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Editor's Note

In this edition of NREEL Vista, Anne Minard discusses the costs and benefits of marketing provisions contained in 33 existing tribal water settlements, as well as the roadblocks and delays to implementation of such provisions. Next, we follow up on a topic presented at the 2014 NREEL Winter CLE. Jan Biella walks us through the intricate process of classifying properties as cultural resources and the measures that must be taken by federal and state agencies to protect and minimize harm to such resources during development projects.

We welcome submissions from our law student and attorney readers. If you would like to submit an article for the Summer 2015 edition of NREEL Vista, please contact me at kay.bonza@state.nm.us. My sincere appreciation goes out to NREEL Board Members Adrian Oglesby, Sally Paez, and Samantha Ruscavage-Barz for their editorial support. The views expressed in these articles are those of the authors alone and not the views of the NREEL Section. Thank you for your continued support of the NREEL Section of the State Bar.

Kay R. Bonza, Editor

Tribal Water Settlements: Security or a Steal?[1]

*Anne Minard**

Tribal water settlements have seen consistent popularity in the past three decades, partly because they are preferred over exhaustive litigation that can linger for decades in the courts. Settlements are a path to the quantification of *Winters* water rights,[2] which when unquantified can cause uncertainty for neighboring water users. Settlements may also allow for off-reservation water marketing, which many believe would be barred by the Indian Intercourse Act[3] in non-settlement contexts.[4]

Settlements have garnered opposition from non-Indian water users fearing that settling tribal water rights will strain already over-appropriated basins.[5] Some pro-Indian scholars have also expressed fear that marketing provisions in settlements have primarily served neighboring municipalities wishing to bolster their own water portfolios.[6] Among the most critical has been Jesse Harlan Alderman, who wrote: "While tribes turn their 'paper rights' into 'wet water,' they are often shortchanged, and bound by agreement to market water to competing municipal economies off-reservation. The linchpin of most negotiated settlements is federal investment in otherwise politically unpalatable water delivery projects, made possible by the purported necessity of settling senior Indian claims. This form of exchange might critically be called 'water laundering.'"[7]

This article summarizes an assessment of marketing provisions in 33 existing Indian water settlements, found in 24 acts, listed following the text of this article.[8] The summary reveals that there are as many perspectives on the costs and benefits of water settlements as there are tribes that

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have participated in them. Tribes have profited in some cases from water leases, and in other cases, they have wished for more flexibility to market water. Despite this diversity of perspectives, the marketing provisions appearing in these settlements have common themes. Most limit any water leases or transfers to within state boundaries, and some only allow on-reservation transfers. A smaller number limit any water transfers to specific water basins. Most limit water leases to a term of years, and nearly all of the settlements expressly prevent the outright sale of water. Some require the approval of the Interior Secretary for leases, and some require that tribes draft tribal water codes, which must then be approved by the Interior Secretary before water marketing can begin. An analysis of existing settlements suggests that more must be done to (1) craft water marketing provisions that put tribes on equal footing with non-Indian water users, especially when settlements are being driven by non-Indian interests, and (2) identify and remove post-settlement roadblocks to implementation of water marketing provisions.

A group of settlements in Arizona illustrates the strong political pressure that off-reservation interests sometimes exert in the settlement process. These settlements, which involve the **Ak-Chin Community**, the **Salt River Pima Tribe**, the **Ft. McDowell Apache Tribe**, the **Gila River Indian Community**, the **Tohono O'odham Nation**, the **San Carlos Apache Tribe**, the **Yavapai-Prescott Indian Tribe** and the **White Mountain Apache Tribe**, implement specific water leases with neighboring municipalities and corporations. It is these leases where Alderman's criticism would seem most appropriate. But even among these Arizona leases, tribal experiences are mixed.

For example, Thomas Moriarty, Acting General Counsel for the **Fort Yavapai Apache Nation**, said the Fort McDowell Indian Community Water Rights Settlement Act of 1990 precludes tribal access to the Central Arizona Project (CAP) portion of the Community's water rights.[9] None of the 18,000-plus acre-feet of CAP water secured in the Fort McDowell settlement is being used at Ft. McDowell because the settlement, which was completed prior to Moriarty's arrival, requires the Community to lease its CAP water to the downstream city of Gilbert.[10] Unfortunately, the CAP leasing provisions aren't very lucrative for the Fort McDowell tribe. "We would like to be able to sell it for more," Moriarty said. "We have to order the water, and we have to pay for transmission cost when it comes down the CAP. It's on the order of $119 per acre-foot to get water down here. We sell it for a little more than that."[11]

On the other hand**,** the **Gila River Indian Community** has devised a way to profit from water marketing under the terms of its settlement. According to Jason T. Hauter, counsel for the Gila River Indian Community and a partner at Akin Gump Strauss Hauer & Feld LLP in Washington, D.C., "the provisions allow the Community enough flexibility to monetize some of its water rights."[12] He said in initial lease negotiations, municipalities and mining companies had more leverage than the Community. They conditioned their consent on the Community leasing or exchanging some of its water, and the terms seemed at first to be highly favorable for the non-tribal entities. This unequal bargaining power showed up especially in the terms-of-years lease limitations. Because of the assured water supply requirements under Arizona law by which developments are required to have a 100-year water supply, municipalities and other water users negotiated 100-year leases, tying up Community water for long periods of time.

More recently, however, the Community found a way to increase the flexibility and profitability of its water mar-

keting despite the limits of the settlement. "The Community has agreed to make roughly 94,000 acre-feet available for long-term leasing but does not like to tie up its water rights [in 100-year leases] because it does not afford much flexibility," Hauter said.[13] Instead, the Community has entered into a joint venture with the Salt River Project to create the Gila River Water Storage, LLC, which is tasked with marketing all the Community's long-term storage credits. The credits are transferrable by the tribe, and they are the primary mode by which the Community now markets its water. So far, the Community has stored all its water off-reservation, which is allowed by its settlement. Hauter believes the only other tribe that can do this is the **Tohono O'odham Nation**. Because of increasing demands for water and the savvy decisions described above, "in this post-settlement period the Community has more leverage and flexibility, and is only subject to what the market is willing [to] pay."[14]

Outside this subset of Arizona settlements, which require tribes to lease water to specific municipalities and corporations, marketing provisions in other Indian water settlements are more tailored to individual tribes. The experiences on three other reservations – the **Fort Hall Indian Reservation in Idaho**, the **Southern Ute Tribe of southern Colorado**, and the **Zuni Tribe of New Mexico and Arizona** – point out both warnings and hope for tribes still in settlement negotiations.

In Idaho, the Fort Hall Indian Water Rights Settlement Act allows the **Shoshone-Bannock tribes** to market water fairly freely on the reservation, which has been an asset especially because the state has enacted a moratorium on new wells that doesn't apply on Shoshone-Bannock lands, said Gail Martin, a paralegal with the Shoshone-Bannock Water Resources Department.[15] Therefore, agricultural industries are looking to the tribes for additional water on leased reservation lands. New leases will likely provide new groundwater for these customers and income for the tribes.[16] The only water available for off-reservation leasing, however, is surplus federal storage water left over after use at a large, agricultural project run by the Bureau of Indian Affairs (BIA) on the southern portion of the reservation.[17] Unfortunately, the tribe is at the mercy of the BIA, which decides how much water to use on the project in any given year. The tribal Water Resources staff is considering asking the BIA both to cut back on its use, and refrain from calling for water that isn't actually being used on the project.

The Fort Hall experience illustrates the post-settlement roadblocks that frequently delay the implementation of settlements. "Once our settlement was passed, everybody was happy and high-fiving," Martin said. "No one was around for the implementation; the tribe was on its own to do that. The federal agencies don't do a whole lot unless we put heat on them."[18] The Shoshone-Bannock tribes endured years of delay specifically related to an ongoing Department of Interior moratorium on the approval of tribal water codes; approval was required for the Fort Hall settlement to move forward. Fort Hall was able to use political channels to secure approval, but other tribes should consider re-negotiating any settlement provision that requires approval of tribal water codes.

The **Southern Ute Tribe** settlement demonstrates other types of delays inherent in the implementation process. Chuck Lawler, who heads up the Water Resources Division for the Southern Ute Tribe, said even though the settlement act was passed in 1990, the tribe has yet to explore much of its flexibility.[19] An original settlement agreement for the Tribe was implemented as a decree alongside seven other decrees governing water apportionment within several southern Colorado basins. Collectively, these decrees involved the Navajo Tribe, the San Juan Water Commission, the State of New Mexico, the Animas-La Plata Conservation District and the La Plata Conservation District. A major federal project connected to all of these decrees, the Animas-La Plata Project, ran into Endangered Species Act snags and was scaled back. "All of the project's beneficiaries took a hit to their water supplies," Lawler said. "The difference was made up by dollars."[20]

There were additional delays. Construction of the project reservoir, Lake Nighthorse, didn't start until 2004 and wasn't finished until 2009.[21] "Then it took a couple more years to fill," Lawler added. "And then it's taken a couple years to create organization, so here we are, just getting to the point of figuring out how to operate this reservoir with seven or eight different entities involved. The minute the ink is dry on a settlement doesn't mean 'here we go.' Our water attorney thought 30 years' work on water settlement was hard; the post-settlement stuff is just as hard, if not harder."[22]

As for the Southern Ute Tribe's marketing provisions, Lawler says they appear restrictive at first blush. For example, the holy grail for tribes is downstream marketing, he said. But Colorado has disallowed any water to

be marketed out of state, and Southern Ute is near the southern border, where its water supplies flow into New Mexico. "We're faced with that problem almost instantly, unless you could find some wiggle room on rules associated with exchange," he said. "Perhaps in order to satisfy a downstream call, the tribe could lease to someone in the state and the action would be on the reservation, but the impact might be somewhere else."[23]

Lawler said the tribe is poised to take advantage of the future water needs of its neighbors, should such flexibility prove feasible in the future.[24] He says the Southern Ute Tribe is fortunate to enjoy a positive working relationship with the State of Colorado, and he can imagine a scenario where the state would want to view some of the settlement restrictions creatively. "If everyone is trying to figure out what a call on the Colorado would look like, and Upper Basin states have an obligation to deliver water to the Lower Basin, the water rights most protected are pre-compact. Southern Utes have 1868 water rights. Is there [a] mechanism under which those water rights could be used to the benefit of Colorado while other rights are being curtailed? We're happy to talk. I think tribes are just getting used to partnering with people and coming to agreements."[25]

Among the tribes that have entered into water settlements, the **Zuni Tribe** speaks in the most glowing terms about its deal. This is instructive because the Zuni settlement was the most limited in purpose, and the Tribe entered negotiations with clear ideas of what it wanted. The 2003 settlement[26] covers claims only on the Little Colorado River, for water used on fee, reservation, and trust lands in Arizona. Tribal members do not live on the Arizona reservation; the tribal homeland is in New Mexico, and the Tribe's water rights claims in New Mexico are the subject of a separate and ongoing adjudication. Water marketing wasn't a priority for the Tribe in Arizona; instead, the Tribe wanted water to restore a wetland and riparian habitat for religious purposes.[27] The settlement allows off-reservation sales, leases and transfers of Little Colorado River water only if water rights are severed and transferred to other Zuni lands according to Arizona law.[28] Once water is used on fee lands, it is administered by the state.[29]

Jane Marx, attorney for the Zuni Tribe, said the settlement was premised on providing money to the Tribe to acquire water rights from willing sellers in the Little Colorado River basin in Arizona.[30] The Tribe will sever water rights from the land, and move the water to its Arizona reservation to accomplish the riparian habitat restoration goals. "Because the Tribe anticipated it might need flexibility in water delivery options, the settlement permits the Tribe to move its water to other of its lands in Arizona," Marx explained. "This is not about water marketing to outside entities or interests, but rather, flexibility in water use and delivery for the Tribe. This approach worked fine for the structure of this settlement and the Tribe's very specific needs; it likely would not work for a Tribe in another situation where the goal might be to maximize water quantity and flexibility in use."[31] While it might indeed be unusual for a tribe to want water for such a singular purpose, the Zuni settlement illustrates the potential for success when tribal negotiators enter negotiations with a clear sense of tribal priorities and water needs.

Even though the first tribal water settlements were created more than 40 years ago and marketing provisions began appearing more than 20 years ago, additional time is needed to reveal how the diverse array of marketing provisions will serve tribes. Future pressures – including drought, increasing demand and tightening supplies – may shed new light on tribal flexibility in marketing. In a worst-case scenario, political influence might enable non-tribal entities to hang on to tribal water supplies when long-term leases end. On the positive side, such pressures may give tribes powerful leverage at the bargaining tables of the future – and a wait-and-see approach, like that taken by Southern Ute's Tribe, could reveal doors thrown open to increased tribal negotiating power and profitability.

Chronological list of tribal water settlements

- Ak-Chin Community (1978/1992)
- Ute Indian Water Compact (1980)
- Fort Peck-Montana Compact (1985)
- Water Rights Compact Among Seminole Tribe of Florida (1987)
- Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988
- San Luis Rey Indian Water Rights Settlement Act of 1988
- Colorado Ute Indian Water Rights Settlement Act (1988)
- Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act (1990)
- The Fort Hall Indian Water Rights Settlement (1990)
- Fort McDowell Indian Community Water Rights Settlement Act (1990)

- Jicarilla Apache Tribe Water Rights Settlement Act (1992)
- Northern Cheyenne Reserved Water Rights Settlement Act (1992)
- Yavapai-Prescott Indian Tribe Water Rights Settlement Act (1994)
- Confederated Tribes of the Warm Springs Reservation Water Rights Settlement Agreement (1997)
- Chippewa Cree Tribe of the Rocky-Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act (1999)
- Shivwits Band of the Paiute Indian Tribe of Utah Water Rights Settlement Act (2000)
- Fort Belknap-MT Compact (2001)
- Zuni Indian Tribe Water Rights Settlement Act (2003)
- Snake River Water Rights Act of 2004(Nez Perce)
- Arizona Water Settlements Act of 2004 (Gila River Indian Community, Tohono O'odham Nation and San Carlos Apache Tribe)
- Pueblo of Isleta Settlements and Natural Resources Restoration Act (2006)
- Soboba Band of Luiseno Indians Settlement Act (2008)
- Duck Valley Water Rights Settlement of 2009 (Navajo Nation, Shoshone-Paiute Tribes of the Duck Valley Reservation)
- Claims Resolution Act of 2010 (White Mountain Apache Tribe, Crow Tribe, Taos Pueblo, Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque)

Endnotes

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[1] This article is adapted from a paper written for UNM Law Professor Jeanette Wolfley's writing seminar, called "The Natural and Cultural Resources of Tribes."

[2] *Winters v. United States*, 207 U.S. 564 (1908), held that enough water should be set aside for tribes to fulfill the purposes of reservations, with priority dates adhering to the date each reservation was formed.

[3] 25 U.S.C. § 415 (1955).

[4] *See* Jessica Lowrey, *Home Sweet Home: How the 'Purpose of the Reservation' Affects More Than Just the Quantity of Indian Water Rights*, 23 Colo. J. Int'l Envtl. L. & Pol'y 201, 225 (2012); Karen Crass, *Eroding the Winters Right: Non-Indian Water Users' Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering*, 1 U. Denv. Water L. Rev. 109, 126 (1997).

[5] Karen Crass, *Eroding the Winters Right: Non-Indian Water Users' Attempt to Limit the Scope of the Indian Superior Entitlement to Western Water to Prevent Tribes from Water Brokering*, 1 U. Denv. Water L. Rev. 109, 126 (1997).

[6] *Id.*

[7] *Id.*

[8] Tribal settlements were accessed at the Native American Water Rights Settlement Database (NAWRS), *available at* http://repository.unm.edu/handle/1928/21727.

[9] Telephone Interview with Thomas Moriarty, Acting Gen. Counsel, Fort McDowell Yavapai Apache Nation (Nov. 4, 2014).

[10] *Id.*

[11] *Id.*

[12] E-mail from Jason Hauter, Counsel for Gila River Indian Cmty., Akin Gump Strauss Hauer & Feld LLP, to author (Oct. 22, 2014).

[13] *Id.*

[14] *Id.*

[15] Telephone Interview with Gail Martin, Paralegal, Shoshone-Bannock Water Res. Dept. (Oct. 17, 2014).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Telephone Interview with Chuck Lawler, Div. Head, S. Ute Water Res. Div. (Oct. 30, 2014).

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. 108-34, 117 Stat. 782 (June 23, 2003).

[27] E-mail from Jane Marx, Attorney, Zuni Tribe, to author (Oct. 22, 2014).

[28] Zuni Indian Tribe Water Rights Settlement Act, *supra* note 26, at 795-796.

[29] *Id.*

[30] E-mail from Jane Marx, Attorney, Zuni Tribe, to author (Oct. 22, 2014).

[31] *Id.*

Legal Protections for Cultural Resources in New Mexico

*Jan Biella**

Mineral development projects have the potential to affect cultural resources—sites, structures, places and objects that have historic, archaeological, scientific, architectural or other cultural significance. Legal protections for cultural resources can be traced back for more than 100 years, but the modern era of preservation began with the passage of the National Historic Preservation Act (NHPA)[1] in 1966 and the New Mexico Cultural Properties Act (CPA)[2] in 1969. The Acts have been amended several times over the ensuing years, and in New Mexico the legislature passed additional statutes: the Prehistoric and Historic Sites Preservation Act[3]; the Cultural Properties Protection Act[4]; and the State-Tribal Collaboration Act[5] to complement the provisions of the CPA.

These Acts establish a broad framework for preservation of the irreplaceable heritage of the nation and state for future generations by taking into account the effects of an undertaking[6] on significant cultural resources. They outline processes by which cultural resources are listed in the National Register of Historic Places (National Register) and/or the New Mexico Register of Cultural Properties (State Register). Once listed, these cultural resources should be considered for protection from destruction or impairment. This article provides a brief discussion of the federal and state cultural resources consultation process of registering and listing a property as a cultural resource and some of the preservation challenges when undertakings may affect large, landscape-level cultural resources such as the Mount Taylor Traditional Cultural Property, a property determined eligible for listing in the National Register and listed in the State Register.

I. The Cultural Resources Consultation Process

The Historic Preservation Division (HPD), a division within the New Mexico Department of Cultural Affairs (DCA), is the entity responsible for coordinating historic preservation efforts in New Mexico under both federal and state laws. The director of HPD serves as the New Mexico State Historic Preservation Officer (SHPO) and is appointed by the DCA Cabinet Secretary with the consent of the Governor.[7] The responsibilities of the SHPO and HPD are defined under the NHPA and CPA, respectively, and include requirements to maintain a statewide inventory of significant cultural resources; to identify and nominate properties to the National Register and/or State Register; to prepare and implement a statewide historic preservation plan; to advise and assist federal and state agencies and local governments in carrying out their historic preservation responsibilities; to cooperate with the Advisory Council on Historic Preservation, federal and state agencies, local governments, organizations and individuals to ensure historic properties are considered in planning for development; to consult with federal and state agencies on federal and state undertakings; and to provide the public with information, education, training and technical assistance on historic preservation, among other programs.[8]

The Cultural Properties Review Committee (CPRC) is HPD's preservation board that sets policy and advises the SHPO. The CPRC consists of one statutory mem-

ber (state historian) and eight members appointed by the Governor including six individuals with demonstrated expertise in archaeology, history, architectural history, or architecture of New Mexico; one person who is a member of a New Mexico Indian nation, tribe or pueblo; and one person who is a resident of New Mexico and represents the general public.[9] The CPRC determines what constitutes historical, archaeological, scientific, architectural and other cultural significance for the purpose of identifying resources worthy of listing in the State Register.[10] The CPRC also reviews nominations of properties for listing in the National Register to determine whether they meet the criteria for listing, and then makes a recommendation to the SHPO on whether to approve or disapprove the nomination.[11]

The federal and state cultural resources consultation and review processes are similar. Federal and state agencies, local governments and other political subdivisions of the state consult with the SHPO when a project or undertaking may affect significant cultural resources.

A. The Federal Cultural Resources Consultation Process

The federal cultural resources consultation process is governed by Section 106 of the NHPA.[12] Under this section, federal agencies must take into account the effects of their undertakings on historic properties. Historic properties include districts, sites, buildings, structures and objects that are included in or eligible for inclusion in the National Register. These properties must meet specific eligibility and integrity criteria.[13] An independent federal agency called the Advisory Council on Historic Preservation promulgated regulations implementing Section 106, found in 36 CFR Part 800. Section 106 provides a process to take cultural resources into consideration as part of project planning, but it is important to note that it does not mandate preservation of those resources. There are four basic steps in the Section 106 process: (1) establish the undertaking and initiate the Section 106 process; (2) identify historic properties; (3) assess the effects of the undertaking on historic properties; and (4) resolve adverse effects of the undertaking on historic properties.[14] Section 106 is a process involving the federal agency, consulting parties and the public. Key consulting parties include the SHPO, Tribal Historic Preservation Officer (THPO),[15] Indian tribes, local governments, applicants and others with a demonstrated interest in an undertaking.

The National Park Service (NPS) administers the National Register that lists historic properties covered by the NHPA. The individual within the NPS who determines which properties are listed in or eligible for listing in the National Register is called the Keeper of the National Register. The NPS provides extensive guidance on evaluating specific sites, structures, districts and objects.[16] For purposes of Section 106, federal agencies may determine, with the concurrence of the SHPO or THPO for tribes that have assumed SHPO functions on tribal lands, whether a property is eligible for listing in the National Register. If there is disagreement between the federal agency and the SHPO/THPO on whether or not to list a property, the Keeper makes the final determination.

B. The State Cultural Resources Consultation Process

State undertakings require consultation between the state agency and the SHPO.[17] 4.10.7 NMAC, which implements Section 18-6-8.1 of the CPA, references the federal definition of "undertaking" and Sections 101, 106 and 110 of the NHPA, and outlines the state consultation process. Under Section 18-6-8.1, when a state agency has direct or indirect jurisdiction over any land or project that may affect a registered cultural property, that agency must afford the SHPO a reasonable and timely opportunity to participate in planning to preserve, protect and minimize adverse effects to the registered cultural property. Cultural resources may be evaluated for eligibility for listing in the State Register,[18] but unlike the federal process, they must be formally registered and listed to be covered under the CPA.[19] Under Attorney General Opinion No. 87-64, the SHPO may participate in a state agency's deliberations when the agency is considering issuance of a license that would affect a registered cultural property on private land.

A state agency or political subdivision of the state is also required to consult with the SHPO under NMSA 1978, Section 18-8-7 (1989) and 4.10.12 NMAC. Section 7 of the New Mexico Prehistoric and Historic Sites Preservation Act prohibits the expenditure of state funds for any program or project that requires the use of any portion of a property listed in the State or National Register and thus deemed to be a significant prehistoric or historic site, unless there is no feasible and prudent alternative to such use, and unless the program or project includes all possible planning to preserve and protect and to minimize harm to the significant prehistoric or historic site resulting from such use. The state agency or political subdivision of the state must notify the SHPO and request a

determination whether a project or program constitutes a use. Possible uses include physical destruction or changes to the property, alteration of its historical setting, and introduction of visual, audible or atmospheric elements that substantially impair the character of the property.[20]

C. The Role of Indian Tribes in the Federal and State Consultation Processes

The participation of Indian tribes in federal and state consultation processes has increased dramatically over the years, most notably after the 1992 amendments to the NHPA. Section 101(d)(6)(B) of the NHPA requires federal agencies to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement is not limited to federal undertakings on tribal land. Consultation is on a government-to-government basis.[21]

Efforts to improve tribal consultation by state agencies have increased over the last 10 to 15 years, but began formally with the issuance of two state executive orders in 2005,[22] followed by the passage of the State-Tribal Collaboration Act in 2009.[23] The Act requires cabinet-level state agencies to make a reasonable effort to collaborate with Indian nations, tribes or pueblos in the development and implementation of policies, agreements and programs of a state agency that may directly affect American Indians. Each cabinet-level state agency is required to appoint a tribal liaison who reports directly to the secretary of the agency. The Act requires an agency policy implementing the provisions of the act and annual reporting. The Indian Affairs Department is charged with maintaining a list of Indian nations, tribes or pueblos and state agency tribal liaisons.

II. Cultural Resources Preservation Challenges

Some of the biggest challenges to consultation on energy-related federal and/or state undertakings in New Mexico are those affecting large, landscape-level properties, especially ethnographic landscapes, including traditional cultural properties or places. A traditional cultural property (TCP) is a property that is eligible for listing because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.[24] TCPs are often associated with Indian tribes but also include other traditional cultural communities.[25] For example, the Cibola National Forest has identified a number of traditional Hispanic properties as well as Pueblo properties and places in the Sandia Mountains as TCPs.

While the state has a long history of identifying archaeological sites and historic buildings in New Mexico with nearly 200,000 properties in the records maintained by the SHPO, identification of TCPs began in the 1990s, with good documentation restricted to relatively few properties. TCPs vary in size but often are large, complex properties. Mount Taylor, for example, is a sacred mountain to many of the pueblos and tribes in New Mexico, and is also subject to federal and state undertakings. In 2007 and 2008, the Cibola National Forest consulted with Indian tribes and pueblos which led the Forest Service to make a determination that Mount Taylor was a traditional cultural property and met the criteria for National Register eligibility.[26] The SHPO concurred. At the same time, the pueblos of Acoma, Laguna and Zuni, along with the Hopi Tribe and the Navajo Nation, collaborated to prepare a nomination for formally listing the Mount Taylor TCP on the State Register. It was listed on the State Register on a temporary basis in 2008 and then on a permanent basis in 2009.[27] The listing was challenged, as reported in the summer 2012 issue of *Vista*.[28] Among other things, challengers argued that the Mount Taylor TCP could not reasonably be inspected, repaired, or maintained due to the diverse and constantly changing nature of the land.[29] The New Mexico Supreme Court upheld the listing but reduced the size of the property to remove the Cebolleta Land Grant property.[30]

For consultation purposes, it is critical to recognize that there are two Mount Taylor TCPs: the federal National Register-eligible property and the State Register-listed property. The supporting documentation for the two TCPs, while largely similar, is not the same. The most important differences are in the exterior boundaries and the exclusion of private property from the State Register listing. There is no comparable exclusion in the National Register-eligible TCP.

When agencies have undertakings that may affect the Mount Taylor TCP, federal agencies will use the information in the National Register eligibility report as part of their planning and decision-making along with new

information that may be provided by Indian tribes during the consultation process for the undertaking. State agencies will use the information in the State Register listing, supplemented by ongoing tribal consultation.

III. Conclusion

The federal and state consultation processes have been in place for more than four decades and during this time, federal and state agency staff, SHPOs, Indian tribes and others have had extensive experience and successes in preserving significant cultural resources while approving development projects. Landscape-level ethnographic properties present new challenges because of their size and their complexity. They are properties or places that are an integral, ongoing part of community life and viability. For many communities, particularly Indian tribes, information about TCPs is esoteric with strict limitations of what information can be shared even when these properties/ places are threatened by development. Open communication among federal and state agencies, SHPOs, Indian tribes, applicants and others is essential to minimize potential adverse effects of federal and state undertakings and to preserve the cultural and historic significance of resources.

Endnotes

* Deputy State Historic Preservation Officer/ New Mexico State Archaeologist.

[1] 16 U.S.C. §§ 470-470x-6 (2014).

[2] NMSA 1978, §§ 18-6-1 to -17 (1969, as amended through 2013).

[3] NMSA 1978, §§ 18-8-1 to -8 (1989, as amended through 2004).

[4] NMSA 1978, §§ 18-6A-1 to -6 (1993, as amended through 2004).

[5] NMSA 1978, §§ 11-18-1 to -5 (2009).

[6] A federal undertaking is defined as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y) (2014). For example, applications to drill that require issuance of a license or permit by a federal agency are federal undertakings and subject to review under the NHPA. For state undertakings, an undertaking means any project, activity or program that can result in changes in the character or use of a historic property; any modification other than ordinary maintenance, under the direct or indirect jurisdiction of a state agency, entity, board or commission of any land or structure which is entered in the state register of cultural properties or in the immediate vicinity of any such registered property. Undertakings include new and continuing projects, programs and activities under direct or indirect state jurisdiction on federal, state or private lands. 4.10.7.7(M) NMAC.

[7] NMSA 1978, § 18-6-8(B) (2004).

[8] *See* 16 U.S.C 470a(b)(3) (2014); NMSA 1978, §§ 18-6-7 and -8 (2004); NMSA 1978, § 18-6-8.1 (1993).

[9] NMSA 1978, § 18-6-4(A) (2005).

[10] NMSA 1978, §§ 18-6-5(A) and (B) (1986).

[11] 36 C.F.R. 60.6(j) (2014).

[12] 16 U.S.C. § 470f (2014).

[13] *See* 36 C.F.R. § 60.4 (2014).

[14] The Advisory Council on Historic Preservation has developed information and guidance on the Section 106 process, particularly in reference to the role of the applicant in the Section 106 process. *See* Section 106 Applicant Toolkit, *available at* http://achp.gov/apptoolkit.html.

[15] *See* 36 C.F.R. § 800.2(c)(2) (2014) for discussion on the role of Indian tribes and Tribal Historic Preservation Officers in the Section 106 process.

[16] Guidance from the National Register may be found at http://www.cr.nps.gov/nr/publications/index.htm.

[17] NMSA 1978, § 18-6-8.1 (1993).

[18] 4.10.18 NMAC.

[19] *See* NMSA 1978, § 18-6-8.1 (1993); 4.10.7.9 NMAC.

[20] 4.10.12.7(O) NMAC.

[21] *See* 36 C.F.R. § 800.2(c)(2) (2014).

[22] *E.O. 2005-003: Adoption of Statewide Tribal Consultation Policy on The Protection of Sacred Places and Repatriation* promoted the careful consideration of the preservation, disposition and repatriation of Native American human remains, cultural items, cultural property and sacred places, drawing on established federal and state laws. It directs selected executive state agencies to prepare a tribal consultation policy for the agency's programs with the guidance of the Indian Affairs Department. *E.O. 2005-004: Statewide Adoption of Pilot Tribal Consultation Plans* directed selected executive state agencies to adopt a pilot tribal consultation plan to involve tribal government, communities and/or tribal members within New Mexico. The Indian Affairs Department serves as adviser to the agencies and the plans are developed in consultation with tribal communities, governments and/or individuals.

[23] NMSA 1978, §§ 11-18-1 to -5 (2009).

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Fire in the Hole: What's Exploding in New Mexico Mining Law

By Laura Burns with Adrian Oglesby

The Natural Resources, Energy, and Environmental Law Section annual conference provided a broad overview of mining and mining law in New Mexico. The conference was very well received and will be available through video replay at the State Bar. Although it does not do the speakers justice, here is a brief summary of what they presented.

Introduction to Mining in New Mexico: History and Recent Events

Dr. Virgil Lueth, the Senior Mineralogist/Economic Geologist at the New Mexico Bureau of Geology and Mineral Resources, discussed the types of mining in New Mexico and their histories and economic impacts.

Prehistoric Native Americans in the New Mexico region mined turquoise and other deposits such as copper, azurite, ochre, salt, and mud. Precious metals and gemstones became the major mining targets of the early European arrivals.

Gold, silver, copper, and coal have provided enormous revenues to the state. The mining of potash, zinc, tin, molybdenum, uranium, and rare earth metals has been developed more recently. Lack of water has hampered development of mineral deposits throughout our history, and environmental damage from hydraulic mining and open pit mining was recognized very early.

Petroleum drilling began in the 1920s. Taxes on petroleum production account for 20 percent of the state's general fund and 95 percent of the revenue to the State Land Permanent Fund, which supports education. Fluctuations in petroleum prices have profound effects on the state's budget.

High-tech minerals or rare earth metals may be very valuable in New Mexico's economic future. Many components of renewable energy technologies come from mining metals like tellurium and beryllium, which occur in northern New Mexico.

Employment in mining has fallen in the last few decades, but remediation employment and reclamation funding and employment have increased.

Dr. Lueth noted that the following legal issues often arise at the nexus of mining and the law: land status or ownership; regulation and compliance issues; environmental and public safety issues; and workplace issues.

Claim to Reclaim

Stuart Butzier, Chair of the Natural Resources Department at the Modrall Sperling law firm, presented an overview of the regulatory scheme from the claim process to reclamation. He pointed out that a mining law practice is always in demand. While commodities may be in demand cyclically, there are balancing legal needs like environmental and closure issues.

When meeting initially with small mining prospectors and operators, it is important to help them understand the extensive and multi-faceted mining-related regulatory compliance issues. It may be important to explain the 1872 Mining Law and how to stake and perfect claims on federal public lands. You may need to discuss permitting issues on the federal and state level, as well as local or

county regulations that must be addressed. The environmental regulatory regimes have implications that must be addressed for a successful mining project.

Mining clients vary in sophistication and mining law background. The initial interview with a new mining client should explore these aspects of the proposed project:

- What minerals are being pursued? What type of claim is being pursued?
- Who owns the land and are there federal or state ownership issues?
- Is this claim within Indian territory or held in trust by the United States?
- Will the project be in a remote setting, close to a municipality, or situated within a city's limits?
- Is the claim within or near a Mexican or Spanish Land Grant?
- Are there any split-estate lands, requiring a need to negotiate with a surface owner?
- Is there a combination of all the above, creating checkerboard lands?
- Is there a clear understanding of the special characteristics of the target, such as a geological deposit with challenges of acid rock drainage?
- Will there be impacts to water? Who holds Clean Water Act jurisdiction?
- Is the proposed project near protected lands, lands of critical environmental concern, or are there any cultural resources suspected to be present?

Mining and Water Quality — The New Mexico Copper Rule

A panel discussion among lawyers representing various interests provided an overview of the controversy and litigation concerning the New Mexico Copper Rule adopted in 2013.

Dal Moellenberg of the Gallagher & Kennedy law firm noted that New Mexico is the nation's third-largest copper-producing state, which has an economic impact of $300 million. He explained that the Water Quality Control Commission first adopted groundwater discharge regulations in 1977. Since 2002 there has been significant controversy and litigation over the discharge rules. A regulatory framework for copper mines was adopted in 2013, which includes technical requirements for issuing groundwater discharge permits to copper mines in New Mexico. This rule has also been controversial and was appealed to the Court of Appeals. Their decision is pending.

Bruce Frederick of the New Mexico Environmental Law Center appealed the Copper Rule on behalf of two nonprofit organizations and other clients. He discussed how copper mines in New Mexico include enormous open pits, tailings impoundments, waste rock stockpiles, and leach stockpiles; all have an enormous impact on the quality of groundwater beneath them even after mining has stopped. For example, the groundwater contaminant plume of acid mine drainage at the Chino and Tyrone mines has polluted approximately 20,000 acres of groundwater. The Environmental Law Center is arguing in the Court of Appeals that the Copper Rule conflicts with the New Mexico Water Quality Act.

Tom Hnasko of the Hinkle Shanor law firm represented the Water Quality Control Commission in the appeal. He pointed out that copper mining is very dirty and that pollution of groundwater is a given. Technological means have not yet been developed to resolve the inevitable impacts to groundwater. Under the New Mexico Water Quality Act, discharge effects on groundwater are measured at any place of withdrawal for present or foreseeable future use. The Copper Rule requires the permitee to monitor water quality as close as possible around the perimeter and downgradient of each open pit, leach stockpile, waste rock stockpile, or tailings impoundment.

Assistant Attorney General **Tannis Fox** stated that the question at issue is whether allowing copper mines to contaminate groundwater above water quality standards in aquifers underneath mine sites and up to a point of compliance is consistent with the prohibition of contaminating present and future water supplies.

In the appeal of the Copper Rule, the Attorney General's experts took the position that the open pit capture zone will not contain the contamination and that capture systems are not completely effective, but pollution can be contained with synthetic liners under leach piles, waste rock piles, and tailings impoundments. Protecting groundwater while mining is an important goal in an arid state where ninety percent of drinking water comes from groundwater.

Mining and Water Quantity: New Mexico Copper's Water Rights in Lower Rio Grande Adjudication

Tessa Davidson of the Davidson Law Firm explained the background of the New Mexico Copper Corporation's (NMCC) mining operation and its claims for water

rights in the Lower Rio Grande. Her client, a large landowner in the area of the NMCC's proposed operations, is interested in the water quality and quantity in Perchas and Las Animas Creeks and in the Rio Grande and Caballo Reservoir.

NMCC's water rights claims are being litigated in the Lower Rio Grande water rights adjudication. NMCC has a claim to about 1,000 acre-feet per year in declared groundwater rights and 6,500 acre-feet per year acquired for main production wells. Some of the claim is perfected by beneficial use, and some is claimed under the Mendenhall doctrine. The Office of the State Engineer made a validity determination that considered the thirty-seven year lapse in development of the claimed Mendenhall water rights, but several parties have joined together to challenge the water rights of NMCC.

Rick Allen from the Office of the State Engineer has been working on the Lower Rio Grande adjudication for nine years. He presented an overview of the Mendenhall doctrine, given that the largest amount of the acreage disputed in the NMCC case is claimed to have a Mendenhall right.

New Mexico follows the prior appropriation doctrine. Those who appropriate water for beneficial use acquire a priority date associated with that right. In the event of a shortage, that date dictates their priority among other water rights holders. In 1961, the Mendenhall case allowed for a priority date to be established when work commenced to perfect a groundwater claim, rather than when water was first withdrawn, if there was diligent development. In agriculture, the standard for diligent development is two years. In some mining cases, the timing for diligent development of water rights may be more compressed.

Mining and Public Lands

Steve Hattenbach of the U.S. Forest Service Office of General Counsel provided an overview of issues associated with mining on federal lands, an important topic for our practitioners because half of the lands in New Mexico are public lands. Federal mining law was established to resolve ownership disputes and determine rights to mineral resources. The General Mining Law of 1872 gives private parties access to locatable minerals on federal lands. The Forest Service is primarily involved with surface locatable minerals. The Forest Service must consider the trust responsibility owed to Indian tribes, as the protection of sacred sites are frequently at issue when mining on federal lands. With the federal environmental protections established in the last fifty years, negative environmental impacts can be mitigated and minimized; however there will always be adverse environmental impacts from modern mining.

Greg Bloom, Assistant Commissioner of Mineral Resources in the State Land Office, discussed mining on public state lands. The Commissioner of Public Lands has the ability to lease, sell, or trade land under his or her jurisdiction. State trust lands comprise 11.6 percent of New Mexico, including 41 percent of the Permian Basin in New Mexico. Beneficiaries are state schools, hospitals, the penitentiary, and other public institutions. The State Land Office has six mineral program rules for general mining leases. Obtaining a general mining lease is subject to mineral program rules for an area open to general mining. The mining lease must be in the best interest of the state, must have a development plan, and must contain a reclamation plan. The Commissioner may inspect the site and must approve any sub-leasing or lease assignment.

Gas production is increasing on state lands. Coal mining is winding down in New Mexico and is primarily near the San Juan generating station. Potash revenue comes from two operators and has dramatically increased. Salt mining provides brine to add to drilling mud in drilling operations. Industrial mining is primarily sand and gravel aggregate. A new Geothermal Rule allows thermal leases for generation of electricity.

The Mount Taylor Traditional Cultural Property Designation

Jan Biella from the State Historic Preservation Office (SHPO) discussed the role of SHPO in enforcing the National Historic Preservation Act of 1966 and the New Mexico Cultural Properties Act of 1969. SHPO is created by both state and federal law and handles national and state traditional cultural property registry programs. A traditional cultural property (TCP) is listed in either the state or national register and is eligible for listing because of its association with the cultural practices or beliefs of a living community, which are rooted in that community's history and important in maintaining its continuing cultural identity.

Mount Taylor comprises the sacred sites of two Native American pueblos. **Ann Berkley Rodgers** of the Chestnut Law Firm represents Acoma Pueblo. She discussed how boundaries of the cultural property designation have been difficult to define. The tribal perspective is critical but the pueblos differ in their estimation of the importance of certain areas. The pueblos are committed to protection and mitigation of damage to their sacred lands on Mount Taylor. The mountain represents the pueblos' existence, identity, and self-image. Compliance with the needs of the pueblos can be very simple, and it may be inexpensive to provide satisfactory protection of sacred areas.

Stan Harris from Modrall Sperling represents private parties who are impacted by the traditional cultural property listings of Mount Taylor. The effect of the listings on a private party can come from both the listing at the state level and the determination that it is eligible for listing at the federal level. At the state level, inside the boundaries of a traditional cultural property, private land is excluded from the listing, but landowners must submit plans that may affect the designated area to SHPO for determination of adverse effects on the state-listed property. The federal eligibility determination covers the private property within the traditional cultural property. The state listing has been litigated and upheld. The federal eligibility determination has not. There are practical challenges to listing a property half the size of the state of Rhode Island, especially as the boundaries are still undetermined.

Steve Hattenbach of the U.S. Forest Service noted that once a federal determination of eligibility is made, federal protections kick in. However, determinations can change. Site-specific information could cause boundaries to be re-drawn. Some federal requirements can be triggered even if adverse impacts occur outside the boundary lines. He noted that plans have been submitted for mining on Mount Taylor, but mitigation plans have not been submitted. It usually takes two to three years to study the procedures proposed for mitigation.

In addition to the presentations described above, the mining conference also featured an excellent session on recent changes made to the New Mexico Rules of Professional Responsibility by Professor **Alex Ritchie** from our School of Law. The Board of the Natural Resources, Energy and Environmental Law Section is grateful for the significant contributions made by all of our speakers.

Legal Protections for Cultural Resources in New Mexico *continued from page 9*

[24] Patricia L. Parker & Thomas F. King, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, U.S. Dep't of Interior, Nat'l Park Serv., Nat'l Reg. Bull. 38 at 1 (1998).

[25] National Register Bulletin 38 provides guidance on traditional cultural properties and may be accessed at http://www.nps.gov/history/nr/publications/bulletins/nrb38/. There have been an increasing number of questions about traditional cultural properties over the last few years. The National Park Service has consulted with a variety of agencies, Indian tribes and Native Hawaiian Organizations, SHPOs and other parties who work with traditional cultural properties and is in the process of updating its guidance on TCPs, including a revision to Bulletin 38.

[26] The Cibola National Forest and SHPO National Register eligibility determination was based on: Cynthia Buttery Benedict & Erin Hudson, *Mt. Taylor Traditional Cultural Property Determination of Eligibility for the National Register of Historic Places*, Mt. Taylor Ranger Dist., Cibola National Forest (2008).

[27] *See* Property Number 1939: Mt. Taylor Cultural Property Application for Registration, N.M. Reg. of Cultural Props (June 5, 2009).

[28] Frank T. Davis, Jr., *When Size Matters: Properties Listed on the State Register*, Vista (State Bar of N.M. Nat. Resources, Energy and Envtl L. Sec.), Summer 2012, at 6-7.

[29] *Id.*

[30] *Rayellen Res., Inc. v. N.M. Cultural Props. Review Comm.*, 2014-NMSC-006, 319 P.3d 639.

Walter Stern Awarded Inaugural NREEL Lawyer of the Year Award

At a luncheon on December 5, 2014, the NREEL Section presented Walter Stern of the Modrall Sperling firm with the "NREEL Lawyer of the Year" award.

Mr. Stern was selected for the award because of his service to natural resources law, his devotion to education in the area, and his outstanding professionalism in the practice of law. His highly successful career has included practice in many areas in which the section is involved: public lands law; environmental law, including work with the National Environmental Policy Act; historic and cultural resources issues; Indian law; water law; oil and gas; and mining. He is a recognized expert on historic and cultural resources and co-authored the American Bar Association's book, as well as numerous papers, on the subject. He is also a recognized expert on Indian law, having delivered scholarly papers and represented a wide array of clients doing natural resources development projects or other business in Indian country.

Walter Stern accepting the Lawyer of the Year Award

Water Stern and NREEL Board of Directors 2014 Chair Kim Bannerman

Mr. Stern has demonstrated devotion to education and service to others practicing in the natural resources field as well. He previously served as President of the Rocky Mountain Mineral Law Foundation, one of the premier legal education organizations in natural resources law. He has also served as Chair of the NREEL Section in the past. Along with his service to the natural resources legal community, Mr. Stern is currently the President and Executive Committee Chair of Modrall Sperling and the past Chair of the firm's Natural Resources Department, Recruiting Committee, and Client Relations Committee. Mr. Stern's willingness to take on leadership roles within his firm and in natural resources law organizations demonstrates his exemplary service to the New Mexico Bar.

This is the first year the NREEL Section has presented such an award. Mr. Stern was chosen by a committee made up of members of the NREEL Section Board of Directors. The Board advertised the award and sought nominations from Section members. Mr. Stern was then selected from the list of nominations received.

The award recognizes a lawyer who, within his or her practice and location, is the model of a New Mexico natural resources, energy, or environmental lawyer. Additionally, the NREEL Section Board of Directors sought to award a candidate who promoted the stated purpose of the Section: (1) to provide Section members, the State Bar, and the public with information and dialogue concerning issues affecting natural resources, energy and the environment; and (2) to share ideas, legal research, and networking with the goal of providing the highest possible quality of legal services to New Mexicans in the areas of natural resources, energy, and environmental law.

Congratulations, Walter!

Natural Resources Lunch & Learn Lectures and Evening Speakers Series at UNM School of Law

In 2014, the NREEL Section continued its collaboration with UNM School of Law to bring in a variety of guest speakers for the Natural Resources and Environmental Law Lunch & Learn Series and the evening Natural Resources Speakers Series.

Attorneys David Yepa and Tom Luebben with UNM School of Law Professors Wolfley and LaVelle

The NREEL Section supported three lunchtime talks at UNM School of Law. In March, **Dave McCoy**, Executive Director of Citizen Action New Mexico, presented "Winning Environmental Battles – Kirtland Oil Spill and Sandia Nuclear Reactor Safety." Also in March, **Randy Pharo**, an oil and gas attorney with Davis Graham & Stubbs LLP, presented "The Successful Corporate Energy Lawyer: Thirty-Seven Years and Nine Jobs Later." In October, **Judy Calman**, an attorney with the New Mexico Wilderness Alliance, presented a lecture on endangered wolves. The Lunch & Learn lectures are free and open to law students, lawyers, and the public.

The evening Natural Resources Speakers Series included four well-attended lectures in 2014. On February 26, New Mexico Assistant Attorney General **Stephen Farris** and **Steve Hernandez**, attorney for the Elephant Butte Irrigation District and NREEL Section Board member, presented an overview of the U.S. Supreme Court case *Texas v. New Mexico* and ongoing litigation regarding Rio Grande water disputes. On March 26, the Honorable **Ignacia S. Moreno**, former Assistant Attorney General for the Environment and Natural Resources Division of the U.S. Department of Justice, led a dynamic discussion of environmental and natural resources issues in Indian Country. She reviewed the progress made to date as well as upcoming plans to address water adjudications, pollution in Indian country, climate change, tribal trust litigation settlements, sacred sites, and the safe and responsible development of a domestic source of energy. On October 22, the UNM School of Law welcomed New Mexico Environment Department Cabinet Secretary **Ryan Flynn**. Secretary Flynn provided an overview of the EPA's proposed rule aimed at reducing greenhouse gas emissions from existing and modified power plants under Section 111(d) of the Clean Air Act. On November 6, **David Yepa**, General Counsel for the Pueblo of Jemez, and **Tom Luebben**, a leader in aboriginal land claims and litigation, delivered a lecture on "Aboriginal Indian Title Land Claims – *Pueblo of Jemez v. United States*." The Natural Resources Speakers Series is free and open to law students, lawyers, and the public; CLE credit is available at most lectures. Commissioner **Norman Bay** of the Federal Energy Regulatory Commission will present the next lecture on March 20, 2015; look out for e-mails from the State Bar regarding upcoming presentations.

Three New Members Join the Natural Resources Section Board

The NREEL Section Board is pleased to announce its three new members as of January 2015. These new members were selected by the NREEL Nominating Committee because they will enhance the Board's mission of providing the State Bar and the public with information and dialogue regarding issues affecting natural resources, energy, and the environment.

Louis W. Rose, a shareholder at Montgomery & Andrews, P.A. in Santa Fe, will re-join the board for a three-year term. Mr. Rose has served on the NREEL board for many years and is a member of the Montgomery & Andrews' environmental and natural resources practice group. He formerly worked as an attorney for the New Mexico Environment Department and its predecessor agencies for sixteen years, and has been with his current firm since 1992. His practice is focused on environmental law, including air, groundwater and hazardous waste permitting and enforcement. Mr. Rose represents clients before federal and state agencies and courts on environmental permitting, rulemaking, and enforcement matters, as well as occupational health and safety matters.

We are pleased to have **Deana M. Bennett**, a shareholder at Modrall Sperling in Albuquerque, join the board for a three-year term. Ms. Bennett is a member of her firm's Natural Resources and Environment Practice Group. Her practice is focused on natural resource and energy development on public and tribal lands. Her experience includes permitting and environmental compliance efforts under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other related federal statutes. Ms. Bennett has worked on a number of utility matters and with renewable resource developers with siting issues on public, tribal, state, and local land.

Joining the board for a one-year term is **Sean FitzPatrick**, a former Assistant District Attorney with the 11th Judicial District Attorney's Office in Farmington. Although not practicing in the natural resources area on a daily basis, Mr. FitzPatrick is expected to add depth to the board based on his area of practice and his geographic location. Mr. FitzPatrick is a graduate of the University of New Mexico School of Law, where he obtained a Natural Resources certificate.

We are honored to have Lou Rose, Deana Bennett, and Sean FitzPatrick join us to serve the members of the NREEL Section.

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