Inside This Issue

Board of Legal Specialization  6
Comments Solicited

Fifth and Ninth Judicial District Courts  6
Judicial Appointments

Eleventh Judicial District Court  7
Judicial Appointment

Corrections to the 2006-07 Bench & Bar Directory  9

Legal Education Calendar

Writs of Certiorari

List of Court of Appeals' Opinions

2006-NMCA-078, Nos. 24,320/24,805: American Civil Liberties Union of New Mexico v. City of Albuquerque

2006-NMCA-079, Nos. 25,516/25,517: State v. Lopez


2006-NMCA-082, No. 25,888: Pickett Ranch, L.L.C. v. Curry

Special Insert:
IOLTA News
In Loving Memory

RONDOLYN R. O’BRIEN

August 2, 1951 - July 31, 2006

Rondolyn R. O’Brien passed away at her home early Monday, July 31, 2006 after a long illness. She is survived by her loving husband of 35 years, Daniel; her parents, Herman and Frances Rauch, her sister Terry Mileshosky and husband Rob and their son Britt; sister Brenda Bronson of Longview, Texas, her husband Gene, their children Jessica, Casey and Melissa McCall, and her husband Rick and their daughter Cassidy; her in-laws Paul and Dorothy O’Brien; sister-in-law Megan de la O, her husband Eloy and their children Shannon, Matt and Alex; her brother-in-law Sean O’Brien of Colorado and his children Kyla, Sean and Erin; her sister-in-law Kat Tiano and her husband Tony; and Jason O’Brien, the son of her late brother-in-law David O’Brien.

Rondolyn graduated from Highland High School in 1969 and UNM in 1973 after which she taught school and worked as a juvenile probation officer. She graduated from UNM Law School in 1978 and worked as an attorney for a number of years. She was a tireless volunteer for many legal organizations at the local, state and national level, having served as president of the Albuquerque Bar Association, president of the Woman’s Bar Association, chair of the Solo and Small Firm Practitioners Section, president of the Young Lawyers Division of the State Bar of New Mexico, Bar Commissioner for the State Bar of New Mexico, New Mexico’s delegate to the House of Delegates of the American Bar Association, and president of the National Conference of Woman’s Bar Associations. In 1996, she was a recipient of the Governor’s Award for Outstanding New Mexico Women.

Rondolyn was well known for her sense of humor and made many friends along the way.

She will be dearly missed by all.
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DVD contents:

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• NMSA, 1978™ includes fully linked access to helpful research tables as:
  - Tables of Disposition of Laws; Tables of Corresponding Code Sections; Tables of Abbreviations; Table of Adjournment; Perpetual Calendar; Morality Tables; Annuity Tables; Interest Tables — Thousands of links added to get you what you want, when you need it.
  - New Mexico Session Laws from the 1993 Regular Session to present
  - New Mexico Supreme Court Decisions, Jan. 1852 to present
  - New Mexico Court of Appeals Decisions, Nov. 1966 to present
  - New Mexico Attorney General Opinions, 1909 to present
  - New Mexico Administrative Code
  - New Mexico Judicial Decisions
  - New Mexico Federal Judicial Decisions
  - New Mexico Federal Rules
  - U.S. 10th Circuit Judicial Decisions
  - New Mexico Resources Journal and New Mexico Law Review

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CLE PROGRAMS - State Bar Center

AUGUST

22 or 23 SETTLEMENT FACILITATION AND MEDIATION WORKSHOP SERIES
A Limited Enrollment Discussion-Based Program with Leading Experts
Workshop #2
TWO DATES, TWO CITIES – YOUR CHOICE
Tuesday, August 22, 2006 • State Bar Center, Albuquerque
Wednesday, August 23, 2006 • State Library, Archives and Record Center
Pinon Room, 1205 Camino Carlos Rey, Santa Fe
3.0 General CLE Credits

Co-Sponsors: First Judicial District Court and Second Judicial District Court
☐ Standard Fee $95  ☐ Government/Paralegal $85

The second workshop will cover several difficult areas identified in the first workshops held during the spring - how to handle open conflict, entrenched impasses, and hardened combative stances – how to use mediation skills, including joint sessions, to enhance the settlement facilitation process. This workshop will confirm basic techniques and procedures for neutrals and advocates together with presentation of advanced skills and problem solving.

Cynthia Olson will be the special guest and ADR expert in both locations. Cynthia trains mediators and designs ADR programs, practices, and policies for the judiciary, state government, and private sector.

12:15 p.m. Lunch provided 12:45-4 p.m. CLE

For further information, please contact:
Celia Ludi
ADR Program Director
First Judicial District Court
(505) 827-5072
sfedcal@nmcourts.com

David Levin
Director, Court Alternatives
Second Judicial District Court
(505) 841-7475
albdpl@nmcourts.com

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MAIL: CLE, PO Box 92860, Albuquerque, NM 87199

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Table of Contents

Notices ..........................................................................................................................6–9
Legal Education Calendar ............................................................................................10–11
Writs of Certiorari ......................................................................................................12–13
List of Court of Appeals’ Opinions ...........................................................................14
Opinions ....................................................................................................................15–44

From the New Mexico Court of Appeals

2006-NMCA-078, Nos. 24,320/24,805: American Civil Liberties Union of New Mexico v. City of Albuquerque .................................................................15
2006-NMCA-079, Nos. 25,516/25,517: State v. Lopez ...........................................23
2006-NMCA-080, No. 24,277: Murken v. Deutsche Morgan Grenfell, Inc. ........26
Services, L.L.C. .........................................................................................................30

Advertising ...............................................................................................................45

Professionalism Tip

With respect to the courts and other tribunals:
I will avoid the appearance of impropriety at all times.

Meetings

August

14 Taxation Section Board of Directors, noon, via teleconference
15 Solo and Small Firm Practitioners Section, noon, State Bar Center
16 Bankruptcy Law Section Board of Directors, noon, U.S. Bankruptcy Court, 
10th floor conference room
18 Appellate Practice Section Annual Meeting, 12:45 p.m., State Bar Center
18 Prosecutors Section Board of Directors, 3 p.m., State Bar Center
24 Senior Lawyers Division Board of Directors, 4:30 p.m., State Bar Center
24 Technology Committee Workshop, 5 p.m., State Bar Center
31 Natural Resources, Energy, and Environmental Law Section Board of 
Directors, noon, State Bar Center

State Bar Workshops

August

23 Consumer Debt/Bankruptcy Workshop 
6 p.m., State Bar Center, Albuquerque
24 Consumer Debt/Bankruptcy Workshop 
5:30 p.m., Branigan Library, Las Cruces

September

27 Consumer Debt/Bankruptcy Workshop 
6 p.m., State Bar Center, Albuquerque

October

25 Consumer Debt/Bankruptcy Workshop 
6 p.m., State Bar Center, Albuquerque

December

6 Consumer Debt/Bankruptcy Workshop 
6 p.m., State Bar Center, Albuquerque

Consumer Debt/Bankruptcy workshops include a one-on-one consultation with an attorney. For more information, call Marilyn Kelley at (505) 797-6048 or 1-800-876-6227, or visit the SBNM Web site, www.nmbar.org.
NOTICES

COURT NEWS

NM Supreme Court Law Library

For the convenience of state employees, the judiciary and the general public, the Supreme Court Law Library is open extended hours:

Monday-Friday, 8 a.m.–5:30 p.m.
Saturday, 10 a.m.–3 p.m.
Closed holiday weekends

The library has statutes, rules, regulations, etc., plus free computer access to Westlaw and Lexis. It also has many other computer-based research tools.

Phone: (505) 827-4850; fax: (505) 827-4852; e-mail: libref@nmcourts.com; Website: www.supremecourtlawlibrary.com.

Board of Legal Specialization

Comments Solicited

The attorneys listed below are applying for certification as specialists in the area of law identified. Application is made under the New Mexico Board of Legal Specialization, Rules 19-101 through 19-312 NMRA, which provide that the names of those seeking to qualify shall be released for publication. Further, any person may comment upon any of the applicant’s qualifications within 30 days after the independent inquiry and review process carried on by the board and appropriate specialty committee. The board and specialty committee encourage attorneys and others to comment upon any applicant. Address comments to New Mexico Board of Legal Specialization, PO Box 93070, Albuquerque, NM 87199.

Employment and Labor Law
Thomas L. Stahl

Natural Resources Law – Oil and Gas
Michael Gibson

First Judicial District Court

Destruction of Tapes
Criminal, Civil, Children’s Court, Domestic, Incompetency/Mental Health, Adoption and Probate Cases 1971 to 1991

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 1st Judicial District Court will destroy tapes filed with the Court in Criminal, Civil, Children’s courts, domestic, incompetency/mental health, adoption and probate cases for years 1971 to 1991, included 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. 6 by Order of the Court.

Second Judicial District Court

Destruction of Tapes

Pursuant to the Judicial Records Retention and Disposition Schedules, the 2nd Judicial District Court will destroy tapes filed with the Court in the criminal cases for years 1973 to 1984, included 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, may verify tape information with the Archives and Special Services Division, at (505) 841-6717, from 8 a.m. to noon and from 1 p.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed after Aug. 25.

Retirement Reception
A retirement reception in honor of Dan Cathey, program manager, administration, will be held from 2 to 4 p.m., Aug. 30, in the 3rd floor conference center of the 2nd Judicial District Courthouse, 400 Lomas Blvd. NW, Albuquerque.

Third Judicial District Court

District Attorney’s Office

The 3rd Judicial District Attorney’s Office has relocated. All correspondence should be sent to the following address:
845 N. Motel Boulevard
Second Floor, Suite D
Las Cruces, NM 88007
Telephone: (505) 524-6370
Fax: (505) 524-6379

Fifth Judicial District Court

Judicial Appointment

Governor Bill Richardson has appointed J. Richard Brown to serve as a judge on New Mexico’s 5th Judicial District Court, Division IX, Carlsbad. Brown is a graduate of Carlsbad High School, the University of New Mexico and the UNM School of Law. He has practiced law for 15 years as a trial attorney and managing attorney in the New Mexico public defender’s district office in Carlsbad and as an associate with the law firm of Grove Burnett. Brown is a member of the New Mexico Criminal Defense Lawyers Association and is also a member of the National Association of Criminal Defense Lawyers. He is a former board member and umpire-in-chief of the Shorthorn Little League. Brown, one of two candidates recommended to Governor Richardson by the Judicial Nominating Commission, stands for election in 2006.

Judicial Appointment

Governor Bill Richardson has appointed Stephen L. Bell to fill a newly created judicial position in Chaves County. Bell, currently an attorney with Atwood, Malone, Turner & Sabin, is a graduate of the University of Texas Law School and earned his undergraduate degree in honors studies from Texas Tech University. He is a fellow at the American College of Trial Lawyers and has been named one of the best lawyers in America since 2001. Bell has practiced law for 28 years, specializing in personal injury, commercial and appellate law.

Ninth Judicial District Court

Judicial Appointment

Governor Bill Richardson has appointed David Reeb to serve as a judge on New Mexico’s 9th Judicial District Court, Division V, Clovis. Reeb is a graduate of Overland High School in Aurora, Colorado; the University of Colorado, Boulder; and the Creighton University School of Law. He has practiced law for 28 years, specializing in personal injury, commercial and appellate law.

Bar Bulletin

Employment and Labor Law

Governor Bill Richardson has appointed Stephen L. Bell to fill a newly created judicial position in Chaves County. Bell, currently an attorney with Atwood, Malone, Turner & Sabin, is a graduate of the University of Texas Law School and earned his undergraduate degree in honors studies from Texas Tech University. He is a fellow at the American College of Trial Lawyers and has been named one of the best lawyers in America since 2001. Bell has practiced law for 28 years, specializing in personal injury, commercial and appellate law.
Eleventh Judicial District Court

Destruction of Exhibits

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition Schedules, the 11th Judicial District Court, McKinley County, will destroy exhibits filed with the Court in the civil and criminal cases for the years of 1986 through 2003, included but not limited to cases which have been consolidated. Cases on appeal are excluded. Counsel for parties are advised that exhibits may be retrieved beginning June 8 to Aug. 17. Counsel who have cases with exhibits should verify exhibit information with the judicial lead worker, (505) 863-6816, from 8 a.m. to noon and from 1 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 by Order of the Court.

Judicial Appointment

Governor Bill Richardson has appointed Karen L. Townsend to fill a vacant judicial position in San Juan County. Townsend, a former prosecutor for the City of Aztec, is a graduate of the Syracuse University Law School and earned her undergraduate degree from Fort Lewis College. She is a sole practitioner and has been admitted to practice law in New Mexico as well as in Navajo, Hopi, Laguna Pueblo, Ute, Taos Pueblo, and Zuni tribal courts. Townsend has practiced law for the last 16 years and has extensive experience in personal injury, domestic relations, commercial, juvenile and criminal law. She has served as a domestic violence hearing officer and guardian ad litem for abused and neglected children for the 11th Judicial District Court. This is a new position created by the 2006 Legislature.

Twelfth Judicial District Court

Destruction of Tapes—Civil

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition schedules, the 12th Judicial District Court (Otero County) will destroy tapes filed with the Court in civil cases for years 1995–1996. Cases still pending are excluded. Attorneys who have cases with tapes and wish to have duplicates made, should verify tape information with Judicial Manager Karen Duprey, (505) 437-7310, ext. 122, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed Aug. 15.

Destruction of Tapes—Civil

Pursuant to the Supreme Court ordered Judicial Records Retention and Disposition schedules, the 12th Judicial District Court (Otero County) will destroy tapes filed with the Court in the civil cases for year 2001. Cases still pending are excluded. Attorneys who have cases with tapes and wish to have duplicates made should verify tape information with the Judicial Manager Karen Duprey, (505) 437-7310, ext. 122, from 8 a.m. to 5 p.m., Monday through Friday. Aforementioned tapes will be destroyed Aug. 28.

Santa Fe Municipal Court

Brown Bag Lunch

Santa Fe Municipal Judge Ann Yalman invites all attorneys who practice in the Santa Fe Municipal Court to meet with her at Municipal Court at 11:30 a.m., Aug. 23, for a discussion of court practices and procedures.

Video Arraignments

The Santa Fe Municipal Court is now conducting video arraignments for all detainees. The arraignments are currently scheduled for noon, Monday through Friday.

STATE BAR NEWS

Appellate Practice

Section

Scholarships Available for Annual Institute

The Appellate Practice Section will present the 2006 Appellate Practice Institute Aug. 18 at the State Bar Center. The standard fee is $189, $179 for section members, and will provide 5.8 general and 1.0 ethics CLE credits. To register for the CLE, call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and click on CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199. The section's annual meeting will also be held Aug. 18 during the lunch break at 12:45 p.m. Agenda items should be sent to Chair Bryan Biedscheid, bryan@swbpc.com or (505) 988-1668.

Attorney Support Group

The next Attorney Support Group meeting will be held at 5:30 p.m., Sept. 4, at the First United Methodist Church at Fourth and Lead SW, Albuquerque. The group meets regularly on the first Monday of the month. For more information, contact Bill Stratvert, (505) 242-6845.

Casemaker

Free Legal Research is Here

Casemaker is now live and accessible on the State Bar Web site at www.nmbar.org. Casemaker is free online legal research made available to State Bar members. Contact Veronica Cordova, vcordova@nmbar.org, or (505) 797-6039, for technical assistance or questions.

Children’s Law Section

The Children’s Law Section is sponsoring a “Noon Knowledge” program from noon to 1:30 p.m., Aug. 18, on Gangs 101, a basic course on gangs in New Mexico. The presentation will take place at the John E. Brown Juvenile Justice Center, 5100 Second Street NW, Albuquerque, in conference rooms A and B. The guest speaker will be Nick Costales, a juvenile probation and parole officer who has extensive knowledge of the subject.

Public Law Section

Annual Meeting and CLE

The Public Law Section will hold its annual meeting at 12:30 p.m., Sept. 22, in conjunction with the New Mexico Administrative Law Institute. All section members are encouraged to attend. Agenda items should be sent to Chair Al Lama, Al.Lama@state.nm.us or (505) 827-0475.

The cost of the CLE program is $189 and $169 for section members, government attorneys and paralegals. Lunch will be provided. See the CLE At-A-Glance insert in the July 17 (Vol. 45, No. 29) Bar Bulletin for more information. To register call (505) 797-6020; fax (505) 797-6071; visit www.nmbar.org and select CLE; or mail CLE, PO Box 92860, Albuquerque, NM 87199.

Technology Committee

Federal Rules and Electronic Discovery (FRED) Committee

The State Bar Technology Committee is assembling a discussion panel to create best practices guidelines for the new Electronic Discovery Federal Rules of Civil Procedure

Bar Bulletin - August 14, 2006 - Volume 45, No. 33 7
which were adopted by the Supreme Court on April 12 and are scheduled to be implemented Dec. 1. These new rules are sweeping and will affect all aspects of the litigation practice in the federal courts and eventually other jurisdictions as well. The Technology Committee is looking for judges and attorneys to be a part of this committee. No "technical" background is necessary, and all are welcome. The first meeting is scheduled from 4 to 6 p.m., Aug. 29, at the State Bar Center. Contact Tony Horvat, thorvat@nmbar.org or (505) 797-6033, to R.S.V.P. and to join the committee.

Using Microsoft Word Styles in the Legal Environment

The Technology Committee will be holding a free workshop from 5 to 6 p.m., Aug. 24, at the State Bar Center, Albuquerque. In this one-hour session, participants will learn how easy it is to use Word Styles to quickly format documents and make tables of contents as easy as clicking a button. Paralegals, attorneys and support staff are all invited to attend. Class is limited to 11 attendees. Reservations should be made by Aug. 22 with Mary Patrick, CLE program coordinator, mpatrick@nmbar.org or (505) 797-6059. CLE credit will not be provided.

Other Bars

Albuquerque Bar Association

Monthly Luncheon and CLE

The Albuquerque Bar Association’s monthly luncheon will be held at noon, Sept. 5, at the Albuquerque Petroleum Club. Space Law and Returning to the Moon will be presented by Harrison H. “Jack” Schmitt. As an astrogeologist, businessman, space advocate, and former NASA astronaut and U.S. senator, Schmitt is uniquely qualified to think and talk about not just the science and technology of space, but the issues of politics, management, investment, legal principles and human commitment it will take to achieve success in a new era of human enterprise, achievement and settlement in space. Schmitt has recently published Return to the Moon: Exploration, Enterprise, and Energy in the Human Settlement of Space.

Lunch only: $20 members/$25 non-members; lunch and CLE: $40 members/$30 non-members; CLE only: $20 members/$30 non-members.

Register for lunch by noon, Sept. 1. Lunch is an additional $5 without reservations. Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

Roast Aug. 26

The Albuquerque Bar Association invites members of the legal community to join them for an evening of laughter, merriment and irreverence as they roast Bruce Hall of Rodey, Dickason, Sloan, Akin, & Robb, PA. The event will be held at 6 p.m., Aug. 26, at the Hotel Albuquerque, Old Town (former Sheraton Old Town).

By reservation only: $65 individual; $650 table of ten (includes program recognition). Register at www.abqbar.com; by e-mail at abqbar@abqbar.com; by mail to ABA, 400 Gold SW, Suite 620, Albuquerque, NM 87102; by fax to (505) 842-0287; or call (505) 842-1151 or (505) 243-2615.

Other News

Business and Employer Workshops

The New Mexico Taxation and Revenue Department and the Internal Revenue Service are offering free, one-day workshops in Albuquerque for businesses with or without employees. These workshops are designed to address the tax requirements for new and existing businesses.

The New Business Workshops are for all new business owners. Items to be covered include New Mexico gross receipts tax, IRS filing requirements and a brief summary of other new business issues. New Business Workshops are offered the first, second and third Tuesday of every month.

The New Employer Workshops are for small businesses that have employees or plan to have employees. Regulatory and tax filing requirements from six different federal and state agencies will be covered. New Employer Workshops are offered the fourth Tuesday of every month.

All workshops will be held at the New Mexico Taxation and Revenue Department, 5301 Central, NE (Bank of the West building), 10th Floor, Conference Room A, 8:15 a.m. to 3:45 p.m., with a one-hour lunch.

New Business Workshops: Aug. 15; Sept. 5, 12 and 19; Oct. 3, 10 and 17; Nov. 7, 14 and 21; Dec. 5, 12 and 19.

New Employers Workshops: Aug. 22; Sept. 26; Oct. 24; Nov. 28; and Dec. 26.

For additional information, contact the State of New Mexico Taxation and Revenue Department, (505) 841-6200.

Children’s Law Summit on Serving Former Foster Youth

September 15, 2006

A number of child welfare system stakeholders have come together to develop a plan for serving 18- to 21-year-old youth who have exited the foster care system. As part of this planning, the Court Improvement Project of the New Mexico Supreme Court; the Children, Youth, and Families Department (CYFD); the Corinne Wolfe Children’s Law Center; the UNM School of Law; the New Mexico Citizen Review Board; the New Mexico CASA Network; and Red Mountain Family Services are sponsoring a one-day summit. Preserving Connections/Promoting Independence will explore how we can maximize independence and create the skills, supports and resources young people need to live on their own. With assistance from national legal experts, we will look at the optimal role for the court, CYFD, the youth attorney, and others.

The summit will be held from 8:30 a.m. to 4 p.m., Sept. 15, at the Hotel Albuquerque in Old Town. The registration fee of $35 includes materials and a working lunch; no CLE credits are being offered. To register, download a registration form from http://ipl.unm.edu/childlaw or contact Hilari Lipton, (505) 277-1652.

New Mexico Christian Legal Aid

New Mexico Christian Legal Aid (NMCLA) will hold its annual training session from 11:30 a.m. to 5 p.m., Sept. 22, at the State Bar Center. The training, which will be eligible for CLE credit, will cover the unique pro bono services that NMCLA provides to the homeless. Learn how to be a part of NMCLA and make a difference in our community! Free lunch will be provided. Call Denise Trujillo or Jim Roach at (505) 243-4419 for reservations and/or questions.
By Veronica Cordova, Assistant Director of Administration

This month, users are directed to “Divisions/Sections/Committees” on the State Bar Web site. This area has attorney resources and includes links to three divisions, 19 sections and 20 committees.

Divisions
The Young Lawyers Division and the Senior Lawyers Division contribute content to the Web site and include resources such as the Bill Kitts Mentor Program, which pairs newer lawyers with more experienced members of the profession. The Young Lawyers Division is also conducting its mentorship program to match attorneys with UNM law students. Board members and bylaws are published in addition to other activities that these divisions conduct during the year. The Paralegal Division site is also accessible and hosts many resources for its members.

Sections
Users can access information for each section which many times includes the board of directors, bylaws, newsletters, links to additional resources in that particular practice area, articles, and much more. Each section determines content to be published on the Web site that helps serve their members and reach prospective members. Some content is restricted to attorney members only and is not accessible to the general public. Members of the Bar are encouraged to review section content and consider membership in the section to advance the objectives of each respective section. Information and resources are continually being developed on section sites so these resources serve members and the public alike.

Committees
Many committees have expanded information on the Web site in addition to their main mission statement. Examples of content available from the committees include the Ethics Advisory Opinions, Law Office Management Resources, Lawyers Assistance Program, and publications and surveys.

Members are encouraged to visit the site. Ideas and suggestions to continually improve the site are always welcome. Send comments to vcordova@nmbar.org, or call (505) 797-6039.

Corrections to the 2006-2007 Bench and Bar Directory

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Celia A. Ludi, Alternative Dispute Resolution
First Judicial District
827-5072

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LMcCary@aol.com

Lina Weisdorfer
Tenth Judicial District Clerk
Harding County Courthouse
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4th and Pine Street
Mosquero, NM 87733
673-2252 F 673-2252
mosdliw@nmcourts.com
## Legal Education

### August

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
<th>Sponsor</th>
<th>Type</th>
<th>Duration</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>14</td>
<td>Internet Sources and Resources</td>
<td>TRT, Inc.</td>
<td>Teleconference</td>
<td>2.0 G</td>
<td>(703) 779-2006</td>
</tr>
<tr>
<td></td>
<td>to Research and Resolve Access Disputes</td>
<td>National Business Institute</td>
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**Key**

G = General  
E = Ethics  
P = Professionalism  
VR = Video Replay  
Programs have various sponsors; contact appropriate sponsor for more information.
## Low Impact Development and Storm Water Management
Albuquerque
Lorman Education Services
6.0 G
(715) 833-3940
www.lorman.com

## Convenient Truths: Techniques for Getting Ahead of the Game
Branigan Library, Las Cruces
NMCDLA
6.0 G
(505) 992-0050
www.nmcdla.org

## Do You Really Want This Case?
Teleconference
TRT, Inc.
2.0 G
(703) 779-2006
www.trtcle.com

## Fostering Cooperation in Separated Families: Ethical Issues for Professionals
Albuquerque
Samaritan Counseling Center
6.0 E
(505) 842-5300

### SEPTEMBER

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## Moral Character Test: Its Affect on Admissions and Retention
Teleconference
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www.trtcle.com

## Turning the Tables: Bias Directed at Attorneys
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## Workers’ Compensation Update
Albuquerque
Council on Education in Management
11.0 G
(800) 942-4494
www.counciloned.com

## Arbitration Training Course
Albuquerque
Construction Dispute Resolution Services
12.0 G, 1.0 E, 2.0 P
(505) 474-9050
www.constructiondisputes-cdrs.com

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TRT, Inc.
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(703) 779-2006
www.trtcle.com

## Dispute Review Board Training Course
Albuquerque
Construction Dispute Resolution Services
5.5 G, 1.0 E, 1.0 P
(505) 474-9050
www.constructiondisputes-cdrs.com
**Writs 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 14, 2006

### Petitions for Writ of Certiorari Filed and Pending:

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<td>25,998</td>
<td>7/10/06</td>
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<td>State v. Marin</td>
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<td>State v. Quintana</td>
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<td>State v. Carpenter</td>
<td>25,999</td>
<td>6/28/06</td>
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<td>25,455</td>
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<td>State v. Lucero</td>
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<td>6/14/06</td>
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<td>26,458</td>
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<td>25,950/25,968</td>
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<td>24,026/24,027/24,042</td>
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<td>Case v. Hatch</td>
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Note: Dates are as updated by the Clerk of the New Mexico Supreme Court.
**WRITS OF CERTIORARI**

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

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New Mexico Supreme Court
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**Effective August 14, 2006**

| No. 29,725 | McMinn v. MBF Operating Acquisition Corp. (COA 25,006) | 8/20/06 |
| No. 29,689 | Garcia v. Dorsey (12-501) | 8/20/06 |
| No. 29,724 | NM Dept. of Labor v. Echostar (COA 25,777) | 8/20/06 |
| No. 29,751 | State v. Bricker (COA 24,719) | 5/1/06 |
| No. 29,752 | Campos v. Bravo (12-501) | 5/3/06 |
| No. 29,763 | Rehders v. Allstate Insurance Company (COA 25,284) | 5/23/06 |
| No. 29,717 | Rael v. Blair (12-501) | 5/31/06 |
| No. 29,760 | Swanton v. Ortiz (COA 25,201) | 6/2/06 |
| No. 29,753 | State v. Drennan (COA 26,002) | 6/2/06 |
| No. 29,745 | State v. Salazar (COA 24,468) | 6/2/06 |
| No. 29,768 | Luna v. Lewis Casing Crews (COA 26,338) | 6/2/06 |
| No. 29,775 | State v. Martinez (COA 24,601) | 6/2/06 |
| No. 29,790 | Board of Veterinary Medicine v. Rieger (COA 25,610) | 6/6/06 |
| No. 29,801 | State v. Lopez (COA 25,110) | 6/14/06 |
| No. 29,806 | State v. Walters (COA 24,885) | 6/14/06 |
| No. 29,803 | State v. Lopez (COA 24,566) | 6/15/06 |
| No. 29,846 | State v. Lopez (COA 25,516/25,517) | 7/3/06 |
| No. 29,783 | Gardiner v. Galles Chevrolet (COA 26,560) | 7/6/06 |
| No. 29,867 | Romero v. Board of Regents (COA 26,414) | 7/20/06 |

**Certiorari Granted and Submitted to the Court**

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

| No. 28,660 | State v. Johnson (COA 23,463) | 3/11/05 |
| No. 28,997 | Maestas v. Zager (COA 24,200) | 6/14/05 |
| No. 29,058 | Sanchez v. Pellicer (COA 25,082) | 9/29/05 |
| No. 29,016 | State v. Jade G. (COA 23,810) | 10/11/05 |
| No. 29,017 | State v. Jade G. (COA 23,810) | 10/11/05 |
| No. 29,134 | State v. Kathleen D.C. (COA24,540) | 11/14/05 |
| No. 29,202 | Montgomery v. Lemos Altos (COA 24,297) | 11/16/05 |
| No. 29,246 | Chavarria v. Fleetwood (COA 23,874/24,444) | 12/12/05 |
| No. 29,178 | State v. Maestas (COA 24,507) | 12/13/05 |
| No. 29,160 | Benavidez v. City of Gallup (COA 25,373) | 12/13/05 |
| No. 29,158 | State v. Otto (COA 23,280) | 2/13/06 |
| No. 29,385 | State Farm v. Luebbers (COA 23,556) | 2/15/06 |
| No. 29,350 | Doe v. Santa Clara Pueblo (COA 25,125) | 3/27/06 |
| No. 29,351 | Lopez v. San Felipe Pueblo (COA 25,884) | 3/27/06 |
| No. 29,218 | Montoya v. Ulibarri (12-501) | 4/10/06 |
| No. 29,476 | Salazar v. Torres (COA 23,841) | 4/11/06 |
| No. 29,484 | State v. Wilson (COA 25,017) | 5/22/06 |
| No. 29,286 | State v. Gutierrez (COA 25,279) | 5/22/06 |
| No. 29,527 | State v. Chee (COA 25,112) | 5/22/06 |
| No. 29,712 | Smith v. City of Santa Fe (COA 24,801) | 6/12/06 |
| No. 29,336 | State v. Kerby (COA 24,350) | 6/13/06 |
| No. 29,533 | State v. Kerby (COA 25,891) | 6/13/06 |
| No. 29,563 | State v. Simmons (COA 25,594) | 6/13/06 |
| No. 29,528 | State v. Jensen (COA 24,905) | 6/13/06 |
| No. 29,562 | State v. Scott (COA 24,735) | 8/14/06 |
| No. 29,436 | Martinez v. Mills (COA 24,673) | 8/14/06 |
| No. 29,624 | Maes v. Audubon Indemnity Ins. Group (COA 25,598) | 8/15/06 |
| No. 29,513 | State v. Grogan (COA 25,699) | 8/15/06 |
| No. 29,334 | State v. Garvin (COA 24,299) | 8/28/06 |
| No. 29,153 | State v. Arnijo (COA 24,951) | 8/28/06 |

**Petition for Writ of Certiorari Denied:**

| No. 29,811 | Starko, Inc. v. Gallegos (COA 25,042) | 7/25/06 |
| No. 29,839 | State v. Greenlee (COA 26,130) | 7/26/06 |
| No. 29,862 | State v. Bomar (COA 26,141) | 7/26/06 |
| No. 29,873 | State v. Gallardo (COA 26,358) | 7/26/06 |
| No. 29,874 | State v. Brasheer (COA 26,466) | 7/26/06 |
| No. 29,877 | State v. Lui (COA 24,921) | 7/26/06 |
| No. 29,896 | Chavez v. Burlington (COA 26,273) | 7/26/06 |
| No. 29,925 | Pinon v. Ulibarri (12-501) | 7/26/06 |
| No. 29,851 | Butler v. Deutsche Bank (COA 25,556/25,557/25,558) | 7/27/06 |
| No. 29,875 | Hunt v. Ulibarri (12-501) | 7/27/06 |
| No. 29,906 | Roman v. Romero (12-501) | 7/27/06 |
| No. 29,907 | Saelveda v. Janecka (12-501) | 7/27/06 |
| No. 29,892 | State v. Archuleta (COA 26,390) | 7/31/06 |
| No. 29,897 | Grygorwicz v. Trujillo (COA 25,317) | 7/31/06 |
| No. 29,895 | Davis v. Farmers Ins. Co. of AZ (COA 25,312) | 7/31/06 |
| No. 29,842 | State v. Dennis (COA 26,527) | 8/3/06 |
| No. 29,911 | State v. Proctor (COA 26,321) | 8/3/06 |
| No. 29,910 | State v. Gutierrez (COA 26,314) | 8/3/06 |

**Petition Dismissed:**

| No. 29,854 | Harris v. Trujillo (COA 25,262) | 7/31/06 |
### Published Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>District</th>
<th>Case Details</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>24869</td>
<td>2nd Jud Dist Bernalillo</td>
<td>DM-84-3430, DM-99-4275, C PALMER v D PALMER (affirm and remand)</td>
<td>7/31/2006</td>
</tr>
<tr>
<td>25979</td>
<td>11th Jud Dist San Juan</td>
<td>JQ-00-35, CYFD v ATHENA H (affirm)</td>
<td>8/3/2006</td>
</tr>
</tbody>
</table>

### Unpublished Opinions

<table>
<thead>
<tr>
<th>No.</th>
<th>District</th>
<th>Case Details</th>
<th>Date Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>26720</td>
<td>2nd Jud Dist Bernalillo</td>
<td>LR-05-110, STATE v V ARREY (affirm)</td>
<td>8/1/2006</td>
</tr>
<tr>
<td>26377</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CR-05-64, STATE v D RUTHERFORD (affirm)</td>
<td>8/2/2006</td>
</tr>
<tr>
<td>26503</td>
<td>2nd Jud Dist Bernalillo</td>
<td>CV-05-8952, E OROZCO v LIGHTHOUSE FINANCE (affirm)</td>
<td>8/2/2006</td>
</tr>
<tr>
<td>26553</td>
<td>3rd Jud Dist Dona Ana</td>
<td>CR-05-727, STATE v M MEDRANO (affirm)</td>
<td>8/2/2006</td>
</tr>
<tr>
<td>25444</td>
<td>3rd Jud Dist Dona Ana</td>
<td>DM-03-25, R TARIN v R TARIN (reverse and remand)</td>
<td>8/3/2006</td>
</tr>
<tr>
<td>26167</td>
<td>12th Jud Dist Lincoln</td>
<td>CR-05-01, STATE v D MCMINN (conditionally affirm and remand)</td>
<td>8/3/2006</td>
</tr>
<tr>
<td>26432</td>
<td>5th Jud Dist Eddy</td>
<td>CR-03-80, ARTESIA CITY OF v F PORTER (affirm)</td>
<td>8/3/2006</td>
</tr>
</tbody>
</table>

Slip Opinions for Published Opinions may be read on the Court's website:
IOLTA News

What is IOLTA?

IOLTA is an idea that originated in British, Canadian and Australian jurisdictions in the 1960s. In the United States, IOLTA was pioneered in Florida and now exists in every state in the country.

The New Mexico IOLTA program was approved by the State Supreme Court in 1984 and is now one of the largest non-governmental funders of civil legal services for poor people in the state. Through IOLTA, attorneys and firms may pool otherwise unproductive client funds in interest-bearing accounts.

Only those funds that are either nominal in amount or held for a relatively short period of time (making investment on the client’s behalf impractical) are eligible to earn interest for the IOLTA program. That interest is then paid to the Center for Civic Values, the administrator of IOLTA, for distribution to programs that provide civil legal services to poor people, public law-related education or improvements in the administration of justice.

Enrolling in IOLTA is easy. By completing a simple form, attorneys can instruct their financial institutions to convert their existing trust accounts to interest-bearing IOLTA accounts. If an attorney doesn’t currently have a trust account, by completing the same easy form, s/he can establish an IOLTA account. Nearly all New Mexico financial institutions are cooperating partners in the IOLTA program.

However, if an attorney wants to open an IOLTA account at a non-participating institution, CCV’s staff is happy to help.

There are no tax consequences for the financial institution, the law firm or the client. Interest earned and paid on IOLTA accounts is reported to the Internal Revenue Service via a Form 1099 generated by the financial institution and bearing CCV’s taxpayer identification number.

Are YOU in Compliance?

The Rules Governing Discipline and Professional Conduct require:

If you are an attorney in private practice, you or your firm MUST maintain a trust account.

If you decline to participate in IOLTA, by January 10 every year you MUST send a letter to the Clerk of the Supreme Court, PO Box 848, Santa Fe NM 87504-0848.

Whether you participate in IOLTA or opt out, you MUST provide accurate information, including the account name, number and financial institution, for all trust accounts you hold on the annual certification included with your Bar dues form—see text of rules inside.

REMEMBER: When you enroll in IOLTA, you join hundreds of other lawyers and firms who have decided to direct earnings (on otherwise unproductive client funds) to nonprofits that provide law-related programs and services to people across New Mexico.

When you opt out of IOLTA, you’re choosing, instead, to let your financial institution have “free” use of those funds. Call 764-9417 (or 800-451-1941, outside ABQ) to enroll today!

In our last insert, the following IOLTA participants were incorrectly listed. We apologize and offer the accurate firm names below.

- Jones Snead Wertheim & Wentworth PA
- Little & Drantell PC

We Goofed!

Participation in IOLTA is free and doesn’t affect the administrative duties of managing a trust account. When converted to an IOLTA account, the only change that will occur is that the trust account will generate interest, and the bank statements for the account will reflect the interest earned and paid to the IOLTA program.
Court Approves Grants

The State Supreme Court approved distribution of $195,000 in IOLTA grants to seven nonprofit organizations that provide a wide variety of services to the citizens of New Mexico. The 2006 distribution brings the total awarded by IOLTA to more than $3.15 million since the first grants were given in 1987, and this year's budget represents a 21% increase over 2005.

Last September, New Mexico 501(c)(3) organizations that met the established IOLTA criteria were invited to apply for funding. Completed applications were due in October, and the grant committee met in November to review them. The group's recommendations were submitted first to the CCV Board of Directors for review and then to the New Mexico State Supreme Court for approval. The grant committee is composed of seven members who are appointed to three-year terms by the Supreme Court, the State Bar of New Mexico and CCV.

The grant committee is composed of seven members who are appointed to three-year terms by the Supreme Court, the State Bar of New Mexico and CCV: Kathy Silva, Chair, Sandia National Labs; David M. Berlin, Esq., Duhigg, Cronin, Spring & Berlin; John P. Hays, Esq., Cassut, Hays & Friedman; Kim Griffith, Esq., Sheehan, Sheehan & Stelzner; Edward T. O'Leary, First National Bank of Santa Fe; The Hon. John Pope, 13th Judicial District Court; The Hon. Patricio M. Serna, Supreme Court of New Mexico.

Nationwide, IOLTA programs contribute more than $120 million dollars each year to fund programs that provide civil legal services for the poor, law-related education for the public or improvements in the administration of justice.

Applications for 2007 funding will be available on the CCV website on October 1 and must be postmarked by November 1. Call 764-9417, extension 12, for more information about IOLTA grants or visit IOLTA on the web at civicvalues.org.
**Are YOU in Compliance?**

17-204. Required records.

**(B) Certificate of compliance.** On forms to be prescribed by the Disciplinary Board, every attorney subject to these rules shall annually submit to the state bar the attorney's certificate of compliance with this rule and Rule 16-115 of the Rules of Professional Conduct. Such certificate shall be submitted to the state bar with the registration statement filed pursuant to Rule 17-202. The state bar shall forward the original of each certificate of compliance to the Disciplinary Board and a copy of each certificate of compliance to the Center for Civic Values.

**(C) Applicability of rule.** This rule shall not apply to any attorney whose entire compensation derived from the practice of law during the year preceding the filing of any registration statement was received in the attorney's capacity as an employee handling legal matters of a corporation or an agency of the federal, state or local government. Any such attorney shall, in lieu of the required certificate, certify on the same form provided by the clerk that the attorney has not had in possession any funds, securities or other properties of the client.

16-115 (D) Safekeeping property.

7. *Every lawyer* subject to these rules shall include in the annual certificate of compliance required by Rule 17-204 of the Rules Governing Discipline that all clients' funds which are nominal in amount or to be held for a short period of time are deposited in an IOLTA account unless the lawyer or the law firm with which the lawyer is associated declines by January 10 of the calendar year to maintain an IOLTA account for the calendar year.

8. A *lawyer or law firm* may decline to maintain an IOLTA account by submitting in writing a letter to the clerk of the Supreme Court on or before January 10 of each calendar year the lawyer wishes to decline participation in the IOLTA program.

**2006 Grantees**

For 2006, IOLTA has awarded $184,000 to New Mexico nonprofits that provide a wide variety of programs and services to citizens across the state.

**Albuquerque T-VI Foundation** $5,000
The Foundation will fund a position in the TVI Paralegal Law Center that will provide limited, high-quality legal assistance to low-income South valley residents.

**Catholic Charities** $5,000
Catholic Charities will advocate on behalf of battered immigrants seeking effective legal remedies.

**Legal FACS** $15,500
Legal FACS (Forms and Courthouse Services) will provide legal services to low-income civil litigants in Bernalillo, Sandoval, Torrance and Valencia counties through its "courthouse booth" and maintain its self-litigant website.

**New Mexico Center on Law and Poverty** $83,500
NMCLP will supply advocacy services for low-income persons throughout the state and will provide technical assistance and training to others who advocate for New Mexico's poor.

**New Mexico Environmental Law Center** $10,000
NMELC will offer free legal representation to low-income, minority communities that are facing environmental justice, degradation and health issues.

**New Mexico High School Mock Trial** $35,000
The Mock Trial program will educate high school students about domestic and teen dating violence.

**New Mexico State Bar Foundation Bridge to Justice Legal Helpline** $10,000
The Bridge to Justice Legal Helpline will assist the working poor of New Mexico by providing legal information, advice, issue assessment and brief services.

**Senior Citizens' Law Office** $20,000
SCLO will provide a Health Care Rights project by advocating for and educating senior citizens in managed health care plans in Bernalillo County.

**Equal justice is a vital part of the bright constellation that guides our political fates and our national life.**

Thomas Jefferson
Third President
United States of America
Your IOLTA Dollars at Work

New Mexico State Bar Foundation
Bridge to Justice Legal Helpline

Catholic Charities  VAWA Immigration Project

Legal FACs (Forms and Courthouse Services)
Opinion

MICHAEL D. BUSTAMANTE
Chief Judge

{1} We consolidate the appeals of two cases brought by the American Civil Liberties Union (ACLU) and John Does, challenging the City of Albuquerque’s sex offender ordinances on the grounds that the ordinances violate the New Mexico and Federal Constitutions. We decline to address the issues raised in the older of the cases involving the City’s Sex Offender Alert Program (SOAP) because they are moot following the passage of a new state law. In the second case, we affirm the district court’s decision finding various provisions of the Albuquerque Sex Offender Registration and Notification Act (ASORNA) unconstitutional and upholding the remainder of the ordinance. We hold additional registration provisions not specifically addressed by the district court to be unconstitutional.

BACKGROUND

{2} The City of Albuquerque drafted SOAP in response to a directive by the Mayor to draft an ordinance designed to close asserted loopholes in the statewide Sex Offender Registration and Notification Act, NMSA 1978, §§ 29-11A-1 to -8 (2000) (amended 2005) (SORNA). The City Council responded with the adoption of SOAP, Council Bill No. O-03-92. SOAP contained both registration and notification provisions that were broader in scope than the provisions of SORNA. SOAP also contained additional provisions that prohibited offenders from residing within a certain distance of a school, or being alone with children other than their own. The ACLU challenged SOAP, alleging violations of the New Mexico Constitution and seeking a permanent injunction. The district court found that SOAP’s notification provisions, and its limitations on where an offender may live, violated procedural due process. The district court further held that the invalid provisions could not be severed without rendering SOAP incapable of accomplishing its legislative purpose, and therefore enjoined SOAP in its entirety. The City appealed.

{3} The City subsequently repealed SOAP and enacted a revised sex offender registration and notification ordinance, ASORNA, while the SOAP appeal was pending before this Court. ASORNA attempted to remedy the problems that rendered SOAP unconstitutional. Following the adoption of ASORNA, the ACLU challenged the new ordinance, on grounds similar to its prior challenge, and further argued that state law preempts ASORNA. The district court held that ASORNA is not preempted by state law. In addressing the ACLU’s constitutional challenges to ASORNA, the district court held that the registration requirements

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1 We note that HB 165 has now been codified into law, NMSA 1978, §§ 29-11A-1 to 10 (1995, as amended through 2005).
for non-New Mexico residents, and the “Alone With a Child” provision, violate equal protection, and the “sex offender location” limitations violate due process. The district court severed these provisions from ASORNA, denied the ACLU’s request for a stay while this appeal was pending, and allowed the ordinance to go into effect. The ACLU appealed.

While this second appeal was pending before this Court, the State Legislature adopted House Bill 165, which contained amendments to SORNA. HB 165 provided that the revisions to SORNA were prospectively applicable as of the effective date of the statute, July 1, 2005. HB 165 contains a State Preemption and Savings Clause, Section 29-11A-9, which preempts the field of sex offender registration and notification, but allows existing ordinances that do not conflict with SORNA to remain in effect until they are repealed. This Court permitted supplemental briefing by the parties to address the effects of HB 165 on the pending ASORNA litigation.

After a review of the records in both the SOAP and ASORNA litigation, we consolidated the appeals and hold as follows. We decline to address the issues raised in the SOAP litigation because the Preemption and Savings Clause of HB 165 prohibits the re-enactment of SOAP, and therefore the issues became moot when SOAP was repealed by the City Council. With respect to ASORNA, we hold that state law does not preempt ASORNA. In regards to the constitutional challenges to ASORNA, we affirm the district court’s ruling that (1) the registration provisions for non-residents violate equal protection; (2) the “sex offender location” limitations as modified by the district court, also challenged on due process grounds, are constitutional; (3) the Alone With a Child provision violates equal protection. We also hold that the notification provisions, challenged on due process grounds, are constitutional; ASORNA is not punitive, and therefore does not violate ex post facto, double jeopardy, or cruel and unusual punishment protections. The registration requirements for the offenses of kidnapping and false imprisonment, without any indication of sexual motive, violate substantive due process. Furthermore, we hold that the registration requirements allowing the Albuquerque Police Department (APD) to collect DNA samples and dental imprinting violate search and seizure protections. We begin with a brief discussion of our holding that the appeal in SOAP is moot. We then turn to ASORNA.

SOAP

6 We decline to address the issues raised on appeal in regards to SOAP because HB 165 effectively prohibited the reenactment of SOAP once it was repealed. HB 165 prohibits the enactment of sex offender ordinances not in effect on January 18, 2005. The bill provides:

A. The state preempts the field of sex offender registration and notification. Cities, counties, home rule municipalities and other political subdivisions of the state are prohibited from adopting or continuing in effect any ordinance, rule, regulation, resolution or statute on sex offender registration and notification.

B. After January 18, 2005, cities, counties, home rule municipalities and other political subdivisions of the state are prohibited from adopting or amending an ordinance, rule, regulation or resolution on sex offender registration and notification. An ordinance in effect on January 18, 2005 shall continue in force and effect until repealed; provided that the ordinance shall only continue in force and effect with regard to sex offenders who are required to register pursuant to the provisions of this ordinance, but who are not required to register pursuant to the provisions of the Sex Offender Registration and Notification Act. All other sex offenders shall register pursuant to the provisions of the Sex Offender Registration and Notification Act.

7 The repeal of SOAP, followed by the enactment of HB 165 renders SOAP moot. The doctrine of mootness “is a limitation upon jurisdiction or decrees in cases where no actual controversy exists.” Mower v. Rust, 95 N.M. 48, 51, 618 P.2d 886, 889 (1980). “[A]n action will be dismissed if the issues . . . become moot.” Id. “We must review the judgment of the district court in light of [the] law as it now stands, not as it stood when the judgment below was entered.” Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412, 414 (1972) (per curiam); see also Kremens v. Bartley, 431 U.S. 119, 126-27 (1977) (holding that enactment of a new statute repealing provisions declared unconstitutional in the court below renders claims on appeal moot).

8 There is no current controversy as to SOAP because it has been repealed and the City may not now revive it. To comment on SOAP would be to pass upon a law not in effect and, unless state law is changed, that cannot be reenacted. Thus, not only are we without a current controversy, it appears that there cannot be a controversy regarding SOAP in the foreseeable future. We note, however, that to the extent any provisions of SOAP are duplicated in ASORNA, those issues will be addressed in our analysis of ASORNA. We now turn our attention to ASORNA.

ASORNA

9 The City enacted ASORNA in an effort to cure the constitutional infirmities in SOAP. The district court found certain provisions of ASORNA unconstitutional and severed those provisions from the ordinance, leaving the remaining ordinance intact. The ACLU appealed, arguing that ASORNA is preempted by state law; suffers from vagueness and over breadth, and violates due process and equal protection; violates offenders’ rights to be free from unreasonable searches and seizures; and violates state and federal protections against double jeopardy, ex post facto laws, and cruel and unusual punishment. Addressing the ACLU’s challenges to ASORNA, we provide more detail on the specific provisions of ASORNA in the discussion below.

STANDARD OF REVIEW

10 We review constitutional challenges de novo. State v. Druktenis, 2004-NMCA-032, ¶ 14, 135 N.M. 223, 86 P.3d 1050. In reviewing constitutional attacks, “there exists a presumption of constitutionality, and the party attacking the constitutionality of the statute has the burden of proving the statute is unconstitutional beyond all reasonable doubt.” Id. ¶ 15. See also City of Albuquerque v. One (1) 1984 White Chevy, 2002-NMSC-014, ¶ 5, 132 N.M. 187, 46 P.3d 94 (“A strong presumption of constitutionality surrounds a statute.”) (internal quotation marks and citation omitted)). We also review issues of statutory construction de novo. Brenneman v. Bd. of Regents of the Univ. of N.M., 2004-NMCA-003, ¶ 4, 135 N.M. 68, 84 P.3d 685.

PREEMPTION OF ASORNA

11 Prior to the adoption of HB 165, the district court held that SORNA did not preempt ASORNA. We agree, and further hold that ASORNA was not preempted by the adoption of HB 165. HB 165 preempts the field of sex offender registration and notification into the future, but allows local sex offender ordinances in effect on
January 18, 2005, to continue in effect. ASORNA became effective November 5, 2003, and therefore is not preempted based on the plain language of HB 165. However, our analysis does not end there. The ACLU argues that ASORNA is preempted because it conflicts with state law.

{12} A municipality may adopt ordinances “not inconsistent” with the laws of the state for the purpose of “providing for the safety, preserving the health, promoting the prosperity and improving the morals, order, comfort and convenience of the municipality and its inhabitants.” NMSA 1978, § 3-17-1(B) (1993). An ordinance can be more restrictive than a state law, as long as it supplements, complements, or duplicates the state statute but does not conflict with it. Gould v. Santa Fe County, 2001-NMCA-107, ¶ 18, 131 N.M. 405, 37 P.3d 122, overruled on other grounds by Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm’n, 2003-NMSC-005, ¶ 16 & n.10, 133 N.M. 97, 61 P.3d 806. In deciding whether ASORNA is invalid, we must determine if “the stricter requirements of the ordinance conflict with state law, and whether ordinance permits an act the general law prohibits, or prohibits an act the general law permits.” Id. (internal quotation marks and citation omitted).

The ACLU contends that ASORNA is directly inconsistent with SORNA, §§ 29-11A-1 to -10; the DNA Identification Act, NMSA 1978, §§ 29-16-1 to -13 (1997, as amended through 2005); and the Omnibus Bill, now codified in various sections, including NMSA 1978, § 9-3-13 (2005), and is therefore preempted. We are not persuaded.

{13} The compilation of state laws cited by the ACLU, taken together, provide a statewide scheme for sex offender registration, notification, DNA testing, and oversight. However, they do not conflict with ASORNA, and as already noted, HB 165 expressly allows ASORNA to remain in effect. We presume the Legislature was aware of the existence of ASORNA when it enacted HB 165. Cf. In re Kira M., 118 N.M. 563, 569, 883 P.2d 149, 155 (1994). Furthermore, we also presume that when enacting a statute, the Legislature “did not intend to enact a law inconsistent with existing law[s].” Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm’n, 1999-NMSC-040, ¶ 25, 128 N.M. 309, 992 P.2d 860 (internal quotation marks and citation omitted). The Legislature, being aware of the existence of ASORNA, was free to preempt the ordinance, and chose not to, despite the stricter requirements under ASORNA.

{14} Nor does ASORNA otherwise conflict with state law. Some requirements of ASORNA are undisputably stricter than the equivalent provisions of SORNA. For example, ASORNA’s requirement for registration, reaching back to convictions in 1970, captures a broader class of offenders, but does not conflict with SORNA. Offenders required to register under the state law are not required to register under ASORNA. As a result, there will never be a direct conflict in the provisions. There is no conflict in the City requiring offenders to provide more detailed information upon registration, or broader notification provisions. Cities are free to adopt ordinances that are more restrictive than state law, which is exactly what ASORNA does. See Gould, 2001-NMCA-107, ¶ 18.

{15} In sum, we are not persuaded by the ACLU’s arguments that through the enactment of a state sex offender law, and other related laws, the Legislature expressed a clear intent to occupy the entire field of sex offender registration and notification, thereby preempting ASORNA. On the contrary, the Legislature declared an express intent to not preempt the City ordinance.

The language of the preemption and savings clauses provides that “[a]n ordinance in effect on January 18, 2005 shall continue in force and effect until repealed.” ASORNA is such an ordinance. We perceive no legislative intent implicit in SORNA, the DNA Identification Act, the Omnibus Bill, or other related laws sufficient to override this explicit language. We now turn to the ACLU’s constitutional claims.

DUE PROCESS AND EQUAL PROTECTION (VAGUENESS AND OVER BREADTH)

{16} The ACLU argues that “ASORNA suffers from a multiplicity of constitutional infirmities that violate state and federal due process and equal protection guarantees.” The due process clause of article II, section 18 of the New Mexico Constitution guarantees that “[n]o person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws.” N.M. Const. art. II, § 18. The Fourteenth Amendment contains an analogous provision. Due process is implicated “when state conduct alters a right or status previously recognized by state law.” Doe v. Sturdivant, No. 05-70869, 2005 WL 2769000 at *5 (E.D. Mich. Oct. 25, 2005) (internal quotation marks and citation omitted). Substantive due process protects fundamental rights that are so “implicit in the concept of ordered liberty” that “neither liberty nor justice would exist if they were sacrificed.” Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks and citation omitted), cert. denied, 126 S.Ct. 624 (2005); Doe v. Moore, 410 F.3d 1337, 1342 (11th Cir. 2005) (internal quotation marks and citation omitted). Substantive due process “focuses on the validity of legislation as it equally burdens all persons in the exercise of a specific right,” while equal protection “focuses on the validity of legislation that permits some individuals to exercise a specific right while denying it to others.” Marrujo v. N.M. State Highway Transp. Dep’t, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994).

{17} We address only the substantive due process and equal protection arguments raised by the ACLU because its procedural due process arguments have been foreclosed by the holdings in Connecticut Dep’t of Public Safety v. Doe, 538 U.S. 1 (2003), and Druktenis, 2004-NMCA-032. We address the substantive due process and equal protection claims together because the “substantive due process attack implicitly and necessarily includes an equal protection attack.” Druktenis, 2004-NMCA-032, ¶ 53.

{18} The ACLU originally challenged ASORNA under the New Mexico Constitution, urging the district court to rely on independent state constitutional grounds for finding ASORNA unconstitutional. The district court, however, found that the ACLU failed to make the required showing for a divergence from federal precedent, and therefore declined to decide the issues on independent state constitutional grounds. See State v. Gomez, 1997-NMSC-006, ¶ 19, 122 N.M. 777, 932 P.2d 1 (stating that a state court may rely on the state constitution, diverging from federal precedent, if it is shown that there is “a flawed federal analysis, structural differences between [the] state and federal government, or distinctive state characteristics”). The burden is on the party seeking relief under the state constitution to provide reasons for interpreting the state provisions differently from the federal provisions when there is no established precedent. Druktenis, 2004-NMCA-032, ¶ 38. Despite the possibility of an independent state constitutional ground for finding an ordinance such as ASORNA unconstitutional, we agree with the district court that the ACLU has failed to meet the required showing. We therefore limit our due process and equal protection analysis to the federal constitution, unpersuaded that
the state constitution affords any greater protections.
{19} When an ordinance is challenged on due process or equal protection grounds, one of three levels of review is applied, depending on either the rights affected by the ordinance, or the status or group of people it affects. Breen v. Carlsbad Mun. Schs., 2005-NMSC-028, ¶ 8, 138 N.M. 331, 120 P.3d 413. “Strict scrutiny applies when the violated interest is a fundamental personal right or civil liberty” guaranteed by the constitution. Marrero v. City of Albuquerque, 1998-NMSC-043, ¶ 27, 125 N.M. 721, 965 P.2d 305. Intermediate scrutiny applies when legislative classifications infringe on important but not fundamental rights, or involve sensitive but not suspect classes. Trujillo v. City of Albuquerque, 2005-NMCA-095, ¶¶ 91-94, 122 N.M. 401, 925 P.2d 518. Under intermediate scrutiny, the party supporting the statute must prove the scheme is substantially related to an important governmental interest. Breen, 2005-NMSC-028, ¶ 13. If the ordinance “does not affect a fundamental right or create a suspect classification, nor impinge upon an important individual interest,” rational basis review applies. Mieras v. Dynamic, 1996-NMCA-095, ¶ 27, 122 N.M. 401, 925 P.2d 518. Under rational basis, the challenger has the burden to demonstrate that the ordinance is not rationally related to a legitimate state interest, defined by our Courts as the absence of a “firm legal rationale or evidence in the record to support the classification.” Breen, 2005-NMSC-028, ¶ 16 (internal quotation marks and citations omitted). We begin by looking at the nature of the interests at stake.

{20} This Court conducted a thorough analysis of the nature of the interest affected by SORNA in Druktenis, and concluded that the registration and notification scheme did not infringe on any fundamental rights and, therefore, rational basis was the appropriate review. See 2004-NMCA-032, ¶¶ 91-94, 100-01 (stating that fundamental rights emanate from natural law, and “for the liberty interest to be a fundamental one, the interest must be one traditionally protected by our society, or rooted in history and tradition”) (internal quotation marks and citation omitted)). Other jurisdictions that have addressed the issues posed by sex offender registration and notification statutes have similarly held that no fundamental rights are implicated and applied a rational basis review. See, e.g., Moore, 410 F.3d at 1343 (stating that the Supreme Court recognized fundamental rights in regard to some special liberty interests, but has not created a broad category of rights where any alleged infringement on privacy and liberty will be subject to due process protections); Doe v. Tandoske, 361 F.3d 594, 597 (9th Cir. 2004) (holding that persons convicted of serious sex offenses had no fundamental right to be free from registration and notification provisions of the Alaska sex offender statute), cert. denied, 543 U.S. 817 (2004).

{21} We agree with the reasoning set forth in Druktenis and other jurisdictions, and conclude that no fundamental rights are implicated by the application of ASORNA. We therefore apply a rational basis standard of review. The burden is then on the ACLU to show that the ordinance is not rationally related to a legitimate governmental interest, or the absence of a “firm legal rationale” for the challenged provisions. Druktenis, 2004-NMCA-032, ¶ 111. As we review the challenged provisions, we are mindful that liberty is a rational continuum which “includes a freedom from all substantial arbitrary impositions and purposeless restraints[,]” and that “[d]ue process has not been reduced to any formula.” Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting). Although we separate the provisions of ASORNA for purposes of discussion, we are aware that taken as a whole, the ordinance imposes a substantial burden on individuals subject to it. We are also aware that looking at each provision in isolation tends to artificially dilute the overall impact of the ordinance. With this in mind, we now turn to the challenged provisions.

REGISTRATION UNDER ASORNA

{22} ASORNA requires sex offenders who were convicted of “sex offenses” after January 1, 1970, to register with APD. A sex offense is defined as having “the same meaning the term has under [Section 29-11A-3(E)], except that ASORNA includes only offenses against [c]hildren and not offenses against [a]dults. The offenses subject to registration under Section 29-11A-3(E)(1)-(12) include criminal sexual penetration in the first, second, third, or fourth degree; criminal sexual contact in the fourth degree; criminal sexual contact of a minor in the second third or fourth degree; sexual exploitation of children; sexual exploitation of children by prostitution; kidnapping when the victim is less than eighteen years of age and the offender is not a parent of the victim; false imprisonment when the victim is less than eighteen years of age and the offender is not a parent of the victim; solicitation to commit criminal sexual contact of a minor in the second, third or fourth degree; and attempt to commit any of these sex offenses. Upon registration, a sex offender must provide the APD with a variety of information, including the offender’s names, aliases, date of birth, social security number, current address, the address of any residences or real property owned by the offender, place of employment including the name and telephone number of a contact person who knows the offender’s location at any and all times during employment hours, drivers license number, and a list of all sex offense violations. Furthermore, when a sex offender registers under ASORNA, APD takes and retains their photographs and sets of fingerprints, and may record and retain an offender’s shoe size, a DNA sample, dental imprints, and a description of tattoos, scars, and other identifying features.

{23} The district court held that the registration requirements for residents of the County contained in Section 4 of ASORNA were constitutional. The district court, relying on Smith v. Doe, 538 U.S. 84 (2003), and Connecticut Department of Public Safety, 538 U.S. 1, noted that the United States Supreme Court has examined and approved sex offender registration schemes, including those that apply to people convicted before the enactment of the registration requirement, those allowing for widespread dissemination of sex offender information, and those that apply to a broader category of offenders than ASORNA. On the basis of Smith and Connecticut Department of Public Safety, we agree with the district court ruling that the registration requirements for New Mexico residents are constitutional with two exceptions. The registration requirements for convictions of kidnapping and false im-

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3We clarify that intermediate scrutiny requires either an important right or a sensitive class, not an important right and a sensitive class as stated in Druktenis, 2004-NMCA-032, ¶¶ 97-100.
prisonment are not rationally related to the City’s interest in protecting citizens from sex offenders. Furthermore, the registration provisions allowing for DNA sampling and dental imprints violate search and seizure protections. We discuss the kidnapping and false imprisonment requirements next, and address the DNA sampling under the search and seizure analysis below.

REGISTRATION REQUIREMENTS FOR KIDNAPPING AND FALSE IMPRISONMENT

{24} The ACLU argues that ASORNA is both vague and over broad in its registration requirements. The ACLU contends that ASORNA requires registration of an overly broad class of individuals, for example, those who have never committed crimes with a sexual motivation. Other jurisdictions faced with similar constitutional challenges have found it significant that the statute at issue applies only to crimes with a sexual motive, and have held unconstitutional statutes that are over-inclusive in their registration requirements. See, e.g., State v. Small, 833 N.E.2d 774, 782-83 (Ohio Ct. App. 2005) (holding that “absent evidence that defendant committed the kidnapping of the minor victim with sexual motivation,” denomiating defendant a “sexually oriented offender lacked a rational basis under substantive due process” (internal quotation marks omitted)); Moore, 410 F.3d at 1340 n.1 (“When a person is convicted of kidnapping, false imprisonment, or luring or enticing a child into a dwelling or conveyance, there must be a sexual component shown in addition to the predicate offense before designating that person as a sex offender.”); Raines v. State, 805 So. 2d 999, 1003 (Fla. Dist. Ct. App. 2001) (holding that inclusion of a person convicted of false imprisonment, with no concomitant sexual component, in the definition of a sex offender violated equal protection because it was over-inclusive), review dismissed, 888 So. 2d 623 (Fla. 2004). We agree with the reasoning of this line of cases.

{25} The inclusion of kidnapping and false imprisonment as convictions requiring registration as a sex offender is not rationally related to the legitimate interest of the City in protecting victims or potential victims of sex offenders. There is no “firm legal rationale” for including offenses with no sexual motivation as “sex offenses.” In Drukenis, this Court found it significant that the criminal statutes triggering notification under SORNA all proscribed sexual conduct involving children. 2004-NMCA-032, ¶ 62. The same is not true of ASORNA. Furthermore, we note that the hardship imposed on an offender convicted of kidnapping or false imprisonment to be labeled a sex offender, absent any evidence of a sexual motivation for the crime, is great. The City’s stated purpose of ASORNA, which is the “protection of the victims and potential victims of sex offenders” is not furthered by the inclusion of crimes that are not sexually motivated. (Emphasis added.)

We hold that the registration provision of ASORNA that requires registration for offenders with convictions of kidnapping, NMSA 1978, § 30-4-1 (2003), or false imprisonment, NMSA 1978, § 30-4-3 (1963), without any sexual component, violates due process and is therefore unconstitutional.

REGISTRATION REQUIREMENTS FOR NON-RESIDENTS

{26} The district court held that the registration requirements for out-of-state offenders, Section 5 of ASORNA, contained a loophole rendering those provisions unconstitutional as a violation of equal protection guarantees. We provide a brief overview of the resident registration requirements and the non-resident registration requirements to clarify our discussion. ASORNA requires sex offenders to register with APD. A sex offender is defined as an adult who:

(1) is resident of the City who is convicted of a Sex Offense against a Child in New Mexico or, (2) changes his residence to the City after that person has been convicted of a Sex Offense against a Child . . . Outside New Mexico,

(3) is resident of the City who is convicted of a Sex Offense against a Child . . . Outside New Mexico or (4) is a Sex Offender who is convicted of a Sex Offense against a Child . . . Outside New Mexico and is temporarily in the City for more than three consecutive days at any time or an aggregate of ten or more days in a registration year.

{27} Under Section 5, registration for non-resident sex offenders temporarily in the City is required for non-New Mexico resident[s] who has[ve] been convicted of a Sex Offense against a Child . . . Outside New Mexico and [are]: (a) employed full-time or part-time or performing duties under a contract in New Mexico for a period of time exceeding three days or for an aggregate period of time exceeding twenty days during any calendar year or (b) attend[ing] or . . . enrolled on a full-time or part-time basis in a private or public school in New Mexico including but not limited to secondary schools, trade schools, professional institutions or institutions of higher education.

{28} These provisions result in differing treatment for resident and non-resident sex offenders that is not rationally related to the City’s interest in protecting citizens from sex offenders. The district court illustrated the problem as follows:

(1) A person with a 1993 Maine conviction, who resides in Maine, and is in Albuquerque for three consecutive days in one year, is required to register under Section 4 [(which regulates residents)], but not Section 5 (which regulates non-residents); (2) A person with a 1993 New Mexico conviction who lives one block outside the Albuquerque city limits and works in Albuquerque every day is not required to register under Section 4 or Section 5; (3) A person with a 1993 New Mexico conviction, who resides in Maine, and is in Albuquerque 300 days in one year, is not required to register under Section 4 or Section 5.

{29} In other words, the language in Section 5 does not require registration of those convicted sex offenders who are most likely to have the means and opportunity to reoffend in the City. Yet those offenders who were convicted of sex offenses outside of New Mexico, who reside outside the state, and are in the City only a limited number of days, must register. We agree with the district court that this violates equal protection guarantees. See Breen, 2005-NMSC-028, ¶ 10 (stating that the threshold question in equal protection challenges is “whether the legislation creates a class of similarly situated individuals who are treated dis-similarly”). We affirm the holding of the district court regarding the registration requirements for out-of-state offenders.

{30} To summarize our holdings regarding the registration provisions of ASORNA, we hold that the inclusion of kidnapping and false imprisonment, without a sexual motivation, in offenses requiring registration, is not rationally related to a legitimate
state interest, is over-inclusive, and therefore violates due process. We affirm the district court’s holding that the registration requirements for out-of-state offenders violates equal protection guarantees and is unconstitutional. We now turn to the notification provisions of ASORNA, and determine whether they violate due process or equal protection guarantees.

**NOTIFICATION PROVISIONS**

{31} We start with an overview of the notification provisions. The notification provisions require the City to make available and disseminate sex offender registration on the City of Albuquerque’s website. The ordinance provides that inclusion of a sex offender in the City’s database and on the website is based solely on the fact of a prior conviction and is not based on any assessment of current dangerousness. Like the statute at issue in Connecticut Department of Public Safety, the ordinance in this case requires a disclaimer on the website stating that the decision to post offender information on the website is based on conviction, and the City has not assessed the specific risk posed by any particular offender or the degree of dangerousness of any offender.

538 U.S. at 5. Furthermore, the disclaimer notes that the purpose of providing the data on the internet “is to make the information more easily available and accessible, not to warn about any specific individual.”

{32} The district court did not find any constitutional violations in the notification provisions. We agree. In large part, ASORNA simply makes available, the City’s website, information that is already publicly available. *See Smith*, 538 U.S. at 98 (noting that Alaska’s Megan’s Law provides for “dissemination of accurate information about a criminal record, most of which is already public”). As the Court reasoned in *Smith*, “[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record.” *Id.* at 101. SORNA already provides for public dissemination of sex offender information on the State website, and ASORNA simply provides information on a broader class of offenders. The City contends that providing sex offender information on the City’s website is rationally related to the City’s interest in allowing the public and authorities to identify sex offenders accurately and “to know their whereabouts even if they decide to move and reestablish residences.” We agree, and hold that the notification provisions are constitutional, as they are rationally related to the City’s interest in allowing the public and authorities to identify sex offenders accurately, and to know their whereabouts.

**SEX OFFENDER LOCATION**

{33} The “sex offender location” provision states that sex offenders “shall not acquire, mortgage or newly occupy any real property, occupy or acquire any real property by lease or otherwise or establish a place of lodging within 1000 feet of a [s]chool.”

The district court held that language in this provision, which may be read to require offenders currently owning property within 1000 feet of a school to have to relocate, was constitutionally infirm. The intent of the provision was to prohibit sex offenders from newly acquiring property within 1000 feet of a school, but the language did more than that. The district court found that the language could prohibit a second mortgage on an existing home, and failed to provide an exclusion of existing owners.

{34} The district court severed the constitutionally defective language from the “sex offender location” provision, and left the remaining portions intact. Following the district court’s ruling, the provision now reads, “Sex Offenders shall not acquire, or newly occupy any real property, acquire any real property by lease or otherwise or establish a place of lodging within 1000 feet of a School.” As modified, the provision serves its intended purpose, to prevent sex offenders from newly occupying a residence within 1000 feet of a school, and is constitutional. The provision is rationally related to the City’s interest in protecting children from sex offenders by preventing them from living within 1000 feet of places where children congregate.

{35} We note that other jurisdictions that have considered similar provisions have upheld “sex offender location” provisions as constitutional. *See Doe v. Miller*, 405 F.3d 700, 705, 710-16 (8th Cir. 2005) (holding that Iowa statute prohibiting sex offenders from residing within 2000 feet of a school or daycare does not infringe on liberty interests sufficiently to require heightened scrutiny and was rationally related to a legitimate state interest); *People v. Leroy*, 828 N.E.2d 769, 775 (Ill. App. Ct. 2005) (concluding that prohibiting sex offenders from living within 500 feet of a playground or facility providing programs or services for children bears a reasonable relationship to the goal of protecting children from known sex offenders); *Lee v. State*, 895 So. 2d 1038, 1041-44 (Ala. Crim. App. 2004) (in an ex post facto challenge, noting that there is nothing indicating that the regulatory scheme prohibiting sex offenders from living within 2000 feet of a school “is anything other than reasonable in light of the nonpunitive objective of keeping children safe from convicted sex offenders.”)

We find the reasoning in these cases persuasive. Prohibiting sex offenders from newly residing within 1000 feet of a school is rationally related to the City’s objective to protect children from sex offenders. We affirm the district court’s holding in regards to the “sex offender location” provision, and hold that as modified by the district court, the provision is constitutional. We now turn to the alone with a child provision.

**ALONE WITH A CHILD**

{36} ASORNA prohibits sex offenders from being alone with a child unless a responsible adult is present. “Alone with a child” is defined as being “present in the same room or in a vehicle with a Child other than [the offender’s w]ard, their own biological or legally adopted Child or their own biological grandchild[ or, or] if [they are] outdoors, within a 30 yard radius of [such] a Child. A “responsible adult” is “an adult who is not a sex offender.”

{37} The district court found the “alone with a child” provision to be constitutionally infirm because it violates equal protection guarantees. The district court illustrated the problem with the following example: “While a grandfather who sexually abused his granddaughter is permitted to be alone with that child, a twenty year old sister of a child convicted of touching the genital area of a fully clothed sixteen year old boy, could not be alone with her sister.” The district court reasoned that excluding stepparents, siblings, or other persons similarly situated to grandparents equates to treating similarly situated people dissimilarly, thus violating equal protection. *See Breen*, 2005-NMCA-028, ¶ 10 (stating that the threshold inquiry of an equal protection analysis is whether similarly situated persons are treated dissimilarly). The City conceded that there was no rational basis for the distinction. In fact, the district court pointedly asked the City at trial if there was a rational basis for the categorization allowing a grandparent sex offender to be alone with a grandchild, while prohibiting a stepfather, brother, or sister. The City answered “no,” there was not a rational basis for the dissimilar treatment. Absent any reason to support the
dissimilar treatment that results from the alone with a child provision, we agree with the district court. We therefore affirm the district court’s ruling that the alone with a child provision is not rationally related to a legitimate governmental interest, violates equal protection guarantees, and therefore is unconstitutional.

SEARCH AND SEIZURE

{38} The ACLU next argues that ASORNA violates both the Fourth Amendment and article II, section 10 of the New Mexico Constitution, which protect against unreasonable searches and seizures. The ACLU contends that the violation stems from forcing sex offenders to submit to compulsory DNA testing and dental imprinting after they have served their entire sentence. According to the ACLU, this amounts to a search and seizure of evidence without requiring any showing that registrants have committed, or are likely to commit, a new crime. The challenged provision states:

When a Sex Offender registers under ASORNA, APD shall take and retain their photograph and a set of fingerprints. Additionally, APD may record and retain the person’s shoe size, a DNA sample, dental imprints and a description of tattoos, scars and other identifying features that would assist in identifying the Sex Offender.

(Emphasis added.)

The ACLU argues that while compulsory DNA testing or blood sampling from offenders who are currently incarcerated, or on probation or parole, has been upheld as constitutional, requiring submission of DNA sampling or dental imprinting by persons convicted of offenses who are no longer in custody or subject to some type of supervisory release is a violation of the Fourth Amendment. We agree.

{39} The Fourth Amendment and article II, section 10 of the New Mexico Constitution both protect citizens against unreasonable searches and seizures. Reasonableness is the touchstone of our Fourth Amendment analysis in all circumstances of a governmental invasion of a citizen’s personal security. Terry v. Ohio, 392 U.S. 1, 19 (1968); State v. Attaway, 117 N.M. 141, 149, 870 P.2d 103, 111 (1994). The ACLU expressly argues that the New Mexico Constitution affords greater protections than the Fourth Amendment, citing State v. Cardenas-Alvarez, 2001-NMSC-017, ¶ 12, 130 N.M. 386, 25 P.3d 225 (stating that article II, section 10 of the New Mexico Constitution has been interpreted more broadly than its federal counterpart), and Gomez, 1997-NMSC-006, ¶¶ 22-23 (discussing requirements for preserving state constitutional claims for appellate review).

We agree that broader protections may be available under the state constitution, and that the ACLU has preserved the issue for review. However, since we hold that the challenged provisions violate the Fourth Amendment, we need not reach the possibly broader protections afforded under the state constitution.

{40} The compulsory administration of a blood test “plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment.” Schmerber v. Cal., 384 U.S. 757, 767 (1966). Furthermore, “[s]uch testing procedures plainly constitute searches of ‘persons,’ and depend antecedently upon seizures of ‘persons,’ within the meaning of that Amendment.” Id. “Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.” Id. at 770.

{41} Individuals who are incarcerated, or subject to some form of conditional release, traditionally enjoy fewer privacy rights than other citizens, and therefore may be subject to compulsory DNA testing. United States v. Kimler, 335 F.3d 1132, 1146-47 & n.14 (10th Cir. 2003) (holding that DNA sample extraction, “while implicating the Fourth Amendment, is a reasonable search and seizure under the special needs exception to the . . . warrant requirement” as applied to conditions of a convicted felon’s supervised release from incarceration); Shaffer v. Saffle, 148 F.3d 1180, 1181 (10th Cir. 1998) (holding that “while obtaining DNA samples implicates Fourth Amendment concerns, it is reasonable in light of an inmate’s diminished privacy rights”). The same is not true for citizens who are not incarcerated, or who have completed their conditions of probation or parole.

{42} Following the enactment of HB 165, the effect of ASORNA is to require registrants who are not incarcerated, and who have completed the terms of their probation or parole prior to July 1, 1995, to submit to bodily intrusions for DNA testing or dental imprinting at the request of APD. The City offers no authority for its proposition that “[t]aking DNA is not a search and seizure,” other than a reference to Connecticut Department of Public Safety, 538 U.S. at 4.

{43} However, Connecticut Department of Public Safety did not address the issue of retroactive DNA collection from offenders that are no longer incarcerated or under any type of supervised release. Id. The City argues that the registration scheme at issue in Connecticut Department of Public Safety contemplated DNA testing, and the Court made no determination that it was unconstitutional. This argument is not persuasive. The Supreme Court simply was not presented with a challenge to the DNA testing requirement, and therefore it was not addressed. Id. Furthermore, the DNA testing requirements in the Connecticut Department of Public Safety scheme, unlike those in ASORNA, did not apply retroactively. 538 U.S. at 4-5.

{44} The City asserts that by raising the search and seizure issue, the ACLU is implicitly challenging the DNA Identification Act and, at the same time, arguing that the Act preempts ASORNA. The City appears to misunderstand the provisions of the DNA Identification Act. The Act only allows collection of DNA samples from convicted offenders under limited circumstances, including:

(1) a covered offender convicted on or after July 1, 1997 shall provide a sample immediately upon request of the corrections department so long as the request is made before release from any correctional facility or, if the covered offender is not sentenced to incarceration, before the end of any period of probation or other supervised release;

(2) a covered offender incarcerated on or after July 1, 1997 shall provide a sample immediately upon request of the corrections department so long as the request is made before release from any correctional facility.

Section 29-16-6(A)(1)-(2). The provisions for DNA testing under the Act are not retroactive, and allow for compulsory testing only of those individuals that are currently incarcerated, on probation, or parole, or some type of supervised release. The ACLU does not challenge the constitutionality of DNA testing for those groups, and

\[\text{SB 216, passed by the 2006 Legislature, provides for DNA collection of certain felony arrestees, on or after January 1, 2007. We express no opinion about the constitutionality of SB 216, and it does not enter into our analysis.}\]
in fact acknowledges that prisoners, probationers, and parolees traditionally enjoy fewer privacy rights than other citizens.

{45} For the foregoing reasons, and because the City has offered no authority to the contrary, we hold that the provisions of ASORNA allowing APD to collect DNA samples and dental imprints from registrants, is an unreasonable governmental invasion into the individual's personal security or privacy, thus violating the Fourth Amendment.

EX POST FACTO LAWS, DOUBLE JEOPARDY, AND CRUEL AND UNUSUAL PUNISHMENT

{46} The ACLU argues that ASORNA violates state and federal prohibitions on double jeopardy, ex post facto laws, and cruel and unusual punishment. The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution prohibits the application of any law passed “after the fact” and “applies only to penal statutes which disadvantage the offender affected by them.” State v. Nunez, 2000-NMSC-013, ¶ 112, 129 N.M. 63, 2 P.3d 264 (internal quotation marks omitted).

Double jeopardy protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and it protects against multiple punishments for the same offense. Swafford v. State, 112 N.M. 3, 7, 810 P.2d 1223, 1227 (1991). Constitutional protections against cruel and unusual punishment imply “a limitation upon the form and character of punishment that may be prescribed.” State v. Peters, 78 N.M. 224, 430 P.2d 382, 385 (1967). Central to each of these constitutional claims is the issue of punishment. If ASORNA is not punitive, none of these constitutional protections are violated.

{47} We deal with these arguments summarily because “[v]irtually all federal circuits and state jurisdictions considering this issue have rejected the argument that retroactive application of sex offender statute registration and notification requirements violates constitutional ex post facto prohibitions.” Druktenis, 2004-NMCA-032, ¶ 36. See, e.g., Smith, 538 U.S. at 105-06 (holding that the retroactive application of Alaska’s sex offender law did not violate the Ex Post Facto Clause because the statute was not so punitive either in purpose or effect as to negate the intention to deem it civil); Cutshall v. Sundquist, 193 F.3d 466, 476-77 (6th Cir. 1999) (holding sex offender scheme is not punitive, and therefore does not violate ex post facto prohibitions); Druktenis, 2004-NMCA-032, ¶ 32 (holding that the “Legislature’s intent in enacting SORNA was to enact a civil, remedial, regulatory, nonpunitive law,” and the effects of the law were not punitive); and State v. Moore, 2004-NMCA-035, ¶ 24, 135 N.M. 210, 86 P.3d 635 (holding that although the provisions of SORNA “are immediate and automatic, they do not constitute punishment for a crime,” and furthermore, that SORNA is “remedial in purpose and effect”).

{48} The stated intent of ASORNA is to provide “a more comprehensive local counterpart” to SORNA, to address the unique, local concerns of Albuquerque. Although the requirements of ASORNA may have adverse consequences on offenders as do those in SORNA, they do not rise to the level of punishment. Therefore, since ASORNA is a regulatory scheme that is not punitive in intent or effect, the retroactive application of the ordinance does not violate the Ex Post Facto Clause, double jeopardy, or cruel and unusual punishment prohibitions.

{49} The ACLU raised additional equal protection concerns in their supplemental brief-in-chief, following enactment of HB 165, which we briefly address here. Subsequent to the passage of HB 165, sex offenders in Albuquerque are required to comply with one of three registration and notification schemes. The amendments in HB 165 apply only prospectively to offenses committed on or after July 1, 2005, or to those offenders still incarcerated or on probation or parole for a sex offense as of July 1, 2005. For those individuals, SORNA, plus the HB 165 amendments, apply. For offenders convicted on or after July 1, 1995, but before July 1, 2005, the provisions of SORNA prior to the enactment of HB 165 apply. For offenders who committed offenses after January 1, 1970, but before July 1, 1995, the provisions of ASORNA apply. No offender is required to register under the provisions of more than one law. The result of this classification is that offenders subject to the more stringent requirements of ASORNA are those who have not committed an offense or been on probation or parole since July 1, 1995, whereas the more recent offenders are subject to the less stringent requirements of SORNA.

{50} Although we recognize the concerns this scheme raises, we find no equal protection violation. Both the City and the State have valid interests in protecting the public from sex offenders. As we discussed in the preemption analysis, the City may enact an ordinance that is more restrictive than state law. That is what occurred with ASORNA. While we appreciate the ACLU’s concerns about the different schemes and requirements that result following the enactment of HB 165, the different requirements do not create an equal protection violation.

CONCLUSION

{51} We conclude with a brief summary of our holdings. We decline to address the issues raised in the SOAP litigation because they are moot. We affirm the district court’s decision finding various provisions of ASORNA unconstitutional and severing those provisions from the ordinance. In addition, we hold that the inclusion of kidnapping and false imprisonment absent a sexual motivation for the crimes is over broad and violates due process. We also hold that the registration provision which allows APD to collect DNA samples and dental imprints is unconstitutional. We also hold that ASORNA does not violate ex post facto, double jeopardy, or cruel and unusual punishment protections.

{52} As a final note, we are well aware of the public concern over “sex offenders.” However, as this Court stated in Mieras, 1996-NMCA-095, ¶ 53 (Hartz, J., specially concurring), “[t]o affirm [or reverse] the constitutionality of a statute is not to approve it on policy grounds. Unfortunately, or fortunately, judges are not ex officio members of the legislature. We should refrain from imposing our views of policy under the banner of constitutional principles.” Thus, we may not, and do not, express any view on the wisdom of the provisions found to be constitutionally valid or invalid.

{53} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE,
Chief Judge

I CONCUR: JAMES J. WECHSLER, Judge
IRA ROBINSON, Judge, specially concurring.

ROBINSON, Judge (specially concurring).

{54} The City of Albuquerque has chosen to exercise its right to make its sex offender registration ordinance, ASORNA, so much more stringent than that of the State of New Mexico, SORNA, and any other municipality in New Mexico. Albuquerque has a right to do so. I have no sympathy for convicted sex offenders and, as far as I am concerned,
that is all well and good. But what effect will ASORNA have? It will hopefully keep sex offenders away from schools where children play. It will make the identities and whereabouts of sex offenders more widely known and discoverable to the average citizen and certainly to the average parent who, in this dangerous society, worries constantly about the safety of his or her child every time the child is out of sight.

So, if the heat is on these sex offenders in Albuquerque, what will they do? They will leave Albuquerque and go to another city or town in New Mexico, which has no ordinance of its own and their life will be governed by the less restrictive and less stringent provisions of the State’s sex offender registration law, SORNA. My concern is that we will drive them out of Albuquerque and into smaller cities and towns in New Mexico where the police forces and local authorities do not have the resources to handle the burden of keeping track of these sex offenders and making sure that they do not violate SORNA.

One way that the smaller communities could alleviate this ominous problem is to pass their own ordinances duplicating the stringent provisions of Albuquerque’s sex offender law so that the sex offender would find no advantage in moving to a smaller town or city. But, alas, the State has preempted the field and after January 18, 2005, no new sex offender registration ordinance may be enacted by cities, counties, and local governments. Albuquerque’s ordinance predates the cut-off, so it may remain in force.


certiorari granted, no. 29,846, July 3, 2006

from the new mexico court of appeals

opinion number: 2006-NMCA-079

state of new mexico,
plaintiff-appellee,

versus

philip oscar lopez,
defendant-appellant.

no. 25,516 (filed: may 23, 2006)

consolidated with:

state of new mexico,
plaintiff-appellee,

versus

philip oscar lopez,
defendant-appellant.

no. 25,517

appeal from the district court of dona ana county

stephen bridgforth, district judge

patricia a. madrid
attorney general
santa fe, new mexico

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chief public defender

catherine a. begaye
assistant appellate defender
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for appellee

for appellant

opinion

james j. wechsler, judge

1. in this appeal, we consider, in the circumstances of two consecutive sentences, whether a district court may revoke a defendant’s probation when (1) as to the second sentence, the violations occurred before the defendant had begun serving the sentence to which the probation is attached and (2) as to the first sentence, the defendant had completed serving the sentence. we conclude that the district court had the authority to revoke the probation attached to the second sentence but did not have the authority to revoke the probation attached to the first. we also conclude that the district court properly allocated probation credit as between the two sentences. we affirm as to the second sentence and reverse as to the first.

background

2. On August 4, 1999, Defendant Phillip Oscar Lopez was convicted in two separate cases, CR 99-500 and CR 99-502, after he entered plea agreements. Both cases involved fourth degree felony charges of burglary of a vehicle and larceny and CR 99-500 also involved other crimes. The district court sentenced Defendant in both cases on August 30, 1999. In CR 99-502, it imposed a six-year sentence. It suspended three years of the sentence, requiring Defendant to serve three years in custody and then three years on supervised probation concurrent with one year of parole. The district court ran the sentence in CR 99-500 consecutive to the sentence in CR 99-502. It suspended its entire five-year sentence and placed Defendant on supervised probation for that period. The conditions of the probation in both cases were substantially the same.
[3] Defendant served his three-year commitment in custody in CR 99-502 and completed his parole while in custody for an earlier charge. After Defendant had been released for nearly one year, the State filed petitions to revoke his probation in both cases for multiple violations since his release. Defendant admitted to the probation violations before the district court on July 22, 2004.

**REVOCATION IN CR 99-500**

[4] Prior to the district court’s acting on the petitions, Defendant completed his probation in CR 99-502 and began serving his probation in CR 99-500. Although the parties brought this transition to the district court’s attention and the district court indicated that it would order the case completed, it nevertheless entered an order revoking Defendant’s probation in CR 99-502 and sentencing Defendant to serve the six-year term followed by one year of parole with a credit of six years and fifty-six days for time spent in confinement and on probation. It revoked Defendant’s probation in CR 99-500 and sentenced Defendant to a term of five years followed by a year of parole period, suspending two years and six months to be served on probation concurrent with parole. Defendant appeals the order revoking his probation and imposing sentence in both cases. We address Defendant’s arguments, even though he did not raise them to the district court, because they raise the issue of an illegal sentence that can be brought for the first time on appeal. See State v. Bachicha, 111 N.M. 601, 605, 808 P.2d 51, 55 ( Ct. App. 1991) (stating that because the district court lacks jurisdiction to impose an illegal sentence, it may be challenged for the first time on appeal). We subject the legality of a sentence to de novo review. State v. Brown, 1999-NMSC-004, ¶ 8, 126 N.M. 642, 974 P.2d 136.

[5] This Court has held that a district court may revoke probation and a suspended sentence even though the probation period has not begun. State v. Martinez, 108 N.M. 604, 607, 775 P.2d 1321, 1324 ( Ct. App. 1989); State v. Padilla, 106 N.M. 420, 422, 744 P.2d 548, 550 ( Ct. App. 1987). Our Supreme Court has similarly stated. State v. Rivera, 2004-NMSC-001, ¶ 21, 134 N.M. 768, 82 P.3d 939. Defendant seeks to distinguish these cases, correctly contending that they do not involve circumstances, as here, in which the defendant is not serving some portion of the sentence for which probation is revoked. Although we agree with Defendant that these cases may be distinguished on that basis, we decline to do so based on the underlying broad power of the district court over its criminal sentencing.

[6] Padilla is at the center of our analysis. The defendant in Padilla failed to return from work release while serving the custodial portion of his sentence. Padilla, 106 N.M. at 421, 744 P.2d at 549. In doing so, he violated the law and a condition of his subsequent probation. Id. This Court held that the district court had jurisdiction to revoke the defendant’s probation and suspended sentence despite the fact that the defendant had not begun serving the probation because he was still incarcerated. Id. at 422, 744 P.2d at 550. Because the suspension of the defendant’s sentence and probation emanated from the district court’s discretionary act of clemency, we reasoned that the district court retained jurisdiction to revoke its acts “for good cause shown at any time subsequent to the entry of judgment and prior to the expiration of the sentence.” Id. We followed Padilla in Martinez to hold that a sentencing court can revoke a suspended sentence of a defendant who violates a probationary condition while serving parole before a probationary period began. Martinez, 108 N.M. at 607, 775 P.2d at 1324. Our Supreme Court built upon Padilla in Rivera to hold that a district court has jurisdiction to revoke probation when the probationary period has not begun and the defendant violates the conditions of probation while the case is on appeal without bond. Rivera, 2004-NMSC-001, ¶¶ 26-27. It pointed out that a district court’s discretion to suspend a sentence and order probation was part of its broad power to achieve the goal of rehabilitation. Id. ¶¶ 20-21.

[7] The district court exercised its broad sentencing power in granting Defendant clemency and structuring a rehabilitative sentence. Defendant did not have any right to such action. See State v. Follis, 81 N.M. 690, 692, 472 P.2d 655, 657 ( Ct. App. 1970) (“The suspension or deferment of a sentence is not a matter of right but is an act of clemency within the trial court’s discretion.”). The district court sentenced Defendant in CR 99-500 and CR 99-502 at the same time. It imposed partially suspended sentences and standard conditions of probation in both cases that applied equally to both cases. Thus, at the time of his actions, Defendant was on notice that he was violating conditions of his probation. Even though Defendant was not serving his sentence in CR 99-500 at the time of the violations, because the sentences were consecutive, Defendant still had to successfully complete his sentence in CR 99-502. Under Defendant’s argument, upon Defendant’s admission that he violated the probation conditions in CR 99-502, the district court could not take any action. But such a result is contrary to a sentencing court’s broad power as discussed in Padilla and Rivera. Rather, in connection with its broad power to grant clemency and structure rehabilitation, the district court had the ongoing ability, through Defendant’s conditions of probation, to monitor Defendant’s behavior to determine whether he continued to be capable of rehabilitation and suitable for clemency. It therefore did not make any difference that Defendant had yet to begin serving his sentence in CR 99-500 when he violated the conditions of the probation attached to that case. The district court retained jurisdiction to revoke his probation and suspended sentence.

[8] We note that Defendant, relying on a stated exception in Padilla, argues that we should apply the rule of lenity because Defendant could not have known that the judgment and sentence, ambiguous statutory authority, and case law would subject him to conditions of probation in CR 99-500 from the time of his original sentencing or at any time prior to the expiration of his sentence in CR 99-502. We do not agree. As we have discussed, Defendant had notice of the probation conditions because they applied in both cases. More significantly, given that Defendant has no right to a suspended sentence and probation, and given the general language of Padilla that a “sentencing court retains jurisdiction to revoke a suspended sentence for good cause shown at any time subsequent to the entry of judgment and prior to the expiration of the sentence,” we cannot say that Defendant could reasonably expect that he could violate conditions of his probation in CR 99-500 prior to his sentence in that case with impunity. Padilla, 106 N.M. at 422, 744 P.2d at 550. As said in a special concurring opinion in James v. United States, 140 F.2d 392, 394 (5th Cir. 1944) (Waller, J., specially concurring) (quoting Burns v. United States, 287 U.S. 216, 222 (1932)): “If, at any time before the defendant has completed the maximum period of probation, or before he has begun service of his probation, he should commit offenses of such nature as to demonstrate to the court that he is unworthy of probation and that the granting
of same would not be in subservience of the ends of justice and the best interests of the public, or the defendant, the court could revoke or change the order of probation. A defendant on probation has no contract with the court. He is still a person convicted of crime, and the expressed intent of the Court to have him under probation beginning at a future time does not “change his position from the possession of a privilege to the enjoyment of a right.”

REVOCATION IN CR 99-502


{10} In reversing this order, we note that it grants Defendant credit for probation served of fifty-six days after the expiration of Defendant’s sentence in CR 99-502. However, Defendant is not entitled to any further credit as he contends on appeal because the district court improperly gave him credit for the same fifty-six days in its order revoking probation and imposing sentence in CR 99-500.

CONCLUSION

{11} We affirm the district court’s order revoking probation and imposing sentence in CR 99-500 and reverse the order revoking probation and imposing sentence in CR 99-502.

{12} IT IS SO ORDERED.

JAMES J. WECHSLER,
Judge

I CONCUR:

IRA ROBINSON, Judge

MICHAEL E. VIGIL, Judge

(concurring in part and dissenting in part)

VIGIL, Judge (concurring in part and dissenting in part).

{13} I concur with the majority in reversing the order revoking probation and imposing sentence in CR 99-502. I dissent from the majority opinion affirming the district court’s order revoking probation and imposing sentence in CR 99-500.

{14} The judgment and order suspending sentence specifically states that the sentence in CR 99-500 “shall be served consecutive” to the sentence in CR 99-502. It is undisputed that Defendant did not complete his sentence in CR 99-502 until September 9, 2004, and that Defendant did not commence serving his sentence under CR 99-500 until September 10, 2004. The petition to revoke probation was filed on June 9, 2004, alleging various probation violations occurring in 2003 and early 2004. Thus, the petition to revoke probation was filed before Defendant even began serving his sentence under CR 99-500. The majority nevertheless concludes that Defendant’s probation was properly revoked on the basis of actions which occurred before Defendant’s sentence commenced. I disagree with this conclusion for three reasons.

{15} First, it is horn book law that in order to revoke probation, a violation of probation must be established. “In determining whether there is a violation, we look to the trial court’s order.” State v. Martinez, 84 N.M. 295, 296, 502 P.2d 320, 321 (Ct. App. 1972). It is also settled that a hearing to revoke probation is to determine “whether the conduct of the defendant during the probation period has conformed to the course outlined in the order of probation.” State v. Brusenhan, 78 N.M. 764, 766, 438 P.2d 174, 176 (Ct. App. 1968) (quoting Sparks v. State, 47 S.E.2d 678, 680 (Ga. Ct. App. 1948) (emphasis added)). Here, the alleged violations occurred before the judgment and sentence imposing probation was even in effect.

{16} Each of the cases relied upon by the majority are distinguishable and therefore not applicable. In Padilla, the defendant was sentenced to serve two concurrent sentences of three years, and two years and one day of each sentence was suspended. The defendant was actually serving the prison sentence when he escaped from custody. 106 N.M. at 421, 744 P.2d at 549. We held that the probation of a defendant who commits a probation violation while still serving the custodial portion of his sentence may be revoked. Id. at 422, 744 P.2d at 550. Similarly, in Martinez, the defendant violated conditions of probation while he was serving his parole. 108 N.M. at 606, 775 P.2d at 1323. Following Padilla, we concluded that the district court had jurisdiction to revoke the defendant’s probation. Martinez, 108 N.M. at 607, 775 P.2d at 1324. Finally, in Rivera, the defendant committed a probation violation while serving his sentence and his appeal was pending. 2004-NMSC-001, ¶ 2-4. Following Martinez and Padilla, our Supreme Court held that the district court had jurisdiction to revoke the defendant’s probation notwithstanding the appeal. Rivera, 2004-NMSC-001, ¶ 21, 27.

{17} The fact which distinguishes Martinez, Padilla, and Rivera is that in each of those cases the defendant was serving his sentence when he committed the probation violation. In this case, there were no conditions of probation to violate because the sentence to which the probation violations attached had not yet commenced.

{18} Second, the net effect of the majority opinion is to allow an amendment to the judgment and sentence and conditions of probation in CR 99-500. Specifically, the amendment is that before commencing his sentence in CR 99-500, a condition of probation in CR 99-500 is that he not commit any violations of probation in CR 99-502. Even if such a condition could have been originally imposed, it is well established that once a valid original judgment and sentence is entered, it cannot be amended to add conditions of probation because this results in an increased penalty. See Martinez, 84 N.M. at 296, 502 P.2d at 321; State v. Soria, 82 N.M. 509, 511, 484 P.2d 351, 353 (Ct. App. 1971).

{19} Finally, I also disagree with the majority in its assertion at paragraph 8 that Defendant had no contract with the State. Specifically, Defendant was given consecutive judgments with conditions attached to each. Defendant could not violate the order of probation in CR 99-500 because he had not yet commenced serving his sentence. The State was allowed to breach its contract with Defendant by changing the effective date of his sentence in CR 99-500. I cannot agree with the majority that this is consistent with due process.

{20} Therefore, I therefore dissent from the majority opinion to the extent it affirms the district court order revoking probation and imposing sentence in CR 99-500.

MICHAEL E. VIGIL, Judge
OPINION

RODERICK T. KENNEDY, JUDGE

{1} Defendant and third-party plaintiff John S. Rendall appeals the district court’s order compelling him to arbitrate his claims against Merrill Lynch. Rendall asserted claims against Merrill Lynch after he was named as a defendant in a securities fraud class action brought by former shareholders of Solv-Ex Corporation (Solv-Ex). Rendall had been a corporate officer of Solv-Ex when the company’s stock abruptly plummeted. He claimed that Merrill Lynch, among others, had been responsible for the demise of Solv-Ex. The district court, pursuant to a provision in a pledge agreement (the Agreement) between Rendall and Merrill Lynch, compelled Rendall’s claims to arbitration.

{2} Merrill Lynch asserts that none of Rendall’s claims were preserved for our review. We hold that Rendall’s argument that the existence of an arbitration agreement is a question for the jury was clearly not preserved. Rendall’s argument that his claims for conspiracy, RICO, and antitrust involve third parties, and are hence not subject to arbitration, was also not sufficiently preserved for our review. We have doubts that Rendall’s remaining arguments were preserved, but will give Rendall the benefit of the doubt and address these arguments on the merits.

{3} We hold that Rendall’s objection to the Agreement documents could be characterized as an authenticity objection in its most basic terms. However, we hold that Rendall later conceded that the challenged document was authentic because, in the course of challenging the Agreement’s accuracy, Rendall made statements that conceded its authenticity. Next, we address the two parts of Rendall’s fraud in the inducement claim concerning the Agreement. Rendall admitted signing the second page of the Agreement (which acknowledged the first page and stated that his disputes with Merrill Lynch would be arbitrated). We hold that under these circumstances, the district court properly compelled arbitration. We affirm.

BACKGROUND

{4} This case is one of many appeals arising from litigation surrounding the collapse of Solv-Ex stock. In October 1996, after the value of Solv-Ex stock plummeted, Solv-Ex shareholders sued Rendall and others, primarily claiming that these Defendants had in various ways deliberately distorted Solv-Ex’s financial condition.

{5} Approximately six years later, in 2002, Rendall filed his answer along with counterclaims, cross claims, and a third-party complaint. Rendall named in his third-party complaint approximately a dozen new parties that he blamed for Solv-Ex’s downfall, including Merrill Lynch. He claimed that Merrill Lynch had pulled the “final trigger” in Solv-Ex’s demise.

{6} Rendall admitted in his complaint that he had executed a pledge agreement with Merrill Lynch in March 1997 securing a loan of $4 million with approximately 2.61 million restricted shares of Solv-Ex common stock. Shortly after making the loan, Merrill Lynch demanded repayment. When Rendall did not pay, Merrill Lynch started selling the Solv-Ex stock. Rendall claimed that this action caused a sharp decline in the value of Solv-Ex stock, causing Solv-Ex to lose financing, which in turn caused it to shut down operations and later file bankruptcy. He also claimed that Merrill Lynch had “made false and misleading statements to the public in order to make the sale. Merrill Lynch also allegedly forced Rendall to sign a release of his claims against it in return for the Solv-Ex stock still in its possession.

{7} Based on these factual allegations, Rendall asserted claims against Merrill Lynch for breach of a fiduciary duty under the pledge agreement, breach of contract, and breach of the covenant of good faith and fair dealing. Rendall claimed that Merrill Lynch had fraudulently “sold [his] . . . stock under false pretenses, which de-
stayed the Solv-Ex financing and injured . . . Rendall.” Rendall claimed that Merrill Lynch had interfered with his prospective economic advantages when it refused to release the stock remaining in its possession until Rendall relinquished his claims against it. Rendall also claimed intentional or negligent infliction of emotional distress as a result of Merrill Lynch’s actions. Finally, Rendall made other claims that did not specify a party against whom he was making the claim.

{8} Merrill Lynch moved to compel arbitration or to alternatively dismiss Rendall’s claims against it. Attached to its unverified motion was what it claimed to be “a true and correct copy of the March 20, 1997 Pledge Agreement . . . signed by Mr. Rendall.” This copy was almost illegible. Merrill Lynch also attached a clear and easily legible form pledge agreement that was unsigned and did not have any information typed into its blanks. There was no overt explanation in the motion of how this form agreement was related to the Agreement itself. Merrill Lynch asserted that in the pledge agreement, Rendall had agreed to arbitrate all of his claims against Merrill Lynch. Rendall filed a written response to Merrill Lynch’s motion.

{9} On June 12, 2003, the district court heard the parties’ arguments on this motion. Rendall objected to the admission of the documents that had been attached to Merrill Lynch’s motion to compel arbitration. He denied the existence of any arbitration agreement, asserting that he had only signed and faxed back to Merrill Lynch one illegible sheet of paper. He said that the only agreement contained on the sheet of paper he had signed was the agreement to pledge the Solv-Ex shares for a loan of $3.8 to $4 million. After Rendall spoke, the district court orally granted Merrill Lynch’s motion to compel arbitration. The district court entered its written order on July 7, 2003, ordering arbitration “in accordance with the agreement attached to the motion.” Rendall now appeals the order compelling his claims against Merrill Lynch to arbitration.

II. DISCUSSION

A. Preservation of Issues

{10} Merrill Lynch argues that Rendall did not preserve any of his arguments for our review.

{11} We first address the preservation of Rendall’s argument that the existence of an arbitration agreement is an issue of fact for the jury. We have not discovered any point where Rendall invoked a ruling from the district court on this issue. See id. Rendall has not directed our attention to where this issue was preserved. See Rule 12-123(A)(4) NMRA (requiring a statement of how and where an issue was preserved below). Points in Rendall’s pleadings and argument also state, to the contrary, that the district court must decide this issue. We therefore hold that Rendall did not preserve this argument for our review.

{12} Also, Rendall argues that the district court’s sending of his conspiracy, RICO, and antitrust claims to arbitration was improper because these claims involve third parties. Merrill Lynch asserts that none of these claims were actually pleaded against itself and that this issue was not preserved. We agree.

{13} Rendall argues that he invoked a ruling from the district court on his legal argument via a statement in his complaint that he “restates and incorporates the preceding fact allegations.” This argument confuses the making of a factual assertion with invoking a ruling from the district court on a specific legal argument. See Elliott, 2001-NMCA-108, ¶ 21. It does, however, appear that in his reply brief to Merrill Lynch’s motion to compel arbitration, he argued that these claims were not subject to arbitration. Rendall then abandoned this argument at the hearing, merely alleging that Merrill Lynch had engaged in a conspiracy and committed RICO and antitrust violations without asserting that these claims had any specific legal consequence to the question of arbitration.

{14} These claims had not been previously asserted against Merrill Lynch. Rendall’s a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon. . . . [I]t is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked.

State v. Elliott, 2001-NMCA-108, ¶ 21, 131 N.M. 390, 37 P.3d 107 (internal quotation marks and citations omitted).

Because the district court did not reach Merrill Lynch’s motion to dismiss Rendall’s claims on the merits, our review is limited to questions surrounding Rendall’s claims to arbitration. We therefore do not reach any question of the sufficiency of Rendall’s claims.
narrow our focus in this opinion to Rule 11-901 NMRA. As an evidentiary issue, the admission or exclusion of the document attached to Merrill Lynch’s motion to compel arbitration is within the discretion of the district court. See State v. Apodaca, 118 N.M. 762, 771, 887 P.2d 756, 765 (1994); Couch v. Astec Indus., Inc., 2002-NMCA-084, ¶ 8, 132 N.M. 631, 53 P.3d 398. {16} Before addressing the merits of these claims, we address Merrill Lynch’s contention that Rendall failed to preserve his authenticity argument. At the hearing on Merrill Lynch’s motion to compel arbitration, Rendall stated:

As a threshold premise, . . . I object to these documents [referring to the document attached to Merrill Lynch’s motion to compel arbitration] coming into Court. I object to what is purported to be an agreement that I signed. I object. I have never stipulated to it and I object to those documents entering in without the due process of law to check [the] veracity of those documents.

{17} This statement could be interpreted as an authentication objection in its most basic terms, i.e., that the thing must be shown to be what its proponent claims it is. See Rule 11-901(A) (stating that authentication “as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims”). Yet in light of Rendall’s later statements that focused on the Agreement’s accuracy, while conceding its authenticity, Rendall’s reference to “veracity” could also be contextually interpreted as a claim that the Agreement did not truly reflect an agreement to arbitrate. See Apodaca, 2003-NMCA-085, ¶ 59 (distinguishing between arguments challenging the authenticity of a document and arguments challenging the document’s accuracy). We therefore harbor some doubts that an authenticity objection was actually made. See Reeves v. Wimberly, 107 N.M. 231, 236, 755 P.2d 75, 80 (Ct. App. 1988) (stating that where the record is doubtful or deficient, “every presumption is indulged in favor of the correctness and regularity of the trial court’s decision, and the appellate court will indulge in reasonable presumptions in support of the order entered”). However, even if Rendall preserved his authenticity argument, this is not an argument on which he could prevail.

{18} “The requirement of authentication . . . as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Rule 11-901(A). Merrill Lynch produced no witnesses to testify that the Agreement attached to its motion was the one that Rendall had signed or that the signature on the Agreement was Rendall’s. We have previously acknowledged that, in some areas, foundation requirements have become more relaxed. See State v. Ramirez, 89 N.M. 635, 646, 556 P.2d 43, 54 (Ct. App. 1976), overruled on other grounds by Sells v. State, 98 N.M. 786, 653 P.2d 162 (1982). While acknowledging this trend, we have reiterated that “[f]oundation requirements have not been eliminated altogether.” Ramirez, 89 N.M. at 646, 556 P.2d at 54. “Unless they fall within the narrow exception for self-authenticating documents, the records must be authenticated.” Id.

{19} At the hearing on Merrill Lynch’s motion to compel, Merrill Lynch asserted that “[t]here’s no dispute that that is the [A]greement that covered” its relationship with Rendall. Soon thereafter, Rendall made an objection that could be construed as an authenticity objection. However, Rendall later conceded that the document was authentic, i.e., that the document Merrill Lynch had attached to its motion was the Agreement that he had signed. Some time after making his authenticity objection, he stated,

I said okay, send me one, what to sign. They sent me one sheet of paper. A signature paper which nobody can read. At the top was 2.61 million in shares and at the bottom was a signature. I signed it. Nobody can read that sheet of paper. I signed it, faxed it back and sent the original back. One sheet of paper.

Rendall thus conceded to our satisfaction that the document was authentic, i.e., that the copy of the faxed document Merrill Lynch had attached to its motion was the Agreement that he had signed.

{20} Furthermore, typed into the blanks on the second page of this document was “2,610 M,” “Solv-Ex,” and “3.8 Million.” This is the exact number of shares and the correct party that Rendall, in his complaint, agreed were part of his Agreement with Merrill Lynch. Rendall also stated at the hearing that he signed an agreement with the exact characteristics of the document attached to Merrill Lynch’s motion: 2.61 million shares at the top, a signature at the bottom, and difficult to decipher. Finally, in Rendall’s complaint, he stated that he entered into the Agreement. We hold that these statements, in light of the document itself, provided the district court with sufficient evidence to find that the document Merrill Lynch attached to its motion to compel was what Merrill Lynch claimed it was. See Rule 11-901(A).

{21} Rendall apparently abandoned his authenticity arguments, to the extent he made them, in pursuing his arguments as to the accuracy of the document. In Apodaca, 2003-NMCA-085, we distinguished between a challenge to the documents’ authenticity and a challenge to the accuracy of statements within those documents. Id. ¶ 59. The latter challenge does not go to admissibility, but to weight. Id. Here, Rendall ended up conceding authenticity and only challenging accuracy. Our standard of review is abuse of discretion. Couch, 2002-NMCA-084, ¶ 8. We see no abuse because the factual information that Rendall conceded correlated precisely to the information in the Agreement. We therefore hold that it is not an abuse of discretion to admit the Agreement that Rendall admitted signing. We affirm the district court on its use of this document to find an arbitration agreement.

C. Fraud in the Execution and Inducement

{22} Rendall argues that the district court should have decided his fraud in the inducement claims before deciding whether a valid agreement to arbitrate existed. There appear to be two questions here: the first is addressed to the entire Agreement, the second to the arbitration agreement contained within it.

{23} We first address whether Rendall preserved his argument. It is questionable whether Rendall preserved either aspect of this fraud claim. His complaint presumes the validity of the Agreement, which he claims that Merrill Lynch breached. In the complaint, Rendall does not plead facts concerning the formation of the Agreement, but focuses on Merrill Lynch’s actions once it obtained his Solv-Ex stock. From his pleadings, there is no question that Rendall knew that he was securing a loan from Merrill Lynch based on his pledge of Solv-Ex stock; his claims, and particularly the facts he alleges to support them, relate to what he feels Merrill Lynch did with the stock once the stock was in its possession.

{24} In Rendall’s motion in opposition to arbitration, he stated that Merrill Lynch induced him to enter into the Agreement. However, the facts alleged by Rendall all deal with Merrill Lynch’s actions after the
Agreement was executed. For example, at the hearing on Merrill Lynch’s motion to compel arbitration, Rendall reiterated the allegation in his complaint that Merrill Lynch had wrongfully sold the shares it had obtained from him after signing the Agreement. Rendall also asserted that Merrill Lynch had acted as “part of a conspiracy” with superior bargaining power: “There’s fraud adequately pled, it’s in the complaint.” Both assertions concern acts of Merrill Lynch occurring after the Agreement was executed.

[25] In responding to the motion to arbitrate, Rendall quoted law stating that fraudulently procured arbitration agreements cannot be used to compel arbitration. After the district court ruled, Rendall “read the cases in” that supported the argument from his motion that the court must determine issues of fraud in the inducement. Rendall’s factual assertions related to matters occurring after the Agreement was executed, his invocation of “fraud” was general, and his legal authority only related to fraudulently procured arbitration agreements. This was not specific enough to invoke a ruling from the district court on fraud as to the entire Agreement. See Elliott, 2001-NMCA-108, ¶ 21. We therefore hold that Rendall’s claim goes to the arbitration agreement, not the Agreement as a whole, and address the enforcement of the arbitration agreement under a de novo standard of review. See Alexander v. Calton & Assocs., Inc., 2005-NMCA-034, ¶ 8, 137 N.M. 293, 110 P.3d 509 (stating that we review the district court’s grant of a motion to compel arbitration de novo); see also DeArmond v. Halliburton Energy Servs., Inc., 2003-NMCA-148, ¶ 4, 134 N.M. 630, 81 P.3d 573.

[26] Rendall makes two factual assertions to support his argument that the district court was required to adjudicate his fraud claims before compelling arbitration. Because each of these factual assertions are of a different character, we address them separately. Rendall’s first claim is that he only saw and signed the second page of the Agreement, and that Merrill Lynch “hid” the arbitration provision on the first page. This assertion has little to do with fraud in the inducement, but is more akin to fraud in the execution. See McLean v. Paddock, 78 N.M. 234, 238, 430 P.2d 392, 396 (1967) (distinguishing between fraud in the inducement and fraud in the execution; the latter involves a document “signed under a mistaken belief as to its contents, due to fraud,” or where executed in the belief that the document represents something else, such as fraudulently switching one document for another or where another trick or artifice is used to secure a signature), overruled on other grounds by Duke City Lumber Co. v. Terrel, 88 N.M. 299, 540 P.2d 229 (1975); Rodriguez v. Horton, 95 N.M. 356, 361, 622 P.2d 261, 266 (Ct. App. 1980) (stating that fraud in the execution includes a party signing a contract under a mistaken belief as to its contents).

[27] Merrill Lynch invites our attention to the second page of the Agreement that Rendall admitted signing. This second page stated there was a first page and contained an acknowledgment of receipt of the Agreement. The second page also stated that the signor agreed to arbitrate any disputes that arose with Merrill Lynch. Rendall does not dispute that this language was on the second page. We therefore regard Rendall’s assertion that the arbitration provision was fraudulently concealed on the first page of the Agreement as immaterial to an interpretation of the second page. Parties to a written contract are generally presumed to know the contents of the contract and to have agreed to them, absent fraud, misrepresentation or some other wrongful conduct, which will be addressed in this opinion. See Smith v. Price’s Creameries, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982). The district court would not have erred in applying this presumption to the contents of the second page alone and ordering arbitration. See K. L. House Constr. Co. v. City of Albuquerque, 91 N.M. 492, 494, 576 P.2d 752, 754 (1978) (stating that it is the district court’s role to determine the existence of an arbitration provision and that once it has done so, it should order arbitration); see also Melboom v. Watson, 2000-NMSC-004, ¶ 20, 128 N.M. 536, 994 P.2d 1154 (stating that we affirm the district court when it rules correctly, even if the ruling is for the wrong reason). With millions of dollars at stake in the Agreement, the gravity of the Agreement and the accessibility of its terms lead us to presume that Rendall was sufficiently aware of what he signed as to impute his agreement to arbitrate his disputes with Merrill Lynch on the second page of the Agreement. Thus, whether Rendall’s claim with respect to a hidden arbitration provision is characterized as fraud in the inducement or fraud in the execution, we hold that Rendall had adequate notice and knowledge of the arbitration provision at the time he signed the Agreement. He therefore has no factual basis supporting such a claim.

[28] We now turn to Rendall’s second factual assertion, that Merrill Lynch secured the arbitration agreement by fraudulently misrepresenting its intent. Rendall relies upon Shaw v. Kuhnel & Assocs., Inc., 102 N.M. 607, 608, 698 P.2d 880, 881 (1985), superseded by statute as stated in Aguilera v. Palm Harbor Homes, Inc., 2002-NMSC-029, ¶ 6, 132 N.M. 715, 54 P.3d 993, for his argument that the district court must decide his fraud in the inducement claim before compelling arbitration. Shaw construed a motion to compel arbitration as a “suit for specific performance of an agreement to arbitrate.” Id. At issue in that case was whether the defendants could compel arbitration of its contracts with the plaintiffs where performance of those contracts was prohibited. Id. The performance of the contracts was barred because one defendant was not licensed in New Mexico to perform the work it had contracted to do. Id. Shaw noted that performance of the other defendant’s contract could also be barred because that defendant was a corporation that was not licensed to do business in New Mexico. Id. Shaw thus held since the performance of one, and possibly both, contracts was enjoined, compelling arbitration under such illegal contract(s) was also enjoined. Id.

[29] The Supreme Court then proceeded to an issue it stated was “unnecessary to a determination of [the] case.” Id. The ensuing discussion stated that the district court should determine fraud in the inducement of an entire agreement, since to compel arbitration of a contract that might itself be declared invalid for fraud in its inducement -- including its arbitration agreement -- would be “ridiculous.” Id. at 608-09, 698 P.2d at 881-82. When an appellate court makes statements that are unnecessary to its decision, those statements are without the binding force of law. See Ruggles v. Ruggles, 116 N.M. 52, 59 n.8, 860 P.2d 182, 189 n.8 (1993); Kent Nowlin Constr. Co. v. Gutierrez, 99 N.M. 389, 390-91, 658 P.2d 1116, 1117-18 (1982). As a result, we recognize a problem.

[30] Shaw points out that NMSA 1978, § 44-7-1 (1971) of the Uniform Arbitration Act stated that an agreement to arbitrate is “valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” Shaw, 102 N.M. at 608, 698 P.2d at 881 (internal quotation marks and citation omitted). The Supreme Court continued, saying “an arbitration clause is enforceable and valid” absent the existence of “legal
or equitable grounds for revoking it.” Id. (emphasis added). This pronoun, together with Shaw’s statements that New Mexico’s judicial policy favors arbitration of claims and that an agreement to arbitrate is itself an agreement capable of specific performance, see id., creates an ambiguity and begs a question: “ridiculous” or not, can an arbitration clause be invoked even if the entire contract that contains it might be declared invalid? If New Mexico’s judicial policy promotes determining a contract’s validity in other respects by resort to arbitration as a substitute for litigation, there may be nothing ridiculous about allowing a district court to compel arbitration under an arbitration clause where an arbitrator might then ultimately decide that the contract that contains the clause is otherwise void. {31} Shaw’s application to fraud in the inducement of the entire contract is not, however, the case we have before us. However, Rendall relied on Shaw, his claim is fraud relating to the arbitration agreement, and Shaw can be read as indicating that the district court should decide that issue before sending the entire contract to the arbitrator. Therefore, when a party challenges only an arbitration provision as fraudulently induced, the district court must decide this issue before sending the entire contract to the arbitrator. Rendall did not mention the arbitration provision in his complaint, which only contained general allegations of fraud in the performance of the contract on Merrill Lynch’s part. Therefore, in line with Shaw, we regard Rendall’s challenge to the arbitration clause alone and that the district court properly determined the arbitrability of the Agreement according to its terms.

III. CONCLUSION

{32} We affirm.

{33} IT IS SO ORDERED.

RODERICK T. KENNEDY,
Judge

WE CONCUR:
JAMES J. WECHSLER, Judge
JONATHAN B. SUTIN, Judge
from MSS.” For two or three years prior to August 2001, when the alleged interference occurred, there were billing and payment errors between MSS and Title Guaranty. There was a dispute in the record as to whether these errors were due exclusively to MSS’s billing practices or were partially attributable to Title Guaranty’s accounting practices, but there was no dispute about the existence of these problems. Denise Terrazas, Title Guaranty’s vice president, testified that MSS’s accounting practices were “a nightmare.” Martinez admitted that MSS and Title Guaranty had some billing problems and asserted that some of the problems were caused by Title Guaranty. While the billing errors, particularly double billings, were ultimately corrected, correcting them took Title Guaranty months of staff time and money.

{4} Martinez’s wife worked for LANB for more than twelve years as a vice president of the bank until April 2000. In 1995, she was promoted to head LANB’s mortgage-loan department. Over the years, Martinez and his wife had borrowed money from LANB to fund other business ventures. On October 17, 1997, the Martinezes entered into a development loan agreement with LANB to allow them to borrow $274,367 from LANB (Martinez Note). On September 11, 1998, DKDJ Holdings, LLC, a development company for which Mr. and Mrs. Martinez owned 24.5% of the stock of MSS, was formed.

{5} On May 23, 2001, Mr. and Mrs. Martinez filed for voluntary bankruptcy. In anticipation of the bankruptcy filing, Mr. and Mrs. Martinez formed MSS, on May 21, 2001, a limited liability company, owned by a family partnership. Mr. and Mrs. Martinez each owned 24.5% of MSS, for a total of 49%, and the other 51% was owned by Martinez’s father, who continued as the only licensed surveyor employed by MSS. When MSS was formed, Martinez assigned all of the liabilities and assets of Martinez Surveying Services, including the Collateral, to MSS. The district court found that even though Martinez was aware both of LANB’s lien on the Collateral and of the Security Agreement’s requirement that he advise LANB of any proposed transfer of the Collateral and obtain LANB’s prior written consent, he did not contact LANB and made the assignment without LANB’s knowledge or consent. Martinez conceded that “it was partially correct” that part of the protection he sought was to keep LANB from being able to exercise its lien rights. LANB subsequently provided MSS with notice of its refusal to consent to MSS’s use of the Collateral in March 2002.

{6} Beginning in 1995 and continuing until April 2000, when she left her employment at LANB, Mrs. Martinez engaged in an ongoing scheme of embezzlement involving fraudulent loans. In 1995, she made a fraudulent loan to her brother, deposited the money into an account she controlled, and spent the money. She also subsequently made other loans to a fictitious person and deposited this money into accounts at different banks. A portion of the monies embezzled from LANB were deposited into bank accounts owned and controlled jointly by Mr. and Mrs. Martinez. Trial exhibits show that $128,000 was deposited into a joint account and $23,000 into another, in addition to a number of smaller deposits. The plea agreement between federal prosecutors and Mrs. Martinez includes stipulations acknowledging guilt to charges of bank fraud and money laundering in the amount of $349,868.00. Some of the embezzled funds were used to repay LANB on the various notes and loans on which money was owed to LANB by Mr. and Mrs. Martinez and MSS.

{7} Title Guaranty’s Board of Directors met in August 2001, and decided that Title Guaranty would no longer initiate new survey orders with MSS. The Board decided to complete all existing contracts with MSS and to honor requests to use MSS made by realtors or customers. However, it would not recommend MSS to its customers or contract for surveys with MSS on its own initiative. This decision forms the basis for the claim that LANB conspired with Title Guaranty to interfere with prospective contractual relations of Martinez and MSS.

{8} Trinity Capital Corporation, a bank holding company located in Los Alamos, New Mexico, owns all of the stock of LANB, a national bank. In May 2000, Trinity Capital acquired Title Guaranty. The two corporations are wholly owned subsidiaries of Trinity Capital. All three members of Title Guaranty’s Board are also members of LANB’s Board. In August and September 2001, Mr. Enloe served as the chief executive officer of LANB, as the president and chief executive officer of Title Guaranty, and as the chief executive officer of Trinity Capital. Ms. Terrazas was the vice president of Title Guaranty. The district court’s findings note that the decision “was not made by LANB but by individuals associated with both LANB and Title Guaranty.” Nevertheless, “[t]he decision to have Title Guaranty stop ordering surveys from [MSS] was made by Enloe, Wells and Kinsfather [sic], who were Directors of Title Guaranty, and Officers and Directors of LANB.” The district court found, “LANB, by implication and through common directorship, caused Title Guaranty to stop ordering new surveys from MSS.” Further, the district court concluded that “LANB used the positions of Enloe, Wells and Kinsfather [sic] with Title Guaranty, and Enloe’s position as . . . boss of Denise Terrazas to cause or coerce Title Guaranty to stop ordering the surveys from MSS.”

{9} Ms. Terrazas confirmed that in August 2001, she met with Mr. Enloe in his capacity as chief executive officer of Title Guaranty. At the meeting, Ms. Terrazas said she was instructed by Mr. Enloe to stop initiating survey orders from MSS, but if there were realtors, clients, or customers that wanted to use MSS, Title Guaranty could contract with MSS, and “[t]hat’s what we did.” The court found that Title Guaranty was still ordering surveys from MSS in 2002. The dispute below centered on whether there was any improper coercion of Ms. Terrazas. Ms. Terrazas testified that, at that time, Mr. and Mrs. Martinez were her “best friends,” that “[e]motions were high,” and that her position as vice president of Title Guaranty was awkward, given their friendship. Ms. Terrazas testified that she was reluctant to tell the Martinezes that Title Guaranty would no longer initiate contracts with MSS, but she did so because she had been told to implement the Board’s decision by Title Guaranty’s President and her superior, Mr. Enloe. However, Ms. Terrazas denied that Mr. Enloe, or any other member of Title Guaranty’s Board, threatened or forced her to implement the decision.

{10} Mr. Enloe testified why the Title Guaranty Board made its decision to stop ordering new surveys from MSS. The biggest concern identified was the dishonesty of the owners of MSS, given the embezzle-
ment from LANB by Mrs. Martinez, a part owner of MSS, the deposit of embezzled money into joint accounts upon which checks were written by Martinez, and the transfer of assets by Martinez in anticipation of his bankruptcy filing two days later. Mr. Enloe testified, “the honesty issue is a big one, and, you know, if we can’t have confidence and an understanding that the people we’re doing business with are doing it in an honest manner, we can’t and shouldn’t do business with them. And that would have nothing to do with [LANB].” Mr. Enloe stated that it was his view, and the view of the other members of Title Guaranty’s Board, that it was financially risky for Title Guaranty to continue to recommend to its customers a company whose owners had shown themselves to be dishonest and unethical. He testified that he had a fiduciary duty to protect Title Guaranty’s profits and its shareholders, to ensure Title Guaranty operated legally, to protect its assets, and to act in Title Guaranty’s best interests. Based on these interests, he saw little choice for Title Guaranty but to stop initiating new survey orders with MSS, and to stop recommending MSS to its customers. Mr. Enloe stated that he and the Board also relied, in part, on the accounting problems and double billing problems Title Guaranty had encountered with Martinez Surveying and MSS. He explained that it was expensive for both the bookkeeping in Title Guaranty and its auditors to continually search the records to determine if the bills were correct. He noted double billings, billings for work that Title Guaranty was never paid for, and billings for closings which didn’t occur as concerns of the Board. The double billing of Title Guaranty by MSS raised additional questions about the honesty of Martinez and of MSS. Finally, the Board’s decision was based, in part, on Martinez’s default on the DKDJ and Martinez Notes, on his refusal to work with LANB to repay those loans, and on the financial drain created by the litigation to collect the amounts due.

Ms. Terrazas confirmed these concerns. She testified that when Mr. Enloe informed her about the Board’s decision, “he was concerned with their integrity, their dishonesty. The embezzlement had already started to come out. We also discussed the accounting issues that we had with [MSS] with double-billing.” She also testified herself about spending hours working every time she received an MSS invoice to verify its accuracy, time she testified she put in out of friendship with the Martinezes, even though the work was not profitable for Title Guaranty. Ms. Terrazas added that all of the other surveying firms on Title Guaranty’s approved surveyor list at that time were required to have Errors and Omissions coverage to do work for Title Guaranty, and that MSS did not have Errors and Omissions insurance. She said that concern about potential liability to Title Guaranty and its customers was one reason for Title Guaranty’s decision to stop initiating new contracts with MSS.

**DISCUSSION**

{12} LANB argues that the district court’s legal conclusion that LANB interfered with Defendants’ prospective contractual relations was erroneous. When a party is challenging a legal conclusion, the standard for review is whether the law correctly applied the facts, viewing them in a manner most favorable to the prevailing party, indulging all reasonable inferences in support of the court’s decision, and disregarding all inferences or evidence to the contrary. Golden Cone Concepts, Inc. v. Villa Linda Mall, Ltd., 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991).

{13} In a cause of action for interference with prospective contractual relations, improper motive must be the sole motive for interfering with a prospective or at-will contract. Fikes v. Furst, 2003-NMSC-033, ¶ 21, 134 N.M. 602, 81 P.3d 545 (emphasis added). Interference with a prospective contract is therefore distinguishable from the cause of action for interference with an existing contract, which does not have this sole motive requirement. Id. As an alternative to showing improper motive, a plaintiff may also show that the defendant used improper means with the sole intention of harming the plaintiff by interfering with a prospective business advantage. Silverman v. Progressive Broad., Inc., 1998-NMCA-107, ¶ 28, 125 N.M. 500, 964 P.2d 61. Where there is at least in part a legitimate business reason for the act, then a claim based on improper means fails. See id. LANB argues that the evidence does not support a finding of interference with prospective contractual relations because: (1) neither the evidence in the record nor the findings of the district court support a legal conclusion of conspiracy to interfere with prospective contractual relations based solely on an improper motive, and (2) none of the means used by the Title Guaranty and LANB Directors was improper or wrongful as a matter of law. Viewing the evidence in this case in the light most favorable to Defendants, we agree. Both improper motive and improper means are absent.

{14} The sole finding of fact by the district court regarding LANB’s motive states: “One of the reasons that the directors of Title Guaranty who were also directors of LANB, decided to have Title Guaranty stop initiating orders from MSS was that Danny Martinez and Katherine Martinez were in default on their loans to LANB.” We agree with LANB that the plain language of this finding does not support a legal conclusion that LANB’s sole motive was to harm Defendants. Both Furst and Silverman make it clear that an improper motive may form a basis of the act that interferes with prospective contractual relations, as long as it is not the only motivation. Therefore LANB could not have committed interference with prospective contractual relations as a matter of law.

{15} We are persuaded that this finding was not in error because, as LANB points out, the district court rejected all of Defendants’ proposed findings of fact that would have established that LANB’s sole motive was to harm Defendants or that the reasons advanced by LANB were pretextual. Failure of a district court to make a finding of fact is regarded as a finding against the party seeking to establish the affirmative. Landskroner v. McClure, 107 N.M. 773, 775, 765 P.2d 189, 191 (1988). The district court also therefore implicitly found that sole motive did not exist for the additional reason that it refused to adopt any of Defendants’ findings of fact that would have established sole motive. Therefore, sole motive cannot form the basis for the conclusion that LANB conspired to interfere with Defendants’ prospective contractual relations.

{16} Defendants assert that LANB’s argument is erroneously based on the assumption that the finding with the language “one of the reasons” is the sole finding of LANB’s improper motive. They point to a number of requested findings that they submitted which the district court adopted which they claim demonstrates LANB’s improper motive. The findings cited by Defendants address a number of factual issues, demonstrating that certain events occurred but they do not address motivation. Defendants also point out some of the proposed findings of LANB that were rejected by the district court. However, the negative of rejecting those findings requested by LANB does not establish the positive finding of a
sole motive to harm.

{17} Finally, Defendants argue that this finding of fact does show that LANB’s only motivation was to injure MSS because the Title Guaranty Directors were also simultaneously LANB directors, so when they reached the decision for Title Guaranty to stop ordering surveys from and to injure the business of MSS, based on Danny and Katherine Martinez’s other loan defaults at LANB, their decision was not based on the business of MSS at Title Guaranty, but instead based on the business of LANB’s other relations with Danny and Katherine Martinez.

This argument does not persuade us that we should read the district court’s finding of fact differently from how it is written. Therefore we conclude that this argument regarding improper motive also fails.

{18} Next we address whether an improper means was used by LANB to interfere with Defendants’ prospective contractual relations. Improper means includes both tortious and predatory behavior with the latter defined as being “wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.” Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112, ¶ 21, 125 N.M. 748, 965 P.2d 332 (internal quotation marks and citations omitted). Examples of improper means include but are not limited to “violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.” M & M Rental Tools, Inc. v. Milchem, Inc., 94 N.M. 449, 454, 612 P.2d 241, 246 (Ct. App. 1980) (internal quotation marks and citation omitted). We agree with LANB that the evidence fails to prove an improper means.

{19} LANB discusses the only findings of fact and conclusions of law in this case that might arguably support a conclusion that it used improper means to interfere with Defendants’ prospective contractual relations. A review of these findings and conclusions supports LANB’s position that no improper means were employed. We consider each of LANB’s points.

{20} First, the district court concluded that: “LANB used the positions of Enloe, Wells and Kinsfather [sic] with Title Guaranty, and Enloe’s position as the President of Title Guarantee [sic] and boss of Denise Terrazas to cause or coerce Title Guaranty to stop ordering the surveys from MSS. LANB argues that the conduct involved in connection with this conclusion law was not coercive as a matter of law because the record reflects only a conflict for Denise Terrazas between her duties as Title Guaranty’s vice president and her loyalty to her friends, the Martinezes, and not any threats or intimidation on the part of LANB. LANB maintains that the implicit threat of a reduction in salary or discharge from employment if an employee fails to comply with lawful directives given to her is “an everyday circumstance which is not illegal or improper.” We agree. The obligation of an employee to carry out lawful directives of a superior or board is not illegal or wrongful. Therefore, this conclusion of law does not support a holding that LANB used improper means to interfere with Defendants’ prospective contractual relations.

{21} Defendants counter that because LANB does not challenge the court’s findings regarding conspiracy, it is undisputed that LANB used improper means to interfere with MSS’s prospective contractual relations because a conspiracy itself constitutes an improper means. Defendants’ reasoning is circular. A civil conspiracy requires a “combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means.” Seeds v. Lucero, 2005-NMCA-067, ¶ 12, 137 N.M. 589, 113 P.3d 859 (internal quotation marks and citation omitted). Stated another way, an agreement by itself, without an independent, unlawful, act, is not an improper means. Because there is neither an unlawful purpose nor an unlawful means in Title Guaranty’s Board of Directors directing that Ms. Terrazas stop ordering surveys from MSS, there can be no conspiracy. Therefore we reject this argument.

{22} LANB also argues that the following conclusion of law fails to establish an improper means: “The decision of whether Title Guaranty stopped ordering surveys from MSS, its largest supplier of surveys, was not properly one to be made by LANB or by Enloe or any other persons who were LANB officers and directors, such as Messrs. Enloe, Wells and Kinsfather [sic].” LANB argues that this conclusion of law conflicts with settled law governing the operation of a corporation, which states that the board of directors of a corporation is charged with and is ultimately responsible for the management of a corporation, citing to NMSA 1978, Section 53-11-35 (1987).

LANB asserts that “[t]here is simply no independently wrongful action when the board of directors and the president and chief executive officer of a corporation directs the vice president of that corporation to carry out a decision of its board.” Defendants respond with the argument that the general authority of corporate directors to manage a corporation does not apply here because “LANB is not any corporation; it is a national bank . . . and its chief executive officer [sic] testified that as a national bank there are rules that prohibit LANB and Title Guaranty from commingling their businesses.”

{23} We are not persuaded by Defendants’ argument that LANB’s status as a national bank requires that its corporate governance be somehow different from other corporations under New Mexico law. Nor are we persuaded that the decision by Title Guaranty’s board members where some of the board members were also LANB board members to stop ordering surveys from MSS constitutes the improper commingling of business. Defendants’ argument suggests that the mere fact that LANB and Title Guaranty had board members in common means that Title Guaranty’s board members should have disregarded information that raised the issue of whether further dealings with MSS could be injurious to Title Guaranty. Given the undisputed embezzlement by one of MSS’ owners along with other problematic indications such as MSS’ billing practices, had Messrs. Enloe, Wells, and Kinsfather not considered whether to terminate ordering further surveys from MSS, their inaction may well have constituted a breach of their fiduciary duty to Title Guaranty to act in its best interests. See § 53-11-35(D). Defendants do not address whether the Board’s action was in good faith and in the best interests of Title Guaranty, therefore their argument that the action was not privileged fails. We are further unpersuaded that federal banking regulations have any bearing on the issue. We therefore hold that the mere fact of common board members between LANB and Title Guaranty did not render the decision by Title Guaranty’s Board of Directors to stop ordering surveys from MSS an improper means of interfering with MSS’ prospective contractual relations.

{24} LANB finally argues that the following finding of fact does not demonstrate an improper means: “LANB impaired the collateral from MSS when it caused, and participated in, Title Guaranty’s stoppage of ordering surveys from MSS.” Defen-
dants fail to cite any authority for the proposition that under the circumstances LANB was obligated to continue doing business with MSS in order to avoid impairing its collateral in violation of Article 9 of the Uniform Commercial Code (codified at NMSA 1978, Sections 55-9-101 to -710 (2001, as amended through 2005)), and we fail to find any such authority. We therefore conclude the finding that LANB interfered with Defendants’ prospective contractual relations by the improper means of impairing the Collateral is not supported by the record.

{25} Defendants argue that LANB “accepted and ratified” the district court’s judgment, thereby waiving its right to appeal. The factual basis for this contention is that Defendants filed a motion to vacate the judgment; LANB opposed Defendants’ motion and argued that the judgment was consistent with the district court’s filed findings of fact and conclusions of law. Defendants do not cite any authority for this novel proposition, so we do not address it. See State v. Clifford, 117 N.M. 508, 513, 873 P.2d 254, 259 (1994) (stating that our Supreme Court will not review issues raised in the appellate briefs that are unsupported by authority). Moreover, LANB argued to the district court that there were no facts in the record establishing that LANB engaged in any interference with the sole motive to harm Defendants and that the record conclusively showed that there were many reasons for Title Guaranty’s decision to stop initiating survey orders from MSS. LANB also argued that the evidence failed to establish that LANB engaged in an act of interference by improper means. Therefore, LANB’s arguments were preserved for our review. See Woolwine v. Furr’s, Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987) (“To preserve an issue for review on appeal, it must appear that appellant fairly invoked a ruling of the trial court on the same grounds argued in the appellate court.”)

{26} For the reasons explained above, upon viewing the facts in the light most favorable to the judgment, we hold that the district court’s conclusion that LANB interfered with Defendants’ prospective contractual relations is not supported by the evidence in the record and we reverse. We therefore need not address LANB’s additional argument that its actions were not the proximate cause of Defendants’ damages.

{27} The district court’s denial of LANB’s request for attorney’s fees was based on its conclusion that LANB precipitated Defendants’ default under the loans by interfering with Defendants’ prospective contractual relations. Because we hold that interference with prospective contractual relations did not occur, this is no longer a proper basis for denying LANB’s request for accrued interest and attorney’s fees. Furthermore, as the prevailing party, LANB is entitled to its costs in a sum to be determined on remand. Rule 1-054(D) NMRA.

CONCLUSION

{28} The judgment in favor of Martinez and MSS on their counterclaim is reversed, and the cause is remanded for further proceedings consistent with this opinion. In all other respects, the judgment of the district court is affirmed.

{29} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE,
Chief Judge

CELIA FOY CASTILLO, Judge
ADMINISTRATIVE APPEAL FROM THE NM ENVIRONMENT DEPARTMENT

RON CURRY, Secretary of the NM Environment Department

MARK K. ADAMS
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Santa Fe, New Mexico
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PICKETT RANCH, LLC,
Appellant,
versus
RON CURRY, SECRETARY OF THE NEW MEXICO ENVIRONMENTAL DEPARTMENT,
Appellee.
No. 25,888 (filed: July 5, 2006)

Certiorari Not Applied For

From the New Mexico Court of Appeals

Opinion Number: 2006-NMCA-082

BACKGROUND

In 2001, the City of Tucumcari submitted to the Department an application for a permit to open a new landfill. In accordance with the Solid Waste Act, NMSA 1978, §§ 74-9-1 to -43 (1990, as amended through 2001) (the Act), the Department held a public hearing. Appellant in this case is a landowner whose land abuts the proposed landfill site. Appellant, through counsel, appeared at the hearing and presented evidence and expert testimony in opposition to the application. After the hearing, the hearing officer issued a detailed report, recommending that the permit be granted with certain conditions. The Secretary of the Department approved the report and issued a final order granting the permit. Appellant appeals the Secretary’s final order pursuant to Section 74-9-30. Appellant contends that the permit should not have been granted because Tucumcari failed to comply with certain statutory and regulatory requirements involving financial assurance, because some of the Secretary’s findings are not supported by substantial evidence, and because the Secretary abused his discretion and acted arbitrarily and capriciously.

DISCUSSION

Appellant’s arguments fall into two categories. First, Appellant argues that the permit should not have been granted because Tucumcari failed to demonstrate that it met the financial assurance requirements of the Act and the relevant regulations. Second, Appellant challenges several of the Secretary’s factual findings, arguing that they are either arbitrary and capricious or not supported by substantial evidence. Appellant’s contention appears to be that, in light of Tucumcari’s poor history of compliance with the regulations at its existing landfill, the Secretary granted the permit for the new landfill without doing enough to ensure that adequate safeguards were in place to protect the public health and welfare. Appellant argues a third issue involving the regionalization scheme set forth in the Act. We do not reach this issue, as it was not raised before the hearing officer. See Rule 12-216(A) NMRA.

1. Financial Assurance Requirements

The hearing officer found that Tucumcari was not required to satisfy certain aspects of the regulations governing financial assurance in order to obtain a permit. Rather, the officer concluded that the regulatory scheme allowed the Department to issue the permit to Tucumcari and then require the City to demonstrate that it was in compliance prior to the initial receipt of waste at the facility. The officer recommended that the Secretary impose a condition slightly more stringent than what was required by the regulations: she recommended that Tucumcari be required to demonstrate the necessary financial compliance before beginning construction, rather than before the initial receipt of waste. The Secretary approved the proposed condition.

The crux of Appellant’s argument is that Tucumcari was required to show compliance with all of the regulations governing financial assurance before it could get a permit and that the Department violated its own regulations by allowing Tucumcari to make such a showing after it had already obtained a permit. Because there are no facts in dispute, the question we must answer is whether the Act and the relevant regulations permit the Department to allow post-permit compliance, rather than pre-permit compliance, with some of the regulations governing financial assurance. Under the Act, we may set aside an action of the Department only if we find it to be “(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). Our review of the relevant statutes and regulations is generally de novo, State v. Collins, 2005-NMCA-044, ¶ 23, 137 N.M. 353, 110 P.3d 1090, but we will accord deference to the Department’s interpretation of its own ambiguous regulations, Colonias Dev. Council v. Rhino Envtl. Servs. Inc., 2005-NMSC-024, ¶ 13, 138 N.M. 133, 117 P.3d 939. In reviewing for substantial evidence, we apply “whole record” review, meaning that we examine all of the evidence in the record, including the evidence that supports the decision. See Atlixco Coal. v. Maggiore, 1998-NMCA-134, ¶ 23, 125 N.M. 786, 965 P.2d 370.
{6} We begin by setting forth the statutory and regulatory framework governing financial assurance. The Act directs the Department to promulgate regulations that are “designed to assure that there are adequate sources of funds to provide for” various occurrences, including eventual closure of facilities, monitoring of environmental hazards, and clean up or decontamination of facilities if such becomes necessary. Section 74-9-35(A). The Act states that such funds “shall be available during the operating life of the solid waste facility and for a post-closure period[.]” Section 74-9-35(B). The Act mentions various methods by which a facility operator may show that it has the financial resources necessary to eventually close the facility and to deal with problems that may arise during operation of the facility. Section 74-9-35(D). Finally, the Act states that the Secretary “may . . . deny a permit application if the applicant fails to meet the financial responsibility requirements” established by the Department. Section 74-9-24(A).

{7} We next set forth the relevant Department regulations. The regulation that establishes the effective date of the financial assurance regulations, 20.9.1.900(A)(2) NMAC (1995) (citing 40 C.F.R. § 258.70 (2004)), states as follows:

The requirements of this Subpart [20.9.1.900 NMAC, governing financial assurance] are effective upon the earliest of:

(a) when an owner or operator seeks a permit;
(b) when an owner or operator seeks a permit to modify their facility;
(c) when the Secretary has requested a permit application; or
(d) when the date for compliance with financial assurance provisions established in 40 CFR [§]258.70, Subpart G - Financial Assurance Criteria, takes effect.

Subsection F of 20.9.1.900 NMAC sets forth eight ways in which an owner or operator of a landfill may demonstrate financial assurance. Subsection F states that an owner or operator must pick one of the eight methods. The method chosen by the City of Tucumcari in this case was the “Local Government Financial Test,” which is described in 20.9.1.900(F)(6)(a)-(e) NMAC. For the sake of clarity, we now set forth the relevant parts of that regulation in full:

(a) An owner or operator that satisfies the requirements of [20.9.1.900(F)(6)(b)-(d)] may demonstrate financial assurance up to the amount specified in [20.9.1.900(F)(6)(e)] for closure, post closure, the Phase I and Phase II assessment, and/or corrective action.

(b) Financial component:

(i) The owner or operator must satisfy one of the following:

1) if the owner or operator has outstanding general obligations bonds, it must have a current rating of Aaa, Aa, A, or Baa, as issued by Moody’s, or AAA, AA, A, or BBB, as issued by Standard and Poor’s on all outstanding general obligation bonds; or
2) if the owner or operator does not have outstanding general obligation bonds, it must satisfy each of the following financial ratios: a ratio of cash plus marketable securities to total expenditures greater than or equal to 0.05; and a ratio of annual debt service to total expenditures less than or equal to 0.20; and a ratio of long-term debt issued and outstanding to capital expenditures less than or equal to 2.00.

(ii) The owner or operator must prepare its financial statements in conformity with Generally Accepted Accounting Principles for governments.

(iii) An owner or operator is not eligible to assure its obligations under this Subsection F [the Local Government Financial Test] if: it is currently in default on any outstanding general obligation bonds; has an outstanding general obligation bond[rated lower than Baa as issued by Moody’s or BBB as issued by Standard and Poor’s]; operated at a deficit equal to five percent or more of total annual revenue in either of the past two fiscal years; or receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant (or appropriate State agency) auditing its financial statement as required under [20.9.1.900(F)(6)(b)(iii)]. However, the Secretary may evaluate qualified opinions on a case-by-case basis and allow use of the financial test in cases where the Secretary deems the qualification insufficient to warrant disallowance of the test.

(d) Record keeping and reporting requirements:

(i) The local government owner or operator must place the following items in the facility’s operating record:

[1] a letter signed by the local government’s chief financial officer that: [a] lists all the current cost estimates covered by a financial test, as described in [20.9.1.900(F)(6)(c) NMAC]; [b] provides evidence and certifies that the local government meets the conditions of [20.9.1.900(F)(6)(b) and (c) NMAC]; and [c] certifies that the local government meets the conditions of [20.9.1.900(F)(6)(e) NMAC];[2] the local government’s independently audited year-end financial statements for the latest fiscal year, including the unqualified opinion of the auditor who must be an independent, certified public accountant or an appropriate State agency that conducts equivalent comprehensive audits; and [3] a report to the local government from the local government’s independent certified public accountant or the appropriate State agency stating that: the certified public accountant or State agency has compared the data in the chief financial officer’s letter with the owner’s or operator’s independently audited, year-end financial statements for the latest fiscal year; and in connection with that examination, no matters came to his attention which caused him to believe that the data in the chief financial officer’s letter should be adjusted.

(ii) the items required in [20.9.1.900(F)(6)(d)(i) NMAC] must be placed in the facility operating record as follows:
in the case of closure, post-closure care, and the Phase I and Phase II assessment, either before the initial receipt of waste at the facility or before the effective date of this Subpart [20.9.1.900], whichever is later.

.......

(v) A local government must satisfy the requirements of the financial test at the close of each fiscal year.

20.9.1.900(F)(6) NMAC.

{8} As noted above, Appellant’s argument is that (1) Tucumcari needed to meet all of the requirements set forth in 20.9.1.900(F)(6) NMAC, and specifically the requirement of 20.9.1.900(F)(6)(d)(i) NMAC involving a year-end financial statement from the latest fiscal year, before it could get a permit, and (2) the Secretary erred in issuing the permit and allowing Tucumcari to demonstrate compliance with some of those requirements at a later date.

{9} Before setting forth Appellant’s arguments in greater detail, we note that Appellant does not argue that the central financial assurance requirement was not satisfied in this case. As we stated above, the purpose of the regulations is to ensure that adequate funds are available for closure of facilities and for problems that may arise while the facility is in operation. 20.9.1.900(F)(6)(b)(i) NMAC, titled “Financial component,” describes the substantive mechanisms through which a local government may show that it has adequate resources. The regulation states that the local government must show that either (1) it has been given a certain rating by Moody’s or Standard and Poor’s, or (2) it operates under certain ratios involving debts, expenditures, and assets. Tucumcari made the requisite showing in this case. Because 20.9.1.900(F)(6)(b)(i) NMAC sets forth the substantive requirements for showing financial assurance, we think it fair to conclude that 20.9.1.900(F)(6)(b)(i) NMAC is the central requirement of the local government financial test. As noted, Appellant makes no argument that Tucumcari failed to satisfy 20.9.1.900(F)(6)(b)(i) NMAC.

{10} We now examine Appellant’s arguments regarding financial assurance in greater detail. We first note Appellant’s argument that if Tucumcari did not meet the financial assurances requirements, the Secretary was required to deny the permit. We are not convinced that this is true. 20.9.1.200(L)(12) NMAC (1995) states that the Secretary “shall” deny a permit application “if the applicant fails to meet the financial responsibility requirements.” However, the Solid Waste Act states that the Secretary “may” deny a permit if the applicant has failed to satisfy the financial assurance requirements. Section 74-9-24(A). Where a statute and a regulation are inconsistent, the statute will prevail. Jones v. Employment Servs. Div., 95 N.M. 97, 99, 619 P.2d 542, 544 (1980) (“If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail.”). In this case, we need not decide whether the statute and the regulation are truly inconsistent, such that the statute would trump the regulation and the Secretary would have discretion to grant the permit even if he found that the requirements were not satisfied. We determine that even if the Secretary was required to deny the permit on a finding that the financial assurance requirements were not satisfied, the Secretary did not err because Tucumcari adequately complied with the requirements in this case.

{11} In support of its contention that a permit applicant must demonstrate total compliance with all of the financial assurance requirements at the time the application is filed, Appellant first cites 20.9.1.900(A)(2) NMAC. As noted above, that regulation states that “[t]he requirements of [Subpart 900] are effective upon the earliest of: (1) “when an owner or operator seeks a permit”; (2) “when an owner or operator seeks a permit to modify their facility”; (3) “when the Secretary has requested a permit application”; or (4) “when the date for compliance with financial assurance provisions established in 40 C.F.R. §§ 258.70, Subpart G - Financial Assurance Criteria, takes effect.”

{12} Appellant appears to make a broad argument that the first category listed above, “when an owner or operator seeks a permit,” dictates that, as soon as an applicant files a permit, the financial assurance requirements are “triggered,” such that the applicant must comply with all of the requirements detailed in Subpart 900. We reject this argument. Category (4) above refers to 40 C.F.R. § 258.70, Subpart G. Subsection (b) of that C.F.R. states that “[t]he requirements of this section are effective April 9, 1997.” Subpart 900 was promulgated in 1994, prior to the April 9, 1997, date referenced in the C.F.R. Accordingly, we see only one logical interpretation of 20.9.1.900(A)(2) NMAC: before April 9, 1997, owners or operators who sought a permit to open or modify a facility were subject to the financial assurance requirements, but owners or operators of existing facilities (as long as they did not seek a new permit) were not subject to the requirements; then, beginning on April 9, 1997, when the C.F.R. became effective, all owners and operators of facilities, both new and existing, became subject to the financial assurance requirements. We find our interpretation to be the only logical one because, after April 9, 1997, the “earliest” of the four options under 20.9.1.900(A)(2) NMAC will always be April 9, 1997. After that date, the financial assurance requirements are simply applicable to everyone, and the remaining categories listed in 20.9.1.900(A)(2) NMAC are rendered irrelevant.

{13} Under our interpretation, Appellant’s argument regarding 20.9.1.900(A)(2) NMAC fails. We have stated that, after April 9, 1997, the financial assurance requirements are “applicable” as to all owners and operators of landfills. However, as we detail below, the bare fact that the requirements have become applicable does not dictate that all of the particulars detailed in Subpart 900 must be satisfied before a permit can be issued. Rather, we take 20.9.1.900(A)(2) NMAC to be nothing more than an “effective date” provision. Since the effective date has now passed (and since it had passed before Tucumcari filed its permit application) we determine that 20.9.1.900(A)(2) NMAC is no longer relevant and does not help Appellant.

{14} We now turn to Appellant’s central contention, which is that a permit cannot be granted unless a permit applicant provides “an unqualified opinion from an accountant covering its latest fiscal year” that is “available for public review during the permitting process.” Contrary to Appellant’s argument, the hearing officer found that the financial statement requirement “does not obtain at the time of [the] permit application,” but rather, “the proper reports must be in place before waste is received.”

{15} It appears that the only financial statement Tucumcari submitted with its application was a “draft audit” for the year 2002, and that document contained a “qualified” opinion. It is undisputed that Tucumcari did not submit any financial statement for 2004, which would have been the latest fiscal year. However, we agree with the hearing officer’s determination. We are not
persuaded that the regulations require the submission of a year-end financial statement from the latest fiscal year before a permit can be granted.

{16} In support of its argument regarding the year-end financial statement, Appellant relies on 20.9.1.900(F)(6)(d)(i) NMAC, which is titled “Record keeping and reporting requirements.” That regulation states that the owner or operator must place into its “operating record” “the local government’s independently audited year-end financial statements for the latest fiscal year, including the unqualified opinion of the auditor.”

We agree with the hearing officer’s interpretation of 20.9.1.900(F)(6)(d)(i) NMAC. Another section of the same paragraph, 20.9.1.900(F)(6)(d)(ii) NMAC, states that the items required by 20.9.1.900(F)(6)(d)(i) NMAC, including the year-end financial statement, must be placed in the operating record “either before the initial receipt of waste at the facility or before the effective date of this Subpart [Subpart 900], whichever is later.” (Emphasis added.)

{17} As we have already established above, for all permit applications filed after April 9, 1997, the “effective date” of Subpart 900 is April 9, 1997. Accordingly, for all permit applications filed after April 9, 1997, 20.9.1.900(F)(6)(d)(ii) NMAC requires that the statements be placed in the operating record “before the initial receipt of waste at the facility,” because that date will now always be “later” than the “effective date” of Subpart 900 (April 9, 1997). As such, we hold that Tucumcari was not required to obtain or submit the financial statement before issuance of the permit. Rather, after April 9, 1997, the regulations require only that an applicant place the appropriate statement in its operating record before the initial receipt of waste. As we have noted, the Department in this case imposed a more stringent condition on Tucumcari, requiring that it obtain the financial statement prior to beginning construction.

{18} Our determination regarding the year-end financial statement is also supported by the plain language of 20.9.1.900(F)(6)(d)(i) NMAC. The regulation states that the financial statements must be placed in the facility’s “operating record.” Another regulation defines “operating record”: “Owners and operators of solid waste facilities shall make and maintain an operating record during the active life of the facility, for each day that operations, monitoring, closure, or post-closure activity occurs.” 20.9.1.109(A) NMAC (1995). Under this regulation, it is clear that a landfill is not required to maintain an “operating record” if the facility is not “active.” Moreover, it is common sense that a facility would not keep an “operating record” during the permit process before the facility is actually ready to become operational. Accordingly, we hold that 20.9.1.900(F)(6)(d)(i) NMAC did not require Tucumcari to possess an unqualified opinion from an accountant covering its latest fiscal year” before it could obtain a permit.

{19} We are similarly unpersuaded by Appellant’s reliance on 20.9.1.900(F)(6)(d)(v) NMAC, which states that “[a] local government must satisfy the requirements of the financial test at the close of each fiscal year.” By its plain language, the statement that the requirements must be satisfied every year does not indicate that any particular financial documents must be in place before a permit can be granted. Rather, 20.9.1.900(F)(6)(d)(v) NMAC, which goes on to describe the steps that must be taken by an owner or operator who initially satisfied the local government financial test but can no longer do so, appears to address ongoing compliance by an already operational facility. Thus, we reject Appellant’s argument involving 20.9.1.900(F)(6)(d)(v) NMAC.

{20} Appellant next argues that the Secretary “waived” “the requirement[s] for yearly financial statements,” an action that is not permitted by the relevant regulations. (Emphasis omitted.) We disagree that the Secretary “waived” the requirements. As we held above, the regulations did not require Tucumcari to have the relevant financial documents in place at the time it applied for a permit. Rather, the regulations were satisfied as long as the Department required that Tucumcari have the documents in place, at the latest, before it starts accepting waste at the new facility. Accordingly, the Secretary did not “waive” any requirements of the regulations.

{21} In connection with its argument regarding the Secretary’s purported “waiver” of the financial assurance requirements, Appellant also cites 20.9.1.900(F)(6)(b)(ii) NMAC. That regulation provides that an owner or operator is “not eligible” to use the local government financial test if it “receives an adverse opinion, disclaimer of opinion, or other qualified opinion from the independent certified public accountant . . . auditing its financial statement as required under [20.9.1.900(F)(6)(b)(ii) NMAC].” The regulation goes on to provide that even if an owner or operator does receive a “qualified opinion,” the Secretary has discretion to continue to allow use of the local government financial test.

{22} In this case, Tucumcari did submit an opinion from its accountant. The document was from 2002 and contained a “qualified . . . opinion.” Pursuant to 20.9.1.900(F)(6)(b)(iii) NMAC, the Secretary decided to allow Tucumcari to continue using the local government financial test despite the qualified opinion.

{23} We reject Appellant’s argument that 20.9.1.900(F)(6)(b)(iii) NMAC requires an applicant to submit a financial statement “for the most recent fiscal year” and that the Secretary “waived” this requirement. The regulation does mention a “financial statement as required under [20.9.1.900(F)(6)(b)(ii) NMAC].” (As we have noted, 20.9.1.900(F)(6)(b)(ii) NMAC states only that “The owner or operator must prepare its financial statements in conformity with Generally Accepted Accounting Principles for governments.”) However, 20.9.1.900(F)(6)(b)(iii) NMAC makes no mention of any requirement that a statement must be “from the latest fiscal year.” Cf. 20.9.1.900(F)(6)(d)(i) NMAC (noting that “financial statements for the latest fiscal year” must be placed in a facility’s operating record (emphasis added)). Under these circumstances, we think the Secretary had discretion to rely on the 2002 financial statement in determining whether Tucumcari satisfied the financial assurance requirements.

{24} Appellant also appears to argue that the Department itself recognizes that a financial statement from the latest fiscal year is required. Appellant cites a memorandum that appears in the record. The memorandum states that the regulations require “supporting documentation, none of which was included with the application.” It then states, “The applicant needs to provide a copy of the independently audited year-end financial statements from the latest fiscal year, including the unqualified opinion of the auditor.” We question whether this document is really a memorandum from the Department to Tucumcari, as Appellant contends, rather than some type of an interoffice memorandum from within the Department. At any rate, we note that the document is from “E. Gifford Stack.” Appellant has not indicated who Mr. Stack is, but clearly he is not the Secretary. Accordingly, we reiterate our conclusion that the Secretary had discretion to rely on the 2002 financial statement.

{25} Next, we address Appellant’s argu-
ment that 20.9.1.200(A)(2)(d) NMAC mandates that the documentation described in 20.9.1.900(F)(6) NMAC, and specifically the year-end financial statement described in 20.9.1.900(F)(6)(d)(i) NMAC, must be in place before a permit can be granted. 20.9.1.200(A)(2)(d) NMAC simply states that all permit applications shall "comply with the financial assurance requirements as specified in Subpart [900]." In the foregoing discussion, we have held that the regulations governing financial assurance do not require an applicant to submit the year-end financial statement prior to getting a permit. Accordingly, we reject the argument that 20.9.1.200(A)(2)(d) NMAC imposes such a requirement. Rather, we assume that as long as the central requirement involving financial capacity as shown by credit rating or financial ratio, see 20.9.1.900(F)(6)(b)(i) NMAC, is satisfied, a permit applicant will be in compliance with 20.9.1.200(A)(2)(d) NMAC. Because Tucumcari made the necessary showing in its application in this case, we hold that the Secretary did not err in granting the permit.

(26) Appellant next argues that it is important for a permit applicant to make its financial information available to the public during the permitting process so that the public can be informed and participate in the process. In support of its argument, Appellant cites the following statutes: Section 74-9-22, which states that each application shall contain "documentary proof that the applicant has provided notice of the filing of the application to the public and other affected individuals and entities"; Section 74-9-23(B), which states that, after determining that a permit application is complete, the Secretary shall hold a public hearing and give proper notice of that hearing; and Section 74-9-24(A), which states that the Secretary must either issue or deny a permit after a public hearing has been held. Appellant also cites 20.9.1.200(A)(3)(f)(v) NMAC, which states that the notice that the applicant must provide to the public and interested parties shall contain "a statement that comments should be provided to the applicant and the Department."

(27) We do not disagree with Appellant that these authorities support the general proposition that notice and public participation are important to the permitting process. However, none of these authorities support the more specific proposition that all of the requirements mentioned 20.9.1.900 NMAC must be satisfied at the time that an applicant submits its permit application. Accordingly, we reject Appellant's argument involving the above authorities.

(28) Appellant also relies heavily on a recent case from our Supreme Court, Colonias Development Council, 2005-NMSC-024. Colonias involved a landfill permit application that was highly contested by the community. Id. ¶ 2-4. After several public hearings at which sixty people spoke, the hearing officer issued a report recommending that the permit be granted. Id. ¶ 3, 6. While there appeared to be no dispute that the public had been afforded an adequate opportunity to be heard, the hearing officer had erroneously concluded that the lay testimony was irrelevant to the permit process because that testimony was "beyond the scope of the Secretary's authority for granting or denying a landfill." Id. ¶ 33. The hearing officer apparently refused to consider the public comment, believing that the grant or denial of the permit should be based only on whether the technical requirements of the Solid Waste Act and the relevant regulations were satisfied. See id. ¶ 10. Our Supreme Court set aside the Secretary's final order and remanded for a limited public hearing, concluding that "the hearing officer erred in characterizing testimony relating to the community's quality of life as irrelevant." Id. ¶¶ 36, 42.

(29) Like the other authorities cited by Appellant, Colonias supports the general proposition that public comment is important to the permitting process. Indeed, Colonias held that the hearing officer was not permitted to allow public comment, but then completely disregard it. Appellant in this case has not argued that, as in Colonias, the hearing officer or the Secretary completely disregarded Appellant's input. Rather, Appellant appears to rely on Colonias for the proposition that the Department erred in granting the permit without detailed financial information being made available to the public during the permitting process. We disagree that Colonias can be read so broadly, and we do not find it persuasive in this case.

(30) Finally, we address Appellant's cursory argument, contained in one paragraph of the brief in chief, that substantial evidence does not support the Secretary's determination that Tucumcari satisfied the financial assurance requirements. We reject Appellant's substantial evidence argument. We have already noted that Tucumcari submitted as part of its application a statement from its chief financial officer demonstrating that the City meets the requirements of 20.9.1.900(F)(6)(b)(j) NMAC. The record also contains a "draft" audit for the year 2002, as well as documentation involving estimated closure and assessment costs for the new landfill. In view of our prior holdings that the regulations do not require specific documents (such as a year-end statement for the latest fiscal year) to be in place before a permit can be granted, we hold that the foregoing constitutes substantial evidence on which the Secretary could have concluded that Tucumcari satisfied the financial assurance requirements.

2. The Secretary's Findings Were Supported by Substantial Evidence, and The Secretary Did Not Abuse His Discretion or Act Arbitrarily or Capriciously

(31) Appellant next attacks a number of the Secretary's specific findings, contending that the Secretary either abused his discretion, acted arbitrarily and capriciously, or made findings that were not supported by substantial evidence. We now address each of the contested findings.

a. The Secretary's Findings Involving Tucumcari's Compliance with Regulations at Its Existing Landfill

(32) Appellant first challenges the Secretary's findings that (1) "[Tucumcari] has not failed to demonstrate a knowledge and ability to operate a facility in accordance with the [regulations] or a history of non-compliance with environmental regulations or statutes at other facilities"; (2) the Application demonstrated that "neither a hazard to public health, welfare[,] or the environment nor undue risk to property will result"; and (3) Tucumcari's past failings do not "rise to the level of `willful disregard for the Solid Waste Act, or failure to demonstrate the ability to operate a landfill in accordance with the [regulations], that warrants denial of the permit application.'"

(33) These findings correspond to 20.9.1.200(L)(16) NMAC, which lists a number of circumstances that constitute "cause[] for denying a permit application." Two of those circumstances are that (1) the applicant has "fail[ed] to demonstrate a knowledge and ability to operate a facility in accordance with [the regulations] or [has] a history of non-compliance with environmental regulations or statutes at other facilities," 20.9.1.200(L)(16)(d) NMAC, and (2) "the permitted activity endangers public health, welfare[,] or the environment," 20.9.1.200(L)(16)(c) NMAC. Appellant also relies on a similar regulation that states that "The Secretary shall issue a permit if the . . . 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. Finally, Appellant appears to rely on 20.9.1.200(L)(13)(e) NMAC, which states that the Secretary “may deny any permit application” if the applicant has “exhibited a history of willful disregard for the environmental laws of any state or the United States.”

{34} Appellant’s general contention with regard to all of these findings is that the Secretary should not have granted the permit for the new landfill in view of Tucumcari’s poor history of compliance with relevant laws at its existing landfill. Appellant makes three specific arguments with regard to the above findings: (1) the findings are bare conclusions not supported by substantial evidence, (2) the findings are in error because the Secretary failed to consider Tucumcari’s long and serious history of non-compliance at its existing facility, and (3) the Secretary erred because Tucumcari’s past failures to demonstrate financial assurance indicate that the new landfill will likely be “a hazard to public health, welfare[,] or the environment.”

20.9.1.200(L)(10) NMAC.

{35} Before addressing Appellant’s specific arguments, we first note that the regulations cited by Appellant state only that the specified findings provide “cause” to deny a permit. Moreover, 20.9.1.200(L)(10) NMAC does not affirmatively state that a permit must be denied if the facility will create a hazard, but states only that the Secretary “shall issue a permit” if “the solid waste facility application demonstrates that neither a hazard to public health, welfare[,] or the environment nor undue risk to property will result.”

{36} Given the permissive language of these regulations, we note that the Secretary would have discretion to grant a permit even if he found that some of the above-stated “causes” for permit denial were present. See Joab, Inc. v. Espinosa, 116 N.M. 554, 559, 865 P.2d 1198, 1203 (Ct. App. 1993) (noting that regulations do not require an affirmative showing of the knowledge and ability to operate a facility, but rather, the Secretary has discretion to deny a permit “if the applicant fails to show the knowledge and ability to operate a facility”); holding that where the record showed that the applicant had operated a landfill in the past and where the application contained plans for how the landfill would be operated, the Secretary did not err in granting the permit). Accordingly, we think the real question is whether the Secretary abused his discretion or acted unreasonably in concluding that Tucumcari’s past problems were not severe enough to warrant a discretionary denial of the new permit.

{37} Appellant makes the following argument:

“[h]ad the Secretary considered and properly [weighed] all of the evidence, he could not have reasonably concluded that Tucumcari does not have a history of non-compliance with environmental laws at its current landfill, that Tucumcari demonstrated a knowledge and ability to operate a landfill in accordance with the [r]egulations, or that it demonstrated that neither a hazard to public health, welfare[,] or the environment nor undue risk to property will result from the [n]ew [l]andfill.

We suspect that Appellant’s goal is to have this Court reweigh the facts in order to evaluate the Secretary’s exercise of his discretion. We decline to do so. See Tallman v. AFB (Arkansas Best Freight), 108 N.M. 124, 127-28, 767 P.2d 363, 366-67 (Ct. App. 1988) (noting that even under whole record review, “[a] reviewing court may not reweigh the evidence,[,] but should only determine whether, in light of the whole record, the result reached is reasonable), modified on other grounds by Delgado v. Phelps Dodge Chino, Inc., 2001-NMSC-034, ¶ 27, 131 N.M. 272, 34 P.3d 1148.

Rather, we think the Secretary is in the best position to determine what constitutes a “lack of knowledge and ability” or “a history of non-compliance” sufficient to warrant the discretionary denial of a permit. As long as the Secretary’s decision is supported by substantial evidence and is not unreasonable, we will affirm it.

{38} With regard to Appellant’s first argument, we conclude that the contested findings are supported by substantial evidence. Evidence was submitted to the hearing officer indicating that Tucumcari has had a poor history of compliance with environmental laws at its existing facility. For example, the record contains a letter from the Department to the City indicating that there is a plume of contaminated water beneath the City’s existing landfill. The record also shows that Tucumcari has failed in the past to comply with regulations governing monitoring of groundwater. The record also indicates that Tucumcari’s inspection reports regularly revealed that blowing trash was leaving the landfill and littering neighboring properties.

{39} However, there is also evidence in the record that indicates that Tucumcari made efforts to deal with the compliance problems and that the problems may not have been as severe as Appellant makes them out to be. For example, a Department witness testified that, Tucumcari’s compliance with regard to issues other than litter was “average.” The same witness stated that the Department had never issued an administrative compliance order to Tucumcari because Tucumcari always corrected problems when the Department sent notices of violation. Moreover, several of the Department’s witnesses testified that these past problems did not constitute an adequate reason to deny the permit.

Together, the above constitutes substantial evidence on which the Secretary could have based the contested findings.

{40} With regard to Appellant’s second argument, we disagree that the Secretary erred in failing to consider Tucumcari’s past compliance problems. For example, the hearing officer’s report notes that Tucumcari has had a “poor compliance history” regarding litter and that the City “has not proceeded expeditiously” in dealing with groundwater contamination problems. However, the officer stated that Tucumcari’s actions “do not rise to the level of . . . failure to demonstrate the ability to operate a landfill in accordance with the [r]egulations.” The officer also concluded that “the more appropriate remedy considering the totality of circumstances is vigorous enforcement at the old landfill rather than permit denial for the proposed new landfill.” Finally, we note that the Secretary, in his final order adopting the hearing officer’s report, imposed an additional condition on the permit: making specific reference to Tucumcari’s compliance history, the Secretary required an interim review, to be conducted two years after the facility begins operations, in order to assess Tucumcari’s compliance. These statements from both the hearing officer and the Secretary indicate that the Department properly considered Tucumcari’s past compliance problems and reasonably concluded that they did not warrant denial of the permit.

{41} We next address Appellant’s third argument, which is that Tucumcari’s past failures to satisfy the financial assurance regulations indicate that the new landfill will be “a hazard to public health, welfare, or the environment or [will cause] undue risk to property.” Appellant also appears to argue that these alleged past failures in the area of financial assurance indicate that
Tucumcari lacks the knowledge or ability to operate a landfill in compliance with the regulations and that Tucumcari has a history of non-compliance with the regulations at its existing landfill. We are not persuaded that the Secretary erred.

{42} Appellant has not provided any citations to the record proper in support of its contention that Tucumcari has failed to satisfy the local government financial test with regard to its existing landfill. However, we assume that Appellant is referring to the apparent fact that Tucumcari has not provided the Department with a financial statement for any year since 2002. We have held that 20.9.1.900(F)(6)(d)(i) NMAC, which requires an owner or operator to place in its operating record “the local government’s independently audited year-end financial statements for the latest fiscal year,” does not require an applicant to provide the statements during the application process. However, we agree with Appellant that the regulation clearly requires an owner or operator to keep such statements, including one from the latest fiscal year, in its operating record. Because Tucumcari did not provide such statements from 2003 or 2004 in its application, but did include the statement from 2002, we assume that Tucumcari did not have the required statements in the operating record for its existing landfill.

{43} However, we are not persuaded that Tucumcari’s apparent failure to obtain the financial statements leads to any of the conclusions argued by Appellant. We have a difficult time seeing how failure to obtain up-to-date financial statements indicates that the new landfill will present a health hazard. Nor do we see how it indicates a lack of knowledge or ability to operate the new landfill in a safe manner. We do not disagree that Tucumcari’s past failures in this regard show “non-compliance” with the applicable regulations. However, as we have stated, in the absence of a showing of unreasonableness, we will defer to the Department’s interpretation of what constitutes a “history of non-compliance” severe enough to warrant the discretionary denial of a permit. In this case, we do not think Appellant has demonstrated such a severe history of non-compliance with the financial assurance regulations that this Court should override the Secretary’s discretionary decision that past problems with financial compliance did not warrant the denial of a permit. We conclude that the Secretary did not abuse his discretion or act arbitrarily or capriciously in exercising his discretion to grant the permit despite Tucumcari’s past instances of non-compliance with the financial assurance requirements.

{44} Before moving on to Appellant’s remaining arguments, we note that not only is the Secretary in the best position to consider what level of past non-compliance with the regulations is sufficient to warrant permit denial, but the Secretary is also in the best position to consider more global policy concerns that might weigh against or in favor of granting a permit. For example, the hearing officer heard expert testimony that Tucumcari’s current landfill was built before the regulations were enacted and that it is unlined. The same expert also testified that cities are being encouraged to close unlined landfills “as soon as they can and dispose of their waste in a properly constructed, lined landfill.” A hydrologist who works for the Department also testified that a lined landfill is “[b]y far more protective of groundwater than an unlined landfill. In view of this information, the Secretary might have concluded that a new landfill would be in the best interests of the residents of Tucumcari and the surrounding areas. In sum, our review of the record persuades us that the Secretary’s decision to issue the permit was supported by substantial evidence and was neither unreasonable nor arbitrary and capricious.

b. The Secretary’s Finding that the Department Need Not Consider Whether a City “Needs” a New Landfill or Whether Some Other Option Would Be More Appropriate

{45} Appellant next argues that [where applicants fail to demonstrate a knowledge of and ability to operate in accordance with the [r]egulations, and where applicants have a history of non-compliance at other facilities, the Secretary has a duty, as a matter of public policy, to consider whether he should deny a new landfill permit to such a bad actor and require the bad actor to manage its solid waste in another way less threatening to the environment. Appellant refers to the statement in the hearing officer’s report that “Neither the Act nor the [r]egulations contemplate that the [Department] will determine whether a particular permit applicant . . . ‘needs’ a landfill, or would make a ‘better choice’ with a transfer station.” Appellant apparently contends that, before granting the permit, the Secretary was required to consider whether it would be more appropriate for Tucumcari to build a transfer station instead of a new landfill. Other than arguing that this specific duty is “inherent” in the Secretary’s general obligation to protect the public health, welfare, or environment, Appellant makes no argument and cites no authority for this proposition, and we are thus entitled to assume that there is no applicable or analogous authority. In re Adoption of Doc., 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984). In the absence of any authority or persuasive argument, we reject Appellant’s contention regarding a transfer station.

c. The Secretary’s Finding that the Depth Between the Bottom of the Landfill and Subsurface Water Would Be Sufficient to Comply With the Regulations

{46} Appellant next attacks the Secretary’s finding that “[t]he Application contained information that indicates the proposed landfill will not be located where depth to seasonal high water table will be closer than 100 feet to the bottom of the fill.” This finding corresponds to 20.9.1.300(B)(1)(b) NMAC (1995), which states that “[n]o municipal or special waste landfill shall be located . . . where depth to seasonal high water table will be closer than 100 feet to the bottom of the fill.” Appellant appears to make four arguments with regard to this finding: (1) the finding is not supported by substantial evidence; (2) three out of eight monitoring wells show that the depth to water is less than 100 feet, and the City impermissibly based its calculations on only the three deepest wells; (3) the map on which Tucumcari based its showing that the depth to water would be sufficient was flawed; and (4) the Secretary erred in failing to consider Appellant’s arguments “based on the well schematics and the deficiencies in the ‘Map.’” We reject Appellant’s arguments.

{47} In determining that the new landfill would comply with the regulation prohibiting a landfill if the depth to water will be less than 100 feet, the hearing officer relied on the testimony of Mr. Miller, an expert hydrologist who testified for Tucumcari. Miller testified that the City had installed eight monitoring wells and that those wells showed that “the uppermost aquifer is greater than 100 feet below the fill in all areas of the landfill.” One of the Department’s witnesses also testified that the 100 foot siting requirement would be satisfied.

{48} Appellant’s expert testified that “at six out of the eight wells, . . . the water is shallower than 100 feet from the bottom of the waste.” However, it is clear that the hearing
officer rejected this expert’s calculations because they utilized the “potentiometric surface,” which the hearing officer found to be a flawed method. It also appears that Tucumcari’s own calculations indicate that two of the eight wells showed a depth to water of less than 100 feet. However, Miller testified on cross-examination that, while the figures did show that two of the wells hit water at a depth of less than 100 feet, “the water level in a well is not the determining factor of the regulations[;] it is the depth to the water table.”

{49} Whether the depth to water at the landfill would be 100 feet or greater was a question of fact, and as long as the Secretary’s finding on this issue is supported by substantial evidence, we will accord deference to the Secretary’s findings. Particularly where specialized technical or scientific knowledge is involved, we will give great deference to an agency’s factual findings. See Gonzales v. N.M. Bd. of Chiropractic Exam’rs, 1998-NMSC-021, ¶9, 125 N.M. 418, 962 P.2d 1253 (“In evaluating whether substantial evidence exists, this Court may properly give special weight and credence to findings concerning technical or scientific matters by administrative bodies whose members, by education, training or experience, are especially qualified and are functioning within the perimeters of their expertise.”) (internal quotation marks and citation omitted)); Chavez v. Mountain States Constructors, 122 N.M. 579, 583-84, 929 P.2d 971, 975-76 (1996) (“We will generally defer to an agency’s factual determination, especially if the factual question concerns matters that fall within the agency’s area of specialization.”); Attorney General v. N.M. Pub. Serv. Comm’n, 111 N.M. 636, 642, 808 P.2d 606, 612 (1991) (giving “great deference” due to the agency’s “expertise in [a] highly technical area”).

{50} Here, given the testimony of Miller and the Department’s witnesses, we cannot say that the Secretary’s finding regarding depth to seasonal high water table is not supported by substantial evidence. Miller’s testimony alone provides substantial evidence on which the hearing officer and the Secretary could permissibly conclude that the regulation involving depth to water table would be satisfied. Appellant’s assertions that the map used by Tucumcari was flawed and that the City improperly used only the deepest wells in calculating the depth to water table simply raised factual disputes that were for the hearing officer and the Secretary to resolve. Given our determination that Miller’s testimony provides substantial evidence to support the depth-to-water-table finding, we will not substitute our judgment for the Department’s reasoned and more educated judgment. See Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm’n, 2004-NMCA-073, ¶29, 136 N.M. 45, 94 P.3d 788 (noting that in conducting substantial evidence review of an administrative action, we do not reweigh the facts).

{51} We also reject Appellant’s argument that the Secretary acted arbitrarily and capriciously in failing to consider all of Appellant’s arguments “based on the well schematics and the deficiencies in the ‘Map.’” Appellant submitted 147 proposed findings of fact and 23 proposed conclusions of law. One section of the analysis portion of the hearing officer’s report is devoted to the depth-to-water-table issue. The hearing officer makes reference to a section of Appellant’s requested findings. The findings referenced include requested findings 81 and 84, which involved the well schematics and the map. The report then goes on to state that many of Appellant’s proposed findings “are based on conjecture,” “are taken out of context,” or “lack evidentiary support completely.” While the report does mention Appellant’s proposed findings “54-87,” findings 81 and 84 are not specifically mentioned by name.

{52} Appellant has not cited any authority indicating that a hearing officer acts arbitrarily and capriciously solely because the officer’s report does not specifically discuss each and every one of a party’s requested findings and conclusions. See Attilix Coal., 1998-NMCA-134, ¶24 (noting that an agency acts arbitrarily and capriciously when it “entirely omits consideration of relevant factors or important aspects of the problem at hand”); cf. Cordova v. Taos Ski Valley, Inc., 121 N.M. 258, 264, 910 P.2d 334, 340 (Ct. App. 1995) (reviewing a workers’ compensation judge’s award of attorney fees for abuse of discretion; noting that “If the record reflects individualized consideration of a fee request without an arbitrary refusal or failure to consider a factor properly brought to the court’s attention, then the appellate court should defer to the court’s decision. We emphasize that it is the appellant’s burden to demonstrate there has been a material refusal or failure to consider a relevant factor. A mere showing that the court rejected, disagreed with, or adopted a modified version of the appellant’s position will not be deemed an abuse of discretion unless the court’s decision is manifestly wrong or contrary to logic and reason.”).

{53} In the absence of authority supporting Appellant’s position, we will not presume error on the part of the Secretary. See State ex rel. Reynolds v. Aamodt, 111 N.M. 4, 6, 800 P.2d 1061, 1063 (1990) (“On review of the acts or orders of administrative bodies, the courts will presume, among other things, that the administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable; presumptions will not be indulged against the regularity of the administrative agency’s action.”) (internal quotation marks and citations omitted). Rather, given the thoroughness of the hearing officer’s report, we presume that the officer carefully considered all arguments, and we hold that the hearing officer and the Secretary did not act arbitrarily or capriciously in failing to mention by number some of Appellant’s requested findings. See Regents of the Univ. of Cal., 2004-NMCA-073, ¶35 (noting that an agency action is arbitrary and capricious where it is “unreasonable, irrational, willful, and does not result from a sifting process.”) (internal quotation marks and citation omitted).

d. The Secretary’s Refusal to Adopt Permit Conditions Requested by Appellant

{54} Appellant next argues that the Secretary erred in failing to consider several permit conditions that were requested by Appellant. The Solid Waste Act and the Department’s regulations permit the Secretary to issue a permit with conditions. See §74-9-24(A) (noting that the Secretary can issue a permit with terms and conditions). In this case, the Secretary imposed a number of conditions on the permit, including some requested by Appellant. The hearing officer’s report states, “In preparing these conditions[,] I reviewed [Appellant’s] submittal, along with several other parts of the record. I agreed with some of [Appellant’s] proposed conditions; those I have not included either lack a sufficient evidentiary basis or seek something not required by the [r]egulations.”

{55} With regard to the hearing officer’s failure to accept all of Appellant’s proposed permit conditions, Appellant argues that (1) in stating that the proposed conditions “lack a sufficient evidentiary basis,” the hearing officer improperly placed the burden of proof on Appellant; (2) by “failing to consider” the conditions, the Secretary neglected to ensure that the new landfill would not be a hazard to public health; and (3) the Secretary erred in rejecting the
conditions on the sole basis that they were not required by the regulations. We reject Appellant’s arguments.

{56} With regard to the first argument, we disagree that the Secretary impermissibly shifted the burden of proof. Clearly, the burden was on Tucumcari to show that its application met all of the statutory and regulatory requirements for the granting of a new landfill permit. See *Joah, Inc.*, 116 N.M. at 557, 865 P.2d at 1201 (agreeing that a landfill permit applicant bears the burden of proof). However, we think it would be unreasonable to require the City to affirmatively prove that each one of Appellant’s approximately 26 requested conditions was not necessary. Rather, where Appellant requested conditions that were not required by the relevant statutes and regulations, we think it fair to put the burden on Appellant to show that such conditions were necessary. See *Allsup v. Space*, 69 N.M. 353, 362, 367 P.2d 531, 536 (1961) (noting the “fundamental rule” that “the party alleging and seeking affirmative relief has the burden of proof”).

{57} With regard to Appellant’s second argument, we disagree that the hearing officer or the Secretary “failed to consider” Appellant’s proposed conditions. At least three of the conditions recommended by the hearing officer and imposed by the Secretary were conditions requested by Appellant. Moreover, the hearing officer’s report explicitly states that she “reviewed [Appellant’s] submittal, along with several other parts of the record.” Under these circumstances, we will not presume that the hearing officer or the Secretary refused to consider Appellant’s proposed conditions. Similar to our views expressed above in the discussion of Appellant’s requested findings of fact, the mere fact that the hearing officer’s report does not contain a detailed discussion of each of the 26 requested conditions and why each one was rejected does not indicate that the officer refused to consider the conditions. Rather, given the hearing officer’s explicit statement that she reviewed Appellant’s proposed conditions, we conclude that the officer properly considered all of the proposed conditions and adopted only those that she thought were necessary to protect the public and the environment. See *Aamodt*, 111 N.M. at 6, 800 P.2d at 1063 (noting that courts presume regularity and correctness on the part of administrative bodies).

{58} We also reject Appellant’s third argument, which is that the hearing officer and the Secretary erred in rejecting Appellant’s proposed conditions on the sole basis that they were not required by the regulations. Appellant contends that “[w]hat happened here is exactly what happened in *Colonias*,” Appellant relies on our Supreme Court’s statement in *Colonias* that “the Department cannot ignore concerns that relate to environmental protection simply because they are not mentioned in a technical regulation.” 2005-NMSC-024, ¶ 34. We disagree that this situation is analogous to the situation in *Colonias*. In that case, our Supreme Court merely held that the Department was required to “consider” public comment involving environmental concerns. See id. ¶ 24 (holding that “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” and that “[i]n reviewing the hearing officer’s report, the Secretary must consider whether lay concerns relate to violations of the Solid Waste Act and its regulations”). Here, we have already concluded that the hearing officer and the Secretary did properly consider Appellant’s proposed conditions. That is all that is required by *Colonias*.

{59} We also disagree with Appellant that the hearing officer and the Secretary impermissibly rejected Appellant’s proposed conditions on the sole basis that the conditions requested measures not required by the regulations. As we have noted, both the hearing officer and the Secretary imposed a number of conditions that were not required by the regulations. The logical inference from this action is that both were aware that they had the authority to impose conditions as necessary, whether or not such conditions were mandated by the regulations. Indeed, we think the whole idea of a “condition” suggests something more than what is already required by the regulations. Cf. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm’n*, ___-NMCA-___, ¶ 20, ___ N.M. ___ (2003) (discussing the differences between conditions and regulations). In view of the officer’s and the Secretary’s obvious awareness that they had authority to impose conditions not required by the regulations, we agree with the Department that the hearing officer’s statement that she was rejecting the proposed conditions because they “[sought] something not required by the regulations” merely indicates that she thought they were not necessary to protect public health and safety or the environment. Having rejected all three of Appellant’s arguments with regard to its proposed conditions, we hold that the Secretary did not err in refusing to impose those conditions.

e. The Secretary’s Finding that an Additional Monitoring Well Was Not Necessary

{60} Finally, Appellant makes a more specific argument that the Secretary erred in refusing to impose one particular condition. Appellant requested the following condition:

Within 90 days of [the] final approval of this permit, the City must install in compliance with the Solid Waste Regulations at least one additional monitoring well at least 200 feet deep on that portion of the City-owned property that is closest to [Appellant’s] windmill, not more than 50 feet from the Southeast corner of the City’s property.

With regard to this requested condition, the hearing officer stated,

I did consider the windmill stock well on [Appellant’s property], but it is cross-gradient from the disposal area, and completed in a deeper formation. The wells already drilled, particularly [monitoring well 5], will be “sentry wells” for the time being; if contamination is found at the site in the future, additional wells and remediation can be required then.

{61} Appellant argues that “[t]he Secretary did not have substantial evidence supporting his conclusion that an additional monitoring well was not necessary in the Chinle formation [i.e., near Appellant’s windmill] to protect public health, welfare[,] and the environment and prevent undue damage to property.” Appellant also attacks the factual determinations in the report that (1) an additional monitoring well is not necessary because the windmill well is “cross-gradient from the disposal area” and (2) monitoring well 5 can act as a “sentry well.” We reject Appellant’s arguments.

{62} First, we disagree with Appellant’s characterization of the applicable burden of proof. As we stated above, the permit applicant bears the burden of proving that the application meets all of the requirements of the relevant statutes and regulations. However, the extent that another party argues for a condition that is not required by the relevant laws, the burden of proof should be on that party. See *Allsup*, 69 N.M. at 362, 367 P.2d at 536 (noting the “fundamental rule” that “the party alleging and seeking
affirmative relief has the burden of proof”). We do not think it appropriate to place the burden on the applicant to prove lack of necessity with regard to every condition proposed by any party. Rather, we think the burden was on Appellant to affirmatively show that the requested condition was necessary to protect public health and the environment. The record shows that the hearing officer and the Secretary could have easily determined that Appellant failed to meet its burden with regard to the requested additional monitoring well.

\{63\} Appellant’s expert testified that as to the “plain view,” Appellant’s windmill well is “crossgradient” from the disposal area. But, he stated, the well is “downgradient vertically” from the disposal area. He also testified that “if there were any sort of vertical migration, it could potentially be a problem.” The expert further testified that installing a monitoring well to protect Appellant’s windmill well would be “the safest course of action.” In view of the fact that Appellant’s own expert testified only that contamination “might be a problem” and that the “safest” thing would be to drill an additional well, we conclude that the Secretary could have permissibly decided that Appellant failed to meet its burden of showing that the additional well was necessary.

\{64\} We also reject Appellant’s argument that “reliance on the cross gradient position of the stock well does not in and of itself provide sufficient assurance to conclude that the permitted activity” will not create hazards to public health or the environment. We assume that the term “downgradient vertically” is supposed to refer to Appellant’s expert’s apparent allegation that, while the windmill well and the landfill site are at equal elevations at the surface, the well is downgradient from the site at a subsurface level. However, Appellant does not cite to any point in the record that would assist this Court in determining the exact meaning or significance of sites being “downgradient” or “crossgradient” from one another. Cf. Clayton v. Trotter, 110 N.M. 369, 373, 796 P.2d 262, 266 (Ct. App. 1990) (noting that the appellant has a responsibility to put forth arguments that can be understood by the Court). In view of the highly technical and fact-specific nature of this issue, we will defer to the Secretary’s conclusion that the possible “downgradient” location of Appellant’s well did not necessitate an additional monitoring well. See N.M. Pub. Serv. Comm’n, 111 N.M. at 642, 808 P.2d at 612 (giving “great deference” due to the agency’s “expertise in [a] highly technical area”).

\{65\} We similarly reject Appellant’s contention that the hearing officer and the Secretary erred in concluding that monitoring well 5 could act as a “sentry well.” The hearing officer’s report does indicate, as Appellant points out, that monitoring will not occur at well 5 on an ongoing basis. However, we are not persuaded that this fact indicates error. The report states that “[t]he wells already drilled, particularly [monitoring well 5], will be ‘sentry wells’.” (Emphasis added). This language makes clear that the hearing officer was not relying solely on monitoring well 5, because the other wells are also capable of serving a monitoring function with regard to Appellant’s windmill well. Accordingly, we will defer to the conclusion of the hearing officer and the Secretary that an additional monitoring well is not necessary to protect Appellant’s property. We conclude that the Secretary did not err in refusing to impose Appellant’s requested permit condition.

CONCLUSION

\{66\} We affirm the Secretary’s final order granting the permit to Tucumcari.

\{67\} IT IS SO ORDERED.
LYNN PICKARD, Judge

WE CONCUR:
CYNTHIA A. FRY, Judge
RODERICK T. KENNEDY, Judge
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Assistant Trial Attorney - Sandoval County
The Thirteenth Judicial District Attorney’s Office is accepting applications for an experienced attorney to fill the position of Assistant Trial Attorney in the Sandoval County Office, Bernalillo, NM. This position requires a felony caseload and at times some misdemeanor prosecutions. Salary will be based upon experience and the District Attorney Personnel and Compensation Plan. Please send resumes to Filemon Gonzalez, District Office Manager, 333 Rio Rancho Blvd. Suite 303, Rio Rancho, New Mexico 87124. Deadline for submission of resumes: Immediate opening until filled.

The Eleventh Judicial District
Attorney’s Office
Division II (Mckinley County), is currently seeking immediate resumes for one (1) entry level and one (1) experienced attorney. Will consider applicants awaiting bar exam or an Attorney in good standing with another State Bar. Opportunity for immediate courtroom experience in Magistrate and District Courts. Salary $38,000.00 to $52,000.00 range. Submit letter of interest and resume to R. Alfred Walker, Deputy District Attorney, 201 West Hill, Suite 100, Gallup, NM 87301, or e-mail to Awalker@da.state.nm.us. Positions open until filled.

Twelfth Judicial District Prosecutors
The 12th Judicial District Attorney’s Office for Otero and Lincoln Counties, is taking applications and letters of interest to fill positions in both historic Lincoln County and diverse Otero County. Although career prosecutors are specifically sought and encouraged to apply, the office would treasure the opportunity to convert civil law minded attorneys into public servants that protect and serve our communities. Our two offices have several opportunities for exciting positions that allow attorneys to live in beautiful Ruidoso or the cool pines of Cloudcroft. These positions are classified but incentive and advancement opportunity make our positions very competitive with other state attorney positions. Limited licenses can be applied for from the Supreme Court for out-of-state, licensed attorneys. Resumes and letters of interest should be sent to Scot D. Key, District Attorney, Room 301, 1000 New York Ave., Alamogordo, New Mexico 88310.
Civil Litigation Attorney
Keleher & McLeod, P.A. seeks a civil litigation attorney. Applicants should have interest and 3 years experience in civil litigation work. Send resumes to Recruiting Attorney, P.O. Box AA, Albuquerque, NM 87103-1626 or fax to 505-346-1370.

Attorney
CITY OF SANTA FE seeks a licensed attorney to represent qualified criminal defendants before the Santa Fe Municipal Court. The City intends to enter into a contract with said Public Defender commencing on September 1, 2006, for a period of 9 months with the possibility of continued work thereafter either by contract or as a City employee. Knowledge of Spanish is essential. The City of Santa Fe is an EEO/AA. Please submit a cover letter and resume to the City Manager's Office, 200 Lincoln Avenue, P.O. Box 909, Santa Fe, NM 87504. For further information contact Celeste Valentine, Administrative Assistant to the City Manager at (505) 955-6509.

Associate Attorney
Modrall Sperling, a full service law firm with offices in Albuquerque and Santa Fe, New Mexico, is accepting resumes for an associate attorney to join our Tax Group in Santa Fe, focusing on both federal tax (including tax-exempt bond transactions) and state and local tax matters. Candidate must have an LL.M. in tax, strong academic background, and excellent research and writing skills. Three to five years’ relevant experience and a proven record of success in past endeavors required. Modrall Sperling provides excellent professional opportunity, working environment, and benefits. Please submit cover letter, resume, transcript and representative writing sample to Hiring Attorney, Modrall Sperling Law Firm, PO Box 2168, Albuquerque, NM 87103-2168, or to wkeleher@modrall.com.

CYFD Attorney Senior
The Children, Youth and Families Department is seeking to fill a vacant Children’s Court Attorney position in Las Vegas, NM. The attorney will represent the department in abuse/neglect and termination proceedings and related matters in the Las Vegas area, including Mora, Guadalupe and San Miguel Counties. The ideal candidate will have experience in the practice of law totaling at least four years. New Mexico licensure required. Benefits include medical, dental, vision, paid vacation, and a retirement package. The salary range is $38,000-$67K annually, depending on experience and qualifications. Please contact our office administrator, Lu Anne Tanuz at (505) 476-5474 or e-mail luanne.tanuz@state.nm.us for information on how to apply and to ascertain the closing date for the position. The State of New Mexico is an EOE.

Lawyer/Supervisor
The Department of Labor is seeking a Lawyer/Supervisor of the Appeals Tribunal Section. Duties include: Review reports and statistical information to monitor unit compliance with USDOL standards on timeliness and quality; Analyze and evaluate testimony/exhibits presented to make legally binding findings of fact; Manage time to ensure USDOL time lapse standards are met issuing decisions; Knowledge of UI regulations, state and federal laws and hearing evidence procedures. A law degree is required. Experience in employment, tax and/or unemployment is preferred. Knowledge of legal research methods is essential, with three years of general practice of law. This is a supervisor position, some supervisory experience preferred. Requires excellent written and verbal communications. Must be able to work under stress with strict timelines. Must maintain positive work relationship with staff. Send resume, writing sample, copy of state bar license, list of 3 references to: NM/DOL, Chief Legal Counsel, P.O. Box 1928, Albuquerque, NM 87103. Disabled persons are encouraged to apply. Contact the Department if accommodations are needed. Submit your online resume and application to www.state.nm.us/spo.COB August 28, 2006. Recruitment begins on August 7, 2006. For application and resume, visit www.state.nm.us/spo.

KYFD Attorney Manager
The Children, Youth and Families Department is seeking to fill a vacant NW Regional Attorney Manager, in Santa Fe, NM. The attorney is responsible for direction and management of Children’s Court Attorneys in the Northeast region of the state who handle civil child abuse and neglect cases. The ideal candidate will have experience in the practice of law totaling ten (10) years. New Mexico licensure required. Benefits include medical, dental, vision, paid vacation, and a retirement package. The salary range is: $55-$89k annually, depending on experience and qualifications. Some travel is required. Please contact our office administrator, Lu Anne Tanuz at (505) 476-5474 or e-mail luanne.tanuz@state.nm.us for information on how to apply and to ascertain the closing date for the position. The State of New Mexico is an EOE.

Felony Domestic Violence Prosecutor
First Judicial District Attorney’s Office
The First Judicial District Attorney’s Office, which includes Santa Fe, Rio Arriba and Los Alamos counties, has a position available in the Domestic Violence Unit for a felony prosecutor. Salary will be based on experience. This position is available beginning August 15. Please email resume to sweinstein@da.state.nm.us or mail to Shari Weinstein, Chief Deputy District Attorney, PO Box 2041, Santa Fe, NM, 87504-2041.

Attorney-FT
Staff attorney position at the State Bar. Primary duties with the Lawyer Referral for the Elderly Program (LREP) include working the legal helpline answering general civil law questions, conducting legal workshops and client meetings (in-state travel required), making private attorney referrals, and assisting in writing legal educational brochures. Patience and compassion required. Assist with other department programs as required. Spanish helpful. Requires current license to practice in NM. Salary between $41K to $43K with benefits. Send letter of interest and resume to HR-LREP SA, PO Box 92860, Albuquerque, NM 87199 or fax 505-797-6019 or email HR@nmbar.org. Position opened until filled. EOE.

Paralegal
Successful, growing uptown plaintiff’s firm seeks a full-time experienced paralegal that is well-organized, self-disciplined, and committed to providing the highest quality service to the firm’s clients. Candidate should have federal court experience, excellent writing and verbal skills, ability to multi-task independently, and proficiency in Microsoft. Salary DOE. All inquiries kept confidential. Fax detailed resume and cover letter to 505/ 883-5613.

Paralegal Level I
To work in fast-paced Immigration Law Firm. Must be detail-oriented. Able to multi-task and be able to work independently with strong writing skills. Position requires motivated individual. Will assemble family based application packets for submission to DHS, USDOL, US Department of State; Contact clients for necessary documents and information, data entry and applications for filing. Interact with clients from all economic, ethnic and social strata. Training provided. Must be fluent in written and spoken Spanish and have a Bachelors degree with at least 3.5 GPA. Position is full time and has full benefits. We are looking for individuals interested in pursuing a challenging, exciting and satisfying career, helping people from all parts of the world with their immigration to the United States. Positions available immediately. Salary DOE. Please send resume, letter of interest and writing sample to Diane Grover at dgrover@jlawit.com.

Full Time Legal Secretary
Established medium-sized law firm seeks full time legal secretary. Applicants should have 3 years legal experience. Must be a team player who can perform multi-tasks in a high volume, fast paced practice. Please submit cover letter, resume and salary requirements to Office Manager, YLAW, 4908 Alameda Blvd, NE, Albuquerque, NM 87113 or email to fruiz@ylawfirm.com. No phone calls please.
Accountant/Bookkeeper
Successful, growing uptown plaintiff’s firm seeks a full-charge experienced accountant/ bookkeeper that is sharp and well-organized. Candidate should have experience with a law office practice and possess strong expertise in QuickBooks and familiarity with Timeslips Plus. All inquiries kept confidential. Fax resume and cover letter by to 505/883-5613.

Uptown Square Office Building
Prestigious Uptown location, high visibility, convenient access to I-40, Bank of America, companion restaurants, shopping, two-story atrium, extensive landscaping, ample parking, full-service lease. Two different suite sizes, 850SF & 1008SF available now and 2806SF available February 1, 2007. Buildouts for larger suite include separate kitchen area, storage and 5 windowed offices. Competitive Rates. Tenant Improvements negotiable. Call Ron Nelson or John Whisenant 883-9662.

Downtown
Beautiful adobe building near MLK on north 1-25 on-ramp. Convenient to courthouses with free adequate parking for staff and clients. Conference room, reception room, employee lounge, utilities and janitor service included. Broad band access, copy machine available. From $300 per month. Call Orville, (505) 867-6566; or Jon, (505) 507-5145. Oak Street Professional Bldg., 500 Oak NE.

Albuquerque Offices For Rent
Albuquerque offices for rent 820 2nd NW, one block from court houses, copier, fax, high speed internet, off street parking, library, statutes up to date, telephone system, conference room, receptionist, rates depending on space rented $500 to $1,000 monthly. Call Ramona @ 243-7170 for appointment.

Two Offices Available
Best location in town, one block or less from the new federal, state, metropolitan courts. Includes secretarial space, phones and service, parking, library, janitorial, security, receptionist, runner, etc. Contact Thomas Nance Jones, (505) 247-2972.

Office Share
Office share atop the New Mexico Bank & Trust Building. Includes access to kitchen, conference room. Office equipped with high speed internet. Long distance may be included. Secretarial space also available. Contact Krista at 842-6626 for a tour.

Consulting

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Piles of paper and filing getting in your way? THE OFFICE ANGEL can make it history in one day Business system design & de-cluttering. 20 years experience. Robin Bergner, M.A. @ 670. 6740 or officeangel505@earthlink.net.

Office Space

Louisiana Candelaria Corner
Very desirable location in Uptown. Executive suite and separate staff area. Shared conference room, copier/kitchen area, reception area. 889-3899.

City Place Building in Uptown
Office space for rent in a busy business law firm suite in City Place, in prestigious Uptown area. Spectacular 8th floor view of the westside. Office includes a separate secretary work space and filing area. Full facilities, phone system, conference room and kitchen. Right across the street from the spectacular new ABQ Uptown retail shopping park. Call Randy, 884-2400 or Joe 872-0800.

Law Books For Sale

2003 BMW 530i
Superb 2003 BMW 530i. Premium/Sport Packages. Topaz Blue/Sand Leather. 1 owner, non-smoker. 23k miles. $32,500. 385-3960.

Miscellaneous

Busy law office in Las Crusces is closing for good. Office furniture and equipment for sale including desks, chairs, bookshelves, file cabinets, laser printers etc... Please call 541-6110 or 644-5500 for more information.

NOTE

SUBMISSION DEADLINES

All advertising must be submitted by e-mail or fax by 5 p.m. Wednesday, two weeks prior to publication (Bulletin publishes every Monday). Advertising will be accepted for publication in the Bar Bulletin in accordance with standards and ad rates set by the editor and subject to the availability of space. No guarantees can be given as to advertising publication dates or placement although every effort will be made to comply with publication request. The editor reserves the right to review and edit classified ads, to request that an ad be revised prior to publication or to reject any ad. Cancellations must be received by 10 a.m. on Thursday, two weeks prior to publication. For more advertising information, contact: Marcia C. Ulibarri at 505.797.6058 or e-mail ad to ads@nmbar.org or fax 505.797.6075.
2006 ANNUAL
PROBATE INSTITUTE
State Bar Center, Albuquerque
Friday, September 8, 2006
6.0 General CLE Credits

Co-Sponsor: Real Property & Probate Section

9:00 a.m. Special Needs Trusts
Nell Sale, Miller Stratvert PA

9:45 a.m. Break

10:00 a.m. End of Life Planning
Robert Fleming,
Fleming & Curti, P.L.C., Arizona

10:45 a.m. Best Uses of Technology
Robert Fleming

11:30 a.m. Representing Clients With
Diminished Capacity
David J. Estes and Robert J. Rosepink,
Rosepink & Estes, P.L.L.C.

12:15 p.m. Lunch
(provided at the State Bar Center)

1:15 p.m. Multi-Jurisdictional Practice
Richard Gregory,
Richard B. Gregory, P.C.

2:00 p.m. Formation of 501(c)(3)
Organizations
Kenneth Bateman,
Gerber & Bateman, P.A.

2:45 p.m. Break

3:00 p.m. LLC Drafting & Waiver of Attorney-
Client Privilege
Kurt Sommer, Sommer Udall
Hardwick Ahern & Hyatt, L.L.P.

3:45 p.m. Mandatory Requirements of the
Uniform Trust Code
Fletcher Catron,
Catron Catron & Pottow, P.A.

4:30 p.m. Adjournment

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