

Utton Center Report

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Message from the Director

Marilyn C. O'Leary

This is the last *Utton Center Report* you will receive in the mail. In order to reduce our costs and to preserve valuable resources we have decided to publish future publications electronically through our website <http://uttoncenter.unm.edu>

If you would like us to notify you when a new *Report* is ready please send your request and email address to uttoncenter@law.unm.edu

The Utton Center has been involved in a number of projects that have taken us into the middle of some fast-moving waters.

After a visit by Alberto Székely from Mexico, with New Mexico Governor Richardson, the Utton Center was asked by the Governor to prepare a report on water issues on the U.S./Mexico border under Székely's leadership. As Chair of the Border Governors Conference, Governor Richardson planned to use the report to assess the interest of the other Border Governors to address critical water issues affecting both U.S. and Mexico border states. The Governor's willingness to examine these difficult issues

had positive results in fostering understanding among the U.S. border states on areas of mutual concern north of the border.

The Utton Center has established an Advisory Committee to help with its project on producing model interstate water compacts. The Committee is composed of individuals and national entities that are either stakeholders or have expertise in interstate water matters. The committee met in March at Bishop's Lodge in Santa Fe, the site of many important interstate compact negotiations. (More detail on this project is included in the Model Interstate Surface and Groundwater Compacts Project discussed in this issue.)

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Utton Center
is moving ahead
with many
projects including
planning a national
Energy-Water
Supply Technology
Program.

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Last year the Utton Center was asked to help sponsor a CLE on New Mexico water policy. It became the First Annual New Mexico Water Policy CLE and serendipitously fulfilled one of my desires to have the UNM School of Law sponsor high-level conferences on water issues with presentations given by both academics in the field and water practitioners. The Second Annual Conference is scheduled for May 20, 2005 and is being supported by the Natural Resources Section of the New Mexico State Bar. Dean Suellyn Scarnecchia is supportive of this effort as is the Law School's Natural Resources faculty; Professors Em Hall and Denise Fort will present papers. More information is available on our web site at <http://uttoncenter.unm.edu> and www.nmbar.org.

The Center is also helping with the planning of the Rocky Mountain Mineral Law Foundation Natural Resources Faculty Institute to be held this year in Santa Fe, June 2-5. Natural Resource professors from universities around the country will participate in the program that will focus on resource development on tribal lands. A planned field trip will include visits to Bandelier National Monument, the Valles Caldera, Zia Pueblo, and Santa Ana Pueblo. Lectures related to the field trip will be presented by Ted Jojola, chair of UNM's School of Architecture and Planning; Professor John Lavelle of the School of Law; and Peter M. Pino, past Governor

of Zia Pueblo. Suedeen Kelly, former School of Law faculty member and current FERC Commissioner, has also agreed to speak.

The Center continues to work with many UNM School of Law students on various projects and with the myriad faculty located throughout UNM who are working on water issues.

The Utton Center has also been asked by Senator Domenici's office to participate in the planning of a national Energy-Water Supply Technology program. The purpose of the program is to develop technologies to purify low quality water and to focus on the nexus between "water for energy" and "energy for water development." The Utton Center would provide legal and policy assessments of the law related to technology implementation. This is an exciting new program and will allow the Center to branch out into national work, while keeping the core Utton Center focus on multidisciplinary research and programs together with preventive diplomacy.

Reservoir Storage Modeling

The Utton Center continues to work with the Middle Rio Grande Endangered Species Act Collaborative Program to create reservoir storage scenarios for modeling using the Upper Rio Grande Water Operations Model. This effort involves meetings with stakeholders to reach consensus on scenarios to be modeled. The

idea is to minimize the need for additional supplemental water for endangered species, yet still meet the needs of water users and the requirements of the Rio Grande Compact. The hope is that if we can objectively look at better reservoir management options, discussions can begin that will lead to proposed changes in reservoir authorizations, thus providing benefits to New Mexico for many years to come.

Water Rights Transfer Model

Susan Kelly, Associate Director, represented the Utton Center as part of an advisory team that worked with Sandia National Laboratories on a project to develop a systems dynamics model regarding water rights transfers in the Middle Rio Grande. The research team focused on land being taken out of agricultural production and changing water use in the region. In developing the model, an attempt was made to identify and quantify the key variables associated with the movement of land and water from agricultural to urban use. The final model is designed to analyze potential impacts arising as land that was once in agricultural production and where water was used to grow crops, shifts to either a suburban setting or to a fully urban use with water used primarily for residences, institutions and non-agricultural businesses.

Transboundary Waters

Crossing Cultural Boundaries for Sustainable Solutions

Susan Kelly

In September 2004, the Utton Center held a four-day conference on cross-cultural communications and water rights negotiations. This was a by-invitation only national conference held at the Tamaya Resort at Santa Ana Pueblo, New Mexico. Participants had the opportunity to talk, listen, gather information and build skills in using preventive diplomacy. The event brought together tribes, irrigators, government attorneys and environmental interest groups to enhance cross-cultural communication skills in water rights negotiations.

The 80 participants reported that the conference was successful in enhancing the understanding and skills of water users from diverse constituencies in negotiating water rights settlements. Participants included 28 tribal members or representatives, 20 representing federal, state or municipal entities, 10 irrigation or acequia representatives, 8 environmentalists, as well as lawyers, judges, special masters, and others not identified with specific groups.

Program presentations and panel discussions with national experts were interwoven with small group work where participants were assigned to play roles different from those they take in real life. Participants gleaned much from

the hypothetical, providing them insights into other groups' points of view in a way they hadn't seen previously.

A video, produced for the conference by a team of exceptional filmmakers, illustrated a basin in New Mexico where the pueblos and the non-Indian irrigators were able to reach an agreement to share river waters in times of drought. Copies of the video, "Voices of the Jemez River," are available from Mary Lance, New Deal Films, Inc. newdealfilms@earthlink.net.

Showing of the video was followed by a panel discussion concerning the Jemez Valley, New Mexico watershed. The Utton Center worked with UNM students from the School of Law and Water

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This Utton Center event brought together tribes, irrigators, government attorneys and environmental interest groups.

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Resource Program to prepare background papers to provide more details on the Jemez adjudication and water resource issues. (PDF document of background papers is available on the Utton Center website at <http://uttoncenter.unm.edu>.)

The conference was considered by many to support groundbreaking discussions of cultural differences that are reflected in our viewpoints

towards water and water negotiations, and which can lead to more productive negotiations in settling water rights disputes. Participants articulated a continuing role for the Utton Center in developing new tools for such negotiations. The experience may help avoid costly litigation over shared waters and promote long-term sustainable resource planning.

Conference proceedings are nearly complete and will be posted on the Utton Center website. Also, the conference program, a list of participants, and background papers are posted on the website at <http://uttoncenter.unm.edu>.

Making an Impact

1. The Utton Center and the Natural Resources Section of the State Bar of New Mexico are presenting the Second Annual University of New Mexico School of Law Water Policy Conference on May 20, 2005. The conference will be held at the law school and will consist of experts discussing cutting edge issues, such as the State of New Mexico's Active Water Resource Management Regulations and Federal and State institutional responses to drought. Leading regional experts will also provide the latest thinking on these timely issues. NM Continuing Legal Education Credits will be available.

2. The Rocky Mountain Mineral Law Foundation (RMMLF) is holding its Thirteenth Institute for Natural Resources Law Teachers in Santa Fe, New Mexico, June 2-5. The Utton Center, through Marilyn O'Leary, who is a member of the RMMLF Board of Directors, has been very active in helping to organize the program. Many western water law issues will be discussed, including endangered species, interstate

water allocation compacts, and also emerging issues in energy and mining law. The course is primarily oriented towards natural resources and environmental law professors. Practitioners and others who might be interested can find out more information by going to the RMMLF web site at: www.rmmlf.org.

3. The Utton Center is working with the Middle Rio Grande Conservancy District and the UNM Biology Department, through Dr. Cliff Crawford, Professor Emeritus, to host a 2nd Annual Bosque Restoration Workshop. It is tentatively scheduled for May 26. The purpose is to gather professionals (biologists, hydrologists, and project implementers) to reach consensus on guidelines for implementation of restoration projects by a variety of agencies in the Middle Rio Grande. The goal is to maximize water savings, reduce fire danger, create diverse habitat for wildlife, and develop consistent maintenance standards and approaches. Participation in the workshop is open; contact the Utton Center at 277-7809 for more information or to register.

The Model Interstate Surface and Groundwater Compacts Project

Background

Disputes among states sharing interstate rivers have increased significantly over the past two decades. These disputes involve the states' respective quantitative shares of such rivers, water quality concerns and how to comply with a variety of federal environmental laws enacted since the early 1970s.

There are three Constitutional mechanisms to resolve interstate water disputes: (1) interstate agreements or compacts; (2) litigation in the United States Supreme Court; and (3) Congressional legislation. The Supreme Court has made its position abundantly clear: States should resolve their conflicts among themselves pursuant to the compact clause of the Constitution. Such disputes are "more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted." *New York v. New Jersey*, 256 U.S. 296, 313 (1921). This position was reaffirmed in *Vermont v. New York*, 417 U.S. 270 (1974), *Texas v. New Mexico*, 462 U.S. 554 (1983), and *Oklahoma and Texas v.*

New Mexico, 501 U.S. 221 (1991). In response, the states have entered into some 26 interstate water allocation compacts, primarily in the western United States, most of them over 50 years ago.

The Model Compacts Project

As interstate water conflicts have increased, so has the realization that most of the existing interstate compacts appear to be inadequate to resolve such conflicts. Consequently, the Utton Transboundary Resources Center at the University of New Mexico School of Law has initiated a comprehensive project to develop two model compacts, an interstate water compact (state parties only) and a federal-interstate water compact (states and the United States as parties). This project has been undertaken by Mr. Jerome C. Muys and Dr. George William Sherk, nationally recognized

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attorneys with vast experience in interstate compact matters.

The methodology for the project consists of a number of discrete though closely interrelated steps:

- The initial step has been a thorough literature review to identify and evaluate the asserted strengths and weaknesses of the use of compacts to resolve interstate water conflicts in both theory and practice.
- The next step has been to review the language of all existing interstate water compacts and required Congressional consent legislation to ascertain how critical issues have been addressed historically. This has been supplemented with information obtained in response to a questionnaire sent to each of the interstate compact commissions on the practical administration of those compacts.
- While these tasks were ongoing, an Advisory Committee was selected comprised of some two dozen individuals representing a wide range of professional areas of expertise and stakeholder interests in interstate water issues.
- The results of the earlier reviews will be complemented by several

case studies, including the current efforts to negotiate (or renegotiate) compacts on the Apalachicola-Chattahoochee-Flint River Basin and the Alabama-Coosa-Tallapoosa River Basin in the Southeast, and the Great Lakes to identify problem areas and opportunities in the interstate compact approach.

- Additional project activities, that will supplement the identification of issues by the earlier reviews, include an analysis of the impact of federal environmental legislation affecting existing interstate water compacts and a review of compact litigation in the Supreme Court.

In March 2005, the Advisory Committee assembled at Bishop's Lodge near Santa Fe, New Mexico, where the first interstate compact (the Colorado River Compact) was negotiated in 1922. The purpose of this meeting was to evaluate the principal issues and to receive recommendations regarding specific approaches or methodologies to be included in the model compacts.

During the spring and summer of 2005, Mr. Muys and Dr. Sherk will prepare working drafts of the two model compacts which will be sent

to the Advisory Committee for review. The model compacts will not be "one size fits all" proposals, but will be annotated extensively with suggestions for alternative approaches to critical issues, such as compact commission membership and voting procedures, allocation methodologies, dispute resolution and adjustments to changing hydrologic data or legal requirements. Once this review has been completed, the model compacts will be modified as appropriate and distributed with commentary for public comment.

A primary goal of the Project is to provide a mechanism by which interstate water conflicts may be resolved in an amicable, efficient, equitable and effective manner. In addition, the Utton Center hopes that the model compacts may assist in the peaceful resolution of international water conflicts.

More information and copies of presentations made at the workshop are available on the Utton Center website <http://uttoncenter.unm.edu>.

Selected Bibliography of recent articles, reports, books, and proceedings related to interstate compacts:

Water Education Foundation, *Colorado River Compact 75th Anniversary Symposium Proceedings* (1987)

Nation Water Commission, *Water Policies for the Future – Final Report to the President and the Congress of the United States* (1973)

Thorson, John E., *Essay – Visions of Sustainable Interstate Water Management Agreements*, 43 *Nat. Resources J.* ____ (Winter, 2003)

Grant, Douglas L., *Limiting Liability for Long-Continued Breach of Interstate Water Allocation Compacts*, 43 *Nat. Resources J.* ____ (Winter, 2003)

New Mexico Water Resources Research Institute, *The Rio Grande Compact: It's the Law!*, *Proceedings of the 44th Annual New Mexico Water Conference* (1999)

Riding the Waves

UNM School of Law Natural Resources Program Update

UNM School of Law students in Western Water Policy

accompanied Professor Denise Fort and a number of state and local officials for two days of discussion and a firsthand tour of the Gila River, the only non-dammed major river system in New Mexico. It is a river where native fish still thrive and the seasonal variations in flow still produce seasonal flooding.

There was a discussion of the Arizona Settlements Act, which allocates 140,000 acre feet of Gila and San Francisco river water to southwestern New Mexico averaged during a 10-year period. New Mexico also would receive \$66 million for water projects and additional funding if a reservoir is built on the river. Government officials, along with interested citizens, are now in the process of determining which options presented by the Act to adopt.

Among those sharing their views at the forum were Craig Roepke, a hydrologist with the Interstate Stream Commission;

Bill Hume, with Gov. Bill Richardson's office; Tom Bates, a member of the Southwest New Mexico Regional Plan Steering Committee and Jack Hiatt, Grant County attorney. Fort organized and moderated the panel discussion.

The following day there was a tour of the Gila River Valley, during which the group further discussed possible ways to allocate, store and use the water. The Nature Conservancy provided lodging for the students and officials.

"Western water policy is made up of cases like that of the Gila, where Congress, state government officials and local citizens are hammering out how water is managed. The Gila settlement represents an opportunity for the state to protect a free flowing river, while also ensuring the water resources that future generations will need," says Fort. "My goal is to train students who can play a role in water management decisions across New Mexico."

The American Indian Law Center, Inc. and the University of New Mexico Natural Resources Journal

recently co-sponsored a symposium titled "Moving Beyond the Current Paradigm: Redefining the Federal-Tribal Trust Relationship for This Century." Potential conflict of interest inherent in federal representation of tribal interests in water rights litigation was a hot topic during the two-day event.

University of Tulsa Law Professor Judith Royster challenged attendees to critically consider the potential for conflicting federal concerns in tribal water rights litigation involving FOIA requests and the ESA, as well as the potential for breach of trust actions against the federal government with respect to controversial water settlement agreements.

University of Washington Law Professor Robert Anderson followed Royster with a presentation focusing on the background principles and political motivation behind a series of historic Indian water rights settlements. Professor Anderson also examined the pros and cons of the quantification of Indian water rights through litigation or settlement. Other speakers proposed transferring trust property from the federal government to the various consenting tribes.

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more Riding the Waves

Denise Fort, UNM Professor of Law, recently published an editorial in the *Water Resources Impact*, Vol. 7, No. 1 (January 2005), published by the American Water Resources Association. The editorial is entitled, "The Role of the Federal Government in the 21st Century: Time for a Clearly Defined and Constructive National Role."

Denise Fort has been appointed to a committee of the National Research Council. The committee is charged with conducting a study entitled, "Potential and Pitfalls for Sustainable Underground Storage of Recoverable Water." The goals of the study will be to provide an overview of research needs and priorities concerning sustainable underground storage technology, and to assess a variety of factors that may contribute to the performance, good or poor, of storage projects. Its work will result in a book for publication. The National Research Council is part of the National Academies, which also comprise the National Academy of Science, National Academy of Engineering and Institute of Medicine.

Nick Wolf, a Ph.D. in chemistry and third year UNM law student, is currently researching and writing about arsenic in water.

Kathryn Benz, a second year law student at the University of New Mexico School of Law and a research employee for the Utton Center, will be working for the Environmental Protection Agency, Office of Enforcement and Compliance Assurance in Washington, D.C. this summer. As one of 50 law clerks,

Kathryn will work under the direct supervision of a practicing attorney in one of the Office's practice areas. Kathryn hopes to work in Toxics & Pesticides Enforcement, Clean Water Act Enforcement or the Agriculture and Ecosystems Division, performing a wide variety of legal research and writing.

During the summer after her first year of law school, Kathryn worked for Public Employees for Environmental Responsibility (PEER), a small non-profit organization also located in Washington, D.C.. She hopes to convince fellow students to spend some time working in D.C., describing the experience as "invaluable" and the "best place to learn first-hand about the system that produces the laws and policies that impact our individual and professional lives." After graduating from law school, Kathryn hopes to return to D.C. and work for the federal government in an environmental capacity.

G. Emlen Hall, Professor of Law and Editor-in-Chief of the *Natural Resources Journal*, will be publishing an article in the next *Journal* about the status of the law with regard to water rights in the national forests, entitled "The Forest Service and Water – an Intimate Portrait of U.S. v. New Mexico and its Aftermath." Given that as much as 70% of the surface water is estimated to originate in the national forests, the quantity of federally reserved water rights is a major issue in the western United States.