

## Editor's Note

Welcome to the winter issue of NREEL Vista. In this edition, Elizabeth Reitzel explains the significance of R.S. 2477 federal rights-of-way and the process for validating a right-of-way amidst competing interests in the public domain. Next, Laura Sanchez-Rivet provides an overview of the Clean Power Plan and New Mexico's plan to achieve carbon dioxide reductions of 32% below 2005 levels by 2030.

We welcome submissions from our law student and attorney readers. If you would like to submit an article for the Summer 2016 edition of NREEL Vista, please contact Luke Pierpont at [lpierpont@gmail.com](mailto:lpierpont@gmail.com). Many thanks to former NREEL board member Kim Bannerman for her 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*

## “What Road Are We On?” R.S. 2477 Rights-of-Way and How to Identify if Your Client is Using One

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### I. Background

In an era of manifest destiny, the 1866 Mining Act included Revised Statute 2477 (hereinafter “R.S. 2477”) granting federal rights-of-way over the public domain for highway construction.<sup>1</sup> Under the law, the rights-of-way were created to encourage westward expansion and provide public access to natural resources. To ensure the public could easily take advantage of these federal grants, R.S. 2477 was self-executing and, therefore, the law did not require a patent or any other type of government action for creation of a right-of-way.<sup>2</sup> These roads appeared all across the western United States.<sup>3</sup>

After over 100 years of expansion, the Federal Land Policy and Management Act (“FLPMA”) repealed R.S. 2477 in 1976.<sup>4</sup> However, FLPMA provides that R.S. 2477 roads in existence before October 21, 1976 remain valid.<sup>5</sup> Since no government action was required to create an R.S. 2477 right-of-way, and the roads were “grandfathered” in without additional action under the FLPMA, any road that was created for use by the general public

before October 1976 could potentially be validated as an R.S. 2477 grant.<sup>6</sup> Today many of these roads are recognized as state and county roads, however there are even more roads that remain unrecorded with the potential to be validated. Accordingly, disputes often arise when access to a road is cut off or the ability to improve, maintain or modify the road is denied.<sup>7</sup> As these disputes arise, it is difficult to identify whether a valid R.S. 2477 right-of-way exists because the FLPMA did not outline a framework for the validation of these roads.

Disputes over validation of R.S. 2477 rights-of-way have led to legal conflict between various interests in the

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public domain. On one side is the federal government attempting to preserve an intact public domain that is not crisscrossed by roads that were, at times, rarely used. Those wanting to limit the validation of R.S. 2477 recognized grants also include environmental groups seeking to protect these areas from vehicle and human access.<sup>8</sup> On the other side, there are groups who seek to limit the public domain and would rather claim these roads as property for states, counties or private interest groups. For some of these groups, any historical road that once had wagon treads on it should be considered an R.S. 2477 grant. In fact, disputes often arise when a state or county seeks to validate a right-of-way because the roads highlight a context in which state sovereignty is tested.<sup>9</sup> At least three states have tried to pass legislation allowing validation of more R.S. 2477 rights-of-way, however these attempts have failed.<sup>10</sup>



of 2015, New Mexico legislators introduced House Bill 291, which would have funded a study to address problems concerning land access and to review the implications and costs of federal land being transferred to New Mexico for management.<sup>14</sup> Ultimately the bill didn't pass out

of committee, but it highlights the trend of states seeking transfer and validation of federal land over to the states.

R.S. 2477 right-of-way proponents in New Mexico also include rural communities seeking to maintain access to lands they have traditionally utilized for hundreds of years, such as land grants seeking to maintain access to forested areas. For this group, the issue is not whether the public domain should remain under federal control, but rather about the social justice implications of barring access to historically used roads. From a land-grant perspective these are roads the communities have always used, prior to New Mexico's inclusion in the United States, and under R.S. 2477 the roads were granted to the communities by the federal government. Thus, the method for validating R.S. 2477 grants is extremely important to these communities.<sup>15</sup>

## II. R.S. 2477 Rights-of-Way in New Mexico

In New Mexico, R.S. 2477 issues have surfaced in the context of state-tribal disputes, federal versus state jurisdiction, and with rural communities seeking to maintain access to land. An R.S. 2477 dispute recently halted the Aamodt Water Settlement in Santa Fe County, demonstrating the importance of validating these roads.<sup>11</sup> The non-profit group, Northern New Mexicans Protecting Land, Water and Rights filed the case on June 30, 2015, in the United States District Court for the District of New Mexico.<sup>12</sup> The group is seeking the court's declaration of valid R.S. 2477 grants for county roads crossing tribal land. While the lawsuit is pending, Santa Fe County has not been successful in negotiating the use of the alleged R.S. 2477 grants with the tribes. In turn the Aamodt Water Settlement, involving the tribes located in the Pojoaque Basin, has come to a standstill since the County is withholding its funding for the project while it pushes the tribes for a "global solution" to the issue regarding the rights-of-way.<sup>13</sup>

Local governments are not the only players in New Mexico bringing attention to R.S. 2477 grants and the struggle between federal and state law. Last year, during the First Session

## III. Validating an R.S. 2477 Right-of-Way

Because R.S. 2477 questions occur in many different contexts related to natural resource law, like the Aamodt water rights adjudication discussed above, it is important that natural resource practitioners are aware of how to address these rights-of-way. As explained above, R.S. 2477 and the FLPMA are silent regarding the elements necessary to prove a valid R.S. 2477 grant. For Tenth Circuit states, the seminal case on the issue is *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (2005) (hereinafter, "SUWA"). SUWA provides guidance for states, counties, federal agencies and other interested parties on classification of a road as an R.S. 2477 grant. In SUWA, an environmental group sued a Utah county for improper road construction and also sued the Bureau of Land Management ("BLM") for violating its duty to stop the improper construction.<sup>16</sup> At the heart of the matter was the determination of whether or not a valid R.S. 2477 right-of-way existed.<sup>17</sup> After considering the necessary elements that es-

establish a valid right-of-way, the Tenth Circuit Court of Appeals decided that an R.S. 2477 grant did not exist.<sup>18</sup> The court determined that for a valid R.S. 2477 grant to exist, the road must have been formed and accepted by the general public prior to October 21, 1976, and the road must have been in continual use since it was formed.<sup>19</sup> The court broke down these elements by defining the terms “formed,” “acceptance by the general public,” and “continual use.”<sup>20</sup>

### **A. Formation/Construction of a Right-of-Way**

In defining “formed,” the court established that where R.S. 2477 provides for the “construction of highways,” the word construction is equivalent to providing for the formation of highways.<sup>21</sup> However, formation of a valid R.S. 2477 road need not require mechanical construction, or even the use of tools. Rather, the “construction” of the highway should be reviewed relative to the methods that would have been appropriate to form a road for that particular use when the road was created.<sup>22</sup> *SUWA* provides examples of acceptable methods used for “construction” or formation of a valid R.S. 2477 road. In the court’s discussion of this issue, it cited an early California Supreme Court case where the public walking a specific route to form a road constituted a valid R.S. 2477 grant for a highway.<sup>23</sup> Though actual construction, implying the use of tools, is not required for a valid R.S. 2477 right-of-way, actual construction may be used as evidence that an R.S. 2477 road exists.<sup>24</sup>

### **B. Public Acceptance of the Right-of-Way**

In addition to the construction element, the court in *SUWA* found that the general public must have accepted the dedication of the right-of-way for a valid R.S. 2477 road to exist today.<sup>25</sup> To explore this standard the court reviewed Utah precedent to determine what would constitute acceptance by the general public. The court found that the public had to have *intent* to accept a grant.<sup>26</sup> In Utah, part of having the necessary intent to accept a grant was continued use of the road for at least 10 years.<sup>27</sup> Evidence of the public’s intentions may be illustrated by identifiable destinations, including towns, mines, community grazing pastures, well known areas for hunting or fishing, and schools.<sup>28</sup> Furthermore, the road must remain available for the public to use indiscriminately.<sup>29</sup>

### **C. Continual Use of the Right-of-Way**

Under *SUWA*, the final qualifier for determining whether an R.S. 2477 road exists is continual use.<sup>30</sup> Continual use

is considered within the context of the location of the road and the traditional uses of the road.<sup>31</sup> *SUWA* highlights that a valid R.S. 2477 road must be continually used as it was traditionally used.<sup>32</sup> For example, if a road was established to reach grazing pasture or for hunting, then the road must still be used to move cattle or for hunting purposes. The continual use element may be satisfied even if the road is not used year-round. For instance, a road that is only accessible during the summer and fall seasons may still satisfy the continual use element as long as the road is used annually at the times when the road is accessible.<sup>33</sup> The *SUWA* court did not clearly indicate how much the traditional use of a road may be modernized.<sup>34</sup>

### **D. New Mexico Law on R.S. 2477 Grants**

In *SUWA* the court held that federal law should be used first to interpret R.S. 2477. Then, state law should apply to fill in any gaps in the federal interpretation so long as it does not contradict federal law.<sup>35</sup> The applicable New Mexico statute, NMSA 1978, Section 67-2-1 (1905), defines a public highway as:

All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways.<sup>36</sup>

Since R.S. 2477 rights-of-way are roads dedicated to public use by the federal government, the statute is complimentary to the federal grants. However, the statute does not lend guidance on what elements will prove existence of a R.S. 2477 road.

In New Mexico, there are a limited number of cases addressing R.S. 2477 rights-of-way; most cases addressing these grants have held the roads at issue to be invalid R.S. 2477 grants or haven’t reached a discussion of the elements necessary to prove an R.S. 2477 grant.<sup>37</sup> The leading R.S. 2477 case in New Mexico is *Lovelace v. Hightower*, 50 N.M. 50, 168 P.2d 864 (1946) (hereinafter, “*Lovelace*”). In *Lovelace*, an individual claimed that a road crossing private property could not be blocked because the road was an alleged R.S. 2477 right-of-way or a prescriptive easement.<sup>38</sup> The court held that neither allegation was correct. However, the court determined that acceptance by the general public is crucial to have a valid R.S. 2477 right-of-way, especially in New

Mexico where a public highway may be established by use alone.<sup>39</sup> The actions of the general public should illustrate clear intent to accept the grant, even where acceptance is fulfilled by use alone.

*Lovelace* emphasizes that a few individuals may not accept a grant for an R.S. 2477 right-of-way; there must be evidence that the general public has and may use the road indiscriminately.<sup>40</sup> Unlike the decision in *SUWA*, the court in *Lovelace* specifically determined that ten years of use, or any prescribed period, was not necessary so long as the road remained in continual use; acceptance by the public was fulfilled by use alone.<sup>41</sup> While *Lovelace* provides guidance as to acceptance by the general public through use, it does not address the other necessary elements defined in *SUWA*, formation of a road or continual use. Thus, Tenth Circuit and state case law should be utilized to help make these determinations.

#### IV. Conclusion

R.S. 2477 rights-of-way are located across New Mexico and have been utilized for a variety of reasons including major county highways, roads for reaching community-grazing pasture, and roads for hunting. The validation of these roads may appear in a number of contexts within natural resource cases, making it important for natural resource practitioners to know how to identify a potential R.S. 2477 right-of-way for their clients. Currently, to identify a road in New Mexico as an R.S. 2477 right-of-way, a practitioner should review the FLPMA, the New Mexico statutory definition of a public highway, and the elements discussed in *SUWA* and *Lovelace*. Most importantly, an R.S. 2477 right-of-way (1) must have been established prior to October 21, 1976, (2) must have been formed and accepted by the general public, and (3) must remain in continual use based on its traditional uses. Finally, in New Mexico the public's use of a road alone is enough to establish the acceptance of an R.S. 2477 grant for a right-of-way.<sup>42</sup>

#### Endnotes

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<sup>1</sup> R.S. 2477, 43 U.S.C.A. § 932 (repealed 1976).

<sup>2</sup> *S. Utah Wilderness Alliance v. BLM*, 425 F.3d 735, 741

(10th Cir. 2005) (stating that the establishment of R.S. 2477 rights-of-way required “no administrative formalities”).

<sup>3</sup> See Utah Office of the Attorney Gen., *R.S. 2477: Why is Utah Involved in Roads Litigation?*, (Dec. 13, 2015), <http://attorneygeneral.utah.gov/r-s-2477-why-is-utah-involved-in-roads-litigation> (stating that in Utah there are 12,000 roads that counties and the state are seeking to validate).

<sup>4</sup> 43 U.S.C.A. § 1769(a) (1976).

<sup>5</sup> *Id.*; See also *S. Utah Wilderness Alliance*, 425 F.3d at 741 (stating that FLPMA had the effect of “freezing” R.S. 2477 rights as they existed in 1976).

<sup>6</sup> *Id.*

<sup>7</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 749.

<sup>8</sup> See George Cameron Coggins and Robert L. Glicksman, *The Overlay Doctrines and Mechanisms of Public Natural Resources Law*, 2 PUB. NAT. RESOURCES L. § 15:19 (2d ed. 2007) citing 59 Fed. Reg. 39216, 39216-17 (1994).

<sup>9</sup> See Utah Office of the Attorney Gen., *R.S. 2477: Why is Utah Involved in Roads Litigation?* (Dec. 13, 2015), <http://attorneygeneral.utah.gov/r-s-2477-why-is-utah-involved-in-roads-litigation>.

<sup>10</sup> See Andrew Stone, Note, *The Road Ahead: R.S. 2477 Right-Of-Way Claims After Wilderness Society v. Kane County, Utah*, 12 VT. J. ENVTL. L. 193, 211 (2010); see also GAO Opinion, *Recognition of R.S. 2477 Rights-of-Way Under the Department of the Interior's FLPMA Disclaimer Rules and its Memorandum of Understanding with the State of Utah*, B-300912 (Feb. 6, 2004).

<sup>11</sup> See generally T.S. Last, *Roads Fight Could Throttle Landmark Aamodt Water Deal*, ALBUQUERQUE JOURNAL, (Aug. 28, 2015), available at <http://www.abqjournal.com/635381/news/roads-fight-could-throttle-landmark-aamodt-water-deal.html>. The Aamodt Water Settlement is an agreement between the State, Santa Fe County and several tribes regarding Indian water rights and the construction of a regional water system. Due to the disagreement between Santa Fe County and the tribes located within the Pojoaque water basin, over the alleged R.S. 2477 rights-of-way, the county has halted its funding for the construction of the regional water system.

<sup>12</sup> *N. New Mexicans Protecting Land, Water and Rights v. United States*, Case No. 15-CV-00559 (D.N.M. 2015), available at <http://nnmprotect.org/docs/CR84/Lawsuit.pdf>.

<sup>13</sup> See generally Staci Matlock, *Pueblo, County at Impasse Over El Rancho Roads*, THE NEW MEXICAN (Aug. 20, 2015), [http://www.santafenewmexican.com/news/local\\_news/pueblo-county-at-impasse-over-el-rancho-roads/article\\_5867007d-7679-50d9-985d-45a4b38f69c5.html](http://www.santafenewmexican.com/news/local_news/pueblo-county-at-impasse-over-el-rancho-roads/article_5867007d-7679-50d9-985d-45a4b38f69c5.html).

<sup>14</sup> See An Act Relating To Public Lands; *Creating The New Mexico Federal Land Management Study Commission; Making An Appropriation*, H.R. 291 52<sup>nd</sup> Legis. (2015).

<sup>15</sup> *The Northern New Mexicans Protecting Land, Water and Rights* case specifically makes claims of violations of the Treaty of Guadalupe Hidalgo and grants of land. *N. New Mexicans Protecting Land, Water and Rights v. U.S.*, Case No. 15-CV-00559 (D.N.M. 2015).

<sup>16</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 742-44, 748 (determined that federal land management agencies may make an initial decision regarding the validity of an alleged right-of-way).

<sup>17</sup> *Id.* at 742-44.

<sup>18</sup> More recent opinions decided by the Tenth Circuit Court of Appeals have worked to clarify jurisdictional questions and discussed the appropriate use of the Quiet Title Act to clear title of an alleged R.S. 2477 road; however these more recent cases do not discuss the elements necessary to prove that an R.S. 2477 road exists. Part of the difficulty in cases involving R.S. 2477 rights-of-way has been the inconsistency in application of the statute between the Ninth and Tenth Circuits. In *Kane County v. United States*, 772 F.3d 1205 (10th Cir. 2014), Appellants requested cert. for a ruling that would clarify discrepancies between the judicial circuits, however this request was denied. See also *San Juan County v. United States*, 754 F.3d 787 (10th Cir. 2014) (providing Ninth Circuit R.S. 2477 precedence).

<sup>19</sup> See *S. Utah Wilderness Alliance*, 425 F.3d at 748, 781 (citing 43 U.S.C.A. § 1769(a) (1976) (stating that roads created prior to October 21, 1976 could be valid R.S. 2477 rights-of-way)); see also *Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 285 P. 646, 648 (1929) (explaining the continual use standard).

<sup>20</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 770-84.

<sup>21</sup> *Id.* at 777-82 (citing *Cent. Pac. Ry. Co. v. Alameda County*, 284 U.S. 463, 467 (1932)).

<sup>22</sup> *Id.* at 746.

<sup>23</sup> *Id.* at 764 (citing *McRose v. Bottyer*, 81 Cal. 122, 125, 22 P. 393 (1889)).

<sup>24</sup> *Id.* at 776 (citing BLM R.S. 2477 Administrative Determination(s)—San Juan County Claims at 5, Aplt. App. Vol. 1 at 249 (“San Juan Admin. Det.”); Garfield Admin. Det. at 4, Aplt. App. Vol. 2 at 307. See also Kane Admin. Det. at 5, Aplt. App. Vol. 2 at 371) (administrative decisions stating that actual construction may be used as evidence to prove the existence of a valid R.S. 2477 right-of-way).

<sup>25</sup> *Id.* at 772.

<sup>26</sup> *Id.* at 769 (citing Joseph K. Angell & Thomas Durfee, *A Treatise on the Law of Highways*, 64–131 (2d ed. 1868)).

<sup>27</sup> *Id.* at 771 (citing *Lindsay Land & Live Stock Co.*, 285 P. at 648).

<sup>28</sup> *Id.* at 783 (citing San Juan Admin. Det. at 5, Aplt. App. Vol. 1 at 249. See also Garfield Admin. Det. at 5, Aplt. App. Vol. 2 at 308; Kane Admin. Det. at 5, Aplt. App. Vol. 2 at 371) (administrative decisions describing situations where identifiable destinations were used as evidence to prove the public’s intent to accept an R.S. 2477 grant for a right-of-way).

<sup>29</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 776. See also *Luchetti v. Bandler*, 777 P.2d 1326 (1989) (illustrating that a few individuals do not constitute use by the general public).

<sup>30</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 769-82.

<sup>31</sup> See *S. Utah Wilderness Alliance*, 425 F.3d at 767.

<sup>32</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 748.

<sup>33</sup> *Id.* at 775-776.

<sup>34</sup> For instance, if a road was used for moving cattle and trucks were not used at the time the road was established, must trucks hauling cattle be allowed on that road once it is validated? This question, like the initial determination of validity, will most likely be answered by a land management agency as it applies other federal laws based on the location of the road. The initial determination of a road’s validity and its traditional uses are not binding on a court but may be used as evidence in the course of litigation. A court should give equal weight to evidence that is contrary to a federal agency’s initial findings regarding the traditional use of a road. *San Juan County v. United States*, 754 F.3d at 10.

<sup>35</sup> *S. Utah Wilderness Alliance*, 425 F.3d at 762-68. See also *San Juan County v. U.S.*, 754 F.3d 787, 791 (10th Cir. 2014) (stating that state law should supplement federal law).

<sup>36</sup> N.M. STAT. ANN. 1978, § 67-2-1 (1905).

<sup>37</sup> See generally *Percha Creek Min., LLC, v. Fust*, 189 P.3d 702 (N.M. App. 2008). See also *Hamaatsa, Inc. v. Pueblo of San Felipe*, 310 P.3d 631 (N.M. App. 2013) cert. granted sub nom. *Hamaatsa v. San Felipe*, 311 P.3d 452 (N.M. 2013).

<sup>38</sup> *Lovelace*, 168 P.2d at 865.

<sup>39</sup> *Id.* at 873.

<sup>40</sup> *Id.* at 866.

<sup>41</sup> *Id.* at 896.

<sup>42</sup> *Lovelace*, 168 P.2d at 873.

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# The Clean Power Plan: Compliance and Opportunity

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Laura E. Sanchez-Rivét\*

On August 3, 2015, President Obama announced the release of the U.S. Environmental Protection Agency's (EPA) final rule regulating carbon dioxide pollution emissions from existing power plants, also known as the "Clean Power Plan" (CPP). The CPP is the country's most ambitious effort to fight global climate change, and establishes the country's first-ever carbon dioxide pollution standards for power plants, believed to be the largest source of carbon dioxide emissions in the United States.<sup>1</sup> The measure is broad in terms of its nationwide reach, and important in positioning the U.S. as a global leader in fighting climate change, solidifying President Obama's legacy on the environment. The final rule is a culmination of thousands of comments received from stakeholders on the proposed rule.<sup>2</sup> While the rule is being challenged by 26 states and various industry petitioners who have asked the U.S. Court of Appeals for the District of Columbia Circuit to strike it down, New Mexico has indicated its intent to comply and has joined 17 other states and cities that have intervened in support of the CPP.<sup>3</sup> The rule includes a gradual approach to regulating carbon dioxide (CO<sub>2</sub>) pollution that seeks to reduce CO<sub>2</sub> to 32% below 2005 levels by 2030.<sup>4</sup>

## What is the CPP?

The CPP derives its authority from Section 111(d) of the federal Clean Air Act.<sup>5</sup> The rule establishes nationally uniform emission rates for coal-fired power plants and natural gas-fired combined cycle (NGCC) power plants.<sup>6</sup> Emission rates are calculated using a regional, rather than a state-by-state approach, which better reflects the reality of our interconnected electricity grid, and is an at-



tempt to level the playing field among states.<sup>7</sup> The rule regulates carbon dioxide emissions from electric generating units (EGUs) and authorizes emissions trading to assist in achieving reductions.<sup>8</sup> The rule sets state goals based on how efficiently electricity is generated, regardless of how much is consumed.

## The Plan for Achieving 32% CO<sub>2</sub> Reduction Below 2005 Levels by 2030

The CPP phases in emissions standards over a period of time, beginning in 2022 through 2030, by allowing states to develop their own emission reduction trajectory in a state plan.<sup>9</sup> The CPP establishes the "best system of emissions reduction" (BSER) for existing power plants in three areas: (1) heat rate improvement for steam EGUs; (2) shifting from higher-emitting steam EGUs to lower-emitting NGCC units; and (3) replacing electricity generation from fossil-fuel EGUs with new renewable energy.<sup>10</sup> The CPP also sets national CO<sub>2</sub> emissions performance rates measured in pounds of CO<sub>2</sub> per net megawatt-hour of electricity generated (lb CO<sub>2</sub>/Net Mwh). These performance rates are set separately for the two types of fossil fuel-fired EGUs: (1) fossil fuel-fired electric steam generating units, and (2) stationary NGCC plants.

The national emission performance rate for fossil fuel steam EGUs is 1,305 lb CO<sub>2</sub>/Net Mwh, while the national emission performance rate for NGCCs is 771 lb CO<sub>2</sub>/Net Mwh.<sup>11</sup> The CPP also sets state-specific rate-based (lbs of CO<sub>2</sub> per Mwh) and mass-based (measured in short tons of CO<sub>2</sub>) goals based on how many EGUs exist in each state. States may adopt approaches for emissions reduction that meet either the rate-based goal or the mass-based goal for the state.<sup>12</sup> A rate-based measure helps states

set an “emissions standards” approach, in which emissions are regulated at each EGU, while a mass-based approach permits states to use a “state measures” approach, facilitating mass-based trading in which emissions allowances can be assigned and traded.<sup>13</sup> When the latter state measures approach is used, a state must also include a contingent backstop of federally enforceable emissions standards that would be triggered if the state plan fails to achieve required emissions reductions.<sup>14</sup> The rule also allows, but does not require, multi-state approaches to achieve compliance.<sup>15</sup>

### What does this mean for New Mexico?

For a sparsely populated but natural resource-rich state like ours with multiple power plants, the announcement of this final rule no doubt caused anxiety. But New Mexico may have a shorter journey to achieve its goals than other states. State officials, utilities, clean energy advocates and environmentalists believe New Mexico is in a strong position to achieve the CO<sub>2</sub> reduction goals, thanks in part to Public Service Company of New Mexico’s (PNM) shutdown of half of the San Juan Generating Station (SJGS) to meet federal haze regulations.<sup>16</sup> The SJGS retirement is expected to cut that facility’s CO<sub>2</sub> emissions in half, so the state already appears to be on track to meet reduction goals. With a comprehensive plan from the New Mexico Environment Department (NMED), New Mexico will be well on its way to compliance, especially if New Mex-

ico seeks credit for utilizing a variety of technologies and approaches.

The CPP sets state-specific goals rather than source-specific goals. This provides New Mexico with maximum flexibility and latitude to achieve compliance, accounting for specific policies and needs, and considering New Mexico’s energy profile.<sup>17</sup> The EPA has established CO<sub>2</sub> performance rates for the two types of EGUs. According to the EPA, all state goals fall between 771 lbs CO<sub>2</sub>/Net Mwh (states with only natural gas plants) and 1,305 lbs CO<sub>2</sub>/Net Mwh (states with only coal/oil plants).<sup>18</sup> A state’s goal is based on how many of each of these two types of plants exist in-state. New Mexico has two major coal-fired power plants and numerous smaller coal-fired plants, as well as several natural gas-fired plants around the state.<sup>19</sup> New Mexico’s 2030 goal is 1,146 lbs CO<sub>2</sub>/Net Mwh, which is in the middle of the range, making New Mexico’s goal moderate compared with other states’ goals, according to the EPA.<sup>20</sup> New Mexico’s mass-based goal for 2030 in average annual CO<sub>2</sub> emissions is 12,412,602 short tons.<sup>21</sup> By comparison, New Mexico’s 2012 historic rate is 1,798 lbs CO<sub>2</sub>/Net Mwh, while its 2012 historic mass-based emissions is 17,339,683 short tons of CO<sub>2</sub>.<sup>22</sup> The EPA’s projections for 2020 for New Mexico, *without* the CPP, are 1,225 lbs CO<sub>2</sub>/Net Mwh and 12,177,632 short tons of CO<sub>2</sub>. Figure 1 shows New Mexico’s interim goals. According to the EPA, New Mexico’s goals are reasonable and achievable over the next 15 years.<sup>23</sup>

**Figure 1. New Mexico’s Interim (2022-2029) and Final Goals (2030)**

NEW MEXICO			
	CO <sub>2</sub> Rate (lbs/Net MWh)	CO <sub>2</sub> Emissions (short tons)	
2012 Historic <sup>1</sup>	1,798	17,339,683	
2020 Projections (without CPP)	1,225	12,177,632	
	Rate-based Goal	Mass-based Goal (annual average CO <sub>2</sub> emissions in short tons)	Mass Goal (Existing) & New Source Complement
Interim Period 2022-2029	1,325	13,815,561	14,342,699
Interim Step 1 Period 2022-2024 <sup>2</sup>	1,435	14,789,981	15,041,467
Interim Step 2 Period 2025-2027 <sup>3</sup>	1,297	13,514,670	14,142,829
Interim Step 3 Period 2028-2029 <sup>4</sup>	1,203	12,805,266	13,594,353
Final Goal 2030 and Beyond	1,146	12,412,602	13,229,925

1. EPA made some targeted baseline adjustments at the state level to address commenter concerns about the representativeness of baseline-year data. These are highlighted in the CO<sub>2</sub> Emission Performance Rate and Goal Computation TSD.

2, 3, 4. Note that states may elect to set their own milestones for Interim Step Periods 1, 2, and 3 as long as they meet the interim and final goals articulated in the emission guidelines. In its state plan, the state must define its interim step milestones and demonstrate how it will achieve these milestones, as well as the interim goal and final goal. See section VIII.B of the final rule preamble for more information.

Source: Clean Power Plan: State at a Glance – New Mexico (Aug. 3, 2015), <http://www3.epa.gov/airquality/cpptoolbox/new-mexico.pdf>

The CPP requires New Mexico, specifically the NMED, to develop its own state compliance plan to meet these goals. States are given latitude to determine their own emission reduction trajectories to minimize costs and encourage development of renewable energy technologies.<sup>24</sup> The State has until September 6, 2016 to submit its plan. However, if more time is needed, states are permitted to submit a draft plan and request an extension up to September 6, 2018. Allowing states to develop their own plans means those most familiar with local energy issues will craft the strategies for compliance. If the State fails to submit a plan, the EPA will develop its own federal plan for compliance with the goals. The NMED has indicated its intent to develop and submit a state plan, rather than letting the EPA establish a federal plan for New Mexico.<sup>25</sup>



Figure 1. The retirement proposal also includes replacement renewable-generated electricity which could result in credit for compliance with the CPP, if New Mexico uses a state measures standard.<sup>28</sup>

### Clean Technology Opportunities

#### How does PNM's San Juan Generating Station fit in?

As the NMED readies to develop a state plan, a significant case has been winding its way through the Public Regulation Commission (PRC) which has important implications for New Mexico's long-term compliance with the CPP. PNM's application for retiring two of four units of the San Juan Generating Station (SJGS), a coal-fired power plant located northwest of Farmington, was pending before the PRC for over a year. The retirement of the two units is an effort to comply with the State Implementation Plan requirements of another section of the Clean Air Act on regional haze.<sup>26</sup> PNM proposed to replace the power from the two units with a mix of electricity from Palo Verde Nuclear Generating Station in Arizona, electricity generated from the remaining units at SJGS, and solar-generated electricity.<sup>27</sup> While there were many twists and turns in the case, several parties - including environmental organizations, the Attorney General, and a renewable energy industry association - joined PNM in a stipulated agreement. The retirement of these two coal units was approved by the PRC on December 16, 2015.

Retirement of these two coal-fired units is an important outcome for complying with New Mexico's State Implementation Plan for Regional Haze and the CPP. Removing these two units will mean less CO<sub>2</sub> emissions by 2018, an important step toward achieving the goals in

Beyond compliance, the CPP also provides an opportunity to deploy certain energy technologies that can help transform New Mexico's economy into a robust and diverse energy market. New Mexico can continue to rely on utility programs that have already been created to address emissions, while also developing other programs and employing strategies to reduce consumer costs, minimize stranded assets, and increase private investment in renewable energy and energy efficiency technology and businesses.<sup>29</sup> These technologies include solar, wind and other renewable energy, as well as demand-side energy efficiency programs.<sup>30</sup>

Moreover, we are seeing historically low prices for renewable energy generation. In the last five years, utility scale solar and wind have seen an average price decline nationally of 78% and 58%, respectively.<sup>31</sup> A national association of business leaders called Advanced Energy Economy (AEE) works on "transforming public policy to enable rapid growth of advanced energy companies."<sup>32</sup> AEE's white paper *Advanced Energy Technologies for Greenhouse Gas Reduction* outlines the benefits of 40 advanced energy technologies and services that could be used by New Mexico and other states.<sup>33</sup> According to the association, by incorporating these advanced energy technologies into state plans, "states can not only meet carbon reduction goals but also improve the efficiency, resiliency, and cost effectiveness of service provided by electric utilities."<sup>34</sup> Among the technologies and services discussed by AEE are: waste energy recovery, building energy management systems, fuel cells, electric vehicles, energy storage, smart grid data management and analytics, voltage and volt-ampere reactive optimization, and many others - a wide variety that should be considered for implementation in New Mexico. Some of these advanced energy technologies are hardly new, and some are emerging and have yet to be widely deployed in the industry. Nevertheless, given that compliance with the CPP will be gradual through 2030, renewable energy and advanced technologies merit

consideration for our state plan to provide opportunities for spurring economic development in advanced energy.

## Conclusion

New Mexico is in a strong position to develop a workable state plan to meet the CPP's emissions goals for the State. New Mexico has the chance to meet the requirements of the CPP while also repositioning for advanced energy investments. In this way, our state will not only ensure a clean energy future with better air quality, but also transform from a 19th century fossil-fuel based economy, into a modern and diverse clean energy economy.

## Endnotes

\* Laura E. Sanchez-Rivét is an attorney at Cuddy & McCarthy, LLP and a regular panelist on the TV show *New Mexico in Focus* on New Mexico PBS. E-mail: lsanchezrivet@cuddymccarthy.com.

<sup>1</sup> The White House Office of the Press Secretary, *Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plants* (Aug. 3, 2015), <https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards>.

<sup>2</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 65,120 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter *Rule*].

<sup>3</sup> Robin Bravender, *Clean Power Plan: 44 States Take Sides in Expanding Legal Brawl*, E&E NEWS (Nov. 4, 2015), <http://www.eenews.net/stories/1060027463>.

<sup>4</sup> *Rule*, *supra* note 2, at 64,665.

<sup>5</sup> 42 U.S.C. §§ 7401 *et seq.* (1970).

<sup>6</sup> *Rule*, *supra* note 2, at 64,811.

<sup>7</sup> *Id.* at 64,665.

<sup>8</sup> "Emissions trading" is a market-based approach to pollution reduction by authorizing entities a certain amount of emissions during a given compliance period. The credit or allowance is a fully marketable commodity that can be bought, sold, traded or banked for future years' compliance. See U.S. Environmental Protection Agency, Allowance Markets, <http://www.epa.gov/airmarkets/allowance-markets> (last visited Dec. 11, 2015).

<sup>9</sup> *Rule*, *supra* note 2, at 64,666.

<sup>10</sup> Ben Carrier & Kevin Poloncarz, *EPA Finalizes Ambitious Clean Power Plan*, PAUL HASTINGS: STAY CURRENT (Aug. 2015), [available at http://www.paulhastings.com/](http://www.paulhastings.com/)

[docs/default-source/PDFs/stay-current-epa-finalizes-ambitious-clean-power-plan.pdf](http://www.paulhastings.com/docs/default-source/PDFs/stay-current-epa-finalizes-ambitious-clean-power-plan.pdf).

<sup>11</sup> *Rule*, *supra* note 2, at 64,667.

<sup>12</sup> *Id.* at 64,668.

<sup>13</sup> *Id.* at 64,667.

<sup>14</sup> *Id.* at 64,668.

<sup>15</sup> *Id.* at 64,665.

<sup>16</sup> Kevin Robinson-Avila, *NM Opts to Comply with Pending Carbon Rules*, ALBUQUERQUE JOURNAL (Aug. 3, 2015), [available at http://www.abqjournal.com/622100/biz/nm-opts-to-comply-with-impending-carbon-rules.html](http://www.abqjournal.com/622100/biz/nm-opts-to-comply-with-impending-carbon-rules.html).

<sup>17</sup> *Rule*, *supra* note 2, at 64,672.

<sup>18</sup> Clean Power Plan: State at a Glance – New Mexico (Aug. 3, 2015), [available at http://www3.epa.gov/air-quality/cpptoolbox/new-mexico.pdf](http://www3.epa.gov/air-quality/cpptoolbox/new-mexico.pdf) [hereinafter *State Glance*].

<sup>19</sup> See U.S. Energy Information Administration's New Mexico State Energy Profile, <http://www.eia.gov/state/print.cfm?sid=NM>; New Mexico Power Plants, Dreaming New Mexico (2012), [http://www.bioneers.org/wp-content/uploads/2014/08/DNM\\_PowerPlants\\_For\\_Use\\_With\\_All\\_Levels.pdf](http://www.bioneers.org/wp-content/uploads/2014/08/DNM_PowerPlants_For_Use_With_All_Levels.pdf).

<sup>20</sup> *State Glance*, *supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Rule*, *supra* note 2, at 64,672.

<sup>25</sup> New Mexico Environment Department, Clean Power Plan, <https://www.env.nm.gov/aqb/CPP.htm> (last visited Dec. 11, 2015).

<sup>26</sup> In the Matter of PNM's Application for Approval to Abandon San Juan Generating Units 2 and 3, NMPRC Case No. 13-00390-UT, Executive Summary at 1 (Dec. 20, 2013).

<sup>27</sup> *Id.*; see also PNM's Supplemental Stipulation, NMPRC Case No. 13-00390-UT (Aug. 13, 2015).

<sup>28</sup> PNM's Supplemental Stipulation at 5.

<sup>29</sup> *Rule*, *supra* note 2, at 64,666.

<sup>30</sup> *Id.*

<sup>31</sup> *Lazard's Levelized Cost of Energy Analysis - Version 8.0*, LAZARD (Sept. 2014), [https://www.lazard.com/media/1777/levelized\\_cost\\_of\\_energy\\_-\\_version\\_80.pdf](https://www.lazard.com/media/1777/levelized_cost_of_energy_-_version_80.pdf).

<sup>32</sup> Advanced Energy Economy, <https://www.aee.net/about/aee> (last visited Dec. 11, 2015).

<sup>33</sup> *Advanced Energy Technologies for Greenhouse Gas Reduction*, ADVANCED ENERGY ECONOMY (2014), <https://www.aee.net/initiatives/epa-1111d.html#epa-reports-and-white-papers>.

<sup>34</sup> *Id.*

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# Gregory J. Nibert Awarded 2015 NREEL Lawyer of the Year Award

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The 2015 “NREEL Lawyer of the Year” award was given to Gregory J. Nibert of the Hinkle Shanor law firm in Roswell, New Mexico. Mr. Nibert was selected for the award because of his service to oil and gas law, his devotion to the NREEL Section and the Rocky Mountain Mineral Law Foundation, and his outstanding professionalism in the practice of law.

Mr. Nibert is a recognized specialist in oil and gas law and has delivered papers and speeches to a wide range of organizations, including the Rocky Mountain Mineral Law Foundation, the American Association of Professional Landmen, the University of Texas School of Law Oil, Gas, and Mineral Law Institute, and the Center for American and International Law.

Mr. Nibert has demonstrated devotion to education and service to others practicing in the oil and gas field as well. He has served on the Rocky Mountain Mineral Law Foundation Board of Directors for several years, one of the premier legal education organizations in natural resources law. He also previously served as Chair of the NREEL Section and was on the NREEL Section Board for many years. Along with his service to the legal community, evidence



*Gregory J. Nibert*

of Greg’s commitment to public service and the public interest is manifested in his current service as a Chaves County Commissioner, and his past service as President of the Roswell Chamber of Commerce and a member of the Roswell Independent School District Board of Education.

Mr. Nibert 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. Nibert 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, Greg!*

# News and Updates



*Rio Grande del Norte National Monument. Photo credit: Sally Paez*

membership meeting and recognized the 2015 “NREEL Lawyer of the Year,” attorney Greg J. Nibert. In addition, the outgoing chair, Adrian Oglesby, concluded his year of Section leadership and passed the proverbial baton to the incoming chair, Sally Paez. Please send any suggestions for future CLE topics or other NREEL activities to Sally Paez at [supsap@nmcourts.gov](mailto:supsap@nmcourts.gov). The Section is here to serve you, and we welcome your input!

*Sally Paez, 2016 NREEL Section Chair*



*NREEL and ELS Fall Mixer at UNM*

## 2015 NREEL PUBLIC LANDS CLE

The NREEL Section sponsored a full-day CLE program on December 18, 2015, entitled Navigating New Mexico Public Lands Issues. Approximately seventy people attended the program, either in person or by webcast, including about sixty attendees and ten speakers. Topics included current federal regulatory issues, an update from the State Land Office, a presentation about recent initiatives to designate and transfer federal public lands, discussion of how the Endangered Species Act impacts energy development, an assessment of past and present management at the Valles Caldera National Preserve, and an ethics presentation focused on conflicts of interest. During the lunch hour, the Section held its annual full

## ELS AND NREEL SOCIAL MIXER

The NREEL Section combined its fall mixer with UNM School of Law’s Environmental Law Society career mixer on Thursday, October 15, 2015. Approximately 85 practicing attorneys, experts and students attended the event. Attorneys hailed from federal and state government agencies, non-profit entities, and several area firms. The support from the Rocky Mountain Mineral Law Foundation and a contribution from the NREEL Section provided for food, beverages, and a musician. Attendance did not wane until the end of the two hours, and feedback from numerous students and attorneys indicated that guests enjoyed themselves very much. Thanks to everyone who attended!

*Anne Minard, ELS Co-President*

## 2015 NREEL RETREAT



*Valles Caldera National Preserve. Photo credit: Sally Paez*

In August 2015, the NREEL Section Board spent a weekend together at the Valles Caldera National Preserve. Activities included a CLE lecture on the Jemez Pueblo title claim to the Valles Caldera delivered by attorney Karl Johnson, an elk watching tour, and a tour of stream restoration sites by Friends of the Valles. The Section looks forward to hosting similar programs for Section members in the future, and extends a special thanks to 2015 Chair Adrian Oglesby for organizing a wonderful event.



*From left: Luke Pierpont, Kelsey Rader, Deana Bennett, Sally Paez, Danny Paez, Kay Bonza, Eric Bonza, Adrian Oglesby and Maxine Paul*



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