

## **Norman Gaume, P.E. (ret.)**

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HAND DELIVERED

March 1, 2016

Ms. Darr Shannon, Chair, and Members  
New Mexico CAP Entity  
Catron, Grant, Hidalgo, and Luna Counties, New Mexico

Re: Notice of Violation—Illegally Closed Public Meeting

Dear Madam Chair and Members of the NM CAP Entity,

I write pursuant to NMSA 1978 § 10-15-3 (B) (1997) to give you notice of the violation of the New Mexico Open Meetings Act committed by the NM CAP Entity by closing its public meeting held January 14, 2016 for reasons not included in the lawful exceptions. As is set forth below, it is clear that the NM CAP Entity violated the New Mexico Open Meetings Act in hiding from the public its proposed design for the NM Unit, even though this design was shared with the Interstate Stream Commission (ISC) almost a month ago.

As you know, the NM CAP Entity created several committees of its members and other government officials to pursue its public business. At its October 14, 2015 public meeting, the NM CAP Entity appointed the Technical Subcommittee with Jim Massengill as chair, chair-appointed-members Vance Lee and Anthony Gutierrez, and "volunteers" Wendell Hann and Alan Campbell "to work with ISC regarding scope of work for the firm that will be selected for the 30% design proposal."

The discussion by NM CAP Entity members prior to the action to appoint the Technical Subcommittee had the general theme of them not knowing the configuration of the NM Unit. However, defining a specific configuration is a prerequisite for beginning the 30% design process pursuant to the ISC's June 2015 Request for Proposal (RFP). In turn, having a design sufficient to characterize the proposed action is a prerequisite to Reclamation's Notice of Intent (NOI) to prepare the EIS. Thus, the NOI, which initiates the public NEPA process, cannot be issued until the NM CAP Entity picks a configuration. As a result, the Technical Subcommittee's work is highly important and time sensitive.

Pursuant to the ISC's RFP, proposals consisting only of respondent's qualifications were solicited in June 2015 and submitted in July 2015. ISC staff have reported publicly that they evaluated proposals and conducted interviews and selected a top-ranked firm for negotiations. As already noted, these negotiations have been delayed for months because the basis of the negotiations, a specific

configuration of the NM Unit to be designed, has been unavailable because no such configuration has been selected by the NM CAP Entity.

During the October 14, 2015 NM CAP Entity meeting, Member Aaron Sera prefaced his motion to appoint the technical subcommittee with a statement, as summarized in the meeting minutes (emphasis added):

Mr. Sera – It is very important to have this scoping committee because this is the time we need to decide what we want to do. If anyone is planning a billion dollar project they probably shouldn't be on this board.

Motion by Mr. Sera to approve the appointments (Mr. Lee, Mr. Gutierrez, and Mr. Massengill) and volunteers (Mr. Campbell, and Mr. Hann), with the chairman of this committee to be Mr. Massengill, seconded by Mr. Allred.

The motion passed unanimously.

Despite this optimistic beginning, the technical committee in the four months since its appointment has made no public report nor conducted no public discussions or deliberations addressing the alternatives or factors being considered to “decide what we want to do.” The NM CAP Entity has not considered “what we want to do” in any public meeting.

The “Memorandum of Understanding Regarding Engineering Design for the NM Unit” between the ISC and the NM CAP Entity (30% Design MOU) that the NM CAP Entity unanimously approved at its December 15, 2015 public meeting, states:

The technical subcommittee must provide a recommendation for the scope of work to the NM CAP Entity in early January 2016, for a vote by the Entity on the proposed scope of work at the Entity's January 2016 public meeting. The Entity must vote on the scope of work to ensure milestones are met.

The NM CAP Entity's Final Agenda for its January 14, 2016 public meeting includes a report of the Technical Subcommittee as the last item under old business, followed by a “closed session of the contract negotiation process regarding competitive sealed proposals pursuant to the Procurement Code” pursuant to the New Mexico Open Meetings Act exemption Section 10-15-1 H. (6). The agenda concludes with a vote in open session “to approve/disapprove the contract negotiation process for the request for proposal issued by the NMISC for the up to 30% engineering services.”

The Technical Subcommittee report was given by committee chair Jim Massengill. He replied, “keep hoping” to the Chair Darr Shannon's invitation, “we

are hoping you might have some sort of technical committee project report, please?”  
He went on to say:

The technical committee has met and looked at projects. We have made some progress, we still have a long way to go, or we still need more time, I should say. We...the next meeting is scheduled for Feb 3. ... We did meet today with the Bureau of Reclamation. They spearheaded that meeting. We will be meeting with them again. Early February all day meeting, this time. Our group is well aware of how much pressure we are under to come up with these projects.

Following a five minute recess, the NM CAP Entity was advised by Pete Domenici, Jr., its counsel, that the closed session was authorized by the exemption described in Example 56 of the Attorney General’s Compliance Guide for the Open Meetings Act. The NM CAP Entity then met in closed session for approximately one hour with ISC staff, an ISC attorney, and a Bureau of Reclamation project engineer.

After reconvening in open session, the NM CAP Entity unanimously voted to approve the technical committee’s recommendation. I transcribed the following from my audio recording of the meeting.

Chair Shannon: Based on the contract negotiation process discussion, would the technical committee now provide their recommendation to the NM CAP Entity parties and that will be Mr. Gutierrez, please.

Technical Subcommittee member Gutierrez: Madam Chair, the committee recommends that the Entity approve the contract negotiation process discussed in closed session. This is a preliminary approval. The Entity will have to make another vote once contract negotiations are complete.

Technical Subcommittee member Lee: Second.

Chair Shannon: I need a motion first. That was just the recommendation. Sorry.

Technical Subcommittee member Lee: Madam Chair, I move we approve the contract negotiation process for the request for proposals issued by the Interstate Stream Commission for up to 30% design services.

NM CAP Entity Member Hutchison: This will be for Marcos, I just had a question about the process we are being asked to approve. Would disclosing the elements of the contract negotiating process possibly create an unfair advantage for possible RFP respondents?

ISC Contracts Manager Marcos Mendiola: If I disclose the contents it would, we would...if I disclose the contents. The reason why we can't disclose any of the information discussed is because I have not entered into negotiations with the firm that our evaluation committee has selected. All information pertaining to the RFP as of right now must remain quiet until an award is made.

Chair Shannon: Thank you Marcos very much

I have a motion from Mr. Lee and a second by Mr. Gutierrez that we approve the recommendation by the technical committee as presented.

All in favor

Any opposed

The motion passed unanimously. I then requested information regarding what the NM CAP Entity had just approved. The following responses are from my audio recording.

Chair Shannon: Mr. Marcos just explained to ...

ISC Attorney Dominique Work (after first interrupting from the audience and then being asked to speak from the podium): I believe Mr. Gutierrez made a recommendation on behalf of the Technical Committee, Madam Chair.

Technical Subcommittee member Gutierrez: The recommendation is based on what we discussed in closed session. The Technical Committee is who made that recommendation to the CAP Entity parties.

The NM CAP Entity met again on February 2, 2016. A Technical Subcommittee report was on the agenda, but again, no report was given. Neither was there any discussion by the NM CAP Entity during the public meeting of the configuration or components of the NM Unit.

At the ISC's public meeting on February 18, 2016, ISC Director Deborah Dixon described recent ISC staff work with the NM CAP Entity and federal agencies:

The NM CAP Entity continues to be extremely busy and actively engaged. The staff from ISC has continued to discuss next steps with the AWSA planning process with the Bureau of Reclamation and to support the CAP Entity in that process. We have representatives from ISC that attended meetings on February 2 with the NM CAP Entity and the technical...technical meeting on February 3. The CAP Entity Technical Committee presented ISC staff with their desired NM

Unit components to be evaluated by the consulting design engineer upon execution of their contract, which has not happened yet.

Thus, according to Ms. Dixon, on February 3, the day following the NM CAP Entity's meeting that had no Technical Subcommittee report, despite the agenda item for that report, nor any consideration by the NM CAP Entity, that same subcommittee presented to the ISC its long awaited and overdue "desired NM Unit components" – a publicly controversial topic that implicates massive expenditures of public funds. This happened on the date identified by Technical Subcommittee chair Jim Massengill at the NM CAP Entity's January 14 meeting as the next Technical Subcommittee meeting date. Instead, the Technical Subcommittee met with ISC staff to present the NM CAP Entity's secret decisions.

From this chain of events it is impossible to believe that the one-hour closed session during the January 14 NM CAP Entity meeting did not include discussion of the "desired NM Unit components" as described by Ms. Dixon. It defies belief that the Technical Subcommittee would present to the ISC something of such huge importance to the NM CAP Entity without first running it by the full NM CAP Entity. If the desired NM Unit components were not discussed during this January 14 hour-long closed session, it must have been discussed amongst the full NM CAP Entity via phone calls and emails—a rolling quorum of the CAP Entity as defined by the Attorney General's Compliance Guide for the Open Meetings Act.

This whole series of events demonstrates a previously concocted plan, a ruse, for the Technical Subcommittee report regarding the configuration of the NM Unit to be made behind closed doors to the full membership of the NM CAP Entity and followed by a vote of approval in open session. This process was intended to withhold from the public all details of what it approved, and all NM CAP Entity deliberations, in order to move the process forward.

The ruse hides important and weighty public business behind the non-applicable Procurement Code requirement that competitive sealed proposals not be disclosed during negotiations. The applicable Procurement Code requirement:

13-1-116. Competitive sealed proposals; disclosure; record.

The contents of any proposal shall not be disclosed so as to be available to competing offerors during the negotiation process.

The illegally closed discussion of public business must have included:

1. The identification of the configuration of the NM Unit;
2. The associated recommendations and concerns and limitations of the non-quorum Technical Subcommittee's report;

3. How to deal with the practical problem that the procurement of the 30% design engineering services is substantially behind schedule because of the failure to identify the preferred configuration for or specific description of the NM Unit, which was presumed by the ISC's RFP to be the starting point for the 30% design engineer; and
4. How to address the NM CAP Entity's desire or need for further study of alternatives by the selected design engineer, while the scope of work of the RFP, as well as the ISC's public remarks, indicates the engineer's scope of work is limited to 30% design, not evaluation of alternatives for a later selection of a final configuration, which would then be designed.

The ruse included public discussion upon return to open session that information discussed in the closed session regarding the "negotiation" process could not be discussed publicly because it would give an unfair competitive advantage to a proposer. The information actually discussed in closed session instead relates directly to the design engineer's scope of work, which should have been identified to the public and all respondents in the RFP last summer (the normal practice under such circumstances).

The NM CAP Entity violated the New Mexico Open Meetings Act Section 10-15-1 B:

All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency, any agency or authority of any county, municipality, district or any political subdivision, held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act. No public meeting once convened that is otherwise required to be open pursuant to the Open Meetings Act shall be closed or dissolved into small groups or committees for the purpose of permitting the closing of the meeting.

The NM CAP Entity's closed session to hear from its Technical Subcommittee, after which it voted to approve the Technical Subcommittee's secret recommendations for the "desired NM Unit components to be evaluated by the consulting design engineer," is not within the limited exception that allows closed meetings "at which the contents of competitive sealed proposals...are discussed" cited, Section 10-15-1 H. (6):

that portion of meetings at which a decision concerning purchases in an amount exceeding two thousand five hundred dollars (\$2,500) that can be made only from one source and that portion of meetings at which the contents of competitive sealed proposals solicited pursuant to the Procurement Code are discussed during the contract negotiation process. The actual approval of purchase of the item or final action regarding the selection of a contractor shall be made in an open meeting

Example 56 from the OMA compliance guide cited by the CAP Entity's counsel during the January 14 CAP Entity meeting as justification for the closed session is not applicable. That example addresses situations where a public body has to "decide how to handle negotiations" involving responses to an RFP. However, the RFP in question here was issued by the ISC, not the CAP Entity. Example 56 does not suggest that one public agency can hold closed sessions regarding another public agency's RFP negotiation process. Further, there is no support in the OMA itself for the proposition that one agency's confidential bidding process can allow a separate agency to close its meetings. The 30% Design MOU also supports the conclusion that closed meetings by the CAP Entity to shield the details of the proposed NM Unit design are inconsistent with the OMA. That MOU is clear that the ISC will negotiate with companies responding to the RFP and the Technical Subcommittee of the NM CAP Entity will provide input to the ISC -- not have a negotiating role. Discussions by the NM CAP Entity regarding what the NM Unit should be must be conducted publicly; Example 56 does not compel a contrary result.

If, despite all logic, the NM CAP Entity maintains that it did not discuss the configuration of the NM Unit during its January 14 closed session, the only other conclusion possible is that Technical Subcommittee members discussed their proposed choice with the full committee via a series of meetings, phone calls and/or emails that constituted a rolling quorum -- also a violation of the OMA. As the Attorney General's Compliance Guide explains:

The Act's requirement for open, public meetings applies to any discussion of public business among a quorum of a public body's members. Usually, a quorum of a public body's members meets together to discuss public business or take action. However, a quorum may exist for purposes of the Act even when the members are not physically present together at the same time and place. For example, if three members of a five member board discuss public business in a series of telephone or email conversations, the discussion is a meeting of a quorum. This is sometimes referred to as a "rolling" or "walking" quorum. The use of a rolling quorum to discuss public business or take action violates the Act because it constitutes a meeting of a quorum of the public body's members outside of a properly noticed, public meeting.

If the Technical Subcommittee presented the "desired NM Unit components" to the ISC without first obtaining approval from the NM CAP Entity (which seems quite unlikely), that would have violated the OMA. This is the case because, if the Technical Subcommittee went forward without approval from the NM CAP Entity, it would have been a public body making policy without holding public meeting—a direct OMA violation.

A final violation of the OMA is the NM CAP Entity's failure to identify what it had decided in its January 14, 2016 closed session. If it decided on a configuration of the NM Unit during its closed session that should have been disclosed once the closed session ended and the vote to approve what was discussed in closed session should have included the specifics.

Pursuant to the notices listed above, I am notifying you that each and every decision and action based on the secret discussions of the configuration of the NM Unit that occurred in the illegally closed public meeting on January 18, 2016 (or via a rolling quorum or via unlawful actions by the Technical Subcommittee), are void due to this egregious violation of the Open Meetings Act. I hope to hear from you within the 15-day period identified in the Open Meetings Act, Section 10-5-3 B.

Furthermore, I request, as a citizen with substantial interest in the NM CAP Entity's work, that the NM CAP Entity change its behavior to match its rhetoric about being transparent. Henceforth the NM CAP Entity should comply with the letter and the spirit of the law, as stated in the Open Meetings Act, Section 10-15-1 A, which states (emphasis added).

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings. All meetings of any public body except the legislature and the courts shall be public meetings, and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings.

It is your legal duty to conduct your public business in public. It is my legal right to attend your meetings and listen to your deliberations and proceedings. You may not make your most important decisions secretly, based on your secret deliberations and proceedings.

Sincerely,

Norman Gaume, P.E. (ret.)