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Recollected Distance by Andrea Cermanski (see page 5)
The William and Joseph Gallery, Santa Fe
Solos at Seasons
Planning Ahead: Protecting Your Clients and Your Practice, Including Transition and Succession Issues in the Event of Disability or Death
Wednesday, Dec. 10, 2014 • 4:15-5:15 p.m.
Seasons Restaurant in Old Town, 2031 Mountain Rd. NW, Albuquerque

Presented by William Slease, Chief Disciplinary Counsel, Disciplinary Board of the New Mexico Supreme Court; and Gaelle McConnell, McConnell Law Firm, New Mexico Supreme Court Lawyer Succession and Transition Committee
Co-sponsor: Solo and Small Firm Section

25th Annual Real Property Institute
Thursday, Dec. 11, 2014 • 9 a.m.-5 p.m.
State Bar Center, Albuquerque
Co-sponsor: Real Property, Trust and Estate Section
This course focuses on specific issues related to a commercial real estate transaction. Presentations will emphasize unique issues, considerations and concerns. This is an advanced level seminar containing useful information for real estate lawyers of all levels of experience.

Providing a Life Path for Your Clients
Friday, Dec. 12, 2014 • 8:30 a.m.-4:15 p.m.
State Bar Center, Albuquerque
Co-sponsor: Paralegal Division

Nonprofit Corporations Compliance
Tuesday, December 16, 2014 • 8:30 a.m.-12:15 p.m.
State Bar Center
Co-sponsor: Paralegal Division

All live seminars and video replays are held at the State Bar Center, 5121 Masthead NE, Albuquerque. They include course materials, CLE credit and filing fees for New Mexico. Full-day programs also include continental breakfast, breaks and buffet lunch.

Register online at www.nmbarcle.org or call 505-797-6020.
## State Bar Practice Sections

### Benefits of being involved:

- Network With Colleagues
- Enjoy Educational Opportunities
- Connect With Section Members Through Electronic Discussions
- Engage in Legislative Advocacy

### Join now and benefit from membership through Dec. 31, 2015.

To join visit [www.nmbar.org](http://www.nmbar.org) and click on About Us/Sections or complete the form below.

Check the section(s) you wish to join.

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### Payment Options

- Check enclosed
- Visa
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- Master Card
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Mail to State Bar of New Mexico, Accounting Department, PO Box 92860, Albuquerque, NM 87199-2860, or fax to 866-767-7281.
Member Benefits Resource Guide

- Attorney Resource Helpline
- Bar Bulletin
- Bench & Bar Directory
- Bridge the Gap Mentorship Program
- eNews
- Center for Legal Education
- Digital Print Center
- Ethics Assistance
- Fee Arbitration Program
- Lawyers and Judges Assistance Program
- New Mexico Lawyer
- State Bar Center Meeting Space

Visit www.nmbar.org for the most current member benefits and resources.
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MEETINGS

December

3 Employment and Labor Law Section BOD, Noon, State Bar Center
6 Young Lawyers Division Section BOD, 10 a.m., State Bar Center
10 Children’s Law Section BOD, Noon, Juvenile Justice Center
11 Business Law Section BOD, 4 p.m., via teleconference
11 Public Law Section BOD, Noon, Montgomery and Andrews, Santa Fe
11 Animal Law Section Annual Meeting, 5 p.m., State Bar Center
12 Immigration Law Section BOD, Noon, via teleconference
12 Prosecutors Section BOD, Noon, State Bar Center
19 Family Law Section BOD, 9 a.m., via teleconference
19 Trial Practice Section BOD, Noon, State Bar Center

STATE BAR WORKSHOPS

December

3 Divorce Options Workshop 6 p.m., State Bar Center
3 Civil Legal Fair 10 a.m.–1 p.m., Second Judicial District Court, Third Floor Conference Room, Albuquerque
4 Landlord Tenant Workshop 5:30 p.m., State Bar Center
9 Civil Legal Clinic for Veterans 9 a.m.–noon, Raymond G. Murphy VA Medical Center, SCI Meeting Room, Albuquerque
9 Legal Resources for the Elderly Workshop 10–11:15 a.m., Presentation 12:30–2:30 p.m., Clinics Fred Luna Senior Center, Los Lunas
10 Consumer Debt/Bankruptcy Workshop 6 p.m., State Bar Center
13 Consumer Debt/Bankruptcy Workshop, 9 a.m., The Law Office of Kenneth Egan, Las Cruces

Cover Art: Andrea Joy Cermanski is an artist who lives and works in Santa Fe. She has been working in acrylic and encaustic for more than 19 years, and has a bachelor’s degree in Art History and a master’s degree in Art Education. Cermanski has exhibited her work in five solo and nine group shows, including Feminists Under Forty, which was curated by Judy Chicago. She is featured in E. Ashley Rooney’s Contemporary Art of the Southwest (2014), and has numerous collectors around the country, including two corporate collections. She is currently represented by galleries in Santa Fe and San Jose del Cabo, Mexico. View more of her work online at http://www.santafemodernpainter.com/.
Court News

First Judicial District Court
Mass Reassignment of Cases

Effective Dec. 10, a mass reassignment of cases will occur pursuant to NMSC Rule 23-109, the Chief Judge Rule. All of the cases previously assigned to the Hon. Jennifer L. Attrep, Division IX, will be reassigned to the Hon. David K. Thomson, Division VI. Parties who have not previously exercised their right to challenge or excuse will have 10 days from Dec. 10 to challenge or excuse the judge pursuant to Rule 1-088.1.

Second Judicial District Court
Notice of Mass Reassignment to Judge Cristina T. Jaramillo

Pursuant to the constitution of the State of New Mexico, Cristina T. Jaramillo has been elected to Division VIII at the Second Judicial District Court. Effective Dec. 8, Judge Jaramillo, will be assigned criminal court cases previously assigned to Judge Kenneth H. Martinez, Division XXIV. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 24 to excuse Judge Jaramillo.

Notice of Mass Reassignment to Judge Victor S. Lopez

Pursuant to the constitution of the State of New Mexico, Victor S. Lopez has been elected to Division XXVII at the Second Judicial District Court. Effective Dec. 1, Judge Lopez, was assigned civil court cases previously assigned to Judge Ned S. Fuller, Division XXVII. Pursuant to Supreme Court Rule 1-088.1 parties who have not yet exercised a peremptory excusal will have 10 days from Dec. 24 to excuse Judge Lopez.

13th Judicial District Court
Announcement of Vacancy

One vacancy will exist in the 13th Judicial District Court due to the pending expiration of the term of Hon. Camille Martinez Olguin, effective Jan. 1, 2015. This will be a general jurisdiction bench assignment in Grants (Cibola County). Further inquiries regarding details or assignment of this judicial vacancy should be directed to the chief judge or the administrator of the court. David Herring, chair of the Judicial Nominating Commission, solicits applications for this position from lawyers who meet the statutory qualifications in Article VI, Section 14 of the New Mexico Constitution. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications is 5 p.m., Dec. 5. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The Judicial Nominating Commission will meet at 10 a.m. on Dec. 12 at the Cibola County Courthouse, 515 W High St., Grants, to evaluate the applicants. The Commission meeting is open to the public and anyone who wants to voice his or her opinion about a candidate will be heard.

Investiture Ceremony for Hon. Cindy M. Mercer

The Judges and employees of the 13th Judicial District Court invite all to attend the investiture ceremony of Hon. Cindy M. Mercer, Division VI, Valencia County. The ceremony will take place at 3 p.m., Dec. 19, at the Valencia District Courthouse, 3rd floor ceremonial courtroom. Refreshments will follow the ceremony. For more information, contact Terecina Marquez at 865-4291, ext. 2104.

Notice of Case Reassignments (Sandoval County)

Hon. Cheryl H. Johnston, elected to Division VIII, Sandoval County, 13th Judicial District, will be assigned all the cases previously assigned to Hon. Gina R. Manfredi effective Dec. 8. Pursuant to NMRA 1-088.1, parties who have not yet exercised a peremptory excusal in these reassigned cases will have until Dec. 31 to excuse the successor judge. Questions about case assignments should be directed to Christal Bradford, chief clerk, at 867-2376, ext. 1123, or Arlene Baca, leadworker, ext. 1148.

Notice of Case Reassignments (Valencia County)

Hon. Cindy M. Mercer, elected to Division VI, Valencia County, 13th Judicial District, will be assigned all the cases previously assigned to Hon. Pedro G. Rael effective Dec. 8. Pursuant to NMRA 1-088.1, parties who have not yet exercised a peremptory excusal in these reassigned cases will have until Dec. 31 to excuse the successor judge. Questions about case assignments should be directed to Phillip Romero, chief clerk, at 865-4291, ext. 2130, or Alonzo Garcia, leadworker, ext. 2173.

Bernalillo County Metropolitan Court
Announcement Of Vacancy

One vacancy on the Bernalillo County Metropolitan Court will exist as of Jan. 1, 2015, due to the expiration of the term of Hon. Cristina T. Jaramillo. The vacancy will be a criminal court assignment, Division III. Inquiries regarding details or the assignment of this judicial vacancy should be directed to the chief judge of the administrator of the court. The dean of the UNM School of Law, designated by the New Mexico Constitution to chair the Bernalillo County Metropolitan Court Nominating Committee, solicits applications for this position from lawyers who meet the statutory qualifications in Section 34, Article 8A-4b of the New Mexico Statutes Annotated 1978. Applications may be obtained from the Judicial Selection website: http://lawschool.unm.edu/judsel/application.php. The deadline for applications has been set for 5 p.m., Dec. 8. Applicants seeking information regarding election or retention if appointed should contact the Bureau of Elections in the office of the Secretary of State. The Judicial Nominating Committee will meet on Dec. 18 at the Bernalillo County Metropolitan Courthouse, 401 Lomas NW, Room 849, Albuquerque, to evaluate the applicants. The Committee meeting is open to the public and anyone who wants to voice his or her opinion about a candidate will be heard.

Early Closure

The Bernalillo County Metropolitan Court will close from 3–5 p.m. on Dec. 5 for the court’s annual holiday celebration.

Mass Reassignment of Cases

A mass reassignment of cases will occur pursuant to Rule 23-109 NMRA, the
to be available to counsel one week prior to the scheduled jury selection. Once juror questionnaires become available, all active attorneys on the case will receive email notification with a confirmation number that will allow the attorney to access the questionnaires through the District of New Mexico CM/ECF system. Email notice will be sent to each active attorney's primary email address only. Secondary email addresses will not receive notice of Juror questionnaire availability. Attorneys are responsible for ensuring their CM/ECF user account information is up to date. Copy fees for electronic juror questionnaire packets will not be charged.

**STATE BAR NEWS**

**Attorney Support Groups**
- Dec. 8, 5:30 p.m.
  UNM School of Law, 1117 Stanford NE, Albuquerque, Room 1119 (The group meets the second Monday of the month.)
- Dec. 15, 7:30 a.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the third Monday of the month.)
- Jan. 5, 2015, 5:30 p.m.
  First United Methodist Church, 4th and Lead SW, Albuquerque (The group meets the first Monday of the month.)
- For more information, contact Bill Stratvert, 505-242-6845.

**2015 State Bar Budget Disclosure Deadline to Challenge Expenditures**

Using the form provided on the last page of the budget disclosure document, submit written challenges on or before noon, Dec. 5, to: Executive Director Joe Conte, State Bar of New Mexico, PO Box 92860, Albuquerque, NM 87199. Challenges may also be delivered in person to the State Bar Center, 5121 Masthead NE, Albuquerque; faxed to 505-797-6019; or emailed to Joe Conte, jconte@nmbar.org. The budget disclosure document is available in its entirety on the State Bar website at www.nmbar.org.

**Animal Law Section Annual Meeting and Presentation**

The Animal Law Section Annual Meeting will be held at 5 p.m. on Dec. 11 at the State Bar Center. Wine and appetizers will be served. Following a brief meeting,

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**U.S. Bankruptcy Court New Bankruptcy Rules Briefing**

The new local bankruptcy rules will be discussed at a brown bag lunch at noon on Dec. 19 at the U.S. Bankruptcy Courthouse, 500 Gold SW, 10th floor, in Albuquerque. Hon. David Thuma and Patti Hennessy will be the presenters. No R.S.V.P. is necessary.

**U.S. Courts Library Holiday Open House**

Join the staff of the U.S. Courts Library to enjoy cookies and punch on Dec. 10. All state and federal bar members are encouraged to stop by between 10 a.m. and 5 p.m. to meet staff, peruse the volume collection of more than 30,000 and discover how the Library can become an integral part of all legal research teams. The Library is located on the third floor of the Pete V. Domenici U.S. Courthouse at the northeast corner of Fourth St. and Lomas Blvd. in downtown Albuquerque. Normal hours of operation are 8 a.m.–noon and 1–5 p.m., Monday through Friday. For more information, call 505-348-2135.

**U.S. District Court for the District of New Mexico Change in Juror Questionnaire Procedures**

Effective Dec. 4, the U.S. District Court for the District of New Mexico will require attorneys to access juror questionnaires electronically for all jury trials. Juror questionnaires will continue to be available to counsel one week prior to the scheduled jury selection. Once juror questionnaires become available, all active attorneys on the case will receive email notification with a confirmation number that will allow the attorney to access the questionnaires through the District of New Mexico CM/ECF system. Email notice will be sent to each active attorney's primary email address only. Secondary email addresses will not receive notice of Juror questionnaire availability. Attorneys are responsible for ensuring their CM/ECF user account information is up to date. Copy fees for electronic juror questionnaire packets will not be charged.
UNM School of Law Professor Marsha Baum will give a short talk about animals in disasters to introduce the acclaimed film “MINE: Taken by Katrina.” “MINE” is the powerful story about how tragedy intensifies the essential bond between humans and their animals, told against the backdrop of one of the worst natural disasters in U.S. history. “MINE” explores the perspectives of original guardians, rescuers, and adoptive parents of the voiceless victims of Katrina. R.S.V.P. to Evansn Kleinschmidt, ekleinschmidt@nmbar.org, by Dec. 10.

Appellate Practice Section Brown-bag Lunch with Chief Justice Barbara J. Vigil

The Appellate Practice Section is now partnering with the Young Lawyers Division on a joint lunch program for section and division members. These lunches provide an opportunity to meet with individual Supreme Court justices and Court of Appeals judges in an informal setting to talk about issues facing New Mexico’s appellate courts. Chief Justice Barbara J. Vigil will be at the next meeting at noon on Dec. 12 at the State Bar Center. These meetings are informal, and attendees are encouraged to bring their own “brown bag” lunch. Space is limited, R.S.V.P. to section board member Dolph Barnhouse, dbarnhouse@indiancountrylaw.com.

Justice Vigil was elected to the New Mexico Supreme Court in November 2012. She has served as Chief Justice since April. Before joining the Supreme Court, Justice Vigil served as a district judge and then chief judge on the First Judicial District Court. Justice Vigil presided over Children’s Court for more than 10 years, and was instrumental in the creation of Juvenile Justice Boards in Santa Fe, Rio Arriba and Los Alamos counties. As a licensed lawyer for more than 28 years, Justice Vigil has served on numerous community and legal boards, committees and commissions, including the New Mexico Drug Court Advisory Board and the New Mexico Chief Judges Council. She also served as chairperson of the Disproportionate Minority Contact Blue Ribbon Panel between 2006 and 2008. These meetings have proven to be both well attended and very enjoyable both for our guest and the section members who have come to share lunch and conversation.

Bankruptcy Law Section Winter Social Event

The Bankruptcy Law Section will be holding a winter social event, 5:30 p.m. on Dec. 11 at the Nob Hill Bar & Grill, 3128 Central Ave. SE in Albuquerque. Appetizers and drinks will be provided. R.S.V.P. to Dan White at dwhite@askewmazelfirm.com. This event is free to Bankruptcy Law Section members.

Ethics Advisory Committee Seeking New Members

The State Bar’s Ethics Advisory Committee is looking for volunteers to assist with the work of the committee. The committee meets once a month and via email, responding to specific requests for ethics advisory opinions from members of the State Bar based on the New Mexico Rules of Professional Conduct. Committee members outside of Albuquerque can participate via teleconference. To volunteer for the committee, contact rspinello@nmbar.org. For more information about the committee visit www.nmbar.org/legalresearch/ethicsadvisoryopinions.html.

Indian Law Section Toys and Canned Food Collection

The State Bar is the drop-off location for the Indian Law Section’s collection of toys and canned food for the Albuquerque Indian Center this year. Donation boxes are located in the State Bar Center lobby, 5121 Masthead N.E., and food and toys will be accepted through Dec. 16.

Solo and Small Firm Section December CLE and Annual Meeting

The Solo and Small Firm Section Annual Meeting will be held at 3:30 p.m., Dec. 10, at Seasons Restaurant in Old Town Albuquerque. Afterwards, William Sleese, chief disciplinary counsel for the Disciplinary Board of New Mexico, and Gaele McConnell of the McConnell Law Firm, also of the New Mexico Supreme Court Lawyer Succession and Transition Committee, will present “Planning Ahead: Protecting Your Clients and Your Practice, Including Transition and Succession Issues in the Event of Disability or Death” (1.0 EP). Register online at www.nmbarcle.org.

Mark your calendars now for the Section’s exciting line up of speakers. All members of the bench and bar are welcome at the free noontime lunch presentations, the third Tuesday of the month, at the State Bar Center.

Young Lawyers Division Veterans Clinic Volunteers Needed on Dec. 9

The Young Lawyers Division and the New Mexico Veterans Affairs Health Care System are holding clinics for the Veterans Civil Justice Legal Initiative from 9 a.m.–noon, the second Tuesday of each month at the VA hospital. Breakfast and orientation for volunteers begin at 8/15 a.m. The next clinic is Dec. 9. No special training or certification is required. Volunteers can give advice and counsel in their preferred practice area(s). Volunteers are needed in the following practice areas: family, workers’ compensation, consumer, bankruptcy, driver’s license restoration, labor/employment, landlord/tenant, veteran-specific, and immigration. To volunteer, contact Keya Koul, keyakoul@gmail.com.

UNM Law Library Hours Through Dec. 13

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Free Professionalism CLE

Join the University of New Mexico School of Law, Chief Judge Christina Armijo and invited guest speakers for a free, practical and useful CLE on interpreters and language access in the legal system. “Laws-t in Translation: A Lawyer’s Guide to Understanding and Communicating with Non-English Speaking Clients” will be held from 1–4:30 p.m., Dec. 5, at the Health Sciences Center Domenici Center Auditorium, East building #1220, 1001 Stanford NE, Albuquerque. RSVP to Alejandro Chan, chanal@law.unm.edu, or Professor Barbara Creel, 505-277-5265 or creel@law.unm.edu.
Note that the final issue of 2014 will be the Dec. 24 Bar Bulletin (Vol. 53, No. 52). Please plan ahead to make sure your notices are included.

To be included in the Jan. 7, 2015, issue, all notices and editorial content must be submitted by Monday, Dec. 22.

Submit content to notices@nmbar.org.
### Legal Education

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<td>4</td>
<td>Estate Planning for Second Marriages</td>
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<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>25th Annual Appellate Practice Institute</td>
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<td>5</td>
<td>Trust Planning and Drafting Techniques</td>
<td>5.6 G, 1.0 E</td>
<td>Live Seminar</td>
<td>Sterling Education Services 715-855-0495</td>
<td><a href="http://www.sterlingeducation.com">www.sterlingeducation.com</a></td>
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<td>2014 Fall Elder Law Institute: The Complexities of the Special Needs Trust: Drafting, Funding and Implementation</td>
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<td>Technology in the Courts</td>
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<td>9–10</td>
<td>Great Adverse Depositions: Principles and Principal Techniques</td>
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<td>Live Webinar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>National Teleseminar</td>
<td>Center for Legal Education of NMSBF 505-797-6020</td>
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<td>Civil Procedure Update and Recent Developments in the U.S. Supreme Court</td>
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<td>Solos at Seasons Planning Ahead: Protecting Your Clients and Your Practice</td>
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<td>2015 UCC Update: Secured Transactions, Notes, Sales and More</td>
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<td>Employees, Social Media, Smartphones, Tablets: Legal Issues for Employers</td>
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<td>20–21</td>
<td>Selling Closely-Held Companies to Employees, Parts 1–2</td>
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<td>Estate Planning for Pre- and Post-Nuptial Agreements</td>
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<td>Ethics of Maintaining Client Confidences in a Digital World</td>
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## Writs of Certiorari

As Updated by the Clerk of the New Mexico Supreme Court

**Effective November 19, 2014**

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

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<tr>
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<td>34,981</td>
<td>State v. Aceves</td>
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Petition for Writ of Certiorari Denied:

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Submission Date = date of oral argument or briefs-only submission
## Clerk’s Certificates
From the Clerk of the New Mexico Supreme Court

### Clerk’s Certificate of Correction

A clerk’s certificate of withdrawal dated June 16, 2014, for the following attorney was issued in error, that the attorney has not withdrawn from membership, and shall remain shown on the Roll of Attorneys on inactive status in the State Bar of New Mexico since May 4, 1994:

**Charles Dale Arden**
8837 Barnett Valley Road
Sebastopol, CA 95472

### Clerk’s Certificate of Change to Inactive Status and Change Of Address

- **Effective November 5, 2014:**
  **Laura M. Franze**
  5610 W. Amherst Avenue
  Dallas, TX 75209
  214-350-3519
  lfranze@me.com

### Clerk’s Certificate of Reinstatement to Active Status

- **As of October 28, 2014:**
  **John G. George Jr.**
  6360 E. Sahara Avenue,
  Apt. 2118
  Las Vegas, NV 89142

- **As of November 12, 2014:**
  **Megan L. Kuhlmann f/k/a Megan Jahner**
  Yenson, Allen & Wosnick, PC
  4908 Alameda Blvd. NE
  Albuquerque, NM 87113
  505-266-3995
  505-268-6694 (fax)
  mljahner@ylawfirm.com

### Clerk’s Certificate of Name Change

- **Lexi Wilson Jones f/k/a Lexi Wilson**
  U.S. District Court -
  District of New Mexico
  333 Lomas Blvd. NW
  Albuquerque, NM 87102
  505-348-2300
  alexandra_wilson@nmcourt.fed.us

- **As of November 12, 2014:**
  **Megan L. Kuhlmann f/k/a Megan Jahner**
  Yenson, Allen & Wosnick, PC
  4908 Alameda Blvd. NE
  Albuquerque, NM 87113
  505-266-3995
  505-268-6694 (fax)
  mljahner@ylawfirm.com

### Clerk’s Certificate of Withdrawal

- **Effective November 12, 2014:**
  **Suzanne N. Manning**
  704 V Street
  Port Townsend, WA 98368

- **Effective November 4, 2014:**
  **Mary Alice Van Cleve**
  5121 27th Avenue NE
  Seattle, WA 98105

- **Effective November 3, 2014:**
  **Lorili J. Powell**
  17949 Main Street #901
  Dumfries, VA 22026
  202-688-5605

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As of November 12, 2014:

**Lexi Wilson Jones f/k/a Lexi Wilson**
U.S. District Court -
District of New Mexico
333 Lomas Blvd. NW
Albuquerque, NM 87102
505-348-2300
alexandra_wilson@nmcourt.fed.us
Recent Rule-Making Activity
As Updated by the Clerk of the New Mexico Supreme Court

Effective December 3, 2014

Pending Proposed Rule Changes Open for Comment:


Recently Approved Rule Changes Since Release of 2014 NMRA:

Children's Court Rules and Forms

Effective Date

10-102 Commencement of action. 08/31/14
10-315 Custody hearing. 07/01/14
10-317 Notice of change in placement. 08/31/14
10-323 Dismissal of a respondent or child; party dismissal sheet. 08/31/14
10-343 Adjudicatory hearing; time limits; continuances. 07/01/14
10-501A Abuse and neglect party information sheet. 08/31/14
10-565 Advance notice of change of placement. 08/31/14
10-566 Emergency notice of change of placement. 08/31/14
10-567 Abuse and neglect party dismissal sheet. 08/31/14

Rules of Appellate Procedure

12-206A Expedited appeals from Children's Court custody hearings. 07/01/14
12-303 Appointment of counsel. 07/01/14

Rules Governing Admission to the Bar

15-102 Admission requirements. 06/01/15
15-103 Qualifications. 06/01/15
15-105 Application fees. 06/01/15
15-107 Admission by motion. 06/01/15

Supreme Court General Rules

23-109 Chief judges. 04/23/14

To view all pending proposed rule changes (comment period open or closed), visit the New Mexico Supreme Court's website at http://nmsupremecourt.nmcourts.gov.
To view recently approved rule changes, visit the New Mexico Compilation Commission's website at http://www.nmcompcomm.us.
Opinion

Jonathan B. Sutin, Judge

INTRODUCTORY COMMENTS

(1) This case was submitted to a panel of this Court in December 2013. As will be discussed in detail in this Opinion that follows this preface, the appeal raised legal, procedural questions related to the New Mexico Environment Department’s (NMED) approval of a permit modification request to allow the WIPP site to accept waste in a newly developed shielded container. As this Court was working toward issuance of an opinion in this matter, news of the February 2014 fire and radiation leak at the WIPP site led the Court to determine that prudence warranted postponing the issuance of an opinion until more was known about the February 2014 incidents. In April 2014, the Court set a hearing for June 26, 2014, and ordered the parties to apprise the Court of the impact of the recent developments, if any, on the issues before the Court in this appeal. The hearing notice stated, in part:

The Court in particular requests the views of the parties as to whether it should continue its analyses and deliberations at this time in light of the uncertainty about what may or may not be required or changed in the future in regard to operations and safety equipment that may have some impact on the issues before the Court.

Attorneys representing NMED, the federal Department of Energy (DOE), and Southwest Research and Information Center (Southwest Research) presented their respective views in the June 26, 2014, hearing.

(2) All parties agreed in the hearing that the WIPP site was closed and that it was not possible to estimate, with any degree of certainty, when the site would open. Southwest Research indicated that the site may never again be reopened given the extent of the contamination of the site. Based on the facts known to date, the extensive amount of investigation and analysis devoted to resolving the issues and the amount of money being allocated by Congress for recovery and opening, NMED was confident that the site would open at some point. DOE also expressed confidence that the site would open, but likely not before 2015 or 2016.

(3) Southwest Research’s position at the hearing was that it was premature to make a decision on the propriety of the shielded container-related modification given the many uncertainties, including, without limitation, what caused the radiation leak, whether a decision must be made to close WIPP permanently, whether, if WIPP is opened at some point, the opening will be subject to material changes in drums or shielded containers, in procedures for storage, and in infrastructure requiring a redesign of the WIPP site and its functions. Southwest Research requested that this Court remand the matter to NMED with instructions to revisit the approval of the shielded container-related permit modification request. In Southwest Research’s view, remand would allow NMED to consider the propriety of the permit modification in the context of any changes to WIPP that will likely be required as a result of the February 2014 incidents before the facility may open.

(4) NMED and DOE shared a view that it was not likely that anything that arose from the ongoing investigations and analyses of the February 2014 incidents would impact the issues in the case before this Court. NMED and DOE indicated that there was no reason to believe that changes relating to waste storage in the future, upon the
opening of the site would impact or affect the storage of shielded containers as allowed in the present modification, and that all of the issues in the present appeal had been fully aired before the NMED, and that, therefore, a decision from this Court was warranted. Further, NMED and DOE expressed their desire for an opinion in the present appeal in order to provide some certainty for planning purposes with respect to the shielded containers in the context of developing plans to reopen the WIPP site. NMED and DOE also gave assurances that if, during the continuing investigations and analyses of the February 2014 incidents and issues arising out of those incidents, it was determined that any changes required could have an impact on the storage of shielded containers, NMED and DOE would address that as it arose and, if necessary, vacate or amend the relevant permit modification.

[5] This Court required the June 26, 2014, hearing because it was clear that the February 2014 incidents and the ongoing extensive investigations and analyses were a matter of important and ongoing public interest. After the discussions at the hearing, the Court has determined to address the merits of the issues on appeal.

[6] In the Opinion that follows, we affirm NMED’s approval of the permit modification request to allow WIPP to accept shielded containers. In issuing this Opinion, we point to four important circumstances. First, when this case was submitted to the Court, the February 2014 incidents had not yet occurred. The parties have devoted considerable time and expense to this case, which involves issues that may recur concerning the permit modification process. Second, other than the uncertainty that will not be fully quelled until the numerous investigations into the February 2014 incidents are complete and the conclusions reported, there is nothing before the Court at this time indicating that there will be any changes at WIPP that will impact the issues before this Court. The facts at this point do not indicate that either the fire or the leak was in any way related to a shielded container or its storage at the WIPP site. Third, based on the statements and representations of NMED and DOE, implementation of changes at WIPP may require a permit modification or modifications that may include necessary material changes concerning the storage of shielded containers. Fourth, regardless, NMED has assured the Court that, as regulations require, it will address any changes that may impact the storage of shielded containers, including whether the permit modification related to shielded containers should be amended, suspended, or revoked.

MERITS

[7] Appellants SouthWest Research and Information Center (Southwest Research) and Margaret Elizabeth Richards appeal a decision by NMED to modify the operating permit for the Waste Isolation Pilot Plant (WIPP or the facility). The modification allows the addition of a shielded container to the facility that, in turn, will allow remote-handled waste to be managed within WIPP under the protocols applicable to contact-handled waste. At issue is whether the permit modification request complied with the applicable regulations and whether NMED appropriately approved the modification under Class 2 procedures that do not require a public hearing, rather than Class 3 procedures that do require a public hearing. We affirm NMED’s decision.

BACKGROUND

General Information Regarding WIPP and the Permit


[9] The permit is governed by the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (1977, as amended through 2010), and the New Mexico Hazardous Waste Management Regulations. See § 74-4-3(D), (F) (stating that, in the context of the Hazardous Waste Act, “director” and “secretary” are synonyms meaning the secretary of NMED and “division” or “department” means NMED); see also NMSA 1978, § 74-1-8(A)(13) (2000) (stating that the Environmental Improvement Board shall adopt rules applicable to the management of hazardous waste); § 74-4-4(A) (same); 20.4.1.1 to .3 NMAC (6/14/2000) (stating that the hazardous waste management regulations applicable to the storage of hazardous waste were adopted by the Environmental Improvement Board pursuant to the Board’s statutory authority). Throughout this Opinion, we refer to the actions of the director or the secretary as those of NMED. The Hazardous Waste Act comports with its federal analog, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k (2006), and therefore, NMED is authorized to administer and enforce the state hazardous waste management program under the Hazardous Waste Act in lieu of a federal program.¹

[10] Two categories of waste are stored at WIPP: contact-handled and remote-handled. Contact-handled waste is that with a surface dose rate not greater than 200 millirems per hour, which can be handled manually without personnel protective equipment. See Pub. L. No. 102-579, § 2(3), 106 Stat. at 4777 (defining contact-handled waste). WIPP was permitted to and began receiving contact-handled waste in 1999. Remote-handled waste is that with a surface dose rate of 200 millirems per hour or greater, which must be handled remotely using machines. See Pub. L. No. 102-579, § 2(12), 106 Stat. at 4778 (defining remote-handled waste). WIPP was permitted to receive remote-handled waste in 2006 and began receiving it in 2007. Contact-handled waste is placed on the floor of the underground disposal rooms, otherwise known as “panels,” and remote-handled waste is placed in boreholes in the walls of the panels.

[11] The permit limits the total amount of contact-handled and remote-handled waste that can be disposed of at WIPP to 148,500 cubic meters of contact-handled waste and 2,635 cubic meters of remote-handled waste.

¹See Authorized State hazardous waste programs, 42 U.S.C. § 6926(b) (2006) (authorizing a state to carry out a hazardous waste program in lieu of a federal program provided that, among other things, the state program is equivalent to the federal program); New Mexico; Decision on Final Authorization of State Hazardous Waste Management Program, 50 Fed. Reg. 1515-01, 1515 (Jan. 11, 1985) (granting New Mexico final authorization to operate its hazardous waste management program); State of New Mexico: Final Authorization of State Hazardous Waste Management Program, 55 Fed. Reg. 28,397-01, 28,397 (July 11, 1990) (granting New Mexico final authorization to regulate the mixed waste component).
waste. The permit also limits the amount of each type of waste that can be placed in WIPP's eight respective panels.

[12] In March 2011, the United States Environmental Protection Agency (the EPA) announced its decision to approve DOE's request to place a portion of its remote-handled waste in specially designed shielded containers on the floor of the disposal rooms at WIPP rather than in the boreholes. By its letter, the EPA explained that once remote-handled waste was properly loaded into the shielded containers, it may be treated as contact-handled waste. The EPA explained that DOE's request to use the shielded containers was intended to "enhance the efficiency of facility operations."[13] The EPA's letter acknowledged, however, that DOE would "separately need a hazardous waste permit modification from [NMED]" in order to implement its proposed use of the shielded containers at WIPP.

**Permit Modification Requests**

[13] Permittees may submit permit modification requests to NMED, and the secretary is charged with issuing a decision thereupon. See § 74-4-4.2(D), (G)(2) (stating that "a permit may be modified at the request of the permittee" and that decision is within the purview of the secretary). Depending on the nature of the intended modification, the modification request will be classified as Class 1, Class 2, or Class 3. See Permit modification at the request of the permittee, 40 C.F.R. § 270.42 (2013); 20.4.1.901 NMAC (3/1/2009) (adapting 40 C.F.R Part 270); 20.4.1.901(B)(1) NMAC (3/1/2009) (stating that the secretary may modify a permit pursuant to 40 C.F.R Part 270). Each class of modification is subject to a specific set of procedures. Class 1 modifications include "routine changes, such as changing typographical errors, upgrading plans and records maintained by the facility, or replacing equipment with functionally equivalent equipment." Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37,912-01, 37,913 (Sept. 28, 1988). "Class 2 modifications address common or frequently occurring changes needed to maintain a facility's capability to manage wastes safely or to conform with new regulatory requirements." Id. "Class 3 modifications cover major changes that substantially alter the facility or its operations." Id. Class 1 and Class 2 modifications are considered "minor permit modifications[,]" 20.4.1.901(B)(6) NMAC. Class 2 and Class 3 modifications are relevant to this appeal.

[14] Class 2 modifications and Class 3 modifications have similar initial requirements. See 40 C.F.R. § 270.42(b), (c). They both require the permittee to submit a modification request describing the exact change to be made to the permit conditions, identifying the class of the requested modification, explaining why the modification is needed, and providing other materials required by regulations. See 40 C.F.R. § 270.42(b)(1), (c)(1). Likewise, among other things, they each require the permittee to give public notice of the modification request that includes the announcement of a sixty-day comment period and announcement of the date, time, and place for a public meeting to be held within the comment period and in the vicinity of the permitted facility. See 40 C.F.R. § 270.42(b)(2)-(5), (c)(2)-(5).

[15] Within ninety days of a Class 2 request, NMED must take one of five actions on the modification request, that is, NMED, in relevant part, may (1) approve the request (with or without changes), (2) deny the request, or (3) determine that the request must follow the procedures for a Class 3 modification request. 40 C.F.R. § 270.42(b)(6)(ii)(A)-(C). The regulations enumerate the following bases upon which NMED may deny or change the terms of a Class 2 permit modification request: (1) "[t]he modification request is incomplete[,]" (2) "[t]he requested modification does not comply with the appropriate . . . requirements[,]" or (3) "[t]he conditions of the modification fail to protect human health and the environment." 40 C.F.R. § 270.42(b)(7). Likewise, the regulations enumerate the following bases upon which NMED may determine that the Class 2 modification request must follow Class 3 procedures: "(1) [t]here is significant public concern about the proposed modification; or (2) [t]he complex nature of the change requires the more extensive procedures of Class 3." 40 C.F.R. § 270.42(b)(6)(ii)(C). In making a decision as to a Class 2 modification request, NMED is required to "consider all written comments submitted to [NMED] during the public comment period and must respond in writing to all significant comments in [the] decision." 40 C.F.R. § 270.42(b)(6)(vi).

[16] Unlike Class 2 circumstances, in a Class 3 modification request, NMED must give notice and opportunity for a public hearing. See § 74-4-4.2(H) (stating that NMED may not rule upon a major modification request without an opportunity for a public hearing); 20.4.1.901(F) NMAC (governing public hearings). A public hearing is an adversarial proceeding held before a hearing officer. See 20.4.1.901(F) NMAC. The public hearing must be held within the sixty-day comment period. See 40 C.F.R. § 270.42(c)(4); Public hearings, 40 C.F.R. § 124.12(c) (2000). "After the conclusion of the [sixty]-day comment period, [NMED] must grant or deny the permit modification request according to the permit modification procedures of 40 C.F.R. Part 124[,]" 40 C.F.R. § 270.42(c)(6). Additionally, in a Class 3 modification request, NMED must "consider and respond to all significant written comments received during the [sixty]-day comment period." Id.

**The September 2011 Modification Request**

[17] On September 29, 2011, the Permittees submitted a Class 2 permit modification request to NMED seeking to implement use of the shielded containers at WIPP. In an overview of the modification request, the Permittees described the requested change, in relevant part, as one to add "a new gamma shielded container for managing remote-handled waste since it meets the surface dose rate of [contact-handled] waste[,]" In response to the permit modification request, Southwest Research and a number of members of the public responded by sending letters to NMED expressing concern about the proposed use of shielded containers and requesting that the modification be considered a Class 3 modification request instead of a Class 2 modification request.

[18] By a December 22, 2011, letter, NMED notified the Permittees that it was "appropriate for [NMED] to process the modification request as a Class 3 permit modification" because there was substantial public concern about the requested modification and because the complex nature of the changes required the more extensive Class 3 procedures. But in a December 28, 2011, letter, NMED retracted the December 22, 2011, letter and then, by a letter dated January 31, 2012, NMED issued a decision in which, among other things, it denied the request to add provisions for shielded containers. The denial, which will be discussed in greater detail as necessary later in this Opinion, was based primarily on the deficiencies and "technical inadequacies" in the modification request.

**The July 2012 Modification Request**

[19] On July 5, 2012, the Permittees submitted a new Class 2 permit modification...
request for the addition of the shielded containers. The modification request was subject to a sixty-day public comment period that ran from July 12, 2012, through September 10, 2012. The Permittees held public meetings on the proposed modification on August 14 and 16, 2012. NMED received 206 comments from the public, including one from Southwest Research; nearly all of the letters requested a public hearing. By a “final determination” letter dated November 1, 2012, NMED approved, with changes not at issue in this appeal, the requested Class 2 permit modification. This appeal followed.

[20] Appellants raise eight points on appeal in support of two overarching arguments. First, Appellants argue that, for a number of reasons, the permit modification request did not comply with the applicable regulations, and therefore, it could not lawfully be granted by NMED. Second, Appellants argue that approval was improper under Class 2 procedures and should instead have been determined under Class 3 procedures. DOE intervened and argues in support of NMED’s decision. We conclude that Appellants’ arguments provide no basis for reversal and affirm NMED’s approval of the permit modification.

DISCUSSION

Standard of Review

[21] This Court may set aside the Secretary’s decision if it is arbitrary or capricious or an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with the law. Section 74-4-14(C). “The burden is on the parties challenging the agency order to make this showing.” N.M. Attorney Gen. v. N.M. Pub. Regulation Comm’n, 2013-NMSC-042, ¶ 9, 309 P.3d 89 (internal quotation marks and citation omitted). In seven of their eight points, Appellants argue that the Secretary’s decision was arbitrary and capricious. “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” Gila Res. Info. Project v. N.M. Water Quality Control Comm’n, 2005-NMCA-139, ¶ 16, 138 N.M. 625, 124 P.3d 1164 (internal quotation marks and citation omitted). In their final point, Appellants argue that NMED abused its discretion. “An agency . . . abuses its discretion when its decision is contrary to logic and reason.” Oil Transp. Co. v. N.M. State Corp. Comm’n, 1990-NMSC-072, ¶ 25, 110 N.M. 568, 798 P.2d 169. The appellate courts generally accord deference to an agency’s determination of a factual matter within its specialized expertise and do not substitute judgment for that of the agency. Plains Elec. Generation & Transmission Coop., Inc. v. N.M. Pub. Util. Comm’n, 1998-NMSC-038, ¶ 7, 126 N.M. 152, 967 P.2d 827.

I. Appellants’ Arguments Regarding the Modification Request’s Compliance With the Applicable Regulations

[22] Appellants raise five points in support of their position that the modification request did not meet the requirements of the applicable regulations. We consider each in turn and conclude that none of the five points demonstrates a basis for reversal of NMED’s decision.

A. The Need for the Proposed Modification

[23] Pursuant to 40 C.F.R. § 270.42(b)(1) (iii), a Class 2 modification request must explain why the modification is needed. Although the Permittees provided a “need” statement in their modification request, Appellants fault the Permittees for not having honestly stated the need for the modification and fault NMED for not having determined or recognized for itself what Appellants believe to be the unstated actual need that the modification serves. Because NMED granted the modification request notwithstanding the alleged deficiency in the need statement, Appellants request reversal on the basis that NMED’s decision was arbitrary and capricious.

[24] In their modification request, the Permittees identified three reasons for the need to add shielded containers as acceptable waste containers at WIPP. Summarized, those reasons were (1) the need to accommodate generator sites’ use of shielded containers, (2) to increase the efficiency of the shipment of remote-handled waste, and (3) to increase the efficiency with which remote-handled waste is managed, processed, and handled at WIPP. According to the Permittees’ modification request, generator sites were turning to the use of shielded containers because the containers were “expected to reduce the time and personnel necessary for the packaging of remote-handled waste at generator sites. Additionally, shipping remote-handled waste in shielded containers would permit three times the amount of waste per shipment than remote-handled waste in non-shielded containers. And, in terms of the waste processing time, use of the shielded containers, which allow the remote-handled waste to be handled as contact-handled waste, “is inherently less complex” than handling it as remote-handled waste. Thus, for example, the Permittees explained that a pallet of shielded containers “can be managed from unloading to disposal in about two hours versus the eight to ten hours needed for handling remote-handled waste in a non-shielded container. The Permittees also stated that, in terms of the remote-handled waste disposal limits, the remote-handled waste stored in the shielded containers would be characterized as, and count against, the limits applicable to remote-handled waste. NMED argues that the Permittees’ explanation of the need to use shielded containers at WIPP, which was certified to be “true, accurate, and complete,” constituted substantial evidence supporting the need for modification.

[25] Appellants argue that, contrary to the reasons stated in the modification request, the real and unstated reason that the Permittees needed the modification was to make up for their earlier inefficient use of remote-handled storage capacity at WIPP. Appellants argue that Permittees placed contact-handled waste in Panels 1 through 3 prior to their receipt of any remote-handled waste, which resulted in a lost opportunity to place any remote-handled waste in boreholes in those panels because remote-handled waste must be placed first. They also argue that Permittees understood the borehole capacity in Panels 4 and 5. Because shielded containers will allow placement of remote-handled waste on panel floors, the real need to use them, according to Appellants, stems from the lost capacity to store remote-handled waste within the unused or underused boreholes of Panels 1 through 5.

2 Generator sites are places from which the waste originates; waste is originally placed in containers at these sites.

3 Panel 4 has a maximum capacity for 356 cubic meters of remote-handled waste, but has a final waste volume of 176 cubic meters of remote-handled waste. Panel 5 has a maximum capacity for 445 cubic meters of remote-handled waste, but has a final waste volume of 235 cubic meters of remote-handled waste.
YLD...In Brief
The Official Newsletter of the State Bar of New Mexico Young Lawyers Division
December 2014

Message from the YLD Chair…

By Benjamin I. Sherman

As 2014 comes to an end, I am proud to report that the State Bar of New Mexico Young Lawyers Division was able to continue its long-standing tradition of providing excellent public service and member service programs. In fact, 2014 marked a year of many new records: from the extremely successful Veterans Civil Justice Legal Initiative to the YLD/UNMSOL Mentorship Program, a record number of attorney and paralegal volunteers served a record number of members of the legal community and the community at-large.

But before I delve into some of the highlights, it must be kept in mind that it was the combined effort of some very hard-working and talented individuals that made the year such a success. To that end, I want to personally thank all of the 2014 YLD board members for their leadership skills and for offering constant support. But it certainly doesn’t stop with the YLD Board; to all of the volunteers, both “young” and “old” who donated their time, money, space, skills, and support for the many public and member service projects over the past year, I extend a most heartfelt thank you. YLD could not do it without you and I am forever indebted to the tireless assistance of all of the lawyers, paralegals, legal assistants, law students, and State Bar staff that made the following programs a huge success.

Now for some of the records, starting with the VA free legal clinics. Held the second Tuesday of every month from 8:30 a.m. – noon. at the VA Medical Center in Albuquerque, these clinics, through the efforts of attorney and paralegal volunteers, continued to provide much needed legal counseling to 500-600 local veterans. A special thank you to YLD Immediate Past Chair Keya Koul, Krista Gignes-Chavez, Linda Murphy, Keith Meir, and former ABA/YLD District 23 Representative Greg Gambill for spearheading this program and making sure it ran smoothly every month.

I am especially excited to report that for the first time, on May 21, a VA free legal clinic was held in San Juan County. Thank you to Cathryn Abeyta from DNA – People’s Legal Services, for your tireless efforts in making the inaugural clinic a huge success, with 33 veterans served! If you have not volunteered for a VA clinic yet, please consider volunteering in the near future. The veterans of New Mexico deserve our support.

Another YLD public service program, Wills for Heroes, saw a record number of participants this year. In this program, attorney volunteers draft wills, powers of attorney, and healthcare directives for free for our state’s first-responders, including police officers, paramedics and firefighters. The Paralegal Division provides witnesses and notaries to finish the wills and other legal documents. This year, YLD hosted five separate Wills for Heroes events throughout the state—Santa Fe, Hobbs, Socorro and Albuquerque—assisting more than 90 first-responders! A special thank you to YLD Vice Chair Spencer Edelman for again serving as the main point-of-contact for the Wills for Heroes program. In addition, thank you to YLD Board Member Robert Lara for implementing the first-ever Wills for Heroes in Santa Fe; and YLD Board Member Tim Scheiderer, for setting up the first-ever Wills for Heroes in Hobbs. Thanks also to all of the hardworking attorney and paralegal volunteers who took time out of their busy schedules to give back to the first-responders who help keep our community safe!

This year’s YLD Law Day Call-in event took place on April 26 and saw a record number of callers seeking legal advice from around the state. Volunteer attorneys staffed phones in four locations.
In the fall of 2012, Jennifer Broomfield, a licensed social worker, lawyer, and Veterans Justice Outreach Specialist at the New Mexico Veterans Affairs Health Care System (NMVAHCS), approached the State Bar of New Mexico Young Lawyers Division (YLD) to explore how to expand the pro bono legal services available to military veterans from the State Bar of New Mexico and legal service providers from around the state, and how to partner with other community stakeholders to address clinical recovery and community integration when delivering legal services. The YLD Board was eager to help. Through the efforts of the YLD Board, specifically attorneys Greg Gambill, a member of the YLD who has since moved his practice to Colorado, and Keya Koul, Krista Gianes-Chavez of the Paralegal Division of the State Bar, D.D. Wolohan, Program Manager, Communications and Member Services for the State Bar of New Mexico, Joe Conte, Executive Director of the State Bar of New Mexico, and Camila Lopez and Earl Roybal of the NMVAHCS Veterans Justice Outreach Program, the exploration led to a formal agreement between the NMVAHCS and State Bar of New Mexico for the purpose of implementing a civil law clinic supporting the Veterans Civil Justice Initiative (VCJI) in New Mexico.

The VCJI expands civil legal services to military veterans in a big way and improves the quality of legal services the Bar provides to our nation’s veterans. The VCJI offers veterans a broad range of veteran-specific and non-veteran-specific legal services during monthly clinics held from 9 a.m. to 12 p.m. on the second Tuesday of every month in the Spinal Cord Injury (SCI) Conference Room (Building 45) at the Raymond G. Murphy Medical Center (VA hospital) in Albuquerque. Breakfast is provided and a brief orientation for volunteers is conducted from 8:30 a.m. to 9 a.m. At the time signing up for the first time, volunteers are provided with a comprehensive Orientation Memo and detailed directions to the clinic. The Clinic partners not only with the NMVAHCS and its services, but many organizations including New Mexico Legal Aid, the Volunteer Attorney Program (VAP), the Supreme Court Library, the Second Judicial District Court Self Help Center, the New Mexico Department of Veterans Services, Goodwill Industries of New Mexico, Law Access New Mexico, Senior Citizens Law Office, United South Broadway Corp., and others. The clinic has been in operation for approximately 16 months and has assisted over 55 veterans per clinic, which is a staggering number given the three-hour timeframe. Overall the clinics have served more than 830 veterans. The clinic on Tuesday, December 9, will be the last for calendar year 2014, and organizers expect to serve more than the average, which will bring the number of veterans served since the clinic’s inception very close to 900.

The NMVAHCS has been more than a great host, and the organization’s leadership continues its consistent support of the monthly clinics. Currently, Camila Lopez and Lisa Anderson, both Veterans Justice Outreach Specialists, and a wonderful group of NMCAHCS staff, support the clinics directly ensuring the monthly sessions continue to serve as many veterans as possible.

However, the continued success of the legal clinics is largely dependent on volunteers, and the wonderful legal community throughout New Mexico has responded. Attorneys from across New Mexico with specialties spanning the gambit of civil legal services consistently volunteer, and many have attended since the Clinic’s inception. The Paralegal Division of the State Bar coordinates paralegal volunteers who conduct the client intake process, and do an exceptional job of talking and listening to the veterans helping to narrow their potential legal issue making the veterans’ interactions with attorneys much more successful. Students from the University of New Mexico School of Law also volunteer and assist with pairing veterans and attorneys with the appropriate expertise to address the veteran’s issues. Those from partner organizations are also invaluable to the program providing a number of services in addition to the legal advice provided the veterans. The overall program should be considered a large success, and the root of that success is the line of caring people willing to serve our communities veterans.

For those who would like to volunteer, or would like further information, please contact any one of the YLD Board members. In addition please contact Keya Koul at keyakoul@gmail.com, Krista Gianes-Chavez at kgianes@nmjsc.org, or Keith Mier at kcm@sutinfirm.com.
Wills for Heroes Assists First Responders Statewide

By Vice Chair Spencer Edelman

This year the Young Lawyers Division, together with the Paralegal Division and members of the State Bar continued to give back by helping protect those that protect us. Organized by members of the YLD, these programs are staffed by volunteer attorneys and paralegals to fill a vital need.

Wills for Heroes provides free wills and other estate planning documents for qualified first responders. The program originated after Sept. 11, 2001, when Anthony Hayes asked what lawyers could do to help in response to the terrorist attack. He quickly identified a crucial need. Very few of the first responders who selflessly responded to the attack had any estate planning documents. Following those first efforts to provide pro bono services to New York’s first responders, the program was expanded to help police, firefighters, and EMTs around the country.

Wills for Heroes has been growing in New Mexico for the past several years. One of the best things about the program is that lawyers with no experience in drafting wills or estate planning documents can guide first responders through a few simple questions, and the first responders can leave that day with a will in hand.

This year New Mexico hosted three Wills for Heroes clinics and more are in the works. Mark Baralbar, Tim Scheiderer, and the Lea County Bar Association took the lead in hosting a clinic in Hobbs at City Hall. Robert Lara worked with the New Mexico Fire Marshall to host a clinic in Socorro at the Third Annual Fire & EMS Expo at the New Mexico Firefighters Training Academy. And Spencer Edelman worked with the New Mexico State Police and EXPO New Mexico to host a clinic at the New Mexico State Fair. Each program was a success and plans for two more clinics this year are in the works.

If you are interested in volunteering at an upcoming clinic, please keep an eye out for e-mails from the State Bar and announcements in the Bar Bulletin. If you are interested in helping the YLD host a clinic for a group of first responders in your area, please contact Spencer Edelman at spencer.edelman@modrall.com.

YLD Vice Chair Spencer Edelman prepares a will for a first-responder during the the NM State Fair

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and answered a stream of phone calls from 9 a.m. – 1 p.m. YLD was able to assist approximately 355 members of the public on family law, immigration, criminal matters, landlord-tenant, bankruptcy, and personal injury. ‘Thank you to all of the volunteers who gave up their Saturday to help the community!’

Perhaps one of my personal favorite programs that YLD offers is the YLD/UNMSOL Mentorship Program. This year, the YLD enjoyed a new record number of participants in the program, with more than 75 pairs of law students and attorneys. That’s 150 individuals committing to participate! The YLD/UNMSOL Mentorship program pairs 1L, 2L, and 3L law students with volunteer attorneys based on the students’ career interests and attorney practice areas. On Saturday, Sept. 6, fellow YLD Board Members and incoming Vice Chair Tomas Garcia, myself, Student Bar Association President Victor Sanchez, and Student Bar Association Treasurer Stephanie Crespin met at the law school to complete the daunting task of pairing the students and attorneys. I want to thank those individuals for their time (six hours!) and efforts in helping to ensure the program’s success.

On September 25, law students met their attorney mentors for the first time during a fun and exciting kickoff event on the back patio of the law school that included food, drinks, music, and even a little rain… ok, a lot of rain. Feedback on this program continues to be positive, and we are grateful for the generous donation of time that all of the attorney volunteers commit to their mentees. At the time of this writing, the next mentorship event is a holiday social mixer on Nov. 13 at Backstreet Grill in Old Town. Of course, the mentorship program would not be possible without the efforts of Assistant Dean for Career Services Heather Harrigan, and Employer Liaison and Career Advisor Stevie Nichols. Thank you for your continued support!

Other record-setting YLD programs are described inside YLD … In Brief.

Finally, the young lawyers of New Mexico continued to be well-represented on a national level, sending delegates to all four ABA/YLD Conferences, and won a prestigious award for the ABA/YLD Next Steps Diversity Challenge. New Mexico was also fortunate enough to have the distinct honor of having two members of the State Bar selected to serve as ABA/YLD Scholars: Incoming YLD Vice Chair Tomas Garcia and YLD Board member Dayan Hochman. I would also be remiss not to thank Greg Gambill for his excellent leadership over the past two years as ABA/YLD District 23 Representative, a role which required him to represent Arizona and New Mexico on a national level. We wish Greg the best of luck at his new firm in Colorado.

As can plainly be seen, 2014 was a busy year for the young lawyers of New Mexico. Through hard work, dedication, and fun….yes, we had fun, the YLD was able to set new records and achieve new goals. The real kudos go to the many attorney and paralegal volunteers who donated so much of their time, the staff members of the State Bar, and my fellow YLD board members. It has been my distinct pleasure and an honor to represent the more than 1,600 young lawyers in this State, and I thank you for the opportunity.
ABA/YLD Annual Meeting: Boston

By: Chair-Elect Ken Stalter

In early August, thousands of attorneys from across the nation flocked to Boston, site of the American Bar Association’s 2014 Annual Meeting. New Mexico young lawyers have historically been well-represented at the event, and this year was no exception. New Mexico Young Lawyer’s Division Board members Sean FitzPatrick, Day Hochman and Ken Stalter attended as voting delegates at the ABA YLD assembly. Young lawyers Steven Johnston and Daniel Abeyta also attended, appearing on behalf of San Juan County to accept the Harrison Tweed Award for indigent representation.

In addition to participating in the ABA YLD’s assembly, New Mexico’s young lawyers attended trainings on legal topics ranging from emerging issues in food safety to the collateral consequences of criminal conviction. The delegates also met with representatives of the ABA’s sections and divisions.

Though the Red Sox were out of town, New Mexico’s young lawyer delegates were nevertheless able to take advantage of Boston’s deep history through visits to Boston Commons and Harvard Square. Stalter even treated his fellow young lawyers to an impromptu tour of his alma mater. State Bar President Erika Anderson was able to carve a little time from her schedule to share desserts and career advice with New Mexico’s young lawyer delegation at the famous Mike’s Pastry in Boston’s historic North End.

YLD/UNM SOL Mentorship Program

By YLD Board Member Tomas Garcia

This year more than 80 young lawyers volunteered to mentor students from the University of New Mexico School of Law over the course of the school year. Originally intended as a way to connect 1Ls with young lawyer mentors, the program has grown to include 2L and 3L student participants. Mentors provide guidance to the students on topics such as navigating law school, the job search process, résumé preparation and more. As an indication of the past success and growing popularity of the program, a record number of students, 112, signed up to participate this year. While most attorney mentors practice in Albuquerque, this year the YLD drew on volunteers from Santa Fe, Las Cruces, Farmington, and other communities throughout the state. YLD hosted a kickoff BBQ at the law school in September, where students and attorney mentors gathered to meet each other for the first time. After the kickoff event, students and mentors develop their relationships independently over the course of the school year.
Over the past few decades, the number of diverse lawyers in the legal profession has grown. That increase in numbers, especially in a state as diverse as New Mexico, might cause some to wonder whether there is any work left to do in the area of diversity. The Committee on Diversity in the Legal Profession is proving that when it comes to raising awareness of diversity issues, there is always more that can be done.

In fact, this past summer, the Committee tackled head-on the issue of whether diversity still matters in the legal profession during a CLE program at the State Bar’s annual meeting. The CLE was co-sponsored by the Young Lawyers Division, the Senior Lawyers Division, the Paralegal Division, the New Mexico Hispanic Bar Association and the New Mexico Black Lawyers Association. Panelists Raymond Hamilton, Arturo Jaramillo and Sarita Nair presented historical and current data on the state of diversity in the State Bar of New Mexico. They also discussed the reasons why diversity in the legal profession still matters, as well as the movement toward inclusiveness initiatives that promote full and equal participation by diverse lawyers in the profession. The CLE program generated ideas about other diversity issues. And, as a result, the Committee is planning a follow-up CLE presentation that will focus on the impact of the legal system on people of color.

Raising awareness of diversity issues through CLEs is just one of the Committee’s many ongoing efforts. The Committee is also concentrating on collaboration with other bar organizations, legal entities and law student groups at the UNM School of Law to support each other’s diversity initiatives and programs. Recently, the Committee organized two well-attended and successful events in which leaders of the diverse bar organizations and law student groups talked about their respective initiatives and exchanged information about their organizations. To ensure that each organization is connected and informed about each other’s initiatives, the Committee is starting an email listserv where information can be shared, as well as a calendar of events for all of the organizations’ programs. This marks the first organized effort between diverse bar organizations and law student groups to work together on diversity initiatives.

The Committee is also now responsible for administering the Arturo L. Jaramillo Summer Law Clerk program. The program provides summer law clerk experience to first-year law students in medium and large law firms, state and local public agencies, and corporate law departments. Although any first-year law student can apply, the program has a long track record of providing job opportunities to diverse law students. The Committee is actively working to improve the program and reach out to new employers so that even more students have the opportunity to participate.

While the Committee is undertaking new efforts, like the diversity collaboration initiative and the Summer Law Clerk program, the Committee has not forgotten about its important role in reporting on the status of diversity in the profession. The Committee is perhaps best known for its reports on the “Status of Minority Attorneys in New Mexico.” The Committee’s 2009 report included a set of recommendations related to various issues in the report. Among those was a recommendation to provide more frequent reporting on the status of diversity in the New Mexico bar. The Committee is now working on producing an abbreviated report with demographic information about diverse lawyers in New Mexico. It hopes to publish the report sometime in 2015.

There is still much work to be done on diversity issues in the State Bar of New Mexico. If you are interested in serving on the Committee, or if you have any ideas to present to the Committee, please contact Keya Koul, chair, at keyakoul@gmail.com.

The Committee for Diversity in the Legal Profession met for the Diversity Collaboration Kick-off Event on Sept. 6 at UNM School of Law.
Constitution Day and the Annual Retreat

By Vice Chair Spencer Edelman

Every year during the week of Sept. 17, YLD coordinates a celebration of the ratification of the Constitution by teaching fifth graders about this important document. This year members of the State Bar throughout the state stepped up to make this year’s Constitution Day the largest yet, with 125 elementary schools and 7,993 students participating. In each case the 5th grade classes were paired up with volunteer attorneys who went through fun lesson plans to teach these youngsters about their rights and responsibilities under the Constitution. In addition to receiving lessons from attorneys who want to inspire the next generation, each child received a free pocket Constitution.

Although we can’t highlight everyone’s experience with the program, we couldn’t pass up the opportunity to share a couple of anecdotes from this year’s Constitution Day:

Peter Ossorio taught fifth graders in Chaparral. He reported back that he and the 115 fifth graders had a great time and he made such an impression that several of the students asked for his autograph!

Bobbie Collins taught Mr. Reyes class at Longfellow Elementary in Albuquerque and reported back that both she and the kids enjoyed it, and she pledged to continue to volunteer for Constitution Day in the future!

Geoff Nims may have gotten the most attention for his efforts. He taught at Bosque Farms Elementary and his presentation was covered by a reporter from the Valencia News-Bulletin!

In order to reach more fifth graders in Farmington as well as to promote teamwork amongst the YLD board members, the board held its annual retreat in Farmington the weekend of Sept. 19. On the morning of the 19, board members went to McKinley Elementary School as part of Constitution Day. After a fun morning teaching, the board members attended a luncheon to honor the San Juan County Bar Association for their receipt of the American Bar Association’s Harrison Tweed Award for outstanding pro bono service.

This year’s retreat and public service project would not have been possible without support from some wonderful people and organizations: the 12th Judicial District Bar Association; the San Juan County Bar Association; the State Bar Bankruptcy Section; the State Bar Criminal Law Section; Dixon, Scholl & Bailey; the Edward Group; the Modrall Sperling Law Firm; SaucedoChavez; Christina Rosado; and Tim Scheiderer. The YLD Board thanks you all for helping bring Constitution Day to Farmington!

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YLD Board Members Tomas Garcia, Ben Sherman, Joachim Marjon, and Spencer Edelman in Farmington

Sarah Maestas Barnes teaching 5th grade students about the Constitution

Magistrate Judge Mateo Page teaching 5th grade students about the Constitution

Peter Ossorio meeting with 5th grade students in Chaparral
Law Day Call-in

By YLD Board Member Erin Atkins

On Saturday morning, April 26, the phones were ringing, and attorneys across the state were there to help.

This spring, the Young Lawyers Division united lawyers across judicial districts and provided free phone consultations to the public for its annual Law Day Call-in. YLD Chair Ben Sherman promoted the event on KOAT-7 and the calls flooded in! The event was a phenomenal success, with a record 335 members of the public receiving free legal advice. More than 230 callers were from the Albuquerque region, and some of these calls were transferred to outlying areas in the state, where volunteering attorneys were prepared to assist and offer free legal counseling.

Family law questions dominated, but there were also questions regarding consumer issues, estate planning, administrative law, disability, criminal law, employment law, landlord/tenant rights, civil rights, personal injury, real property, medical malpractice, and immigration law. Callers reached out from Abiquiu to Dexter, from Glorieta to Lovington and from Peralta to Truce or Consequences.

YLD thanks the many volunteer attorneys, judges and legal professionals who made this day such a success!

ABA YLD Fall Conference

By YLD Board Member Tomas Garcia

New Mexico YLD Board members Spencer Edelman, Tomas Garcia, and Dayan Hochman attended the ABA YLD Fall Conference in Portland, Oct. 9-11. At the ABA YLD affiliates’ showcase event, the New Mexico contingent highlighted its ongoing work on veterans’ legal clinics, which are held monthly at the Raymond G. Murphy VA Medical Center in Albuquerque. During the Fall Conference, YLD board members participated in a national summit on access to justice and the future of legal services led by a distinguished panel including ABA President William Hubbard, Judge Ann Aiken from the U.S. District Court for the District of Washington, and Washington Supreme Court Justice Barbara Madsen. Board members also volunteered at a legal services clinic for homeless youth in Portland.
Law School Activities

By 2014 YLD Chair Ben Sherman

YLD understands that the law students of today will be the young lawyers of tomorrow. That is why we are committed to putting on quality programs to assist law students in reaching their professional goals. Historically, YLD has enjoyed a close relationship with the University of New Mexico School of Law, and 2014 was no exception. From conducting mock interviews at the law school, to hosting a State Bar Open House and organizing the popular Speed Networking event, 2014 was a banner year for the YLD’s involvement with the law school.

On Saturday, Feb. 15, approximately 20 attorney volunteers gathered at the law school to interview 40 students during the annual YLD Mock Interviews. Students were matched with attorneys based on practice areas and given the opportunity to rehearse their interview skills. Attorneys spent a half hour interviewing the student as if he or she were applying for an associate position, and then spent another half hour providing valuable feedback and discussing the practice of law. Students dressed professionally and submitted a résumé and cover letter to their attorney volunteer. The law students greatly appreciated the opportunity to practice their interview skills and also enjoyed the feedback they received. Thank you, YLD Vice Chair Spencer Edelman, for organizing such a valuable learning experience.

On Sept. 9, YLD hosted the 2nd Annual State Bar of New Mexico Open House for law students. With close to 100 people in attendance, law students were greeted by the staff of the State Bar and introduced to all of the great resources and opportunities the State Bar offers law students.

A couple years ago, YLD realized that law students did not have much interaction with the State Bar and were left “in the dark” when it came to the ways in which they could benefit. In response, YLD created this open house, in which practice section leaders joined the State Bar president in discussing why students should join and participate in State Bar events.

For just $10 a year, law students can be members of the bar and can attend daylong CLE programs, receive the weekly Bar Bulletin and participate in YLD activities. Perhaps the biggest benefit, however, is the ability to network with other attorneys and join practice sections.

Speaking of networking opportunities, on Oct. 28, YLD hosted the annual Speed Networking event at the State Bar Center and drew more than 75 participants! Volunteer attorneys gathered to talk with law students in a relaxed and fun environment before attendees were split in half, with attorneys at one end and law students at the other end. Next, the attorneys stood in a big circle facing outwards. Then the law students formed a circle around the attorneys, facing inwards. With the students and attorneys standing face-to-face, the clock began to tick. Students had about 2 minutes to deliver their “elevator speech” before the chime rang, signaling it was time to move one space to the next attorney. After about an hour of practice, the students gained valuable networking skills and made new professional contacts.

A special thank you to UNM Assistant Dean of Career Services Heather Harrigan, SBA President Victor Sanchez and Vice President Darin McDougall, for making this event run smoothly. And to all the attorney volunteers who participated, we thank you for supporting the professional development of tomorrow’s lawyers!

Appellate Section Brown-Bag Lunch Program

By Appellate Section YLD Liaison Elizabeth Martinez

In May 2014, the YLD became a co-sponsor of the Appellate Practice Section’s quarterly brown-bag lunch program. The lunch programs, which are open to all YLD members, allow practitioners to meet with New Mexico Supreme Court justices and Court of Appeals judges in an informal setting to discuss issues relating to appellate practice. The program also provides an opportunity for YLD members to meet and learn from established appellate practitioners.

Since becoming involved, YLD has co-sponsored a June lunch with Justice Petra J. Maes and a September lunch with Judge M. Monica Zamora.

These meetings have proven to be both well attended and very enjoyable both for the guest and the section members who have come to share lunch and conversation. Chief Justice Barbara J. Vigil will join Appellate Practice Section and YLD members for the final lunch of the year at noon on Friday, Dec. 12, at the State Bar Center.

These meetings are informal, and we encourage those attending to bring their own brown-bag lunch. Space is limited, so please e-mail Appellate Practice Section Board member Dolph Barnhouse if you plan to attend, at dbarnhouse@indiancountrylaw.com.
[26] Appellants’ argument regarding an ulterior reason behind the Permittees’ need for modifying the permit to allow the use of shielded containers is speculative and not clearly supported by evidence in the record. At most, Appellants’ argument illustrates a possible advantage the Permittees will gain from using the shielded containers, but we are not persuaded that it illuminates an ulterior motive by the Permittees for the requested modification. NMED determined that the Permittees’ statement of need was justified by the reasons stated, substantiated by data, and constituted an “adequate statement” of the need. And Appellants have not demonstrated otherwise. See N.M. Attorney Gen., 2013-NMSC-042, ¶ 9 (stating that the appellant bears the burden of demonstrating reversible error in the agency’s decision).

[27] Appellants also argue that the use of shielded containers could violate the panel limits on remote-handled waste. Appellants tie this argument to a separate issue—whether the use of shielded containers will allow the Permittees to exceed the permitted limit of remote-handled waste that may be stored at WIPP. Appellants argue that NMED reverses itself in stating that the remote-handled waste limits do not apply to remote-handled waste in shielded containers because those containers constitute contact-handled waste. But Appellants’ argument confuses NMED’s position regarding the limit of remote-handled waste that WIPP may receive with its position regarding the management of remote-handled waste in shielded containers by the Permittees.

[28] At the crux of this issue is the distinction between designating waste as remote-handled or contact-handled for purposes of measuring the amount of waste stored at WIPP versus the waste designation for purposes of managing the waste once it is at WIPP. On the one hand, the limit of remote-handled waste that is permitted to be stored at WIPP is defined by 10 C.F.R. § 200.15(h)(4) (defining contact-handled waste). DOE was allowed, pursuant to applicable regulations, to recognize that shifting is a serious risk. In support of this argument, Appellants cite a portion of a final draft report titled “Review of DOE Planned Change Request for Shielded Containers for Remote-Handled Waste.” The report, prepared for the EPA by an independent contractor, summarized the contractor’s “technical review of the shielded container [planned change request].” The report indicates that before the EPA would approve the use of shielded containers, the United States Nuclear Regulatory Commission and the Department of Transportation must approve the shipping container design, and a safety analysis must be prepared by DOE. DOE was allowed, pursuant to applicable regulations, to “self-certify that the shielded container [met] the [applicable] requirements[.]” DOE demonstrated compliance with the requirements by conducting a series of “analyses, tests, and evaluations performed on the shielded container to demonstrate” that the packaging design met relevant requirements.

[29] On the other hand is the management of waste within WIPP. Panels 4 through 8 are designated to store a limited amount of remote-handled and contact-handled waste respectively. For purposes of management and storage within the facility, the designation of waste as remote-handled versus contact-handled is, under the permit and according to federal regulation, determined by the amount of surface radiation or “surface dose rate.” See 10 C.F.R. § 200.15(h)(4) (defining contact-handled waste); Pub. L. No. 102-579, § 2(3), 106 Stat. at 4777 (defining contact-handled waste). Thus, remote-handled waste within a shielded container with a surface dose rate not greater than 200 millirems per hour can be managed by WIPP as contact-handled waste. See 10 C.F.R. § 200.20; 10 C.F.R. § 200.15(h)(4) (defining contact-handled waste). Therefore, the positioning of waste stored at WIPP as contact-handled waste for purposes of measuring the amount of remote-handled and contact-handled waste within shielded containers is a separate issue from the issue of whether the Permittees will exceed the permitted limit of remote-handled waste that may be stored at WIPP. As explained by NMED, in response to public comments, the limits applicable to contact-handled waste drums and that the prospect of contents shifting during shipment of the waste to WIPP creates a “serious likelihood” that the shielded containers will exceed that limit. Appellants also assert that the EPA and DOE “recognize that shifting is a serious risk.” In sum, NMED concluded that the Permittees adequately stated the need for the modification. And Appellants have not demonstrated that NMED’s conclusion in that regard was arbitrary and capricious.

[30] In sum, NMED concluded that the Permittees adequately stated the need for the modification. And Appellants have not demonstrated that NMED’s conclusion in that regard was arbitrary and capricious. See N.M. Attorney Gen., 2013-NMSC-042, ¶ 9 (stating that the appellant bears the burden of demonstrating reversible error in the agency’s decision); Gila Res. Info. Project, 2005-NMCA-139, ¶ 16 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” (internal quotation marks and citation omitted)). Therefore, this issue provides no basis for reversal.

B. **Enforcement of the Surface Dose Rate Limits**

[31] Appellants argue that the modification request was deficient in that it failed to demonstrate otherwise. See id. (stating that “[NMED] may deny or change the terms of a Class 2 permit modification” if “[t]he conditions of the modification fail to protect human health and the environment”); Titus v. City of Albuquerque, 2011-NMCA-038, ¶ 29, 149 N.M. 556, 252 P.3d 780 (recognizing that use of the term “may” evokes discretion). Further, Appellants argue that NMED acted contrary to 40 C.F.R. § 270.42(b)(6)(vi) by failing “to explain its reasoning in declining to protect against an admitted risk.” See id. (stating that “[NMED] must consider all written comments submitted to [NMED] during the public comment period and must respond in writing to all significant comments in [the] decision”). Appellants assert that the surface dose rate for shielded containers will, on average, be much closer to the 200-millirems-per-hour limit for usual contact-handled waste drums and that the prospect of contents shifting during shipment of the waste to WIPP creates a “serious likelihood” that the shielded containers will exceed that limit. Appellants also assert that the EPA and DOE “recognize that shifting is a serious risk.” In support of this argument, Appellants cite a portion of a final draft report titled “Review of DOE Planned Change Request for Shielded Containers for Remote-Handled Waste.”
prepared by the independent contractor. Appellants' argument that the EPA and DOE "recognize that shifting is a serious risk" is based upon one such comment by the EPA.  

{35} In response to a representation by DOE regarding a test used to determine whether significant changes in radiation would result depending on the weight of a particular shipment, the EPA raised two questions. First, the EPA asked why, if DOE had determined that radiation levels did not vary depending on the weight of the shipment, it did not expressly so state. Second, the EPA asked that DOE show where it had addressed movement of point sources of radiation and what actions would have to be taken to prevent such movement. In response to the EPA's comment, DOE stated, in relevant part, that "[i]t is the responsibility of the shipper to ensure that there is adequate bracing within the . . . internal payload container such that the point radiation source doesn't move during transportation to cause a significant increase . . . in the external radiation levels." It further explained that specific loading instructions were provided in a handling and operation manual, and the instructions would be "revised to further instruct the shipper to securely fasten and position contents . . . in a manner to prevent a significant increase in the level of radiation at the external surface of the [shielded containers] as a result of movement during transport." Based on review of DOE's "self-certification activities and responses to EPA comments," the independent contractor concluded that the relevant Department of Transportation requirements were met.  

{36} Subsequently, the EPA announced that it "propose[d] to allow the emplacement of shielded container[s] . . . at WIPP, on the condition that, prior to shipping the shielded containers to WIPP, DOE implement[ed] a consistent complex-wide procedure to ensure that the shielded containers remain below the . . . 200 millirem[s] per hour dose limit for contact-handled waste." This condition was met, and the EPA gave its final approval on August 8, 2011.  

{37} NMED responded to public comments regarding shifting by noting that the EPA's final approval of the use of shielded containers was contingent upon DOE addressing this concern. NMED also explained that shifting was not a serious concern because DOE "generator sites are subject to packaging requirements to minimize any shifting of wastes." Generator sites' shipping requirements include standards requiring the use of specific containers and measurement devices before the waste is placed within any container. Further, NMED argues DOE and its contractors are responsible for adhering to federal regulations applicable to the shipment of waste. Thus, NMED argues there are significant safeguards in place to minimize the risk of shifting.  

{38} Appellants' citation to the EPA's questions of DOE does not show that the possibility of waste shifting led to an abuse of discretion due to a serious risk to human health and the environment that should have led NMED to deny the permit modification, and Appellants do not cite further evidence or authority in support of that proposition. To the extent that the EPA had questions regarding the possibility of waste shifting during transportation, its final approval of DOE's use of shielded containers indicates that the concern was adequately addressed. We will not assume, without evidence to the contrary, that NMED abused its discretion by not requiring safeguards over and above those applicable to DOE and its contractors in regard to the transportation of shielded containers. In sum, we are unable to conclude that NMED acted arbitrarily or capriciously under 40 C.F.R. § 270.42(b)(7)(iii). See Gila Res. Info. Project, 2005-NMCA-139, ¶ 16 (stating the arbitrary and capricious standard); Oil Transp. Co., 1990-NMSC-072, ¶ 25 ("An agency . . . abuses its discretion when its decision is contrary to logic and reason."). Therefore, Appellants' argument in this regard provides no basis for reversal.

C. The Permitted Height of Stacked Containers  

{39} Appellants argue that NMED acted arbitrarily and capriciously under 40 C.F.R. § 270.42(b)(7)(iii) by not adequately restricting the stacking height of shielded containers. See id. (granting NMED discretion to deny a modification request when the requested modification "fail[s] to protect human health and the environment"). In support of their argument, Appellants cite a phrase from the modification request in which the Permittees stated that "[t]he stacking-stability requirements . . . , shielded containers will not be stacked more than two high.""] And they compare that statement with the modified permit, which states, in relevant part, that "[c]ontainers will be stacked in the best manner to provide stability for the stack (which is up to three containers high) and to make best use of available space." According to Appellants, the parenthetical statement allowing containers to be stacked "up to three containers high" fails to protect human health and the environment because it allows Permittees to stack the containers in an unstable formation.  

{40} NMED and DOE respond that the permit's requirement that the containers be stacked in "the best manner to provide stability" prohibits unstable stacking. Thus, to the extent that stacking the containers in a two-high stack is to provide the best stability, the Permittees are required by the permit to stack the containers no more than two high. NMED argues further that because "the modified permit expressly forbids the stacking of containers in an unstable manner[,]" the alleged problem identified by Appellants is resolved by the language of the modified permit.  

{41} Appellants argue that this Court cannot rely on the foregoing explanation provided by NMED because, in response to a public comment regarding the stacking concern, NMED did not expressly state "that a general direction to stack containers 'in the best manner' adequately protects against unstable stacking. Therefore, according to Appellants, this explanation cannot provide a basis for affirming NMED's decision because it constitutes a "post hoc rationalization" made for the first time on appeal in support of NMED's decision. See Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 11, 133 N.M. 97, 61 P.3d 806 (recognizing that "courts are not free to accept post hoc rationalizations of counsel in support of agency decisions, because a reviewing court must judge propriety of agency action solely on grounds invoked by [the] agency"). We do not find this argument persuasive.  

{42} The requirement that containers be stacked "in the best manner to provide stability" is stated in the modified permit. The modified permit, including the at-issue stacking-stability requirement, was before NMED when it issued its response to the public's comments. NMED's failure to specifically raise the stacking-stability requirement in response to public comment is not a bar to raising it now since the at-issue language was obviously before NMED when the modified permit was approved, thereby providing a ground on which NMED's approval was based. Id. (recognizing that this Court must judge an agency's action on the grounds invoked
by the agency). That NMED omitted the stacking-stability requirement explanation from its response to the public comment does not necessarily mean that the later expressed rationalization was post hoc.

Based on the requirement in the modified permit that the containers must be stacked in the best manner to provide stability, we cannot say that NMED's approval of the modified permit was arbitrary or capricious. NMED has broad discretion in interpreting the applicable regulations.

That NMED did not exercise its discretion to deny the permit reflects its view that the requirement that the Permittees stack the containers in "the best manner to provide stability" adequately protected human health and the environment. We will not substitute our judgment for that of NMED in this regard.

Further, we note in response to a public comment as to the inherent flexibility in the modified permit, NMED emphasized that the up-to-threshold-high language will allow "the Permittees to develop procedures to determine a stacking height as appropriate depending upon certain containers or combination of containers."

**D. Overpacking Procedures**

The term "overpacking" refers to the placement of a damaged container into a larger, intact container to prevent waste from being released into the environment. The permit states that "the Permittees may be overpacked into standard waste box or ten drum overpack." Standard waste boxes and ten drum overpacks are types of containers meeting certain regulatory and design specifications for the storage of waste.

The permit also enumerates the types of containers used for storing remote-handled and contact-handled waste at WIPP. The permit states that contact-handled "waste containers will be either [fifty-five-gallon] . . . drums singly or arranged into [seven]-packs, [eighty-five-gallon] . . . drums singly or arranged into [four]-packs, [one-hundred]-[gallon] . . . drums singly or arranged into [three]-packs, ten drum overpacks . . . , standard large box 2s . . . , or standard waste boxes]." And it states that remote-handled "waste containers include RH TRU Canisters, which are received at WIPP loaded singly in an RH-TRU 72-B cask, shielded containers, which are received in HalfPACTs, and [fifty-five]-gallon drums, which are received in a CNS 10-160B cask."

Based on the foregoing, Appellants argue that NMED arbitrarily and capriciously authorized an unlawful practice by approving the modification request because standard waste boxes and ten drum overpack containers that are "authorized only to receive [contact-handled] waste" are "not authorized to contain [remote-handled] waste." Thus, Appellants argue, were a shielded container damaged in a manner that caused it to have a surface dose rate greater than 200 millirems per hour, thus requiring it to be managed as remote-handled waste, the modified permit "contains no lawful procedure to manage" it. Appellants state that "[o]n its face, a [p]ermit provision requiring a damaged shielded container . . . to be overpacked in a container authorized only to contain [contact-handled] waste fails to protect health, safety[,] and the environment and is arbitrary and capricious." (Emphasis omitted.)

Appellants' argument in this regard requires examination of two distinct overpacking circumstances. The first is overpacking shielded containers that, although damaged, have a surface dose rate of less than 200 millirems per hour. The second is how the Permittees intend to handle a shielded container with damage that causes the container to have a surface dose rate in excess of 200 millirems per hour. These contingencies were addressed separately in the modification request.

In regard to the first contingency, the Permittees stated:

In the unlikely event that shielded containers have surface contamination or container integrity issues which may require decontamination/repair/patch/overpackaging, the Permittees may overpack the shielded container into a standard waste box or ten drum overpack. Because the surface dose rate is less than 200 [millirems per hour], this overpacking will occur in the [contact-handled b]ay . . . and not in the [remote-handled b]ay, consistent with overpacking other containers that are managed and stored as [contact-handled] . . . waste.

In regard to the second contingency, the Permittees stated:

Even if the damage to the shielded container resulted in a breach of the shielding, it would still be handled in the [contact-handled b]ay in accordance with [the permit's procedure applicable to control of spills or leaking or punctured containers of contact-handled and remote-handled waste] . . . Facility radiological control programs will dictate how a container breach will be mitigated and may include the use of supplemental shielding, overpacks, or other methods to manage radiological hazards beyond the scope of this [p]ermit.

Thus, contrary to Appellants' argument, the record in this case does not support the conclusion that the Permittees intend to manage damaged shielded containers that meet the definition of remote-handled waste by overpacking them within containers that are only approved to hold contact-handled waste. Rather, the permit's provision that "[s]hielded containers may be overpacked into standard waste box or ten drum overpack" addresses the manner in which the Permittees may handle damaged shielded containers that meet the definition of contact-handled waste. Additionally, the permit provides that "[o]verpack containers will be compatible with the hazards of the materials involved." To the extent that standard waste boxes or ten drum overpacks would not be compatible with the hazards of a damaged shielded container that was classified as remote-handled waste, the permit prohibits overpacking in that manner.

Based on the foregoing, we conclude that the record contradicts Appellants' assertion that "[t]he permit clearly calls for placing [remote-handled] waste in [contact-handled] containers[.]"] Further, Appellants have not shown, by argument or authority, that the Permittees' plan to rely on radiological control programs to dictate how to mitigate a container breach that causes the shielded containers to have surface dose rate higher than 200 millirems per hour is inadequate. Accordingly, we do not consider that issue in this appeal.

See N.M. Attorney Gen., 2013-NMSC-042, ¶ 9 (recognizing that it is the appellant's burden to demonstrate that an agency's decision should be reversed).
In sum, based on our review of the record, we reject Appellants’ argument that NMED authorized an unlawful overpacking practice. Having reviewed and considered all of the relevant evidence in the record pertaining to the overpacking issue, we are unable to conclude that NMED’s decision to grant the modified permit was arbitrary or capricious. See Gila Res. Info. Project, 2005-NMCA-139, ¶ 16 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.”) (internal quotation marks and citation omitted)).

E. Breach of Shielded Containers

Appellants’ final argument in regard to the adequacy of the modification request concerns the possibility of a breach of the shielded containers. Before turning to Appellants’ argument, and to provide context for our analysis, we review the regulation upon which Appellants’ argument is premised.

Title 40 of the Code of Federal Regulations, Section 264.601 governs the environmental performance standards applicable to miscellaneous units, including WIPP. See Environmental performance standards, 40 C.F.R. § 264.601 (2006); Definitions, 40 C.F.R. § 260.10 (2014) (“Miscellaneous unit means a hazardous waste management unit where hazardous waste is treated, stored, or disposed of.”); 20.4.1.100 NMAC (3/1/2009) (adopting 40 C.F.R. Part 260); 20.4.1.500 NMAC (3/1/2009) (adopting 40 C.F.R. Part 264). Section 264.601 provides, in relevant part, that miscellaneous units “must be located, designed, constructed, operated, maintained, and closed in a manner that will ensure protection of human health and the environment.” It further provides that “[p]ermits for miscellaneous units are specifically written to protect public health and the environment, including provisions specifically written to protect public health and the environment from hazards associated with remote-handled . . . waste.” See Delta Automatic Sys., Inc. v. Bingham, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (explaining that failure to respond in a reply brief to arguments raised in an answer brief constitutes a concession of the matter). Among those measures are overpacking shielded containers, as discussed earlier in this Opinion, installation of “[o]ne or more filter vents” in the “shielded container lid to prevent the escape of radioactive particulates and to prevent internal pressurization”; specific protocols applicable to the management, storage, and placement of the shielded containers, and security and radiological checks and shipping documentation reviews of the shielded containers that arrive at WIPP. Having reviewed NMED’s citations to evidence in the record pertaining to these safety measures, and having not been presented with argument or evidence in the record demonstrating that they were inadequate, we cannot conclude that NMED abused its discretion by not denying the permit pursuant to 40 C.F.R. § 270.42(b)(7)(ii). See Oil Transp. Co., 1990-NMSC-072, ¶ 25 (stating that an agency’s action that is “contrary to logic and reason” constitutes an abuse of discretion).

Nor are we persuaded by Appellants’ argument that NMED improperly
reversed its position when it failed to require an evaluation of the impacts of the proposed modification under 40 C.F.R. § 264.601. Appellants’ argument in this regard is premised on the history of the administrative proceedings applicable to the September 29, 2011, modification request, which, although it is not at issue in this appeal, is discussed in the background section of this Opinion to provide a historical overview of the proceedings. Appellants point to NMED’s December 22, 2011, letter in which NMED informed the Permittees that their September 29, 2011, modification request would be processed as a Class 3 permit modification.

In the December 22, 2011, letter, NMED stated, in relevant part, that “[t]he requested modification would require complex changes to the operation of the facility. . . . For example, [NMED] will need to evaluate whether the proposed modification complies with 40 C.F.R § 264.601, which addresses the potential for health risks caused by human exposure to waste constituents.” Six days later, NMED retracted the December 22 letter. Subsequently, on January 31, 2012, NMED issued its final decision as to the September 29, 2011, modification request, denying the permit modification request to add provisions for shielded containers. The January 31, 2012, letter did not refer to 40 C.F.R. § 264.601 as a basis for its denial. Rather, NMED’s denial was based on “technical inadequacies” that could not be corrected by NMED and approved with changes because NMED lacked sufficient information to make the required changes.

Appellants cite federal and state case law for the proposition that it is arbitrary and capricious for an agency to change course without explanation, or treat one case differently from another case with similar facts. See, e.g., Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46-47 (1983) (holding that a federal agency’s rescission of part of a federal regulation was arbitrary and capricious where the agency failed to present an adequate basis and explanation for the rescission); Sais v. N.M. Dept of Corr., 2012-NMSC-009, ¶ 17, 275 P.3d 104 (holding that “[a] worker’s termination may be arbitrary and capricious if one employee is treated differently compared with others who are similarly situated and no rational explanation is offered for the difference”). Based on that proposition, Appellants argue that NMED’s approval of the modification request in this case without having evaluated whether the proposed modification complies with 40 C.F.R § 264.601(c)(6), in keeping with the December 22, 2011, letter, rendered NMED’s decision arbitrary and capricious because NMED “reversed its position on a fundamental issue without explaining its reasons.”

We do not share Appellants’ view that NMED’s December 22, 2011, letter, which was rescinded six days after it was issued, and replaced with a letter that did not rely on 40 C.F.R § 264.601, may be viewed as reflecting NMED’s “position on a fundamental issue.” At best, the rescinded letter can be said to have reflected NMED’s view of the September 29, 2011, modification request which, although it sought to introduce shielded containers to WIPP, suffered from technical inadequacies and insufficient information. As indicated by NMED’s approval of the July 5, 2012, modification request, the later request did not reflect the same deficiencies. As such, we cannot conclude that NMED acted arbitrarily and capriciously by treating the respective modification requests differently.

We do not share Appellants’ view that NMED’s December 22, 2011, letter, which was rescinded six days after it was issued, and replaced with a letter that did not rely on 40 C.F.R § 264.601, may be viewed as reflecting NMED’s “position on a fundamental issue.” At best, the rescinded letter can be said to have reflected NMED’s view of the September 29, 2011, modification request which, although it sought to introduce shielded containers to WIPP, suffered from technical inadequacies and insufficient information. As indicated by NMED’s approval of the July 5, 2012, modification request, the later request did not reflect the same deficiencies. As such, we cannot conclude that NMED acted arbitrarily and capriciously by treating the respective modification requests differently.

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or that it improperly disregarded 40 C.F.R. app. § 270.42(F)(1)(a).

Furthermore, to be clear, the volume of the shielded containers counts toward the limit of remote-handled waste that may be shipped to and stored within WIPP. In terms of WIPP’s ability to manage its limited volume of remote-handled waste, the shielded containers have the effect of increasing the areas of WIPP where remote-handled waste can be stored. That is, rather than storing the remote-handled waste exclusively within the panel boreholes, the Permittees may, under the modified permit, store remote-handled waste within the panel floors. Yet, there is no evidence in the record to support a view that the Permittees’ ability to use the space differently will increase WIPP’s storage capacity by more than twenty-five percent. Without evidence to support it, Appellants’ argument in this regard provides no basis for reversal.

B. Waste Management Practices

Appellants argue that Class 3 procedures were required because the use of shielded containers constitutes “[s]torage of different wastes in containers . . . that require additional or different management practices from those authorized in the permit[,]” 40 C.F.R. app. § 270.42(F)(3)(a); see 20.4.1.900 NMAC (adopting 40 C.F.R. Part 270). Appellants argue that NMED arbitrarily or capriciously disregarded the terms of the federal regulation by authorizing the use of shielded containers under a Class 2 modification. Additionally, relying on NMED’s January 31, 2012, denial letter, Appellants argue that NMED acted arbitrarily or capriciously by changing its position on the issue whether, pursuant to 40 C.F.R. app. § 270.42(F)(3)(a), Class 3 procedures were required to modify the permit to allow the use of shielded containers at WIPP.

The term “different wastes” as used in 40 C.F.R. app. § 270.42(F)(3)(a) refers to a circumstance in which “the facility may be seeking to accept wastes that were not previously identified in the permit, or it may already be managing the waste but would prefer to shift it to a different treatment, storage, or disposal process.” 53 Fed. Reg. at 37,927. Permit modifications to allow different wastes follow either Class 2 or Class 3 procedures. Id.

Class 2 procedures apply in circumstances in which the “different wastes . . . are sufficiently similar to wastes currently authorized at the unit so that no additional or different management practice, design, or process is required.” Id. For “example, a unit may be permitted only to treat specific solvent wastes, but may be equally capable of treating other solvent wastes that exhibit similar physical and chemical properties within the same management conditions of the permit.” Id. Class 3 procedures apply in circumstances in which “the introduction of a different waste . . . will require different or additional management practices, design, or processes to properly manage the waste—for instance, if the waste is reactive or ignitable—and the permit . . . does not anticipate that such wastes will be managed in the unit.” Id. In the context of WIPP, the term “unit” means the eight underground disposal units referred to throughout this Opinion and in the permit as “panels.”

Appellants argue that Class 3 procedures were required because the Permittees stated in their modification request that “[t]he shielded container will contain hazardous waste already approved for disposal at the WIPP facility; however, that waste ([remote-handled waste]) is approved for management in the [remote-handled complex] and not in the [contact-handled bay], and therefore . . . it is a different waste in a particular unit.” Appellants characterize the foregoing as a concession by the Permittees that Class 3 procedures were required; however, the Permittees’ acknowledgment of the fact that the modification includes “different waste in a particular unit” is not dispositive. As indicated, in the preceding paragraph, “different waste” may lead to Class 2 or Class 3 procedures; the determining factor is whether “additional or different management practices from those authorized in the permit” are required. See 40 C.F.R. app. § 270.42(F)(3). Following the “different waste” statement, the modification request continued, providing the following relevant explanation of why Class 2 procedures were applicable here.

In this modification, the Permittees are proposing to manage hazardous waste that is defined as [remote-handled waste] by the generator in the [contact-handled] waste management areas by using the shielded container. Because [the remote-handled] waste has not been managed and stored in the [contact-handled] portion of the facility, the Permittees consider this Class 2 [permit modification request] as the appropriate modification request to authorize this activity. Since modification of the facility is not needed, and the imposition of different waste management practices is not needed, this modification is not classified as a Class 3 [permit modification]. This is because the management of [remote-handled] waste in shielded containers can be done using existing [contact-handled] waste practices in the [contact-handled] portion of the facility.

Appellants argue that, contrary to the Permittees’ statement, different management practices are, in fact, required with the addition of shielded containers. Appellants identify what they believe to be six management practices that are different from those in the permit: (1) “[t]he shielded container itself is a new payload container with layers of lead and steel, weighing nearly a ton”; (2) “[m]anagement of [remote-handled] waste in shielded containers requires shielded-container-specific ‘packaging requirements to minimize shifting’”; (3) “[t]he [three]-pack package contains numerous elements not used in shipping [contact-handled] waste and is managed differently from [contact-handled] waste shipments”; (4) “[i]n [the] event of contamination or release from a shielded container, the [three]-pack must be disassembled for overpackaging”; (5) “[a] still-unknown, but shielded-container-specific, overpackaging method must contain the intense radiation from [remote-handled] waste”; and (6) “[a] still-unknown, but shielded-container-specific, stacking system will be used in [placing] shielded containers in the underground.” Appellants’ fifth and sixth points are not accompanied by authority, evidence, or citations to the record proper and will not be considered.

Appellants’ first through fourth management-practices points are not supported by the record. As to Appellants’ first point, we do not believe, and Appellants do not show by argument, authority, or evidence in the record, how their recitation of the shielded containers’ weight and composition may be considered a “management practice” or otherwise requires a new management practice. Concerning Appellants’ second point, that shielded containers are subject to particular packaging requirements, Appellants provide no record support for their view that this affects management practices or requires new management practices at WIPP.
the contrary, the record reflects that the shielded-container-specific packaging requirements govern the generator sites where the packaging will occur. As to Appellants’ third point, contrary to their argument that the shielded containers must be managed differently from contact-handled waste, the record reflects that shielded containers do not need to be managed differently from contact-handled waste; rather, they may be managed using contact-handled waste equipment and operating procedures. Finally, as to Appellants’ fourth point, NMED argues and the record reflects that the modification request does not require a new management practice; rather, it provides that a damaged shielded container may be managed according to the existing permit requirements.

[73] In sum, Appellants’ argument in regard to the different management practices is not supported by the record. Because Appellants have not shown by argument or evidence in the record that NMED contravened 40 C.F.R. § 270.42(F)(3) in approving the modification request, we cannot say that NMED’s decision was arbitrary or capricious. See N.M. Attorney Gen., 2013-NMSC-042, ¶ 9 (recognizing that it is the appellant’s burden to demonstrate that an agency’s decision should be reversed); Gila Res. Info. Project, 2005-NMCA-139, ¶ 16 (“A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.” (internal quotation marks and citation omitted)).

[74] Nor are we persuaded by Appellants’ argument that, in light of NMED’s January 31, 2012, denial letter, we should conclude that NMED acted arbitrarily or capriciously by changing its position on the issue whether, pursuant to 40 C.F.R. app. § 270.42(F)(3)(a), Class 3 procedures were required in this case. In contrast to the September 29, 2011, modification request that provided a sparse and conclusory statement as to why the modification request should follow Class 2 procedures, in their July 5, 2012, modification request the Permittees provided two full pages explaining why the modification request required Class 2 procedures. Among other things, as indicated earlier, the Permittees addressed the issue whether different waste management practices were required, concluding that they were not. Appellants have not demonstrated that NMED erred in agreeing with the Permittees in this regard. See N.M. Attorney Gen., 2013-NMSC-042, ¶ 9 (recognizing that it is the appellant’s burden to demonstrate that an agency’s decision should be reversed). Moreover, as we have noted, owing to the difference in the respective modification requests, we do not believe that comparing NMED’s responses to them demonstrates that NMED acted arbitrarily and capriciously. See Sais, 2012-NMSC-009, ¶¶ 17, 21, 27 (stating that where there is a “meaningful distinction between” the differently decided cases, disparate treatment of them does not constitute an abuse of discretion).

C. Public Concern

[75] As indicated earlier in this Opinion, in making a decision as to a Class 2 modification request, NMED is required to consider all written comments submitted to NMED during the public comment period and must respond in writing to all significant comments in the decision. 40 C.F.R. § 270.42(b)(6)(vi). NMED points to the fact that of the 206 comments that it received, 173 were pre-printed form letters containing “very little substance[,]” sixteen were copies, or near copies, of the form letters, twelve were “similarly lacking in substance[,]” and only two organizations, Southwest Research and Nuclear Watch New Mexico, provided substantive comments. Thus, NMED argues, notwithstanding the volume of letters it received, the substance of the public’s concern was fairly limited. NMED further argues that it carefully considered the public comments it received and responded thereto in writing, as evidenced by its explanatory written responses contained in the record. NMED determined that in light of the fact that it held public meetings on the modification request and addressed the public comments in writing, a public hearing was not required.

[76] Appellants argue that NMED abused its discretion by failing to require Class 3 procedures pursuant to 40 C.F.R. § 270.42(b)(6)(i)(C)(1), which provides that “significant public concern about the proposed modification” is a basis upon which NMED may determine that the modification must follow Class 3 procedures. Appellants’ argument in this regard is supported exclusively by the number of letters sent to NMED during the comment period. Appellants argue that in NMED’s December 22, 2011, letter pertaining to the September 29, 2011, modification request, NMED stated that “more than [eighty] public comments indicated substantial public concern, requiring Class 3 procedures[.]” Whereas, Appellants contend, in this case, where “200 citizens express[ed] the need for a public hearing” as to the July 5, 2012, modification request, NMED, acting contrary to logic and reason, found “a lack of public concern[.]”

[77] In regard to this argument, as in regard to others that we have already discussed, we do not find Appellants’ reliance on NMED’s December 22, 2011, letter that did not pertain to the present modification request and that was retracted six days after it was issued, persuasive. In NMED’s January 31, 2012, final decision on the matter of the September 29, 2011, modification request, technical inadequacies, rather than public concern over the use of shielded containers or the need for a public hearing, was the basis for denying the modification request. Furthermore, without evidence to the contrary, we assume that the public’s concern, like that of NMED, reflected the technical and informational inadequacies of the September 29, 2011 modification request. We do not conclude that the views expressed in NMED’s later-retracted December 22, 2011, letter, which was written in response to a technically inadequate modification request, is informative or persuasive in regard to NMED’s decision in regard to the present modification request.

[78] Although we recognize that issues surrounding WIPP and modifications to the permit are of general public interest and concern owing to the health and environmental implications of waste storage within our state, Appellants have not demonstrated that NMED abused its discretion by acting contrary to or ignoring the public interest and concern in processing the modification request under Class 2 procedures. Short of a generalized reiteration of the issues raised throughout their briefs, and addressed earlier in this Opinion, Appellants do not demonstrate that NMED failed to adequately address the public’s specific concerns here by NMED’s written responses to the public comments. N.M. Attorney Gen., 2013-NMSC-042, ¶ 9 (recognizing that it is the appellant’s burden to demonstrate that an agency’s decision should be reversed). Nor do Appellants demonstrate, by argument, evidence, or authority, what could have or should have been raised and addressed in a public hearing that was not addressed in NMED’s written responses to the public’s comments. See Sw. Research & Info. Ctr. v. N.M. Env’t Dep’t, 2003-NMCA-012, ¶ 39, 133 N.M. 179, 62 P.3d 270 (recognizing
that “there is great public interest in the WIPP facility in general” but holding that this “does not mean that there must be a hearing for every administrative detail concerning the facility”). Under the circumstances of this case, we are unable to conclude on the issue of public concern that NMED abused its discretion by declining to process the modification request under Class 3 rather than Class 2 procedures. See Oil Transp. Co., 1990-NMSC-072, ¶ 25 (stating the abuse of discretion standard).

CONCLUSION

[79] Based on our review of the record in this case, we are not persuaded that NMED erred in approving the July 5, 2012, modification request to permit the addition of shielded containers at WIPP.

We affirm NMED’s approval of the permit modification.

[80] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge
LINDA M. VANZI, Judge
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8:00 a.m. Check-In/Registration
8:30 a.m. Winning with Civility
Justice Edward L. Chavez
(60 minutes - 1.0 EP Credit)

9:30 a.m. Multi-Plaintiff Litigation - How to Effectively and Ethically Represent Numerous Plaintiffs from Beginning to End
Allegra C. Carpenter, Esq. and Katie Curry, Esq.
(60 minutes - 1.0 EP Credit)

10:30 a.m. ACLU Update - The Courts in Review - Last Year’s Famous and Infamous Civil Rights Cases
Alexandra Freedman Smith, Esq.
(60 minutes - 1.0 General Credit)

11:30 a.m. Whistleblower Protection Act Claims and Challenges
Joleen K. Youngers, Esq.
(45 minutes - 0.7 General Credits)

12:15 p.m. Encinias v. Whitener and Governmental Premises Liability
Bruce E. Thompson Esq.
(45 minutes - 0.7 EP Credits)

1:00 p.m. Civil Procedure Update
Professor Max J. Minzner
(60 minutes - 1.0 General Credits)

2:00 p.m. Adjourn

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Furnished office available in existing law firm. We are located near the Albuquerque International Sunport. Benefits include: Copier, Fax Line, Printer, Receptionist, Mail Service, 1-800 Number, Conference Rooms, Library, Reference Materials and co-counsel opportunities. Please email DebbiePrimmer@NewMexicoCounsel.com All resumes are kept confidential.

**Miscellaneous**

**Will for Shirli A. Delgado**

Shirli A. Delgado passed away on September 17, 2014. It is believed that she had enlisted an attorney in this jurisdiction to draft her Last Will & Testament, which has not been found. Should you have any information regarding Ms. Delgado’s Will, please contact Eric D. Norvell of Norvell Werenko, P.A., at (505) 717-2857 or edn@norvellwerenko.com.

**Holiday Advertising Schedule**

Due to holiday closures, the following advertising submissions for the *Bar Bulletin* will apply:

**Dec. 24, 2014:**
Advertising submissions due Dec. 10, 2014

**Jan. 7, 2015 issue:**
Advertising submissions due Dec. 15, 2014

For more advertising information, contact: Marcia C. Ulibarri at 505-797-6058 or email mulibarri@nmbar.org
Your 2015 State Bar licensing fees and certifications are due Dec. 31, 2014, and must be completed by Feb. 1, 2015, to avoid non-compliance and related late fees.

Complete your annual licensing requirements at www.nmbar.org. Payment by credit and debit card* and e-check are available.

If you have any questions, please call 505-797-6083 or email license@nmbar.org.

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Orders placed by Dec. 12 will be ready by Dec. 19.