

[9] The Olympic pool at Los Alamos has a capacity of 620,000 gallons. County of Los Alamos, New Mexico, *Aquatic Center Fees and Information*, Los Alamos Rec. Winter/Spring Prog. Guide, Jan.–May 2010, at 6. Given these figures, annual produced water could fill over 22,000 such swimming pools, or 6,811 gallons annually per capita. U.S. Census Bureau, State and County Quick Facts—New Mexico (2009), *available at* http://quickfacts.census.gov/qfd/states/35000.html.

[10] N.M. Stat. §70-2-12.1 (2004).

[11] *Vance v. Wolfe*, 205 P.3d 1165, 1170-71 (Colo. 2009).

[12] *Id.* at 1171.

[13] *Id.* at 1167.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 1173.

[17] Colo. Rev. Stat. Ann. § 37-90-137(7) (West 2009); Colo. Rev. Stat. Ann. § 37-92-308(11) (West 2009); Ken Wonstolen, *Vance Decision Throws Oil and Gas Into Uncharted Waters*, Beatty & Wozniak, P.C., Energy News Alert (2009) *available at* http://www.bwenergylaw.com/News/documents/VanceDecisionThrowsOilandGasIntoUnchartedWaters.pdf.

[18] N.M. Stat. §70-2-12.1 (2004).

[19] *Vance*, 205 P.3d at 1167.

[20] U.S. Geological Survey, Water Produced with Coal Bed Methane 1 (2000) (USGS Fact Sheet FS-156-00) (emphasis added) *available at* http://pubs.usgs.gov/fs/fs-0156-00/.

[21] *Id.*

[22] *State ex rel. Erickson v. McLean*, 62 N.M. 264, 273, 308 P.2d 983, 988 (1957).

[23] *Vance*, 205 P.3d at 1167.

[24] N.M. Stat. §70-2-33(K) (2004).

[25] Introduction to Produced Water Issues, Senate Memorial 53 Executive Task Force *at* 3 (Oct. 4, 2007) (Statement of Mark Fesmire, Director, N.M. Oil Cons. Div., State Engineer) *available at* http://74.125.155.132/search?q=cache:SrjXAdmpTj0J:www.emnrd.state.nm.us/OCD/documents/200710-9OPENINGREMARKSSM53EXECUTIVETASKFORCEMEETING.doc+%22Coal+Bed+Methane%22+%26+%22New+Mexico%22+%26+water&cd=42&hl=en&ct=clnk&gl=us.

[26] Mark Fesmire, *Charting a Course for Produced Water Regulation in New Mexico*, SW. Hydrology, Nov.–Dec. 2005, at 22–23, *available at* http://www.swhydro.arizona.edu/archive/V4_N6/feature3.pdf.

[27] N.M. Stat. §72-12A-1 to -13 (2004).

[28] Fesmire, *supra* note 25 at 23, *available at* http://www.swhydro.arizona.edu/archive/V4_N6/feature3.pdf.

[29] *Id.*

[30] *See, e.g.*, Colo. Rev. Stat. Ann. § 37-90-137(7) (West 2009); Colo. Rev. Stat. Ann. § 37-92-308(11) (West 2009); 2010 Colo. Legis. Serv. Ch. 31 (West); Wonstolen, *supra* note 16.

[31] N.M. Stat. § 72-12A-7 (1980).

Introduction

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time to write the agency updates, to Kim Bannerman for her editorial assistance and to Sally Paez for the case summaries.

If you have any comments or questions regarding these articles or if you would be interested in submitting a short article for our next newsletter, which we aim to publish again in Winter 2011, please contact me at joshandsabrina@msn.com.

Thanks for your support,
Josh Mann, Editor

Recent Cases

Rio Grande Silvery Minnow v. Bureau of Reclamation, 2010 U.S. App. LEXIS 8750 (10th Cir. Apr. 21, 2010) (holding that intervening events (namely the 2003 Biological Opinion) mooted Plaintiff's scope-of-consultation claim under the ESA; dismissing the appeal and remanding to the District Court to vacate several of its memorandum opinions and orders, and dismissing Plaintiff's scope of consultation claim under the ESA).

Rio Grande Silvery Minnow v. Bureau of Reclamation, 599 F.3d 1165 (10th Cir. N.M. 2010) (affirming the District Court's dismissal of the MRGCD's quiet title suit as time-barred under the federal Quiet Title Act's 12 year statute of limitations; holding that the District Court exceeded its authority in ruling that the United States holds title to the MRG Project properties; and remanding the case back to District Court with instructions to vacate that portion of the opinion quieting title in the United States).

Lion's Gate Water v. D'Antonio, Jr., 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622 (interpreting the scope of de novo review of State Engineer decisions by the district court pursuant to NMSA 1978, Section 72-7-1 of the water code and holding that de novo review was limited to the issue before the State Engineer, which was whether there was water available for appropriation).

McNeill v. Rice Engineering & Operating, Inc., 2010-NMSC-015, ___ N.M. ___, ___ P.3d ___ (No. 31,686, Mar. 4, 2010) (holding that plaintiff did not have standing to bring action for trespass resulting from defendant's operation of a salt water disposal well on the plaintiff's property because trespass is an action in personam and plaintiff did not have a possessory interest in the land at the time of the alleged trespass).

Albuquerque Bernalillo Co. Water Utility Auth. v. N.M. Public Regulation Comm'n, 2010-NMSC-013, ___ N.M. ___, ___ P.3d ___ (No. 31,268, Mar. 19, 2010) (affirming the Public Regulation Commission's award of an emergency fuel and purchased power cost adjustment clause to the Public Service Company of New Mexico).

Camino Real Environmental Center, Inc. v. N.M. Dept. of Environment, No. 28,857, slip op. (N.M. Ct. App. Feb. 10, 2010) (holding that the New Mexico Secretary of the Environment was without authority to renew a private landfill permit for a single year period because the Solid Waste Act required landfill permits to remain in effect for ten years, despite the holding in *Colonias Development Council v. Rhino Environmental Services Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, that permitting decisions must take into account a landfill's adverse impact on a community's quality of life).

Gerke v. Romero, No. 28,652, slip op. (N.M. Ct. App. Mar. 10, 2010) (holding that the discovery rule governs the accrual of "toxic tort" personal injury claims for purpose of determining the statute of limitations period).

Bass Enterprises Production Co. v. Mosaic Potach Carlsbad, Inc., Nos. 28,746, 28,747, slip op. (Ct. App. Apr. 19, 2010) (upholding the New Mexico Oil Conservation Commission's denial of two permits to drill oil and gas wells in Eddy County).

Interstate Stream Commission Update

The Middle Rio Grande

1. *Endangered Species Act*

The Bureau of Reclamation, the U.S. Army Corps of Engineers and the United States Fish and Wildlife Service continue to develop a new biological opinion under the Endangered Species Act (ESA). The new biological opinion will replace the existing biological opinion that expires in 2013. The Middle Rio Grande Endangered Species Collaborative Program (Collaborative Program) has become involved in the development of the new biological opinion as part of its effort to focus on recovery of the Rio Grande silvery minnow and Southwestern willow flycatcher. For example, the Collaborative Program began revising its Long Term Plan to better align with the recovery plans for both the silvery minnow and the flycatcher. The Collaborative Program intends to submit the Long Term Plan as the reasonable and prudent alternative for the future biological opinion and to conduct additional projects that proactively aid in the recovery of the species. Additionally, the non-federal participants in the Collaborative Program are seeking broad and long-term ESA coverage for Middle Rio Grande water users in the new biological opinion.

On April 21, 2010, the United States Court of Appeals for the 10th Circuit ruled on the Rio Grande silvery minnow appeal regarding Plaintiffs environmental groups' scope-of-consultation claim under the ESA. Specifically, Plaintiffs claimed that the Bureau of Reclamation has discretion to allocate Middle Rio Grande Project water from agricultural and municipal water users to maintain stream flows for the benefit of the Rio Grande silvery minnow and consequently, its failure to weigh that discretion in consultations with the United States Fish and Wildlife Service violated Section 7 of the ESA.

The court ruled that intervening events (namely the 2003 Biological Opinion) mooted Plaintiffs claim. As a result, the court dismissed the appeal and remanded to the district court with orders to vacate several of its memorandum opinions and orders, and to dismiss Plaintiffs scope-of-consultation claim. The case was decided on two procedural issues—those of mootness and vacatur—that were extensively briefed by the New Mexico Attorney General's Office. The State of New Mexico was a Defendant-Intervenor-Appellant in the case.

Lower Rio Grande

On May 15, 2010, the State of New Mexico relinquished 80,000 acre-feet of accrued Rio Grande Compact credit water in Elephant Butte Reservoir to increase the supply of surface water available for use by New Mexico farmers downstream of the reservoir.

Credit water accrues under the Rio Grande Compact when New Mexico deliveries to Elephant Butte Reservoir exceed the annual amounts required by the Compact. New Mexico's accrued credit water may be relinquished (transferred) to Texas in exchange for an entitlement to store a like amount upstream in future years when otherwise prohibited by the Compact. This year, Texas requested the relinquishment on behalf of Elephant Butte Irrigation District to increase its early season surface water allocation. New Mexico offered to relinquish 80,000 acre-feet and Texas accepted. Therefore, the relinquishment converted 80,000 acre-feet of New Mexico credit water to usable Rio Grande Project water and, in exchange, New Mexico is now entitled to store 80,000 acre-feet of water for use within the Rio Grande Basin upstream of Elephant Butte Reservoir.

Snowpack levels in the northern portion of the Rio Grande basin are currently between 90-130 percent of average and the most recent projections by the U.S. Natural Resources Conservation Service indicate that the snowmelt runoff this year should be about average.

The Pecos River

1. *The Pecos Settlement Agreement*

A 1988 Amended Decree in *Texas v. NM*, 485 U.S. 388 (1988) enjoins New Mexico to comply with its obligations under the Pecos River Compact, N.M. Stat. §72-15-19, *et.*

seq., and requires that New Mexico remedy any delivery shortfall with a rapid repayment of water.

The seminal March 25, 2003 Pecos River Water Rights Settlement Agreement ("Settlement") provides that the NMISC will augment Pecos River flows to ensure that a sufficient quantity of water passes over the Texas-New Mexico state line pursuant to the Pecos River Compact, and to ensure a sufficient supply for the senior water right holder (the Carlsbad Irrigation District).

The Settlement was not fully implemented until June 2009, when all of the parties certified that the conditions precedent to implementation of the Settlement were met (i.e., development of augmentation well fields capable of delivering 15,750 acre-feet of ground water to the Pecos River, acquisition of water rights appurtenant to 12,000 acres of irrigated land, and the entry of a Partial Final Decree in the Lewis Adjudication, *State of New Mexico ex rel. State Engineer v. L. T. Lewis*, Nos. 20294 and 22600 (Consolidated)).

2010 is the first year that the NMISC began projecting available water supply pursuant to the terms of the Settlement. Fortunately, due to favorable weather conditions the NMISC does not project a need to begin augmentation pumping this year. In fact, merely satisfying the Settlement's conditions precedent has resulted in an accumulated 100,100 acre-foot state line delivery credit for 2009, which nearly accomplishes the Settlement's goal of obtaining a 115,000 acre-foot credit. However, a series of dry years could rapidly reduce New Mexico's credit.

2. *The Vaughan Conservation Pipeline*

In addition to the Settlement-related efforts, the NMISC has developed an augmentation well field (the Vaughan Conservation Pipeline) pursuant to the Strategic Water Reserve, N.M. Stat.§ 72-14-3.3, just below Fort Sumner Dam, for the purpose of augmenting Pecos River flows for the benefit of the "threatened" Pecos bluntnose shiner ("PBNS"). The Conservation Pipeline is capable of delivering approximately 1,500 acre-feet of water (sold to Reclamation) just above the "critical habitat" for the PBNS. In 2008 and 2009, Reclamation purchased as much water as NMISC could pump, but this year Reclamation has not yet called for water delivery from the Conservation Pipeline.

The Gila and San Francisco Rivers and Implementing the Arizona Water Settlement Act of 2004

Presently, the State of New Mexico and individual interests are allocated approximately 30,000 acre-feet of water annually from the Gila and San Francisco Rivers under *Arizona v. California*, 376 U.S. 3402 (1964), and an additional amount of up to 14,000 acre-feet annually over ten years under the Arizona Water Settlement Act of 2004 ("AWSA"), P.L. 108-451, Title II. Importantly, the AWSA authorized funding to help New Mexico put the additional 14,000 acre-feet to consumptive use: (1) beginning in 2012, $6.6 million, annually for ten years, of non-reimbursable federal funds for projects that meet water supply demands and (2) up to an additional $62 million should New Mexico opt to develop a New Mexico Unit of the Central Arizona Project.

As a means of addressing the water supply demands in southwestern New Mexico and accessing the full amount of AWSA funding available to the State for such a purpose, various planning groups and activities have been held since 2001. Among others, the Southwest New Mexico Stakeholders Group – comprised of a interested federal, state and local government representatives; members of a local irrigation district, environmental organizations, and interest groups; and concerned citizens – and the Gila-San Francisco Water Commission – composed of representatives of local governments – have engaged in efforts to collect and disseminate scientific information and craft and assess proposals for water utilization projects and other permissible non-diversion activities in the Gila Basin. These groups and other stakeholders are striving by the end of 2010 to present recommendations to the NMISC, the state agency charged under the AWSA with consulting the public on the use of AWSA funds and administering the funds.

The NMISC will consider the Stakeholder Group's recommendations and any other proposals that could be permissible uses for AWSA funding, and prepare a plan for developing the AWSA water to submit to the Secretary of the Interior by the statutory deadline of December 31, 2014.

The Canadian River Basin and the Eastern New Mexico Rural Water System Project

In March 2009, the federal government authorized the Eastern New Mexico Rural Water System Project. P.L.

111-11, Sect. 9103. Studied and planned for more than forty years, the proposed project consists of a water pipeline to deliver up to 16,500 acre-feet of water per year from state-owned and operated Ute Reservoir to communities in eastern New Mexico, including those around Ute Reservoir, Clovis, Portales, Cannon Air Force Base, and others. For decades, these communities have relied on the Ogallala/High Plains aquifer for municipal, domestic, agricultural and other needs, but this source is declining rapidly and the Project provides an opportunity to meet existing and projected population and communal needs with a sustainable water source.

Once authorized and upon receipt of initial federal funding, the federal team, led by the Bureau of Reclamation, began compliance activities required under the National Environmental Policy Act (NEPA) and, by incorporation, the ESA. As joint funding partners, the State and the Eastern New Mexico Rural Water Authority have participated in the NEPA-related and other project activities. With the federal, state, and local team in place, Reclamation is working to complete the NEPA process by this year's end in order to receive any additional, available federal funding and begin the first phase of construction.

Colorado River

New Mexico, through the NMISC, together with the other six Colorado River Basin States, are partnering with the Bureau of Reclamation on the Colorado River Basin Study. The Study will evaluate water supply and demand throughout the Colorado River Basin, imbalances between demand and supply including those caused by or resulting from climate change, reservoir system reliability for meeting water demands in the basin and opportunities for additional flow regulation and water augmentation projects to meet demand. The Basin Study is scheduled to be completed in 2012.

Upper Colorado River Basin--San Juan River Basin/ Navajo Settlement

The State continues to be actively engaged in efforts to implement federal legislation (P.L. 111-11) authorizing the Navajo Settlement. The State and the Navajo Nation previously executed the Navajo Settlement Agreement in 2005 for the purpose of facilitating a settlement of the Navajo Nation's water rights claims in the San Juan River Basin in New Mexico. The settlement will provide water development projects for the benefit of the Navajo Nation and non-Indian communities in exchange for a release of Navajo claims to water that potentially could have displaced existing non-Indian water rights in the basin. One of the primary elements of the settlement is the Northwestern New Mexico Rural Water Supply Project (also known as the Navajo-Gallup Water Supply Project) that includes a pipeline to be constructed by the Bureau of Reclamation to bring a renewable surface water supply from Navajo Reservoir to Navajo and non-Indian communities in northwestern New Mexico.

Currently, the parties are conforming the 2005 Settlement Agreement so that it is consistent with the federal legislation. The State anticipates that the conformed Settlement Agreement will be ready for execution by Fall 2010.

State Water Plan

Pursuant to N.M. Stat. Ann § 72-14-3.1, the NMISC, the OSE and the Water Trust Board published the first New Mexico State Water Plan in 2003. The plan is a comprehensive and coordinated management tool that "establish[es] a clear vision and policy direction for active management of the state's waters." Id.

The 2003 plan is a compendium of water policies with technical appendices on water resources, population projections, work plans for water administration and adjudications, and public input. Since its publication, the NMISC has provided regular progress reports implementing the plan See http://www.ose.state.nm.us/publications_state_water_plans.html (reports and updates in 2004, 2005 and 2008).

Building on a 2008 comprehensive, multi-agency review of the initial plan, implementation activities and more than 20 public meeting held in 2009, the NMISC and other state agencies are drafting a new strategic plan. The 2010 updated plan will provide an overview of water supply and demand challenges and opportunities in the state's major river and groundwater basins, climate variability and conservation efforts and federal, state and local opportunities to work collaboratively on water issues, including infrastructure needs. The NMISC anticipates publishing the 2010 State Water Plan Update before year's end.

Update from the New Mexico Environment Department

By: Felicia Orth

The legal work of the Department remains as busy and fascinating as always. In addition to the wide variety of cases handled for the Department's Bureaus and Divisions, the boards and commissions administratively attached to the Department are having an exceptional year.

The Hazardous Waste Bureau and counsel have recently completed a hearing on the renewal of the hazardous waste permit for Los Alamos National Laboratory. The hearing lasted three weeks notwithstanding the Bureau's convening of more then 40 meetings in 2008-2009 with LANL, the interested general public and two pueblos to discuss and resolve outstanding controversies. Contentious issues included treatment of hazardous waste by open burning, financial assurance for LANL's private co-operator, closure of hazardous waste landfills, groundwater monitoring and public participation in permit implementation. The post-hearing process will proceed into the fall. In the meantime, another permit renewal hearing will be conducted in August for the WIPP permit.

Solid Waste Bureau permitting continues under the revised Solid Waste Management Regulations, which now require a survey of any nearby community much like the environmental assessment required under the National Environmental Policy Act (NEPA). A recent Court of Appeals decision relating to the Camino Real Landfill in Sunland Park, New Mexico remanded a matter in which the Secretary had issued a one-year permit on renewal following a three week hearing[1]. The Court found the Solid Waste Act to require the issuance of a ten year permit. Citizens opposing a permit of any length have applied for certiorari.

Solid Waste Bureau recent enforcement efforts have resulted in the closure of the Vaughn municipal landfill, and settlement of a compliance order to a private landfill in Carlsbad (LeaLand). Following an administrative hearing, the Secretary's Order to Vaughn was appealed; the municipality's primary contention was that the state was responsible for providing sufficient funding to the municipality to properly operate the landfill. The Court of Appeals upheld the Order[2], and the Supreme Court denied certiorari. In the LeaLand Landfill matter, settlement was reached after extensive discovery, prior to hearing, and following a Court of Appeals decision that the Department Hearing Officer was not precluded from conducting the hearing by virtue of her employment there.

In the Ground Water Bureau, permitting staff and their counsel are seeing increased activity around uranium mining cleanup. Two recent hearings, both in Grants, include Homestake Mine, which needed a ground water discharge permit to build a third storage pond in order to maximize the operation of the reverse osmosis plant; and a mine on Mount Taylor, Rio Grande Resources, which plans to conduct a pilot project with a new treatment method involving resins to reduce uranium concentrations in water at the mine to the current ground water standard. A ground water discharge permit issued to Louisiana Energy Services for its uranium enrichment plant in Eunice, New Mexico was recently upheld by the Court of Appeals.

Other Ground Water Bureau staff and counsel have been working hard on the promulgation of new regulations relating to dairies in New Mexico. The regulation hearings are being conducted by the Water Quality Control Commission (WQCC), and will resume in June.

The WQCC is extraordinarily busy this year. In addition to the new dairy rules, they are deliberating on a dairy appeal

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Energy, Minerals and Natural Resources Department Update

A dispute over whether and how the State of New Mexico can regulate mining exploration activity on federal public land has led to decisions from the New Mexico Mining Commission and federal District Court. Ree-Co Uranium LLP (Ree-Co) sought approval from the Energy, Minerals and Natural Resources Department Mining and Minerals Division (MMD) for a project involving both shallow auger holes and deep drill holes on land where Ree-Co had filed federal mining claims. Under the New Mexico Mining Act, MMD can issue several types of permits depending on the nature of the project. The MMD Director approved the shallow auger holes under a "general permit" but required Ree-Co to obtain and exploration permit for the deeper drill holes.

Ree-Co appealed to the Mining Commission claiming that the MMD must permit all requested drilling under a general permit, that discovery work on federal land is not "exploration" under the NM Mining Act, and that the Mining Act requirements for exploration permits on federal land interfere with, and are therefore preempted by, the federal General Mining Law of 1872. The Mining Commission, after held 5 days of hearings and required briefings, upheld the decision of the MMD Director. The Commission concluded that the Director has considerable discretion under the Mining Act and the decision to require the deep drill holes to be permitted under an exploration permit was a reasonable one. The Commission also concluded that the Ree-Co's discovery work falls within the definition of "exploration" under the Mining Act and the General Mining Law of 1872 does not preempt the Mining Act or the Commission's rules.

Ree-Co has appealed the Commission decision to the District Court. Ree-Co also earlier filed a lawsuit in federal District Court against the Mining Commission and EMNRD seeking a determination that New Mexico's mining regulations are preempted by federal law. The federal court recently denied a motion for a preliminary injunction finding that Ree-Co is not likely to succeed on the merits of their preemption claim and that they have not shown irreparable injury.

Update from the New Mexico Environment Department

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of the denial of a permit to locate a new dairy adjacent to Percha Creek, deliberating on the triennial review of surface waters which was heard in December, and then hearing and deliberating on a broad petition to nominate surface waters in wilderness areas around the state as Outstanding National Resource Waters (ONRWs).

The Environmental Improvement Board, which is also attached to the Department, was very busy, but became less so when a district court judge in Lovington enjoined them from proceeding further on a petition filed by New Energy Economy to impose a statewide cap on greenhouse gas emissions. This is a preliminary injunction; a hearing on the merits of the question of the Board's authority will follow.

Those lawyers who practice before the Department, the Commission and the Board know that the procedural rules for participation in those hearings are varied and can be challenging. The Department is participating in a new opportunity to discuss administrative procedures generally, and their implementation in a lot of state agencies, as part of the New Mexico Administrative Procedures Act (APA) Task Force recently established by the Lieutenant Governor in response to Senate Joint Memorial 7 (Keller). SJM 7 died, but because the stakeholders were in agreement with the structure and intent of the memorial, the Lt. Governor decided to create the task force to examine proposed revisions to the New Mexico APA anyway. The Task Force, chaired by Kelly O'Donnell, Superintendent of the Regulation and Licensing Department, has had its first meeting and will continue to meet every three weeks with an initial focus on rulemaking and publication.

(Endnotes)

1 *Camino Real Environmental Center, Inc. v. N.M. Dept. of Environment*, No. 28,857, slip op. (N.M. Ct. App. Feb. 10, 2010).

2 *N.M. Environment Dept. Environmental Protection Division v. Town of Vaughn*, No. 29,910 (N.M. Ct. App. Apr. 14, 2010) (unpublished memorandum opinion)

State Land Office Update

Prather v. Lyons

For many years, when State trust lands were sold, the State Land Office issued a land patent reserving to the State "all minerals of whatsoever kind, including oil and gas." In *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, 122 N.M. 422, 925 P.2d 1184, the New Mexico Supreme Court overruled prior case law holding that this kind of general mineral reservation excludes surface materials such as sand, gravel and caliche unless they are specifically mentioned. Under the *Bogle Farms* standard, the scope of the mineral reservation is determined by examining what the parties to the patent intended, regardless of whether the particular mineral is mentioned.

In the first litigated case since *Bogle Farms*, the Seventh Judicial District Court, Torrance County, conducted a bench trial and determined that the State's reservation in a 1947 patent includes crushed rock that is mined and sold for railroad ballast. *Delma E. Prather, as Trustee of the Delma E. Prather Revocable Trust v. Patrick H. Lyons, Commissioner of Public Lands*, No. D-722-CV-2006-228. In April 2009, the District Court found that (i) the applicant to purchase the land was required to and did state that he was acquiring the land for livestock grazing purposes only; (ii) blasting, crushing and selling rock was not among the purposes for which the land was acquired; and (iii) the State and the patentee understood that the State's intention in reserving "all minerals of whatsoever kind" was to maximize its opportunities to collect royalties from any mineral exploitation that might be made on the land. The District Court further found that under the circumstances the most reasonable construction of the mineral reservation includes industrial minerals such as crushed stone.

The plaintiff in *Prather* has appealed the District Court judgment, arguing that the District Court erred in not applying the "surface destruction doctrine," under which a general mineral reservation excludes common variety minerals the removal of which entails significant disturbance of the surface. *Delma E. Prather, as Trustee of the Delma E. Prather Revocable Trust v. Patrick H. Lyons, Commissioner of Public Lands*, NM Ct. App. No. 29,812.

Prather is the latest in a series of cases reaching back decades that address the interpretation of the State's mineral reservation. The *Prather* case arose when the Prather trust entered into a lease to allow mining of stone on the patented land without the State's consent, and the Commissioner of Public Lands subsequently entered into a separate lease with the mining company which resulted in a reduction of the royalty paid to the Prather trust. The Prather trust has asserted that the State did not reserve ownership of the rock in question when it patented the land and that the Land Commissioner's lease with the mining company constituted a taking of its property. After *Bogle Farms*, disputes regarding the State's ownership of sand, gravel and other minerals purportedly reserved under a general mineral reservation often will be resolved on a case-by-case basis looking to the circumstances surrounding the State's issuance of the patent.

Prather also highlights the issues that can arise when there is separate ownership of the mineral estate, particularly when the "surface" owner is not fully aware that the minerals are separately owned. In an effort to mitigate the consequences to surface owners when the minerals are owned by the State, the New Mexico legislature has, since 1919, required that the State's mineral lessee's compensate the surface owner for damages suffered as a result of mineral exploration and development. *See* NMSA 1978, § 19-10-26 (as amended

through 1979) and § 19-10-27 (1925). More recently, the New Mexico legislature enacted the Surface Owner Protection Act, NMSA 1978, § 70-12-1 *et seq.*, which provides a measure of protection with respect to oil and gas exploration and development when the minerals are privately owned.

The White Peak Case

For many years, the State Land Office has evaluated the possibility of consolidating State trust lands in the White Peak area in Northeast New Mexico by exchanging State trust lands for adjacent privately held land. Beginning in September 2009, the Commissioner of Public Lands published notices requesting exchange proposals for acquisition of trust lands in connection with two of four contemplated land exchanges in the White Peak area. In each of the two notices, the Land Commissioner required that qualifying proposals (i) offer a minimum amount of land equal in value to the State trust land referenced in the notice and (ii) seek acquisition of all of the State trust land referenced in the notice. In response to each of the two notices, no party submitted an exchange proposal other than the party that had applied to acquire the trust lands offered in the notice (the Stanley Ranch and the UU Bar Ranch, respectively). The Stanley Ranch exchange was completed on January 7, 2010.

On February 1, 2010, the New Mexico Attorney General filed with the New Mexico Supreme Court a Petition for Writ of Mandamus seeking to rescind the Stanley exchange and to prevent the completion the other contemplated White Peak exchanges. *State ex rel. Gary K. King v. Patrick H. Lyons, Commissioner of Public Lands*, NM Sup. Ct. No. 32,197. The Attorney General's petition contends that the Land Commissioner has unduly restricted the kinds of bids that would be considered in connection with the proposed land exchanges and thereby violated the Enabling Act's public auction requirement for the disposition of State trust land.

After oral argument on the petition, the Supreme Court requested additional briefing on two issues: (1) whether the Enabling Act authorizes disposition of trust lands by land exchange, and whether there are any limitations on that authority; and (2) what extent, if any, the Land Commissioner's authority to dispose of trust lands by land exchange was affected by the New Mexico voters' 1990 rejection of a proposed constitutional amendment providing specific authority for land exchanges.

Amicus curiae briefs have been submitted in support of the Attorney General's position by the New Mexico Wildlife Federation and the National Wildlife Federation and by the League of United Latin American Citizens. *Amicus curiae* briefs in support of the Land Commissioner's position have been submitted by the New Mexico School for the Blind and the Visually Handicapped, by the University of New Mexico, and by Easter Seals El Mirador and Union Pacific Railroad Company.

The supplemental briefing has been completed. The Court has not issued a notice scheduling additional argument, and a decision is pending.

Spur Ranch CLE Trip a Great Success

By: Jennifer Pruett, Chair

On June 12, 2010, the NREEL Section presented its first ever CLE "field trip" at the Spur Ranch near Luna (and Reserve), New Mexico. Board member Tom Paterson hosted breakfast at his ranch, where UNM Law Professor Eileen Gauna led off with general outlines of the Clean Water Act and Endangered Species Act. Tom presented a Power Point showing river restoration projects completed on the Centerfire Creek running through the ranch, explaining applicable features of land management and how they intersect with the Acts. Next the group drove to the Creek to view for themselves the projects and their success in slowing the movement of water and building back eroded soils and streambed.

The group then carpooled to Flannigan Cienega in the Gila National Forest, upstream from Tom's ranch. Pat Morrison, District Ranger at Glenwood Ranger District, detailed the work the Forest Service had done to transform the eroded arroyo into the now lush area. Pat and Doug Boykin of NMEMNRD's Forestry Division explained forestry management techniques used in the area, and their adaptations required by the presence of the endangered Mexican spotted owl and other species. Eileen and Tom filled in the legal background and current regulatory issues, while we enjoyed sack lunches. Finally, attendees walked the Cienega and admired its many blooming wild iris and native plants.

Our last location, Romero Creek, was even farther upstream in the same watershed. Here Pat and Tom debated the merits of various species protection programs, including the Mexican wolf re-introduction program, and how they affected land management from several different perspectives. Eileen wrapped up by tying together the many regulatory concepts and statutory schemes discussed throughout the day.

This program brought together lawyers, law students, and "civilians" to share multiple perspectives on land management and the protection of threatened and endangered species. Hung on the skeleton of applicable laws and regulations, our speakers embellished the discussion with a "real world" understanding of how these legal concepts are applied in the course of running a ranch, managing a forest, and restoring a watershed. Being in the field and seeing the issues at ground level (literally) was not only great fun but extremely informative. The Section looks forward to similar innovative programs in the future, and is indebted to Tom and Eileen for leading and presenting an unusual and remarkable CLE program.