

Published by the New Mexico Water Dialogue

To promote the wise stewardship and ensure the availability of water resources for future generations of New Mexicans through support of community-based planning and creation of inclusive forums for education, communication, and development of common ground.

## Texas v New Mexico Oral Arguments Underway

by Lisa Henne, PhD, JD,  
Associate, Law Office of Steven L. Hernandez PC



The State of Texas filed a lawsuit in the United States Supreme Court against New Mexico and Colorado in 2013, alleging that New Mexico violated the terms of the Rio Grande Compact. Texas alleges that the Compact is based on the understanding that water deliveries to the Texas state line would not be subject to depletions in New Mexico beyond those that were occurring when the Compact was signed in 1938, and that New Mexico has allowed water users in the Lower Rio Grande to intercept surface water deliveries to Texas through unpermitted surface water diversions and by allowing pumping of hydrologically connected groundwater. Texas is asking the Court to enforce the Compact and order New Mexico to pay for the water that Texas alleges was taken and any damages that resulted from the shortfall.

The Compact requires New Mexico to deliver specified amounts of water to El-

phant Butte Reservoir, which is located about 100 miles north of the New Mexico/Texas state line. Once Compact water is delivered to the reservoir, the Bureau of Reclamation allocates the water to the only two Rio Grande Project (Project) beneficiaries: Elephant Butte Irrigation District (EBID) in New Mexico and El Paso Water Improvement District No. 1 (EP1) in Texas. This presents a unique situation in which the upstream state's delivery point for interstate compact water is a considerable distance from the state line, and the entities that utilize "Texas" Compact water pursuant to contracts under the Project are located in both the upstream and the downstream states.

In 2008, Reclamation, EBID, and EPI entered into an operating agreement that they intended to resolve the issue of New Mexico's depletions and their impact on required deliveries to Texas.

### Save the Date - New Mexico Water Dialogue 22nd Annual Statewide Meeting Planning - How Can It Make a Difference?

The New Mexico legislature enacted statutes in 1987 that created a regional water planning framework. The first regional water plans weren't accepted by the Interstate Stream Commission (ISC) until 1999; the last in 2008. In 2013, the ISC initiated a new round of regional water planning. As a result of work undertaken so far, each of the 16 regions will receive drafts of an updated regional water plan – prepared largely by ISC consultants and staff – late this fall and early winter.

At the 22nd Annual Statewide Meeting on January 7, we will have an opportunity to address several issues that relate to improving both the planning process and its outcomes. How can regions better integrate ongoing planning with implementation? How can we strengthen processes to assure adequate representation of the values and concerns each region's diverse people? How can our institutions for governing and managing our water resources become more nimble and responsive to accelerating climate change impacts? How can water planning help the State better address funding for needed projects? And finally, how can we enhance dialogue, cooperation, and coordinated action among local, regional, state, and federal actors – that is, how can regional water planning make a difference?

= DIALOGUE =

**Fall 2015**

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## Report from the President

*by Jason John**NM Water Dialogue President, Board of Directors*

### Animas River spill brings water quality issues to the water planning table

**O**n August 5th, three million gallons of mine wastewater was released into Cement Creek, a tributary to the Animas River, north of Durango, Colorado. The point of discharge was located approximately 100 miles upstream of the Animas River confluence with the San Juan River in Farmington, New Mexico. The plume of heavy metals in the river reached New Mexico on Saturday, August 8 and merged with the San Juan River shortly thereafter. In a short time span the discharge affected the water supply to domestic wells, irrigation projects, water supply systems, local economies, the environment and wildlife.



The hours, days, and weeks following the discharge brought attention to the water quality of rivers, the health of watersheds, the connection between ecosystems, relationships between communities and values toward water. A wide array of emergency operations personnel were deployed to assess the impacts, monitor the developments, and keep the public informed. A vast amount of water quality data was analyzed and presented in public meetings and on the internet in hopes of bringing some understanding of this issue to as many people as possible. A lot can be learned from this event about how information is gathered, analyzed and disseminated to the public.

The spill highlighted the ongoing cleanup of historic mines in Colorado. In northwest New Mexico and the Four Corners region, the ongoing assessments and cleanup of uranium mines remains. These historic mining operations can and do affect water use and policy decisions. Water planning within the regions can assist with understanding the risks and in the development of projects, programs, and policies to better address these and other concerns.

The New Mexico Water Dialogue will take part in assisting in the discussion at the 22nd Annual Statewide Meeting on Thursday, January 7, 2016. We look forward to your continued support and participation in water planning in New Mexico and the Southwest Region.



## NM Water Dialogue testifies before the Water and Natural Resources Committee

Good morning.

I'm Eileen Dodds, Secretary/ Treasurer of the New Mexico Water Dialogue, and I'd like to thank you for the opportunity to address this committee.

On July 28th, the Water Dialogue had the pleasure of hosting a workshop at the Sevilleta National Wildlife Reserve conference center. We met to discuss the ongoing regional water planning activities occurring throughout the state that hopefully will lead to 16 updated regional water plans by this time next year.

We met to discuss the successes, challenges, and concerns with the process, and the format being used in updating the regional water plans. Thirteen of the 16 state planning regions were represented, as was the Interstate Stream Commission, including its Director, Ms. Dixon.

The day provided candid but objective discussions by each region and by the ISC as to the technical, administrative, and fiscal challenges in updating the regional water plans and meeting the ISC deadline.

You have been presented with a summary of our discussion. I'd like to review some of the major points that came out of the workshop.

We agreed to a list of 5 major issues:

1. Dissatisfaction with the DATA because the common technical platform figures represent the "lowest common denominator" and are generalized across the state where regional conditions vary greatly. With additional time and effort, more complete information for each region could be included to enhance the crucial understanding between the supply and demand gap.

2. There seems to be no good process for PRIORITIZING THE PROJECTS AND PROGRAMS that each region has presented to the ISC. There is a great inequity between very large and very small planning entities. Additional work is needed to establish a framework to assist the regions with submission of projects that can succeed in being implemented.

3. PARTICIPATION in the planning process has been somewhat lacking with little involvement by the pueblos and other tribes as well as many other stakeholders. We believe that participation can be increased through continued outreach within the regions.

4. The need to consider the issue of GOVERNANCE led us to agree to form a joint working group consisting of representatives from the ISC, regional water planners and steering committee members, and the Dialogue. The working group will look at models from other states and consider ways to make regional water planning groups more effective both legally and administratively. They will also explore ways the regions can be brought together to address conflicts.

5. LEGISLATIVE FUNDING has decreased. We discussed the need for funding using a "cost-benefit" approach in regards to legal issues, reducing the supply/demand gap, and building relationships, as well as implementing policies, programs, and projects to justify the funding requests.

Ms. Dixon's presentation pointed out that the first round of regional water planning took 11 years, and each region was responsible for its own process and plan completion. We no longer have that leisure. But the fundamental point today is that the current approach is dramatically underfunded to conform to the ambitious schedule. While the ISC has done what it could within those constraints, the resulting product will most likely meet only a fraction of each region's water planning needs. Much more work will be needed, most particularly a focus on how to deal with declining water supplies in changing conditions.

All that being said, good work has been accomplished. Comments from those representing the individual regions are summarized in handouts you have been given. Many concerns have been heard and each region will see a draft plan come out of the ISC by the end of this year.

Although this process is different than last time (then being "bottom-up" and this being "top-down"), we have to wait until we have new plans for the regions before judging the merits of the two approaches. Then, together, we will be able to decide on our next steps and see how our concerns have been addressed before plans are finalized. The Dialogue is willing to work with the ISC and others to plan for the use of the State's most valuable resource. We believe Ms. Dixon will offer us a seat at the table.

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### Committee on Water Governance Working Group Report

by Sharon Hausam

On July 28, 2015, the New Mexico Water Dialogue hosted a meeting to discuss regional water planning at the Sevilleta National Wildlife Refuge. The meeting was well attended by water planners, Dialogue board members, and Interstate Stream Commission staff.

Among other topics, participants discussed the concept of "governance" as it relates to water planning and water management in the state. According to Merriam-Webster online, governance is "the way that a city, company, etc., is controlled by the people who run it." Wikipedia offers more thorough definitions:

1) "All processes of governing, whether undertaken by a government, market or network, whether over a family, tribe, formal or informal organization or territory and whether through laws, norms, power or language" (*Bevir, Mark. 2013. Governance: A very short introduction. Oxford, UK: Oxford University Press*); and,

2) "The processes of interaction and decision-making among the actors involved in a collective problem that lead to the creation, reinforcement, or reproduction

*Governance—Continued on pg 4*

*Governance—Continued from pg 3*

of social norms and institutions" (Hufty, Marc. 2011. "Investigating Policy Processes: The Governance Analytical Framework (GAF). In: Wiesmann, U., Hurni, H., et al. editors. *Research for Sustainable Development: Foundations, Experiences, and Perspectives*. Bern: Geographica Bernensia: 403–424).

Governance is closely linked to democracy and public participation, subjects of great importance in our culture. It is tied to considerations of decentralization and sharing of responsibilities, and to opportunities for broad participation that promotes collective learning, cooperation, and partnerships among government entities and members of civil society.

In regional water planning, questions of governance revolve around who participates in the regional water planning process, how steering committees are formed and operate, how planning frameworks reflect and address the needs of multiple levels of jurisdiction, and how inter-regional concerns are addressed. They must also consider how the plans are implemented – whether by local governments, regions, federally-recognized tribes, or the state – to resolve critical issues.

Participants at the Sevilleta meeting agreed to form a working group to discuss these issues and make recommendations for improvements. The volunteer "Governance Study Group" will research successful models for water governance, both those used in prior rounds of water planning in New Mexico and those from outside the state, and use those models as a basis for suggestions. As of mid-September, the Study Group had held an initial meeting via conference call. Participants are exploring the motivation for public engagement in water planning, the role of technical committees in the planning process, tribal involvement in water planning, the benefits of long-term water planning and management groups, the impact of water rights on water planning, and other topics.

Elaine Hebard is coordinating the Governance Study Group. If you would like to participate, please contact her at [eheward@yahoo.com](mailto:eheward@yahoo.com).

*LRG Lawsuit—Continued from pg 1*

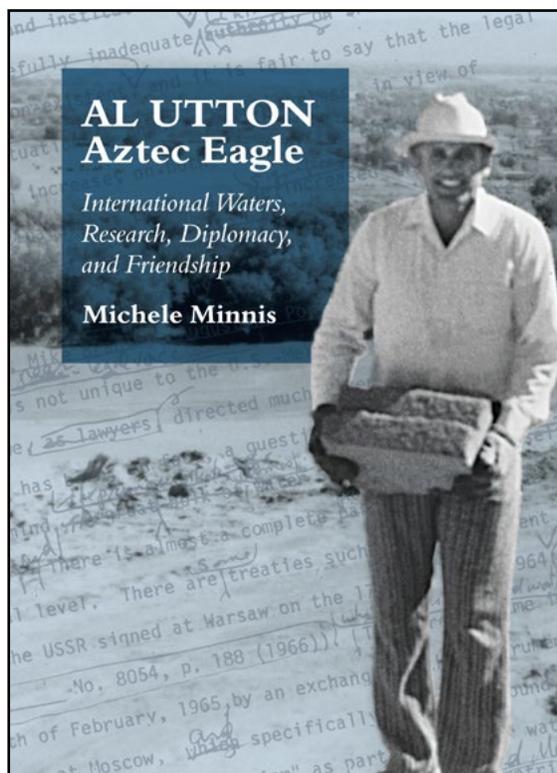
The 2008 Operating Agreement allowed groundwater depletions in New Mexico from wells developed between 1951 and 1978 to be grandfathered into the Project in exchange for EBID guaranteeing that EP1 would receive its full allocation of surface water, as well as allowing a limited amount of carry-over storage in the reservoir. Although the parties to the Operating Agreement were satisfied with its terms, the New Mexico Attorney General sued the BOR, EBID, and EP1 over the agreement in 2011, claiming that it gave too much water to Texas and was detrimental to New Mexico. The Attorney General's lawsuit is viewed by many as having provoked Texas into bringing the Supreme Court action against New Mexico.

The Supreme Court appointed a special master to preside over the case and make recommendations to the Court. There are presently three motions pending before the special master: New Mexico's motion to dismiss the case, EBID's motion to intervene, and EP1's motion to intervene. The special master held oral arguments in August 2015 for New Mexico's motion to dismiss and EBID's motion to intervene.

During oral arguments, New Mexico argued that the lawsuit should be dismissed

because the Compact does not require New Mexico to make a state line delivery of water to Texas or to preserve conditions in the Lower Rio Grande as they existed in 1938. In effect, New Mexico's position is that its Compact delivery obligation ends at Elephant Butte Reservoir, and that the United States should request a priority call be made against all junior appropriators that are impairing the Project.

EBID asked to intervene on the grounds that it has a compelling interest in the case and is not properly represented by the State of New Mexico or any of the other parties to the lawsuit. EBID argued that it has an interest in its own right because of its location between Elephant Butte Reservoir, where New Mexico claims its Compact obligation ends, and the New Mexico/Texas state line, where Texas receives its Compact water, and because EBID has primary responsibility for ensuring that water ordered by EP1 is actually delivered to Texas. EBID also argued that it has bi-state interests because it crosses the state line to deliver water to irrigators in Texas. EBID's position is that implementation of the 2008 Operating Agreement should be pursued in the Supreme Court case.



Michele Minnis, PhD, was one of the founders of the UNM Master of Water Resources Program where she taught for 15 years, serving twice as its acting director. She was also associate director of the Natural Resources Center, created by Al Utton as an education, research, and public service arm of the *Natural Resources Journal*. In the early 1980s, Minnis designed and directed a legal writing program for first-year UNM law students.

Review of her new book, *Al Utton, Aztec Eagle*, by Lisa Robert, follows next page.

## Al Utton, Aztec Eagle, a biography by Michele Minnis

Book Review, by Lisa Robert

Something we long for but won't fully receive in our lifetime is perspective on the effect we'll have on future generations. Such verifications await our passing, and fall to others to pronounce. The best we might hope for is tenancy in the benevolent memory of many, some hint of our footprint on the hard-packed trail, and a devoted biographer like Michele Minnis to assemble our residual fragments into a holograph that continues the dance. Al Utton has been so blessed.

When he joined the faculty of UNM's law school in 1961, he was 30 years old and already "a former UNM student body president; a Rhodes Scholar with an Oxford degree in jurisprudence who had done post-graduate work at the University of London and Yale; a US Air Force JAG lawyer with two years experience; and a member of the New Mexico Bar who had practiced with a distinguished Albuquerque firm and been 'called to the English Bar' by the mysterious, august-sounding Inner Temple..." Behind that sophisticated resume, though, was an accessible, empathetic soul, product of rural, community-minded Aztec, NM, who had looked with his own eyes upon the wreckage of Europe in the aftermath of World War II, and that ugly outcome of disrespect among neighbors seems to have informed his thinking for the rest of his life.

Well ahead of his time on issues of environment and the necessity of caring for it as a connected whole, Utton was an advocate for the "institutional capacity to flex and move with changing circumstances." A believer in "functional relationships," he saw the value in establishing enduring venues for collective problem solving, and his tracks turn up worldwide, wherever unconfined natural resources test the arbitrariness of political boundaries. He had his finger on a pulse that would quicken in the years to come, for as Minnis observes, "In the last quarter of the twentieth century, the traditional notion of the international boundary as a land and water 'area' was being supplanted by the far more complex and dynamic concept of an 'ecosystem'." Utton got it: as early as 1972, he organized a milestone symposium

on environmental problems common to the US/Mexico border. What took root in that early gathering was a sense that decisions about critical natural resources ought not be relegated to 'governments' alone. "We must redesign our institutional arrangements," he wrote in the conference summary, and "eventually develop institutions that will focus on best use of natural resources rather than on artificial political boundaries that are often the product of historical accident." Under his prescient guidance, the symposium evolved into the US/Mexico Transnational Resource Study

*"We must redesign our institutional arrangements," he wrote in the conference summary, and "eventually develop institutions that will focus on best use of natural resources rather than on artificial political boundaries that are often the product of historical accident."*

Group, which aimed to inventory not only the region's common problems, but also the array of data and technology available for solving those problems, and the public policy that would be needed to effect necessary change. Within the group, "the professions of civil engineering, economics, hydrology and law dominated; but there was at least one architect and a smattering of agronomists, political scientists, environmental planners, philanthropists, diplomats and public-agency water professionals." The scope of issues they pondered proved equally cosmopolitan, and one problem in particular foreshadowed in uncanny detail the headlines of a future decade: the unsustainable nature of groundwater pumping beneath the border cities of El Paso and Juárez. The group's call for "immediate, cooperative, bi-national attention" fell on deaf ears.

Where the plea to team up did take root was inside Utton's home state. As the convener of innumerable seminars, work groups, and symposia that sought to soften

distrustful ranks; as author and co-author of a stack of useful templates for treaties, sharing agreements and legislation regarding sustainable resource management; as longtime editor of the esteemed Natural Resource Journal; and as a twenty-year veteran of the Interstate Stream Commission (ten of those years as its genteel chair), Al Utton influenced every possible aspect of water policy and consciousness in the Land of Enchantment. His drumbeat is as unmistakable as the tattoo of rain on dusty ground, and we are still auditing his course on group process, accord, and malleability.

Minnis' book reawakens memories of the anxiously optimistic 1990s, when Utton's vision seemed destined for realization. I'm struck by the noble word 'comity,' (a term this self-assured spell-checker doesn't even recognize), and by legions of perceptive phrases such as 'articulating the interests of a constituency,' 'enlisting diversely-talented people in common cause,' and 'how mutual interest overcame natural suspicion.' These are the ribs and sacroiliac of regional water planning, a program largely of Utton's creation, and if you harbor any doubts about that, you won't once you've finished Chapter 19, Minnis' lucid account of *El Paso v. Reynolds*. Piece by piece, she links the hydrologic reality of the Hueco Bolson; the provoking role of a notorious case called *Sporhase*; and the thrusts and parries of a brilliant legal team, until the entire story emerges, seamless and stunning.

Al Utton kept an eye on the 20-year oscillation of regional water planning that followed *El Paso*. He lived to see all 16 stakeholder committees begin work on their mandated water plans, and like some beneficial mineral in the drinking supply, his ardent philosophy of inclusive collaboration and ongoing exchange so infused the process that grassroots interests are still convinced their contributions matter. As the state embarks on another 'iteration' of stretching and sharing that most 'trans-boundary' of resources, *Aztec Eagle* is an unexpected glimpse into water planning's DNA, and a worthy map, straight to Al Utton's legacy.

## Common Ground on Hostile Turf

### Stories from an Environmental Mediator by Lucy Moore

*Book Review, by Kathy Grassel*



It's all about the story. "Colonel Michael DeBow, district engineer for the Albuquerque District, US Army Corps of Engineers, stands in full uniform in front of an angry Hispanic crowd in the Abiquiu elementary school gym." Just try to put this book down after reading that line. This is the opening sentence of Lucy Moore's Chapter 6, "The Army Corps Takes Orders," of her riveting book, titled, powerfully, *Common Ground on Hostile Turf*. All of Lucy Moore's stories are riveting and suspenseful. This was to my curious surprise, because in almost all books (that I manage to read), there is some definable part in the course of it where there's a lag, a departure to the beauty of nature or some such, a deflation, but not here. Just when I thought I might allow myself a little snooze in Chapter 11, reading down a listing of necessary protocols to anchor a meeting, wham! the Tribal leaders abruptly get up and walk out on the Feds for what turned out to be a two-hour caucus, with no one, including Lucy, knowing if and when they would return to the table. (Spoiler alert: They did come back, and, with Lucy's and the Feds' stunned blessing, took control of the process, and without ground rules, saw 18 months of negotiations through to the end.) This book, in short, is a page-turner.

Lucy defines mediation as "all about the story," and this book, for me, was all about her own astonishing ability to tell that story. Lucy tells eleven stories epitomizing her life's work as a mediator of different conflicts that had become, over years, decades and even centuries, intractable. Whether with Western Network or solo as Lucy Moore and Associates, Inc., it was her Mission Impossible to locate some elusive common ground on which to arrange a table, make coffee and talk. Lucy is able to guide, herd, nudge, lure, or cajole all manner of antagonistic, distrustful, historically hurt, sometimes vengeful groups to a meeting room, meadow, chapter house, or school auditorium and get them to communicate. Interest groups are transformed into individual people with a story to tell and for others to hear. They're on their sometimes tortuous, always emotional, way to a semblance of accord.

Lucy's confidence that within these warring and stubborn circles can be found the narrowest concentricity on which to build some kind of mutual relationship—Step One to building trust and possible resolution—is testament to her flexibility and keen intuition, these qualities piled on to actual skill. Col. DeBow was skilled, too, but in the rarefied field of reservoir management, on whose principles he could depend to neatly wrap up the Corps' engineering proposals at Abiquiu Lake, skill which would do him no good at all in the four public meetings held to satisfy the requirements of NEPA. But before it was over, the colonel was able to appreciate one person testifying that "...the lakeshore looks like a dirty bathtub ring with rotting trees, floating stumps, and mud. Soon the trees and stumps will float away, just like our culture and way of life." And another, "It feels like being a prairie dog, drowned and run out of your hole, over and over again."

The variety and scope of groups in conflict with whom Lucy has dealt is dizzying. Land-based communities of acequias and shepherders versus environmentalists and regulators. Tribes versus resource extractors and anything federal government. Ranching radically redefined by EPA list-

ing of the Chiricahua leopard frog and the tiny Cochise pincushion cactus. Then there's the two-stroke engine industry—makers of those unregulated air pollutants, chain saws, lawn mowers, ice augurs, and weed whackers—Lucy Moore went to Michigan for that one, learning that one hour of weed whacking was equivalent in air pollution to driving 450 miles in your car. Who knew?

The amazing thing for me as I was reading along was that I felt myself actually physically changing, my head getting curiously lighter, so that by the end of twelve chapters, I had unconsciously put a knife into the naïve but steady environmentalist that I'd fancied myself to be, spanning the years from *Silent Spring* to *An Inconvenient Truth*. Now my truth is shaky, subject to change, as I relax and listen to people telling their marvelous stories.

Lucy Moore is not only perennially visible and vocal as facilitator of our New Mexico Water Dialogue annual meetings, she is also the Dialogue's co-founder, nurturing and guiding us for more than 22 years. What would our meetings be without the day's pages of talking points and summaries, torn from her flip chart and taped to the walls?

And now, Lucy Moore is the recipient of the 2015 Sharon Pickett Award from the Association for Conflict Resolution, a high honor for her contributions to environmental protection through her work as a mediator and her stories about those in conflict (*Common Ground on Hostile Turf*, Island Press).

New Mexico Water Dialogue  
 22nd Annual Meeting  
 January 7, 2016  
 8:00 am to 4:30 pm  
 Indian Pueblo Cultural Center  
 2401 12th St. NW, Albuquerque, NM 87104

## PLANNING: HOW CAN IT MAKE A DIFFERENCE?

Registration includes lunch catered by the Indian Pueblo Cultural Center and morning beverages and snacks. By registering early, you help us plan for these items, and we offer discounts. The simplest way to register for the 22nd Annual Statewide Meeting is to go on line to <http://nmwaterdialogue.org> and click on the "Register Now" button. Credit cards can be used online only. Alternatively, you may fill out this form and mail it with a check or purchase order to NMWD c/o John Brown, PO Box 1387, Corrales, NM 87048. The registration fee after January 3rd is \$60 and will need to be paid at the door the day of the meeting.

Registration Form

Name(s) \_\_\_\_\_

Organization (optional, except for purchase orders) \_\_\_\_\_

Title or position (optional) \_\_\_\_\_

Address (street or box number) \_\_\_\_\_

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Amount included: \$ \_\_\_\_\_

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**New Mexico Water Dialogue  
22nd Annual Statewide Meeting**

**Planning: How Can It Make a Difference?**

January 7, 2016

8:00 am - 4:30 pm

Indian Pueblo Cultural Center, Albuquerque, New Mexico  
2401 12th St. NW, Albuquerque, NM 87104

**DRAFT AGENDA**

8:00 – 8:30 AM	Registration
8:30 – 9:00 AM	Introductions/Opening Remarks
9:00 – 10:15 AM	Keynote Speakers: Sen. Peter Wirth and Rep. Candy Ezzell (tentative), Chair and Vice-Chair, Water and Natural Resources Committee
10:15– 10:30 AM	Break
10:30 – 12:00 PM	Panel: Pushing the Envelope—Solutions or Pipe Dreams
12:00 – 1:00 PM	Lunch
1:00 – 2:30PM	Panel: Regional Water Planning—Emerging Issues
2:30 –2:45 PM	Break
2:45– 4:00 PM	Panel: Report and Update from the Interstate Stream Commission
4:00 – 4:30 PM	Closing Remarks: Next Steps for the Dialogue Nominations of candidates for the Dialogue Board

Please check [www.nmwaterdialogue.org](http://www.nmwaterdialogue.org) for additions and changes to the agenda and to register.