

GreenFireReport

Summer 2010

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.

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Law Center Resuscitates Rulemaking

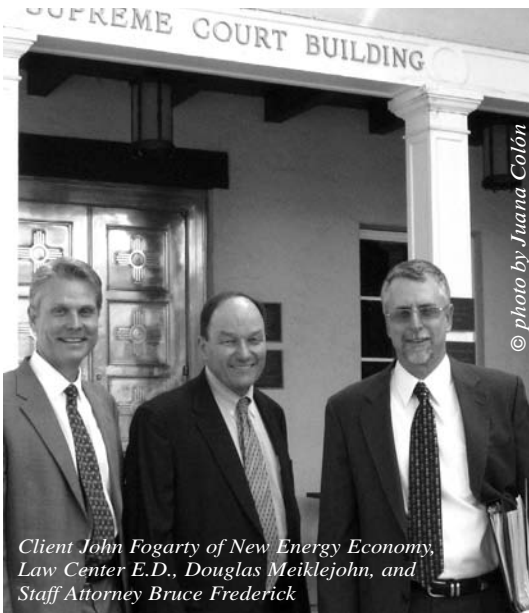
by Cole Merrick

On June 8, we foiled plans by New Mexico's biggest industries (PNM, El Paso Electric, the NM Oil and Gas Assoc.) to not only kill our client's petition to limit greenhouse gas emissions, but to cripple the State of New Mexico's ability to adopt and amend regulations.

On that day, Staff Attorney Bruce Frederick and Eric Miller of the Attorney General's Office argued before the five justices of the New Mexico Supreme Court that a Lovington District Court Judge had no jurisdiction to stop an administrative climate change

proceeding before the Environmental Improvement Board (EIB). If the Supreme Court did not intercede, they argued, any party could sue at any time to stop any State agency from even considering new regulations in the future.

"We would have – and we would deserve – chaos," Frederick argued in his rebuttal. "State agency proceedings could easily be shut down by any lawyer who can spot a legal issue, no matter how frivolous, and the district courts would become clogged with random



Client John Fogarty of New Energy Economy, Law Center E.D., Douglas Meiklejohn, and Staff Attorney Bruce Frederick

The Major Opposition in 2009:

El Paso Electric Company: net income \$66.9 million; total operating revenues \$483.3 million

PNM: net earnings \$136.7 million; total operating revenues \$1.647 billion

Tri-State Generation and Transmission Association, Inc.: net income \$104.9 million; total operating revenue \$1.2 billion

New Mexico Environmental Law Center: net income \$105,971; total expenses \$731,052

and premature declaratory judgment actions."

In response, the Supreme Court issued a Writ of Superintending Control, which ordered the district judge to dismiss the case, and allowed the EIB to resume our climate change hearing in August. Announcing the ruling after only 15 minutes of deliberations, Supreme Court Chief Justice Charles Daniels stated that the case raised serious separation of powers issues and that the district court had mistakenly interfered with an ongoing executive agency proceeding.

The Supreme Court case sprang from a

lawsuit filed by four state lawmakers, business / industry groups and our state's utilities to stop the EIB from considering New Energy Economy's (our client's) petition to limit greenhouse gas emissions in the state. In January, they filed their suit in a district court in Lea County – the capital of our state's oil region. On a windy April day at the Lovington courthouse, Judge William G.W. Shoobridge, heard arguments in the case; shortly

Story continued on page 2

contents

Case Updates: pages 2-5

News: pages 6

Green Business Partners . . . page 8

Recent court victories for Hydro Resources don't mean that uranium mining will begin anytime soon in Navajo villages.

– Story on page 2



On July 16, 2009 Navajo citizens commemorated the 30th anniversary of the United Nuclear tailings spill with a 5 mile walk.

– Story on page 5

© photographs by Juana Colón



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

– Aldo Leopold
A Sand County Almanac



Federal Judges Rule Against Navajo Communities

by Eric Jantz

On March 8, we received a disappointing decision in our federal appeal of Hydro Resources uranium mining license.

As you may recall, in May 2008, we traveled to Denver with a delegation from the Navajo communities of Church Rock and Crownpoint. There, we made the case to the U.S. 10th

Circuit Court of Appeals that the uranium mining license granted to Hydro Resources should be thrown out. At the heart of my legal arguments was the contention that uranium mining in these communities will damage the health of the people who drink the water and breathe the air that these mines will impact.

Unfortunately, two of the three judges on our panel deferred to the Nuclear Regulatory Commission (NRC)—an agency that has historically promoted uranium mining and the nuclear industry. The decision was not unanimous; Judge Carlos Lucero dissented “because the majority’s decision in this case will unnecessarily and unjustifiably compromise the health and safety of the people who currently live within and immediately downwind from [the minesite].” It is one of the strongest dissents that my colleagues and I have ever seen. Despite Judge Lucero’s dissent, however, the Court refused our request for an *en banc* review, in which all of the active judges on the 10th



A member of Students Against Uranium Mining on the steps of the federal courthouse in May 2008.

Circuit bench would have reviewed the decision.

In a separate, but related case, the 10th Circuit overturned its previous ruling on which entity will regulate the groundwater beneath the first proposed minesite. The new ruling states that the proposed Church Rock Section 8 site, despite being in a community that is 97% Navajo, falls under the jurisdiction of the New Mexico Environment Dept. The issue at hand—who governs an Indian community in the Checkerboard region—is legally significant, and it is likely that the Navajo Nation (which was a party to the case, along with the U.S. EPA and Hydro Resources, Inc.) will not be satisfied with the appellate decision. For our clients, this ruling is especially significant because

it means that the Navajo Nation’s ban on uranium mining no longer applies to the site.

Despite these rulings, this case is far from over. We are preparing for permitting proceedings before the NM Environment Department later this year. If you are a member of the Law Center, you know that as long as our clients in Crownpoint and Church Rock continue their struggle, we will fight beside them. My colleagues and I will keep you apprised of our efforts.

Thank you for supporting our work.



Clients Chris Shuey of the Southwest Research and Information Center (SRIC) and Larry King of the Eastern Navajo Diné Against Uranium Mining (ENDAUM) discuss potential uranium mining at King’s home in Church Rock.

Supreme Court Story continued from page 1

thereafter, he ruled in favor of the plaintiffs. We had to move quickly to preserve both our climate change hearing, and the sanctity of the public rulemaking process in New Mexico—and so made the rare move of appealing directly to the Supreme Court.

“The Supreme Court does not do something like this unless there are extraordinary circumstances involved,” says Frederick, noting that only five percent of requests for

Writs of Superintending Control have been granted during the past eight decades. “The Lovington district court and EIB are two separate branches of government. The court cannot intercede in a state agency appeal—the separation of powers issue made for this extraordinary circumstance.”

“We were confident that the Supreme Court would put us back on track. We can finally move ahead to create clean energy

jobs, provide a level playing field for small business and the renewable energy industry, and prove that solving global warming will catalyze job creation,” said John Fogarty, Executive Director of New Energy Economy.

Frederick is confident that the EIB hearings will resume and finish by the end of the summer.



New Mexico Mooo-ving Towards Groundwater Protection

© photo by Roderick Ventura and Sarah Pillich



Liquid dairy waste pours from two pipes into a ditch that travels to nearby fields.

by Shelbie Knox

With New Mexico being the 7th largest producer of dairy products in the nation, we're also one of our country's biggest producers of cow manure. That much manure—approximately 2.2 billion gallons per year—can wreak havoc on aquifers, fouling them with nitrates, phosphorus, ammonia, human pathogens and hormones ... not to mention the smell.

The problem dairies pose to water quality is not small. Of the roughly 150 dairies operating in New Mexico, approximately 57% of them have documented groundwater pollution (for those that monitor groundwater quality), and a third are in abatement. Some of this contamination is historic, and new liners for liquid waste lagoons are better than their predecessors at preventing leakage. At the same time, however, no one is sure how well technology can treat this contamination (no dairy has been fully remediated in New Mexico yet), and we know that cleaning up polluted groundwater is never cheap or easy.

To address these problems, and to comply with a legislative mandate, the NM Environment Department has drafted dairy-specific regulations to protect groundwater. But in some situations, the regulations don't go far enough. So when our state's water quality watchdogs wanted to plug the holes in the State's proposal, they turned to the

Law Center for help.

Some key provisions for which the Law Center and its clients [Amigos Bravos, Caballo Concerned Citizens Group, Citizens for Dairy Reform, the Rio Grande Chapter of the Sierra Club, and Food and Water Watch] are advocating for:

- A minimum separation of 30' between the bottom of manure lagoons and groundwater, instead of the 4' recommended by the State.
- Stricter setback requirements, including a buffer of at least 1 mile between dairies and populations of 10 or more homes or businesses, and keeping untreated waste away from food crops.
- Increased monitoring and reporting.
- A company must state in its permit application how many cows will be housed at the dairy.
- A company must send a map of its proposed location to neighbors as part of the public notification process.
- A company must submit a closure plan with its application, and must provide a reclamation bond that would fund cleanup, in the event that the company cannot clean up the site when it closes.

Staff Attorneys Jon Block and Bruce Frederick represented our clients at a 4-week hearing before the Environmental Improvement Board. We expect a ruling later this year.

"By planning in advance, we will reduce the costs to these companies, and reduce the amount of contamination."

—**Brian Shields,**

Director of Amigos Bravos, responding to Commissioner Howard Hutchinson's question about why public interest groups want dairies to have plans in place for closure.

Where are New Mexico's dairies?

75% – *Eastern*

[Curry, Roosevelt, Chaves, Eddy + Lea Counties]—approx. 266,000 cows

15% – *Southern*

[Doña Ana, Sierra + Luna Counties]—approx. 53,000 cows

10% – *Albuquerque Area*

[primarily South Valley]—approx. 35,500 cows

2.2 billion gallons of cow manure per year can wreak havoc on aquifers.



Positive Step in Homestake Case

“Residents have reason to be frustrated with progress to date, and suspicious of promises of remediation timelines.” – NMED Secretary Ron Curry

For decades, residents north of Milan have fought to get the Homestake Mining Company to clean up the water polluted by that company’s uranium mill, which was shuttered in 1990. In March, the NM Environment Department handed them a small but significant victory, included in an order renewing Homestake’s groundwater discharge permit for its collection and evaporation ponds.

The renewal came on the heels of a public hearing, held in Grants in January. At the hearing, Staff Attorney Jon Block represented members of the Bluewater Valley Downstream Alliance (BVDA), a grassroots groups comprised of citizens living in the shadow of the mill’s massive tailings piles. In addition to presenting community concerns, the group submitted technical testimony from Paul Robinson, Research Director at the Southwest Research and Information Center (SRIC), assisted by Chris Shuey, MPH, SRIC’s Environmental Health Specialist.

In his order renewing the permit, Secretary of the Environment Department Ron Curry specifically agreed that “residents have reason to be frustrated with progress to date, and suspicious of promises of remediation timelines.” He then stated that a study being conducted by the Army Corps of Engineers (and due to be completed this year) may “prompt modifications to the larger remediation strategy of the Mill Site.”

“This is the first time anyone from the State has acknowledged the issues and frustrations that our clients have expressed,” explains Jon. “It is also the first time that a regulatory agency has provided some hope by indicating a commitment to restore groundwater to usable condition in the foreseeable future – and the first time they

have offered the possibility of requiring Homestake to change course if the study shows that the company’s current reclamation efforts are not succeeding. Our hope is that the Environment Dept. has opened the door to working with BVDA and other interested community organizations, to come up with a realistic human time-bounded clean up solution for this Superfund site. The fact that Secretary Curry told us that his Water Quality people will be paying attention to the Army Corp of Engineer’s assessment of the site is something we view as a positive step.”

Contamination from the massive mill complex has plagued residents for more than forty years. Because of unsafe levels of uranium, selenium and nitrates in drinking water wells, the company was required to haul water to families, hook residents up

to Milan’s municipal water system, and pay residents’ water bills for a decade. Not satisfied with these stopgap measures, our clients at the BVDA continue to fight for true reclamation of the site and remediation of local groundwater.



Staff Attorney Jon Block is flanked by clients from the Greater Gardner Neighborhood Association. Doug Wood (left) and Kyle Silber (right) after the hearing on the settlement.

Neighborhood Negotiates Better Air

Soon after Staff Attorney Jon Block began working with the Greater Gardner Neighborhood Association in Albuquerque to appeal an air quality permit, he realized it would be an uphill fight. For two years, residents of the neighborhood had fought the operational expansion of the American Cement transfer facility, which often spewed hazardous cement dust into their yards, homes, schools and businesses. Despite vocal opposition and documentation of pollution, the Albuquerque-Bernalillo County Joint Air Quality Division issued a permit to the facility that allowed it to operate 24 hours a day/ 365 days per year, and allowed it to more than quadruple its emissions.

“This was yet another example of how the Air Quality Division does not consider public testimony when considering air quality permits,” explained Jon “So, we decided to get the results we wanted without them.”

Jon helped residents set up settlement negotiations with Grupo Cementos de Chihuahua (GCC), the owner of the facility and one of the larger cement producers in the northern hemisphere. “From my experience with these kinds of matters, I knew that attorneys would likely complicate the proceedings. So I suggested that opposing counsel and I stay out of the room, and let our clients and the company participate in a mediated negotiation – something that had not taken place during the permitting process.”

The result was a win-win for the Greater Gardner Neighborhood Association and the company. Among other outcomes, the company has agreed to install state-of-the-art monitoring equipment at the site, and is working with neighbors to implement a panel comprised of residents and company representatives to address any future concerns.

“We’re very pleased that our clients walked away with what they wanted,” says Jon. “However, both they and I remain frustrated that this fight could have been avoided had the City implemented a stakeholder process early on. Until the Air Division and the Board become more responsive to citizens, I believe we will be working with residents in Albuquerque for a long time to come in their fights against air pollution.”

© photo by Cole Merrick



Uranium: Boom or Bubble?

Over the past decade, the nuclear industry has spent more than \$600 million on lobbying, and \$63 million on campaign contributions. So it is no wonder that the nuclear industry is now crowing about its pending revival and lining up for federally-funded subsidies and loan guarantees.

Uranium mining is also benefiting from the buzz. Last year, the Nuclear Regulatory Commission “streamlined” its uranium mine licensing process because of an anticipated surge in license applications. This Spring, FORBES magazine featured a story about uranium mining’s potential for big profits. We’ve known that the threat has been growing—during 2009 our uranium caseload grew from three cases to twelve. In addition to our Crownpoint Uranium Project and Homestake Mill cases, here’s the latest on the mines opposed by our clients:

- **Roca Honda mine, on Mount Taylor:** This is the first time that a uranium company is seeking a full-fledged mining permit in New Mexico (mining permits

weren’t required until 1993) This case will determine how the State deals with proposed uranium mines for decades to come.

- **Mount Taylor mine, on Mount Taylor:**

Fortunately, the State of Colorado recently passed a law prohibiting General Atomics’ from opening its Cañon City, CO uranium mill until that site is remediated. It is believed that remediation will take 50–100 years. Because General Atomics will be unable to process the ore from the Mount Taylor mine, in June the company backed off of plans to reopen the mine.

- **Nichols Ranch mine/Lost Creek mine/Moore Ranch mine, in Wyoming, and Dewey/Burdock mine in South Dakota:** As one of the few law firms to work on federal uranium mine licensing over the past decade, we didn’t hesitate to help oppose these license applications, despite their distance from New Mexico. These cases will determine the extent to which regulators at the Nuclear Regulatory Commission can utilize its new licensing

On July 16, 2009, Navajo citizens and their allies commemorated the 30th anniversary of the United Nuclear tailings spill with a 5 mile walk past the broken earthen dam that released 95 million gallons of radioactive effluent and 1100 tons of radioactive tailings.

process that will restrict opportunities for public participation and limit the requirements for site-specific studies at proposed in situ leach uranium mines.

- **Pandora Mine, Moab, UT:** Our most recent uranium case involves a lawsuit against the US Forest Service, which has approved a plan to expand the Pandora Mine on federal land near Moab. This lawsuit will help determine how federal land management agencies permit uranium mines in the future.

For more information on these cases, please see the “Case” pages on our website.

Thank You



Thank you, Matthew!

Long-time Law Center supporter, Matthew Baca threw a benefit for the Law Center in January, where he read from his first novel, **The Antiquarian**.

Our sincere thanks to Sallie Bingham, for her generous \$10,000 challenge grant – and to all of our supporters who helped us meet her match!

“It strikes me every time I look out my studio window at the arroyo and the hills, the junipers and the piñons of the Santa Fe watershed: how lucky I am to rest my eyes every day on hundreds of acres of open space.

My own private view reminds me of my responsibility to provide this same view to people who can't afford to buy a piece of land next to the watershed or to the National Forest, who must live with what is being done to the views we all share, whether that be the Galisteo Basin, the desert alongside Chaco Canyon, the threatened communities of Mora and San Miguel Counties, or any strip of open land that can fall prey to oil and gas development. Alone I can't fight for the sanctity of the views that belong to us all, but through my support of the New Mexico Environmental Law Center, I can feel secure in the certainty that my interest and all our interests are being protected.” – **Sallie Bingham**

And thanks to Santa Fe's Zia Diner for including us in the Zia Gives Back! Program – and to all of our members who ate there on April 20th!

➤ **Thank you to the funders, sponsors and contributors who make the work of the Law Center possible.**

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