Inside This Issue:

NM Supreme Court  7
Rules of Criminal Procedure for District Court Committee Vacancy

Board of Bar Commissioners  9
Appointments to New Mexico Legal Aid Board

Children’s Law Section  9
Annual Poster and Writing Contest Deadline Extended

Family Law Section  9
Annual Meeting

Senior Lawyer Division  10
Annual Meeting

Legal Education Calendar

Writs of Certiorari

Proposed Revision of the Children’s Court Rules

2005-NMSC-023: Cerrillos Gravel Products, Inc., and Brad Aitken v. Board of County Commissioners of Santa Fe County, and Rural Conservation Alliance

2005-NMSC-024: Colonias Development Council v. Rhino Environmental Services Inc., and New Mexico Department of Environment

2005-NMCA-099: State v. David Ray Pratt

2005-NMCA-100: State v. Fermín Silago


continued on page 6
UNM SCHOOL OF LAW
ALUMNI REUNION WEEKEND & CELEBRATION

Join your classmates from UNM School of Law classes of:
1950, 1955, 1960, 1965,
1970, 1975, 1980, 1985,
1990, 1995 and 2000
visit with old friends and celebrate your accomplishments!

Friday, 9/16, Noon-5 p.m.
GOLF
UNM North Golf Course

Saturday, 9/17, Noon-4 p.m.
LUNCH & CLE
UNM School of Law
“The Global Film & Television Industry: New Mexico’s Role.”
Professor Sherri Burr, Presenter
Panel: Intellectual Property & Economic Development in NM

Saturday, 9/17, Evening
CLASS REUNION DINNER
No-Host Reception 5:00 p.m.
Dinner 7:00 p.m.
Embassy Suites Hotel, Albuquerque
(I-25 and Lomas)

Reservation Form
Name__________________________________________
Spouse/Guest Name_________________________________
Address__________________________________________
City______________________________________________
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___ Golf ______ X $50 ______
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___ Class Gift $_______

Total $_______

Check enclosed
Please charge my M/C or Visa:
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Please return this form to: UNM School of Law,
MSC11-6070, 1 University of New Mexico, Albuquerque, NM 87131
For more information Contact Carmen Rawls at 505-277-8184 or visit us on-line at lawschool.unm.edu
With more than 44 years of experience insuring attorneys in the private practice of law, CNA is now the nation’s largest provider of professional liability coverage for attorneys.

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As the exclusive broker for the CNA program for New Mexico attorneys, Health Agencies of the West, Inc. is proud to present the CNA seminar, "Smart Practice, Not Malpractice", in Albuquerque on Thursday, September 22, 2005 from 9 am to 12:15 pm at the Hyatt Regency Albuquerque.

This informative and entertaining seminar will provide you with:

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Bar Bulletin – August 29, 2005 – Volume 44, No. 34

9 Annual Probate Institute
Friday, September 9, 2005 • 8 a.m. - 5 p.m.
State Bar Center, Albuquerque
7.2 General CLE Credits

Co-Sponsor: Real Property, Probate and Trust Section
Presenters: Fletcher R. Catron, David M. English,
Richard B. Gregory, Scotty A. Holloman,
William C. Weinsheimer

The primary focus of this year’s annual seminar will
be on the Uniform Trust Code as presented by David
M. English, professor of law at the University of Mis-
souri-Columbia School of Law, and fiduciary liability
as presented by William C. Weinsheimer, partner in
the Chicago office of Foley & Lardner, LLP and a fellow
and active member of the American Trust and Estate
Counsel (ACTEC). Other topics will also include Cir-
cular 230, HIPAA, and acts relating to Uniform Estate Tax
Apportionment and Uniform Disclaimer of Property
Interests in New Mexico.

☐ Standard & Non-Attorney $179
☐ Government & Paralegal $169
☐ Real Property, Probate and Trust Section Member $159

22-24 Annual Meeting
Back to the Basics: Building Blocks to a Better Practice
Thursday, September 22 -
Saturday, September 24, 2005
Ruidoso Convention Center - Ruidoso
7.2 General, 2.4 Ethics and
2.4 Professionalism CLE Credits

Featured speakers include Dustin Cole on the Seven
Keys of Maintaining a Safe and Successful Practice, and
Jack Marshall on Ethics Rock!

For a complete schedule of events and programs see
the insert in the July 25 issue of the Bar Bulletin or visit
the State Bar’s Web site at www.nmbar.org.

FOUR WAYS TO REGISTER

PHONE: (505) 797-6020, Monday - Friday, 9 a.m. - 4 p.m.
(Please have credit card information ready)
FAX: (505) 797-6071, Open 24 hours
INTERNET: www.nmbar.org, click CLE, then area of interest
MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Make check payable to: CLE
☐ VISA ☐ MC ☐ American Express ☐ Discover
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TABLE OF CONTENTS

Notices ........................................ 7-11
Legal Education Calendar ............................................. 12-14
Writs of Certiorari .................................................. 15-16
Rules/Orders ............................................ 17

Proposed Revision of the Children’s Court Rules ............................................. 17
Opinions ................................................ 18-39

From the New Mexico Supreme Court

No. 28,780: Cerrillos Gravel Products, Inc., and Brad Aitken v. Board of County Commissioners of Santa Fe County, and Rural Conservation Alliance............. 18
No. 28,337: Colonias Development Council v. Rhino Environmental Services Inc., and New Mexico Department of Environment........................................................................ 22

From the New Mexico Court of Appeals

No. 24,387: State v. David Ray Pratt................................................................. 28
No. 24,854: State v. Fermin Silago........................................................................ 30
No. 24,820: State v. Scott LeFevre..................................................................... 34
No. 24,848: Arlo and Joyce Murken, Deutsche Morgan Grenfell, Inc. and John Rendall, and W. Jack Butler v. SunCor Energy, Inc.; Syncrude, Inc.; Shell, Inc.; Exxon-Mobil, Inc.; Deutsche Bank, AG; Raymond and Rawl; R. George; Bob Pitman; Al Hyndman; Helmar Kopper; and Merrill Lynch, Pierce, Fenster & Smith, Inc............. 37

Advertising .................................. 40-48

• Professionalism Tip •

Judge’s Preamble
As a judge, I will strive to ensure that judicial proceedings are fair, efficient and conducive to the ascertainment of the truth. In order carry out that responsibility, I will comply with the letter and spirit of the Code of Judicial Conduct, and I will ensure that judicial proceedings are conducted with fitting dignity and decorum.

Meetings

August
31 Committee on Women and the Legal Profession, noon, Lewis and Roca, PC

September
1 Elder Law Section Board of Directors, noon, State Bar Center

Natural Resources, Energy, and Environmental Law Section Board of Directors, noon, via teleconference
5 Attorney Support Group, 5:30 p.m., First Methodist Church
7 Employment and Labor Law Section Board of Directors, noon, State Bar Center

State Bar Workshops

August
29 Consumer Debt/Bankruptcy Workshop, 6 p.m., Gallup City Council Chambers, Gallup
31 Bankruptcy/Family Law Workshop, 6 p.m., Judge Pope’s Chambers, Valencia County Courthouse, Los Lunas

September
7 Lawyer Referral for the Elderly Workshop, 9 a.m., Mosquero Senior Center, Mosquero
7 Lawyer Referral for the Elderly Workshop, 1 p.m., Roy Senior Center, Roy

*Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley, (505) 797-6048 or 1-800-876-6227; or visit the SBNM Web site, www.nmbar.org.
LREP is funded through a grant from the Aging and Long-Term Services Department (ALTS), the New Mexico Civil Legal Services Commission and resources from the State Bar. The ALTS Department has been, and continues to be, a critical partner in the LREP program. Through the support of these groups, LREP has become an important resource for the public and members of the State Bar by providing referrals to the private bar and conducting legal workshops and clinics at senior centers throughout much of the state. LREP workshops include presentations on topics of concern to senior citizens such as long term care, planning for incapacity, government benefits, consumer fraud, debtors’ rights and land issues. The legal clinics involve one-on-one meetings between a senior citizen and an attorney who provides pro bono legal services on site, and, when warranted, other legal services.

In 1992, LREP added a legal helpline through which in-house attorneys provide free legal information and advice as well as other legal services such as assistance with writing letters to creditors, contacting third parties to help resolve disputes and contacting government agencies. Both pro bono and fee-based referrals are made for cases that are not amenable to in-house services, such as those involving litigation. Throughout its history, LREP has prepared various informational brochures and handouts on legal issues relevant to older New Mexicans and has disseminated those informational materials throughout the state, mainly via its legal workshops and clinics.

Today LREP is one of the State Bar’s premiere public service programs. Some of the achievements that have made LREP such a great program are:

• The program has set three consecutive record-breaking years for the numbers of New Mexico seniors served with a three-year total of 11,802 clients.
• In the past year, LREP received 10,153 calls to the program.
• LREP recently completed a statewide tour of workshop and clinic outreach programs to every county in the State. This four-year initiative was completed in three years.
• LREP has established a Community Outreach Pilot Program that contracts with local attorneys in three geographic regions to provide enhanced services and outreach to New Mexico’s rural and poor seniors. The pilot program has significantly contributed to rural seniors access to legal information and is also responsible in part for the record number of LREP participants. Catron County alone has seen a 136% increase in seniors helped by LREP.
• The ABA Commission on Law and Aging has recognized LREP as one of the top legal hotlines in the country. The Commission compared LREP to hotlines in the much larger states of Texas and California.
• LREP revised the New Mexico Senior Legal Handbook. The handbook was distributed to New Mexico seniors at the Glorieta Conference on Aging in August 2005. The handbook is one of the most extensive legal resources available for seniors in the nation.

This is a brief look at the Lawyer Referral for the Elderly Program. I hope this information is useful. If you have questions about LREP or if you want to help with one of its programs, I urge you to contact Richard Spinello, the State Bar’s Director of Public and Legal Resources, or Joe Conte, the Executive Director of the State Bar.

Sincerely,

Charles J. Vigil
President
NOTICES

COURT NEWS

NM Supreme Court Law Library Hours

The following are the hours of the New Mexico Supreme Court Law Library for the Labor Day Weekend:

- Sept. 3, 2005 - Closed
- Sept. 5, 2005 - Closed
- Sept. 6, 2005 - Resume hours, 8 - 5:30 p.m.

Proposed Revisions to the Rules Governing Admission to the Bar

The Supreme Court is considering the adoption of proposed revisions to the Rules Governing Admission to the Bar. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 9 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 22 (Vol. 44, No. 33) Bar Bulletin.

Proposed Revisions to the Rules of Appellate Procedure

The Supreme Court is considering the adoption of proposed revisions to the Rules of Appellate Procedure. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 9 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 22 (Vol. 44, No. 33) Bar Bulletin.

Proposed Revision of the Rules of Criminal Procedure for the District Courts

The Supreme Court is considering the adoption of proposed revisions to the Rules of Criminal Procedure for the District Courts. Attorneys who would like to comment on the proposed revisions should send written comments by Sept. 9 to: Kathleen J. Gibson, Chief Clerk, New Mexico Supreme Court, PO Box 848, Santa Fe, NM 87504-0848.

For reference: The proposed amendments were printed in the Aug. 22 (Vol. 44, No. 33) Bar Bulletin.

Rules of Criminal Procedure for District Court Committee Vacancy

One attorney vacancy exists on the Rules of Criminal Procedure for District Court Committee due to the recent resignation of one member. Attorneys interested in volunteering their time on this committee may send a letter of interest or resume to Kathleen J. Gibson, Chief Clerk, PO Box 848, Santa Fe, NM 87504-0848. Deadline for letters and resumes is Sept. 9.

First Judicial District Court Criminal Bench and Bar Brownbag

The First Judicial District Court Criminal Bench and Bar will have a brownbag meeting at noon, Sept. 20 in the courtroom of Judge Michael E. Vigil. Issues and topics for discussion may be submitted to any of the First Judicial District Court’s Criminal Divisions.

Second Judicial District Court

Children’s Court Monthly Judges’ and Managers’ Meeting

The Second Judicial District Children’s Court will hold its monthly judges’ and managers’ meeting at noon, Sept. 6 in the jury room, John E. Brown Juvenile Justice Center, 5100 Second St. NW, Albuquerque. Children’s Court judges and managers of court-related agencies will meet to discuss ongoing concerns and projects. For a copy of the meeting agenda, call (505) 841-7644.

Destruction of Tapes: Criminal, Civil, Children’s Court, Domestic and Probate Cases

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy tapes filed with the court in criminal, civil, children’s court, domestic and probate cases for years 1974 to 1988, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and wish to have duplicates made should verify tape information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 28.

Destruction of Exhibits: Criminal, Civil, Children’s Court, Domestic and Probate Cases

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the First Judicial District Court will destroy exhibits filed with the court in criminal, civil, children’s court, domestic and probate cases for years 1970 to 1987, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits can be retrieved through Oct. 28. Attorneys who may have cases with exhibits may verify exhibit information with the Special Services Division, (505) 476-0196, from 8 a.m. to 5 p.m., Monday through Friday. Plaintiff exhibits will be released to counsel of record for the plaintiff(s) and defendant exhibits will be released to counsel of record for the defendant(s) by order of the court. All exhibits will be released in their entirety. Exhibits not claimed by the allotted time will be considered abandoned and will be destroyed.

BAR BULLETIN - AUGUST 29, 2005 - VOLUME 44, NO. 34
Destruction of Tapes: Domestic Relations

Pursuant to the Judicial Records Retention and Disposition Schedules, the Second Judicial District Court will destroy tapes and logs filed with the court in domestic relation cases for years 1974 to 1986, including but not limited to cases that have been consolidated. Cases on appeal are excluded. Attorneys who have cases with tapes and logs, and wish to have duplicates made, should verify tape information with the Special Services Division, (505) 841-6787, from 8 a.m. to noon, from 1 to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Sept. 5.

Family Court Open Meetings Cancelled

The Family Court judges open meeting scheduled at noon, Sept. 12 has been cancelled. The next open meeting will be held at noon, Nov. 7 in the conference center located on the third floor of Second Judicial District Court, 400 Lomas Blvd. NW. The court apologizes for any inconvenience and looks forward to seeing attendees in November.

Judicial Vacancies

Two vacancies on the Second Judicial District Court will exist as of Sept. 30 due to the resignations of Judges Tommy Jewell and Robert Thompson. The chair of the Second Judicial District Court Nominating Commission now solicits nominations and applications for these positions from lawyers who meet the statutory qualifications. Application forms and applications for these positions from lawyers who meet the statutory qualifications may be obtained from the Judicial Selection Web site, http://lawschool.unm.edu/judse/index.htm, or e-mailed, faxed, or mailed by contacting Reva Chapman, (505) 277-4700. The deadline for applications has been set for 5 p.m., Sept. 16. Applications received after that time will not be considered. The Commission will meet on Oct. 17 and, if the number of applications warrant, Oct. 18.

Notice to Attorneys

Judge Kenneth H. Martinez will fill the criminal court position at the Second Judicial District Court effective Sept. 1. Martinez will assume criminal court cases assigned to Division XXIV. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Sept. 1 to challenge or excuse the judge pursuant to Supreme Court Rule 1-088.1.

Swearing-In Ceremony

Judge Kenneth H. Martinez will be formally sworn in as a Second Judicial District Court Judge, Division XXIV, at 4:30 p.m., Sept. 15 in Chief Judge William F. Lang’s courtroom, No. 338, of the Bernalillo County Courthouse, 400 Lomas Blvd. NW. A reception will follow the swearing-in ceremony at La Posada de Albuquerque.

U.S. District Court for the District of New Mexico

Criminal Local Rules Posted for Public Comment

The Criminal Local Rules of the United States District Court for the District of New Mexico have been approved but are not effective. The Criminal Local Rules have been rewritten in their entirety and are posted for public comment on the court’s Web site, www.nmcourt.fed.us. Members of the bar may e-mail comments no later than Sept. 23 to crlr@nmcourt.fed.us or by mail to U.S. District Court, Clerk’s Office, Suite 270, 200 Lomas Blvd. NW, Albuquerque, NM 87102, Attn: CRLR.

U.S. Bankruptcy Court

Chapter 13 Brownbag on BAPCPA

The office of the Chapter 13 trustee will hold weekly brownbag sessions covering the NACTT’s consumer bankruptcy practice under BAPCPA. Attendees should bring lunch and a copy of the Bankruptcy Code with BAPCPA changes highlighted. Weekly sessions will be held on Mondays beginning at noon, Aug. 29 in the tenth floor training room, U.S. Bankruptcy Court, Albuquerque. Presenters on the DVD include Judge Keith Lundin, Judge Ray Mullins, Judge William Brown, Judge Tom Waldron, Chapter 13 Trustee Henry Hildebrand and Attorney Richardo Kilpatrick. Topics covered will include: notice - getting information where it goes; case filing issues - “getting in”; automatic stay/refiling issues; attorney responsibilities – DRAs; chapter 13 – the “new” chapter 13; exemptions; court and clerk responsibilities; discharge and dischargeability; and reaffirmation. Call Kelley Skehen, 505-243-1335 ext. 3013, for additional information.

STATE BAR NEWS

2005 Section Elections

In accordance with the section bylaws, each State Bar section is required to appoint a nominating committee for its annual election and provide notice of the election so that any section member may indicate to the committee his or her interest in serving on the board of directors. The nominating committee appointment deadline is Aug. 31.

See the Aug. 8 Bar Bulletin (Vol. 44, No. 31) for a complete list of positions to be elected. Nominating committee members for the Appellate Practice, Elder Law, Health Law, Public Law and Solo and Small Firm Practitioners sections have been published in past issues. Nominating committee information for the Children’s Law, Criminal Law, Natural Resources, Energy and Environmental Law, and Real Property, Probate and Trust Sections follow:

Children’s Law Section
Nominating Committee:
Kathleen A. Wright, Chair
(505) 266-0786
losninoslawofficelc@msn.com

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(505) 437-3042
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albdskam@nmcourts.com

Ida M. Lujan
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ilmujan@cyfld.state.nm.us

Anthony J. Ferrara
(505) 797-2907

Criminal Law Section
Nominating Committee:
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Stephen_McCue@fd.org

David G. Crum
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penni@adrian-law.com

Benjamin A. Gonzales
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smatthewtorres@hotmail.com

S. Matthew Torres
(505) 842-0392
smatthewtorres@hotmail.com

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Stephen_McCue@fd.org

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Benjamin A. Gonzales
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S. Matthew Torres
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smatthewtorres@hotmail.com

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joe@moseslaw.com

Attorney Support Group
Monthly Meeting
The next Attorney Support Group meeting will be held at 5:30 p.m., Sept. 12 at the First United Methodist Church at Fourth and Lead SW in Albuquerque. The group meets regularly on the first Monday of the month, but is meeting one week later due to the Labor Day holiday.

For more information, contact Bill Stratvert, (505) 242-6845.

Board of Bar Commissioners
Appointments to New Mexico Legal Aid (NMLA) Board
The Board of Bar Commissioners will make three appointments to the New Mexico Legal Aid (NMLA) Board at its next meeting on Sept. 22. Two of the appointments are for two-year terms to end December 2007 and one appointment is for a one-year term to end December 2006. Members wishing to serve on the NMLA Board should send a letter of interest and brief resume by Sept. 9 to Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860; or fax to (505) 828-3765.

Children’s Law Section
Annual Poster and Writing Contest Deadline Extended
The sponsorship deadline has been extended to Sept. 15 for the Children’s Law Section’s third annual poster and writing contest. This event is a great way for attorneys, their firms, or organization to assist in changing the lives of New Mexico’s troubled youths by supporting children’s artistic talent, and to promote mentorship for positive behavior to children in the delinquency system. The contest is for children who are currently incarcerated, or involved in such programs as the Youth Reporting Center, Drug Court and anti-domestic violence programs. Contestants in Bernalillo, Sandoval, Valencia and Santa Fe Counties will be asked to create a work based on the theme “My Hero, My Heroine.”

Sponsorship opportunities include cash donations or prizes to award contest winners. Recognition will be given through press releases of the event, thank you signs at each exhibit and special in-person thanks at the awards ceremony at each exhibit location. Awards ceremonies will be held in mid October or early November. Donations will enable contest organizers to purchase art supplies, prizes and set up the exhibit. Donations may be made to: Children’s Law Section, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199-2860. Call Linda Yen, (505) 841-5164, or Lorette Enochs, (505) 841-5001, for more information.

Commission on Professionalism
Public Member Vacancies
The State Bar of New Mexico is seeking candidates to fill two public member vacancies on the Commission on Professionalism. Both of the public member positions are for two-year terms. Members who know a nonattorney who would be interested in serving on the commission should contact Executive Director Joe Conte, (505) 797-6099 or jconte@nmbar.org. Letters of interest should be sent to PO Box 92860, Albuquerque, NM 87199-2860.

Elder Law Section
NAELA Conference Scholarship
The Elder Law Section has set aside funds to provide a scholarship to one or two members to help offset the registration fees for the 2005 National Association of Elder Law Attorneys (NAELA) Conference. Section members interested in attending should e-mail Chair Kevin D. Hammar, kevinhammar@qwest.net, for an application and a letter providing further details. The NAELA Conference is scheduled for Sept. 28 to Oct. 2 in New Orleans. The quid pro quo for this financial support is that any sponsored attendees would be expected to present a CLE of two to three hours in 2006 to brief the membership on topics of interest from the conference. Attorneys who have already registered may still apply for the scholarship.

Employment and Labor Law Section
Board Meetings Open to Section Members
The Employment and Labor Law Section Board of Directors welcomes section members to attend its meetings. The board meets at noon on the first Wednesday of each month at the State Bar Center. The next meeting will be Sept. 7. (Lunch is not provided.)

For information about the section, visit the State Bar Web site, www.nmbar.org, or call Cindy Lovato-Farmer, section chair, (505) 667-3766.

Family Law Section
Annual Meeting
The Family Law Section will hold its annual membership meeting from 7 to 8 a.m., Sept. 24 in conjunction with the State Bar
The Albuquerque Bar Association to participate. These veterans need not be members of the U.S. military will be acknowledged. The luncheon address, “Military Law and Professionalism CLE credits. The luncheon is $20 for members and $25 for non-members; the luncheon and CLE is $70 for members and $100 for non-members; the CLE only is $50 for members and $75 for non-members. Register online at www.abqbar.com; by e-mail at abqbar@abqbar.com; or phone the Albuquerque Bar office, (505) 243-2615.

Hispanic National Bar Association 30th Annual Convention
Alan M. Varela, president of the Hispanic National Bar Association has announced the 30th Annual HNBA Convention in Washington D.C. at the Mandarin Oriental Hotel Oct. 16 to 20. Registration for the convention can be found at the HNBA Web site, www.hnba.com, and completed entirely online. The convention is open to all interested legal professionals. There are special discounted rates for HNBA members as well as those who sign up for the early bird rate now until Aug. 31. For more information go to www.hnba.com or contact the HNBA Washington office, (202) 223-4777.

NM Women’s Bar Association Annual Gala
The New Mexico Women’s Bar Association will hold its annual gala from 5:30 to 10 p.m., Sept. 9 at the Albuquerque Marriott Hotel, located at Louisiana and I-40. The event will feature the innovative music of the Kumusha Women’s Marimba Ensemble. There will be a live and silent auction hosted by Bob Schwartz, Esq. and, of course, delicious food and libations. The Women’s Bar will also be awarding its annual Henrietta Pettijohn Award to Lt. Gov. Diane Denish and its annual scholarship to a deserving University of New Mexico law student.

The CLE, “How to Effectively Represent Your Client in Mediation,” will be presented by Wendy York, mediator and former district court judge, with a portion of the program to include a panel of mediators presenting techniques or approaches that lawyers have used in mediation that help … or hurt … the chances of settlement. The CLE is from 1:30 to 4 p.m. for 2.5 professionalism CLE credits. The luncheon is $20 for members and $25 for non-members; the luncheon and CLE is $70 for members and $100 for non-members; the CLE only is $50 for members and $75 for non-members. Register online at www.abqbar.com; by e-mail at abqbar@abqbar.com; or phone the Albuquerque Bar office, (505) 243-2615.

Senior Lawyers Division Annual Meeting
The Senior Lawyers Division will hold its annual membership meeting at noon, Sept. 23 in conjunction with the State Bar Annual Meeting at the Ruidoso Convention Center. The meeting will be held in the same room as the division’s CLE program, “The Dysfunctional Client: Opportunity to Help or Hazard” presented by Judge Ted Baca, Susan Bennett and Mary Ann Green. The CLE program begins at 10:30 a.m. Contact Chair Turner Branch, tbranch@branchlawfirm.com or (505) 243-3501 to place an item on the agenda.

Annual Meeting at the Ruidoso Convention Center. Breakfast will be provided to section members free of charge. Contact Chair Linda Ellison, lle@atkinsonkelsey.com, to place an item on the agenda. Section members are also encouraged to attend the family law update CLE presented by John Feder and Tom Montoya from 10:30 a.m. to noon, Sept. 23.

Paralegal Division Brown Bag CLE
Bring a lunch and join the Paralegal Division for their monthly CLE from noon to 1 p.m., Sept. 14 at the State Bar Center. Registration begins at 11:30 a.m. and the cost is $16 for attorneys and $15 for paralegals, legal assistants and secretaries. The topic for this month’s CLE is “Get the Facts: Witness Interview Techniques,” presented by Jeanne Adams, paralegal and private investigator. For more information, contact Cheryl Passalaqua, (505) 890-6089, or Amy Paul, (505) 883-8181.

National Notary Association NM Notary Training
New Mexico Secretary of State Rebecca Vigil-Giron has announced a new partnership with the National Notary Association (NNA) to support continuing education and training for Notaries Public throughout New Mexico. New Mexico notaries will now be able to take a state specific training course online through the NNA’s online program at a substantial discount. New Mexico notaries can register for the course through the Secretary of State’s Web site at www.sos.state.nm.us. In addition to the online course, the NNA will host an Identity Theft live training symposium Sept. 20 at the Wyndham Hotel in Albuquerque. The symposium was developed for New Mexico notaries to increase understanding of identity security issues and to increase skills to help prevent identity theft. The Attorney General’s office and the Department of Motor Vehicles will participate in the symposium.

OTHER NEWS
Center for International Legal Studies Visiting Professorships
The Center for International Legal Studies, in cooperation with law faculties in Eastern Europe and the former republics of the Soviet Union, will offer short-term appointments to as many as 40 senior lawyers from Canada and the U.S. during spring 2007 and autumn 2007. A “senior lawyer” has at least 25 years experience in the area of law he or she proposes to lecture. Teaching terms are between two to six weeks. Subject areas are not limited, but there is special interest in corporate and business law, intellectual property, litigation, arbitration and criminal procedure. These appointments are not remunerated and the appointee is responsible for his or her travel. The host university will assist with lodging. A one-week orientation seminar in Salzburg, Austria, is mandatory prior to assumption of the appointment. Interviews will be conducted at various locations in summer 2006. Applications may be requested by e-mail, cils@cilts.org, or by fax, (509) 356-0077.
NM Lawyers’ Chapter of The Federalist Society Free Speech Debate

The New Mexico Lawyers’ Chapter of The Federalist Society for Law and Public Policy Studies and the American Civil Liberties Union of New Mexico Amicus Club will present a “Forum for Academic and Institutional Rights v. Donald Rumsfeld,” a debate on free speech and military recruiting on law school campuses with William Perry Pendley, president and chief legal officer for Mountain States Legal Foundation and George Bach, staff attorney for the American Civil Liberties Union of New Mexico. The debate will begin at 5:30 p.m. Sept. 1 at the Hyatt Regency, 530 Tijeras Avenue, Albuquerque. A cash bar will be available and anyone interested in attending should respond to Wade Jackson, Wade_Jackson@nmcourt.fed.us or (505) 348-2243.

UNM Clinical Law Program Native American Access to Justice Program

The UNM Clinical Law Program invites volunteer attorneys and tribal court advocates to join the Native American Access to Justice Practitioner Network, a network of attorneys committed to providing pro bono and low cost representation to individuals in areas of unmet need. Network members will provide pro bono or reduced fee representation to Native American clients whose cases the Southwest Indian Law Clinic is not able to accept, but who require assistance with Native American issues in various state, federal, and tribal courts and with governmental agencies.

As a network participant, attorneys will receive client referrals from the program, but decide whether to accept a specific case. Attorneys are responsible for client fee and costs arrangements. In return, network participants will receive free access to Loislaw, four Aspen online practice libraries with forms (family law, elder law, personal injury and general litigation), and the Navajo Code CD-ROM. UNM law librarians will provide network attorneys with telephone reference service and online legal research training in the use of the program databases. Free online legal research training sessions for participants will also be offered at the UNM Law Library, Crownpoint Institute, San Juan College, UNM Gallup, and others.

The UNM Clinical Law Program is also interested in identifying individuals who are willing to serve as mentors for the Southwest Indian Law Clinic attorneys.

Finally, the Law School Access to Justice courses are open to network members for $5 per credit hour. Upcoming courses include Spanish for Lawyers I, Spanish for Lawyers II, Navajo Law and Practice, and Tribal Courts. For more information contact Associate Dean Antoinette Sedillo Lopez, (505) 277-5265 or lopez@law.unm.edu.

2005 State Bar Annual Award Recipients

The awards will be presented during the State Bar’s Annual Meeting Sept. 23-24 at the Ruidoso Convention Center in Ruidoso. To register for the luncheons or to review a complete schedule of events and programs for the Annual Meeting, see the insert in the July 25 issue of the Bar Bulletin or visit the State Bar’s Web site at www.nmbar.org.

FRIDAY, SEPTEMBER 23

Distinguished Bar Service Award
Briggs F. Cheney

Distinguished Bar Service – Non Lawyer Award
Kay L. Homan

Outstanding Section Award
Bankruptcy Law Section

Outstanding Contribution to People with Disabilities Award
Tara C. Ford

Outstanding Young Lawyer of the Year Award
Morris J. “Mo” Chavez

SATURDAY, SEPTEMBER 24

Outstanding Judicial Service Award
Judge John W. Pope

Outstanding Local Bar Award
Sandoval County Bar

Outstanding Program Award
New Mexico Hispanic Bar Association Scholarship Program

Professionalism Award
John G. Baugh (posthumously)
Lawrence M. Pickett
Lowell Stout (posthumously)

Quality of Life – Lawyer Award
Susan E. Page

Quality of Life – Legal Employer Award
Aguilar Law Offices, P.C.

Robert H. LaFollette Pro Bono Award
Steve H. Mazer

Fifty-Year Practitioners
William F. Brainard
Saul Cohen
John P. Eastham
Douglass K. Fischer
Leland B. Franks
Glen L. Houston
Daniel A. Sisk
Justice Harry E. Stowers, Jr.
J. Penrod Toles
Matias A. Zamora
# August

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### Legal Education

G = General  E = Ethics  P = Professionalism  VR = Video Replay

Programs have various sponsors; contact appropriate sponsor for more information.
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<td>Coping with Sexual Predators Within the Profession</td>
<td>Teleconference</td>
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<td>Electronic Discovery Needn’t Be Shocking</td>
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<td>They Took My Stuff! How Do I Get it Back?</td>
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<td>2005 Professionalism: Lawyers Concerned for Lawyers</td>
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<td>Intermediate Westlaw</td>
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<td>The Tangled Webs of Impaired Lawyers</td>
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**OCTOBER**

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<td>Page 5</td>
<td>School Law Issues in New Mexico</td>
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<td>Page 6</td>
<td>DaVinci Code of Scientific Evidence</td>
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**WRIT OF CERTIORARI**

*As Updated by the Clerk of the New Mexico Supreme Court*

Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

**Effective August 26, 2005**

**Certiorari Granted And Submitted To The Court**

(Submission = date of oral argument or briefs-only submission)

<table>
<thead>
<tr>
<th>No.</th>
<th>Case Description</th>
<th>Submission Date</th>
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<tbody>
<tr>
<td>27,945</td>
<td>State v. Munoz (COA 23,094)</td>
<td>11/18/03</td>
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<tr>
<td>28,068</td>
<td>State v. Gallegos (COA 22,888)</td>
<td>2/3/04</td>
</tr>
<tr>
<td>28,241</td>
<td>State v. Duran (COA 22,611)</td>
<td>3/31/04</td>
</tr>
<tr>
<td>28,380</td>
<td>Angel Fire v. Wheeler (COA 24,295)</td>
<td>8/9/04</td>
</tr>
<tr>
<td>28,426</td>
<td>Sam v. Estate of Sam (COA 23,288)</td>
<td>9/13/04</td>
</tr>
<tr>
<td>28,471</td>
<td>State v. Brown (COA 23,610)</td>
<td>9/15/04</td>
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<tr>
<td>28,423</td>
<td>Marquez v. Allstate (COA 23,385)</td>
<td>9/15/04</td>
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<tr>
<td>28,438</td>
<td>Marquez v. Allstate (COA 23,385)</td>
<td>9/15/04</td>
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<tr>
<td>27,269</td>
<td>Kmart v. Tax &amp; Rev (COA 21,140)</td>
<td>10/14/04</td>
</tr>
<tr>
<td>28,628</td>
<td>Herrington v. State Engineer (COA 23,871)</td>
<td>11/16/04</td>
</tr>
<tr>
<td>28,500</td>
<td>Manning v. New Mexico Energy &amp; Minerals (COA 23,396)</td>
<td>12/13/04</td>
</tr>
<tr>
<td>28,525</td>
<td>State v. Jernigan (COA 23,095)</td>
<td>12/14/04</td>
</tr>
<tr>
<td>28,410</td>
<td>State v. Romero (COA 22,836)</td>
<td>2/14/05</td>
</tr>
<tr>
<td>28,688</td>
<td>State v. Gutierrez (COA 24,731)</td>
<td>2/14/05</td>
</tr>
<tr>
<td>28,812</td>
<td>Battishill v. Farmers Insurance (COA 24,196)</td>
<td>2/16/05</td>
</tr>
<tr>
<td>28,821</td>
<td>State v. Maese (COA 23,793)</td>
<td>2/16/05</td>
</tr>
<tr>
<td>28,634</td>
<td>State v. Dang (COA 22,982)</td>
<td>2/28/05</td>
</tr>
<tr>
<td>28,537</td>
<td>State v. Garcia (COA 24,226)</td>
<td>3/11/05</td>
</tr>
<tr>
<td>28,660</td>
<td>State v. Johnson (COA 23,463)</td>
<td>3/11/05</td>
</tr>
<tr>
<td>28,820</td>
<td>State v. Heinsen (COA 23,716)</td>
<td>4/11/05</td>
</tr>
<tr>
<td>28,816</td>
<td>Romero v. City of Santa Fe (COA 24,775)</td>
<td>5/9/05</td>
</tr>
<tr>
<td>28,898</td>
<td>Deflon v. Sawyers COA 23,013)</td>
<td>5/10/05</td>
</tr>
<tr>
<td>28,823</td>
<td>Payne v. Hall (COA 22,383)</td>
<td>6/13/05</td>
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**Petition For Writ of Certiorari Denied:**

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<thead>
<tr>
<th>No.</th>
<th>Case Description</th>
<th>Date</th>
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</thead>
<tbody>
<tr>
<td>29,352</td>
<td>State v. Cordova (COA 24,375)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,356</td>
<td>Fleming v. Shaw (COA 25,367)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,355</td>
<td>State v. Sandoval (COA 24,682)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,354</td>
<td>State v. Allen (COA 25,210)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,36</td>
<td>State v. Briones (COA 25,589)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,365</td>
<td>State v. Lente (COA 23,934)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,296</td>
<td>State v. Chapman (COA 24,112)</td>
<td>8/18/05</td>
</tr>
<tr>
<td>29,348</td>
<td>State v. Herrera (COA 23,833)</td>
<td>8/18/05</td>
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**Writ of Certiorari Quashed:**

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<th>No.</th>
<th>Case Description</th>
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<tbody>
<tr>
<td>29,032</td>
<td>State v. Morales (COA 24,061)</td>
<td>8/22/05</td>
</tr>
<tr>
<td>28,982</td>
<td>Atler v. Murphy (COA 23,620)</td>
<td>8/22/05</td>
</tr>
</tbody>
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Kathleen Jo Gibson, Chief Clerk New Mexico Supreme Court
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860
C. Commitment for diagnosis. The court may order a child adjudicated as a delinquent child or convicted in a youthful offender proceeding to be committed to a facility for purposes of diagnosis and recommendations to the court as to what disposition is in the best interests of the child and the public. If the court enters an order transferring the child for a diagnostic commitment pursuant to the Children’s Code, the dispositional proceedings shall be recommenced within forty-five (45) days after the filing of the court’s order. If the hearing is not recommenced within the time specified in this paragraph, unless the child has agreed to the delay or has been responsible for the failure to comply with the time limits, the child shall be released from detention on such conditions as appropriate until the dispositional hearing can be commenced.

(No amendments are proposed for Paragraph D.)
From the New Mexico Supreme Court

Opinion Number: 2005-NMSC-023

Topic Index:
Administrative Law and Procedure: Administrative Appeal; Judicial Review; Legislative Intent; and Standard of Review
Appeal and Error: Appeal and Error, General; Appellate Review; and Standard of Review
Government: Counties; Land Use; Ordinances; and Zoning Law
Statutes: Interpretation; Legislative Intent; and Rules of Construction

CERRILLOS GRAVEL PRODUCTS, INC., and BRAD AITKEN, Plaintiffs-Petitioners, versus BOARD OF COUNTY COMMISSIONERS OF SANTA FE COUNTY, Defendant-Respondent, and RURAL CONSERVATION ALLIANCE, Intervenor-Respondent.

No. 28,780 (filed July 18, 2005)

ORIGINAL PROCEEDING ON CERTIORARI
MARGARET KEGEL, District Judge

MARK A. BASHAM
BASHAM & BASHAM, P.C.
Santa Fe, New Mexico

STEPHEN C. ROSS
Office of the County Attorney
Santa Fe, New Mexico

MARY E. HUMPHREY
CONNIE ODE
HUMPHREY & ODE, P.C.
El Prado, New Mexico

OPINION
RICHARD C. BOSSON, CHIEF JUSTICE

{1} The Santa Fe County Board of County Commissioners (Board or County) voted to suspend a mining use permit the County had previously issued to Cerrillos Gravel Products, Inc. (Cerrillos Gravel). On appeal, the district court ruled that the County did not have statutory authority to suspend or revoke Cerrillos Gravel’s mining use permit for non-compliance.

BACKGROUND

{2} On July 8, 1997, the Board approved a permit, subject to twenty-four conditions, to allow Cerrillos Gravel to mine gravel near Cerrillos, New Mexico. In February 1998, the County notified Cerrillos Gravel that it had failed to comply with some of the permit conditions. In January 2000, the County issued a stop work order and notified Cerrillos Gravel that its permit would be suspended until the mining operation was brought into compliance. The County scheduled a public hearing on the proposed suspension during the Board’s regular meeting on January 25, 2000. Before the public hearing, County staff met with representatives of Cerrillos Gravel, including its attorney, to negotiate a plan to allow Cerrillos Gravel to continue its mining operation. The negotiations resulted in a memorandum of understanding, which addressed several of the alleged violations, including mining outside the three-acre permit area and not having sufficient water rights for dust control and reclamation. The agreement was subject to ratification by the Board.

{3} During the public hearing, the Board allowed each speaker two minutes to address the permit. Most witnesses were strongly opposed to Cerrillos Gravel’s operations and testified that the mine should be permanently closed due to dust, noise, and traffic. Cerrillos Gravel appeared without its attorney. Its representative, who was given the same two minutes to address the Board as every other speaker, requested that the memorandum of understanding be ratified. After listening to testimony, the Board changed some of the provisions of the agreement, and voted unanimously to suspend the permit unless Cerrillos Gravel agreed to the modified memorandum of understanding. Cerrillos Gravel’s representative said he thought the company would accept the changes. The County suspended the permit until the conditions were met.

{4} Instead of accepting the modified memorandum, Cerrillos Gravel appealed the Board’s decision to the district court pursuant to Rule 1-074 NMRA 2005. The district court concluded that the Board did not have the statutory authority to suspend the County’s statutory authority to suspend or revoke Cerrillos Gravel’s mining use permit for non-compliance.
or revoke Cerrillos Gravel’s mining permit. According to the district court, the County only had the statutory authority to pursue relief in district court such as seeking an injunction or abatement. Because of its ruling on the Board’s lack of statutory authority, the district court never determined whether the decision to suspend the permit was supported by substantial evidence.

10 The Court of Appeals granted certiorari to the County and an intervenor, Rural Conservation Alliance, and reversed. See Cerrillos Gravel Prods., Inc. v. Bd. of County Comm’rs, 2004-NMCA-096, ¶ 1, 136 N.M. 247, 96 P.3d 1167. The Court of Appeals held that the County did have authority to administratively suspend a mining permit and rejected the argument that Cerrillos Gravel has a vested right to operate without complying with the County’s conditions. Id. ¶ 22-23. The court ordered the case remanded for the district court to consider whether the Board’s decision to suspend the permit was supported by the evidence and accompanied by due process. Id. ¶ 24. We granted certiorari. We now address whether the Board had the authority to suspend or revoke Cerrillos Gravel’s mining permit.

DISCUSSION

Standard of Review

6 As a matter of law, we interpret zoning laws de novo, using the same rules of construction that we use for interpreting statutes. Smith v. Bd. of County Comm’rs, 2005-NMSC-012, ¶ 18, 137 N.M. 280, 110 P.3d 496.

The County’s Zoning Enforcement Authority

7 Counties possess those powers expressly granted by the Legislature, as well as those necessarily implied to implement express powers. El Dorado at Santa Fe, Inc. v. Bd. of County Comm’rs, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976). A county’s authority to zone “can only be exercised pursuant to statutory authority and in conformity with a lawfully adopted ordinance.” State ex rel. Vaughn v. Bd. of County Comm’rs, 113 N.M. 347, 349, 825 P.2d 1257, 1259 (Ct. App. 1991).

8 The parties do not dispute that the Legislature delegated to counties the statutory authority to zone. The Zoning Act (Act) affords counties a comprehensive scheme to regulate land use as a way to protect public health, safety, and welfare. See NMSA 1978, §§ 3-21-1 to -14 (1965, as amended through 1995). Pursuant to the Act, counties may adopt zoning ordinances. See § 3-21-2(A). Santa Fe County did so by enacting several land use ordinances now compiled as a unified land development code. See Santa Fe, N.M., Santa Fe County Land Dev. Code, Ordinance 1996-10 (Sept. 10, 1996) (Land Development Code or Code). The Code includes Article XI, “Zoning for Extraction of Construction Materials,” which was originally adopted in 1992 to regulate sand and gravel mining. Against this backdrop of general zoning authority, we now examine the statutes and ordinances that address the County’s power to enforce that zoning authority.

9 Three sections of the Zoning Act are relevant to our inquiry. First, Section 3-21-6(A)(1) provides that “[t]he zoning authority within its jurisdiction shall provide by ordinance for the manner in which zoning regulations, restrictions and the boundaries of the district are . . . enforced.” Next, Section 3-21-10(A) provides that “any ordinance adopted pursuant to [Sections 3-21-1 through 3-21-14] shall be enforced . . . as municipal ordinances are enforced.” As part of that statute, Section 3-21-10(B) provides:

In addition, if any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure or land is used in violation of Sections 3-21-1 through 3-21-14 NMSA 1978, or any ordinance adopted pursuant to these sections, the zoning authority may institute any appropriate action or proceedings to:

1. prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use;

2. restrain, correct or abate the violation;

3. prevent the occupancy of such building, structure or land; or

4. prevent any illegal act, conduct, business or use in or about such the premises.

Last, Section 3-21-13(A) provides that counties may enact ordinances to carry out the authority granted to them to regulate building and zoning “the same as a municipality.” Section 3-21-13(B) provides that county ordinances “may be enforced by prosecution in the district court of the county. Penalties for violations of these ordinances shall not exceed a fine of three hundred dollars ($300) or imprisonment for ninety days, or both.” (Emphasis added.) Section 3-21-13(c) provides that “[t]he district attorney and sheriff shall enforce these ordinances.” (Emphasis added.)
consistent with the statutory authority to
or revocation as long as those actions are
need not expressly authorize suspension
the Board. The broad enabling legislation
that suspension and revocation may occur
County’s statutory authority to provide
the very administrative course of action it
County chose an ordinance prescribing
mining land use permit, and which “will
to comply with the Code shall subject the
Vienna}, 73 N.M. 410, 412-15, 389 P.2d 13, 16-18 (1964)
(holding that an ordinance creating an
historical district and requiring new build-
ings to harmonize with old ones was within
the scope of the enabling statute allowing
municipalities to zone consistently with a
comprehensive plan to promote the general
health and welfare).

15} In addition to Section 3-21-6, Section
3-21-10 indicates that the Legislature
intended to delegate broad authority to
counties to enforce their zoning ordi-
nances. While Section 3-21-10(A) speaks
of enforcing the Zoning Act “as municipal
ordinances are enforced,” which includes
direct action in court, that method is not
exclusive. “In addition,” as Section 3-21-
10(B) provides, counties “may institute
any appropriate action or proceedings” to
prevent unlawful land use and zoning viola-
tions. The language of this section indicates
that the Legislature did not intend to limit
enforcement to criminal proceedings, but
rather that Section 3-21-13 simply provides
one alternative for enforcement. Cerrillos
Gravel argues that the Legislature only
intended Section 3-21-10(B) to provide for
injunction or abatement actions in court,
as opposed to administrative action, but
we are not persuaded. The language of the
section does not support such a narrow
construction.

16} Further, the County argues its right
to impose conditions upon permit approval
necessarily implies the right to revoke
approval when those conditions are not
satisfied. We agree. Statutes may confer
authority either expressly or by necessary
implication. See El Dorado, 89 N.M. at
317, 551 P.2d at 1364 (stating counties
possess those powers expressly granted
by statute as well as those necessary to
implement those express powers). We
agree that the power to revoke a permit
is necessarily implied from the power
to approve a permit.

17} As our analysis of the relevant statutes
and ordinances indicates, we are persuaded
that the Legislature delegated broad power
to the County to enforce the zoning ordi-
nance, which the County exercised in con-
formity with a lawfully adopted ordinance.
Cerrillos Gravel argues that this holding is
inconsistent with Vaughn, which Cerrillos
Gravel contends stands for the proposition
that revocation of a zoning permit is beyond
the scope of the Board’s authority in all
instances. Although the Court of Appeals
correctly rejected this interpretation, we
find it necessary to clarify the distinction.

18} In Vaughn, the Court of Appeals
examined whether the Bernalillo County
Board of County Commissioners had au-
thority to revoke a special use permit that
was granted for life. 113 N.M. at 348, 825
P.2d at 1258. In Bernalillo County, a spe-
cific ordinance provided for cancellation of
a special use permit only in the event
the use was discontinued. Id. at 349-50,
825 P.2d at 1259-60. Because the revoca-
tion was not based on discontinuance, the
Court of Appeals found no authority to re-
voke the special use permit based on other
reasons. Id. at 350, 825 P.2d at 1260. Thus,
the Vaughn court held that “nothing in the
applicable statute or ordinance specifically
allows for the cancellation” of a special use
permit that was granted for life. Id.

19} Cerrillos Gravel argues that Vaughn
establishes an absolute prohibition on per-
mit revocations by counties. Disagreeing
with that argument, the Court of Appeals
interpreted Vaughn as standing for the
proposition that a county could revoke a
land use permit but only under certain
circumstances. See Cerrillos Gravel, 2004-
NMCA-096, ¶ 18. The Court of Appeals
distinguished Vaughn from this case on
grounds that Santa Fe County has an ordi-
nance that specifically provides for suspen-
sion or cancellation of a mining permit, and
further provides that such an action may
occur administratively. Id. ¶ 13.

20} We agree that Vaughn did not estab-
lish a broad rule that a county may never
revoke a land use permit. We add to this
analysis, however, by emphasizing that
Bernalillo County clearly went beyond its
limited authority in Vaughn, while Santa Fe
County has broad authority in the case
before us. The Vaughn court never determined
that Bernalillo County lacked authority
to enact an ordinance with a revocation
provision, only that the county did not act
in conformance with the specific provi-
sions of the existing ordinance. Unlike
the situation in Vaughn, the ordinance at
issue in this case does not contain an express
statement denying enforcement power to the
County. Thus, unlike Vaughn, Santa Fe
County suspended the permit pursuant
to statutory authority and in conformance
with a lawfully adopted ordinance.

21} In conclusion, we hold that the Coun-
ty’s ordinance providing for suspension or
revocation of a mining permit is consistent
with the statutory authority granted by the
Legislature to pass ordinances defining how
land use ordinances will be enforced. See
§ 3-21-6. The ordinance is also consistent
with the statutory authority vested in the


12} As the Court of Appeals observed,
the Legislature specifically provided that
violations of ordinances “may be enforced
by prosecution” in court. Id. ¶ 7 (emphasis
added); see § 3-21-13(B); § 4-37-3(A). By
using the word “may,” instead of “shall,”
the Legislature indicated it was being
permissive, granting the County discre-
tionary authority to enforce violations of
ordinances by quasi-criminal prosecution
subject to fines and imprisonment. Cerril-
os Gravel, 2004-NMCA-096, ¶ 10. Thus,
under those specific statutes allowing for
a quasi-criminal prosecution, it would be
proper for a sheriff or district attorney to
enforce violations in court.

13} However, Sections 3-21-13 and 4-
37-3 do not provide the sole remedy for
violations of county ordinances. Rather,
we ascribe greater importance to the
County’s broad authority to “provide by
ordinance for the manner in which zoning
regulations” shall be enforced. Section
3-21-6(A). We agree with the County that
Section 3-21-6 suggests legislative intent
to allow counties to prescribe their own
means of enforcing zoning ordinances,
including at the administrative level. In
Section 3-21-6, the Legislature granted
counties the express authority to enact
ordinances to provide for enforcement of
zoning regulations and restrictions. Pursu-
ant to this broad statutory authority, the
County passed a comprehensive zoning
ordinance that expressly allows the Board
to issue and suspend mining permits, and
further provides that such actions may oc-
cur administratively. See Santa Fe, N.M.,
Santa Fe County Land Dev. Code art. XI, §
1.11(A), (B) (1996) (providing that failure
to comply with the Code shall subject the
mining operation to penalties, which may
include suspension or revocation of the
mining land use permit, and which “will
be imposed only after a hearing before the
board”). Thus, the County had the specific
statutory authority to choose how it would
enforce its land use ordinances, and the
County chose an ordinance prescribing
the very administrative course of action it
pursued in this case.

14} It is clearly within the scope of the
County’s statutory authority to provide
that suspension and revocation may occur
administratively, after a hearing before
the Board. The broad enabling legislation
need not expressly authorize suspension
or revocation as long as those actions are
consistent with the statutory authority to
enforce zoning regulations. See City of
Santa Fe v. Gamble-Skogmo, Inc., 73 N.M.
410, 412-15, 389 P.2d 13, 16-18 (1964)
holding that an ordinance creating an
historical district and requiring new build-
ings to harmonize with old ones was within
the scope of the enabling statute allowing
municipalities to zone consistently with a
comprehensive plan to promote the general
health and welfare).
County to institute “any appropriate action or proceedings” to confront violations of land use ordinances. See § 3-21-10(B). As a result, the County had the authority to enforce its ordinance administratively and suspend Cerrillos Gravel’s mining permit.

**Vested Rights**

{22} Cerrillos Gravel also argues that it has a “vested right” to continue its mining operation, and therefore the County could not suspend its permit. Cerrillos Gravel bases this argument on the longstanding use of its property for mining purposes. Cerrillos Gravel claims it has made substantial investment in developing its operation in reliance on a 1984 permit obtained by previous owners. Thus, Cerrillos Gravel contends its mining operation is an “existing use” not subject to regulations passed after the issuance of its 1984 permit, including the 1992 zoning ordinances that specifically govern gravel mining. See Land Dev. Code art XI, § 1.10(B).

{23} We do not agree that the vested rights doctrine, recognized in El Dorado, 89 N.M. at 319, 551 P.2d at 1366, prevents the County from enforcing its regulations and restrictions on existing mines. Under the plain language of the Land Development Code, a mining operation is subject to penalties for “[f]ailure to comply.” See Land Dev. Code art. XI, § 1.11(A). No language indicates the penalty provision applies only to new mines. See Burroughs v. Bd. of County Comm’rs, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975) (stating that reviewing courts construe ordinances according to the plain language, and will not add language if an ordinance makes sense as written). Therefore, even if the operation is an “existing use,” the Code’s penalty provisions still apply. Id.

{24} Cerrillos Gravel assumes nonetheless that, once it received its permit, it was immune from complying with subsequent ordinances, even when enforced by the prospective remedy of suspension or revocation. We disagree. Cerrillos Gravel does not have a vested right to ignore laws designed to protect public health, welfare, and safety. The Court of Appeals was correct to “reject the argument that Cerrillos Gravel has a ‘vested right’ to operate without complying with legitimate conditions imposed by the County.” Cerrillos Gravel, 2004-NMCA-096, ¶ 23.

**Due Process**

{25} As a final point, Cerrillos Gravel claims its procedural due process right to be heard was compromised by the nature of the Board’s hearing. Cerrillos Gravel emphasizes that its representative was given only two minutes to be heard at the hearing on this significant matter affecting capital investment of more than $840,000 in an ongoing enterprise. While others who spoke up at the hearing were also allowed only two minutes, most were opposed to the mining operation. Thus, Cerrillos Gravel contends its two minutes were insufficient, and perhaps unfairly drowned out by the opposition. In addition, Cerrillos Gravel claims its due process rights were impinged because it was not given an opportunity to cross-examine witnesses.

{26} In response, the County argues not only that Cerrillos Gravel failed to properly preserve any due process issues, but also that these issues were waived by Cerrillos Gravel’s own actions at the hearing. The County argues that the company’s representative chose to speak for less than two minutes, which was followed by a question and answer session that lasted several minutes. The County further asserts that Cerrillos Gravel never requested discovery, additional time to speak, or an opportunity to cross-examine witnesses, and therefore Cerrillos Gravel waived any due process claim.

{27} We decline to address the due process issue at this time because it is not properly before us. See Ramirez v. City of Santa Fé, 115 N.M. 417, 418-19, 852 P.2d 690, 691-92 (Ct. App. 1993) (declining to address issues presented in a zoning case because the district court had not passed on them and courts do not issue advisory opinions). The district court did mention in its discussion of the administrative proceeding that Cerrillos Gravel had not been given an adequate opportunity to review or submit evidence in response to the County’s suspension order. However, after the district court determined that the County did not have authority to suspend the permit, the court did not consider the remaining issues in the case. Therefore, it is appropriate to remand this issue to the district court to determine whether Cerrillos Gravel was afforded due process at the hearing. See Rule 1-074 (providing for district court review of administrative proceedings). For the same reason, because it was not considered below, the district court may consider on remand whether suspension of the permit was supported by the evidence.

{28} We offer no opinion on whether the due process question was properly preserved or waived by Cerrillos Gravel before the Board. The district court must decide that issue as well on remand. In remanding, however, we note that Cerrillos Gravel raises a serious issue implicating important due process and public policy concerns. 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). “In administrative proceedings due process is flexible in nature and may adhere to such requisite procedural protections as the particular situation demands.” State ex rel. Battershell v. City of Albuquerque, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989). A limit of two minutes per person raises concerns. Whether those concerns rise to the level of due process violations depends on context and a full consideration of facts and circumstances. We leave that consideration to the district court.

**CONCLUSION**

{29} For the reasons stated above, we affirm the decision of the Court of Appeals reversing the district court, and remand for further proceedings.

{30} IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:

PAMELA B. MINZNER, Justice
PATRICIO M. SENA, Justice
PETRA JIMENEZ MAES, Justice
EDWARD L. CHÁVEZ, Justice
From the New Mexico Supreme Court

Opinion Number: 2005-NMSC-024

Topic Index:
Administrative Law and Procedure: Administrative Appeal; Administrative Procedure, General; Evidence; Hearings; Judicial Review; Legislative Intent; and Standard of Review
Government: Environmental Law
Statutes: Interpretation; and Legislative Intent

IN THE MATTER OF THE APPLICATION OF RHINO ENVIRONMENTAL SERVICES, PETITIONER FOR A SOLID WASTE LANDFILL PERMIT FOR RHINO SOLID WASTE FACILITY

OLONIAS DEVELOPMENT COUNCIL, Petitioner-Appellant, versus RHINO ENVIRONMENTAL SERVICES INC., and NEW MEXICO DEPARTMENT OF ENVIRONMENT, Respondents-Appellees.

No. 28,337 (filed July 18, 2005)

ORIGINAL PROCEEDING ON CERTIORARI

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OPINION

RICHARD C. BOSSON, CHIEF JUSTICE

{1} When the New Mexico Environment Department (Department) reviews a permit application to operate a landfill, the Department must consider public opinion at a public hearing. When the permit application is shown to comply with all technical regulations, the question arises whether the Department’s review of public testimony is limited to technical issues. We hold that it is not so confined. The Department’s review must include consideration of public testimony about the proposed landfill’s adverse impact on a community’s quality of life. The Court of Appeals having concluded otherwise, we reverse and remand to the Department for proceedings consistent with this opinion.

BACKGROUND

{2} On September 10, 2001, more than 250 people packed the middle school cafeteria in Chaparral, New Mexico, for a public hearing. The purpose of the meeting was to review an application by Rhino Environmental Services, Inc. (Rhino) for a permit to put a landfill in Chaparral pursuant to the Solid Waste Act, NMSA 1978, §§ 74-9-1 to -43 (1990, as amended through 2001). See § 74-9-23(B) (requiring a public hearing on a solid waste facility permit within sixty days of a completed application). As envisioned by the Legislature, an essential goal of public hearings during the permitting process is to provide community members the opportunity to ask questions, offer their own technical evidence, cross-examine witnesses, and make nontechnical statements. See § 74-9-29(A)(4) (providing all persons with a reasonable opportunity to be heard); 20.1.4.300 NMAC (1997) (establishing procedures to facilitate public participation in hearings concerning permit applications).

{3} And the community did want to be heard. Even though the September 11 terrorist attack on the World Trade Center in New York City disrupted the public hearing, emptying chairs the day after the attack, more than 300 people eventually came forth between September 10 and 19, with about sixty actively testifying or conducting cross-examination. Some community members attended the sessions during the day. Others came at night, after driving home from jobs across the border in Mexico and El Paso, Texas. People brought their children and crying babies. They held press conferences. They tried to hang banners protesting the landfill. Some spoke in Spanish, through a translator provided by the Department.
Although a few community members supported the landfill during the hearing, the vast majority did not. Many testified that they did not understand why another landfill had to be placed just a couple of miles from Chaparral, an unincorporated community that lacks infrastructure, political representation, and medical facilities. As a border community consisting primarily of low-income, minority residents, Chaparral has been called New Mexico’s largest colonia.¹

According to many who spoke at the hearings, Chaparral’s toehold in the rural desert a stone’s throw from Texas and Mexico offers sanctuary from the challenges of city life in El Paso and Juarez. And that is why citizens often made passionate appeals against the landfill. They spoke of coming to Chaparral for a better life. They spoke of wanting to breathe clean air and drink clean water. They spoke of wanting to protect the future of their children. They spoke of the fear that Chaparral, in the midst of growing as a residential community and struggling to define itself, was in danger of being overrun by industrial sites and turned into a dumping ground. They also expressed general concerns that the landfill would increase health risks by bringing more dust, flies, noise, traffic, and pollution. This large outpouring of community opposition was organized in part by the Colonias Development Council (CDC), a nonprofit organization dedicated to community improvement in New Mexico’s colonias.

From the record, it appears that the hearing officer let those who opposed the landfill speak, sometimes allowing public comment into the early hours of the morning. This testimony was summarized for the Secretary’s consideration in the hearing officer’s report, which recommended granting the permit. Despite the overwhelming community opposition, the Secretary, acting through the Director of the Water and Waste Management Division, granted the permit for a period of ten years subject to a list of twenty conditions. See § 74-9-24(A) (requiring the Secretary to rule on the application within 180 days after the application is completed).

CDC appealed that decision to the Court of Appeals, which affirmed the Department’s approval of the landfill permit. See Colonias Dev. Council v. Rhino Envtl. Servs., Inc., 2003-NMCA-141, 134 N.M. 637, 81 P.3d 580. On certiorari to this Court, CDC acknowledges that community members were given an opportunity to speak but claims the hearing officer erred by interpreting the Department’s role too narrowly. In CDC’s view, the hearing officer perceived her duty as strictly confined to overseeing the technical requirements of the permit application. As a result, the Secretary approved the landfill permit based on an erroneous assumption that the Department was neither required nor allowed to consider the impact of the proliferation of landfills on a community’s quality of life. This perception, CDC contends, ultimately undermined any influence the public’s nontechnical testimony could have on the decision to grant a landfill permit.

Specifically, CDC claims the hearing officer erred in not permitting Dr. Diana Bustamante to ask Rhino’s general manager during cross-examination whether Rhino had conducted any social impact studies regarding the likely effect of the landfill on the community of Chaparral. Sustaining an objection by Rhino’s counsel, the hearing officer told Dr. Bustamante that the issue was not one of the factors involved in the decision to issue a permit. In CDC’s opinion, the hearing officer mistakenly assumed that the impact of the landfill on the community’s quality of life is irrelevant. As we shall see, this decision of the hearing officer to narrow the scope of relevant testimony goes to the very heart of CDC’s appeal.

CDC further contends that the hearing officer erred in refusing to consider testimony regarding the adverse cumulative effects caused by the proliferation of landfills and other industrial sites. CDC claims there are four waste disposal facilities and three industrial sites near Chaparral.² Sister Diana Wauters testified that allowing another landfill near Chaparral would have “a negative impact on the social environment.” Sister Wauters based her concerns about the proposed landfill on timing, location, and cumulative effect. In her view, Chaparral is “an unorganized, low-income community” that does not have the structure needed to make informed decisions. Because other landfills already exist near the community, she said, the cumulative effect of putting another landfill two miles from Chaparral would create a perception of being “dumped on.” Adding another landfill would stigmatize the community, she testified, hampering its ability to recognize and develop its assets. After stating Chaparral has “been inequitably burdened by poverty and pollution,” Wauters urged the hearing officer to weigh considerations of a more sociological nature.

On appeal, CDC contends the hearing officer, and ultimately the Secretary, disregarded Dr. Bustamante’s line of questioning and Sister Wauters’ testimony in a way that made public participation a sham. At one point, Wauters asked the hearing officer to explain her statement that social impact is irrelevant to the permitting process in light of the public hearing notice, which stated that all persons would be permitted to express their views. “I mean, what are we doing here?” Wauters asked, “I mean, those of us who are nontechnical experts or we’re not scientists, why have we been invited here to express our opinions if it’s irrelevant?” The hearing officer responded:

Any lawyer can point you to the Solid Waste Act and the Solid Waste Management Regulations which set out those grounds on which this permit is granted, denied or granted with conditions. And when I say that it is irrelevant to that decision, I don’t mean that it is irrelevant to the entire proceeding. I mean that it will not form the basis for one of those three ultimate actions.

CDC contends the hearing officer improperly believed she was only allowed to consider technical testimony in the decision to grant a landfill permit, and improperly concluded the community’s concerns about its quality of life were of no legal consequence.

We now inquire whether the Department is required to admit and consider evidence addressing the impact of a proposed landfill, including the cumulative effect of the proliferation of landfills and other industrial sites, on a community’s quality of life.

¹ “Colonias” are rural settlements along the United States-Mexico border that usually consist of recent immigrants and typically lack safe housing, potable water, wastewater treatment, drainage, electricity, and paved roads. See Nancy L. Simmons, Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico, 27 N.M. L.Rev. 33, 33-34 (1997) (discussing the various definitions of colonias).

² The record indicates that there is a closed solid waste landfill in Chaparral, a landfill south of Alamogordo, 50-60 miles away, a landfill in Sunland Park, 40-50 miles away, and a landfill just south of Chaparral across the state border in Texas. In addition, other industrial sites near Chaparral include a tire disposal facility, an incinerator, and a sand and gravel operation.
Las Cruces and the South Valley Coalition of Neighborhood Associations and the New Mexico Environmental Law Center to file amicus curiae briefs in support of CDC’s position.

**DISCUSSION**

{12} CDC argues that the impact of the landfill on the community’s quality of life, and the general concerns of community members opposed to the landfill, were not considered in determining whether to grant the solid waste permit. It contends that such considerations are required by the Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to -16 (1971, as amended through 2003), the Solid Waste Act, and the regulations adopted pursuant to the acts. CDC does not challenge the technical issues addressed in the permitting process.

**Standard of Review**

{13} As dictated by the Solid Waste Act, we will set aside the Secretary’s final order regarding permit issuance if the decision is “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.” Section 74-9-30(B). “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. This Court will generally defer to an agency’s reasonable interpretation of its own ambiguous regulations. *See id.*

**Regulatory Background**

{14} As an initial step, we place the issues on appeal in the context of the regulatory setting designed by the Legislature. The Environmental Improvement Act grants the Department and its Environmental Improvement Board (Board) the power to regulate the environment on behalf of the citizens of New Mexico. *See §§ 74-1-5, -7(A).* The act’s purpose is to ensure an environment that in the greatest possible measure will confer optimum health, safety, comfort, and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people. *Section 74-1-2.*

{15} In addition to implementing the Environmental Improvement Act, the Department through the Board is charged with the maintenance, development, and enforcement of rules and standards regarding the disposal of solid waste as provided in the Solid Waste Act. *See §§ 74-1-5, -7(A)(14).* The Solid Waste Act directs “the establishment of a comprehensive solid waste management program.” Section 74-9-2(A). One purpose of the act is to “plan for and regulate, in the most economically feasible, cost-effective and environmentally safe manner, the reduction, storage, collection, transportation, separation, processing, recycling and disposal of solid waste.” Section 74-9-2(D). Another important purpose is to “enhance the beauty and quality of the environment; conserve, recover and recycle resources; and protect the public health, safety and welfare.” Section 74-9-2(C).

{16} The Solid Waste Act delegates authority to the Board to adopt regulations to administer “the cost-effective and environmentally-safe siting” and operation of solid waste facilities. *Section 74-9-8.* In issuing those regulations, the Board is required to “assure that the relative interests of the applicant, other owners of property likely to be affected and the general public will be considered prior to the issuance of a permit for a solid waste facility.” *Section 74-9-8(A).* In addition, the Board is required to adopt procedural regulations providing for notice and a public hearing on permit actions. *See § 74-9-29* (ensuring all interested persons “a reasonable opportunity” to be heard).

{17} Pursuant to this statutory authority, the Board adopted regulations providing technical siting criteria. *See 20.9.1.300(B) NMAC (2001) (listing specific criteria such as prohibiting locating landfills near flood plains, wetlands, fault lines, and historically or archeologically significant sites).* The Board also adopted regulations governing permitting procedures, which encourage public participation. *See 20.1.4.1 NMAC (2001); 20.1.4.6 NMAC (1997) (ensuring “the ability to participate of all persons and entities who desire to take part”); 20.1.4.100(B) NMAC (2002) (providing for liberal construction of procedures in order to carry out purposes of statutes and regulations and “to facilitate participation by members of the public, including those not represented by counsel”).

{18} Finally, the regulations regarding permit issuance state: “The Secretary shall issue a permit if the applicant demonstrates that the other requirements of this Part are met and the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result.” *20.9.1.200(L)(10) NMAC (2001) (emphasis added).*

**The Importance of Public Participation**

{19} We first address the role of public participation in the permitting process. Pursuant to the authority delegated by the enabling statutes, and the regulations adopted to implement those statutes, CDC urges this Court to conclude that the Secretary is required to allow testimony regarding the impact of a proposed landfill on a community’s quality of life. Such consideration is required, CDC argues, in order to realize the general purposes of the statutes to confer optimum social well-being, to protect public health, safety and welfare, and to assure that “relative interests” of all parties are considered. *See id.* In the view of Rhino and the Department, on the other hand, the purposes of the enabling statutes to promote public welfare and social well-being are addressed in the implementing regulations. Concerns such as landfill proliferation are not mentioned in the regulations, they assert, and cannot be an independent factor in considering whether to issue a solid waste facility permit. The Department sees its role as dictated by the technical regulations. If the siting criteria is met, they argue, the Department has no discretion to deny a permit or impose conditions on one. The Court of Appeals agreed, stating, “[The Department] cannot reasonably be expected to weigh sociological concerns, which it has no expertise in doing. Its role is to pass judgment on the technical aspects of a solid waste site, a subject within its expertise and which it was designed to do.” *Colonias*, 2003-NMCA-141, ¶ 16. Thus, the Court of Appeals determined that the hearing officer could properly limit evidence relating to “social impact” because the term is not mentioned in the statutes or regulations, and therefore is legally irrelevant. *Id.* ¶ 19.

{21} We think the Court of Appeals’ view of the Department’s role is too narrow and has the potential to chill public participation in the permitting process contrary to legislative intent. The Solid Waste Act is replete with references to public input and education. The process of applying for a landfill permit attempts to facilitate public participation in several ways. First, the applicant submits an application for a permit, which includes all the technical information required to support the permit, and files notice to the public and affected parties. *See §§ 74-9-20, -22.* The Department solicits comments, and once the application is complete, conducts a public hearing, which provides the public and interested parties an opportunity to comment and present evidence. *See § 74-9-23.* By directing the Department to...
adopt procedural regulations to provide all persons with a reasonable opportunity to be heard, the Legislature has clearly indicated its intent to ensure that the public plays a vital role in the hearing process. See § 74-9-29(A)(4); see also 20.1.4.6 NMAC (1997) (stating objective of the hearing procedures is to ensure the ability of all persons and entities to participate); 20.1.4.100(B) NMAC (requiring a liberal construction of procedures in order to fulfill the purposes of the statute and to facilitate participation by the public); 20.1.4.300 NMAC (providing that any person may provide a general written or oral statement or nontechnical testimony concerning the application at the hearing).

22 Our courts have previously emphasized that legislative policy favors the public’s ability to participate meaningfully in the landfill permitting process. See Martinez v. Maggiore, 2003-NMCA-043, ¶¶ 15, 17, 133 N.M. 472, 64 P.3d 499; id. ¶ 28 (Pickard, J., specially concurring). In Martinez, the Court of Appeals found that the Department’s failure to comply with statutory notice requirements rendered subsequent administrative proceedings invalid. Id. ¶ 13. In demanding a new public hearing after proper notice, the court recognized the importance of “indicating the general public’s right to participate in the permitting process” and the important interest in insuring that modifications to a landfill permit “do not adversely affect the quality of life” of the surrounding community. Id. ¶¶ 18-19.

23 In finding public participation and the hearing requirement central to the Solid Waste Act, our courts have protected and promoted the role of public input in the Department’s decision to issue a permit. See Southwest Research & Info. Ctr. v. State, 2003-NMCA-012, ¶ 37, 133 N.M. 179, 62 P.3d 270; Joab, Inc. v. Espinosa, 116 N.M. 554, 558, 865 P.2d 1198, 1202 (Ct. App. 1993). In our view, the Legislature did not limit the Department’s role to reviewing technical regulations. Instead, our courts have acknowledged that the Secretary must use discretion in implementing the Solid Waste Act and its regulations in order to encourage public participation in the permitting process. See Joab, 116 N.M. at 558, 865 P.2d at 1202 (observing that the Secretary has statutory authority to exercise discretion to address concerns raised at a public hearing).

24 Given the Legislature’s goal to involve the public in the permitting process to the fullest extent possible, we do not agree with the Court of Appeals that the Secretary was not allowed to consider testimony relating to the community’s quality of life. The Legislature clearly believed public participation is vital to the success of the Solid Waste Act. Members of the public generally are not technical experts. The Legislature did not require scientific evidence in opposition to a landfill permit, but instead envisioned that ordinary concerns about a community’s quality of life could influence the decision to issue a landfill permit. While testimony relating to something as broad as “social impact” may not require denial of a permit, the hearing officer must listen to concerns about adverse impacts on social well-being and quality of life, as well as report them accurately to the Secretary. In reviewing the hearing officer’s report, the Secretary must consider whether lay concerns relate to violations of the Solid Waste Act and its regulations. See § 74-9-24(A) (expressly directing that the Secretary “may deny a permit application on the basis of information in the application or evidence presented at the hearing, or both, if he makes a finding that granting the permit would be contradictory to or in violation of the Solid Waste Act or any regulation adopted under it”). Therefore, the Secretary should consider issues relating to public health and welfare not addressed by specific technical regulations.3

25 To counter this interpretation, the Department claims it has consistently interpreted the Solid Waste Act and the regulations implementing the act as not requiring the denial of solid waste applications due to general concerns raised by members of the public, and that our courts have agreed. The Department cites Joab, 116 N.M. 554, 865 P.2d 1198, contending Joab stands for the proposition that “individual residents[’] concerns about the negative impacts of a landfill do not require denial of a landfill permit.” The hearing officer’s report also relied on Joab when it stated that “testimony from lay witnesses is [an] insufficient basis for a finding that the landfill endangers public health or welfare or the environment, and it does not provide sufficient grounds for denial of the permit.”

3In fact, the Department already allows the consideration of issues that are not specified in a particular regulation but relate to quality of life. Rhino was allowed to introduce evidence regarding the benefits of the landfill to the community, such as Rhino’s plans to lend heavy equipment to help build a park and to establish a community improvement fund to purchase emergency equipment for the fire department. This suggests that the hearing officer and the Department believed evidence relating to the impact of the proposed landfill on the community’s quality of life was relevant to the decision to grant a permit. Thus, it seems within the intent of the Legislature that the public be allowed to introduce opposing information.

26 We reject the Department’s representation of Joab as a general rule that public testimony about a landfill’s negative impact can never affect the Secretary’s decision. In Joab, community members protested permit applications for a landfill and a medical incinerator within that landfill. Id. at 556, 865 P.2d at 1200. Based on the opposition of individual residents, the Department denied the incinerator permit, but approved the landfill permit with conditions. Id. In affirming the Department’s decision in Joab, our Court of Appeals stated that “[a] public nuisance must affect a considerable number of people or an entire community.” Id. at 559, 865 P.2d at 1203. The court concluded that the evidence in that case did not require the Secretary to find the landfill “adversely affected the entire community’s health, welfare, or safety.” Id. Far from supporting the Department’s position, Joab establishes that community concerns can affect the Secretary’s decision to deny a permit or impose conditions on one. Joab is consistent with the idea that the Secretary must consider public testimony in deciding whether a landfill permit affects an entire community’s health, welfare or safety, but that such testimony need not be determinative in the Secretary’s discretion.

27 We find no reason to defer to the Department’s interpretation that it is not required to consider public testimony relating to general concerns and the community’s quality of life. See Altiçxo Coalition v. County of Bernalillo, 1999-NMCA-088, ¶ 26, 127 N.M. 549, 984 P.2d 796 (stating courts should not defer to an agency interpretation if the agency fails to consider important issues rather than “using its expertise to discern the policies embodied in an enactment”) (quoted authority omitted). As a result, we hold that the Secretary abused his discretion by limiting the scope of testimony during the public hearing and interpreting the Department’s role as confined to technical oversight.

Proliferation

28 We next address CDC’s claim that the hearing officer and the Secretary failed to consider the proliferation of industrial sites. This claim involves statutory interpretation, which we review de novo. See Sierra Club, 2003-NMSC-005, ¶ 17. Our ultimate goal in interpreting a statute is to ascertain and give

{29} Although we hold that the Department must allow testimony regarding the impact of a landfill on a community’s quality of life, we agree with the Department that its authority to address such concerns requires a nexus to a regulation. Like the Court of Appeals, we are not persuaded that the general purposes of the Environmental Improvement Act and the Solid Waste Act, considered alone, provide authority for requiring the Secretary to deny a landfill permit based on public opposition. See Colonia, 2003-NMCA-141, ¶ 13. The purposes of the enabling acts, which include the goal of protecting the “public health, safety and welfare,” are designed to invoke the general police power of the state. See City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 415, 389 P.2d 13, 18 (1964) (observing “that the police power may be exercised only to protect and promote the safety, health, morals and general welfare”). This general expression of legislative police power, without more, does not create a standard for protecting “public health, safety and welfare.” Thus, the Court of Appeals was correct to reject CDC’s reliance on the purposes of the acts as a statutory mandate to respond to issues that fit ever so loosely under the umbrella of “sociological concerns.” Such a broad mandate would offer no guidance to the Department, and violate the well-settled principle that a legislative body may not vest unbridled or arbitrary power in an administrative agency. Id. at 417, 389 P.2d at 20 (observing that a legislative body must furnish an administrative agency a reasonably adequate standard to guide it).

{30} Unlike the Court of Appeals, however, we do find that quality of life concerns expressed during the hearing bear a relationship to environmental regulations the Secretary is charged with administering. Although both parties refer to the issues on appeal in a wide variety of ways, including “social impact,” “sociological concerns,” “social well-being,” and “environmental justice,” we believe there are legitimate concerns at the core of CDC’s claim that are within the purview of the Secretary’s oversight role. Contrary to the Department’s position, the impact on the community from a specific environmental act, the proliferation of landfills, appears highly relevant to the permit process.

{31} As we have discussed, the regulations implementing the Solid Waste Act demand more from the Department than mere technical oversight. The regulations regarding permit issuance direct the Secretary to issue a permit if the applicant fulfills the technical requirements and “the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result.” 20.9.1.200(L)(10) NMAC; see also 20.9.1.200(L)(16)(c) NMAC (providing that a specific cause for denying a permit application is a determination that the permitted activity endangers public health, welfare or the environment). The regulations also require all solid waste facilities to be located and operated “in a manner that does not cause a public nuisance or create a potential hazard to public health, welfare or the environment.” 20.9.1.400(A)(2)(a) NMAC (2001). The regulations do not limit the Secretary’s review to technical regulations, but clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit. Cf. El Dorado at Santa Fe, Inc. v. Bd. of County Comm’rs, 89 N.M. 313, 318, 551 P.2d 1360, 1365 (1976) (concluding that under the applicable subdivision statutes, nothing remained for the county board to do but the ministerial act of endorsing approval of plats that complied with all statutory requirements).

{32} Landfill opponents presented testimony that Chaparral is a residential, low income border community that is being overrun by industrial sites including numerous pre-existing landfills. If this is true, we think it is reasonable for the Department to consider whether the cumulative effects of pollution, exacerbated by the incidences of poverty, may rise to the level of a public nuisance or hazard to public health, welfare, or the environment. If proliferation has an identified effect on the community’s development and social well-being, it is not an amorphous general welfare issue, but an environmental problem. The adverse impact of the proliferation of landfills on a community’s quality of life is well within the boundaries of environmental protection. Thus, the testimony regarding the impact of the proliferation of landfills is relevant within the context of environmental protection promised in the Solid Waste Act and its regulations. For that reason, the Secretary must evaluate whether the impact of an additional landfill on a community’s quality of life creates a public nuisance or hazard to public health, welfare, or the environment.

{33} The Department concluded as a matter of law that granting the permit would not result in a public nuisance or a hazard to public health, welfare or the environment. These conclusions, however, were made only after the Department incorrectly found that lay testimony relating to living near multiple disposal facilities was beyond the scope of the Secretary’s authority for granting or denying a landfill. In our view, the Department’s own regulations not only allow, but require consideration of the cumulative effect of large-scale garage dumps and industrial sites on a single community.

{34} As the regulations indicate, the Department cannot ignore concerns that relate to environmental protection simply because they are not mentioned in a technical regulation. The Department has a duty to interpret its regulations liberally in order to realize the purposes of the Acts. See Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 15, 125 N.M. 786, 965 P.2d 370. Because the impact of the proliferation of landfills and industrial sites on a community is relevant to environmental protection, we conclude that the Solid Waste Act and its regulations require the Department to consider whether evidence of the harmful effects from the cumulative impact of industrial development rises to the level of a public nuisance or potential hazard to public health, welfare or the environment. Cf. City of Santa Fe, 73 N.M. at 412-15, 389 P.2d at 14-17 (holding that an ordinance creating an historic district and requiring new buildings harmonize with existing structures was within the scope of the enabling statute allowing municipalities to zone consistently with a comprehensive

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4 Some opponents of the landfill consider the proliferation issue as a matter of “environmental justice.” While we agree with Rhino and the Department that “environmental justice” is not a specific criterion under the state permitting procedures, we are concerned about the Department’s treatment of the subject of proliferation. We cannot foreclose the possibility that interested parties or members of the public might build a strong case against the proliferation of landfills in a certain geographical area by demonstrating how an additional landfill in a low-income, undeveloped, minority community without access to adequate health care would cause harmful physical, economic, psychological, and social effects. See Edward Patrick Boyle, Note, It’s Not Easy Bein’ Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis, 46 Vand. L. Rev. 937, 967 & n.167 (1993).
plan “to promote the health and general welfare”).

{35} We also reject the argument that any consideration of testimony and other evidence regarding proliferation would be ambiguous, without adequate standards, and impossible to enforce. In certain situations, when an agency is charged with protecting public health, safety, and welfare, it may be difficult to lay down a definite comprehensive rule. See Old Abe Co. v. N.M. Mining Comm’r, 121 N.M. 83, 92-93, 908 P.2d 776, 785-86 (Ct. App. 1995). Our courts have recognized that a certain amount of discretion is necessary to administer and enforce regulations so as to implement legislative enactments and meet the needs of individual justice. Id.

Remedy

{36} Having concluded that the hearing officer erred in characterizing testimony relating to the community’s quality of life as irrelevant, we next address the proper remedy. The Department argues that even if we determine the excluded testimony is relevant, the Department did consider it. In the Department’s view, the parties and members of the public opposed to the landfill simply failed to present enough evidence to require denial of the permit. CDC responds that there is no way to measure the impact of the hearing officer’s harmful statements about the irrelevancy of social impact evidence, and that those remarks may have created a “chilling effect” on additional evidence that may have come forth. Thus, CDC argues, we must remand for a new hearing.

{37} While we give serious consideration to CDC’s fears about a chilling effect, our review of the record indicates that many members of the community were allowed to express their opposition to the landfill at the hearing with respect to its impact on quality of life. That testimony was summarized in the hearing officer’s report. No opponents of the landfill tried to introduce evidence through expert witnesses, with the exception of Sister Wauters, who nonetheless testified as a lay person, regarding sociological concerns. Therefore, we cannot conclude that CDC was entirely prevented from presenting testimony and other evidence on this issue, or that any such chilling effect actually existed.

{38} On the other hand, the Department’s present position that it gave proper consideration to quality of life issues, though it was not required to do so, is belied by the Department’s position below. The findings and conclusions adopted by the Secretary state that the social impact of living near a disposal facility is beyond the scope of the Secretary’s authority for granting or denying a permit. By reaching this broad conclusion, the Secretary made clear that no matter how much evidence was presented, it would not be considered. The hearing officer characterized the evidence as irrelevant as to the three ultimate actions: granting, denying or conditioning a permit.

{39} Nor is there an explanation as to why public testimony in opposition to the landfill was inadequate evidence to rebut Rhino’s showing that it complied with the regulations. According to the regulations governing the Department’s permitting procedures, “[t]he Secretary may adopt, modify, or set aside the hearing officer’s recommended decision, and shall set forth in the final order the reasons for the action taken.” 20.1.4.500(D)(2) NMAC (1997). Section 74-9-29(B)(1) of the Solid Waste Act requires that the Secretary’s final order following an adjudicatory hearing “shall state the reasons for the action.” Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶ 15.

{40} The Department argues that it did respond to community concerns raised at the hearing by revising and imposing additional conditions on the permit. Imposing conditions, however, is not the only recourse the Secretary may take. The Secretary did not clearly state the reasoning for the decision to grant the permit in the face of so much public testimony against it. Thus, we have no assurance from the record that the Department actually factored this testimony into the final decision, despite the Department’s claim on appeal that it must have done so.

{41} The Secretary cannot ignore relevant factors or omit important aspects of the problem. See id. ¶ 24 (“[A]n agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.”). Without a reasoned explanation relating to the subject of the social impact of the proliferation of landfills, it appears that the Secretary ignored an entire line of evidence in reaching his decision on the final order. “Allowing the Secretary to ignore material issues raised by the parties in this manner would render their right to be heard illusory.” Id.

{42} As noted previously, because the Legislature contemplated public participation as such an important part of the Solid Waste Act, our courts carefully protect the role of a meaningful public hearing in order to address quality of life. See Martinez, 2003-NMCA-043, ¶¶ 14-19. Given the concern expressed in Martinez that procedural defects can undermine the meaningfulness of a public hearing, we must construe the permit procedures to facilitate meaningful participation by members of the public. See 20.1.4.100(B) NMAC. The only way to achieve this goal is to set aside the final order, and remand this case to the Department to conduct a limited public hearing on the evidence CDC claims was wrongfully excluded, and to allow the Secretary to reconsider the evidence already proffered concerning the impact of the proliferation of landfills on the community’s quality of life.

{43} Because of the potential chilling effect of the hearing officer’s error, we direct the Secretary to afford CDC a reasonable opportunity at a limited public hearing to tender additional evidence regarding the impact of proliferation. The limited public hearing may include cross-examination of Rhino witnesses who previously testified. On this point we caution the hearing officer that it was error to limit the cross-examination of Dr. Bustamante. See 20 NMAC 1.4.400(B)(2) (permitting cross-examination to be limited only “to avoid harassment, intimidation, needless expenditure of time, or undue repetition”). Rhino shall have a reasonable opportunity to respond. We further instruct the Secretary to reconsider the public testimony opposing the landfill and explain the rationale for rejecting it, if the Secretary decides to do so. We are not suggesting that the Secretary must reach a different result, but we do require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making.

CONCLUSION

{44} For the foregoing reasons, we set aside the final order, and remand to the Department for the Secretary to afford the relief specified in this opinion.

{45} IT IS SO ORDERED.

RICHARD C. BOSSON,
Chief Justice

WE CONCUR:

PAMELA B. MINZNER, Justice
PATRICIO M. SERNA, Justice
EDWARD L. CHÁVEZ, Justice
Defendant appeals his conviction of trafficking psilocybin mushrooms by manufacture contrary to NMSA 1978, § 30-31-20(A)(1) (1990) of the Controlled Substances Act (CSA). See NMSA 1978, §§ 30-31-1 to 30-31-41 (1972, as amended through 2002). He argues that his conviction should be reversed because the legislature did not intend to punish the act of growing mushrooms as “manufacturing” when it enacted Section 30-31-20(A)(1). We agree and reverse Defendant’s conviction. Because we find the Section 30-31-20(A)(1) issue dispositive, we do not reach the other issues Defendant raises on appeal.

Applicability of Section 30-31-20(A)(1)

{4} The State argues that Defendant “manufactured” psilocybin mushrooms by growing them artificially using special equipment. Defendant, relying primarily on our holding in State v. Shaulis-Powell, 1999-NMCA-090, ¶ 17, 127 N.M. 667, 986 P.2d 463, argues that the mushrooms “were in a natural state of mushroomness” when they were seized by police and that “assisting a growing plant or a fungus by providing a growing medium and water” is not “manufacturing” as proscribed by Section 30-31-20(A)(1). {5} The question of whether Defendant’s conduct of artificially growing psilocybin mushrooms falls within the ambit of Section 30-31-20(A)(1) is a legal question subject to de novo review. See State v. Marshall, 2004-NMCA-104, ¶ 6, 136 N.M. 240, 96 P.3d 801; Shaulis-Powell, 1999-NMCA-090, ¶ 17. When we interpret a statute, our goal is to give effect to the intent of the legislature. Marshall, 2004-NMCA-104, ¶ 7. “We do this by giving effect to the plain meaning of the words of [the] statute, unless this leads to an absurd or unreasonable result” Id. {6} The CSA prohibits, as intentional trafficking, the “manufacture of any controlled substance enumerated in Schedules I through V or any controlled substance analog as defined in Subsection W of Section 30-31-2.” Section 30-31-20(A)(1). “Manufacture” is defined in Section 30-31-20(M) in relevant part as:

the production, preparation, compounding, conversion or processing of a controlled substance or controlled substance analog by extraction from substances of natural origin or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

{7} Section 30-31-20(A)(1) is silent as to its applicability to the act of artificially growing psilocybin mushrooms. However, Shaulis-Powell is instructive in deciding this issue. In Shaulis-Powell, one defendant was convicted of violating Section 30-31-20(A)(1) by growing eight marijuana plants in his yard. Shaulis-Powell, 1999-NMCA-090, ¶¶ 1, 5-6. In reversing that defendant’s conviction for trafficking by manufacture, we stated that “[t]he plain meaning of manufacture does not include simply growing marijuana. Without more, growing marijuana does not constitute manufacture.” Id. ¶ 19.

{8} The State seeks to distinguish Shaulis-Powell on its facts by arguing that: (1) mushrooms are different from marijuana plants, which were at issue in Shaulis-Powell, and (2) the mushrooms found in Defendant’s possession were not in their natural state. See id. (noting that the marijuana plants seized from the defendant “were growing in their natural state”). In making these arguments, the State relies primarily on the testimony at trial of its expert witness.

{9} The witness, a forensic scientist with the Minnesota Bureau of Criminal Apprehension Forensic Science Laboratory, testified that “Mushrooms are fungi, and...
so they are different from plants [in] that they don’t have seeds; they have spores that they start out with . . . [S]pores are . . . the seeds of the mushroom; they’re the reproductive cells.” The witness also stated that the four stages that make up the life cycle of the mushroom are the spores, the mycelium, the primordia, and the mature fruit. The witness detailed an experiment she conducted in an attempt to duplicate the process Defendant used to grow psilocybin mushrooms. She prepared a substrate using distilled water, brown rice powder, and vermiculite. She placed this mixture into glass jars and inoculated the substrate with psilocybin mushroom spores she purchased legally from an advertisement in High Times Magazine. The witness stated that the mushroom spores were legal because they did not contain psilocybin. However, she detected psilocybin at the “mycelium knot” stage of mushroom development during her experiment. The witness also stated that the process is labor intensive, and, if not followed carefully, the mushrooms will not grow. Based on this evidence, the State argues that Defendant “manufactured” mushrooms as defined by Section 30-31-20(A)(1) and Section 30-31-2(M).

{10} Although Shaulis-Powell noted that the marijuana plants at issue “were growing in their natural state when the officers seized them,” we based our holding in the case on the statutory definition of “manufacture.” Shaulis-Powell, 1999-NMCA-900, ¶ 19. We stated that “[e]ven if growing marijuana could be considered production under the statute, production is modified by the phrase by extraction from substances of natural origin or independently by means of chemical synthesis.” Id. The same statutory analysis applies in this case. We do not agree with the State that Defendant’s actions met the chemical synthesis requirement of “manufacture” by “[u]sing a specialized process [thereby manufacturing] illegal . . . mushrooms from the legal spores . . . received in the mail.” This argument is controverted by the State’s own expert witness who testified that “spores are . . . the seeds of the mushroom” and that the drug was produced naturally in the mushrooms at the mycelium knot stage. Because there is no evidence that Defendant engaged in “extraction from substances of natural origin or . . . chemical synthesis” as defined by Section 30-31-2(M), his acts of cultivating or growing mushrooms, even if by artificial means, are not prohibited by Section 30-31-20(A)(1). To interpret Section 30-31-20(A)(1) otherwise, as the State suggests, would require us to read language into the statute that is not there. See Marshall, 2004-NMCA-104, ¶¶ 10, 13 (refusing to read a personal use exception into the CSA, reasoning that to do so “would impermissibly read language into a statute that makes sense as written”).

{11} Our holding is also supported by an analysis of the federal counterpart to Section 30-31-20(A)(1), 21 U.S.C. § 841(a)(1) (2000) of the Federal Drug Abuse Prevention and Control Act (federal act). See State v. Carr, 95 N.M. 755, 760, 626 P.2d 292, 297 (Ct. App. 1981) (recognizing that the CSA is patterned after the federal act and relying on federal interpretation to the extent that the statutes are similar), overruled on other grounds by State v. Olguin, 118 N.M. 91, 98, 879 P.2d 92, 99 (Ct. App. 1994). The federal act, in pertinent part, proscribes any person from knowingly or intentionally manufacturing, distributing, dispensing, or possessing “with intent to manufacture, distribute, or dispense, a controlled substance.” 21 U.S.C. § 841(a)(1). Its definitional section, which is virtually identical to Section 30-31-2(M), defines “manufacture” in pertinent part as:

> the production, preparation, propagation, compounding, or processing of a drug or other substance, either directly or indirectly by extraction from

substances of natural origin, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis, and includes any packaging or relabeling of its container.

21 U.S.C. § 802(15) (2000). However, the federal act specifically includes a separate definition of “production” as the “planting, cultivation, growing, or harvesting of a controlled substance.” 21 U.S.C. § 802(22); see also United States v. Klein, 850 F.2d 404, 405 (8th Cir. 1988) (affirming the defendant’s conviction of the “manufacture” of marijuana when the defendant grew ninety-four marijuana plants in the basement of his home using fluorescent lights, light fixtures, a heater, planting pots, and soil testing equipment). Because the CSA is patterned after the federal act, we believe the legislature acted intentionally when it omitted a similar definition of “production,” criminalizing as manufacture the “planting, cultivation, growing, or harvesting of a controlled substance.” from the CSA. 21 U.S.C. § 802(22); see also State v. Bennett, 2003-NMCA-147, ¶ 11, 134 N.M. 705, 82 P.3d 72 (“We presume that the legislature knows the law when enacting a statute.”).

Conclusion

{12} Because Defendant’s conduct did not fall within the ambit of Section 30-31-20(A)(1), we reverse his conviction. We remand for proceedings consistent with this opinion.

{13} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:
LYNN PICKARD, Judge
CELIA FOY CASTILLO, Judge
OPINION

CYNTHIA A. FRY, JUDGE

{1} In this case we clarify our case law concerning the relation back of blood alcohol concentration (BAC) levels in DWI cases. See State v. Christmas, 2002-NMCA-020, 131 N.M. 591, 40 P.3d 1035; State v. Martinez, 2002-NMCA-043, 132 N.M. 101, 45 P.3d 41; State v. Baldwin, 2001-NMCA-063, 130 N.M. 705, 30 P.3d 394 (collectively referred to in this opinion as “the BAC nexus cases”). The trial court denied the State’s motion in limine seeking admission of expert testimony on retrograde extrapolation, reasoning that our case law does not permit such testimony where the blood or breath sample is taken more than two hours after the time of driving, the BAC is under the statutory limit, and there is no behavior evidence of intoxication. We reverse the trial court’s ruling because it reflects a misinterpretation of law and remand for a new hearing on the State’s motion in limine.

BACKGROUND

{2} As a result of an automobile accident, Defendant was charged with homicide by motor vehicle, three counts of great bodily harm by motor vehicle, and aggravated DWI. At the scene of the accident, which occurred at about 5:45 a.m., Defendant told an investigating officer that he had consumed alcohol, but that he had stopped drinking at midnight. The officer administered two field sobriety tests, which Defendant passed. Before the officer could administer a third test, Defendant complained of pain. Medical personnel transported Defendant to a hospital where an officer sought Defendant’s permission to obtain a blood sample. When Defendant refused, officers obtained a search warrant, and hospital personnel finally drew Defendant’s blood at 12:05 p.m., six hours and twenty minutes after the accident. Another blood sample was taken at 1:09 p.m.

{3} Prior to trial, the State filed a motion in limine seeking the trial court’s advance ruling on the admissibility of certain exhibits and testimony, including expert testimony “[r]egarding blood-alcohol concentration and extrapolation of previous levels.” At the hearing on the motion, the State intended to make an offer of proof regarding the expert’s testimony, but after the court and counsel discussed the BAC nexus cases, the State asked for another hearing in order to permit the expert to testify in person. The court agreed.

{4} At the next hearing, the State called Ruth Luthi, a forensic toxicologist with the Scientific Laboratories Division (SLD), who explained that retrograde extrapolation is used to calculate a given BAC back to a prior time using generally accepted rates of alcohol burn-off. Assuming that Defendant had stopped drinking at midnight, that Defendant stopped driving at 5:45 a.m., and that Defendant’s BAC six hours after driving was 0.02, Luthi testified that she was very comfortable giving an opinion as to the likely BAC range for Defendant at the time he was driving. Over Defendant’s objection, the trial court accepted Luthi as an expert in retrograde extrapolation. Defense counsel waived cross-examination, and Luthi left the witness stand.

{5} At this point, the prosecutor thought the trial court had ruled that Luthi would be allowed to testify at trial. However, the court stated that it had not heard enough evidence on which to decide “whether in this case with these facts” extrapolation evidence could go before the jury. The prosecutor stated that he thought Luthi had already testified about the facts in the case as they pertained to extrapolation, but that if the court wanted more evidence, he would like to recall Luthi to the stand.

{6} Although defense counsel initially voiced no objection to the recall of Luthi, the trial court asked, “Procedurally, is there a mechanism available that allows me to put her back on without it being error on behalf of the defense?” There ensued a colloquy between the court and the prosecutor as to whether Luthi had actually testified about the result of retrograde extrapolation in this case under these facts. The prosecutor again offered to put Luthi back on the stand, and this time defense counsel objected. Without ruling on the objection, the trial court told the prosecutor to call his next witness.

{7} The prosecutor said he was calling Officer Mace to testify about Defendant’s whereabouts between the scene of the accident and the blood draw, which was an issue raised by the trial court in the course of the hearing. But before Mace could take the stand, the trial court and the prosecutor engaged in another colloquy about whether the results of Defendant’s blood tests were in evidence. The prosecutor then called Mace and attempted to get the lab report of Defendant’s first blood test into evidence through Mace. When the court sustained defense counsel’s hearsay objection to the lab report, the prosecutor again asked to recall Luthi, this time to lay a foundation for admission of the lab report.
Again, the trial court stated that it was “not familiar with the mechanism that allows a witness once [sic] concluded testimony to be recalled” and asked the prosecutor for case law supporting such a recall. The prosecutor responded that recalling a witness is customary when new matters come up and noted that Luthi would again be subject to cross-examination if she were recalled. Ultimately, the court ruled that it would not allow the State to recall Luthi because the court was “not familiar” with the “ability to bring the witness back when it is directly in a dispositive motion and not in a rebuttal setting.” However, the trial court permitted the State to question Luthi in order to preserve its objection to the trial court’s ruling on appeal.

Luthi testified that she is the head of SLD’s implied consent section, and consequently, she is the custodian of all blood samples and BAC reports that come in. She identified the lab report and testified that it appeared to be properly filled out. The report showed a BAC of 0.02. Luthi stated that, assuming that Defendant’s drinking stopped around midnight, that the accident occurred between 5:45 and 6:00 a.m., and that Defendant’s BAC at 12:05 p.m. was 0.02, retrograde extrapolation would lead to the conclusion that Defendant’s BAC at the time of driving was between 0.08 and 0.14.

The trial court then stated its ruling on the State’s motion in limine. In the court’s view, by seeking admission of Luthi’s extrapolation testimony, the State was asking for an expansion of the perimeters of the BAC nexus cases so that a six-hour delay in testing would be acceptable. The trial court further noted that, unlike the circumstances in the BAC nexus cases, Defendant’s BAC tested below the statutory limit and Defendant passed his field sobriety tests. Based on these facts and the case law, the trial court concluded that “the law does not allow Luthi to testify.”

On appeal, the State argues the trial court erred in (1) excluding Luthi’s testimony on retrograde extrapolation, (2) refusing to make a pretrial ruling on the admissibility of Luthi’s testimony regarding impairment, (3) denying the State’s request to recall Luthi to the stand for additional examination, and (4) excluding the report of Defendant’s BAC. Because we reverse on the first issue, we address the other three issues only to provide guidance on remand.

**DISCUSSION**

**The Trial Court’s Ruling**

The parties have different views of the trial court’s ruling excluding retrograde extrapolation evidence. The State contends the trial court relied on a flawed reading of the BAC nexus cases, while Defendant argues that the trial court found the extrapolation evidence to be unreliable pursuant to *Alberico*, 116 N.M. 156, 861 P.2d 192 (1993). We believe the State’s view of the trial court’s ruling is correct.

In *Alberico*, our Supreme Court explained that “Rule 11-702 [NMRA] establishes three prerequisites for admission of expert testimony: (1) the expert must be qualified, (2) the scientific evidence must assist the trier of fact, and (3) the expert may only testify to scientific, technical or other specialized knowledge.” *Lopez v. Reddy*, 2005-NMCA-054, ¶ 11, 116 N.M. ___ P.3d ___ [No. 24,420 (N.M. Ct. App. Mar. 30, 2005)] (citing *Alberico*, 116 N.M. at 166, 861 P.2d at 202 (internal quotation marks omitted)). There is no issue here regarding the first requirement because the trial court expressly found Luthi to be qualified. While the other two requirements are prerequisites to the admission of retrograde extrapolation evidence, the record establishes that the parties and the trial court never reached the applicability of Rule 11-702 and *Alberico*.

The parties’ arguments and the trial court’s comments on the admissibility of Luthi’s testimony focused on the requirements set out in the BAC nexus cases. Although defense counsel made passing mentions of the BAC nexus cases and stated that, based on *Christmas*, *Martinez*, and *Baldwin* and the facts presented, the law would not allow Luthi to testify. While we conclude that the trial court based its decision on the BAC nexus cases, we do not mean to suggest that *Alberico* is irrelevant to a trial court’s determination of whether to admit evidence of retrograde extrapolation. On remand, if the issue is raised, the trial court may consider whether the requirements of Rule 11-702 and *Alberico* are satisfied.

**Retrograde Extrapolation**

Defendant contends the State failed to preserve its argument that the trial court misapplied the BAC nexus cases. We disagree. The record establishes that the prosecutor explicitly argued the meaning of the BAC nexus cases and pointed out his disagreement with the trial court’s interpretation. *State v. Varela*, 1999-NMSC-045, ¶ 26, 128 N.M. 454, 993 P.2d 1280 (explaining that in order to preserve an issue for appeal, a timely objection must specifically apprise the trial court of the nature of the claimed error and invoke an intelligent ruling thereon).

We now turn to the merits of the trial court’s ruling. Although the admission or exclusion of expert testimony is within the sound discretion of the trial court, “the threshold question of whether the trial court applied the correct evidentiary rule or standard is subject to de novo review on appeal.” *State v. Torres*, 1999-NMSC-010, ¶ 28, 127 N.M. 20, 976 P.2d 20. Thus, having determined that the trial court relied on the BAC nexus cases in ruling to exclude retrograde extrapolation testimony, we consider whether the trial court’s analysis of those cases was correct.

In any case where the State attempts to prove a violation of the per se DWI statute, which requires a minimum specific BAC at the time “[t]he defendant operated a motor vehicle,” UJI 14-4503 NMRA, the critical inquiry is how to determine the defendant’s BAC at the time of driving if there is a significant delay between the time of driving and the time BAC is measured. In the BAC nexus cases, this Court has attempted to provide guidance on this issue. We have noted that some delay between driving and testing is inevitable, and that an hour’s delay would not be unreasonable. *Christmas*, 2002-NMCA-020, ¶¶ 23-25. However, “[t]he longer the delay between the time of [the] incident and [the] sample collection, the more difficult it becomes, scientifically, to draw reasonable inferences from one data point, back to the time driving.” *Id.* ¶ 20 (internal quotation marks and citations omitted). Consequently, when the delay between driving and testing is significant, the State must prove a nexus between the defendant’s BAC score and the time of driving through evidence corroborating the inference that the defendant’s BAC at the time of driving was at the statutory level of 0.08 or above. *See Christmas*, 2002-NMCA-020, ¶ 6 (assessing corroborative
At most, they explain that a delay of any significance necessitates the introduction of some evidence providing a nexus between BAC and the time of driving. This is true whether the delay is two hours or six hours. While there may be a question as to the admissibility of the corroborative evidence on other grounds, such as reliability under Rule 11-702 and Alberico, the fact of significant delay alone does not render such evidence inadmissible as a matter of law.

{21} Similarly, the fact that Defendant’s BAC six hours after driving was only 0.02, significantly below the per se level of 0.08, does not by itself mandate exclusion of corroborative evidence, also known as “relation-back evidence.” See Baldwin, 2001-NMCA-063, ¶ 22. It is true that the BAC nexus cases emphasized the importance of relation-back evidence when the BAC was “0.08 or more” in Baldwin, 2001-NMCA-063, ¶ 8, or “0.08 or only marginally above” in Martinez, 2002-NMCA-043, ¶ 11, which may have suggested to the trial court that a BAC below 0.08 would not be susceptible to relation-back evidence. However, we read these phrases in the BAC nexus cases as simply illustrative of the problem created by a significant delay in BAC testing and the need for relation-back evidence to establish the BAC at the time of driving. If an expert can determine a defendant’s likely BAC at the time of driving from a BAC, of whatever measurement, taken a significant time after driving, and if the trial court finds that the expert’s methodology satisfies the requirements of Rule 11-702, then nothing in the BAC nexus cases requires exclusion of that expert’s testimony. The issue in each of the BAC nexus cases was the sufficiency of the evidence to convict the defendant of per se DWI without relation-back evidence, not the admission or exclusion of such evidence. See State v. Montoya, ___-NMCA-078, ¶ 20, ___ N.M. ___, ___ P.3d ___ [No. 24,060 (N.M. Ct. App. Apr. 21, 2005)].

{22} In addition, corroborative behavior evidence is not a prerequisite to the admissibility of expert relation-back testimony. Behavior evidence and expert testimony are but two alternative methods of establishing the nexus between BAC and the time of driving. Baldwin, 2001-NMCA-063, ¶ 2 (noting that corroborative evidence “might include a police officer’s observation of significant incriminating behavior on the part of the driver, or the evidence might include expert testimony relating the test result back in time to the time of driving”). Here, although Defendant apparently passed the field sobriety tests, Luthi nonetheless explained that retrograde extrapolation could establish that Defendant’s BAC at the time of driving equaled or exceeded 0.08. Assuming Luthi’s testimony passed muster for admissibility on other grounds, the testimony could conceivably provide the nexus between BAC and time of driving required by the BAC nexus cases.

{23} In summary, the BAC nexus cases do not establish a bright line rule circumscribing a trial court’s decision to admit or exclude relation-back evidence. Instead, they provide guidance to a trial court in determining when relation-back evidence is necessary and the types of such evidence that may suffice to support a conviction. It is important to note that we are not holding that relation-back evidence is necessarily inadmissible, even after a time lapse as long as six hours. In the related case of State v. Hughey, 2005-NMCA-___, ___ N.M. ___, ___ P.3d ___ [No. 24,732 (N.M. Ct. App. June 27, 2005)], filed today, we have affirmed a trial court’s exercise of discretion to exclude relation-back evidence when it found such evidence unreliable. On remand, the trial court may again consider the question of the admissibility of Luthi’s testimony within the context of the considerations that ordinarily guide the sound exercise of discretion, such as the requirements of Rule 11-702.

Other Arguments

{24} Because we reverse the trial court’s decision on the basis of its erroneous interpretation of the BAC nexus cases, we need not determine the other issues raised by the State. However, because these issues are likely to recur on remand, we briefly address them to provide guidance to the trial court and the parties.

{25} The State argues the trial court erred in excluding evidence regarding the relation of BAC to impairment. It appears the trial court excluded the evidence because the State failed to give Defendant notice that this evidence was a subject of the State’s motion in limine. While the State concedes that the trial court excluded this evidence only for purposes of the motion in limine being heard at that time and not for all purposes, the State’s main objection is that the trial court refused to make
a pretrial ruling on the admissibility of the evidence. On remand, of course, if the State still wishes to introduce this evidence at trial, the trial court’s ruling at the motion hearing does not preclude the State from attempting to do so, and the State is free to file motions seeking pretrial rulings on the admissibility of this evidence. We do not mean to suggest that Defendant cannot raise additional objections to this evidence at the appropriate time.

{26} Next, the State contends the trial court erred in ruling that the State could not recall Luthi to the stand after she had concluded her initial testimony. Although a trial court’s denial of leave to recall a witness is discretionary, see State v. Ortiz, 92 N.M. 166, 169, 584 P.2d 1306, 1309 (Ct. App. 1978), the trial court in this case did not exercise discretion when it denied the State’s request to recall Luthi. Instead, the court stated that it was without the authority to permit the recall. While the court seemed to recognize its authority to permit recall of a witness at trial, it apparently believed that different rules pertain at a hearing on a motion. The trial court certainly has the authority to control the presentation of evidence and may permit a party to reopen its case. See Sena v. N.M. State Police, 119 N.M. 471, 474-75, 892 P.2d 604, 607-08 (Ct. App. 1995). This is so regardless of whether the evidence is offered at trial or at a hearing. Thus, should the issue arise on remand, the decision whether to permit recall of a witness is entrusted to the trial court’s sound discretion.

{27} Finally, the State argues that the trial court erroneously required it to prove Defendant’s BAC at the hearing on the motion in limine in order to obtain a ruling on the admissibility of Luthi’s testimony. To the extent the trial court believed that admission of the BAC reports was a prerequisite to its consideration of the admissibility of Luthi’s testimony, the trial court was mistaken. An offer of proof as to the BAC measurements would suffice in the context of ruling on the State’s motion in limine. Of course, at trial, the State would be required to introduce the BAC reports in order to establish the foundation for Luthi’s retrograde extrapolation testimony. Cf. Rule 11-104(B) NMRA (stating that “[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition”).

CONCLUSION

{28} We reverse the trial court’s exclusion of expert relation-back testimony and remand for proceedings consistent with this opinion.

{29} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:
LYNN PICKARD, Judge
IRA ROBINSON, Judge
OPINION

JONATHAN B. SUTIN, JUDGE

1. This appeal requires us to examine the thin line separating the parental discipline privilege and the crime of battery when a parent uses physical force to discipline a child. In this case, a parent angrily grabbed and held onto his child’s hand, causing discomfort and a bruise. We reverse the battery conviction.

BACKGROUND

2. Twelve-year-old daughter (Daughter) and her younger brother (Son) are the children of parents who had been divorced for several years as of the date of the incident in January 2003 that is the subject of this appeal. They live with their mother. Defendant is their father.

3. Evidence before the jury was generally along the following lines. According to Daughter, when she and Son left school on the day of the incident, Daughter intended to make sure that Son had all the books he needed to do his homework. Daughter would be involved in a sports tryout that afternoon and she would be unable to help him do his homework. In addition, Son was scheduled to visit with Defendant. While looking in Son’s backpack for an assignment sheet, someone from behind her grabbed and squeezed Daughter’s right hand “really hard.” She turned around and saw that it was her father who grabbed her hand. Daughter testified that her father told her, “That’s not your backpack” and when she stated, “Dad, that’s not fair,” he replied, “I’m sick of you.” Daughter testified that Defendant’s tone was harsh and that he held onto her hand for half a minute or less. She also testified that it hurt her. Defendant then left with Son, and Daughter went to the bathroom in the school to wash her face after crying. Daughter then went to tryouts. She told her mother what had occurred when her mother picked her up after tryouts. The mother asked Daughter if she wished to speak to the guardian ad litem appointed to oversee continuing timesharing issues after the divorce was final. However, the guardian ad litem was unavailable. The mother asked if Daughter wanted to see a doctor, and she said no. The mother asked if Daughter wanted to speak to a police officer and Daughter said yes. The officer testified that he observed a bruise on Daughter’s hand. The bruise was on the top of her right hand, near the juncture of her thumb and first finger. It was a dark red mark the size of a dime.

4. Defendant and the mother were separated in 1997 and divorced in 1998. Defendant stated that the divorce and aftermath was contentious. Defendant had visitation with Daughter once a month and visitation with Son every other weekend and every Wednesday. Defendant would pick up Son after school and return him in the evening to a neutral location for the mother to pick him up.

5. Defendant testified that on his last visit with Daughter in December 2002, she refused to go to dinner with him, so they stayed at the neutral location and talked. During the visit, they talked about Son, and Defendant told Daughter that he was not getting “Wednesday notes,” which were letters notifying parents of schedules and special activities, from the school. Defendant asked Daughter to leave the notes in Son’s backpack so that he could look at them. Defendant told Daughter that he needed to read the notes and that he would then send them on to their mother. He further told Daughter that Son had told Defendant that she was taking the notes out of his backpack.

6. Defendant testified that on the day in question he arrived early to pick up Son. After the elementary school let out, Defendant did not see Son. The middle school let out and he saw Daughter walk out. Defendant asked her where Son was. Daughter did not respond and kept walking toward the elementary school. Defendant thought that Daughter was trying to avoid him. He followed her to the elementary school and up steps to a point that Son came around a corner and Daughter ran up to Son, grabbed him by the shoulders, spun him around, unzipped his backpack, and took a manila folder out. Defendant thought, “[e]nough is enough.” He went up to her, took her hand out, and said to Daughter, “I asked you not to do that,” and then he zipped the backpack closed.

7. Defendant testified that he was not angry, but was irritated, because Daughter was doing something he had asked her not to do. He did not intend to hurt her; he thought he had just lifted her hand out of the pack. There was no forcefulness and no resistance. Defendant and Daughter did not visit following this incident.

8. Of note was the testimony of the guardian ad litem. Among other things, she testified that Daughter described the incident to her as occurring outside of the building, pointing to a place where there was a bush; whereas, Son told her that the incident happened in the school. Later, Daughter told the guardian ad litem that the incident happened in the school. The guardian ad litem also testified she had been involved in other cases that were as contentious as the one involving Defendant, the mother, and their children, Daughter, Son,
and another daughter, but that this one had gone on longer than most.

{9} Defendant was charged with battery and abandonment or cruelty to child. He was tried in metropolitan court. The metropolitan court dismissed the abandonment or cruelty to child charge, but convicted Defendant of battery under NMSA 1978, § 30-3-4 (1963). Defendant obtained a de novo trial in district court.

{10} The district court found that Defendant “intentionally touched or applied force to [Daughter] by suddenly, without warning, and with inappropriate, unnecessary and abusive painful force, grabbing her by her hand[.]” The court also found that the touching was unlawful. Further, the court found that Defendant’s words, “I’m sick of you,” said in an angry manner just reinforced the finding. In Defendant’s favor, the court found that his act was “not malicious, not savage [or] painfully vindictive,” was an isolated incident, and one that the guardian ad litem was not required to report to the Children, Youth and Families Department as child abuse.

{11} Defendant appeals the battery conviction, arguing that his act of grabbing Daughter’s hand was privileged under a parental control justification insulating him from criminal liability. As sub-issues, Defendant argues that (1) federal law recognizes a fundamental right of parents to make decisions concerning care, custody, and control of their children; (2) state law recognizes the common law parental control justification as an affirmative defense for offensive acts which would otherwise be punishable under the battery statute; (3) and the district court erred in finding that the touching was unlawful, since the evidence shows Defendant’s acts to be discipline and the discipline was not excessive or unreasonable and was therefore privileged.

**DISCUSSION**

1. New Mexico Recognizes the Common Law Parental Control Privilege

{12} The United States Supreme Court has included within the Fourteenth Amendment’s liberty interest a parent’s right to direct his child’s upbringing. *See Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). However, for the protection of the welfare of the child the state has a right to limit parental freedom in raising children. *Prince v. Massachusetts*, 321 U.S. 158, 165-67 (1944). The difficult task of prosecutors and the courts is to determine when parental use of physical force in disciplining children violates criminal law. The United States Supreme Court has not addressed how parental physical force as a means of discipline is to be treated within the competing rights. *See State v. Wilder*, 748 A.2d 444, 449 n.5 (Me. 2000); *Kandice K. Johnson*, *Crime or Punishment: The Parental Corporal Punishment Defense*-Reasonable and Necessary, or Excused Abuse?,* 1998 U.II. L. Rev. 413, 426.

{13} The common law recognized a parental privilege to use moderate or reasonable physical force. *See Wilder*, 748 A.2d at 449 n.6; *Johnson*, supra at 434-37. Blackstone described a parental discipline privilege in stating that a parent “may lawfully correct his child, being under age, in a reasonable manner,” and further that, “battery is, in some cases, justifiable or lawful; as where one who hath authority, a parent or a master, gives moderate correction to his child, his scholar, or his apprentice.” *Wilder*, 748 A.2d at 449 n.6 (quoting William Blackstone, *Blackstone’s Commentaries on the Laws of England* 440 (Oxford reprint 1966), and William Blackstone, *Blackstone’s Commentaries on the Laws of England* 120 (1768)); see also Johnson, supra at 434-35.

{14} Our Supreme Court in the mid-nineteenth century followed suit. *Territory v. Miera*, 1 N.M. 387, 388 (1866) (“There are many strikings which are not unlawful, and so are not offenses which the laws punish; such as parents correcting their children[.]”). The New Mexico jury instruction on the element of unlawfulness states that an unlawful touching or confinement does not include nonabusive parental or custodial care. UJI 14-132 NMRA (citing *Miera*, 1 N.M. 387). This Court has also indicated that such a privilege exists in New Mexico. *See State v. Stein*, 1999-NMCA-065, ¶ 19, 127 N.M. 362, 981 P.2d 295 (stating that, in excluding “child” from the definition of a “household member” in the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -16 (1995, as amended through 2001), the Legislature may have been concerned that those “new offenses . . . would abrogate the limited privilege of parents to impose physical discipline on their own children”).

{15} The common law guidelines of reasonableness and moderation have been codified or otherwise continued into modern day expressions of the parental discipline privilege. *See e.g.*, *Newby v. United States*, 797 A.2d 1233, 1242-43 (D.C. 2002) (stating that the “basic conception of the parental discipline defense is reinforced by decisions construing the common law of Maryland” to require a genuine disciplinary purpose and moderate or reasonable force, and noting that the “‘reasonable force’ standard for genuine parental discipline appears to be the common law rule in the majority of jurisdictions”); *Johnson v. State*, 804 N.E.2d 255, 257 (Ind. Ct. App. 2004) (stating that “[i]n order to be justified, the parental discipline must not be cruel or excessive”); *State v. Arnold*, 543 N.W.2d 600, 603 (Iowa 1996) (stating that Iowa “recognizes parents have a right to inflict corporal punishment on their child, but that right is restricted by moderation and reasonableness”); *State v. Adaranijo*, 792 N.E.2d 1138, 1140 (Ohio Ct. App. 2003) (requiring a parent’s force to be “proper and reasonable under the circumstances”); *State v. Singleton*, 705 P.2d 825, 827 (Wash. Ct. App. 1985) (“A parent has a right to use reasonable and timely punishment to discipline a minor child within the bounds of moderation and for the best interest of the child.”).

{16} We hold that, in New Mexico, a parent has a privilege to use moderate or reasonable physical force, without criminal liability, when engaged in the discipline of his or her child. Discipline involves controlling behavior and correcting misbehavior for the betterment and welfare of the child. The physical force cannot be cruel or excessive if it is to be justified. The parent’s conduct is to be measured under an objective standard. *See id.* (stating that lawful force “is that which is reasonable and moderate as objectively determined by a jury”).

2. Defendant’s Act Fell within the Parental Privilege

{17} The battery offense of which Defendant was convicted proscribes “the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner.” § 30-3-4. The State had the burden to prove beyond a reasonable doubt all elements of the offense, including unlawfulness. *See State v. Parish*, 118 N.M. 39, 44-45, 878 P.2d 988, 993-94 (1994) (stating that a “defendant does not have the burden of proving . . . self-defense”); UJI 14-132 (comm. cmt.) (stating that the State must prove unlawfulness beyond a reasonable doubt). When a parent’s behavior falls within the parental privilege, the act is not unlawful. UJI 14-132 (comm. cmt.) Thus, when a question of parental privilege exists, the State must prove beyond a reasonable doubt that the
parent’s conduct did not come within the privilege. *Wilder*, 748 A.2d at 451; see *Parish*, 118 N.M. at 45, 878 P.2d at 994.

{18} In considering whether the State has disproved the justification, the court or jury is entitled to consider such factors as “the age, physical condition, and other characteristics of a child as well as with the gravity of the child’s misconduct.” *Arnold*, 543 N.W.2d at 603; see also *Singleton*, 705 P.2d at 827 (considering also “the kind of marks or wounds inflicted on the child’s body [and] the nature of the instrument used for punishment”). Nevertheless, there must exist some threshold at which parental physical force in the discipline of children is justified even though, technically, the elements of the battery offense can be proven. See *Wilder*, 748 A.2d at 452-53, 456 (“There is also a basis in law to set a threshold for the type of physical control of children by parents that will not result in criminal conviction absent special aggravating circumstances[,]” even recognizing that the district court could find “the technical elements of assault were proven.”).{19} We recognize that in reviewing a conviction we are to view “the evidence in the light most favorable to upholding the verdict.” *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789. However, there must exist for parents a harbor safe from prosecutorial interference in parental judgment. See *Model Penal Code and Commentaries* § 3.08, cmt. 2 (1985) (“[S]o long as a parent uses moderate force for permissible purposes, the criminal law should not provide for review of the reasonableness of the parent’s judgment.”). In our view, an isolated instance of moderate or reasonable physical force as that in the present case that results in nothing more than transient pain or temporary marks or bruises is protected under the parental discipline privilege. See *Wilder*, 748 A.2d at 453-56; *Adaranijo*, 792 N.E.2d at 1139-40; see also *Johnson*, *supra* at 471-72 (proposing a model statute permitting force that does not result in physical injury to the extent the force does not place the child at certain substantial risk and defining physical injury to exclude “transient red marks or temporary pain”).{20} This protection for parents should exist even if the parent acts out of frustration or short temper. Parents do not always act with calmness of mind or considered judgment when upset with, or concerned about, their children’s behavior. Nor do parents always act pursuant to a clearly defined circumstance of discipline or control. A reaction often occurs from behavior a parent deems inappropriate that irritates or angers the parent, causing a reactive, demonstrative act. Heat of the moment must not result in immoderate physical force and must be managed; however, an angry moment driving moderate or reasonable discipline is often part and parcel of the real world of parenting with which prosecutors and courts should not interfere. What parent among us can say he or she has not been angered to some degree from a child’s defiant, impudent, or insolent conduct, sufficient to call for spontaneous, stern, and meaningful discipline?{21} In the present case, no reasonable minds could differ on the legal consequence of Defendant’s acts. The district court did not find or determine that Defendant had no legitimate disciplinary purpose whatsoever in mind. Even were a disciplinary purpose questionable or obscure, Defendant’s act was an isolated one. He reacted when he saw Daughter with her hand in Son’s pack. His demonstrative act, even if an angry touching, resulted in only a temporary, dime-sized bruise on Daughter’s hand and transient pain. The force was relatively inconsequential; the injury was marginal. Defendant’s conduct was not cruel or excessive, and considering the totality of circumstances, it was moderate and reasonable. “If such acts, . . . with no apparent evidence of any aggravating factors, are sufficient to support an assault charge, then any physical contact by a parent with a child that hurts the child may support an assault conviction if the State elects to prosecute.” *Wilder*, 748 A.2d at 456.

{22} We determine that Defendant’s conduct did not reach beyond the point of departure from justified parental discipline and was privileged, and that, as a matter of law, the evidence in this case was insufficient to support a determination of guilt on the charge of battery beyond a reasonable doubt.

CONCLUSION

{23} We reverse Defendant’s conviction of battery and remand with instructions to enter a judgment of acquittal.

{24} IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

JAMES J. WECHSLER, Judge
OPINION

RODERICK T. KENNEDY, JUDGE

1. Third-party Plaintiff W. Jack Butler appeals from the district court’s order compelling him to arbitrate his claims against multiple third-party defendants collectively referred to hereinafter as Merrill Lynch. Butler’s third-party claims arose in the larger context of a securities fraud class action brought by the former shareholders of Solv-Ex Corporation against corporate officers Butler and John Rendall, among others. In response to Butler’s third-party complaint, Merrill Lynch filed a motion to compel arbitration, arguing that a pledge agreement between Merrill Lynch and Rendall, Butler’s co-defendant in the class action, provided that all controversies between Rendall and Merrill Lynch would be determined by arbitration.

2. Butler argues that he did not execute an agreement to arbitrate and that the doctrine of equitable estoppel does not apply in this case. We agree, and hold that equitable estoppel cannot be used by a defendant signatory against a plaintiff non-signatory claimant to compel arbitration under the facts of this case. Where, as here, the non-signatory is the plaintiff, and is not alleged to have engaged in substantially interdependent and concerted misconduct with a co-defendant or alleged to have embraced and directly benefited from the agreement, a defendant signatory cannot use equitable estoppel to prevent the plaintiff from denying the existence of the arbitration agreement. We therefore reverse the district court on this basis and do not address the remainder of Butler’s claims.

BACKGROUND

3. In 1996, former shareholders of Solv-Ex Corporation filed a lawsuit against Butler, Rendall, Solv-Ex Corporation, and Deutsche Morgan Grenfell, Inc. Both Rendall and Butler subsequently filed separate third-party complaints against Merrill Lynch. Butler’s complaint alleged market manipulation, unlawful combination in restraint of trade, prima facie tort, defamation, and malicious abuse of process. Specifically, both Rendall and Butler alleged in their separate complaints that Merrill Lynch had dumped Solv-Ex stock on the market, contributing to the fall in the stock’s prices. In response to Butler’s third-party complaint, Merrill Lynch filed a motion to compel arbitration, arguing that a pledge agreement between Merrill Lynch and Rendall, Butler’s co-defendant in the class action, provided that all controversies between Rendall and Merrill Lynch would be determined by arbitration.

4. Merrill Lynch argued that because the factual allegations in Butler’s third-party complaint were similar to allegations made by Rendall, Butler should be equitably estopped from denying that the arbitration agreement applied to him. It claimed that under the doctrine of equitable estoppel Butler should be compelled to arbitration if his claims either arose out of the pledge agreement or were factually intertwined with Rendall’s. Butler argued that he was not a signatory to the agreement containing the arbitration clause and that he therefore should not be compelled to arbitrate his claims. The district court was persuaded by Merrill Lynch’s arguments and entered an order compelling Butler to arbitrate his third-party claims.

DISCUSSION

5. Butler raises four issues on appeal. He argues that (1) he did not execute an agreement to arbitrate and the doctrine of equitable estoppel does not apply in this case; (2) the uncontroverted evidence showed that Rendall did not execute an agreement containing an arbitration provision; (3) Rendall was not acting as Butler’s agent even if Rendall actually did execute a pledge agreement containing an arbitration provision; and (4) Butler’s third-party claims were not covered by the arbitration clause of Rendall’s alleged agreement. Because Butler was not a signatory to the arbitration agreement between Rendall and Merrill Lynch, the threshold issue is whether, under the circumstances of this case, Butler can be compelled to arbitration pursuant to the doctrine of equitable estoppel. We review a district court’s grant of a motion to compel arbitration de novo. Alexander v. Calton & Assocs., Inc., 2005-NMCA-034, ¶ 8, 137 N.M. 293, 110
Butler argues that in New Mexico, both parties must agree to arbitration in order for a court to compel arbitration. Merrill Lynch responds that although the general rule requires both parties to agree to arbitration, this case is subject to several exceptions, including the doctrine of equitable estoppel. Butler argues that the doctrine of equitable estoppel is inappropriate because there was no evidence that Merrill Lynch made any misrepresentations that Merrill Lynch relied on to its detriment. See Gallegos v. Pueblo of Tesuque, 2002-NMSC-012, ¶ 24, 132 N.M. 207, 46 P.3d 668 (“Equitable estoppel precludes a litigant from asserting a claim or defense that might otherwise be available to him against another party who has detrimentally altered his [or her] position in reliance on the former’s misrepresentation or failure to disclose some material fact.”) (internal quotation marks and citation omitted)). Merrill Lynch contends that equitable estoppel is applied differently in the arbitration context in an approach endorsed by this Court in Horanburg v. Felter, 2004-NMCA-121, ¶ 18, 136 N.M. 435, 99 P.3d 685. Butler takes issue with this reading of Horanburg, asserting that the doctrine of equitable estoppel has not been recognized in New Mexico as a vehicle by which an arbitration provision can be enforced against a non-signatory to the agreement.

We agree with Butler that Merrill Lynch’s reliance on Horanburg is misplaced. In that case, we stated that “[g]enerally, third parties who are not signatories to an arbitration agreement are not bound by the agreement and are not subject to, and cannot compel, arbitration.” Id. ¶ 16. Then, without deciding whether New Mexico would recognize the application of equitable estoppel to compel arbitration, we determined that equitable estoppel was not appropriate in that case. Id. ¶ 18. In summarizing the approaches taken by the federal courts to include non-signatories within arbitration agreements, we first observed that “a principal-agent analysis has been applied to include a non-signatory to an arbitration agreement within an arbitration when the interest of the non-signatory is directly related to that of a signatory.” Id. ¶ 16. We declined, based on the facts of that case, to apply an agency theory. Id. We also acknowledged that a line of federal cases has held that in certain situations, a non-signatory could compel a signatory to arbitration under an equitable estoppel theory “(1) when a signatory to the agreement must rely on the terms of the agreement in making a claim against a non-signatory; or (2) when a signatory alleges substantially interdependent and concerted misconduct by both another signatory and a non-signatory.” Id. ¶ 17. We did not address when a non-signatory could be compelled to arbitration.

Merrill Lynch relies on Cherry Creek Card & Party Shop, Inc. v. Hallmark Marketing Corp., 176 F. Supp. 2d 1091 (D. Colo. 2001) [hereinafter Cherry Creek], and Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753 (11th Cir. 1993), to argue that non-signatories to arbitration agreements have been equitably estopped from denying they are bound by the arbitration agreements. Merrill Lynch asserts that under these cases, non-signatories may be estopped when (1) they knowingly exploit the agreement containing the arbitration clause, or (2) their claims are intimately intertwined with the contract containing the arbitration clause. We are not persuaded that these cases support Merrill Lynch’s argument for estoppel in this case.

In Cherry Creek, the owner of the card shop sued its wholesaler, Hallmark, for misappropriation of trade secrets, breach of contract, breach of the implied covenant of good faith and fair dealing, and misrepresentation/concealment. 176 F. Supp. 2d at 1093. Hallmark then moved to stay the case pending arbitration. Id. at 1094. Cherry Creek was not a signatory to the arbitration agreement, and the district court found that Hallmark had not demonstrated that equitable estoppel was justified. Id. at 1096-97. In its discussion of the issue, the district court stated the same two theories cited in Horanburg, addressing when a non-signatory could compel a signatory to arbitration. Cherry Creek, 176 F. Supp. 2d at 1098. Contrary to Merrill Lynch’s representation that the court held that equitable estoppel applies when a non-signatory’s claims were intimately intertwined with a contract containing an arbitration clause, the Cherry Creek court wrote that:

courts have bound a signatory to arbitrate with a nonsignatory at the nonsignatory’s insistence because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory’s obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations.

Id. (internal quotation marks and citation omitted) (alterations in original). This is essentially the same test this Court described in Horanburg, 2004-NMCA-121, ¶ 17. Thus, a signatory, not a non-signatory, is estopped when the signatory’s claims are intertwined with the contract. Cherry Creek, 176 F. Supp. 2d at 1098. This was precisely the situation in Sunkist Soft Drinks, Inc., where Sunkist Growers, a signatory to a licensing agreement containing an arbitration clause, sued Del Monte, a non-signatory that had absorbed the stock of a signatory, alleging contract and tort claims arising from and directly related to the licensing agreement. 10 F.3d at 755, 758. Under those circumstances, the signatory, Sunkist Growers, was estopped from contesting Del Monte’s right to invoke the arbitration clause of the licensing agreement. Id. at 758.

As one commentator has pointed out, the “two stage test is most usual in situations where the non-signatory is seeking to compel arbitration against the signatory.” James M. Hosking, The Third Party Non-Signatory’s Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent, 4 Pepp. Disp. Resol. L.J. 469, 533 (2004). This case presents the inverse situation: a signatory (Merrill Lynch) seeks to compel a non-signatory (Butler) to participate in arbitration. The Second Circuit has pointed out that the distinction between estopping a signatory from denying the existence of an arbitration agreement and estopping a non-signatory is important. Thomson-CSF, S.A. v. Am. Arbitration Ass’n, 64 F.3d 773, 779 (2d Cir. 1995). The circuit court noted that “the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed.” Id. The court reasoned, however, that the non-signatory “cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists.” Id. It emphasized that this was so because “[a]rbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so.” Id. The court acknowledged that the Second Circuit had previously “bound nonsignatories to arbitration agreements under an estoppel
theory” in other cases. Id. at 778. The court pointed out, however, that in one of those other cases, the non-signatory had benefited from and “knowingly exploit[ed]” an agreement containing an arbitration award by which it could use a trade name in return for complying with the terms of the agreement. Id. Thomson-CSF, S.A. noted, however, that that case fell “squarely within traditional theories [of contract and agency] for binding nonsignatories to an arbitration agreement.” Id. at 780. It has been commented that “the crucial lesson from Thomson . . . is the Court’s recognition of the distinction between estopping a non-signatory as opposed to a signatory claimant.” Hosking, supra, at 532-33.

Moreover, the circumstances of a non-signatory who has engaged in “substantially interdependent and concerted misconduct” with a co-defendant who is a party to the arbitration agreement are not present here. Horanburg, 2004-NMCA-121, ¶ 17. Merrill Lynch argued only that Butler’s claims were intertwined with the same claims, or based on the same underlying facts, as those of Rendall (who, Merrill Lynch argued, was a signatory). See Cherry Creek, 176 F. Supp. 2d at 1098 (stating that a signatory can be bound by the arbitration agreement where the claims are intertwined with the contract). Merrill Lynch, however, does not argue that Rendall was Butler’s agent in the loan transaction giving rise to the alleged arbitration agreement. In the loan, Rendall pledged his own stock, but not Butler’s, to Merrill Lynch as collateral. Merrill Lynch also does not assert that Butler benefited from this pledge agreement between Rendall and Merrill Lynch. See id. (noting that non-signatories have been bound by arbitration agreements under equitable estoppel when the non-signatory has embraced and directly benefitted from the underlying contract). Finally, Merrill Lynch does not claim that there was “substantial[] interdependent and concerted misconduct” by Butler and Rendall. See Horanburg, 2004-NMCA-121, ¶ 17. Such conduct, while alleged by the plaintiffs in the underlying class action, is not relevant to the third-party action between Merrill Lynch and Butler.

Courts that apply the doctrine of equitable estoppel do so “to avoid rendering meaningless the purpose of the signatories agreement, an arbitration, in the absence of a non-signatory.” Id. ¶ 19. We are not persuaded that Merrill Lynch and Rendall’s agreement to arbitrate would be rendered meaningless if Butler were not involved in the arbitration. Accordingly, even if New Mexico recognized the doctrine of equitable estoppel in the arbitration context, its application would not be appropriate in this case. Finally, in light of our ruling on this issue, we do not address Butler’s other arguments.

CONCLUSION

We hold that equitable estoppel cannot be used by a defendant signatory against a plaintiff non-signatory claimant to compel arbitration under the facts of this case. Where, as here, the non-signatory is the plaintiff, and is not alleged to have engaged in substantially interdependent and concerted misconduct with a co-defendant or alleged to have embraced and directly benefitted from the agreement, a defendant signatory cannot use equitable estoppel to prevent the plaintiff from denying the existence of the arbitration agreement. Because we are not persuaded that the circumstances of this case justify estopping Butler from denying the existence of an arbitration agreement, we reverse the district court’s order compelling Butler to arbitrate his claims against Merrill Lynch.

IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
JONATHAN B. SUTIN, Judge
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POSITIONS

Part-Time Attorney Position
Work 25 to 35 hours per week helping people with Social Security Disability claims. The work is non-adversarial and involves analysis of medical records, writing of hearing statements and attending OHA hearings. Interested parties can contact Sandra Rivas at Bill Gordon and Associates. Phone 265-1000, fax 242-1841 or e-mail sandra@billgordon.com.

Associate Attorney
Albuquerque criminal defense attorney Billy R. Blackburn is seeking a full-time, experienced associate attorney. Please submit a statement of interest, resume, references, salary request and writing sample to: 1011 Lomas Blvd. NW, Albuquerque, New Mexico, 87102.

Associate Trial Attorney-8th Judicial District (Taos County)
The Eighth Judicial District Attorney’s Office is accepting applications for the position of Associate Trial Attorney (ATA) in the Taos Office. This position will have primary responsibility for DWI and misdemeanor cases under supervision. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Donald Gallegos, District Attorney, 920 Salazar Road, Suite A, Taos, NM 87571. Position open until selection made.

Associate Attorney
Silva & Saucedo, P.C., an AV rated litigation firm, seeks an attorney with two to eight-years experience, interested in working in a congenial atmosphere on complex civil, employment, personal injury, white collar and wrongful death cases. Strong academic credentials and excellent research and legal writing skills required. All inquiries confidential. Excellent salary and benefits. Please mail resume to Office Manager at PO Box 100, Albuquerque, New Mexico 87103-0100. Position available immediately.

Mckinley County District Attorney’s Office
Is inviting resumes for Assistant Trial Attorney. Newly admitted Bar members are welcome. The work consists of misdemeanor and felony prosecution in Magistrate, Children’s and District Courts. If you enjoy courtroom litigation this is the practice for you. Salary negotiable range from $39,000.00. Closing date is 09/09/05. Please submit resume to Karl R. Gillson, District Attorney, 201 West Hill, Suite 100 Gallup, NM 87301, or e-mail to Kgillson@da.state.nm.us.

Associate
Walsh, Anderson, Brown, Schulze & Aldridge, P.C., a Texas based law firm is seeking an associate for the firms Albuquerque, NM office. Candidates should possess 1-5 years experience in a general school law practice. Candidates with litigation experience or a background in governmental/education entities are encouraged to apply. Both State and Federal Court experience required. Please send resume, with writing samples to Jobs@WABSDA.com or via fax to 512.467.9318 attn: Office Manager. No phone calls please.
Notice Of Faculty Positions
University Of New Mexico School Of Law

The University of New Mexico School of Law invites applications and nominations for faculty positions starting in the Fall of 2006 or Spring 2007. The Law School anticipates filling two tenure track positions, one in business and commercial law and the other in natural resources. Both entry level and experienced teachers are encouraged to apply. Academic rank and salary will be based on experience and qualifications, as well as resources available. The business and commercial law position includes teaching subject matter such as UCC courses, Business Associations, Real Estate Transactions, and a Small Business and Economic Development Clinic. Candidates must have two years of experience practicing in general business law. The natural resources law position includes teaching subject matter such as water law, land use, environmental issues, utilities, energy, federal lands, and biodiversity. The UNM Law School supports its natural resources program by offering a Natural Resources Certificate, publishing the Natural Resources Journal, and collaborating with the Utton Transboundary Resources Center. Please see our website at lawschool.unm.edu. Preferred qualifications include at least two years of legal practice in the field of natural resources. All candidates for these tenure track positions must possess a J.D. or equivalent legal degree. Preferred qualifications include a record or promise of academic scholarship; demonstrated excellence or the promise of excellence in the practice of law; and demonstrated excellence or the promise of excellence in teaching in the relevant subject areas. To apply, send a signed letter of interest that addresses your qualifications, curriculum vitae, and names, addresses, and phone numbers of three references to: Professor Gloria Valencia-Weber, Chair, Appointments Committee, UNM School of Law, 1117 Stanford, N.E., Albuquerque, NM 87131-1431. For best consideration, submit applications by September 16, 2005. Recruitment will continue until openings are filled. The University of New Mexico is an equal opportunity, affirmative action employer and educator.

Attorney Position Available
The 12th Judicial District Attorney’s Office in Alamogordo has an immediate opening for an Assistant District Attorney in our DWI prosecution unit. Experienced attorneys or new grads who have just taken the July bar exam are encouraged to apply. Salary is consistent with the range provided for by the New Mexico District Attorney’s Association Compensation and Pay Plan. Interested individuals should send a letter of interest and a resume to District Attorney Scot Key, 1000 New York Ave., Room 301, Alamogordo, NM 88310 or fax to 505-434-2507.

Wills, Trusts and Probate
Legal Assistant
Catron, Catron & Portow, a small Santa Fe AV-rated law firm, seeks a full-time legal assistant with expertise in New Mexico wills, trusts, and probate. Good writing and computer skills are necessary along with knowledge of forms and procedures. Salary DOE; good benefits. Send letter of interest with resume, references and writing samples to pgrace@catronlaw.com or fax to 505-986-1013. All applications will be kept in confidence.

Attorney
New Mexico Mortgage Finance Authority (“MFA”) is seeking a full-time, in-house attorney to provide general legal services in connection with the MFA’s affordable housing programs. The MFA is a governmental instrumentality designated as the State’s Housing Authority with responsibility for administering both State and federal affordable housing programs (See Section 58-18-1 et seq. NMSA 1978). Qualified applicants will be graduates of an accredited American Bar Association School of Law and licensed as attorney to practice law in the State of New Mexico. Additional requirements include four years experience practicing in one or more of the following areas: general litigation, business, finance, affordable housing programs, administrative law, and/or real estate law. Familiarity or experience with New Mexico’s and MFA’s Housing Programs, the MFA Act, the Housing Act, the New Mexico Open Meetings Act, the New Mexico Procurement Act, the New Mexico Affordable Housing Act, the New Mexico Constitution relating to anti-donation issues, mortgage revenue bond law, and FNMA, FHA, RHS, VA and/or HUD guidelines and regulations applicable to MFA’s Housing Programs. Occasional travel within the New Mexico is required. To review the job description, visit our website at www.housingnm.org. Excellent benefits package. Send resume, salary history, sample of a brief, written analysis, agreement, contract, or other documents which you have prepared in connection with your prior legal experience, and professional references to HR Manager, 344 4th St SW, Albuquerque, NM 87102. Fax: 505-243-3289. E-mail: jgarcia@housingnm.org.

Law Clerk
Legal Assistant/Secretary
Full-time position available for legal assistant/secretary for small but extremely busy firm. Candidate should have a minimum of 5 years experience in public finance and transactional work, excellent typing skills and work well in a team setting. Competitive salary and benefit package. Please submit resume to rgomez@bhf-law.com or fax to 505.244.9266.

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Beautiful Office Space
Beautiful office space, great location, downtown, 3 blocks from courthouses, professional atmosphere with available secretarial space, conference room, off-street parking, community printer, DSL and phone hookups. Northeast corner of Mountain and 5th Street. Call 247-3335.

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2 Season tickets on former student side, Row 25. $700. Call or email Brent Ricks, 341-1280; brentric@aol.com.

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Visit the State Bar of New Mexico’s web site
www.nmbar.org
**Spanish for Lawyers I**, Presiliano Torrez, J.D.  Wednesday, 4:00–7:00pm (August 24 to November 30, 2005).  54 General CLE credits.

This course will stress and teach the basic legal terminology that is used in our judicial system in a variety of practice settings. The course will strive to give the practitioner a basic understanding of the legal framework that their Spanish-speaking clients come from if they are from countries with civil system traditions. Basic terminology will be taught in the areas of criminal law, domestic relations and minor civil disputes. There will be an emphasis in practical aspects of language usage and the student should enroll with the idea of actively participating.

**Tribal Courts**, The Honorable Robert Yazzie, Chief Justice Emeritus of the Navajo Nation.  Wednesday 5:00–7:00pm (August 24 to November 30, 2005).  36 General CLE credits.

This course will explore the many facets of tribal courts in the United States, ranging from historical origins to the modern day operations of tribal courts. Among the topics will be the inherent power of tribal courts, judicial independence, separation of powers within tribal government, inter-tribal appellate courts, and the interplay among federal, state, and tribal courts. We will also analyze the fundamental characteristics of tribal courts and their function in the context of cutting edge cases involving jurisdictional issues, Indian civil rights, the use of tribal custom and tradition, criminal law, torts, and consumer law.

- To register, lawyers may contact Gloria Gomez: (505) 277-5265, gomez@law.unm.edu
- Members of the UNM Clinical Law Program, Access to Justice Network may take the course for the $5.00 per credit. Members may attend the course NOT FOR CLE and pay $5.00 per session. For more information about the Access to Justice Network visit [http://lawschool.unm.edu/Clinic/pro_bono/index.htm](http://lawschool.unm.edu/Clinic/pro_bono/index.htm) or call Associate Dean Antoinette Sedillo Lopez: 277-5265.
- Non-members may take the course for $30.00 per CLE credit. (1 credit = 50 minutes of class attendance). Non-members may take course NOT FOR CLE and pay $10.00 per session or $100.00 per unlimited sessions.
- Fees are paid in advance and are not refundable.
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