To: Water and Natural Resources Committee
From: Max Yeh, Percha/Animas Watershed Association (PAWA)
Date: July 31, 2019
Re: **Report and update on NMCC's water rights litigation**

The validity of the water rights which NMCC intends to use at Copper Flat Mine in the Percha-Animas watershed has been challenged in court since 2014. The litigation is not a tort case. Rather it is an *inter se* challenge in the Adjudication of the Lower Rio Grande Water Basin. This means that although many people claim their water will be negatively impacted by NMCC's use of this water, the litigated issue is the validity of its rights. In basin adjudications, the Attorney General on behalf of the State Engineer sues all claimants of water rights in the basin over the legitimacy of their claims. The OSE researches each claim, determines validity, and makes an offer through the court to claimants of their adjudicated rights. In the *inter se* phase of the adjudication, claimants can challenge each others' rights. NMCC's claims were challenged by the State Engineer, the Ladder Ranch, the Hillsboro Mutual Domestic Water Consumers Association, and 13 private local water users. PAWA supports the Water Association and Hillsboro litigants, so my report should not be considered unbiased.

In this litigation, the adjudication court divided NMCC's claims into about 2,000 afy of vested rights and about 7,500 afy of inchoate rights. The court found that only about 900 afy of vested rights were valid and that no inchoate rights were valid. NMCC appealed the decision on the inchoate rights. The Ladder Ranch and Hillsboro cross-appealed the decision on the vested rights, claiming, essentially, that no vested rights should have been recognized. Many amicus briefs have been filed: NM Mining Association and GCM, Inc. (two attorneys and their children claiming residual interests in these rights) support NMCC; and the Navajo Nation, Sierra Club, EBID, and the State of Texas oppose NMCC's claims. By end of next week all the briefs for the appeals will have been submitted, so we all wait for the appellate process to take its course.

The litigation, however, presents the legislature with a serious problem. The state constitution mandates that beneficial use shall be the basis, measure, and limit of the right to use water in New Mexico. NM Constitution, XVI, 3. "Basis" means that you only get a water right through using water. "Measure" means that the amount of water you have a right to is determined by the amount that you use. "Limit" means that if you stop using water, you stop having the right to use water. In the NMCC litigation, the water rights have not been beneficially use for 37 years, since 1982. "Use it or lose it," we say in New Mexico about water. But the law does not clearly back up that constitutional stipulation.

Common law in New Mexico treated four years of nonuse as sufficient for forfeiture, and although forfeiture was written into the statutes in 1907, in 1965 we revised the forfeiture statute – for good, equitable reasons – to allow the State Engineer to declare nonuser,[1] give notice, and allow 12 months to remediate the fault. But what happens if the State Engineer does not give notice? This is the case in the NMCC litigation. The statute does not require the State Engineer to give notice of forfeiture, and generally, no actual forfeiture can be effected without it. The state has opened a loophole in its need to sanction abuse of the use-right to water.

In 2013, I petitioned the State Engineer to examine this case and give NMCC notice of impending forfeiture. The OSE declined, saying that they had no means to track nonuse, and to single out nonuse in this case was prejudicial because there were so many nonusers. By policy, the SE only considers nonuser upon application for a change of use, not upon title change. The forfeiture statute has failed and created grounds for costly court cases as this one in which the issue of abandonment must be brought forward, unreasonably, to deal with sanctions against abuse.

Historically, and also in this case, the problematic reason for nonuse is speculation with water rights; that is, speculators use water rights as assets to be used in the water market for profit.

[1] "Nonuser" is the neglect of a conditional right to use something by neglecting to use it.

In NMCC's litigation, it is called "investment," but in western prior appropriation water law states such as New Mexico, the practice is called "speculation," and it has a long history. As early as 1860, the California Supreme Court held that a claim for mere speculative purposes by parties having no expectation themselves of actually constructing works and applying the waters to some useful purpose gives them no rights against subsequent appropriations made in good faith. *Weaver v. Eureka Lake Water Company*, 15 Cal. 271, 272. Or, as stated in the Colorado Supreme Court in 1893: "The constitution provides that the water of natural streams may be diverted to beneficial use; but the privilege of diversion is granted only for uses truly beneficial, and not for purposes of speculation." *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 152 (1892). A later Colorado Supreme Court explains why speculation conflicts with the concept of public ownership of water: "Mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent bona fide appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution." *Denver v. Northern Colorado Water Dist.*, 276 P.2d 992, 1009 (Colo. 1954).

In Colorado, speculation is now statutorily focused on title change. "Speculative sale," which cannot legally lead to appropriation of water, is determined by either of two evidentiary criteria: (1) the would be appropriator has no legally vested interest or a reasonable expectation of getting an interest in lands to be served (excepting the federal government and an agent of the benefactor of appropriation); or (2) the appropriator has no specific plan and intent to divert, store, or control water for a specific use. C.R.S. § 37-92-103(3)(a)(i) and (ii).

The previous owners of NMCC's water rights parlayed an investment of $20,000 into a profit of $2.6 million. Meanwhile for almost 40 years, the state of New Mexico has not gotten the benefit of a single drop of water.

For the preservation of NM's constitutionally mandated water law and to ensure efficient use of water through efficient application of water rights, the legislature needs to address this problem by mandating SE action to cut off nonuser and/or by statutorily addressing the speculation issue.

Supplemental Comments

1. When Themac, the Australian owned Canadian company which owns NMCC, bought these rights, it seemed oblivious of New Mexico water law as well as NM's "buyer beware" practice in water rights sales, and consequently it got stung on a speculative deal. NMCC has spent over $80 million on a dry mine. As victim of legal ambiguity here, NMCC should join us in seeing that doesn't happen again.

2. In the future, when speculators who have residual interests in these rights own them, the water that these rights control will leave Sierra County because as a poor county we will be unable to buy those rights for local use. Without public water, development in this county will die.

3. Last week, the Seventh District Court dismissed "with prejudice" the Augustin Plains Ranch appeal of the SE's denial of its speculative plan saying "[t]he people of New Mexico should not have their water tied up any longer with possibilities." "Memorandum Decision for Motions on Summary Judgment," *Augustin Plains Ranch v. Tom Blaine,* 7th Judicial District Court, filed 7/24/2019 (unpublished), pp. 5-6. In the court's earlier decisions on matters related to this case, it stated, "[a]pplicant attempts to privatize the powers of the ISC without any of the responsibilities of this public entity serving the owners of this state's waters, the New Mexico public." The plan, the court said, violates "the sound policy of public ownership in the waters of this state as declared in the New Mexico Constitution." And, the cost of such a plan would be the relinquishment of public ownership of water. *Idem*, Appendix B, 31-32.