FIFTH JUDICIAL DISTRICT
COUNTY OF LEA
STATE OF NEW MEXICO

RAYELLEN RESOURCES, INC., DESTINY CAPITAL, INC., LYNNE E. ELKINS, PAULA D. ELKINS, JOY BURNS, CEBOLLETA LAND GRANT, FERNANDEZ COMPANY, LTD., JUDITH WILLIAMS PHIFER, individually and as Personal Representative of THE ESTATE OF JAMES H. WILLIAMS, ORIN CURTIS CLEVE WILLIAMS, RIO GRANDE RESOURCES CORPORATION, STRATHMORE RESOURCES (U.S.) LTD., LARAMIDE RESOURCES (U.S.A.) LTD., and ROCA HONDA RESOURCES, LLC,

and

THE HONORABLE PATRICK H. LYONS, COMMISSIONER OF PUBLIC LANDS FOR THE STATE OF NEW MEXICO

Plaintiffs-Petitioners,

vs. **No. CV2009-812**

NEW MEXICO CULTURAL PROPERTIES REVIEW COMMITTEE, and ALAN "MAC" WATSON, Individually and as Chairman of the New Mexico Cultural Properties Review Committee,

and

PUEBLO OF ACOMA,

Defendants-Respondents.

DECISION AND ORDER

Petitioners, various surface and mineral owners, filed a First Amended Petition for Writ of Certiorari challenging the Respondents' listing of "more than 700 square miles spanning portions of three New Mexico counties and encompassing the entirety of Mt. Taylor – from its peak to its surrounding mesas

– as a traditional cultural property on the New Mexico State Register of Cultural Properties." Respondents herein are the New Mexico Cultural Properties Review Committee, Alan "Mac" Watson, Individually and as Chairman of the Cultural Properties Review Committee and the Pueblo of Acoma, will be hereinafter collectively referred as "Respondents". This Court granted certiorari and now reverses and remands for the reasons stated below.

BACKGROUND

On November 10, 2009, this Court issued its Writ of Certiorari to review the decision of the New Mexico Cultural Properties Review Committee (CPRC) to designate Mt. Taylor and its surrounding mesas, hereinafter collectively "Mt. Taylor", consisting of 434,767 acres of contributing lands and 89,938 acres of non-contributing lands as a Traditional Cultural Property (TCP). Rule 1-075(R) of the Rules of Civil Procedure for the District Courts provides the following standards of review:

> (1) whether the agency acted fraudulently, arbitrarily or capriciously;
>
> (2) whether based upon the whole record review, the decision of the agency is not supported by substantial evidence;
>
> (3) whether the action of the agency was outside the scope of the authority of the agency; or
>
> (4) whether the action of the agency was otherwise not in accordance with law.

The Court must also consider whether the decision designating the TCP presents a question of law, a question of fact, or a combination of the two, and whether the matter is within the agency's specialized area of expertise. Regents of UNM vs. NM Federation of Teachers, 125 N.M. 401, 962 P.2d. 1236

(1998). If the administrative decision does not breach any of the standards set forth in Rule 1-075(R), it will be upheld. The Court will "confer a heightened degree of deference to legal questions that implicate special agency expertise..." Morningstar Water Users Ass vs. NMPUC, 120 N.M. 479, 904 9.2d 28.

Mt. Taylor is a mountain located near Grants, New Mexico with mesas extending in several directions. This matter originated on February 14, 2008, when the Pueblos of Acoma, Laguna, Zuni, the Hopi Tribe and the Navajo Nation submitted an emergency application to have all lands above 8,000 feet on Mt. Taylor and its mesas and land above 7,300 feet on Horace Mesa, totaling over 660 square miles, an unprecedented designation request, listed on the New Mexico Register of Cultural Properties. The designated property is located in Cibiola, Sandoval and McKinley counties. The emergency application was filed by the tribes to prevent an imminent mining boom on or near the mountain and to require consultation with the tribes before activities are conducted which might impact the proposed TCP. As a practical matter, the emergency application sparked a battle over ancient claims to the land between the tribes and environmentalists, against mining interests, some ranchers and Spanish land grant communities. Mt. Taylor and its mesas are sacred to the tribes but also contain pilgrimage trails, shrines, archaeological sites, burial sites, petroglyphs and other artwork. It has been reported that mining experts have estimated that there are millions of pounds of known uranium in the Mt. Taylor area, and although uranium is found widely, Mt. Taylor has a "mother lode". Demand for "yellowcake", as it is called, has escalated with the dramatic rise in its value and with the increasing demands for nuclear power.[1] Old tensions have been opened between the parties as the tribes fear environmental contamination from mining, as well as,

[1] USA Today. "Boom times for uranium mines?", July 10, 2007.

destruction of ancient, historically valuable and sacred properties if mining is not restrained, whereas surface and mineral owners fear significant unwarranted restrictions on the use of their property interest which could have a significant negative economic impact in the community and in our state if mining uranium and other uses of property are unreasonably restricted.

On February 22, 2008, the CPRC approved the emergency listing of the Mt. Taylor nominated property, but the Attorney General gave an opinion that the New Mexico Open Meetings Act had been violated in the scheduling of the meeting. Thereafter the tribes renewed their application and on June 14, 2008, the temporary designation was approved by the CPRC. On April 22, 2009, the nominating tribes submitted a nomination for permanent listing of Mt. Taylor and, on May 22, 2009, a revised in acreage nomination reflecting more recent information about private property holdings was submitted. On June 4, 2009, the nominating tribes submitted another "corrected" nomination with another new acreage number. The Final Order Approving Nomination For Testing On New Mexico Register Of Cultural Properties "contained 434,767 acres of contributing lands and 89,938 acres of non-contributing lands." The emergency nomination consisted of 316,456 acres, the second nomination consisted of 344,362 acres, the third nomination 344,828.49 acres, and the final listing 524,705 acres, although the total acreage in the Final Order appears to be a clerical error.[2] Additional facts will be discussed in analyzing individual review issues below.

Petitioners raised the following review issues:

1. Whether the Final Order should be reversed for lack of fixed regulations;

[2] The parties provided slightly different acreage numbers.

2. Whether the Final Order was properly issued pursuant to regulations relied on by Respondents;

3. Whether Respondents had the statutory authority to list the property that was listed;

4. Whether the Final Order should be revised on grounds specific to Petitioner Cebolleta Land Grant;

5. Whether the Final Order should be reversed on establishment clause grounds.

Additionally, Respondent Pueblo of Acoma raises a challenge to Petitioners' standing.

DISCUSSION

STANDING

1. Private Petitioners and Land Grants

Respondent Acoma argues that Petitioners do not have standing to challenge the CPRC's decision. Acoma maintains that Petitioners (1) were not directly injured as a result of the action they challenge (2) that there is no causal relationship between the injury and the challenged conduct and (3) that the injury is likely to be redressed by a favorable decision. A.C.L.U. of New Mexico vs. City of Albuquerque, 2008-NMSC-045, 144 N.M. 471 (2008). In their Emergency Nomination, the nominating tribes alleged pending uranium exploration and mining would irreparably damage or destroy culturally valuable sites. Respondents have acknowledged that production of minerals under both state and private lands could be delayed while the CPRC consults with the New Mexico Energy, Minerals and Natural Resources Department and the tribes. The TCP designation requires mining interests to obtain a standard permit and review by the Historic Preservation Division before exploratory drilling can begin. The Court agrees with Petitioners that the new burdens placed upon them by the designation is an injury in fact, and but for the

TCP listing, neither the CPRC nor the SHPO would have any jurisdiction over Petitioners' land nor would any state agency's decision regarding mining, land use, or structure modifications be subject to delay. Consultation with the SHPO and the tribes would not be required but for the designation. The designation of any property as contributing land subject to the restrictions of the Cultural Properties Act and other preservation statutes deprives Petitioners of private property rights. All private Petitioners and Cebolleta Land Grant have standing.

2. **State Land Office**

The Petitioners Patrick H. Lyons, Commissioner of Public Lands, did not file a response to Respondent Acoma's argument on standing. The Court agrees with Respondent Acoma's position that the Commissioner of Public Lands has failed to articulate how the TCP listing interferes with his duties or how complying with state law will hinder him from managing trust lands to "reasonably maximize" their financial gain. Although there is clearly substantial public interest in how public lands are used, there is no indication that the challenged action threatens the obligations of the Commissioner of Public Lands. Forrest Guardians vs. Powell, 2001-NMCA-28, 130 N.M. 368, 24 P.3d 1. The Commissioner of Public Lands lacks standing. The Petition filed by the Commissioner of Public Lands should be dismissed.

Whether the Final Order Should Be Revised On Establishment Clause Grounds

Petitioners argue that the Final Order violates Article II, Section 11 of the New Mexico Constitution which prohibits "any preference" from being given "by law to any religious denomination or mode of worship" N.M. Const. Art. II, Section 11. Relying on Lemon v. Kurtzman, 403 U.S. 602 (1971), Petitioners argue that the tribes "repeatedly stated that Mt. Taylor should be listed because of 'deities' worshiped on the mountain..." and made multiple references to religious significance to the nominating tribes

recited in their petition. Respondents argue the Lemon has been modified from a three part test to a two part test and that New Mexico Appellate Courts follow the body of existing Supreme Court precedent, not just the Lemon case. Petitioners allege that in designating the TCP, the CPRC violated the second prong of the Lemon test because "the primary purpose of the listing is one that advances religion," and that merely listing the property for secular purposes does not overcome the multiple references in the nominating petition to religious use and religious significance by the tribes. Petitioners urge that "excessive entanglement" the final prong of the Lemon test occurred because the government became entangled with the religious beliefs of the various tribes creating political divisiveness along sectarian lines which is prohibited by the Establishment Clause.

The Supreme Court in 2005 affirmed that Lemon is controlling precedent. Van Orden vs. Perry, 545 U.S. 677 (2005) Lemon established three tests to determine whether the Establishment Clause is violated:

1. There must be a secular purpose for the statute;
2. Primary purpose of the statute must neither advance or inhibit religion;
3. The statute must not foster an excessive entanglement with religion.

Courts must determine whether the government's "actual purpose is to endorse or disapprove of religion." If there is a plausible secular purpose, "Courts will not lightly attribute unconstitutional motives to the government..." Weinbaum v. City of Las Cruces, N.M., 541 F.3d 1017, (10th Cir. 2008). The government action can only be allowed "if their context or history avoid the conveyance of a message of government endorsement of religion." American Atheists Inc v. Duncan, No. 08-8061 (10th Cir. August 18, 2010).

Respondents argue, and the Court agrees, that Petitioners give "short-shrift to the role of Mt. Taylor in the cultures of the nominating tribes." As argued by Respondents, Intervenor and Amici, the Final Order is supported by many valid secular purposes. There are 316,456 cultural, historical and archaeological features documented in the nomination including over a 1,000 archaeological sites, dozens of shrines and pilgrimage trails. The listing of the property promotes an understanding of Native American Cultures, protects the multiple cultural, historical and archaeological features and avoids interference or endorsement of Nature American religious practices. Although sacred in the traditions of the nominating tribes, Mt. Taylor has thousands of areas important to our state's history and national heritage, and to the nominating tribes, beside being of religious significance, the property listed is a legitimate part of their respective histories and cultures. The nomination neither endorses or inhibits the religious practices of the tribes. The Court concludes that the Final Order does not violate the New Mexico Constitution, Article II, Sections 11 or United States Constitution.

Whether the Final Order Should Be Reversed for Lack of Fixed Regulations

There are basic legal tenets that have been firmly established in our case law when reviewing administrative governmental actions that affect property rights. Property owners "have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all." Smith v. Board of Co. Comm. of Bernalillo Co., 2005-NMSC-12, ¶33, 137 NM 280, 110 P.3d 496. "Ad hoc, standard-less regulation that depends on no more than an... official's discretion would seriously erode basic freedoms that inure to every property owner." Id. "Standards required to support a delegation of power by the ... legislative power need not be specific. Most decisions hold that broad general standards are permissible so long as they are capable of a reasonable application and are sufficient

to limit and define the Board's discretionary powers. City of Santa Fe vs. Gamble-Skogmo, Inc, 73 NM 410, 389 P 2d. 13 (1964), citations omitted. There must be "specific safeguards to ensure against arbitrary action or unrestricted administrative discretion." Id.

The Cultural Properties Act, NMSA 1978 §18-6-1 et seq. Provides that "the historical and cultural heritage of the state is one of the State's most valued and important assets..." NMSA 1978 §18-6-2. " Cultural property means a structure, place, site or object having historic, archaeological, scientific, architectural or other cultural significance." NMSA 1978 §18-6-3 (B). The legislature in declaring the purpose of the act has instructed the CPRC to conform with "but not limited by, the provisions of the National Historic Preservation Act of 1966. NMSA 1978 §18-62-2. Respondents argue that the potential factors to be applied in determining if a given place or site has cultural significance will vary from application to application." Petitioners cite NMSA 1978 §18-6-5 that " the primary function of the CPRC is to review proposals for the preservation of cultural properties" and "to take such actions as are reasonable and consistent with law to identify cultural properties..." and therefore maintain that fixed, formal regulations must be promulgated for the identification of properties subject to being listed on the State Register. Without any fixed regulations, property owners were denied any real opportunity to respond and therefore, according to Petitioners, the Final Order was therefore arbitrary and capricious.

In Petitioners statement of Review Issues and also at oral argument, it was argued that there were no regulations in place, that the process was without guidelines, favored the nominating tribes, gave Petitioners inadequate time to review and indiscriminately listed huge amounts of land without regulations defining the board's discretionary power. They argue that Chairman Watson and the CPRC were given unlimited discretion and that the acreage involved in the designation was constantly changing. Respondents

point to the National Historic Preservation Act claiming that its standards are flexible and national in scope and that the CPRC lawfully used its well established regulations. Respondents assert that size and changing acreage is not important because the boundaries of the proposed TCP never changed, only its acreage, and that proper notice was given each time there was a change in acreage. Respondents maintain that the federal criteria were used, the sub-factors were delineated in the Final Order, and all interested persons knew the federal criteria would be utilized.

In November of 2008, the SHPO in a letter to the nominating tribes "suggested" that the tribes nominate Mt. Taylor using the federal process and form for listing a property on the National Register of Historic Places. Petitioners urge that the federal guidelines "cannot simply be grafted onto the state listing process for Mt. Taylor, because those guidelines instruct how a property is to be listed on the National Register of Historic Places, and not to the State Register." Moreover, Petitioners allege that the federal guidelines, if consulted by the public, provide for an appeal process to the federal keeper of the National Register which does not apply to the state listing and the CPRC themselves treated the federal guidelines as optional citing that Chairman Watson stated that "the CPRC is not required to follow the guidelines of Bulletin 38." Federal Bulletin 38 is the National Register Bulletin that establishes "Guidelines for Evaluating and Documenting Traditional Cultural Properties." Respondents counter that the CPRC is made up of experts that determined Mt. Taylor, composed of hundreds of square miles, is a cultural property worthy of preservation and protection within the meaning of NMSA 1978, §18-6-3(B). "The potential factors to be applied in determining if a given place or site has cultural significance will vary from application to application." The federal standards are professional standards "which are generally accepted within the field of historic preservation and which are applied on a case by case basis." Metropolitan Dade County

vs. PJ Birds, Inc., 654 So.2d 170, 177 (Fla. App. 1995).

The April 2009 Nomination of Mt. Taylor as a permanent TCP contained a section in which the Nominating Tribes incorporated the federal government's Criteria of Evaluation (36 C.F.R. §60.4) by express reference. The same Criteria for Evaluation had been referenced by the United States Forest Service in its submissions to CPRC in connection with the Mt. Taylor TCP nomination in 2007 and 2008. The SHPO concurred with the USFS's findings in April 2008. All these documents were part of the ongoing administrative record.

Petitioners argue that this case is analogous to The Historic Green Springs, Inc. v. Bergland, 497 F. Supp. 839 (E.D. Va. 1980). In Historic Green Springs the Department of the Interior designated 14,000 acres of Virginia land as a National Historic Landmark, and listed the land in the Register of Historic Places. Some landowners, including two mining companies with mining rights over much of the land for mining and processing vermiculite, objected to the listing. Judge Merhige was admittedly troubled that a district the "size of Manhattan can be a historic site," but moreover, found the decision listing the property arbitrary, caprious and an abuse of discretion because of "the Department's failure to promulgate substantive standards for national historic significance and its failure to prepare and publish rules of procedure to govern the designation process." Judge Merhige agreed with plaintiffs that "without published rules of procedure and substantive criteria for qualification as a landmark, they have been denied any meaningful opportunity for an informed response to the proposed action and the Court has been precluded from meaningful review of the Secretary's decisions." The Court remanded to the Department for promulgation of regulations so that "the public may make a meaningful response, and, in the event of further judicial review is necessary, a Court may determine that the proper standards have been applied."

Viewing the whole record on review, it appears the CPRC's permanent listing tracked the criteria listed in Federal Bulletin 38 and listed in the findings of the Final Order paragraphs 20-35. The criteria employed were "capable of reasonable application and are sufficient to limit and define the Board's discretionary power." City of Santa Fe vs. Gamble-Skagmo, Inc., 73 N.M 410, 417-418, 389 P.2d 13 (1964). The federal standards were generally used to determine whether a property has historical or cultural significance and they may be applied on a case by case basis. The record as a whole supports that interested persons knew that the federal criteria would be applied and interested parties could do a meaningful review of the proposal.

Whether the Final Order was Properly Issued Pursuant to Regulations Relied on by Respondents.

The federal regulations for evaluation of a property to be listed on the National register are found at 36 C.F.R. 60.4 (2008). The regulations provide that a property may be eligible for listing if it is (a) associated with events that made a significant contribution to the broad patters of our history; (b) that are associated with the lives of person significant in our past; (c) that possess high artistic values; or (d) that have yielded or are likely to yield information important in prehistory or history. Id. In it Final Order the CPRC stated that the Tribes' Nomination "needed to establish at least one of four possible criteria in order to be eligible for state listing." The CPRC found that the Fourth Amended Nomination "met the criteria as applied under Criterion A, B and D" of the federal eligibility criteria.

Respondents argue that because the nominating tribes use Mt. Taylor for religious purposes that the CPRC failed to find that the property's primary significance is from historical importance, as stated in the "Criteria Considerations" from the National Park Service Federal Bulletin 38. They argue that a

religious property under the federal standards must derive "primary significance" from historical importance. In Step 4 of the federal eligibility criteria considerations, Consideration A: Ownership By a Religious Institution or Use for Religious purposes states:

> In many traditional societies, including most American Indian societies, the clear distinction made by Euroamerican society between religion and the rest of culture does not exist. As a result, properties that have traditional cultural significance are regularly discussed by those who value them in terms that have religious connotations...
>
> Applying the "religious exclusion" without careful and sympathetic considerations to properties of significance to a traditional group can result in discriminating against the group by effectively denying the legitimacy of its history and culture...
>
> National Register guidelines stress the fact that properties can be listed in or determined eligible for the Register for their association with religious history, or with person significant in religion, if such significance has scholarly, secular recognitions"...

The Committee's Final Order is supported by several valid secular purposes, including the following: (1) administering "government programs to avoid interference with" Native American religious practices, Cholla Ready Mix, Inc vs. Civish, 382 F.3d 969, 975 (9th Cir. 2004); (2) protecting the "cultural, historical and archaeological features" of properties used by Native Americans for religious purposes, Access Fund v. U.S. Dep't of Agric., 499 F.3d 1036, 1044 (9th Cir. 2007); (3) "promoting and

understanding" of Native American cultures. Alston, 209 F. Supp 2d at 1224.

Under federal regulations, a property must have (1) "significance" and (2) "integrity" to be eligible for listing. When a property is "used for religious purposes," it must satisfy the additional requirement of "Criteria Consideration A," which states that "religious property" should derive its "significance" primarily from its "historical importance." The CPRC found that the Forest Service in 2008 made a determination of eligibility for listing the TCP property on the National Register using the federal standards, although the Forest Service boundary has a similar but not identical boundary. The nominations by the tribes documented the ethnohistory of Mt. Taylor. The Court finds that substantial evidence supports that the Final Order was issued following the federal guidelines.

Whether Respondents had the Statutory Authority to List the Property that as Listed

The CPRC listing designated Mt. Taylor and surrounding mesas as a "cultural property". The designated TCP in the Final Order Consists of 524,705 acres which Respondents claim is a "clerical error". The parties provided slightly different acreage numbers for the various nominations - but it is apparent that the acreage numbers changed from the emergency nomination and the subsequent revised nominations. Section 18-6-12 of the Cultural Properties Act provides in relevant part that:

> [a] cultural property which the committee thinks may be worthy of preservation may be included on the official register on a temporary basis for not more that one year, during which time the committee shall investigate the property and make a determination as to whether it may be permanently placed on the official register.

Respondents do not deny that the Permanent Application was a continuation of the Emergency Application.

Petitioners argue that the CPRC was without authority to list a "different property" with continually changing acreage following the emergency application. Petitioners additionally argue that Mt. Taylor TCP is so massive that it is simply too big to meet the statutory requirements of the Cultural Properties Act. A "cultural property" means a structure, place, site or object having historic archaeological, scientific, architectural, or other cultural significance. NMSA 1978 §18-6-3 (B). Under federal regulations which were followed by the CPRC, in order to be listed on the National Register, a property must "possess integrity of locations, design, setting, materials, workmanship, feeling and association... 36 C.F.R. §60.4. The nomination herein was approved by the CPRC with the condition that the Historic Preservation Division maintain a flexible and ongoing list and map of non-contributing properties. Our Cultural Properties Act requires the CPRC "shall inspect all registered cultural properties periodically to assure proper cultural as historical integrity and proper maintenance... NMSA 1978 §18-6-5(D) and "shall, based upon the inspection of the registered cultural property, recommend such repairs, maintenance and other measures as should be taken to maintain registered status... NMSA 1978 §18-6-5(E). Petitioner argue that the plain mandatory language of the act requires that the TCP be inspected and maintained by the CPRC and that the unprecedented magnitude of the various nominating petitions (between 660-819 square miles) can not reasonably be inspected and maintained. Respondents maintain that size is not an issue, that cultural significance was determined by the CPRC and that the inspection and maintenance requirements only apply to more discrete structures and sites. Moreover, Respondents allege that the changes in acreage do not matter because the boundaries remained the same throughout the process, the creation of a "living" changing map is a sensible idea that harms no one and that the Final Order simply needs to be amended by this Court to reflect the correct acreage.

Mandatory language in a statute cannot be lightly dismissed. Stennis vs. City of Santa Fe, 2010-NMCA-108, citing Green Valley Mobile Home Park vs. Mulvaney, 1996-NMSC-037. With mandatory language, strict compliance means a statutory provision must be followed precisely, whereas substantial compliance recognizes that legislatures cannot predict all possible applications when drafting a statute. The plain language of a statute is the most reliable indicator of legislative intent. Statutory words are to be given their ordinary meaning and must be construed to prevent absurdity. Stennis supra, citations omitted. The plain language giving its words their ordinary meaning in the Cultural Properties Act indicates that strict compliance is necessary in designating a TCP - it must be capable of inspection, repair and maintenance, substantial compliance does not accomplish the reasonable objectives of the statute. "We strive to read related statutes in harmony so as to give effect to all provisions. Unless an ambiguity exists, we apply statutes as written." Albuq. Bernalillo Cnty. Water Util. Auth v. N.M. Pub. Reg. Comm'n, 2010-NMSC-013 ¶52, 148 N.M. 21, 229 P.3d 494

This Court understands that Mt. Taylor and its surrounding mesas contain pilgrimage trials, burial grounds, shrines, archeological sites, petroglyphs that clearly need protection and logically these areas can be inspected and recommended for maintenance and repairs by the CPRC as mandated by the Cultural Properties Act. However, the Court finds that the sweeping designation of between 660 to 819 square mile of New Mexico raw land can not reasonably be inspected and maintained by the CPRC as required by state law. In fact, Respondent do not argue that inspection, repair and maintenance can be done, but rather argue that these requirements are limited to buildings or structures. The statute does not say that. Moreover, the Court finds that the designation of such a massive TCP area, whose acreage has yet to be correctly and finally defined in the Final Order entered herein, can not "possess integrity of location..." as

set out as a criteria under federal guidelines followed by the CPRC. A property designation that is "flexible and on-going," does not have "integrity of location." The nominating tribes various gross acreage requests resulted in Chairman Watson requesting the tribes "establish consistent gross acreage figures–quantify the acreage within the boundary and the acreage of the non-contributing properties". That has yet to be done. The Court concludes that the statute itself while conforming with, and not being limited by federal standards, requires a cultural property to have integrity of location, definite boundaries and also be capable of being inspected and recommended for maintenance and repair. NMSA 1978 §18-6-5 (D) & (E). The Cultural Properties Act mandates that the property listed be identifiable and that the size of a listed property be limited to that which the CPRC reasonably can inspect, and recommend for repairs and maintenance. The designation in the Final Order of 819 square miles of raw land, even if reduced by 140 square miles for apparent clerical error, and fluid reductions for "non-contributing" properties, is overboard and arbitrary as the CPRC can not reasonably inspect, recommended repairs and maintenance of such a diverse constantly changing mass of land. The Final Order is contrary to the mandatory language in the statute and therefore arbitrary and caprious and not in accordance with law. The Final Order should be reversed and remanded to the CPRC to designate such specific property as is reasonably capable of being inspected, and recommended for repairs and maintenance and which has a definable area and integrity of location.

Whether the Final Order Should be Reversed on Due Process Grounds

Article 2, Section 18, of the New Mexico Constitution provides in pertinent part, "No person shall be deprived of life, liberty or property without due process of law." "The essence of justice is largely procedural. Procedural fairness and regularity are of the indispensable essence of liberty." Uhden vs. N.M. Oil Conservation Comm'n, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991), (citing In re Miller, 88

N.M. 492, 496, 542 9.2d 1182, 1188 (Ct. App. 1975)). In addition to fee simple property rights, due process attaches to mineral rights. See Uhden, 112 N.M. at 530, 817 P.2d at 723 (citing Duvall vs. Stone, 54 N.M. 27, 21, 213 P.2d 212, 215 (1949) ("Mineral royalty retained or reserved in a conveyance of land is itself real property.")) "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." See Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (observing that some form of hearing is required before an individual is deprived of a property interest). Cerrillos Gravel Products, Inc. v. Bd. Of Cty. Commn'ers of Santa Fe Cty, 2005-NMSC-23, ¶28, 138 N.M. 126, 133, 117 P.3d 932, 939. The CPRC was required to provide notice as mandated in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The Mullane standard states:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance...[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.

The CPRC was given an opinion in May of 2008, by the Attorney General that notice should be given "to property owners and others with a demonstrated interest." Mineral owners clearly had a

demonstrated interest as uranium mining was at the heart of the TCP listing controversy and a potential boom in uranium mining was the given reason for the tribes' emergency application. The CPRC knew mineral interests existed but did not provide personal notice to any such parties - using only notice by publication for mineral owners. Known land owners were given direct personal notice of the proposed designations yet, known mineral owners were not. Respondents argue that any defect in providing notice was harmless, because mineral owners had actual notice and participated in the process. Petitioners dispute this.

Petitioners claim, without refutation, that none of the Williams Group mineral owners (Ms. Williams, J.H. Williams and O.C. Williams) received notice of any kind and, that the Williams Group was unrepresented at the June 14, 2008, hearing. In New Mexico it is well established that the surface estate is subservient to the mineral estate, (McNeill v. Burlington Res. Oil & Gas, 2008- NMSC-022, 143 N.M. 740, 182 P.3d 121) and despite this longstanding tenet, only surface estate owners were given personal notice. In this case there was no attempt made by CPRC to document mineral owners. Respondents counter that no actual attempt to give notice to mineral owners was required because they all knew what was being considered by CPRC - personal notice is not necessary in the committee's exercise of the state's police power.

Clearly, mineral owners property rights, including the Williams Group, were affected by the decision to list Mt. Taylor, as much or more, than surface owners. This Court adopts the reasoning of Uhden vs. N.M. Oil Conservation Comm'n, 112 N.M. 528, 531, 817 P.2d 721, 724 (1991) "if a party's identity and whereabout are known or could be ascertained through due diligence, the due process clause of the New Mexico and United States Constitutions requires the party who filed ... to provide notice of the

pending proceeding by personal service to such parties whose property rights may be affected as a result." This cause should be reversed and remanded to the CPRC to provide personal notice to all property owners, including mineral estate owners, whose property rights may be affected by any proposed TCP designation as the failure to provide personal notice violated due process rights, is arbitrary and not in accordance with law.

Whether the Final Order Should be Reversed on Grounds Specific to Petitioner Cebolleta Land Grant

The Land Grant Act, NMSA 1978 Sections 49-1-1 through 49-1-18, applies to "land grants-mercedes" confirmed by Congress through the Court of Private Land Claims and the Office of Surveyor General pursuant to Article VIII of the 1848 Treaty of Guadalupe Hidalgo between the United States and the Republic of Mexico. NMSA 1978, §49-1-2(A)(2004). A "land grant-merced" is "a grant of land made by the government of Spain or by the government of Mexico to a community, town, colony or pueblo or to a person for the purpose of founding or establishing a community, town, colony or pueblo[.]" NMSA 1978, 49-1-1.1(B)(2004). It is undisputed that Cebolleta is a "land grant-merced." Title to common lands is held by the heirs as joint tenants. Cebolleta Land Grant, ex rel Bd of Trustees vs. Romero, 98 N.M. 1, 644 P.2d 515 (1982). The Treaty of Guadalupe Hildago requires the United States and New Mexico to honor the private rights of citizens of Mexico in land grants-mercedes.

The questions presented for review is whether the Legislature intended common land grant real estate to be treated as public or state owned land. Where a cultural property proposed for permanent listing on the official register "is on private land or is otherwise privately owned," the CPRC must either: (1) "acquir[e] the property or an easement or other right therein by gift or purchase;" or (2) condemn the

property. NMSA 197,8 §18-6-10(C)(2), (5) (1969). The Cultural Properties Act also authorizes the CPRC to list cultural properties located on "State Land" which is defined as "property owned, controlled or operated by a department, agency, institution or political subdivision of the state." NMSA 1978, §18-6-3(E)(1993). If the proposed cultural property is located on land that meets the definition of "State Land," and is not "on private land or ... otherwise privately owned[,]" §18-6-10. The Final Order cites Section 49-1-1 of the Land Grant Act in support of the finding that Cebolleta's private, common land within the TCP boundary is state-owned land and therefore "State Land" as defined in Section 18-6-3(E) of the Cultural Properties Act. Section 49-1-1, which was amended along with several other sections of the Land Grant Act in 2004, provides:

> All land grants-mercedes in the state or land grants-mercedes described in Section 49-1-2 NMSA 1978 shall be managed, controlled and governed by their bylaws, by the Treaty of Guadalupe Hidalgo and as provided in Sections 49-1-1 through 49-1-18 NMSA 1978 as political subdivisions of the state.

The Final Order states that because the 2004 amendment to "Section 49-1-1... makes land grants political subdivisions of the State of New Mexico[,]" the land grants are not private property, and thus "the land grants along with other state... owned lands within the Mount Taylor TCP boundary are contributing properties to the TCP."

Once again, the Court is called upon to review legislative intent. Statutory words will be given their ordinary meaning and must be construed to prevent absurdity. Stennis, supra. Additionally, the Court must consider "the purpose to be achieved and the wrong to be remedied." Hovet vs. Allstate Ins. Co., 2004-

NMSC-010, 135 NM 397, 89 P.3d 69. Statutes should be interpreted in a manner that achieves internal consistency and so that each section or part can be reconciled in a manner that is consistent with the statute's purpose. Lions Gate Water vs. D'Antonio, 2009-NMSC-057, 226 P.3d 622. Because this is purely a question of law, the Court's review of this issue is de novo. TPI, Inc. v. New Mexico Taxation and Revenue Dep't, 2003-NMSC-007, 133 NM 447, 64 P.3d 474.

The parties agree that the legislature enacted the Land Grant Act to provide for administration by boards of trustees to administer common land. Prior to the 2004 amendments to the Land Grant Act the New Mexico Supreme Court held that a community land grant's common land is jointly owned as a tenancy in common between the valid heirs of the grant and the board of trustees. Cebolleta Land Grant ex rel. Bd of Trustees, supra. The Tenth Circuit Court of Appeals in Mondragon v. Tenorio, 554 F.2d 423 (10th Cir. 1977) held that "common lands are not open to the public. They are private property and may be leased." 554 F. 2d at 425.

Petitioners point out that the 2004 amendments to the Land Grant Act reaffirmed the trustees authority to exclude trespasses, NMSA 1978, §49-1-16 (2004) and §49-1-15(A) (2004) evidencing that the legislative recognized a fundamental aspect of private rather than public ownership of common land grant land. Moreover, the 2004 amendments did not exempt Cebolleta from paying property taxes on common land - an indication that the legislative treated common lands as private property, not state owned land. Respondents counter that the 2004 definition in the Cultural Properties does not convert ownership of the common lands to the state but only makes explicit "that any entity that is exercising governmental power recognized and granted by the State of New Mexico, as in responsibilities of a governmental entity under the Act." Respondents urge that the legislative declared Cebolleta Land Grant to be a political

subdivision to make it and other land grants eligible for state and federal funds without violating the "anti-donation" clause of the New Mexico Constitution, Art 9, Sec. 14. Petitioners point out that the 2004 amendment to the Land Grant Act does not charge the character of the common land but places certain "burdens of both a political subdivision and a private landowner..." Petitioners contend that the Cebolleta Board of Trustees does not manage the common land for the benefit of the general public but only for the exclusive benefit and protection of the heir who are private owners of the land.

Article VIII of the Treaty of Guadalupe Hildago guaranteed the private property rights of Mexican citizens in land grants - mercedes in New Mexico. The Land Grant Act authorized a management Structure to protect the property rights of the original grantees. NMSA 1978 §49-1-1.1 (A), 49-1-2(A). This Court concludes that the legislature was aware of the purpose of the Land Grant Act and had knowledge of established case law declaring common land grant property to have a private property status. The Court also notes the references to the private status of the common land in the 2004 amendments to the Land Grant Act. This Court finds that the CPRC exceeded its authority by designating Cebollcta's common land as state land and therefore a "contributing property." Because the Court finds that the legislative did not intend to change the status of the ownership of the common land grant property, the Court finds that the listing of thousands of acres of Petitioner Cebollcta's private common land as contributing state land is contrary to law and should be reversed.

Alan "Mac" Watson, Individually and as Chairman of the New Mexico Cultural Properties Review Committee

Respondent Watson should be dismissed from this litigation both individually and as chairman of the CPRC. The record reflects that all of his actions were done in his official capacity for which he is entitled to governmental immunity. Zuniga vs. Sears, Roebuck & Co., 100 N.M. 414, 671 P.2d 662 (Ct. App. 1983); Franklin vs. Blank, 86 N.M. 585, 525 P.2d 945 (Ct. App. 1974).

CONCLUSION

This Final Order entered herein is reversed and remanded to the CPRC to designate such specific property with a definable area as the Mt. Taylor TCP, which is capable of being inspected and recommended for repairs and maintenance, the CPRC should provide personal notice to all known mineral owners within the proposed TCP; and that Cebolleta common land grant property should not be included as contributing property. The Petition filed by the Commissioner of Public lands is dismissed with prejudice for lack of standing and all claims against Respondent Alan "Mac" Watson are dismissed with prejudice.

IT IS SO ORDERED.

William G.W. Shoobridge

WILLIAM G. W. SHOOBRIDGE
DISTRICT JUDGE