

GreenFireReport

Spring 2011

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

Law Center Wins in Supreme Court Again *First lawsuit against Governor Martinez affirms she is not "above the law."*

© photo by Cole Merrick

The New Mexico Environmental Law Center scored a substantial win in the state's Supreme Court on January 26th, when the Justices unanimously granted a writ of *mandamus* ordering the State Records Administrator to print two new rules adopted by state agencies.

The Law Center petitioned the Court for the writ on behalf of its clients, Amigos Bravos and New Energy Economy. Our goal: to compel the Records Administrator to print the dairy groundwater discharge regulations and the greenhouse gas emissions rule in the *State Register*. The printing of these and 30 other rules was halted by Governor Martinez on January 6.

In a packed courtroom, Staff Attorney Bruce Frederick argued that the State Records Administrator had a "non-discretionary duty to publish rules that have been filed with the State Records Center." He asserted that the refusal to print the rules was a violation of law, and that Governor Martinez' attempt to circumvent the law was a threat to the basic process by which administrative law is adopted and made accessible to the public.

Paul Kennedy, the private attorney representing the Governor's office, argued that the groups that brought the petition had no standing (i.e., were not directly impacted by the outcome of the case) and should not be



Bruce Frederick at the New Mexico Supreme Court where we won the first lawsuit against Governor Martinez.

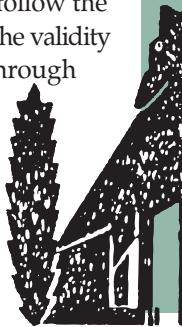
able to bring the case to the Supreme Court for review. Kennedy also said that the Governor halted the printing so that her office could "have time to review" the new rules.

At one point Kennedy stated that those who would be *affected* have standing. Chief Justice Daniels asked "... affected by the air?" "Yes, if you can show..." said Kennedy. "...That they breathe?" replied Chief Justice Daniels. At which point the entire audience laughed.

The Justices then moved on to Kennedy's other argument. The Chief Justice questioned Kennedy on what authority the Governor had to halt the printing, asking: "Wouldn't you agree that no person is above the rule of law?" Justice Chavez added, "I don't see how the Governor has the authority to trump the law. Then the Governor can trump *any* law."

After a recess of only thirty minutes, the Court returned, and Chief Justice Daniels stated that the Court would issue a writ against the State Records Administrator, compelling her to print the rules. Chief Justice Daniels also said the Records Administrator has a non-discretionary duty to follow the law to publish the rules and "let the validity of those regulations be tested" through established means.

Shortly before this case was heard by the Supreme Court, industry groups appealed both regulations to the State Court of Appeals. We will participate in the cases this year.



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

— Aldo Leopold
A Sand County Almanac

contents

Case Updates: pages 2-5

News: page 3

Green Business Partners: ...page 8



New Governor Wages War on Environment.

Administration working publicly and in secret to undermine protections

— Story on page 3



First Round in Preventing New Mexico's Largest Water Grab
Law Center is leader in case to stop massive water speculation

— Story on page 5

Photo: courtesy, State of New Mexico

Citizens not “cowed” by new politics

Citizens and groups overcome first political assault; now get ready for Court

As New Mexico’s dairy groundwater regulations were nearing adoption in 2010, a national anti-regulation movement, well financed by polluting industries, was gaining momentum. The movement’s pundits and politicians added the prefix “job killing” to every mention of regulations. Susana Martinez signaled her alliance with that movement by making the “job-killing” tag a prominent feature of her campaign for governor.

The week before Gov. Martinez failed in her attempt to halt the publication of the dairy groundwater regulations (See page 1), the dairy industry appealed the regulations to the state Court of Appeals. The Law Center will be in Court defending the regulations on behalf of its clients, known collectively as the “Citizens’ Coalition”: Amigos Bravos, Caballo Concerned Citizens, the Rio Grande Chapter of the Sierra Club, and Food and Water Watch.

New Mexico’s first concentrated animal feeding operation (a dairy with more than 700 cows) opened in the mid 1980s. Today, on average, NM dairies house more than 2,000 cows per operation – the highest

average number of animals per farm in the U.S. One cow can produce as much waste as twenty people, so living near a factory dairy is like living near a small city that has no sewers or waste-treatment plant, just giant evaporative lagoons that might be lined with only manure or clay. Approximately 57 percent of the state’s dairies have polluted the groundwater beneath their facilities, according to the state’s Environment Department’s scientific data.

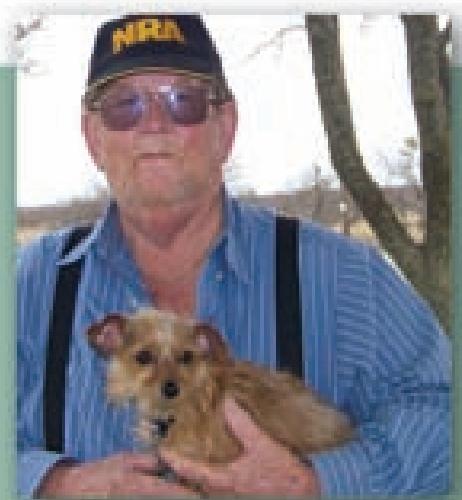
After a permit application for the proposed ParaSol Dairy in Sierra County was denied in 2008 (see below), the dairy industry successfully lobbied for regulations with the goal of making permitting more predictable. By early 2010, the New Mexico Environment Department (NMED) developed draft regulations with input from dairy farmers, the public and the Citizens’ Coalition (represented by Law Center attorneys Jon Block and Bruce Frederick). After four weeks of technical hearings, the regulations were adopted by the Water Quality Control Commission in December 2010.

Though the regulations do not incorporate

all of the Coalition’s proposals, they contain many safeguards including synthetic lagoon liners, specific requirements for separating manure solids from wastewater discharges, metering the flow of wastewater, collecting groundwater samples and analyzing and reporting the results.

Coalition activists are not surprised that Gov. Martinez, whose campaign accepted more than \$80,000 from the dairy industry (according to FollowTheMoney.org), tried to block the regulations. The revelation that her Small Business-Friendly Task Force is packed with big business representatives, including a lobbyist for the dairy industry, did not shock them either.

Despite the opposition, client Brian Shields, Executive Director of Amigos Bravos, is confident that the regulations will be upheld in court. “Even though the dairy industry is working behind the scenes, we are confident we have what we need,” he said. “Science is on our side. Common sense is on our side.”



Client Spotlight: *Jerry Nivens*

by Elizabeth Cook-Romero

Law Center client Jerry Nivens, of Sierra County, was one of the first to start New Mexico’s citizens’ dairy movement rolling. It was in 2007, after he heard rumors that a 2,000-head-dairy operation was to open near his home. He spent his birthday driving around looking for a public posting and found a notice from the proposed ParaSol Dairy alongside a seldom-used road. The only newspaper notice had appeared in the Hatch Citizen. “Hatch is 20 miles to the south,” Nivens said. “By no stretch of the imagination did that meet the requirements of the law to inform the public. Hatch isn’t even in Sierra County.”

Nivens circulated a petition and organized the Caballo Concerned Citizens Group. By the time ParaSol ran a notice in the Sierra County *Sentinel*, Nivens had gathered hundreds of signatures. Farmers downstream feared their crops could be contaminated by E.coli, and those in the tourism industry worried about smells. Even the federal Bureau of Reclamation opposed the permit because the proposed site was in “an extremely sensitive location, basically on top of [Caballo] reservoir.” Despite concerted public protest and the denial of the permit twice by NMED Secretary Ron Curry, the permit was granted—although with numerous environmental conditions—by the Water Quality Control Commission in June 2010.

The permit and the Governor aren’t stopping Jerry Nevins, however. “Our health and our property are in danger,” he said. “When I was a boy, I saw this happen in Texas when the big feed lots came in.” If Nevins has anything to say about it, that history isn’t going to repeat itself in New Mexico.

Photo courtesy of Jerry Nivens

New Governor Wages War on Environment

Administration working publicly and in secret to undermine protections

Governor Susana Martinez wasted no time trying to gut the regulations that protect New Mexico's natural resources and public health. And the Law Center wasted no time blocking her. Some of her anti-environmental, anti-community efforts over the past three months include:

1) OFF TO A ROCKY START. Governor-elect Martinez sent the message to New Mexicans who care about our environment that we're in for a tough four years when she appointed an environmental transition team consisting of representatives of the oil & gas industry, the dairy industry, the energy industry, Los Alamos National Lab, and the ranching industry. Soon afterward, she accepted nearly \$300,000 in corporate contributions for her inauguration from power companies, oil & gas companies, and Helena Chemical.

2) HER FIRST EXECUTIVE ORDER. Just minutes after being sworn in, Governor Martinez signed her first Executive Order (2011-001), which orders government agencies to identify "job-killing" regulations that can be modified or rescinded in order to assist "small" businesses.



3) REGULATIONS? WHAT REGULATIONS? On January 3, a lobbyist for the dairy industry emailed the Governor's office, asserting his view that the first Executive Order gave the Governor power to stop the printing of dairy groundwater regulations adopted in 2010. He then helpfully included the phone number for the State Records Center. Two days later, the publication of the dairy regulations, greenhouse gas emission limits, and 30 other regulations were halted. (See page 1, on the Law Center's successful lawsuit in the New Mexico Supreme Court to overturn this decision.)

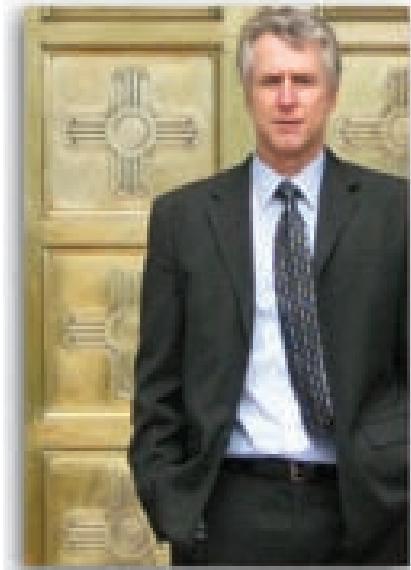
4) TRANSPARENCY IS GOOD...AS LONG AS IT CAN BE DONE IN SECRET. On her website, Governor Martinez states, "As public servants, we are accountable to New Mexicans and they should know exactly what their government is doing on their behalf." Yet her "Small Business-Friendly Task Force" met secretly for the first two months...and may have continued its undercover operations except for the dogged reporting of blogger Tracy Dingmann of ClearlyNewMexico.com.

5) BUT WAIT...THERE'S MORE. Dingmann uncovered the fact that there are not too many "small business" people on the Small Business-Friendly Task Force. Instead, lobbyists for, and representatives of, some of New Mexico's biggest industries (and biggest polluters) fill many of the seats at the meetings.

6) DIABOLICAL PLANS ARE AFOOT. According to the Task Force's Mid-Point Report (found at our website, nmelc.org), the "goal [of the Task Force] is to provide the Governor and/or agencies cover when repealing or revising a rule or regulation thus avoiding litigation if possible... Each troublesome regulation will be accompanied by a recommendation on the best way to reduce their negative impacts." Objectives outlined in the report include weakening the Oil and Gas Pit Rule, climate change regulations, and "mitigating" mid-level classified State employees who have an "anti-business political agenda."

7) "ENVIRONMENTALISTS ARE COMMUNISTS." Governor Martinez's first nominee for Secretary of The Energy, Minerals and Natural Resources Department, Harrison Schmitt, equated environmentalists with communists. Although Dr. Schmitt withdrew before he was appointed, we anticipate that Governor Martinez will continue to champion decision-makers who defer to industry over the environment and the health of our state's residents.

8) NEVER SAY DIE [TO A PERMIT APPLICANT]. In 2010, the Camino Real Landfill in Sunland Park filed for a 10 year permit renewal. Representing local residents, the Law Center petitioned the Environment Department to reconsider the application after significant facts in the case changed. Less than two weeks after NMED Secretary-designate F. David Miller took office, however, he granted the permit. We anticipate that this will be the first of many permit decisions that will benefit industry at the expense of vulnerable communities; the Law Center will continue to work on behalf of these communities.



Attorney Bruce Frederick at the
NM Supreme Court

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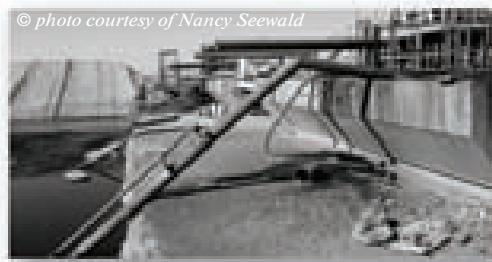


Pit Rule will go to higher Court *Law Center still working to reverse politically-charged chloride standard rollback*

"At the original Pit Rule hearing, an Oil Conservation Division staffer explained how pit liners are installed incorrectly. In fact, he showed 100 photos of torn or otherwise improperly installed liners," stated Attorney Eric Jantz in District Court on February 23. "Nine months later, when it raised the chloride standard by 1100%, the Oil Conservation Commission acted as if all of the sudden, oil and gas operators are installing liners correctly."

Speaking to Judge Barbara Vigil, Jantz explained that compelling evidence such as liner testimony led the Commission to adopt the stringent Pit Rule standards in the first place. When it weakened the standard less than a year later, the Commission's change of heart was not based on compelling evidence, but on a backroom deal between Governor Bill Richardson and the oil and gas industry. As such, it is a flawed standard that should be revisited or rescinded.

But audience members left disappointed if they were hoping for rulings on either the chloride case, or the "Bolling" case, which is an industry appeal of the Pit Rule.



(The Bolling case, which was consolidated with the chloride case in 2010, was argued before Judge Vigil in December.) At the conclusion of the chloride standard hearing, the judge announced that she would send the Bolling case directly to the state Court of Appeals without making a ruling.

The timing of these cases will depend upon a decision by Judge Vigil as to whether or not the chloride standard is remanded back to the Oil Conservation Commission. If the standard is sent back to the agency, the Court will place a stay on the industry appeal until the Commission holds a new proceeding on the chloride standard, or reverts to the original standard. If the standard is not remanded, Judge Vigil will immediately certify both cases to the Court of Appeals.

Law Center takes on Los Alamos Lab *Representing watchdog groups to ensure effective hazardous waste cleanup*

On behalf of Concerned Citizens for Nuclear Safety (CCNS), NMELC Staff Attorney Jon Block filed a motion to intervene in the on-going Federal District Court case between the Department of Energy (DOE) and the New Mexico Secretary of the Environment over the Los Alamos National Laboratory hazardous waste permit.

CCNS is concerned that (1) the permit as issued does not address the need for closure and post-closure plans on three major areas that need remediation from years of hazardous radioactive, chemical and mixed waste disposal; (2) the permit does not require ground water monitoring for those areas; and (3) the permit does not eliminate continued open burning of hazardous waste as a disposal method. The DOE filed the suit charging that NMED was trying to regulate radioactive materials under the permit, but also challenging other portions of the permit in the same complaint.

At this point, CCNS' motion to intervene in the matter is pending.



Environment Escapes Unscathed

The Law Center and allies like Conservation Voters New Mexico were able to prevent any anti-environmental bills from becoming law during this year's Legislative Session. Read more online.

Find up-to-the-minute information about our work, read our legal documents, and easily make your tax-deductible contributions online at www.nmelm.org

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Multicultural Alliance for a Safe Environment

February 10, 2011

To the NMELC,

On behalf of MASE, we want to express our deepest gratitude for all the great work you do for us, our organization, and our communities. We are truly thankful we have been able to establish such a strong and lasting partnership with you all. NMELC is always a strong and dedicated ally and you all have been of great service to our communities.

Thank you!

Nadine Padilla / MASE

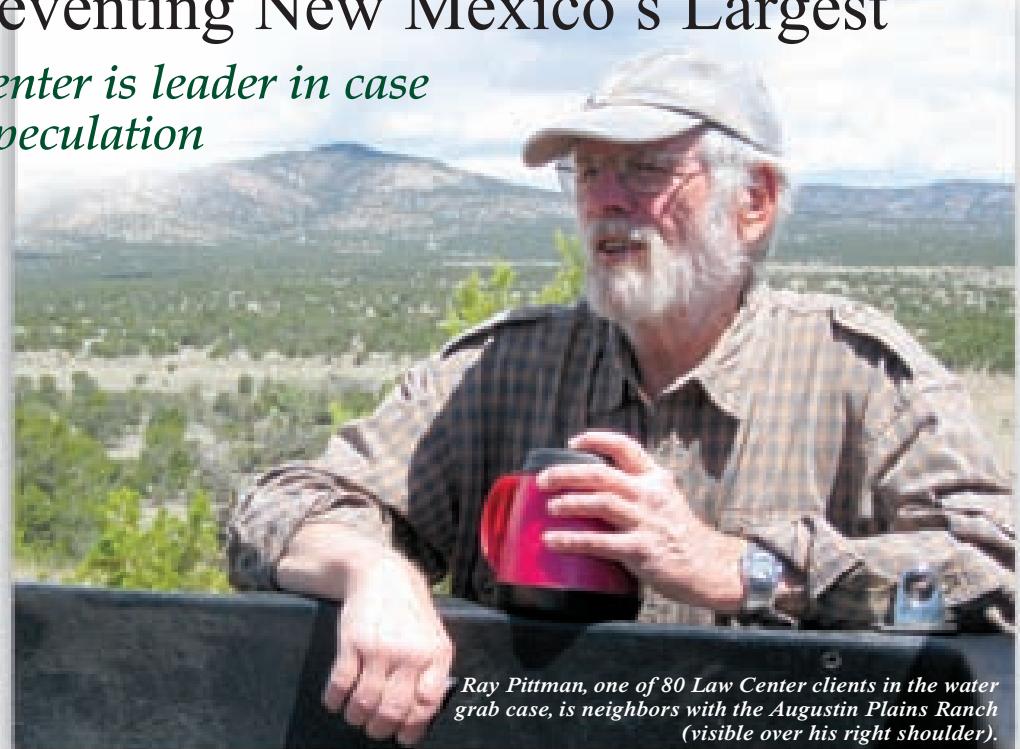
(right) State Police were on high alert during the pre-hearing conference in November. With more than 40 attorneys in attendance, Law Center client Ray Pittman joked that "maybe the sign should say 'no lawyers' beyond this point."

First Round in Preventing New Mexico's Largest Water Grab *Law Center is leader in case to stop massive water speculation*

The Law Center filed a motion on February 11th to dismiss an application by a corporation to appropriate 54,000 acre feet of groundwater per year – enough water to support a new city of hundreds of thousands of people. In its application, Augustin Plains Ranch, LLC, seeks permission from the New Mexico State Engineer to drill 37 wells, 3,000 feet deep, on its corporate ranch located near Datil, NM, for the purpose of selling or using the water anywhere within several counties.

"The application has to be thrown out, because it is so vague and speculative that the State Engineer can't evaluate or approve it," said Bruce Frederick, the Law Center attorney who filed the motion on behalf of about 80 residents who live in west-central New Mexico. "Under our law," stated Frederick, "no corporation or any other person can monopolize or hoard an entire supply of free public water for the purpose of speculative future sales. It's unconstitutional and flies in the face of over 150 years of western water law, which is based on beneficial use."

In addition to several tribes and pueblos that signed on to the Law Center motion, the Law Center has some interesting bedfellows in this case, including the federal Bureau of Reclamation and the Middle Rio Grande Conservancy District. The hearing examiner assigned to the case will hear oral arguments beginning on May 20th. The location of the oral argument has not yet been established.



Ray Pittman, one of 80 Law Center clients in the water grab case, is neighbors with the Augustin Plains Ranch (visible over his right shoulder).



Do you and your business value clean air, clean water, healthy communities, and a robust economy for New Mexico?

I bet you do.

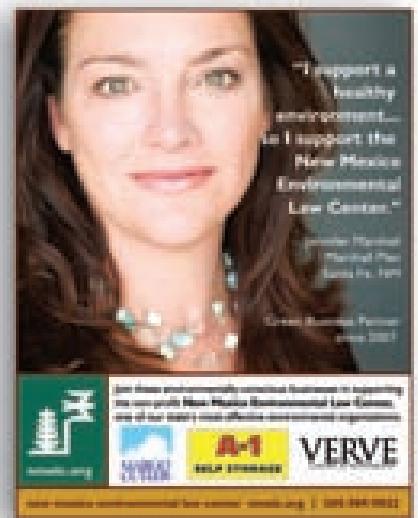
There's no better time to show that your business cares about our environment. Now more than ever, the input from our business community is tremendously important in stopping regulatory rollbacks. For example, you can contact your legislators who are working on relevant interim committees, or you can write letters to the editor of your local paper.

*Another way your business can make a difference is by becoming a Law Center **Green Business Partner**. For as little as \$250/year, your business will be a key partner in helping us keep New Mexico a beautiful and healthy place to live and work.*

I can't wait to talk with you about your commitment to the environment, and the benefits this program can offer your business. Please call me at 505-989-9022, or see our website at nmelc.org.

Sincerely,

*Sebia Hawkins,
Director of Development*



Let us feature your business in the Green Fire Times – which distributes 17,000 copies / month!

Thank You!

Welcome to long-time members Joan West (pictured below) and Lynda Brown, and journalist Elizabeth Cook-Romero, three amazing volunteers who are helping with our membership program and public education efforts, respectively.



Joan and husband, Truel West

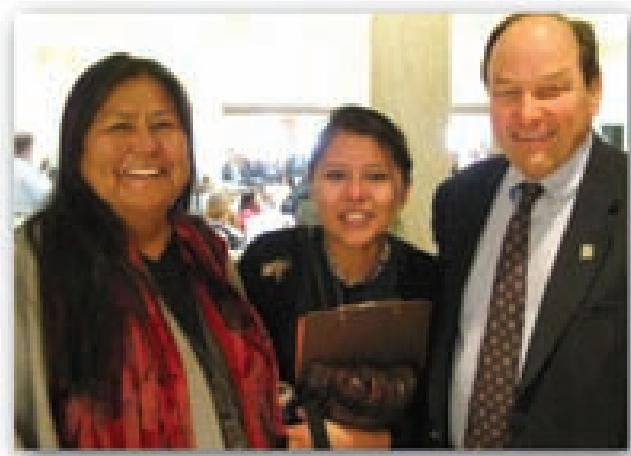
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Leona (center) at the Roundhouse with Law Center Board member Donna House and Executive Director Doug Meiklejohn.



We're also happy to welcome Leona Morgan to our Board of Directors. She is an activist working on Navajo uranium issues.

Finally, good luck to Robby Rodriguez, former Executive Director of the SouthWest Organizing Project and Law Center Board member, as he embarks upon his new work as a foundation program officer in New York City.

Thank you! Your end-of-year generosity helped us to obtain a \$25,000 challenge grant from the EMA Foundation!

We're now using that grant to fight regulatory rollbacks and work to keep pollution out of our communities.

Contributions made October 1, 2010–December 31, 2010

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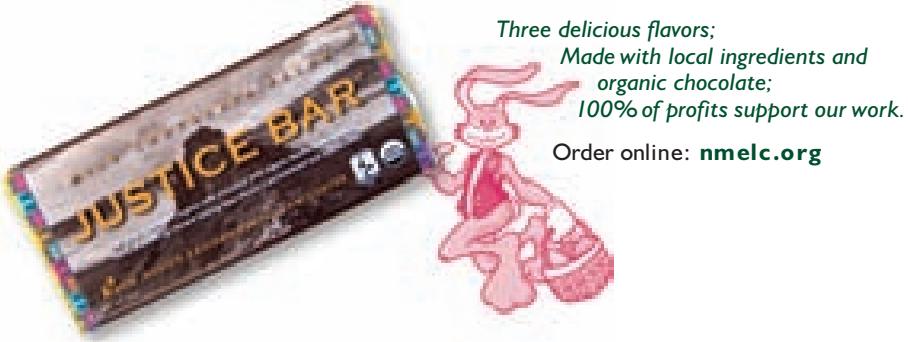


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8

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