

Introduction to the Winter 2013 NREEL Newsletter

Sally Paez

This issue of NREEL Vista begins with two perspectives on the future development of energy transmission lines. Ed Merta observes that the national transmission grid is inadequate to withstand climate change and posits that one likely result will be federal preemption of state transmission siting authority. And Rachel Giron examines the challenges that the SunZia Southwest Transmission Project faces under the current regime of shared federal and state permitting authority.

Changing focus to wildlife and land management, Collin Gannon provides an update on the proposed listing of the Jemez Mountains salamander under the Endangered Species Act and describes the impact that a listing might have on both wildfire management policies and the

continued on page 5

Gridlock Preempted? How Climate Change Could End State Control Over Electric Transmission Siting

Ed Merta¹

What do electric transmission lines have to do with climate change? The answer is about more than just building new transmission capacity to deliver energy from renewable sources. The current national transmission grid, it turns out, is too sparse to handle the projected dramatically hotter temperatures (and other climate impacts, like floods and wildfires) that climate change will bring. This article will show how the resulting pressure for new transmission facilities to adapt to the impacts of climate change will compound preexisting pressure, unrelated to climate change, for federal preemption of state decision-making in this area. Unless an alternative to federal preemption is found, climate change threatens to end decades of state predominance in the siting and construction of electric transmission facilities, ushering in a new era of centralized, national administrative control. Pressures for such a shift will exist even if federal or state action to

limit greenhouse gasses never happens at all.

On October 29, 2012, Hurricane Sandy pounded the northeastern United States with 90 mile per hour winds that knocked down trees and damaged distribution lines carrying

continued on page 2

Inside this Issue

Permitting Renewable
Energy on Federal Lands..... 6

Proposed Listing of the Jemez
Mountains Salamander Under
the Endangered Species Act..... 11

The Public Trust Doctrine
and Climate Change
in New Mexico 15

Rafting and CLE: A Wild
and Wonderful Combination..... 18

Natural Resources Speaker
Series at UNM School of Law 19

electricity locally to homes and businesses. Sandy left millions of people in the northeastern United States without electrical power for days or weeks after the storm itself.² In the wake of the storm, New York governor Andrew Cuomo declared that infrastructure planning must begin adapting to extreme weather events like Sandy – treating them as the new norm rather than the occasional, catastrophic exception. Cuomo noted that, “Going forward, I think we do have to anticipate these extreme types of weather patterns. And we have to start to think about how do we redesign the system so this doesn’t happen again.”³

The Southwest faces weather related challenges different but no less severe than those confronting the Northeast, including analogous threats of extreme weather overwhelming the state’s infrastructure. As was the case with Hurricane Sandy, electric distribution and transmission in New Mexico could be overwhelmed by extreme weather events from heat waves, wildfires, and drought.⁴ An increase in the frequency and severity of heat waves, in particular, can strain the electrical grid’s operating capacity, making technical failures either more likely or more catastrophic when they occur.⁵

Electric power industries around the world, along with national and international government agencies, are well aware of the science indicating that heat waves and other extreme weather events, including droughts, floods, and wildfires, are growing more common over time and will almost certainly continue to do so.⁶ Industry and interested government decision-makers have begun planning for these extreme weather events.⁷ The emerging consensus is a simple one: more heat waves, more wildfire, and less water will require more transmission capacity to prevent failures when extreme weather events stress the grid.⁸

This dawning awareness comes after years of government and industry assessments that already regarded transmission capacity as inadequate for reasons unrelated to climate change.⁹ In the Southwest and elsewhere, economic and population growth have increasingly called attention to the likely future inability of existing transmission lines to deliver sufficient electricity to meet growing demand.¹⁰ Other factors complicate the picture even further, like

the inability of the current grid to handle future expansion of renewable energy generation¹¹ or respond to drought-induced disruptions of water-intensive generation facilities.¹²

States currently hold the legal power to authorize or deny construction of electrical transmission lines carrying power across the country.¹³ Facing pressures from local landowners,

communities, and elected officials with interests ranging from property to ecological values, state and local governments have been unwilling to approve the necessary dramatic expansion of national transmission capacity.¹⁴ In this legal regime, federal law regulated certain aspects of electricity transmission affecting interstate commerce, such as wholesale rates or transactions between utilities in different states.¹⁵ But federal law left to the states the basic decision of whether the physical facilities for electric power transmission would be constructed or not.¹⁶

To change that reality and address industry concerns, Congress for the first time authorized federal preemption of state transmission construction decisions as part of the Energy Policy Act of 2005 (EPAc 2005).¹⁷ This statute requires the Secretary of Energy to undertake a study of congestion in the national electrical transmission grid.¹⁸ The law authorizes the Secretary, based on that study, to designate specific areas of the country as National Interest Electric Transmission Corridors (NIETC).¹⁹ Within



<http://www.flickr.com/photos/40495074@N00/1714911324/>

these corridors, and only these corridors, the Federal Energy Regulatory Commission (FERC) has “backstop” authority to override state decisions on the construction of electric transmission facilities and issue its own permits for such construction, but only under certain conditions.²⁰ In essence, FERC’s backstop preemption applies only if certain legal barriers prevent state approval or if the responsible state agency fails to act on an application for a construction permit within one year.²¹

These provisions of EPAct 2005, in the electric power industry’s view, have failed to overcome perceived state impediments to transmission expansion. Widespread local opposition led the Department of Energy (DOE) to designate only two regional NIETCs where FERC preemption would apply.²² Later, a federal court ruled that the statute allows FERC preemption only if a state fails to take any action at all on a construction application within one year – not, as FERC had argued, if the state explicitly rejects the application in that time.²³ Moreover, another federal court vacated FERC’s designation of NIETCs for failing to consult with affected states as required by the statute.²⁴ With no NIETCs currently in effect, FERC has no preemption authority anywhere under EPAct 2005 and would, according to FERC and others, have questionable authority to preempt a state denial that occurred in one year or less.²⁵

As the perceived failures of EPAct 2005 became more apparent, Congress considered new proposals to address the situation.²⁶ The most prominent of these arose in the context of climate change. In 2010, the American Clean Energy and Security Act passed the House of Representatives but failed to reach the floor in the Senate.²⁷ Commonly known as the Waxman-Markey bill, its most



famous provisions would have established a cap-and-trade greenhouse gas reduction program, but the bill also would have tried to fix perceived defects in EPAct 2005’s backstop preemption authority for FERC in designated transmission corridors. In particular, Waxman-Markey would have expressly allowed FERC, in much of the United States, to authorize transmission projects not only in the absence of a state decision but also to override any state denial of transmission construction permits.²⁸ This enhanced preemption was intended to pave the way for new transmission lines necessary to deliver zero-carbon, renewable energy from wind, solar, and geothermal generation facilities.²⁹

Although Waxman-Markey failed to become law, it illustrates how climate change considerations can strengthen preexisting pressures for federal preemption of state transmission decisions. Mitigation of greenhouse emissions via renewable energy is one rationale for such preemption, but adaptation to extreme weather driven by climate change can be another. The electric power industry and responsible public policy makers have already anticipated the need for new transmission capacity in response to heat waves, storms, and other likely future climate impacts. If state resistance continues to create a perceived barrier to the expansion of critical transmission facilities, the already considerable pressure for federal preemption could become even stronger.

From a policy perspective, federal preemption of state transmission siting authority will be simple and expedient, and it will rest on a virtually ironclad legal foundation. Although Congress has chosen for decades to let states take the lead on authorizing transmission construction, the United States Supreme Court has indicated that Congress could withdraw that authority if it chose to do

so.³⁰ The Court has held that virtually every aspect of electric power transmission is enmeshed in commerce across state lines, thus permitting Congress to exert its authority under the Commerce and Supremacy Clauses of the federal Constitution to preempt state authority over such traditionally local matters as transmission construction.³¹ Such preemption has long been the norm in natural gas policy, where FERC authorizes construction of pipelines to deliver natural gas.³²

Stakeholders in New Mexico and elsewhere who oppose such an expansion of federal authority over electric transmission construction face an uphill battle. There is no self-evident reason why federal preemption should be the norm in transmission of natural gas but not electricity. Today's transmission grid is inadequate to meet likely future needs even apart from climate change, and state opposition has clearly played a role in creating that situation. Climate change promises to expose transmission defects even further, not only by driving expanded use of renewable energy but by increasing the frequency and duration of storms, heat waves and drought. These extreme weather events, compounded by expected growth in population and the economy, will generate escalating pressures for the expansion of the electrical grid across the entire United States. If New Mexico wants to maintain its authority to make future transmission decisions, it will have to show that the states are better situated than federal authorities to make decisions that balance local concerns with increasingly urgent national needs.

Endnotes

¹ Ed Merta is a J.D. candidate at the University of New Mexico School of Law, class of 2014, specializing in environmental and natural resources law. He may be reached at mertaed@law.unm.edu.

² U.S. Department of Energy, *Responding to Hurricane Sandy: DOE Situation Reports*, <http://energy.gov/articles/responding-hurricane-sandy-doe-situation-reports> (last visited November 18, 2012).

³ Joe Romm, *NY Governor Cuomo: 'Anyone Who Thinks That There is not a Dramatic Change in Weather Patterns is Denying Reality'* (October 31, 2012, 11:30 a.m.), <http://thinkprogress.org/climate/2012/10/31/1112301/ny-governor-cuomo-anyone-who-thinks-that-there-is-not-a-dramatic-change-in-weather-patterns-is-denying-reality/>.

⁴ GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 129-134 (Thomas R. Karl, Jerry M. Melillo, and Thomas C. Peterson eds. 2009), available at <http://www>.

globalchange.gov/publications/reports/scientific-assessments/us-impacts.

⁵ *Id.* at 53-56, 58-59.

⁶ See, e.g., U.K. NATIONAL GRID TRANSMISSION PLC, CLIMATE CHANGE ADAPTATION REPORT 1 (2010), <http://www.nationalgrid.com/corporate/Our+Responsibility/News/newscadaptation.htm>.

⁷ See, e.g., Tiffany Finley and Ryan Schuchard, *Adapting to Climate Change: A Guide for the Energy and Utility Industry*, ADAPTATION TO CLIMATE CHANGE: BSR INDUSTRY GUIDES (2011), <http://www.bsr.org/en/our-insights/report-view/adapting-to-climate-change-a-guide-for-the-energy-and-utility-industry>.

⁸ PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, CLIMATE ADAPTATION REPORT 9-21, 54-63 (2011), <http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-82988/7000-RE-DEP4303%20combined%20report.pdf>. A more optimistic view appears in PUBLIC POLICY INSTITUTE OF CALIFORNIA, ADAPTATION OF CALIFORNIA'S ELECTRICITY SECTOR TO CLIMATE CHANGE 1-10 (2008).

⁹ TRANSMISSION ACCESS POLICY GROUP, EFFECTIVE SOLUTIONS FOR GETTING NEEDED TRANSMISSION BUILT AT REASONABLE COST 5-6 (2004), <http://www.tapsgroup.org/sitebuildercontent/sitebuilderfiles/effectivesolutions.pdf>.

¹⁰ See, e.g., JAMES A. HOLTKAMP AND MARK A. DAVIDSON, HOLLAND & HART LLP, TRANSMISSION SITING IN THE WESTERN UNITED STATES: OVERVIEW AND RECOMMENDATIONS PREPARED AS INFORMATION TO THE WESTERN INTERSTATE ENERGY BOARD (2009), http://www.hollandhart.com/articles/Transmission_Siting_White_Paper_Final.pdf.

¹¹ BRACKEN HENDRICKS, CENTER FOR AMERICAN PROGRESS, WIRED FOR PROGRESS: BUILDING A NATIONAL CLEAN ENERGY SMART GRID 1-15 (2009), <http://www.americanprogress.org/issues/green/report/2009/02/23/5553/wired-for-progress/>.

¹² U.S. DEPARTMENT OF ENERGY, ENERGY DEMANDS ON WATER RESOURCES: REPORT TO CONGRESS ON THE INTERDEPENDENCE OF ENERGY AND WATER 13-36 (2006), http://www.sandia.gov/energy-water/congress_report.htm.

¹³ New Mexico statutes on electric transmission siting can be found at N.M. Stat § 62-9-1, 62-9-3. For related regulations see N.M. Admin. Code 17.5.592. See generally ENERGY LAW AND TRANSACTIONS § 2.02 - 2.08, 3.03, and 4.02 (David J. Muchow and William A. Mogel eds., 1990) (in general states exercise power over transmission

siting, with variations in specific mechanisms for individual states). See also Ashley C. Brown and Jim Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the Public Interest in Balancing State and Regional Considerations*, 81 U. Colo. L. Rev. 705 (2010); Sandeep Vaheesan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 89-114 (2012).

¹⁴ Vaheesan, *supra* note 13, at 115-123.

¹⁵ Brown and Rossi, *supra* note 13, at 713-729.

¹⁶ *Id.*

¹⁷ Energy Policy Act of 2005, Pub.L. No. 109-58, 119 Stat. 594 (2005).

¹⁸ 16 U.S.C. § 824p(a)(1).

¹⁹ *Id.* at § 824(p)(a)(2), (3), (4).

²⁰ *Id.* at § 824(p)(b)(1) through (6).

²¹ *Id.* In particular, the statute allows FERC preemption if: 1) a state agency lacks authority to approve construction; (2) a state agency lacks the authority to consider interstate benefits of construction; (3) a utility seeking a state permit had no customers in the state and thus couldn't obtain a permit; (4) a state agency failed to act on an application for construction within one year; (5) a state agency attached conditions to a permit making the proposed transmission project impractical. *Id.*

²² Designation of National Interest Electric Transmission Corridors, 72 Fed. Reg. 56,992 (October 5, 2007). See also HOLTkamp AND DAVIDSON, *supra* note 10, at 9-10.

²³ *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4th Cir. 2009).

²⁴ *Cal. Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072 (9th Cir. 2011).

²⁵ Vaheesan, *supra* note 13 at 123-124. See also Testimony of Acting Chairman Jon Wellinghoff, Federal Energy Regulatory Commission, Before the Committee on Energy and Natural Resources, United States Senate Hearing on Legislation Regarding Electric Transmission Lines (March 12, 2009) (stating FERC's view that Piedmont decision, 558 F.3d, *supra* note 22, significantly weakens overall FERC backstop authority), <http://www.ferc.gov/eventcalendar/Files/20090312100013-03-12-09-testimony.pdf>.

²⁶ See, e.g., American Clean Energy Leadership Act of 2009, S. 1462, 111th Cong. (2009); Clean Renewable Energy and Economic Development Act, S. 539, 111th Cong. § 3 (2009).

²⁷ American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

²⁸ *Id.* at § 151.

²⁹ H.R. REP. NO. 111-137, pt. 1, at 277-317.

³⁰ *New York v. FERC*, 535 U.S. 1, 18-19 (2002).

³¹ *FERC v. Mississippi*, 456 U.S. 742, 755-757 (1982). Note that the Court in its 2002 decision *New York v. FERC*, 535 U.S. 1, did not apply recent decisions limiting the scope of the Commerce Clause. See *U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000). Nor did the Court apply recent discussions enhancing state autonomy under the Tenth Amendment. *New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 898 (1997).

³² Pub. L. No. 75-688, 52 Stat. 831 (1938) (codified as amended at 15 U.S.C. §§ 717-717w (2006)).

Introduction to the Winter 2013 NREEL Newsletter *continued from page 1*

recently promulgated off-road vehicle regulations in the Santa Fe National Forest.

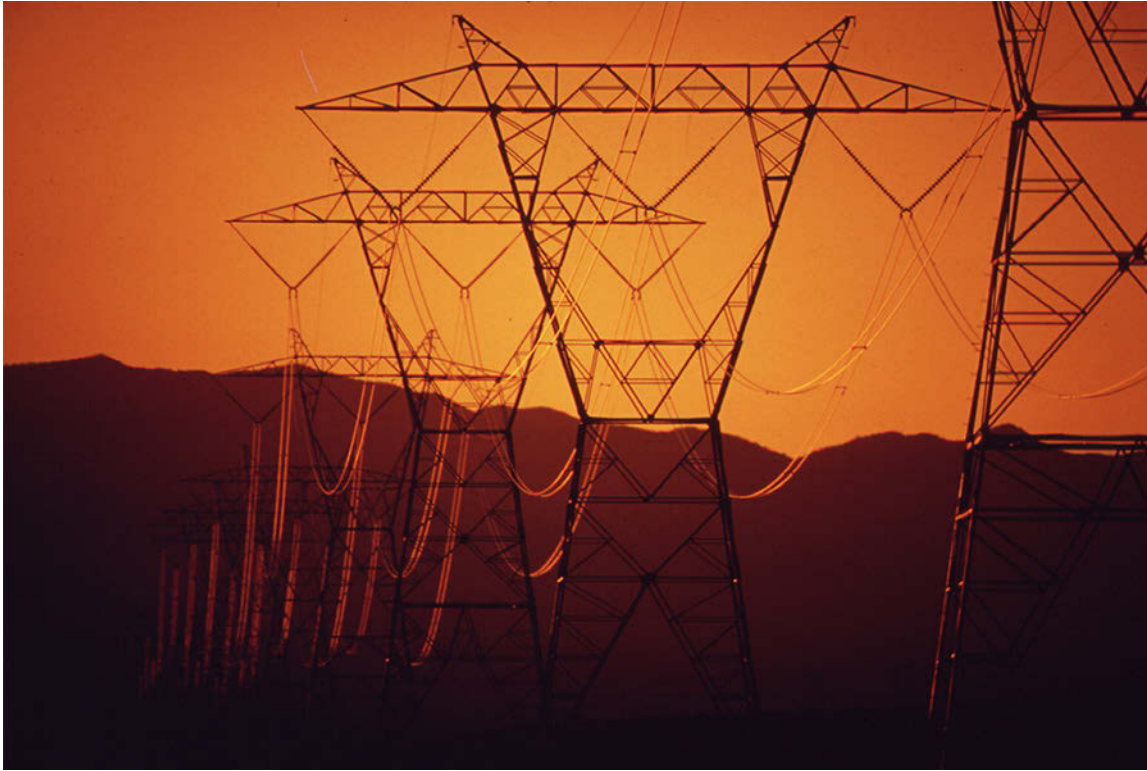
Finally, Samantha Ruscavage-Barz discusses pending litigation in which a teenage plaintiff asserts that the common law Public Trust Doctrine requires the State of New Mexico to protect the atmosphere from impairment caused by greenhouse gases.

If you would like to submit an article for the Summer 2013 issue of NREEL Vista, please contact me at supsap@nmcourts.gov. My gratitude goes out to board members Adrian Oglesby and Samantha Ruscavage-Barz for working with two of our talented student authors. Thank you for your continued support of the NREEL Section of the State Bar.

Sally Paez, Editor

Permitting Renewable Energy on Federal Lands: The SunZia Southwest Transmission Project

Rachel Giron¹



by electric utilities, a wind generation developer, and a merchant transmission developer.⁷ The immediate impetus for the project is mainly economic, to provide access to stranded renewable energy zones and allow the expansion of the energy production economy. It is also expected to increase the reliability of electrical service and further state and federal policy goals that encourage renewable energy development.⁸ The creation of new energy

The SunZia Southwest Transmission Project is a proposed high-voltage transmission project designed to carry largely renewable-generated electricity from sources in the New Mexico and Arizona deserts to load centers in the Western Interconnection.² It will start in central New Mexico near Corona at a new substation called SunZia East in Lincoln County, and go to southeastern Arizona, terminating at a proposed Pinal Central substation near Casa Grande in Pinal County.³ The project will consist of two single-circuit 500 kilovolt (kV) transmission lines with at least three intermediate interconnections.⁴ The proposed routes will stretch for 460-530 miles, depending on the exact path chosen, and the rights-of-way (ROWs) will be between 400-1000 feet wide.⁵

SunZia is managed by SouthWestern Power Group, an independent developer based in Phoenix.⁶ It is sponsored by Arizona utilities Salt River Project and Tucson Electric Power, Tri-State Generation & Transmission Association, and Shell WindEnergy, and so it represents a joint effort

infrastructure is necessary to allow the development of renewable resources, to meet state Renewable Portfolio Standards, and to contribute to larger climate change mitigation efforts. Yet, multistate transmission siting, even for renewable generation, faces numerous challenges from both the complexity of the siting process itself and from local opposition based on environmental or economic concerns and a perceived lack of benefits. This article will examine the siting process and challenges faced by the SunZia Project.

Development began for SunZia in 2008, with an agreement between the sponsors formed in April of that year.⁹ The group submitted a ROW application to the Bureau of Land Management (BLM) in September 2008, and the BLM filed a notice of intent to prepare an Environmental Impact Statement (EIS) in the Federal Register and began scoping for the project the following spring.¹⁰ The proposed route for the SunZia Project will place the lines primarily on public lands in both Arizona and New Mexico,

and will involve traveling around the White Sands Missile Range.¹¹ Consequently, it will require both federal and state permits involving oversight by multiple agencies.

The federal permitting process has been fast-tracked under a 2009 Memorandum of Understanding (MOU) between nine federal agencies, authorizing a cooperative process with one lead agency selected by the DOE. SunZia was also one of seven pilot projects chosen by the Obama administration's Rapid Response Team for Transmission (RRTT), formed in October 2011.¹² The BLM was designated as the lead federal agency for the SunZia project, so it will coordinate the development of the EIS pursuant to the National Environmental Policy Act (NEPA), Federal Land Management and Policy Act (FLMPA), and associated regulations.¹³ Working with the BLM on this process are numerous other federal and state agencies.¹⁴

Even though SunZia will make use of previously designated Section 368 energy corridors under the Energy Policy Act of 2005, a site-specific EIS and ROW decision is still required.¹⁵ After a lengthy public comment process, including holding numerous public meetings and attracting approximately 1,400 comments, the BLM released the draft EIS in May 2012.¹⁶ At that point public comment was reopened until August 22, and the BLM is currently working on the final EIS considering this input. Once finalized, the BLM will use the information gathered as it considers the ROW grant needed to cross BLM-managed federal lands.¹⁷

The BLM's objectives in granting a ROW are to protect the natural resources on public and adjacent lands, prevent unnecessary or undue degradation, promote the use of ROWs in common where possible, and coordinate with state and local governments and other interested parties.¹⁸ The BLM may grant a ROW with terms and conditions in the public interest, including modifications of use or route and mitigation requirements.¹⁹

The cooperative federal process authorized by the 2009 MOU applies only to lands controlled by those agency signatories, so SunZia will still need to obtain separate permits to cross other federal lands. These include lands within the Middle Rio Grande Conservancy District (MRGCD) in New Mexico managed by the Bureau Of Reclamation, and the San Carlos Irrigation Project canal system that is administered by the Bureau of Indian Affairs. Both will require separate NEPA decisions to grant

ROWs.²⁰ In addition, the application is subject to review by the Department of the Army because some BLM lands have been reserved for exclusive use by the military.²¹

As the federal permits are granted, the state permitting process can begin. SunZia must apply to the Arizona Corporation Commission (ACC) for a Certificate of Environmental Compatibility (CEC), and to the New Mexico Public Regulation Commission (NMPRC) for a Location Permit. Considerations for these siting permits are based on needs, costs, and environmental factors.

The New Mexico legislature requires a location permit based on the idea that it is in the public interest to consider any adverse effects on the environment or quality of life of state residents before granting siting permission.²² The NMPRC is required to approve applications for transmission siting unless they find that "the location will unduly impair important environmental values," considering existing state, local, or private development plans; fish, wildlife and plant life; noise emission levels and communications interference; safety of the proposed availability of the location to the public for recreational purposes; existing scenic, historic, cultural, archaeological or religious sites in the area; and any additional factors that require consideration under applicable federal and state laws.²³

In Arizona, the ACC refers applications for a CEC to the Arizona State Power Plant and Transmission Lines Siting Committee (Committee).²⁴ Factors to be considered in granting a CEC are similar to those for a NMPRC location permit, except that the ACC also requires consideration of costs and the protection of unique environmental areas, recognizing that increased facility costs represent potential increases in costs to customers and applicants and that unique areas may have important biological resources or habitat for rare or endangered species.²⁵ Once the Committee makes a decision granting or denying the CEC application or imposing conditions on a grant, the decision is reviewed by the ACC, who may approve, deny, or modify it based on considerations of public interest, project need, and environmental impact.²⁶

No local siting permits will be needed because New Mexico and Arizona siting laws allow these centralized state authorities to preempt local rules.²⁷ However, both states still require compliance with all local rules, unless the state agency determines that the rules are unreasonable

and not in the public interest. Numerous other permits are also required and the process can still be lengthy and cumbersome. SunZia must obtain ROWs across state and private land, and environmental, historic, and encroachment permits from a variety of state agencies.

The ROWs across state trust land are granted by the Arizona State Land Department and the New Mexico State Land Office. Because of the restrictive terms under which land was granted to these states, the State Land Commissioners, as trustees, are required to administer the state trust lands for the benefit of their trust beneficiaries, such as public schools.²⁸ Therefore, both New Mexico and Arizona agencies require applicants to demonstrate that the ROW is in the interest of their beneficiaries for it to be granted.²⁹

In spite of the detailed EIS conducted by the BLM, state environmental permits will be required for water quality, air quality, hazardous waste, plant removal, possible effects on endangered species, and possible impacts on cultural or historical resources. The Arizona State Historic Preservation Office provides guidelines for streamlining the review process by including all involved agencies in a single consultation.³⁰ However, neither the Arizona nor the New Mexico state agencies are signatories to the BLM review, and thus they may duplicate work already completed under federal guidelines.³¹

Finally, encroachment permits from both New Mexico and Arizona Departments of Transportation will be needed, wherever transmission lines cross their ROWs.³² Prior permission of the Federal Highway Administration is also needed if federal-aid interstate highways will be affected.³³ These state permits are expected to be issued in 2013, so that construction can begin in 2014. Operation can be expected, at the earliest, in 2016.³⁴

New Mexico and Arizona are both energy producing states, in that they have the capability to produce more energy than the state resident populations will consume. In the case of renewable energy in particular, both states have some of the highest concentrations of solar and wind power potential in the nation. In order to develop these resources and meet their respective Renewable Portfolio Standards, they have implemented progressive renewables policies.³⁵ New Mexico has created the New Mexico Renewable Energy Transmission Authority (NMRETA), tasked with planning and financing projects to develop renewable resources and create economic opportuni-

ties, and specifically authorized to consider the benefits of interstate projects.³⁶ Arizona legislators attempted to further streamline the siting process for renewable energy projects with the proposal of Senate Bill 1517 in 2011. Senate Bill 1517 would have allowed state agencies to make use of federally collected data as a basis for their permitting decisions. For example, the environmental and historical preservation data collected by the BLM in creating their EIS could have been used to issue state environmental permits. However, due to concerns for state and local autonomy, the bill was defeated in the Arizona House.

Critics point out that SunZia sponsored the bill, characterizing it as an attempt to avoid proper oversight of local issues by local authority. They maintain that consolidating the review process would amount to federal preemption and result in a lack of consideration for local concerns and insufficient input from local residents. This local input/centralized efficiency conflict is at the heart of current transmission siting problems. The inefficiency of the current process results in duplication of federal and multiple state inquiries, collecting the same data and conducting the same reviews. However, each party is unwilling to give up their control over the process, resulting in long delays in approval for necessary transmission infrastructure.

Endnotes

¹ Rachel Giron expects her JD and Natural Resources Law Certificate from UNM School of Law in May 2014. She thanks Adrian Oglesby for his editorial help.

² *SunZia Southwest Transmission Project*, U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT, http://www.blm.gov/nm/st/en/prog/more/lands_realty/sunzia_southwest_transmission.html (last visited Dec. 14, 2012) [hereinafter BLM].

³ *Id.*

⁴ BLM, DRAFT ENVIRONMENTAL IMPACT STATEMENT & RESOURCE MANAGEMENT PLAN AMENDMENTS FOR THE SUNZIA SOUTHWEST TRANSMISSION PROJECT 1-1 to 1-2 (May 2012), *available at* http://www.blm.gov/nm/st/en/prog/more/lands_realty/sunzia_southwest_transmission.html [hereinafter SUNZIA DEIS].

⁵ *Id.*

⁶ *Project Portal: SunZia Southwest Transmission Project*, WESTERN ELECTRICITY COORDINATING COUNCIL (Oct. 24, 2012), <http://www.wecc.biz/Planning/Transmission-Expansion/Transmission/Lists/Project%20Portal/DisplayForm.aspx?ID=18&Source=http://www.wecc.biz/>

Planning/TransmissionExpansion/Transmission/Pages/default.aspx [hereinafter WECC *Project Portal*].

⁷ *Id.*

⁸ *Id.*

⁹ EUCI Western Transmission Conference, SUNZIA SOUTHWEST TRANSMISSION PROJECT (Oct. 24, 2011), available at www.sunzia.net/resources_presentation.php.

¹⁰ Notice of Availability of SunZia DEIS, 77 Fed. Reg. at 31,637; Notice of Intent to Prepare an EIS for SunZia, Supplementary Information, 74 Fed. Reg. 25,764 (BLM May 29, 2009).

¹¹ BLM, *supra* note 2.

¹² Interagency Rapid Response Team for Transmission, COUNCIL ON ENVIRONMENTAL QUALITY, whitehouse.gov/administration/eop/ceq/initiatives/interagency-rapid-response-team-for-transmission.

¹³ BLM, *supra* note 2; National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (2006); Federal Land Management and Policy Act, 43 U.S.C. § 1761 (2006).

¹⁴ Notice of Availability of the Draft Environmental Impact Statement for the SunZia Southwest 500 kV Transmission Line Project, 77 Fed. Reg. 31,637 (BLM May 29, 2012). Cooperating agencies include the Arizona Department of Transportation, Arizona State Land Department, Arizona Game and Fish Department, National Park Service, New Mexico Space Authority, New Mexico State Land Office, Holloman Air Force Base, Ft. Bliss (U.S. Army), White Sands Missile Range (U.S. Army), Ft. Huachuca (U.S. Army), U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and the Department of Defense Siting Clearinghouse. Numerous Federally recognized tribes have also been invited to participate. See also SUNZIA DEIS, *supra* note 4, at 1-11.

¹⁵ *Wilderness Soc'y, et al. v. U.S. Dep't of Interior*, No. 3:09-cv-03048 JW (N.D. Cal. July 9, 2012).

¹⁶ Notice of Availability of SunZia DEIS, 77 Fed. Reg. at 31,637; SUNZIA DEIS, *supra* note 4, at 1-9.

¹⁷ 43 C.F.R. § 2801.9 (2005).

¹⁸ 43 C.F.R. § 2801.2 (2005).

¹⁹ SUNZIA DEIS, *supra* note 4, at 1-15.

²⁰ *Id.* at 1-15 to 1-16.

²¹ Military Lands Withdrawal Act of 1999, Pub. L. No. 106-65, 113 Stat. 885 (1999); SUNZIA DEIS, *supra* note 4, at 1-16.

²² NMSA 1978, § 62-9-3 (2005).

²³ *Id.*

²⁴ A.R.S. § 40-360.03 (2007).

²⁵ A.R.S. § 40-360.06 (2007).

²⁶ A.R.S. § 40-360.07 (2007).

²⁷ WECC *Project Portal*, *supra* note 6.

²⁸ New Mexico-Arizona Enabling Act, 36 Stat. 557 (1910); PETER W. CULP, DIANE B. CONRADI, & CYNTHIA C. TUELL, LINCOLN INSTITUTE OF LAND POLICY/SONORAN INSTITUTE, TRUST LANDS IN THE AMERICAN WEST: A LEGAL OVERVIEW & POLICY ASSESSMENT 62-64, 110-11 (2005), available at <http://www.lincolninst.edu/subcenters/managing-state-trust-lands/publications/>.

²⁹ ARIZONA STATE LAND OFFICE, ROW FLYER, available at www.land.state.az.us/programs/realestate/process.htm ("The Trust cannot subsidize development, no matter how commendable, at the expense of its beneficiaries."); *Right of Way Division*, NEW MEXICO STATE LAND OFFICE, http://www.nmstatelands.org/Right_of_Ways_FAQs.aspx ("By statute and constitution, the State Land Office must manage state trust land so the 22 Beneficiary Institutions of public schools, universities and hospitals receive income from the trust.").

³⁰ ARIZONA STATE PARKS STATE HISTORIC PRESERVATION OFFICE, GUIDELINES FOR THE STATE HISTORIC PRESERVATION ACT, SHPO GUIDELINES 15 (Jan. 18, 2001), available at <http://azstateparks.com/SHPO/review.html>.

³¹ SUNZIA DEIS, *supra* note 4, at 1-11.

³² *Id.* at 1-16.

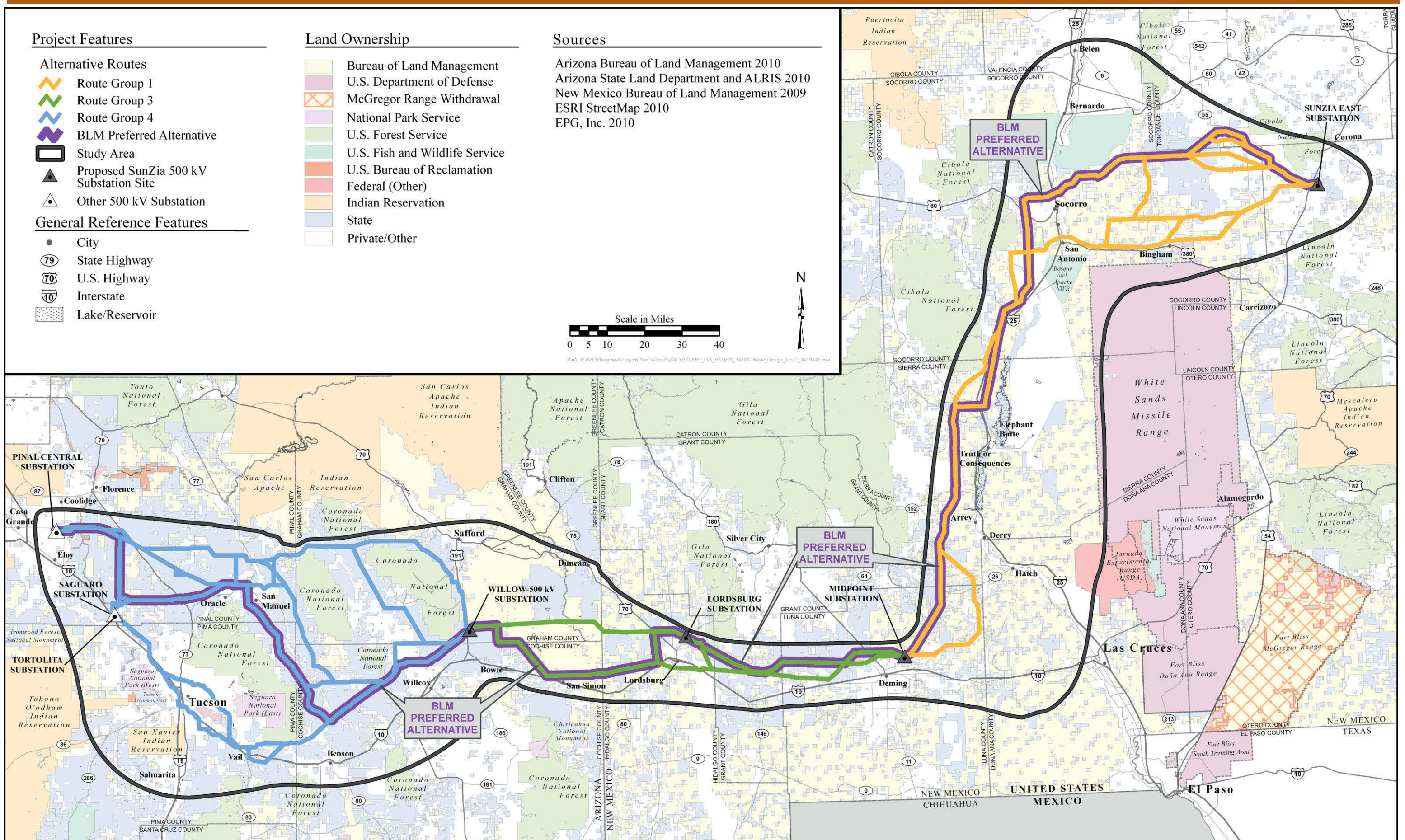
³³ NEW MEXICO DEPARTMENT OF TRANSPORTATION, RIGHT OF WAY HANDBOOK, VOLUME VI: PROGRAMS & INFRASTRUCTURE PROPERTY ASSET MANAGEMENT PROCEDURAL MANUAL 4-9 (Jan. 1, 2011), available at <http://dot.state.nm.us/en/Infrastructure.html#e>.

³⁴ DAVID GETTS, SUNZIA SOUTHWEST TRANSMISSION PROJECT, PROJECT UPDATE NEW MEXICO RETA (Aug. 22, 2012), available at www.sunzia.net/resources_presentation.php.

³⁵ A.A.C. R14-2-1804 (RPS of 15% by 2025), 17.9.572 NMAC (RPS of 20% by 2020).

³⁶ New Mexico Renewable Energy Transmission Authority Act, NMSA 1978, § 62-16A-4 (2007).

SunZia Map



Recent Destructive Wildfires in Northern New Mexico Spark Proposed Listing of the Jemez Mountains Salamander Under the Endangered Species Act

Collin Gannon¹



National Park Service

On September 12, 2012 the United States Fish and Wildlife Service (USFWS) proposed to list the Jemez Mountains salamander under the Endangered Species Act (ESA)² and designate critical habitat.³ Increased severity and frequency of wildfires in New Mexico, along with habitat fragmentation and climate change, are the primary threats to the Jemez Mountains salamander prompting the USFWS proposal.⁴ Recent and controversial off road vehicle regulations in the Jemez Mountains may face immediate scrutiny and alteration in response to this proposed listing.⁵

The Jemez Mountains salamander's unique ecological requirements make the species susceptible to slight variation in its environment. The salamander averages only 14 centimeters in length, and individuals live within a small home range of approximately 86 square feet.⁶ The salamanders have no lungs, and require a moist environment to facilitate oxygen exchange through their skin.⁷ Dwell-

ing underground in moist soils, or beneath rocks and rotting logs, the salamanders typically venture aboveground only to feed at night or lay eggs during midsummer rains.⁸ Like the salamander's minute body size, the species' habitat range is small. Generous researcher estimates depict a range of 400 square miles across the Jemez Mountains at a restricted elevation zone of 7,200 to 9,500 feet.⁹ The small habitat range, little propensity to migrate, and moisture dependency make the salamander vulnerable to relevant hazards such as severe wildfire and habitat fragmentation in the Jemez.

Governmental agencies and environmental advocacy groups have long recognized the growing threats to the salamander's survival. The Secretary of Agriculture selected the southwest Jemez Mountains in 2010¹⁰ as part the U.S. Forest Service's Collaborative Forest Landscape Restoration Program.¹¹ The program, designed to encourage science based collaborative strategies to increase forest health and species conservation, could allocate the Jemez Mountains region up to \$33.7 million in funding over the next ten years to achieve such goals.¹² Initial funding in 2010 created "shovel ready jobs" and purchased monitoring equipment,¹³ inspiring a July 2012 action plan that proposes substantial conservation efforts in the Jemez.¹⁴ Such efforts will include combinations of thinning and prescribed burning projects aimed to decrease the risk of severe stand-replacing fire in salamander habitat.¹⁵

The salamander is listed as an endangered species under the New Mexico Wildlife Conservation Act (NMWCA)¹⁶ without a recovery plan to date.¹⁷ Even with a recovery



Burt Stalter • <http://www.flickr.com/photos/lasconchasfire/5892899928/in/photostream>

plan, the conservation benefits for a species like the salamander, facing threats from wildfire and habitat fragmentation, would be limited under the NMWCA due to a lack of authority to provide habitat protection.¹⁸

Since 1982 the salamander has been a candidate for listing under the ESA.¹⁹ The environmental advocacy group WildEarth Guardians petitioned the USFWS to list the salamander as endangered in 2008 without success.²⁰ It was a May 2011 stipulated settlement agreement between the USFWS and WildEarth Guardians, seeking to resolve inadequacies in the endangered species listing process, that paved the way for this most recent salamander proposal.²¹ The 2011 settlement agreement²² requires the USFWS to address 251 species on its candidate list, which included the Jemez Mountains salamander, within the next six years²³

The USFWS's September 2012 listing proposal describes potential critical habitat for the salamander that covers 90,798 acres of land within parts of Sandoval, Los Alamos, and Rio Arriba counties.²⁴ The proposed critical habitat would be separated into two parcels of federal land in the western and southeastern Jemez Mountains.²⁵ The public comment period for the published proposal ended on November 13, 2012, and the USFWS is expected to make a final determination within one year of the publication.²⁶

The primary threat the USFWS cites to the salamander's survival is the increased risk of severe stand-replacing wildfires in its habitat.²⁷ A stand-replacing wildfire kills the majority of above ground vegetation in the burn area,²⁸ and is a relatively recent phenomenon in the Jemez Mountains.²⁹ In 2011 the Las Conchas wildfire burned 17,780 acres of salamander habitat, 156,000 acres in total.³⁰ The Las Conchas fire came in the wake of several other severe fires in the area, notably the Dome Fire in 1996 and the Cerro Grande in 2000, all combining to burn over 36 percent of previously recorded salamander habitat.³¹ The destructive capacity of these

stand-replacing wildfires makes a species like the salamander, which has a small and isolated range, especially vulnerable to complete habitat destruction. Wildfire, in addition to habitat destruction, can substantially dry the salamander's habitat and hinder its ability to absorb and retain oxygen.³² Chemicals used to suppress wildfires, as well as physical trampling of salamander habitat by fire-fighting personnel, contribute to the threat stand-replacing wildfires pose to salamander conservation.³³

The increased frequency of severe stand-replacing fire has been caused in part by historic fire exclusion and suppression policies. Responding to an increased stake in timber and human safety concerns during the early 1900's, Congress passed the Forest Fire Emergency Act of 1908.³⁴ The Act gave the U.S. Forest Service the authority and funding to take any means necessary to eliminate forest fires.³⁵ Decades of fire suppression (extinguishing fire) and exclusion (preventing fires altogether) followed, resulting in today's over-dense forest composition.³⁶ Frequent and low-intensity natural wildfires prior to human intervention actually had fire-retarding effects; they decreased forest density by burning dead underbrush, which created natural firebreaks to stand-replacing fires.³⁷ Forest composition and the behavior of wildfire have changed drastically in the past 100 years, likely as a result of fire suppression and exclusion policies.

Compounding the threat of wildfire from increased forest density is climate change. Recent climate change trends in the Jemez Mountains indicate increased temperatures and decreased precipitation.³⁸ Climate models consequently project an increase in the duration of the New Mexico wildfire season and an increase in wildfire frequency and severity.³⁹ In addition to elevating fire risk the warmer temperatures could limit the salamander's ability to venture aboveground to feed and lay eggs in the Jemez.⁴⁰

The USFWS anticipates that listing the salamander under the ESA and designating critical habitat could lead to changes in forest suppression and exclusion policies throughout the Jemez Mountains.⁴¹ An ESA listing could force federal agencies to reconsider forest fire policies as well as contribute to the restoration efforts already in action, including forest thinning and prescribed burns.⁴²

In addition to possible changes in forest fire policy, a listing and designation of critical habitat should immediately influence the recent Santa Fe National Forest Travel Management Plan for off road vehicle use. The USFWS cites habitat fragmentation and destruction due to road development and motorized vehicle use as a substantial threat to salamander habitat.⁴³ Unpaved roads increase water runoff, which has a drying effect throughout salamander habitat.⁴⁴ The unpaved roads and trails in the Jemez Mountains historically have encouraged heavy off road vehicle use, likely contributing to localized salamander killings and habitat destruction.⁴⁵

In 2005 the Forest Service published a Travel Management Rule aimed at reducing the negative effects of off road vehicle use on cultural resources, wildlife, and watersheds in National Forests.⁴⁶ The rule led to the Santa Fe National Forest Travel Management Plan establishing approximately 2,200 miles of trails and roads for off road vehicle use through salamander habitat areas.⁴⁷ This is a reduction from the 5,000 miles previously available for off road vehicle use, but environmental groups such as the WildEarth Guardians and the Center for Biological Diversity had hoped to see less.⁴⁸ Advocates for off road vehicle use were not happy with the Travel Management Plan either, but on October 9, 2012 the U.S. Forest Service upheld the plan after the 45-day administrative appeal period ended.⁴⁹ Though the USFWS released final maps detailing the Travel Management Plan's approved trails and roads on December 1, 2012, the proposed listing of the salamander under the ESA will likely lead to further analysis of the Plan's affects on salamander sur-

vival.⁵⁰ The ESA requires conference with the Secretary of the Interior on any agency action likely to jeopardize survival of any proposed listed species.⁵¹

The listing of the Jemez Mountains salamander and designation of critical habitat should help mitigate threats to the salamander's survival. An ESA listing will require governmental agencies to reassess their actions in protected critical habitat for the salamander's conservation. Efforts already directed at decreasing the risks of severe fire could receive the funding needed to expand their capabilities and have greater impact. Improved fire management policies and the reduction in off road vehicle use throughout the Jemez could benefit other threatened species in the region, and even provide a model of improved forest management for other localities that face similar threats.

Endnotes

¹ Collin Gannon is a 2015 J.D. candidate at the University of New Mexico School of Law. Collin graduated from the University of Pittsburgh in 2012 with an Environmental Studies and Philosophy of Science double major. Collin would like to thank Sally Paez for her editorial help and direction.

² 16 U.S.C. § 1531 (1973).

³ Endangered and Threatened Wildlife and Plants; Proposed Endangered Status for the Jemez Mountains Salamander and Proposed Designation of Critical Habitat, 77 Fed. Reg. 56482, 56482 (Sept. 12, 2012).

⁴ Id. at 56499.

⁵ U.S. Forest Service. 2012. Environmental Impact Statement for Travel Management on the Santa Fe National Forest. http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5376148.pdf.

⁶ G. Hammerson, *Plethodon Neomexicanus*, Nature Serve Conservation Status Factors, <http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Plethodon+neomexicanus> (accessed: October 10, 2012).

⁷ 77 Fed. Reg. at 56485.

⁸ See New Mexico Endemic Salamander Team, Conservation Agreement for the Jemez Mountains Salamander Between and Among New Mexico Department of Game and Fish USDA Forest Service and US Fish and Wildlife Service, at 1-2 (Jan. 2000), available at http://nmohva.org/docs/JMS_Cons_Agree-Plan_2000_01_10.pdf.

⁹ W.G. Degenhardt Et Al., *Amphibians and Reptiles of New Mexico* 26 (1996).

¹⁰ U.S. Forest Service, Proposed Action for Southwest Jemez Mountains Restoration, <http://www.fs.usda.gov/>

Internet/FSE_DOCUMENTS/stelprdb5379537.pdf (last visited Nov. 17, 2012) [hereinafter Proposed Action].

¹¹ 16 U.S.C. § 7303 (2009).

¹² Proposed Action, supra note x.

¹³ Id.

¹⁴ Santa Fe National Forest; New Mexico; Southwest Jemez Mountains Landscape Restoration Project Environmental Impact Statement, 77 Fed. Reg. 40846 (July 11, 2012).

¹⁵ Proposed Action, supra note 10.

¹⁶ 19.33.6.8 (D)(1)(a) NMAC.

¹⁷ N.M. Stat. Ann. § 17-2-37 to -46 (1995).

¹⁸ N.M. Stat. Ann. § 17-2-40.1 (1995).

¹⁹ Endangered and Threatened Wildlife and Plants; Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species, 47 Fed. Reg. 58454, 58454 (Dec. 30, 1982).

²⁰ Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Jemez Mountains Salamander (*Plethodon neomexicanus*) as Endangered or Threatened with Critical Habitat, 75 Fed. Reg. 54822, 54822 (Sept. 9, 2010).

²¹ *WildEarth Guardians v. Salazar*, 272 F.R.D. 4 (D.D.C. 2010).

²² Stipulated Settlement Agreement, In re Endangered Species Section 4 Deadline Litigation, No. 10-mc-377 (D.D.C. May 10, 2011), available at http://www.wildearthguardians.org/site/DocServer/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf?docID=2493&AddInterest=1262.

²³ Id.

²⁴ 77 Fed. Reg. at 56482.

²⁵ Id. at 56505.

²⁶ Stipulated Settlement Agreement, In re Endangered Species Section 4 Deadline Litigation, No. 10-mc-377 (D.D.C. May 10, 2011), available at http://www.wildearthguardians.org/site/DocServer/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf?docID=2493&AddInterest=1262.

²⁷ 77 Fed. Reg. at 56486.

²⁸ Interagency Fire Regime Condition Class Guidebook (version 3.0 Sept. 2010), available at http://www.fire.org/nifftt/released/FRCC_Guidebook_2010_final.pdf.

²⁹ 77 Fed. Reg. at 56486.

³⁰ Id. at 56487.

³¹ Id.

³² Id.

³³ 77 Fed. Reg. at 56490.

³⁴ 16 U.S.C. § 556d (2004).

³⁵ Id.

³⁶ Alison Berry, Forest Policy Up in Smoke: Fire Suppression in the United States, Property and Environment Research Center, Bozeman, Mont. (Sept. 2007).

³⁷ Id.

³⁸ 77 Fed. Reg. at 56498.

³⁹ Intergovernmental Panel on Climate Change, Regional Climate Projections, in Climate Change: The Physical Science Basis. Contribution of Working Group 1 to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change 848-940 (2007).

⁴⁰ 77 Fed. Reg. at 56498.

⁴¹ Id. at 56507.

⁴² Id.

⁴³ Id. at 56493.

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ 36 C.F.R. § 212 (2005).

⁴⁷ U.S. Forest Service, Record of decision for travel management of the Santa Fe National Forest, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5376151.pdf, (2012).

⁴⁸ See Press Release, WildEarth Guardians, Destructive Forest Service ORV Plan Upheld (Oct. 9, 2012), available at http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=7989&news_iv_ctrl=1194 [hereinafter Destructive Plan Upheld].

⁴⁹ U.S. Forest Service, Record of decision for travel management of the Santa Fe National Forest, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5376151.pdf, (2012).

⁵⁰ Interview with Bryan Bird, WildEarth Guardians (Oct. 9, 2012).

⁵¹ 16 U.S.C. § 1536(a)(4) (1988).

The Public Trust Doctrine and Climate Change in New Mexico

Samantha Ruscavage-Barz¹



On May 4, 2011, 16-year-old Akilah Sanders-Reed and the environmental organization WildEarth Guardians filed a lawsuit against Governor Susana Martinez and the State of New Mexico (“the State”) to enforce the State’s duty to protect the atmosphere from the effects of greenhouse gases that drive climate change and to hold this vital natural resource in “trust” for present and future generations of New Mexicans.² The case relies on the long-established common law Public Trust Doctrine, under which states hold the natural resources within their boundaries in trust for their citizens and, as trustees, states must manage trust resources so as not to substantially impair their citizens’ interests in these resources.³ Plaintiffs allege that as a natural resource the “atmosphere” is subject to the protections of the Public Trust Doctrine, and should be managed to prevent substantial impairment caused by unlimited greenhouse gas emissions from sources in New Mexico. The New Mexico judiciary has not yet formally recognized the Public Trust Doctrine as part of this State’s common law. Thus, the claims raised in *Sanders-Reed v. Martinez* present issues of first impression in New Mexico.

The Public Trust Doctrine

The Public Trust Doctrine is “[a]n ancient doctrine of common law [that] restricts the sovereign’s ability to dispose of resources held in public trust.”⁴ “The genesis of this principle is found in Roman jurisprudence, which held that ‘by the law of nature’ ‘the air, running water, the sea, and consequently the shores of the sea’ were ‘common to mankind.’”⁵ The Public Trust Doctrine developed through English common law and was incorporated into the first American colonial charters.⁶ Following the American Revolution, the Public Trust Doctrine became part

of American common law. More than a century ago, in what has become the seminal public trust case, the U. S. Supreme Court recognized the Public Trust Doctrine was needed as a bulwark to protect resources too valuable to be disposed of at the whim of the legislature.⁷ Since then, various state courts have defined the Public Trust Doctrine as imposing an affirmative, inalienable obligation on states to protect public trust resources, and not to use the asset in a manner that causes injury to present and future trust beneficiaries.⁸

Unlike state courts in California, Hawaii, and Arizona, New Mexico state courts have not, until recently, been asked to adjudicate issues related to the Public Trust Doctrine and its application to natural resources in New Mexico. However, public trust principles are inherent in New Mexico law. The New Mexico legislature has implicitly recognized the State’s duty as trustee⁹ with respect to surface water, groundwater, moisture in the atmosphere, and salt lakes.¹⁰ Public trust principles are also implicitly expressed in the New Mexico Constitution.¹¹ Thus, judicial recognition that the Public Trust Doctrine is operative in

New Mexico would effectuate the State's role as trustee of these natural resources.

Air as a Public Trust Resource

Illinois Central established the principle that a public trust resource is any "property of a special character" that presents "a subject of public concern to the whole people of a state."¹² Over time, courts have expanded the Public Trust Doctrine beyond original societal concerns of commerce and navigation to other modern concerns such as biodiversity, wildlife, and recreation.¹³ Indeed, courts have "perceiv[ed] the Public Trust Doctrine, not to be 'fixed or static,' but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit."¹⁴ Whether a particular natural resource is part of the public trust is typically treated as a question of state law.¹⁵

Consistent with *Illinois Central*, the idea that the air or atmosphere is subject to the protections of the Public Trust Doctrine stems from the belief that the atmosphere is a shared resource "vital to human welfare and survival."¹⁶ Simply put, state citizens have an interest in seeing their airshed managed in a manner that will prevent substantial impairment to air quality and climate. The latter results from allowing unlimited levels of greenhouse gas emissions into the atmosphere, and is the basis for *Sanders-Reed* as well as for similar public trust cases filed in 11 other states and in federal court.¹⁷

Although the question of whether the atmosphere is a public trust resource is an issue of first impression in New Mexico, a handful of other states have generally recognized the applicability of the Public Trust Doctrine to air in their case law and constitutions.¹⁸ In a recent case similar to *Sanders-Reed*, Texas Judge Gisela Triana held that all natural resources, including the atmosphere, are protected under the Public Trust Doctrine and the Texas constitution.¹⁹ However, other state courts have been reluctant to extend the Doctrine to the atmosphere, choosing either to limit public trust protections to water resources or not to address the question at all and instead dismiss cases for lack of jurisdiction.²⁰

The Case

Of the 13 cases filed in state and federal courts to establish the atmosphere as a public trust resource and seek protections for that resource under the Public Trust Doctrine, *Sanders-Reed* is the only case that is proceeding to the merits phase. The State moved to dismiss the original com-

plaint on the grounds that application of the Public Trust Doctrine was precluded by New Mexico's statutes related to air quality, the requested relief violated the separation of powers doctrine, and the plaintiffs had not met the requirements of the Declaratory Judgment Act. During a hearing held on January 26, 2012, Judge Sarah Singleton stated her belief that "if it was confronted with the issue, the Supreme Court of New Mexico would apply the Public Trust Doctrine in New Mexico."²¹ Following up this statement, the Court provided guidance regarding the context in which the New Mexico Supreme Court would apply the Public Trust Doctrine to the atmosphere: where the legislature had failed to enact a statutory scheme to deal with the atmosphere, where the agency assigned to deal with the atmosphere was not following an existing statutory scheme, or where the public was excluded from the legislative or administrative process.²² Furthermore, the Court stated that appropriate relief in a Public Trust case would be limited to "the court telling a State agency, or the State as a whole, to consider certain things."²³ The Court would not substitute its judgment for that of the Environmental Improvement Board with respect to setting standards for evaluating or managing the atmospheric resource.²⁴ Finally, the Court provided Plaintiffs leave to amend their Complaint "to state a case that is more consistent with the way I am guessing the Public Trust Doctrine would be applied in New Mexico"²⁵

Plaintiffs filed an Amended Complaint requesting a declaratory judgment regarding the State's Public Trust obligations to protect the atmosphere as a public trust resource for the benefit of present and future trust beneficiaries, in particular the youth of New Mexico like Akilah Sanders-Reed. Plaintiffs also requested that the Court order the State to comply with its Public Trust obligation to protect the atmosphere by assessing the current degree of impairment to the atmosphere from New Mexico's greenhouse gas levels and producing a plan for redressing this impairment and mitigating the climate change impacts that flow from it. The State again moved to dismiss the action on the grounds that the Amended Complaint did not comport with the Court's instructions at the prior hearing.

Shortly after oral argument on the State's motion on June 29, 2012, Judge Singleton issued a written order granting in part and denying in part the State's motion to dismiss and request for an immediate appeal. Judge Singleton's order recognized that "Plaintiffs have made a substantive allegation that . . . the state is ignoring the atmosphere

with respect to greenhouse gas emissions.” The case is currently going forward on the issue of whether the state agency charged with protecting the atmosphere has met its Public Trust obligation.

Endnotes

¹ Samantha Ruscavage-Barz is a staff attorney for WildEarth Guardians and an adjunct professor at the University for New Mexico School of Law. She also represents the plaintiffs in *Sanders-Reed et al. v. Martinez et al.*, Case No. D-101-CV-2011-1514, which is currently pending in the First Judicial District Court in Santa Fe County, New Mexico.

² *Sanders-Reed et al. v. Martinez et al.*, Case No. D-101-CV-2011-1514.

³ See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892).

⁴ *Ariz. Ctr. for Law in the Public Interest v. Hassell*, 837 P.2d 158, 166 (Ariz. Ct. App. 1991).

⁵ *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 360 (N.J. 1984) (quoting J. Inst. 2.1.1 (T. Sandars trans. 1st Am. Ed. 1876)).

⁶ See *Martin v. Waddell*, 41 U.S. 367, 413 (1842) (discussing the public trust doctrine in colonial charters).

⁷ See *Illinois Central*, 146 U.S. at 453 (“The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”).

⁸ See, e.g., *Nat’l Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709, 728 (Cal. 1983); *N.J. Dep’t of Env’tl. Protection v. Jersey Central Power & Light Co.*, 336 A.2d 750, 759 (N.J. 1975) (“The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution in that trust corpus.”).

⁹ A state’s duty as trustee of its natural resources has been defined as: “the duty to ensure the continued availability and existence of [trust] resources for present and future generations,” and “incorporates the duty to promote the development and utilization of [trust] resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state.” *Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 1003 (Haw. 2006).

¹⁰ See N.M. Stat. Ann. §§ 72-1-1, 72-12-1, 75-3-3, 72-11-1 (1978).

¹¹ See Article XX, § 21 of the New Mexico Constitution (“The protection of the state’s beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare.”).

¹² *Illinois Central*, 146 U.S. at 453, 454.

¹³ See, e.g., *Nat’l Audubon Soc’y*, 658 P.2d at 719; *Ctr. for Biol. Diversity v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 599 (Cal. Ct. App. 2008); *Matthews*, 471 A.2d at 363.

¹⁴ *Matthews*, 471 A.2d at 365.

¹⁵ See *Montana v. United States*, 450 U.S. 544, 551 (1981).

¹⁶ Mary Wood, *Atmospheric Trust Litigation* in *Adjudicating Climate Change: Sub-National, National, and Supra-National Approached* (William C.G. Burns & Hari M. Osofsky, eds.) (2009, Cambridge University Press).

¹⁷ See <http://ourchildrenstrust.org/page/31/legal-action> for overviews and status of all 12 Atmospheric Trust state cases and the federal case. All of these cases were brought by youth plaintiffs, along with their parents, motivated by government inaction on climate change. The youth plaintiffs belong to the iMatter Movement, a youth-led campaign that empowers young people to advocate for solutions to deal with the effects of climate change. See <http://www.imatteryouth.org/>. Legal efforts were coordinated by Our Children’s Trust, a non-profit organization dedicated to protecting the Earth’s natural systems for current and future generations. See <http://ourchildrenstrust.org/about-us>.

¹⁸ See *Nat’l Audubon Soc’y*, 658 P.2d at 720 (recognizing that the “purity of air” is protected by the public trust); *Majesty v. City of Detroit*, 874 F.2d 332, 337 (6th Cir. 1989) (public trust includes air, water and other natural resources); Haw. Const. art. XI, §1; Pa. Const. art. I, §27.

¹⁹ *Angela Bonser-Lain, et al. v. Texas Commission on Environmental Quality*, Case No. D-1-GN-11-002194 (Tex. Dist. Ct. 2012).

²⁰ See, e.g., *Arnow v. Minnesota*, Case No. 62-CV-11-3952 (Minn. Ct. App. 2012); *Chernaik et al. v. Kitzhaber et al.*, Case No. 16-11-09273 (Or. Dist. Ct. 2012).

²¹ Transcript of Oral Argument at 48: 22-24 (Jan. 26, 2012).

²² Tr. 49: 4-22.

²³ Tr. 50:7-10.

²⁴ Tr. 50: 10-18.

²⁵ Tr. 50: 24-51:1.

Rafting and CLE: A Wild and Wonderful Combination

Jennifer Pruett, Section Member and former Section Chair

On Saturday August 18, 2012, the NREEL Section presented its first rafting CLE “field trip” on the Chama River and Ghost Ranch. Twenty-nine Board members, Section members and other interested attendees from New Mexico, Texas, and Colorado gathered promptly at Ghost Ranch at 8:30 a.m. NREEL Chair Josh Mann and Board member Adrian Oglesby started with an overview presentation on laws governing water management on both the Rio Chama and Rio Grande, explaining the many entities that manage, use, and own water rights to these rivers. Next, UNM professor Dr. Mark Stone and U.S. Bureau of Reclamation hydrologist Dagmar Llewellyn discussed the Rio Chama Optimization Study, including different management techniques and the varied uses and interests of Chama River water.

The group then moved to the Christ in the Desert Monastery to learn about its water and electric conservation projects, as well as the small brewery where the monastery develops and tests new products. As rafting guides and crews readied their boats at the put-in near the monastery, Steve Harris presented “The Cultural Impact of Water Management and Water Law on Water.” Harris’s unique perspective as a rafting company owner, river guide, and water management advocate, shed light on the many cultural uses and impacts of water management, only some of which were initially intended. Steve Hernandez added information throughout the day about the Lower Rio Grande Project, Elephant Butte, and pending adjudication litigation.

Finally, the group adjourned into five rafts and one inflatable kayak, and headed down the Chama River. Undeterred by occasional rain and rocks, attendees enjoyed the sounds of the river, challenging rapids, and the sublime beauty of the canyons and greenery along the river. Many water law discussions and stories were swapped, along with splashing, fun, and tasty snacks.



As with previous field trips, this program brought together lawyers, law students, and “civilians” to share multiple perspectives on water management, the protection of threatened and endangered species, and the competing interests of multiple uses of resources. Learning about water management on the river was not only great fun but extremely informative. The Section looks forward to similar innovative programs in the future, and is indebted to Josh, his Board, and his volunteer rafting guides for leading and presenting an unusual and enjoyable CLE program.



Natural Resources Speaker Series at UNM School of Law



In 2012, the NREEL Section continued its collaboration with the UNM School of Law to provide support for the Natural Resources Speaker Series. The speaker series is free and open to law students, lawyers, and the public; CLE credit is available at most lectures.

The speaker series included four well-attended lectures in 2012. On April 4, visiting scholar and professor Barbara

Cosens from the University of Idaho College of Law discussed integrated water resources management. The title of her talk was “Opportunities and Pitfalls for Achieving Integrated Water Resources Management in Native American Water Right Settlement Negotiations: the Walker River Mediation.” On September 12, Gary King, New Mexico Attorney General, presented a talk on “The Role of the Attorney General in Protecting Natural Resources in New Mexico.” On October 17, Cindy Murray, Brian Arellano, and Laura Sanchez spoke about renewable energy development. The title of their presentation was “Expanding and Integrating Renewable Energy in New Mexico: Challenges and Opportunities.” Finally, on November 14, the speaker

series presented James Gustave Speth, dean of Vermont Law School, who discussed his new book, “America the Possible.”

Suede Kelly, former Commissioner of the Federal Energy Regulatory Commission, will present the next lecture; watch for emails from the State Bar regarding upcoming presentations.



Natural Resources, Energy & Environmental Law Section

Board of Directors

Terry Copeland, Chair
theresa.copeland@sol.doi.gov

Josh Mann, Past-chair
jmann@usbr.gov

Kim Bannerman
kim.bannerman@nmlegis.gov

Eileen Gauna, UNM School of Law Liaison
gauna@law.unm.edu

Steve Hernandez
slh@lclaw-nm.com

Michelle Miano, UNM Student Representative
verheujo@law.unm.edu

Sally Paez
sally.paez@gmail.com

Tom Paterson
tpaterson@susmangodfrey.com

Luke Pierpont
lpierpont@gmail.com

Lou Rose
lrose@montand.com