



Annual Report

December 2001

Office of the Attorney General
State of New Mexico
Patricia A. Madrid, Attorney General

Civil Division

Assistant Attorney General Albert J. Lama, Director



Overview

The Civil Division of the New Mexico Attorney General's Office has 17 attorneys and three clerical staff positions. The attorneys in the Civil Division provide legal advice to administrative boards and commissions throughout the state. Civil Division attorneys are also primarily responsible for preparing advisory letters and formal opinions for members of the state legislature, state officials and district attorneys. In 2001, the Civil Division issued three formal opinions and 31 advisory letters.

Inspection of Public Records Act and Open Meetings Act Seminars

By the end of 2001, attorneys in the Civil Division had visited each corner of the state to educate and assist the public and state and local officials in understanding the provisions of these laws. Some of the communities visited in 2001 included Truth or Consequences, Silver City, Las Vegas, Tucumcari, Raton, Las Cruces, Hobbs and Roswell.

Division Highlights, 2001

Reviewed over 250 pieces of legislation for the forty-fifth legislature, first session

Analyzed over 230 pieces of legislation for the forty-fifth legislature, first session

Issued three Opinions of the Attorney General

Issued 31 advisory letters at the request of elected officials

IPRA Amendment 2001

A new provision of the Inspection of Public Records Act was enacted into law this year and took effect on June 15, 2001. [NMSA 1978, § 14-2-7(D) (2001).] Now, each public body must post in a conspicuous place in its administrative offices, in an area accessible to the public, a written notice describing a person's right to inspect public records and setting forth the public body's specific procedures regarding such inspection. These posted procedures must describe the responsibility of the public body to make its records available for inspection, how a person can request inspection of and copies of public records and the reasonable fees charged for copying public records.

The Attorney General's Office and the New Mexico Foundation for Open Government were instrumental in enacting this change in the law. The AGO drafted the language of the amendment, worked closely with the legislative sponsor in advocating for its passage and encouraged the governor to sign this important provision that strongly supports the public's right to know.

Special Counsel for Indian Affairs

The Special Counsel for Indian Affairs (SCIA) left the office in July 2001. Since that time, the Civil Division Director has been conducting a search for her successor.

Juvenile Justice Program

In 2001, the SCIA maintained contact with the general counsel at the Children, Youth and Families Department (CYFD) regarding the Juvenile Justice Program. Currently, CYFD is in the process of drafting an intergovernmental agreement to propose to the Zuni Tribe for its review and comment. The new SCIA will be working with CYFD to refocus the balance between accountability and rehabilitation planning for youth committed to CYFD's facilities in order for the proposed intergovernmental agreement to provide the state and the Zuni Tribe a complete understanding of obligations and legal requirements under the New Mexico Children's Code, NMSA 1978, § 32A-1-1 et seq.

Navajo Nation Consumer Issues

The SCIA had an opportunity this past year to meet with Navajo Nation Attorney General Levon Henry regarding the coordination of efforts to address mutual consumer issues and concerns of the Navajo Nation. The Navajo Nation Council recently adopted various Consumer Protection Laws to provide protection to Navajo consumers who enter into business transactions within the Nation. The AGO will continue working collaboratively in the coming year with the Navajo Nation Attorney General's Office on a number of consumer issues that have been forwarded to the AGO.

Indian Affairs Committee Issues

In 2001, the SCIA worked closely with staff and members of the Indian Affairs Committee on a variety of issues, ranging from concerns surrounding the exercise of Indian tribes' jurisdictional authority over state highways running through Indian lands to problems with access to law enforcement protection fund monies by tribal law enforcement agencies. The SCIA will continue to offer assistance and act as a resource whenever called upon by the Committee.

Attorney General Opinions and Advisory Letters

Opinions

The AGO issued three Attorney General Opinions and 31 advisory letters in 2001. The opinions covered a wide range of complex legal issues of statewide concern. A synopsis of each is provided below.

Attorney General Opinion No. 01-01 (September 24, 2001)

This opinion addressed whether gambling on Keirin-style Velodrome Bicycle Racing, authorized under the New Mexico Bicycle Racing Act, 1978 NMSA § 60-2D-1 et seq, is illegal under the federal Professional and Amateur Sports Protection Act (PASPA). [28 USCA § 3701 et seq.] The federal law contains broad prohibitions against gambling on amateur and professional sporting events; however, it also contains exemptions for some established gambling industries such as horse racing and Jai Alai. The opinion analyzed whether the New Mexico statute, which authorized parimutuel gambling on bicycle racing in New Mexico, was exempt from the federal gambling prohibitions in PASPA. The opinion concluded that the federal law does prohibit gambling on bicycle racing in New Mexico under the Act. Further, the opinion concluded that the exemptions in PASPA do not apply in New Mexico primarily because gambling on Keirin-style velodrome racing has never actually occurred in New Mexico. In addition, the exemptions in the PASPA cannot apply because the July 1, 1992 effective date of the New Mexico law is beyond the "grandfather" exemption date, which allowed established gambling industries in some states to continue to exist.

Attorney General Opinion 01-02 (October 17, 2001)

This opinion addressed the question of whether counties may own what are called 'conservation easements.' These are easements owned by someone other than the person who owns the actual real estate, and they require the property to be reserved for such things as open space, farmland preservation, trails and the

like. The Land Use Easement Act neither prohibits from owning nor authorizes counties and other government entities to own conservation easements, although provisions of the Act prohibit government entities from acquiring the easements by eminent domain. Because government entities may own many other types of limited use easements, and because the Act was silent on the issue, the Attorney General's opinion was that counties could own conservation easements.

***Attorney General Opinion 01-03
(November 14, 2001)***

This opinion concluded that local school boards may issue general obligation refunding bonds in a principal amount that exceeds the principal amount of the outstanding bonds being refunded, based on both the constitutional provision regarding refunding bonds and decisions by New Mexico courts. However, by statute, the refunding bonds must first be approved by the Department of Finance and Administration, and the proceeds of those bonds can be used only for the purpose of refunding existing school district general obligation indebtedness, as provided by law, and not for new capital outlay projects, operating costs of a school district or other purposes besides refunding.

***Advisory letter dated March 28, 2001 to
Senator Ben D. Altamirano***

Senator Altamirano asked whether the Human Services Department (HSD) could legally move ten full-time equivalent employee positions (FTEs) from one division within the HSD to another. The advisory letter concluded, based on the state constitution's provisions giving the legislature exclusive authority to appropriate money and protecting separation of powers among the branches of government, that because the legislature had appropriated funding for a specified number of FTEs for each division of HSD in the General Appropriations Act, HSD could not move FTEs from one division to another without further legislative authorization.

***Advisory Letter dated August 15, 2001 to
Representative Roberto J. Gonzales***

Representative Gonzales asked whether recent legislation authorizing the imposition of a county education gross receipts tax in certain instances was constitutional. The letter analyzed a number of potential constitutional challenges, and concluded that the legislation did not violate the separation of powers, the equal and uniform taxation or the Article IX debt provisions of our constitution. We were unable to determine if the legislation (which by its terms limited its application to Taos County only) was the kind of special legislation barred by our constitution, but noted that it is up to the legislature in the first instance to determine the need for special legislation. Finally, upon application of the presumption of constitutionality to which legislation is entitled, we concluded the residency requirements contained in the legislation would probably survive constitutional challenge.

***Advisory letter dated August 21, 2001 to Paula
Tackett, Director, Legislative Council Service***

On behalf of Senator Richard M. Romero, Ms. Tackett requested the AGO's advice regarding the constitutionality of a long-term suspension of a student for unexcused absences. The advisory letter concluded that the provisions of the state constitution requiring children to attend school and mandating a uniform system of free public schools did not preclude a school from adopting reasonable disciplinary policies, including suspending a student for unexcused absences.

***Advisory Letter dated October 4, 2001 to
Representative Joe Thompson***

This letter was written regarding the release from liability of persons who use automated external defibrillators (AEDs) in New Mexico. Our advice to Representative Thompson was that a person who uses an AED and is not formally trained in AED use or associated with an AED program under the Cardiac Arrest Response Act may be subject to the release of liability under the Medical Care Act,

§ 24-10-3 NMSA 1978 ("Good Samaritan" law). Representative Thompson was also advised that the federal law on AED use (42 USCA § 238q) does not apply to AED use in New Mexico because New Mexico has two statutes that address immunity for persons who use an AED in emergency circumstances.

Advisory Letter dated November 6, 2001 to Senator Richard Romero

Senator Richard Romero asked for an opinion on two issues concerning the applicability of the New Mexico Environmental Improvement Board's (EIB) current Liquid Waste Disposal Regulations, specifically, the standards that govern onsite liquid waste systems. First, must "failed systems," as defined under the Regulations, located on lots with dates of record prior to February 1, 1990 that are smaller than minimum lot sizes, meet current standards? Second, are on-site liquid waste systems that were installed without permits treated the same under the Regulations as those that have permits? Based on

our review of the Regulations, and after reviewing a response to Senator Romero's letter from the New Mexico Environment Department (NMED), we concluded with respect to the first issue that "failed systems," located on lots with recording dates prior to February 1, 1990, are required to meet all Regulations if such a failed system was installed or most recently modified after October 15, 1997, or if the owner of the system seeks a "modification" as defined in the Regulations. In conversations with representatives of NMED, we have been assured that NMED does not allow any such system to be modified without requiring compliance with all Regulations. NMED agrees that to allow such a modification would violate the Regulations. In response to the second issue, we concluded that systems installed without permits are not treated the same under the Regulations as those that have permits. Specifically, "unpermitted" systems that are properly "grandfathered" need not meet the current EIB Regulations unless they are subject to a modification after October 15, 1997.



*Different times, different places,
different people,
we share suffering and pain
a resolve that none shall
ever fear again
a vow from the bottom of our hearts
freedom and peace forever.*

Kathleen Booky, "THE LONG MARCH"
From a monument on the grounds of the Bataan Building, Santa Fe

Consumer Protection Division

Assistant Attorney General K. Kane Graves, Director



Overview

The Consumer Protection Division has the greatest opportunity to work directly with, and to promote the interests of, the people of New Mexico. Recently, the Health Law Unit was organized and placed under its umbrella in a consolidation effort to better help consumers. This consolidation is intended to provide improved services for health care, charities, consumer protection, antitrust and multistate claims and general commercial trade activities relating to consumers.

In 2001, the Consumer Protection Division worked to protect consumers in the areas of health care, sweepstakes and business opportunity fraud, the Firestone Tire lawsuit, the Level Propane case, numerous multistate cases and charitable solicitations. Our of 5,000 complaints received, 71% were successfully mediated. Those complaints not mediated were either litigated by private attorney, part of a multistate case or had no legitimate issues.

The top ten consumer complaints from New Mexicans fall in the following areas:

- Automobile/Car Rental
- Home Repair/Construction
- Cramming
- Credit Reporting
- Mail Order
- Telemarketing
- Retail Sales
- Internet Goods & Service/Spamming
- Contests/Sweepstakes/Prize Promotion
- Financial/Investments

Major Cases and Activities

Bridgestone-Firestone

On November 8, 2001 the AGO, along with 52 other jurisdictions, settled the lawsuit against Bridgestone-Firestone. The 15-month-long investigation into the allegedly defective tires and ensuing misrepresentations made to consumers during the defective tire replacement process has finally come to an end. The investigation of the company began when the high rate of tread separation on tires manufactured by the company was brought to the atten-

Division Highlights, 2001

Calls received	78,000
Written complaints received	5,000
Educational presentations given	72
Nearly \$ 1 million recouped for New Mexico consumers	

Case Activities

Total number of cases	69
Total fees, including consumer restitution	\$ 1.2 million
Number of cases estimated, FY01-02	72

Direct Restitution to New Mexico consumers, FY01

Investigation/case activity	\$ 36,414
Multistate case activity	\$ 11,754
Antitrust case activity	\$ 2,757,616
Total	\$ 2,805,784

Health Unit Case Activity (Blue Cross/Blue Shield) resulted in up to \$20 million to charitable contributions

Co-sponsored LifeSmarts competition for high school students

Consumer awareness columns provided monthly to newspapers statewide and to college media

Provided television and radio education programs for consumers

Analyzed over 70 pieces of legislation

tion of law enforcement officials. Delving into the company's practices revealed violations of the jurisdictions' consumer protection statutes. Now that the company has entered into a settlement, it is enjoined from misrepresenting the safety or safety characteristics of any tire or tread pattern. The company will also provide detailed safety information to consumers when delivering tires, including information about proper tire maintenance, load capacity, air pressure, proper tire repair and warranty information. Finally, Bridgestone-Firestone has also agreed to cooperate with the multistate group in related investigations. Bridgestone-Firestone has spent approximately \$2,190,485 replacing over 24,000 tires for New Mexico consumers. New Mexico's share of the settlement will total \$525,000, \$25,000 of which is designated to cover attorney fees and investigative costs and the remainder to be used for consumer protection, consumer education or unfair trade practices purposes.

Level Propane

On September 20, 2001, the AGO and seven other states entered into an Assurance of Discontinuance/Assurance of Voluntary Compliance with Level Propane. The settlement followed a ten-month-long investigation of the Ohio-based company's business practices. The practices involved alleged illegal and deceptive business practices in violation of the various states' consumer protection statutes. The New Mexico AGO received numerous consumer complaints claiming failure by Level Propane to honor its contracts, price guarantees and delivery schedules. The consumers alleged that Level Propane would quote the consumers one price and then charge them a higher price; deliver propane without consumer authorization; charge consumers more than the going rate for propane while advertising that its prices were the lowest; and charge them undisclosed fees. The company will pay \$700,000 and make additional direct payments to consumers to resolve the above claims, which impacted thousands of consumers in New Mexico and seven other states. An independent accountant and notification administrator approved by the states will implement the consumer notification and restitution program. The AGO has received over 130 complaints

against Level Propane; those consumers will receive notification automatically. All other Level Propane customers in New Mexico will be notified of the settlement and given an option to file a complaint. New Mexico will receive \$90,000 for investigation costs, consumer education and other public protection purposes.

The AGO and the multistate group will monitor Level Propane's compliance with the terms of the settlement. Any violation of its terms will result in a severe penalty for the company.

Ramada Plaza Resorts/National Travel Services

In February 2000 the AGO, 17 states and Washington D.C. entered into a Consent Decree with Ramada Plaza Resorts/National Travel Services (RPR/NTS). The multistate group investigated the advertising and in-state solicitations of the company's offers of vacation packages. RPR/NTS's business practices were found to be in violation of the New Mexico Unfair Practices Act, False Advertising Act and Time Share Act. At present, the multistate group is monitoring the company's compliance with the Consent Decree. Due to possible violations of the Decree, the AGO served a Civil Investigative Demand on RPR/NTS in June 2001. The violations are related to the company's solicitation of travel services in New Mexico. The violations are still under investigation.



Direct TV

In 1998, the AGO and 30 other states (the multistate group) entered into an Assurance of Voluntary Compliance/Assurance of Discontinuance (AVC) with Direct TV. The multistate group was concerned that

certain practices relating to advertising and implementation of agreements between Direct TV and consumers to provide services for periods greater than 30 days violated the states' consumer protection laws. Under the terms of the AVC, Direct TV was enjoined from advertising or making offers to consumers subject to certain conditions; Direct TV was to undertake certain actions relating to consumers who had entered into prepaid contracts during a certain time frame; and, finally, Direct TV was to provide all AGOs with information pertaining to the refunds or credits given to consumers. During 2001, the multistate group has been investigating alleged violations of the AVC.

Triad Discount Buying Service

New Mexico joined more than 30 states and the Federal Trade Commission (FTC) in filing suit against Triad Discount Buying Service, its president Ira Smolev and numerous associated companies engaged in the upselling of buying club memberships. Consumers calling to purchase advertised goods were "upsold" buying club memberships with Triad Discount Buying Service and similar buying clubs associated with Smolev. Upselling occurs when a business that has obtained credit card information from consumers over the phone in a legitimate, authorized transaction makes a quick pitch for another product or service and charges the consumer for it without obtaining proper authorization for the subsequent charge. The lawsuits alleged that Defendants charged consumers' credit cards for the memberships without authorization and misrepresented that the buyers club memberships were free. As part of a settlement with the states and the FTC, Defendants agreed to a permanent injunction prohibiting these practices. The FTC as part of its settlement with the Defendants will handle restitution to consumers in New Mexico and the other states.

Dennis Lee DBA United Community Services of America

New Mexico filed a lawsuit and obtained a Temporary Restraining Order against Dennis Lee immediately prior to the New Mexico stop on Lee's nationwide

"tour" promoting his "free electricity" scheme. As part of the scheme, Lee promises to make available technology that will provide free electricity and produce income for participating consumers. Lee's scheme centers upon his claims to have developed a perpetual motion machine that produces more electricity than it consumes. Litigation is ongoing. New Mexico is communicating with other states that have filed suit against Lee and, where appropriate, is coordinating its actions with those states.

Privacy

The AGO regularly participates in the multistate monitoring of legislation, cases and web sites involving privacy policies and notices. New Mexico has participated in the intervention in bankruptcy cases where a privacy policy had promised consumers that their personal and private information would not be disclosed to anyone when the company sought to market such a customer list as part of the bankruptcy proceedings. Under the Graham Leech and Bliley Act, financial institutions were to provide "opt-out" privacy notices to consumers. New Mexico and other states monitor these notices under the Unfair and Deceptive Practices Act, and have written warning letters to financial institutions where the primary notices appear to be unfair and deceptive. The AGO lent support to New Mexico Representative Danice R. Picraux's Consumer Privacy Act, which advocated an "opt-in" approach to consumer privacy. An "opt-out" approach places the burden on consumers to contact their financial institutions to request that their information be kept private, whereas the Consumer Privacy Act "opt-in" approach requires the consumers' prior affirmative consent before any private information could be released. While the Consumer Privacy Act has not yet been adopted, the AGO continues to advocate for more consumer privacy protection under state law than is currently available under federal law.

Labeling Food Products Containing Allergens

The AGO, along with most other states, submitted comments to the Federal Food and Drug Administration (FDA) supporting the proposed feder-

al requirement that food products containing the eight most common food allergens be so labeled to protect consumers from often serious or fatal reactions.

Antitrust Unit

Summary of selected major cases and activities

Toys 'R' Us

The AGO continued to oversee the execution of New Mexico's portion of the settlement. New Mexico's share was approximately \$200,000 worth of toys, to be distributed to needy children through the Marine Corps Reserve's Toys-for-Tots Foundation over the three holiday seasons of 1999, 2000 and 2001. Those distributions were completed in December 2001.

Mylan Pharmaceuticals, Inc.

Thirty-three states, including New Mexico, and the FTC filed parallel antitrust suits against Mylan Pharmaceuticals, Inc. (Mylan) and another drug manufacturer and distributor, alleging that the defendants cornered the market on the raw materials for certain drugs and raised the price of two anti-anxiety drugs — lorazepam and clorazepate — by more than 2000%. The states have entered into a settlement, pursuant to which Mylan has agreed to pay \$100,000,000 plus up to \$8,000,000 for costs and attorney fees, to reimburse consumers and state agencies. Final court approval is imminent.

The estimated cash share to consumers in New Mexico (according to the consulting experts for the states), depending on the number of responding consumers, is approximately \$282,000. The total benefit to New Mexico is an estimated \$576,790.

Microsoft

The AGO joined with 19 other state attorneys general and the District of Columbia Corporation Counsel in an antitrust lawsuit against Microsoft Corporation. The complaint alleged that Microsoft abused its monopoly power to gain unfair advantage in the marketplace, thus inhibiting competition and stifling innovation. The United States Court of Appeals for the District of

Columbia ruled in June 2001 that Microsoft had indeed engaged in numerous illegal and anticompetitive actions. Satisfied by this decision, the AGO chose to settle with Microsoft in order to reallocate resources to other concerns. The settlement provided that New Mexico would receive its attorney fees and costs.

Vitamins Litigation

In late summer of 1999, New Mexico and 23 other states joined with the FTC and private class action counsel in seeking injunctive relief, restitution and damages from the responsible companies for a conspiracy that attempted to fix, raise and maintain the prices of vitamins and to allocate customers and markets for certain bulk vitamins and vitamin products.

The states, excluding California, have negotiated a settlement in which the defendants will pay \$225,000,000 for the benefit of consumers and businesses across the country. Approximately \$107,250,000 will be distributed by a national administrator to commercial indirect purchasers such as agricultural producers, dairies and retail groceries over charges arising from the price-fixing conspiracy. The settlement agreement provides that the recovered funds shall be used for the consumers' benefit through programs that advance health and nutrition and for the advancement of nutritional, dietary and agricultural science. New Mexico's share for these programs is \$1,748,000. New Mexico will also receive \$162,000 for the impact on its economy. New Mexico's total projected share for consumers and for the impact fund is \$1,910,000, pending final court approval in April 2002.

Nine West

The court-approved distribution plan was carried out in the spring of 2001 to All Faiths Receiving Home, Inc.; American Cancer Society, Southwest Division, Inc.; La Piñon Sexual Assault Recovery Services; New Mexico Coalition Against Domestic Violence; and YWCA Middle Rio Grande, Inc. Approximately \$190,000 was distributed to the various groups.

Compact Disc Litigation

In the early summer of 2000, the FTC issued a consent decree against the five major music distributors and other co-conspirators based on price-fixing. Soon thereafter, on behalf of consumers, New Mexico and many other states entered into litigation against those companies to recover illegal profits. The case has been consolidated with numerous class actions around the nation and assigned to the U.S. District Court for the District of Maine. Discovery is ongoing and trial is scheduled for late spring 2002.

Chevron-Texaco Merger Review

In late 2000, the two oil giants, Chevron and Texaco, began the process of merging into a single company. The FTC and the states conducted in-depth discovery and intensive negotiations leading to a settlement wherein Texaco divested virtually all post-production downstream assets. The settlement gained the approval of the U.S. District Court for the Central District of California, which also awarded the New Mexico AGO attorney fees and costs of \$44,000.

Sorbate

Sorbate is a food preservative found in many products, from dairy to grain to vineyard products. It was also the subject of an international price-fixing scheme. It came to the attention of New Mexico and 11 other states when they discovered a private antitrust litigation nearing settlement in Wisconsin. Feeling that the consumer classes in that litigation were receiving less than they deserved, these 12 states contacted the counsel for the parties to urge changes more fair to the consumer classes. The efforts of the AGO created a change in *cy pres* funds distributed to New Mexico consumers from \$50,000 to \$186,000.

BuSpar

In another multistate antitrust investigation, New Mexico and other states believe that Bristol Myers-Squibb may have misrepresented legal issues to the FDA in an effort to maintain its period of legal monopoly in the market for this anti-anxiety drug. The case is in its early stages and should be active into 2003.

New Mexico is the Cost Share Administrator and a member of both the Finance and Expert Committees.

Cardizem

Thirty states have alleged that the predecessor of Aventis, Inc. enticed a potential competitor, through multi-million dollar payments, to move very slowly (if at all) to resolve a legal issue that has blocked the entry of any competition, thus maintaining Aventis' monopoly and high profits.

Registry of Charitable Organizations

The Charitable Activities Unit created and launched new pages on the Attorney General's web site (<http://www.ago.state.nm.us>). A first-in-the-nation collaboration between the AGO and Philanthropic Research, Inc., operator of the GuideStar web site, allows visitors to the AGO web site access to information and annual financial reports on charitable organizations registered with the office. This service provides donors with an opportunity to find information on a charitable organization soliciting them for a contribution. The service also provides charitable organizations an opportunity to update information about their organization and their mission.

Health Unit

Summary of Major Cases and Activities

Public Employee Health Insurance

The fiscal year beginning July 1 was the first year in which the Health Care Purchasing Act required the joint procurement of health care coverage for all public employees and retirees. After the terms of the proposed coverage were announced, the AGO received numerous complaints from consumers regarding the expense of the programs, the lack of information on the various options from which employees were required to choose, the mandatory blanket release of confidential patient medical information to state agencies, the severe reduction in benefit coverage and the noncompliance with state and federal law. Following an investigation and hearings before the Legislative Finance Committee and the Public Regulation

Commission, the AGO publicly threatened litigation unless public employees were treated fairly and lawfully. In the end, the General Services Division, the Retiree Health Care Authority, the Public Schools Insurance Authority and the Albuquerque Public Schools agreed to comply with the New Mexico Patient Protection and Mental Health Parity laws by restoring the benefits previously cut. They also agreed to comply with the federal law by discontinuing mandatory use of social security numbers as the coverage identifier. They also agreed to publish a new explanation of the various health care options from which public employees could choose and they agreed to abandon their demand for blanket releases of confidential medical information. In November, the AGO submitted a Final Report to the Legislative Finance Committee, setting out an analysis of the performance



of these agencies and making specific business, policy and legal recommendations on how the process should be improved. During the spring 2001 regular legislative session, virtually all recommendations of the AGO were enacted in legislation that was signed into law by the governor.

New Mexico Blue Cross/Blue Shield

The AGO formally intervened in the Division of Insurance's proceedings in the sale of New Mexico Blue Cross/Blue Shield in order to represent the public's interest. The AGO's mission is to ensure that the interests of current and future insurance policyholders are represented, to ensure that the sale price is fair and to ensure that the net sale proceeds from the transaction are protected and remain dedicated as char-

itable assets for the benefit of all New Mexicans. In May 2001, a Settlement Agreement was reached that materially improved the proposed term of the transaction, which then closed in early July. During the summer and fall of 2001, the Attorney General and the Superintendent of Insurance co-chaired an Advisory and Planning Committee charged with making recommendations concerning the use of the charitable assets remaining from the sale. In October, the Advisory and Planning Committee issued its recommendations calling for the creation of a new, independent grant-making health foundation to serve the unmet health needs of New Mexicans.

In November 2001, the Superintendent of Insurance issued his final order creating Con Alma Health Foundation. Con Alma will be the state's largest charitable health care foundation, funded with \$15 million from the sale of Blue Cross/Blue Shield and an additional \$5 million donated over five years by Health Care Services Corporation of Chicago, purchaser of Blue Cross/Blue Shield.

Privacy

The AGO was active in the area of the proposed regulation of patient health care information supporting the right of patients to control their own confidential health care information. The AGO supported the implementation of Federal HIPAA regulations. The AGO opposed proposed regulations from the New Mexico Department of Insurance Division on the grounds that they effectively destroyed the confidentiality of patient health care information. This is a rapidly evolving area of policy and law, and further developments are likely.

Criminal Appeals Division

Assistant Attorney General Artie Pepin, Director



Overview

On the Attorney General's behalf, the 15 attorneys in the Criminal Appeals Division represent the state in all criminal appeals filed in the state. In addition, the Division represents wardens in state and federal habeas corpus cases, represents the state's interest in extraordinary writ cases and also reviews every extradition and rendition arising from a governor's warrant for a fugitive. A discussion of FY01 activities in these areas follows. Most of the work of the Division is required by statute and is not discretionary.

In FY01, the Division reviewed 229 extradition requests.

Criminal Appeals

The Appeals Division represents the state in every criminal appeal filed in New Mexico, including those filed by prosecutors from suppression of evidence as well as defendants challenging convictions. The appellate process includes the New Mexico Court of Appeals, the New Mexico Supreme Court and can include the United States Supreme Court. Work by the Division in these courts includes memoranda in opposition, briefs-in-chief, answer briefs, reply briefs, certiorari petitions and their responses and motions relating to the appeal. Any appellate case may also be scheduled for oral argument by the courts.

Division Highlights, 2000 -2001

Briefs in State and Federal Courts	231
Memoranda In Opposition in New Mexico Court of Appeals	92
Petitions for Writ of Certiorari and other Non-Habeas Writs	71
Oral Arguments, State and Federal Courts	43
Evidentiary Hearings in State and Federal Courts	30
Federal Habeas Corpus Answers and Motions	81
State Habeas Corpus Responses	64
Extraditions Reviewed	229
Analyzed over 45 pieces of legislation	

Many appeals last beyond a single fiscal year. In FY01, the Division opened 380 new appeals files in criminal cases.

Federal Habeas Corpus

New Mexico prisoners who have exhausted avenues of relief in New Mexico courts can file federal habeas petitions. The Division litigates these claims in federal district court, the Tenth Circuit Court of Appeals and, on occasion, in the United States Supreme Court. Pleadings in district court can include answers, motions to dismiss with supporting memoranda, briefs and objections to magistrate's proposed findings. Tenth Circuit pleadings include briefs-in-chief, answer briefs and reply briefs, and in the Supreme Court there are certiorari petitions and responses as well as briefs. In addition, there are motions in the various courts relating to these cases as well as evidentiary hearings in district court when evidence and witnesses are needed to resolve a claim, and there are oral arguments when scheduled by the district court (Albuquerque) and the Tenth Circuit (usually held in Denver).

These cases usually last beyond one fiscal year. In FY01, the Division opened 58 new federal habeas cases.

In addition to the above actions by Division attorneys, our federal habeas corpus administrator is required to accumulate and provide to federal courts the records from state court trials, state appeals and state habeas corpus proceedings relating to the prisoner who filed the federal habeas petition. The administrator must track down and get copies of records from every court in the state in order to provide these records to the federal courts.

State Habeas Corpus

State habeas corpus cases are litigated in the New Mexico district courts and then appealed by writ to the Supreme Court. Prisoners receive appointed counsel and, due to this factor and the dramatic limitations now imposed on federal habeas claims, state habeas corpus litigation has increased dramatically. Pleadings in these cases include responses to petitions, proposed findings of fact and conclusions of law, responses to certiorari writs, briefs-in-chief, answer briefs, reply briefs and motions relating to these cases. State habeas cases often require hearings in state district court and there may be oral argument in the Supreme Court.

These cases also span more than one year. In FY01, we opened 72 new state habeas corpus cases.

Extradition

The Division reviews every governor's warrant, whether seeking extradition of a prisoner to another state or seeking to have a prisoner returned to New Mexico. The Division also represents the state in all extradition litigation in the New Mexico Court of Appeals, the New Mexico Supreme Court and, on occasion, the United States Supreme Court. Pleadings include responses to writs, briefs-in-chief, answer briefs, reply briefs and motions.

The number of briefs filed, 231, is at the historical average, as is the number of appeals files opened, 280.

Fiscal Year 2001 included a long legislative session that resulted in the loss of the services of one full-time attorney due to his work with the legislature, as well as time devoted to legislative business by other attorneys in the Division. This included drafts of at least nine and analysis of at least 48 pieces of legislation. In addition to the impact of the legislative session, the Division also worked through a continuation in the trend toward more writ work — both habeas corpus and other writs. There was a 54% increase in FY01 over FY00 in non-habeas corpus writs handled, while state habeas corpus writs have increased both in number and complexity. Since FY98, the number of state habeas corpus cases handled by the Division has increased 47%, while the number of hearings required for state habeas corpus cases has more than doubled. In addition, the New Mexico Public Defender obtained funding for another attorney position and created a state habeas corpus litigation unit that now has two attorneys and will soon have three attorneys, resulting in increased litigation in this area. A new attorney position has been requested for FY02 to allow an adequate response to the explosive increase in state habeas corpus cases.

A summary of specific, significant issues addressed this past year follows.

Death Penalty Cases

Terry Clark v. LeMaster

Two attorneys, acting on Clark's behalf but without his permission, sought to pursue a state habeas corpus petition challenging Clark's death sentence, which had been affirmed on direct appeal in an opinion issued by the Supreme Court in 2000. The attorney who worked on Clark's various convictions and appeals for 15 years assisted the District Attorney for the Fifth Judicial District in handling Clark's state habeas corpus petition. In August 2001, the district court held a four-day hearing on Clark's competence to waive further challenges to his death sentence and found Clark competent. The Supreme Court refused to overturn that finding. Clark was executed on November 6, 2001.

State v. Robert Fry

The State is seeking the death penalty in this case from Farmington, which will be tried in Albuquerque on a change of venue. This matter in the Supreme Court concerned an appeal over probable cause to establish the aggravating factors for a death penalty. The appeal was denied, allowing the case to proceed to trial.

Other Cases***State v. Merrill Chamberlain***

Defendant is serving a life sentence for the 1987 killing of Albuquerque Police Department Officer John Carillo. In this federal habeas corpus action, Defendant claimed he should have been given a jury instruction on self-defense. The federal district court, the Tenth Circuit and the U.S. Supreme Court all denied relief and this case is now closed.

State v. Wagoner

In this search and seizure case, the Court of Appeals held that police must articulate a reasonable suspicion to believe there are people inside a home who may be a threat to the police outside or that there is imminent destruction of evidence before they may enter to conduct a protective sweep of the home while waiting for other officers to obtain a search warrant. After a second appeal, the Court of Appeals ruled that, if an unauthorized sweep occurs, the resulting search warrant is invalid unless the State can prove that a warrant would have been obtained without consideration of any evidence the officers observed during the sweep.

State v. Darkis

The Court of Appeals, under the jurisdictional exception, approved a prosecution in district court following conviction in magistrate court. This allows prosecution for a minor offense, such as a speeding ticket, followed by a felony prosecution in district court, such as vehicular homicide, even though both prosecutions arise from the same facts. The Supreme Court has granted review and is currently

considering the application of double jeopardy in this type of circumstance.

State v. Castaneda

The Court of Appeals affirmed the convictions for aggravated DWI and child abuse. Defendant was driving while intoxicated with her three children unrestrained. On appeal, Defendant argued that she could only be convicted of the single crime of aggravated DWI. The Court affirmed each conviction, finding that separate facts support each crime. However, the Court also held that whether or not a child is injured determines the number of child abuse charges. In this case, three counts of child abuse were prosecuted (one for each child) but the Court only allowed one count to stand because no injury occurred to any of the three children.

State v. Nemeth

Police entered Defendant's residence because of a dispatch call that Defendant was suicidal. On appeal, Defendant argued a violation of her Fourth Amendment rights. The Court of Appeals found that the duties of police extend to community caretaking functions. Therefore, the Fourth Amendment did not govern the entry into the home to secure Defendant's welfare. This case was an issue of first impression in New Mexico.

State v. Allison

The Supreme Court held that it was reversible error (prosecutorial misconduct) for a prosecutor to challenge a homicide defendant with his own arrest record, about which Defendant had just lied under oath, when the record had not been formally disclosed by the prosecution to the arrestee's own lawyer.

State v. Mario Barrera

The Supreme Court affirmed this conviction for first-degree murder of Wendy Wagner, the first woman firefighter in Santa Fe, who was killed for her car. This was a high profile case in Santa Fe because Ms. Wagner was so well known and liked.

State v. Rudy Gonzales

The Supreme Court affirmed the verdict in this first-degree murder case from Sandoval County. In this case, the victim's father was tried separately twice to hung juries before being convicted. His motion for new trial was denied and the case is now before the Supreme Court on appeal of that order.

State v. Chris McClendon

The Supreme Court construed for the first time the harsher penalties for repeat violent sex offenders passed by the legislature in 1997. Defendant was convicted, among other things, of two counts of criminal sexual penetration for events that occurred during the rape of one victim over a period of hours. He had a prior conviction for a violent sexual offense. He was sentenced to nine years for each count, plus two life sentences to run consecutively. The Supreme Court affirmed the convictions and sentence, finding that "the Legislature intended to single out repeat violent sexual offenders for more severe punishment than that received by habitual offenders generally and intended to protect society from their criminal activity."

State v. Johnson, consolidated with State v. Wenger

The Supreme Court held that the state may charge with DWI a person in actual physical control of a non-moving vehicle despite the fact that he or she is on private property. The Supreme Court reversed the Court of Appeals' opinion in *State v. Wenger*, 1999-NMCA-92, 127 N.M. 625, 985 P.2d 1205.

State v. Nathan Santillanes

Defendant was convicted of five counts of vehicular homicide, four counts of child abuse resulting in death and one count of driving while intoxicated, fourth offense. On direct appeal, the Court of Appeals reversed the four first-degree felony convictions of child abuse resulting in death. The Court of Appeals decision was based on the principle of double jeopardy and on its interpretation of the general-specific statute rule. The Supreme Court grant-

ed the State's petition for writ of certiorari review and reversed the Court of Appeals, reinstating the four first-degree felony convictions of child abuse resulting in death.

State v. Robert Malloy

The Court of Appeals held that the requirement to deliver a copy of the affidavit when a search warrant is executed is a ministerial requirement, and that suppression was not warranted without a showing of prejudice to Defendant. The district court had granted Defendant's motion to suppress all evidence obtained pursuant to three search warrants because redacted rather than full affidavits were delivered when the warrants were executed; the affidavits had been redacted to protect the identities of alleged minor victims of sexual exploitation of children by prostitution and contributing to the delinquency of minors.

State v. Rebecca Wilson

The Court of Appeals held that New Mexico's § 31-18-15.1, allowing aggravation of the basic sentence by one-third, was constitutional under the U.S. Supreme Court's opinion in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court of Appeals held that § 31-18-15 (establishing basic sentences) and § 31-18-15.1 (allowing aggravation or mitigation up to one third) must be read together to create a statutorily prescribed sentencing range; New Mexico's sentencing scheme is constitutional in allowing the judge to set the sentence within that range based on the judge's finding – by a preponderance of the evidence – of aggravating or mitigating factors after the judge holds a mandatory sentencing hearing. The Supreme Court has granted certiorari and the case is being briefed.

State v. Cardenas-Alvare

The Supreme Court held that questions beyond citizenship and immigration status asked by federal border patrol agents require reasonable suspicion under the New Mexico Constitution. Since many more questions and more intrusive investigation is permitted under federal law, the effect is that most evidence seized by border patrol agents is now not admissible in state court.

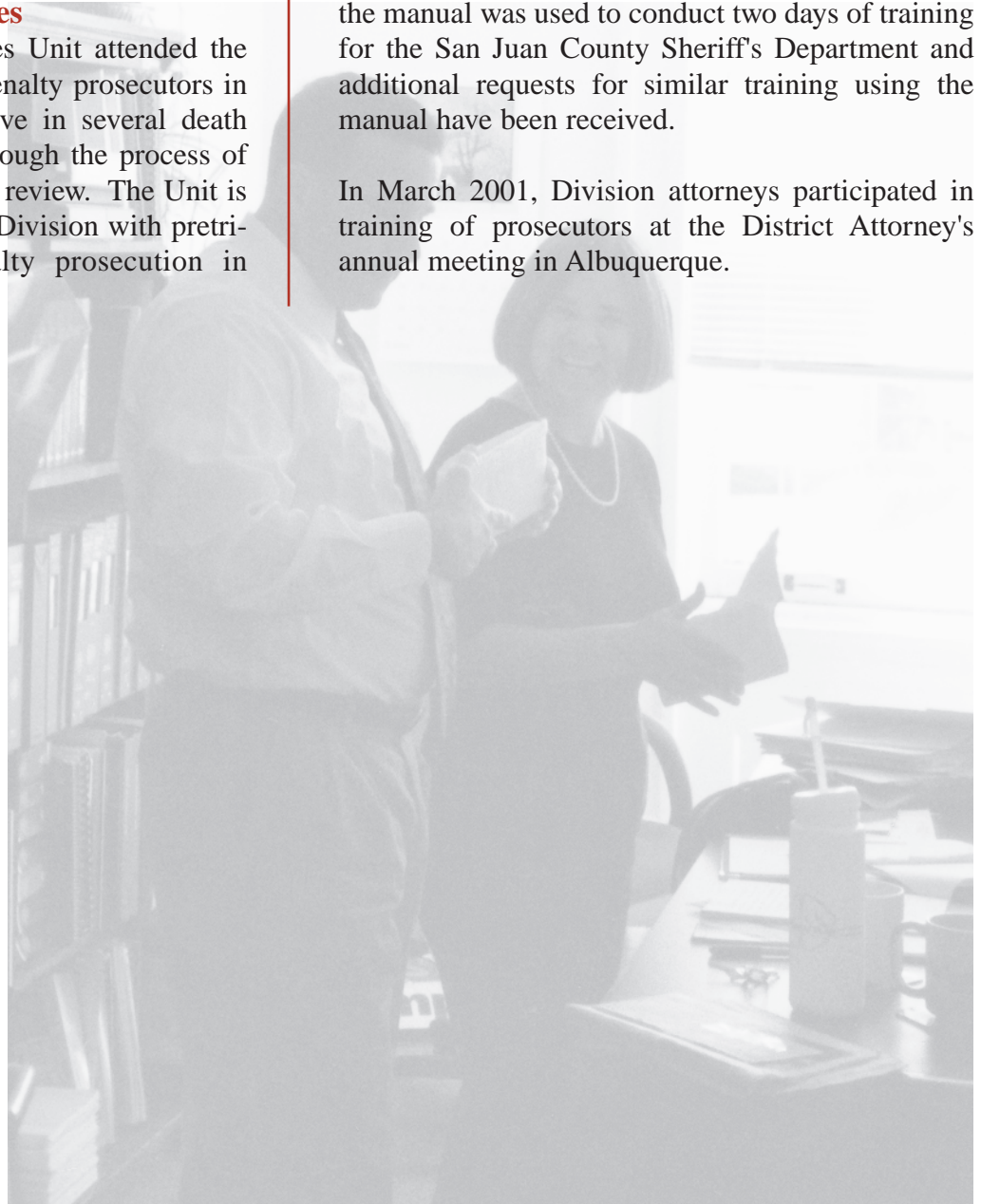
Additional Division Activities

Members of the Capital Crimes Unit attended the national conference of death penalty prosecutors in Miami. The Unit remains active in several death penalty cases as they move through the process of state and federal habeas corpus review. The Unit is also assisting the Prosecutions Division with pretrial motions in a death penalty prosecution in Farmington.

The Division wrote a State Habeas Corpus Manual for use by all attorneys in the Division. A new attorney position has been requested to provide adequate resources to respond to the increased workload in state habeas cases now that the Public Defender has three attorneys working on these cases full-time in its new Habeas Corpus Litigation Unit.

All three sections of the Search and Seizure Manual have been completed and published. In September, the manual was used to conduct two days of training for the San Juan County Sheriff's Department and additional requests for similar training using the manual have been received.

In March 2001, Division attorneys participated in training of prosecutors at the District Attorney's annual meeting in Albuquerque.



Environmental Enforcement Division

Assistant Attorney General Stephen R. Farris, Director

Overview

The Environmental Enforcement Division has a small, dedicated staff of attorneys, an investigator and support staff. The Division is committed to working through the law to protect the environment and natural resources of New Mexico. Over the past year the Division fulfilled its commitment by addressing numerous matters, including those highlighted below. During the coming year, the Division will look toward expanding its role by addressing a number of new environmental and natural resource issues.

The Division's four main areas of work this past year included: 1) matters involving the U.S. Department of Energy (DOE) sites; 2) matters involving water resource issues in the state; 3) matters involving natural resource damages to the state, and 4) matters involving pollution discharges into the state's waterways, including criminal matters.



Matters Involving DOE Sites

Waste Isolation Pilot Plant (WIPP), Carlsbad, New Mexico

The state's Hazardous Waste Act permit is the sole external regulation of the operations of WIPP. The permit was issued in 1999, and since that time the DOE has made numerous attempts to modify its terms in an attempt to improve the efficiency of waste disposal. However, some efficiencies are obtainable only at the expense of safe operations. Since applicable procedures allow for comments on proposed modifications, the AGO has commented on each of the proposals made in 2001 as follows:

On February 9, 2001, that DOE's proposal to change the drum age rules for sampling of gases in waste containers was insufficiently supported; the Environment Department denied the proposal.

On April 2, 2001, that a proposal to adopt digital radiography/computed tomography in lieu of visual examination to verify contents of waste containers was not supported by data; DOE withdrew the proposal.

On May 14, 2001, that a proposal to add certain hazardous waste codes to the permit lacked data support; however, the Environment Department allowed this change.

On July 6, 2001, that a renewed proposal to change the drum age rules for sampling gases in waste containers required the use of Class 3 permit modification procedures (i.e., a public hearing) in light of its complexity. The Environment Department later ordered that Class 3 procedures would apply.

Also on July 6, 2001, that a proposal to enlarge the authorized storage capacity at WIPP based on a previous increase in capacity of Ten Drum Overpack containers should be denied for improper basis. The Environment Department denied the proposal.

On September 18, 2001, that certain modifications in waste characterization procedures (e.g., calling for compositing of gas samples) were not properly presented as Class 1 (i.e., unilateral) modifications and should be rejected. The Environment Department later rejected these modifications.

On September 29, 2001, that a proposal under Class 3 procedures (i.e., requiring a public hearing) to institute onsite waste characterization at WIPP did not comport with rules governing waste transportation and did not support abandonment of the policy against opening waste containers at WIPP. This modification will now go to public hearings.

On November 2, 2001, that the changes in waste characterization procedures (discussed above) should mostly be denied since they compromise the effectiveness of waste characterization.

In addition, DOE plans to file several further proposals to modify the permit in December 2001. Most notable is the proposal to allow the receipt and disposal of remote-handled transuranic waste (RH-TRU). We attended a peer review where a draft of this proposal was elaborated upon and discussed it at two state/DOE quarterly meetings. Questions remain as to the effectiveness of the RH-TRU system in maintaining all necessary safeguards. Further, DOE plans to submit additional proposals to modify the permit to eliminate various required stages of waste characterization, and the safety implications of doing so have not been fully explained.

Los Alamos National Laboratory (LANL)

We have focused on the progress of environmental restoration (i.e., cleanup) of historical contamination at Los Alamos. The legal context is that LANL is regulated by a Hazardous Waste Act permit issued by the Environment Department, and the permit has expired and is in the course of being reissued. Environmental restoration is governed by the Hazardous and Solid Waste Amendments (HSWA) module of the permit, which is amended annually to specify the tasks required in the following year. In addition, LANL is at

the midpoint of a multiyear project under the Hydrogeologic Workplan to drill and complete 32 deep wells to characterize the groundwater under the Pajarito Plateau and design long-term monitoring for hazardous constituents and radionuclides. In this legal context we have engaged LANL at the following points:

We have researched the facts and held discussions with the Environment Department concerning the fact that several LANL waste disposal sites, including the main site, Area G, lack authorization to operate under the Hazardous Waste Act and were required to submit and carry out a closure plan.

We researched the facts and, on September 27, 2001, recommended to the Environment Department that the LANL Environmental Restoration program take specified steps to achieve cleanup of historic contamination at sites throughout LANL and that such requirements be included in the forthcoming amendment to the HSWA module of the permit.

We attended the quarterly meetings concerning the drilling program to design monitoring wells and recommended on October 24, 2001 that certain planned wells be drilled on schedule and that systems be adopted to prioritize the next steps in this program.

We prepared to participate in public processes concerning the reissued LANL permit and the Corrective Action Order that the Environment Department said it will issue governing the Environmental Restoration program.

In addition, we continued oversight of efforts by LANL, by the Interagency Flood Risk Assessment team and by Radiological Assessments Corporation to assess the risks arising from the Cerro Grande Fire and its hydrological impacts. Specifically, surface water runoff is increased by several factors and the contaminant load is likewise increased. These effects are being measured and appropriate actions should be taken in light of the conclusions.

Matters Involving Water Resource Issues

State v. Babbit

The AGO brought this action to challenge the designation by the U.S. Fish and Wildlife Service of a critical habitat in the Rio Grande for the Silvery Minnow. The Fish and Wildlife Service did not follow the requirements of the Endangered Species Act (ESA) or the National Environmental Policy Act (NEPA) when designating this critical habitat for the minnow. Specifically, the Fish and Wildlife Service failed to consider the economic impact of the designation, in violation of both the ESA and NEPA.

The lawsuit was filed to help ensure that the federal government did not take New Mexico's ability to meet its interstate compact obligations through application of the ESA. Ruling in our favor, the Court found that there would be enormous economic impacts and ordered that the Fish and Wildlife Service conduct an Environmental Impact Statement and correctly designate the critical habitat area. By this action, our office assisted the Interstate Stream Commission and the State Engineer in protecting New Mexico's water.

The case is currently on appeal before the Tenth Circuit Court of Appeals, although the United States has conceded that it must address economic impacts and has withdrawn that part of its appeal.

Forest Guardians v. United States

The protected species is the Pecos River Bluntnose Shiner. The Division intervened on behalf of the state, the New Mexico Interstate Stream Commission and the State Engineer. The case has been dismissed but may be refiled.

Minnow v. Keys (formerly Minnow v. Martinez)

A number of environmental groups brought suit against the U.S. Bureau of Reclamation and the Army Corps of Engineers under the ESA. In conjunction with the New Mexico Interstate Stream Commission and the State Engineer, the Attorney General intervened on behalf of New Mexico to protect the water rights of New Mexicans and to ensure that compliance with the ESA by the federal agencies was also in compliance with

state law and did not violate New Mexico's interstate stream compacts. The relief requested by the environmental plaintiffs, keeping the Rio Grande flowing bank to bank at all times between Cochiti Reservoir and Elephant Butte Reservoir, would have drained all of New Mexico's reservoirs that hold the water supply for New Mexico's municipalities and farmers. In addition, even if the reservoirs could be drained, keeping the river constantly wetted is not hydrologically sustainable.

After more than a year of contentious litigation and a failed court-ordered mediation, the Attorney General and the Interstate Stream Commission proposed an innovative settlement agreement with federal agencies that would avoid jeopardy for the endangered Rio Grande Silvery Minnow and provide protection from liability under the ESA for all New Mexico water users on the Rio Grande. The resulting landmark agreement, the "Conservation Water Agreement," has succeeded in protecting the endangered species as well as in protecting water rights, complying with state law and not impairing New Mexico's interstate stream compact obligations. Only three minnows were lost during the 2001 irrigation season, although there was managed drying of portions of the river for short periods of time. However, the environmental plaintiffs have continued the litigation and oral arguments on the merits were scheduled for the winter of 2001.

Endangered Species Act Work Group

The Attorney General is a principal and founding member of this group of stakeholders — environmental environmental interests, state and federal agencies — which seeks to find a long-term solution to endangered species problems on the Rio Grande while protecting water rights, state law and compact obligations. A program has been developed; approval of a cooperative agreement is pending. This year, the work group was successful in obtaining an \$11.2 million appropriation to fund the program's species recovery activities, water purchases, etc. for the next fiscal year. In addition, the work group is working with New Mexico's congressional delegation to draft federal authorizing legislation that will recognize the collaborative program and provide the mechanism for continued federal funding.

Lower Rio Grande Discussions with the State of Texas

The Texas Attorney General's Office requested a meeting with the New Mexico Attorney General's Office to discuss potential interstate controversies between the two states on the lower Rio Grande. These discussions continue with the goal of avoiding litigation between the states, if possible. While the New Mexico Attorney General's Office is pursuing these discussions in good faith, we are aware that the Texas Legislature has appropriated \$6.2 million to its Attorney General to "vigorously represent the State of Texas in all litigation involving water rights disputes with the State of New Mexico, including but not limited to issues relating to the Elephant Butte Reservoir" and, therefore, are taking prudent measures to defend against litigation brought by the State of Texas should the discussions fail.

Matters Involving Natural Resource Damages

By law, the AGO is the legal representative of the New Mexico Office of Natural Resources Trustee, which is empowered to seek restoration of natural resources lost due to violations of the federal Superfund Law, "CERCLA."

Molycorp Questa Mine Site

The Environmental Protection Agency (EPA) has proposed listing the Molycorp Questa mine site on the National Priorities List under CERCLA. In mid-2001, Molycorp and EPA reached an agreed Administrative Order of Consent governing the preparation of a Remedial Investigation/Feasibility Study of the site, looking toward design and selection of a remedy for contamination of ground water, surface water and other resources. To achieve the best result for the state and its resources, the AGO, along with the staff of the Trustee, have met with Molycorp, EPA and federal trustee agencies (Department of the Interior, USDA and Forest Service) to design a process whereby remediation and natural resource restoration can be achieved simultaneously and efficiently. Memoranda of agreement are being drafted, and the AGO will proceed to enroll other state agencies in participating in effective cleanup at this complex site.

South Valley Litigation (State of New Mexico v. General Electric, et al.)

The Division continues to work with outside counsel in an action brought against numerous potentially responsible parties, including General Electric, Texaco and Chevron, etc., for pollution in the South Valley. This is one of the largest natural resources cases ever litigated in New Mexico. All discovery is to be completed in 2002.

Matters Involving Discharges Into the State's Waterways, Including Criminal Actions

Valley By-Products, Inc.

The Division initiated a criminal investigation of this El Paso, Texas rendering plant operation, detected transporting its rendering plant wastes across state lines into New Mexico and illegally dumping the wastes into an Elephant Butte Irrigation District ditch. The joint state/federal investigation resulted in the May 25, 2001 Third Judicial District indictments of five individuals on multiple felony counts: Richard P. Jerome (52 counts); Natalie A. Jerome (52 counts); Hector Villa III (52 counts); Henry C. Medina (17 counts); and Larry A. Gorzeman (35 counts). Hector Villa III is the owner/operator of an environmental consulting firm, Frontera Environmental. The illegal dumping occurred over a two-and-one-half-year period, and involved large quantities of waste.

City of Rio Rancho Wastewater Treatment Plant Discharge

On July 13, 2000, a large sewage discharge into the Rio Grande River occurred at one of the Rio Rancho wastewater treatment plants. The EPA assessed a \$10,000 civil fine against the City of Rio Rancho. Severn Trent Environmental Services, the entity that operates the wastewater treatment plant for the City of Rio Rancho, received no penalty. Because civil enforcement has gone forward against the National Pollutant Discharge Elimination System permit holder, the AGO continues to contemplate whether criminal remedies are appropriate.

Annual Report 2001

New Mexico Attorney General

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A Message from Attorney General Patricia A. Madrid

To the People of New Mexico:

I have often said that the best part of my job is that I have the opportunity to make things happen. During the course of this year, the Office of the Attorney General has accomplished extraordinary things. Working with the Interstate Stream Commission we developed an innovative approach to contentious silvery minnow litigation that protects an endangered species and water rights while complying with interstate compact obligations. We succeeded in the fight to delay implementation of electric deregulation to ensure reliable and reasonably priced electricity for New Mexicans. Settlements reached by the Consumer Protection Division have brought in over a million dollars, much of which has been used to provide restitution and consumer education for New Mexicans.

November 2001 saw the resolution of one of the more divisive issues in New Mexico's recent history, namely, Indian gaming. In June 2000, I filed suit against 12 gaming tribes over their failure to make revenue sharing payments under the 1997 Indian gaming compact. During the 2001 regular legislative session, new gaming compacts were approved pending the resolution of the back payment issue. The task before my office was to resolve the back payments gaming tribes owed to the state. Negotiations were undertaken with ten tribes; two tribes, the the Mescalero Apaches and the Pojoaque Pueblo, refused to enter into talks. Under the settlement terms, the ten tribes have paid approximately \$91 million to New Mexico. There is a risk inherent in bringing any suit, and that was certainly the case with the gaming lawsuit. I am elated that the suit has been successfully resolved with most of the tribes. We will be proceeding in the case against the two tribes that have refused to honor their obligations under the 1997 compacts.

As the year draws to an end, it is apparent that our state as well as the entire country has experienced tragedy in 2001. New Mexico lost six police officers in the line of duty — the greatest number in a single year. I mourn the loss of Bernalillo County Sheriff's Deputy Angelic Garcia, Gallup Police Officer Larry Mitchell, State Police Officer Lloyd Aragon, Jal Chief of Police Luis Castillo, State Police Officer Damon Talbott, and State Police Officer Ramon Solis. The loss of these dedicated sons and a daughter of New Mexico is a loss to us all.

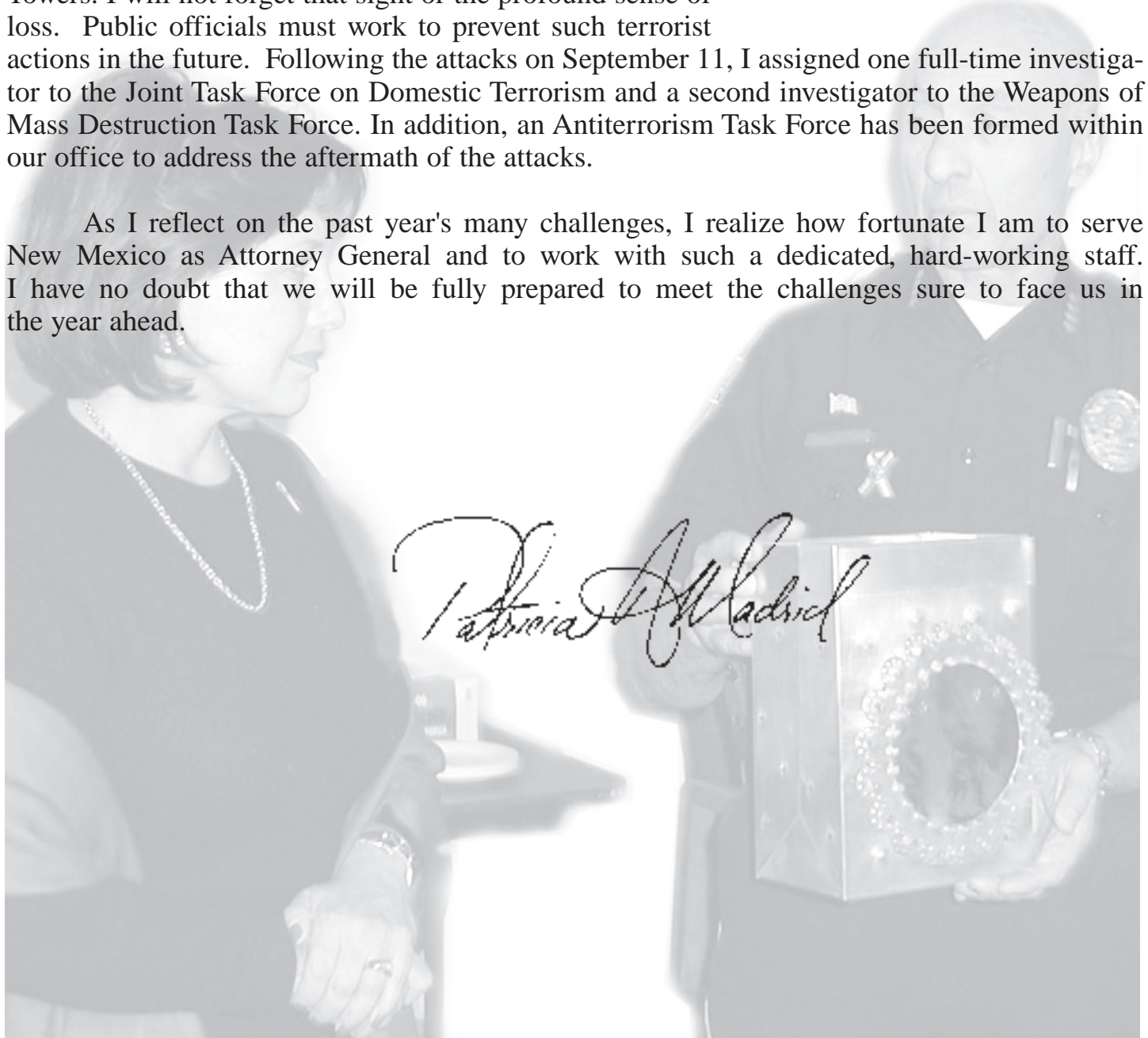


(continued)

On September 11, we watched in stunned disbelief the surreal, real-time attack of terrorists on the United States and her people. While the horrors continued to confront us, the reaction of the American public was to take action. All over the country people came together to offer support — Americans gave their time, their blood and their money. If it is possible to learn something positive from the tragedy and horror of the terrorist attack, it is the knowledge that we are one nation — if there was ever doubt, there is now resolve.

I have seen the rubble that was the World Trade Towers. I will not forget that sight or the profound sense of loss. Public officials must work to prevent such terrorist actions in the future. Following the attacks on September 11, I assigned one full-time investigator to the Joint Task Force on Domestic Terrorism and a second investigator to the Weapons of Mass Destruction Task Force. In addition, an Antiterrorism Task Force has been formed within our office to address the aftermath of the attacks.

As I reflect on the past year's many challenges, I realize how fortunate I am to serve New Mexico as Attorney General and to work with such a dedicated, hard-working staff. I have no doubt that we will be fully prepared to meet the challenges sure to face us in the year ahead.



A Message from Deputy Attorney General Stuart Bluestone



To the People of New Mexico:

When Attorney General Patricia Madrid and I visit with other Attorneys General and their Chief Deputies around the country, they are consistently amazed that Attorney General Madrid chose a former political opponent to be her Chief Deputy. To me, that speaks volumes about her character, openness and strength of leadership.

I have continued to be impressed by Attorney General Madrid. We have developed an extremely effective working relationship, and I feel very fortunate to be serving as her Chief Deputy. We talk and meet regularly about virtually every important issue in the office. She is extremely bright and hard-working, has excellent judgment and is always committed to the best interests of New Mexico. But I think one of her qualities that I appreciate the most, which few in the general public ever get to know about, is her wonderful sense of humor.

Our work at the Attorney General's office is serious and important. When crises get particularly tough, Attorney General Madrid has a special way of putting me and others at ease by placing issues in perspective with a touch of humor. I find that comforting, particularly in these fragile and uncertain times for our country. It's part of what makes it such a pleasure to be working for Attorney General Madrid.

The biggest part of my job involves serving as her liaison with the Division Directors, who are a first-rate group. I also have the pleasure of working closely with the Special Counsels and many of the attorneys and staff in the office.

The year 2001 was an active one. As the enclosed report highlights, we addressed many important issues — from Indian gaming to Antiterrorism to consumer scams — while continuing to render our best legal representation and advice on a wide range of matters.

I am pleased and impressed with the high quality of the work done in the Attorney General's office. New Mexicans are very well served under the leadership of Attorney General Patricia Madrid.

A handwritten signature in black ink that reads "Stuart Bluestone". The signature is written in a cursive, flowing style.

Contents

Report of the Special Counsels	1
Public Information Office	2
Civil Division	3
Consumer Protection Division	7
Criminal Appeals Division	13
Environmental Enforcement Division	18
Office of Guardianship Services	22
Litigation Division	23
Medicaid Fraud Unit	26
Prosecutions/Investigations Division	27
Regulatory Law Division	30

Office of Guardianship Services

Rita J. Seeds, Program Manager

Overview

The Office of the Attorney General has administered the statewide, publicly funded guardianship services program since 1995, when the New Mexico Legislature established the “Office of Guardianship Services.” Before 1995, such services evolved on an ad hoc basis at various state agencies. The program provides court-appointed guardianship, conservatorship and other surrogate decisionmaking services to incapacitated income and resource eligible adults; legal services for guardianship proceedings; guardianship training; and public information, and investigates complaints.



Contracts with Community Providers

Through contracts awarded in accordance with the New Mexico Procurement Code, the Office contracts with three major contractors: The Arc of New Mexico, Desert State Life Management, Inc. and the National Alliance for the Mentally Ill (NAMI). Referrals to contractors come from the district courts, private attorneys and state and local community agencies and advocacy groups.

These state-funded guardianship services are guardians of last resort. The Arc of New Mexico and Desert State Life Management, Inc. serve as guardians (called Corporate Guardians). The state-funded services are frequently involved when the person’s health or safety is at risk, no family member is available to serve as the individual’s guardian and the individual does not have resources for a paid guardian. NAMI recruits and provides free training to volunteers, including family members, to enable them to serve as court-appointed treatment guardians for adults with mental illness.

Contracts for Legal Services in Guardianship Proceedings

The Office contracts for legal services for the filing of guardianship petitions on behalf of income eligible alleged incapacitated adults. The Office contracts with attorneys who provide legal services in all 13 judicial districts. The contracts provide for the filing of up to 70 guardianship cases per year under this program. The majority of petitioners are family members or other individuals known to the protected person who are willing to volunteer to be guardian.

Training

The Office, in partnership with other state agencies and community organizations, develops and provides guardianship and conservatorship training to family members, friends, and community organizations throughout the state. The purpose of the training is to provide information about the Office of Guardianship Services and the role and responsibilities of a guardian. The Office also provides guardianship manuals to individuals with guardianship questions.

Quality Assurance and Improvement

The Office conducts quality assurance and improvement activities to ensure contract compliance and evaluate quality and effectiveness of services. These activities include site visits, education, training, complaint investigations and technical assistance to promote effective and efficient service delivery.

Litigation Division

Assistant Attorney General Bennett S. Cohn, Director



Overview

The Litigation Division performs legal work in three areas: general litigation, administrative prosecutions and the representation of judges on civil writs. The Division has not lost a case since Attorney General Madrid took office. The Division consists of 12 lawyers and three legal assistants.

General Litigation

The Division represents all boards, agencies, judges and state officers when sued in their official capacities in non-tort related claims.

Administrative Prosecutions

The Division serves as administrative prosecutor to 30 boards and commissions. A majority of the prosecutions are for violations of the Uniform Licensing Act. Sanctions range from fines to revocation of state-issued licenses. Additional prosecutions are for notary public violations.

Representation of Judges on Civil Writs

The Division offers representation to all civil judges whose decisions have been challenged by writs of superintending control or by mandamus.

Clearinghouse for Miscellaneous Complaints

The Division receives and responds to miscellaneous complaints or inquiries by private citizens or inmates.

In addition to the services mentioned above, the Litigation Division serves as a resource on state-related issues to all state departments. The Division monitors all special commission assignments to make sure the interests of the state are being adequately protected. The Division serves as counsel to the Labor and Industrial Commission on all labor appeals.

The Division also prosecutes and defends any appeals on cases in which the Division was involved. In FY01-02, the Division has been

Division Highlights, 2001

Cases received and distributed to appropriate agencies for representation	2,300
General litigation matters	150
Administrative prosecutions	525
Notarial prosecutions	10
Pending prosecutions	300
Representations of district judges	125
Representative of inferior court judges	25
Responses to miscellaneous inquiries	400
As a result of prosecutions, \$750,000 in fines were imposed (proceeds to respective boards)	
Analyzed over 10 pieces of legislation	

involved in approximately 50 appeals, both in the state and federal systems. Year 2002 is an election year, and the Attorney General will represent the Secretary of State in election year challenges in both state and federal courts as well as in all redistricting matters.

For the first time, the Attorney General will now prosecute violations of the Notary Public Act. Heretofore, there had been no enforcement of violations of this act.

The Division oversees 250 attorneys who have been specially commissioned to handle legal work on behalf of certain boards or agencies.

AGO Resources Used to Generate Revenue for Other State Agencies

The Attorney General’s Office, through its Litigation Division alone, contributes more than \$1 million in staff resources and revenue generated to other state agencies such as the Regulation and Licensing Department, and to the independent boards and commissions.

Staff resources contributed	\$ 400,000
Revenue generated for Agencies	\$ 750,000
TOTAL	\$1,150,000

The \$400,000 estimation of the value of staff resources is conservative. The valuation was achieved by calculating the salaries of Division attorneys and support staff and the percentage of time spent on administrative prosecutions. This conservative figure does not include per diem for the statewide travel necessary to prosecute these cases. Further, this calculation includes only the base salary and not the cost of employees’ benefits, which is approximately another 33%, nor does it include the extensive staff resources contributed to state agencies by the AGO’s Civil Division.

Under a new cost assessment policy for administrative prosecutions, we anticipate that between \$250,000 to \$500,000 can be generated for the general fund during the next fiscal year.

Notable Cases

State of New Mexico v. UU Bar

This case was brought by the AGO in 1998 and has been joined by the State Game Commission. The case involves disputed ownership of a former state road that gives the general public access to approximately 45,000 acres of state trust land located in Colfax County. The adjacent landowner blocked the road, which was originally part of the historic Santa Fe Trail. A trial took place in July 2001, and a decision is anticipated in early 2002.



Jackson v. HSD & DOH

This is a 17-year-old class action involving delivery of mental health and related services to the mentally challenged. Under the direction of the AGO, the case should be concluded in 2002.

Zuni Public Schools v. State of New Mexico

This case involves a challenge to the State’s capital outlay funding formula. The case has statewide funding implications. The Attorney General has been instrumental in seeking a legislative solution to this problem. A hearing on whether the State’s solution is sufficient occurred in October 2001, and a decision is expected in late 2001.

***Cumbres & Toltec Railroad Commission
v. Bartholomew***

This case was brought by the Commission against the former operator of the Cumbres & Toltec Railroad for failure to promptly maintain the system and the vehicles. The former operator's failure has cost the state in excess of \$400,000.

Starko v. HSD

In this class action case, New Mexico pharmacists complain that they were underpaid pursuant to the Medicaid statute. Challenged in this suit is the State's ability to prioritize the State's Medicaid responsibilities.

Horne v. State Museum of New Mexico

This case, which went on for eight years, was a suit against the Museum for determination of ownership of priceless Spanish artifacts. The Court ruled in favor of the Museum and the artifacts are now safely in the state's possession.

Ashanti v. New Mexico Supreme Court

This case was brought by a local metro court judge challenging the authority of the Supreme Court to sanction her. The case was brought in U.S. District Court and dismissed by the federal court. The case is now on appeal to the Tenth Circuit Court of Appeals.

Green Party of New Mexico, et al. v. Rebecca Vigil-Giron, Secretary of State

This case arose when the Green Party was informed by the Secretary of State that, based on the results of

the last general election held in New Mexico, it does not currently qualify as a major party in New Mexico. Major party status is defined in NMSA 1978 § 1-1-9 (1953). The Green Party lost its major party status based on the decision of the Honorable Stephen Pfeffer, District Judge, First Judicial District, in the matter of *Libertarian Party of New Mexico v. Rebecca Vigil-Giron, New Mexico Secretary of State*. Judge Pfeffer ruled that state law requires that for a party to be a "major party," its candidate for the office of governor or president must receive at least five percent of the votes cast for that office in the last preceding general election for that office. Ralph Nader, the Green Party presidential candidate in 2000, did not meet that threshold.

The Green Party's theory is that any candidate it ran in any state race would qualify it as a major party, as long as the total votes received for that candidate was at least five percent of the total cast for the office of governor or president. That theory is inconsistent with Judge Pfeffer's ruling and, thus, the Green Party was denied major party status. Unhappy with, but well aware of that ruling, the Green Party took another bite at the apple by couching an appeal of Judge Pfeffer's order in the framework of a Mandamus Petition to the New Mexico Supreme Court. The Supreme Court denied its petition and request for declaratory relief.

Medicaid Fraud Control Unit

Assistant Attorney General Kathy Vincent, Director

Overview

The Medicaid Fraud Control Unit has a staff of three attorneys, four special agents, one medical care investigator, three auditors, an administrator and the Division Director.

Medicaid is a program that provides funding for health services. The program is a joint federal and state program with federal share funding approximately 75% in New Mexico. Similarly, the federal government pays 75% of the unit's budget and New Mexico pays 25%. The Center for Medicare and Medicaid services (formerly HCFA) of the U.S. Department of Health and Human Services is responsible for monitoring the state Medicaid program. Medicaid fraud has been investigated and prosecuted in a variety of providers including physicians, nursing homes, hospitals, laboratories, dentists, home health care agencies and medical equipment companies. While the amount of recipient fraud is not significant, the amount of provider fraud has been estimated in the billions of dollars.

The Unit investigates and prosecutes Medicaid provider fraud, which may include billing for services not performed, double billing, drug substitution, falsification of diagnosis and symptoms to obtain payment for unnecessary tests, false cost reports by nursing homes; and investigates and prosecutes cases of resident abuse, neglect and financial exploitation. These cases range from misdemeanor assault and battery to second-degree murder. Most of the cases come from either nursing homes or group homes for the developmentally disabled.

Recoupment of Medicaid Funds

From July 1, 2000 to June 30, 2001, the Unit, through investigation and prosecution, returned to the New Mexico general fund a total of \$116,163 in overpayments. After June, 2001, settlement agreements were reached in two major cases: UNM Audiology (over \$570,000) and Mega Universal Oxygen, which is pending sentencing. Additionally, \$31,095 in civil monetary penalties, \$2,000 in investigative costs and \$63,514 in fines and restitutions were received.

Unit Activities

The Unit actively works complaints and referrals with the Department of Health, Licensing and Certification Division; the Adult Protective Services Division within the Children, Youth, and Families Department; and the Ombudsman Program in the Agency on Aging through a joint protocol. The Division also initiated a statewide law enforcement training and public awareness program regarding elder abuse, neglect and exploitation; proactive searches of the Medicaid provider databases for aberrant billing patterns; and expanded statewide abuse and neglect investigations.



Prosecutions/Investigations Division

Assistant Attorney General Michael Cox, Director



Overview

The Prosecutions/Investigations Division has made significant progress toward its goals of increasing involvement in violent crimes, including capital litigation and crimes against women and children; enhanced victim's services; foreign prosecutions; and statewide law enforcement training and coordination.

The Capital Crimes Litigation Unit has continued to prosecute cases throughout the state. In Taos, Andrew Martinez pled guilty to first-degree murder of Jonathan Weiss and second-degree murder of Chris Medina, and was sentenced to life plus ten years. Also in Taos, Luis Acosta entered a plea of guilty to first-degree murder, kidnapping and armed robbery of Erik Sanchez, a young man he had thrown from the Rio Grande Gorge Bridge. Acosta was sentenced to life plus 71 years.

The Unit is also partnering with the District Attorney in Farmington, New Mexico in the prosecution of Robert Fry, who is charged with the murder of four individuals in three separate incidents. Members of the Unit are actively engaged in the prosecution of those charged with the murder of Ralph Garcia during the Santa Rosa prison riot. In cooperation with the Fourth Judicial District Attorney's Office, 15 prisoners have been charged. Three of those charged have entered pleas of guilty to various charges; 12 others are awaiting trial, three of whom face the death penalty.

In the days preceding the execution of Terry Clark, the Capital Litigation Unit provided legal and logistical support as well as security, in coordination with the Department of Corrections, for the members of the victim's family.

Special Agent Jose Arguello, Chief of Investigations

The Prosecutions/Investigations Division also successfully prosecuted a variety of other violent crimes cases. The Catron County Task Force, which is a partnership between the AGO and the Seventh Judicial District Attorney, convicted Edward Sedler for the murder of Bruce Stark. Sedler entered a plea of guilty to second-degree murder and armed robbery and was sentenced to 40 years. Trial is pending for his co-defendant, Phillip Lopez. In another case prosecuted by both agencies, David Parker Ray was convicted, first at trial and then by plea, of numerous counts of kidnapping, criminal sexual penetration and aggravated battery for the rape and torture of two women near Elephant Butte Lake; he was sentenced to 224 years in prison. In an Albuquerque case prosecuted by the Division, Charles Taylor was convicted of Child Abuse Resulting in Death for the killing of a three-year-old boy; sentencing is pending.



Meanwhile, in federal court, in cooperation with the U.S. Attorney, the Division successfully prosecuted Mel Velarde for Child Sexual Abuse based on his abuse of an eight-year-old girl in Dulce, New Mexico. Velarde was convicted following a jury trial and is awaiting sentencing. In another Catron County case, *State v. Patrick Ryan*, members of the Division successfully fought for the right to use at trial videotapes the defendant had recorded of his sexual assault of a drugged

young woman. Trial in that case is expected in early 2002. In a child sexual exploitation case handled by the Division, *State v. Rendleman*, a Santa Fe court ruled that sexually explicit photographs taken by Rendleman could be used at trial; that ruling is now being appealed. The prosecution of Ray Sena based on the crash of the Shuttlejack bus in Santa Fe is continuing in partnership with the Santa Fe County District Attorney.

The Division dedicated two investigators full-time to a task force formed to attempt to apprehend the individuals responsible for the murder of three young men in the mountains east of Albuquerque last year.

The Division was active in other areas of criminal investigation and prosecution. The investigation of a wave of Pyramid Schemes resulted in the indictment of eight people and the establishment of a Pre-prosecution Diversion Pilot program for these cases in partnership with both the First and the Thirteenth Judicial District Attorneys. Training in the area of Pyramid Scheme litigation was provided for New Mexico magistrates to help them address the civil court resolution of the cases.

The AGO continued to pursue environmental crimes cases in the past year. Charges stemming from the illegal dumping of Texas waste near Las Cruces, New Mexico are being prosecuted, and other possible environmental crimes are being actively investigated. To aid in such cases, the Attorney General has established an Environmental Crimes Unit that will focus on such crimes throughout the state.

Divisional participation in the Region One Drug Task Force resulted in the completion of 106 drug cases, the seizure of \$8,521,048 in illicit drugs and \$595,829 of assets.

Following the attack on the World Trade Center and the Pentagon on September 11, 2001, the Attorney General assigned one investigator full-time to the Joint Task Force on Domestic Terrorism and a second investigator part-time to the Weapons of Mass Destruction Task

Force. In addition, an Antiterrorism Task Force has been formed within the AGO to address the aftermath of the September 11, 2001 attacks.

The foreign prosecution of individuals who flee to Mexico after committing crimes in New Mexico is handled exclusively by members of the Division. In 2001, these cases included charges of murder and rape. The Foreign Prosecutions Unit also provided training outlining the foreign prosecution process to prosecutors and investigators and issued a manual explaining the process in greater detail.

Members of the Division were instrumental in establishing the New Mexico Committee on Internet Crimes Against Children, a federally-funded group consisting of approximately 30 local, state and federal law enforcement agencies from around the state who have banded together to combat the growing use of the Internet to sexually exploit children. The federal grant provides \$47,000 for equipment, training and coordination to improve the investigation and prosecution of these cases.

The Division continues to respond to complaints involving alleged criminal activity, responding to over 200 such complaints in the first nine months of 2001.

The Division's appellate victim services program provided victims of crime the services and notice to which they are constitutionally entitled at the appellate level. Under this program, victims of crime and their families now have a victim advocate in the Attorney General's Office to give them notice of all hearings and provide information and support throughout all appeals, including state court and federal habeas corpus appeals.

In a complimentary component of the victim services initiative, the Division now has two full-time victim advocates on staff, one of whom is compensated by a Violence Against Women Grant, to provide services to victims in those cases the Division prosecutes, and has trained two other employees to act as part-time advo-



cates in an effort to provide true statewide coverage.

The **Victim Services Unit** has secured the following grants to provide additional services and training in the area of victim services:

Violence Against Women Grant: \$42,000 to pay for a full time advocate to provide services to victims of domestic violence, sexual

assault and stalking.

Law Enforcement Training and Technology Grant: \$49,225 for training and technology for law enforcement officers to address domestic violence, sexual assault and stalking.

Court Monitoring Training Grant: \$7,100, in conjunction with the Crime Victims Reparation Commission, to help communities set up their own court monitoring program in domestic violence and violence against women cases.

Court Clerks Scholarship Grant: \$5,000 to provide training to court clerks to provide higher level of service to domestic violence, sexual assault and stalking victims.

Immigrant Battered Women Project: \$25,000 to provide direct services to battered immigrant women and their children in Las Cruces, New Mexico.

Violence Against Women with Disabilities Grant: \$25,000 to create materials for victim advocates working with disabled victims of domestic violence, sexual assault and stalking.

The Division provided training on criminal justice issues to law enforcement agencies throughout the state. Members of the Division traveled to Silver City, Los Alamos, Rio Rancho, Las Cruces, Espanola Santa Fe, and Albuquerque to present seminars and workshops on a variety of topics including drug-induced rape, child sexual exploitation, environmental crimes, foreign prosecution, sex offender registration, and sexual assault.

Members of the Prosecution / Investigation Division are active participants in a variety of entities to keep abreast of issues in the area of criminal justice including the following:

- The New Mexico Domestic Violence Advisory Group
- The Financial Institutions Security Officers Association
- The Women's Community Association
- The New Mexico Coalition of Sexual Assault Programs
- The MADD Task Force on Underage Drinking
- The Challenge 2005 Prevention of Teen Pregnancy Project
- The Multidisciplinary Team of the Safehouse
- The Domestic Terrorism Working Group and Joint Task Force
- The Weapons of Mass Destruction Working Group
- The New Mexico Gang Task Force
- Drug Enforcement Advisory Council
- The New Mexico Criminal and Juvenile Justice Coordinating Committee
- The Female Intimate Partner Death Review Team
- The National Association of Attorneys General: Violence Against Women Project
- New Mexico Police Athletic League
- New Mexico Gang Task Force
- Children's Multidisciplinary Team
- New Mexico Violence Against Women Implementation Team
- Department of Justice Rio Arriba Community Health and Justice Technical Response Team.
- Insurance Fraud Bureau-Advisory Group

The Division analyzed over 25 pieces of legislation for the forty-fifth legislative regular session.

Public Information Office

Sam Thompson, Public Information Officer

Joyce Lincoln, Assistant

The objective of the Public Information Office is to provide to the public information about the activities of the Attorney General's Office. This objective is accomplished in a number of ways, using a variety of media. Written materials such as press releases and consumer columns, television and radio interviews, public service announcements and the AGO web site are used to provide this information.



This year a new communication device, the Law Enforcement Alert, was instituted. This form of alert includes a fax broadcast to all law enforcement agencies in the state and permits the AGO to provide alerts to law enforcement. Through this device, we can also provide information on a variety of matters including training opportunities and scholarship and technology funding opportunities the office has available for local law enforcement.

The AGO web site contains information from all divisions in the office. This year emphasis has been placed on increasing the frequency of site updating. Press releases are placed on the site within 48 hours of their issue. Consumer columns are on the site and downloadable for reprint purposes. A new headline feature was added to the front page to draw visitors' attention to the latest information. The latest versions of New Mexico's Open Meetings Act and Inspection of Public Records Act Compliance Guides are available on the site along with formal opinions and advisory letters issued by the AGO.

Public service announcements (PSAs) were produced this year. The AGO was required to conduct a smoking cessation program aimed at youth as part of a multistate settlement with the manufacturer of smoking cessation aids. PSAs were developed and aired in the spring. Money from a Medicaid grant permitted the development of a law enforcement training film and PSAs to draw the public's attention to the problem of elder abuse.

The AGO began a weekly radio program on KSFR-AM 1400, Santa Fe. The show, "Know Your Rights," covers a variety of topics. The show is taped and airs on KBOM-FM 94.7 as well. A similar show broadcast in Spanish is in the planning stages. While many shows have dealt with consumer topics, a number of other important topics have been covered including victims' rights, child abuse, elder abuse and compliance with the Open Meetings Act and the Inspection of Public Records Act.

For the second consecutive year, Attorney General Madrid has served as the Honorary Chair of the Law Enforcement Torch Run to benefit the Special Olympics. The AGO joined with law enforcement statewide to raise money for the cause and Attorney General Madrid and a number of staff members participated in the run.

The television broadcast of the Underage Drinking Summit developed by Mothers Against Drunk Driving and the Office of the Attorney General, as well as numerous state agencies, received an Emmy award this year.

Regulatory Law Division

Assistant Attorney General Carol Baca, Director

Overview

Effective January 1, 1999, the former State Corporation Commission and the Public Utility Commission were consolidated to form a new Public Regulation Commission (PRC) to regulate public utilities. At the same time, the Attorney General was statutorily charged with representing residential and small business consumers in utility cases before the PRC pursuant to NMSA 1978, § 8-5-17. The Regulatory Law Division (RLD) performs the often complex legal work required to carry out the Attorney General's duties in utility cases under § 8-5-17, as well as any related appellate proceedings before the New Mexico Supreme Court. In addition, pursuant to the NMSA 1978, § 8-5-1(J), the RLD is authorized to represent the state in utility matters before the Federal Communications Commission and the Federal Energy Regulatory Commission. Although variously named units of the AGO have participated in utility cases since 1975, in early 2001 the Attorney General established the RLD as a separate division to underscore both the specialized nature and importance of the work required to carry out the office's duties in the utility area.



The emphasis of the Division in FY01 was participation in a large number of matters relating to the ongoing activities at the state and federal level to deregulate or restructure the telecommunications and electric utility industries, including legislative issues. The Attorney General's interest in protecting consumers in electric restructuring issues and transmission matters affecting the Western Interconnection is also reflected in her recent appointment as Chair of the newly-created Energy Committee of the Conference of Western Attorneys General. Other cases and matters handled, reviewed or monitored by the Division in FY01 include proposed utility mergers, rate cases, several dockets related to telephone held orders, various rulemakings, miscellaneous gas utility matters (including hedging practices) and monitoring or participating in various other cases filed by utilities or un-docketed issues that are expected to affect utility consumers. The Division also assisted with assorted individual complaints from consumers.

Highlights of Activities

2001 Legislative Session

In her capacity as advocate for the residential and small business utility consumers of New Mexico, the Attorney General monitors proposed legislation relating to utility issues and responds to requests for bill analyses. The AGO prepared written analyses, attended hearings and proffered testimony for various bills in 2001, with particular emphasis on Senate Bill 266, which proposed amendments to the Electric Utility Industry Restructuring Act of 1999. At the time, deregulation of electric utilities was scheduled to take place under the Act in the latter half of 2001. In light of the recent problems surrounding deregulation of the electric utility industry in California, the AGO joined with other interested entities in the successful efforts to obtain a five-year legislative delay of restructuring in New Mexico to protect the interests of ratepayers. During the session, the Division analyzed over 15 pieces of legislation.

Electric Deregulation Rulemakings (PRC Cases 3106, 3109, 3145, 3167 & 3349)

The Public Regulation Commission docketed multiple rulemakings in 1999 to implement the Electric Utility Restructuring Act. A number of the rule dockets were reopened to provide for further adjustments as the deregulation landscape across the nation changed. The Division participated actively in the development of these rules as the process continued into the 2001 fiscal year.

PRC Case 3137 - PNM Transition Plan & Holding Company Application

The first phase of the transition plan filed by Public Service Company of New Mexico (PNM) pursuant to the Electric Utility Industry Restructuring Act of 1999, the formation of a corporate holding company shell, was completed within FY00. During FY01, the Division participated actively in the second phase, Approval of PNM's Separation Plan, and the third phase, Approval of PNM's Transition Plan, conducting discovery, filing expert witness testimony and briefs and participating in the hearings. Pursuant to the amendments of the Restructuring Act passed by the 2001 Legislature (SB 266), the Attorney General and other parties also participated in a fourth phase — the formation of a holding company for PNM. That phase was concluded before the Public Regulation Commission at the end of the fiscal year when the Commission issued its Order Approving the Formation of a Holding Company. PNM and the Attorney General have appealed portions of that order and those appeals are pending before the New Mexico Supreme Court.

PRC Case 3170 - EPE Transition Plan & Holding Company Application

During the 2001 regular legislative session, electric deregulation was delayed until 2007 under the terms of SB 266. However, SB 266 allowed utilities that had filed a transition plan the opportunity to file, and receive permission to form, a holding company by July 1, 2001, subject to terms and conditions in the public interest. Representing residential and small business consumers, the AGO participated in the hearings held

in connection with El Paso Electric's application for a holding company.

PRC Case 3215 et al. - US West (Qwest) Petition for Alternative Form of Regulation

Qwest Corporation (formerly US West Communications, Inc.) filed an Alternative Form of Regulation Plan in December 1999. The Plan would change the form of regulation of the largest provider of telecommunications services in New Mexico from rate-of-return regulation to price cap regulation. The AGO objected to the proposed Plan filed by Qwest and the Commission Staff. After six days of hearing, Qwest withdrew its Plan and submitted a much improved plan that provided for higher quality of service benchmarks, ensured greater investment by Qwest in rural areas of the state, and has substantially higher penalties if Qwest does not meet the quality of service benchmarks set out in the amended Plan. The amended Plan was subject to several additional days of hearing before the Commission adopted the amended Plan on March 8, 2001. Whether Qwest has met the benchmarks and performed as required will likely be the subject of hearings during September 2002.

PRC Case 3223 – State Rural Universal Service Fund

This case involved the State Universal Service Fund, including sizing the Fund, determining how to impose a surcharge to capitalize the Fund and the method of allocating the Fund to the eligible carriers. The Division conducted extensive discovery, filed testimony and participated in the hearings during September 2001. The docket presented the interesting issue of how large a surcharge should be imposed on all consumers for the benefit of limited consumers in rural areas. Because federal universal service funding is expected to increase by over 15% over the next five years, and due to the financial health of the rural carriers, the Attorney General advocated not imposing a surcharge on consumers at this time. A recommended decision was expected from the Hearing Examiner in mid-November.

PRC Case 3325 - US West (Qwest) Subsidies

Pursuant to House Bill 400 passed by the legislature in March 1999, the PRC was to identify all subsidies that are included in rates for public telecommunications services offered by incumbent local exchange carriers with more than fifty thousand access lines. In this docket, the AGO intervened, conducted discovery, filed testimony and participated in the hearings that identified the subsidies in Qwest's rates. The major finding by the PRC was that Qwest's residential and business rates are not being subsidized.

PRC Case 3495 - Costing of Unbundled Network Elements (UNEs)

UNEs establish the price a competitor must pay to lease parts of the Qwest system. Establishing properly priced UNE rates is important in encouraging

competition because prices that are not properly cost-based act as a barrier to entry and may prevent, or limit, entry in type or scale. The AGO has intervened, retained an expert and begun to conduct discovery. It is estimated it will take up to six months to prepare the case for hearing in June 2002.

PRC Case 3606 - El Paso Electric Rate Case

During May 2001, El Paso Electric filed notice of a rate increase with the PRC. The filing was precipitated by an increase in fuel costs that EPE was not permitted to pass onto consumers. The AGO actively participated in negotiating a settlement that would minimize the impact on the consumers while not financially punishing EPE. A recommended decision is before the Commission and a final order was expected in December of 2001.

FY 01 Case List

Case No.	Description of Case & Attorney General Participation
PRC 2939	USWest Waivers of Held Orders, filed 1/99, AGO participated in 3-week hearing and filed post-hearing briefs.
PRC 3008	USWest Rate Case – filed 4/99, AGO participated in hearing which extended 61/2 weeks and presented the testimony of 5 expert witnesses. The AGO filed post-hearing briefs and participated in negotiations.
PRC 3056	Investigation/Gas Purchase Hedging Practices – docketed 5/99 at joint request of AGO& PRC Staff, AGO participated in continuing workshops on Phase II re development of hedging guidelines for Public Service Company of New Mexico.
PRC 3106	Utility Code of Conduct Rulemaking, filed 7/99, AGO filed comments and participated in workshops. AGO joined in Staff motion for rehearing of rule.
PRC 3109	Standard Offer Service Rulemaking, filed 7/99, AGO filed motion for rehearing on rule and supplemental comments when Commission granted rehearing.
PRC 3137	PNM Transition Plan, docket opened 9/99, was bifurcated into 3 phases. In each, the AGO conducted discovery, filed testimony, participated in hearings, filed post-hearing briefs and exceptions to Recommended Decision.
PRC 3145	Customer Protection Rulemaking, filed 9/99, AGO filed comments, participated in hearing.
PRC 3167	Competitive Power Supplier Rulemaking, filed 7/99, AGO filed comments, participated in hearing.
PRC 3170	El Paso Electric electric deregulation transition plan, filed 10/99, AGO conducted discovery, filed testimony, participated in hearing, signed settlement in Part I, filed briefs and participated in hearing in Part II, filed exceptions to recommended decision and motion to reopening.
PRC 3215	USWest Petition for Alternative Regulation Plan, filed 10/00, AGO conducted discovery, participated in negotiations, filed testimony re stipulation, participated in hearing and filed post-hearing briefs.
PRC 3220	Southwestern Public Service Co. electric deregulation transition plan, filed 12/99, AGO participated in hearing, filed briefs.

FY 01 Case List

Case No.	Description of Case & Attorney General Participation
PRC 3223	State Rural Universal Service Fund, AGO filed comments.
PRC 3224	Federal Universal Service Support, filed 12/99, AGO filed comments.
PRC 3237	CLEC Expedited Regulatory Process Rulemaking – filed 8/00, AGO filed comments, attended the public comment hearings and filed motion for rehearing.
PRC 3269	USWest § 271 Application – filed 2/00, AGO actively monitored the phases of this multi-state process.
PRC 3295	PNM Underground Tariff – filed 3/00, AGO intervened then monitored.
PRC 3325	USWest Subsidies – filed 4/00, AGO filed testimony, participated in hearing, filed post-hearing briefs and proposed findings.
PRC 3349	Generation Source Rulemaking – docketing 4/00, AGO filed comments and monitored proceeding.
PRC 3378	Texas New Mexico Power Co. electric deregulation transition plan, filed 6/00, AGO intervened, participated in hearing.
PRC 3437	Consumer Protection/Quality of Service Stds Rulemaking [Telecommunications] – filed 8/00, AGO filed comments, participated in hearing, filed motion for rehearing, participated in post-hearing rule enforcement process, AGO appealed final rule (pending).
PRC 3438	Infrastructure Investment Rulemaking (teleco) – filed 8/00, AGO filed comments, participated in hearing.
PRC 3439	CLEC Interconnection Access Rulemaking (teleco) – filed 8/00, AGO filed comments, participated in hearing.
PRC 3495	Teleco Costing & Pricing Rules – filed 10/00, AGO monitored initial phase of case.
PRC 3463	Zia Natural Gas Declaratory Order/Service Termination – AGO intervened and monitored case.
PRC 3503	Declaratory Interpretation of Zia Natural Gas Company's rates and tariffs – AGO intervened and monitored case.
PRC 3519	Rulemaking to Amend Rule 410 (Medical Certificate) – AGO monitored rulemaking process.
PRC 3567	Notice of Inquiry on Customer Service and Quality of Service Rules Enacted in 3437 – AGO filed comments.
PRC 3603	Texas-New Mexico Power Company Affiliate Transaction – filed 4/01, AGO intervened and monitored case.
PRC 3606	El Paso Electric Rate Case filing – filed 4/01, AGO participated in negotiations and signed settlement agreement.
SCT 25,560	Appeal of SCC 96-115-TC (USWest Held Orders) – filed 1/99, AGO responded to motion to hold appeal in abeyance & motion to dismiss.
SCT 26,298	Appeal of PRC 3152, Qwest/USWest Merger by AGO – AGO filed briefs and presented oral argument before Supreme Court.
SCT 26,756	Appeals of PRC 3437, brought by AGO & AT&T – consolidated into SCT 26,811.
SCT 26, 811	Appeal of PRC 3438, brought by AGO on order in telecommunications rulemaking, SCT 26,756 consolidated into this docket, AGO filed statement of issues.
FERC EC01-51	Xcel Energy Services Inc./SPS Application to Transfer Control of Jurisdiction Assets – AGO intervened on behalf of rural electric cooperatives.
FERC ER01-841	Xcel Energy Services Inc./SPS Amended & Restated Agreements Regarding Cooperative Contracts – AGO intervened on behalf of rural electric cooperatives, filed protest brief.
SB 266+ other bills	AGO monitored proposed legislation in 2001 session related to electric deregulation and other utility issues, AGO testified before committee and full chamber hearings re SB 266.

Report of the Special Counsels

Glenn Smith and Chris Coppin

Tobacco Settlement Agreement and Environmental Matters

Special Counsel **Glenn Smith**, appointed by Attorney General Madrid as the State's senior tobacco contact under the Tobacco Master Settlement Agreement (MSA), is responsible for monitoring the tobacco companies' compliance with the Agreement's injunctive provisions directed toward eliminating the ability of the tobacco industry to promote its lethal products to our children. Special Counsel Smith is also charged with the responsibility to protect the state's interest in the \$1.2 billion in settlement proceeds, including the extra \$85 million Attorney General Madrid obtained as New Mexico's reward for its strategic contribution to this historic Agreement.



As part of that protection, the AGO enforces the statutes that require tobacco companies not parties to the tobacco MSA to open escrow accounts and deposit a certain percentage from each cigarette they sell in New Mexico. These non-participating tobacco manufacturers are required to certify to the AGO the amounts placed in escrow. Failure to comply with the requirements subjects them to enforcement actions by the AGO.

Additionally, Special Counsel Glenn Smith is one of Attorney General Madrid's chief policy advisors on environmental matters, including issues involving the operation and management of WIPP, and serves as the AGO project manager for the South Valley Superfund Natural Resource Damages Litigation and the Bravo Dome Royalty Underpayment Litigation.



Indian Gaming Lawsuit

On June 14, 2000, the Attorney General, aided by Special Counsel **Chris Coppin**, filed suit in the U.S. District Court against 12 Indian tribes and pueblos. Attorney General Madrid entered into ten separate settlement agreements with ten of the 12 Indian gaming tribes over revenue sharing requirements in the 1997 Indian gaming compact. The settlements required the settling tribes to pay the state \$91 million dollars upon approval by the U.S. Department of the Interior of the new compact, authorized during the 2001 regular legislative session. Interior approved those compacts on November 23, 2001. The settling tribes are: Jicarilla Apache Nation, Pueblos of Sandia, Isleta, Santa Ana, San Juan, San Felipe, Tesuque, Taos, Laguna and Acoma. The state will continue litigation against the two non-settling tribes, Pueblo of Pojoaque and Mescalero Apache Tribe.



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