

GreenFireReport

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A publication of the New Mexico Environmental Law Center, a non-profit, public interest law firm dedicated to protecting New Mexico's environment and communities.

nmelc.org

Billions of gallons of Water at stake *NM Officials Consider Request for Water Appropriation*

by Shelby Knox

We sat in benches that looked remarkably like pews. There were about 100 of us in the Socorro County courthouse on February 7 – a smattering of reporters and me sprinkled in a crowd that mostly hailed from Catron County, where an Italian billionaire seeks to claim more than 17 billion gallons of water annually. In what seemed like an oddly short hearing – just over an hour – the dozen or so attorneys in the room argued the points of law in one of the most important water battles in recent memory.

"In essence, Augustin Plains Ranch simply wrote a very large number [of acre-feet] on a piece of paper and listed every potential need for water that might arise sometime in the future within a vast area of the state," explained Law Center attorney Bruce Frederick, who represents most of the people in the gallery.



© photo courtesy of Debra Anderson

Judge says State Commission can't reconsider Pit Rule...yet

Stories continued on pg 2 >

Shortly before her election, Susana Martinez promised that "As governor, I would absolutely remove the Pit Rule as a regulation." Her promise took a stumble in February, after District Court Judge Raymond Ortiz granted us a rare "writ of prohibition" in the case.

Industry appealed the Pit Rule in state District Court in July 2008; that case is ongoing. Leery of an uncertain outcome, the New Mexico Oil & Gas Association (NMOGA) took a new tack late last year in its efforts to sink the Rule. Put this case on hold, its attorneys asked District Court Judge Barbara Vigil, and the Oil Conservation Commission will adopt our new proposed Pit Rule. Then the Court won't have to worry about this case anymore. Judge Vigil ordered a stay of the appeal in January 2012.

On the same day as Judge Vigil handed down her decision, NMELC attorney Eric Jantz filed a petition for the writ. "One of the basic tenets of our democratic system is the separation of powers," explains Eric. "Once a regulation has been appealed, the executive branch is done making decisions in the case. At that point, it's up to the courts to decide what happens." A month later, Judge Ortiz issued the writ of prohibition.



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Photo: courtesy, State of New Mexico

NMELC challenges the Martinez Administration's efforts to scuttle landmark energy conservation regulations.

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© photo courtesy of Juana Colón

Playing Defense
Sometimes the best defense is a good lawyer.

– Story on page 4

"We reached the old wolf in time to watch a fierce green fire dying in her eyes."

– Aldo Leopold
A Sand County Almanac

Summer storm in the San Augustin basin.



© photo courtesy of Shelby Knox

In conclusion, Bruce argued that Augustin Plains Ranch “is a private, for-profit corporation that is seeking through its application to have more unlimited power over our water than any person, city, county or public utility has ever had.

Water, continued from pg 1 >

“It took me more than two hours to drive down from Santa Fe, and I never left the area of use proposed by the Ranch.”

The hearing centered on Motions to Dismiss the Ranch’s water rights application. We, along with the Middle Rio Grande Conservancy District, filed those motions in February 2011. The Cliff’s Notes version of our motion: water speculation in New Mexico is

illegal, so speculative applications should be dismissed.

Bruce and opposing counsel agreed on one point: the State Engineer’s decision will be felt throughout our state for years to come. It will shut the door on water speculation for the coming years. Or it could lead to a decision that would, literally, open the floodgates for the privatization of New Mexico’s water (or,

as argued by the Ranch’s lawyer, safeguard free enterprise in our state.)

Hearing Officer Andrew Cone is working on his recommendation. He will forward it to State Engineer Scott Verhines, who will decide whether or not to dismiss the application, or to head into an evidentiary hearing in the case. We expect a decision on the motions to dismiss this Spring.



Attorney Eric Jantz defending the Pit Rule in state district court.

© photo courtesy of Juana Colón

Pit Rule, continued from pg 1 >

Without the writ, it is almost certain that the Commission (2 of its 3 members were appointed by Governor Martinez) would adopt the industry-sponsored Pit Rule, which guts the Rule’s substantive environmental provisions. If the writ remains in place, we’ll return to court. This issue of separation of powers is also being argued in our climate change cases (see page 4-5).

“With these short-sighted efforts to kill specific environmental protections, the Administration is going to cause massive knots of litigation and rulemaking gridlock,” says Jantz. “If the Administration succeeds, the environment won’t win, the taxpayers won’t win, and even industry won’t win. The only ones who will win are the high-paid attorneys who are working

for our opponents.”

Judge Ortiz will hear oral arguments in Santa Fe District Court on June 12, 2012. If we succeed, the District Court will reopen the Pit Rule appeals; if Judge Ortiz rescinds the writ, we will likely head to a new Pit Rule rulemaking in front of the Commission.

Case Profile: Obsolete building codes leave New Mexico in the cold

by Elizabeth Cook-Romero

Con artists rely on speed. They pressure, create confusion. They don't allow their victims time to weigh alternatives or ask questions.

It's no wonder New Mexico's environmental community feels conned by the way the Construction Industries Commission [CIC] rolled back the state's energy conservation codes on June 10, 2011. It took a mere four minutes for the CIC to vote to repeal the state's electrical, energy conservation and mechanical codes and replace them with codes that just barely meet federal standards. During that same four minutes, the CIC also voted to amend the state's plumbing codes.

The Wrong Way to Repeal a Regulation

Every aspect of the Martinez Administration's building codes repeal and replacement was rushed. "What they held were not public hearings," said Tammy Fiebelkorn, a member of the Code Change Committee that drafted the energy conservation codes. "At a real public hearing witnesses can ask questions, they can cross examine other witnesses. Instead, under the Martinez Administration, witnesses were given two minutes, then they were cut off. The meetings in Albuquerque, Farmington, Las Cruces and Roswell were all held on the same night. There were no commissioners at any of those meetings."

The CIC repealed and amended the codes a week after those four statewide meetings. "There was no discussion, no pros and cons—just a vote," Fiebelkorn added. "There was supposed to be analysis, expert witnesses." The commission was so blatant in its contempt for the law, it issued a press release announcing its decisions before the meeting was over, even though the votes to amend the codes took place at the end of the meeting.

"I'm super glad we have a resource like the Law Center," Fiebelkorn said. "I've been doing this work for more than twenty years, and I never thought that in the 21st century, so much of my time would be spent on legal maneuvering."

Douglas Meiklejohn, the Law Center's Executive Director said the CIC clearly violated laws, including the open meetings law. "A commissioner stated that the CIC had discussed the issues before its public meeting, which is against the law," he explained. "Another problem is that the CIC should explain its actions. It is common for an agency to say, 'this is what we looked at, and this is how we came to a decision.'"

A True Collaborative Process

Contrast the actions of the CIC under the Martinez Administration to the painstaking work done by the Code Change Committee in 2009 and 2010. "I was the only energy advocate on the committee," Fiebelkorn recalled. "The other members were builders, people who would enforce the codes locally, Construction Industries Division staff members, state engineering and minerals staff members, architects and builders. We met weekly for 14 months, and we had to come to consensus on every part of that code." The Code Change Committee also met with representatives of cities, counties, building-supply companies, national builders, utilities and environmental groups.

In 2010 the CIC unanimously accepted the energy conservation codes, which mandated that energy usage would be 20 percent more efficient.

Energy Efficiency that Makes Sense for New Mexico

"We didn't pull estimates out of the air," Fiebelkorn continued. "We worked

with the builders, and they provided the cost of those measures. We made sure our code would save people more than it cost. We really thought through the issues faced by low-income home buyers and renters. Most low-income people rent, and landlords have no incentive to make apartment buildings more efficient."

Compared to the energy saved, the added building costs under the efficiency codes were small. Fiebelkorn estimates an increase of \$750 on an average home and perhaps \$2,000 for a very large house. For commercial buildings the added expense was approximately one half of one percent.

"We have to change our mindset because the cost of energy is going to increase over time," said client Faren Dancer, a Santa Fe green builder and host of Green Talk Radio. "Why create more buildings that are going to be too expensive to maintain, more buildings that will need to be retrofitted in a few years?"

Santa Fe's building codes prove Dancer's point. They mandate a 30 percent increase in energy efficiency. Since the recession began, production builders have constructed the majority of new homes in Santa Fe. "They're building affordable housing," Dancer said. "Large national companies like Centex are building in Santa Fe and they are meeting the code."

The Law Center represents the Southwest Energy Efficiency Project; Environment New Mexico; Sundancer Creations Custom Builders, LLC; eSolved Inc.; the Sierra Club; and several individuals.

As always, find Elizabeth's full articles, in their uncut majesty, at our website: nmecl.org/elizabeth

© photo courtesy of Patrick Moore / Stock Exchange

Playing Defense | *Under a pro-industry Administration, Law Center members make environmental defense possible.*

In 2011, Governor Susana Martinez and her Administration tackled many of New Mexico's most progressive environmental protections. Working hand-in-hand with industry (Small Business-Friendly Task Force, anyone?), her staffers worked to repeal regulations, help corporations step over community concerns, and hamper regulatory oversight.

Our members didn't stand by and idly watch. Your support went above and beyond in 2011, making it possible for us to challenge nearly every attempt by her Administration to weaken regulations that protect air, water, land and people. Sometimes the best defense is a strong offense... sometimes it's a tough attorney.



INDUSTRIAL DAIRIES

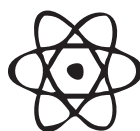
We're going to milk this victory for a long time

Governor Martinez's first executive order, signed within minutes of being sworn in, stopped the publication of new regulations like the dairy groundwater standards. A victory in 2011 before the state Supreme Court mandated that the rules be printed. Shortly thereafter, we entered into negotiations with the New Mexico Environment Department (NMED) and the dairy industry – and safeguarded the substantive environmental provisions in the dairy regs. The final regulations were adopted in December 2011.

MEMBER WEB EXCLUSIVE

Check out attorney Bruce Frederick and his White Board of Chaos, as he explains the greenhouse gas cases.

www.nmelc.org/memberbonus



URANIUM MINING

What happens when your permit application is old enough to drive?

In 2011, the State became a major player once again in our uranium casework. In Church Rock, NMED asserts that it can renew Hydro Resources' groundwater discharge permit – a permit that expired in 1996 (by the way, people who were born in 1996 are now eligible to drive...) We filed a lawsuit in July 2011 to stop the renewal process, and to prevent the company from mining unless a valid permit is issued; we anticipate a decision this Spring.

The State just awarded the shuttered Mount Taylor mine its 4th "standby" mining permit since 1998, despite the fact that the mine is leaking a radioactive plume into groundwater. We are appealing the permit to the state Mining Commission.



OIL & GAS DRILLING

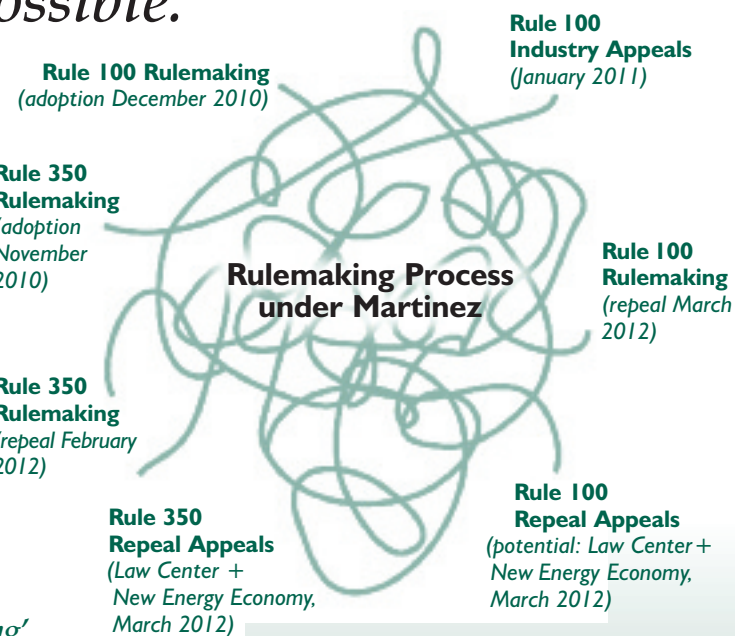
We don't need no 'fracking' regulations

In December 2011, the Oil Conservation Commission adopted industry-sponsored regulations governing disclosure of fluids used for hydrofracturing ("fracking"). The new regulations require drilling companies to disclose some of the fluids they inject into the ground – and to disclose no less than 45 days after they frack. It's no surprise that these rules are worse than those in Wyoming and Texas. For more on oil and gas, see page 1.

ENERGY EFFICIENCY REGULATIONS

It's not easy being green... under this Administration

It took four minutes for the Construction Industries Commission to vote to obliterate months of work when it repealed our state's electrical, mechanical, plumbing and energy conservation codes in June 2011. (That's twice as long as it gave citizens to comment on the proposed changes in public meetings.) We took the Commission to court in July 2011, in a case that is ongoing. (see page 3).



A Normal Rulemaking Process

Climate Change Rule 100	Rule 100	Courts hand down
ADOPTED (December 2010)	APPEALED by Industry (January 2011)	DECISIONS

CLIMATE CHANGE

Simply put, it's complicated

In a nutshell, since 2010 there have been

- two rulemakings to adopt two major climate change rules (we petitioned for Rule 100 on behalf of New Energy Economy and New Mexico Environment Department petitioned for Rule 350);
- two rulemakings to repeal those rules;
- three state Supreme Court victories in our favor; and
- seven appeals by industry.

The Environmental Improvement Board just repealed the regulations, although there was no substantive new evidence offered at the rulemaking hearings this fall. We'll keep you apprised of what happens in these cases this year.

New Council helps Law Center plan 25th Anniversary Campaign

We are excited to announce the inaugural members of NMELC's newly formed Advisory Council. The Advisory Council will provide leadership and support for the Law Center's 25th Anniversary program, membership outreach and resource development. Please join us in welcoming Tony Abeyta, Gay Dillingham, Jennifer Marshall, Michelle Mosser, John Scanlan, and Katie Zemlick to the NMELC Advisory Council!

On behalf of all of us at NMELC, we greatly appreciate the Advisory Council members' commitment and leadership and look forward to working with all of them in the years to come. We hope you will have an opportunity to meet them at our 25th Anniversary events! We'll be sharing more details about these events in the near future – please contact Shelbie Knox at (505) 989-9022, ext. 29 if you would like to discuss volunteer opportunities.

Thank you to long-time member Cathie Sullivan (who designed our logo in 1987!) for donating 80% of the profits from her notecard series. You can pick up **New Mexico Botanicals Series I and II** at Mail Call in Santa Fe, 551 West Cordova Street, or you can purchase through the Law Center. 6 cards for \$18.



Thank you to author Harvey Stone for donating a portion of the proceeds from his climate change thriller *Melting Down*. Find out more at meltingdownnovel.com.

And thanks to Kirt Kempter, volcanologist and photographer, for donating two of his photocanvases for auction during our fall lecture series, produced by our wonderful partner, Southwest Seminars. You can check out Kirt's large format photos at geomosaics.com.

Photo courtesy of Kirt Kempter



Thank You to everyone who makes our work possible.
If you would like to join this monthly donor club for as little as \$5/month, call (505) 989-9022, sign up on our website, nmelc.org or email shelbie@nmelc.org.

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A huge thank you to those who donated in November and December 2011! *You met the match for a \$25,000 challenge grant from the EMA Foundation!* These funds directly translate into cleaner air, water and land for New Mexico in 2012!

*Special thanks to our Monthly Sustainers!

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