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If you're considering suing a New Mexico state agency to try to enforce the state's open meetings law, be careful how you go about it or you might get sued back.

New Mexico Interstate Stream Commission attorneys sent that message last month in a claim filed against Norm Gaume, a retired engineer fighting against the agency's proposal to take water from the Gila River in southwest New Mexico for use by area cities and farms.

Some residents say the project is a critical piece of the area's long term water supply. Critics, including Gaume, say the costs, both financial and environmental, far outweigh any benefits.

Gaume sued the commission in October, asking the court to impose a restraining order against the commission because of Gaume's contention that decisions about the project had been made in secret, without proper notice and public discussion.

A series of procedural decisions in response to Gaume's suit first halted the state agency's consideration of the Gila project, then allowed it to proceed, and the courts never ruled whether Gaume's underlying claim that the agency violated the Open Meetings Act was justified.

#### NORM GAUME

The state claims Gaume's open meetings act allegations were unfounded, and that as a result he should have to pay all the agency's costs associated with the delay – airfare for the state's consultants when a meeting was canceled at the last minute, the cost of agency staff time spent defending against his claim and attorneys' fees spent fighting him in court.

It was not the fact that Gaume sued, but rather the extreme procedure that he used that led to the counterclaim, said Amy Haas, the agency's chief counsel and acting director. In briefly halting the process with his temporary restraining order, Gaume forced the agency to incur substantial costs, Haas said in an interview Monday. "It was an extreme hardship," she said.

The state's claim does not specify how much in damages it hopes to collect, but Gaume has done the math. He figures it could cost him more than \$100,000 if he loses. "It's a hell of a lot of money with respect to my retirement account," he said.

The state's counterclaim – a state agency in essence suing a citizen over an open meetings claim – appears to be unprecedented, said Susan Boe, executive director of the New Mexico Foundation for Open Government, a nonprofit that advocates for transparency in government decision making.

Gaume said the state's claim against him shows how difficult it is for a citizen to challenge a government agency, which has far more resources, in an open meetings fight. "You don't have deep enough pockets if you're just a citizen," Gaume said.

Enforcing New Mexico's Open Meetings Act has always been tough, because it's hard to know what has happened behind closed doors, out of the view of the public.

By my reading, Gaume has made a plausible argument, based on documents that are in the public record, that an Interstate Stream Commission subcommittee may have violated the Open Meetings Act in the way it met and discussed the Gila project. In response, the state's lawyers have made a plausible argument that the subcommittee's meetings and actions were not subject to the Open Meetings Act, and that no violation occurred.

It's a murky question, and because there is little public record of the subcommittee's meetings, it's hard to know who is right. But that is precisely the problem.

Given the high public interest in this controversial water project, there was nothing preventing the Interstate Stream Commission from simply opening up the subcommittee meetings. Defaulting to more openness, especially in issues as controversial as the Gila, is always a good thing. The agency did not.

One of the weaknesses of New Mexico's Open Meetings Act is that relatively little harm comes to those who violate it. "Curing" the problem often requires as little as holding another meeting and redoing in public the discussion or decision that was inappropriately done in private. A willful violation of the act is a misdemeanor, subject to a \$500 fine. There has been at least one case, involving members of a Las Cruces school board, that led to convictions.

Gaume, in his lawsuit last fall, asked for stiffer penalties, though, and it is that for which he is being sued. He asked the court to step in and stop the state's Gila discussions completely while the Open Meetings Act questions were discussed in court. Judge Raymond Ortiz initially found that there was sufficient evidence that Gaume was at risk of "irreparable injury" and halted the state's Gila review while the court reviewed the issue. The court's resulting restraining order forced a key meeting to be delayed for a month, threatening the state's ability to meet a Dec. 31 federal deadline to proceed with the project. But a month later Judge Francis Mathew, who took over the case from Ortiz, dissolved the restraining order and allowed the state's review to proceed. That allowed the state to meet its deadline. But in its December counterclaim against Gaume, the state is playing hardball. The Open Meetings Act itself allows a government defendant to collect court costs and, in extreme cases, attorneys fees spent defending against Open Meetings Act allegations found to be without merits.

But attorneys for the state have gone beyond that, citing a separate section of the law they say should allow them to collect other costs as well, including the cost of airfare associated with a canceled meeting and non-attorney staff costs spent responding to Gaume's allegations. If they prevail, that could significantly jack up the pain to Gaume's retirement savings. The agency chose that path, Haas said, because it believes Gaume's call for a temporary restraining order abused the courts in service of his political goal of trying to kill the Gila project. Whatever the details of the legal argument, the state's counterclaim is likely to have a "chilling effect" on citizens hoping to use the courts to hold government agencies accountable for their Open Meetings Act compliance, the Foundation for Open Government's Boe said.

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