

## Message from the Editor

Already sweltering under the hot New Mexico sun, the prospect of a warming planet and a dryer American southwest can feel a little too close. This edition of the NREEL newsletter sheds light on two issues effected by rising temperatures and diminishing water supplies - instream flow and Indian water settlements; and illuminates one uniquely New Mexican solution for handling our collective carbon footprint - carbon sequestration.

If you have any comments or questions regarding these articles or if you would be interested in submitting a short article for our next newsletter, which we hope to publish in late fall 2008, please contact me at [joshsmann@live.com](mailto:joshsmann@live.com).

Thanks for your support,  
*Josh Mann, Editor*

## Instream Flow Protection in New Mexico - A 2008 Update

*Patrick Redmond*

A 2003 Natural Resources Journal article<sup>1</sup> surveying western states' mechanisms for instream flow protection—the legal, physical, contractual, and/or administrative methods available for ensuring that water remains in natural streams<sup>2</sup>—dubbed New Mexico the “Blank Slate State.”<sup>3</sup> Alone among the eleven states surveyed, New Mexico had neither statutory nor common law directly addressing the administration of instream flows,<sup>4</sup> which environmental advocates consider important to protecting and restoring the ecological health of riparian ecosystems.<sup>5</sup>

Since then, the 2005 enactment of the Strategic Water Reserve has added the new dimension of a statutory mandate and funding for New Mexico instream flow protection efforts. Still, in comparison with some other states' more systematic and aggressive programs and legal framework, New Mexico offers comparatively little formal protection.

New Mexico's sole legal authority for placing instream flows within the prior appropriation framework remains a 1998 Attorney General Opinion concluding that nothing in the state Constitution, statutes, or case law pre-

cluded the Office of the State Engineer (“OSE”) from approving an instream flow right conditioned upon the installation of gauging devices to measure the instream flow beneficially used.<sup>6</sup> This condition helped resolve a perceived inconsistency with New Mexico's prior appropriation system, which while recognizing that unappropriated water belongs to the public<sup>7</sup> declares that beneficial use is necessary to establish a water right.<sup>8</sup> Showing such beneficial use has typically required exercising physical control over the water, as in application to “consumptive” uses such as agriculture, mining, and domestic or municipal supply.<sup>9</sup> The more “pas-

*continued on page 2*

## Inside this Issue

Unadjudicated Reserved Water Rights .....	3
New Mexico's Climate Future .....	6
Board of Directors .....	8
2008 Section Budget.....	8

sive” or “nonconsumptive” dedication of water to being left in the stream simply does not fit well within this control requirement and, with waters becoming fully or over-appropriated for consumptive uses, it has often been considered a form of waste.<sup>10</sup>

Other western states have enacted legislation or relied upon case law to facilitate instream flow within the “prior appropriation” framework. Colorado, for instance, in 1973 passed legislation allowing the Colorado Water Conservation Board to appropriate and hold surface water rights for “minimum stream flows” to “preserve the natural environment to a reasonable degree.”<sup>11</sup> Arizona, despite its arid climate, in 1994 issued a bold declaration of its policy to restore its water resources, by funding restoration proposals submitted by anyone in the state to the Arizona Water Protection Fund.<sup>12</sup> Through 2005, Colorado appropriations numbered nearly 2,000, with over 8,500 miles of stream flows protected, and Arizona had funded over 140 projects and perfected almost 100 instream rights.<sup>13</sup> Alternatively, California’s judiciary, applying the common law “public trust doctrine,” has elevated ecological values to a position co-equal to priority, such that ecological concerns can trump water rights and the California Water Resources Control Board has an affirmative duty to revisit water allocation decisions when ecological values are threatened.<sup>14</sup>

The 2005 enactment of the Strategic Water Reserve by the New Mexico legislature represents a first step along the path taken by Colorado. The SWR allows the Interstate Stream Commission (“ISC”) to purchase or lease, though not to condemn, water or water rights that must remain within its river reach or ground water basin either to assist with interstate compact compliance or to benefit aquatic or riparian species.<sup>15</sup> The SWR received over \$5 million in funding over its first three years. The ISC has closed on two water rights purchase transactions in the Pecos River basin near Ft. Sumner for over 1,500 acre-feet of water, and the OSE has granted permits to the ISC changing the purpose of use from irrigation to “Pecos River augmentation.” That water is being leased in turn to the federal Bureau of Reclamation to ensure river flows—keeping the river “continuous”—throughout the critical habitat of the endangered Pecos bluntnose shiner between Ft. Sumner and Roswell, in order to comply with Endangered Species Act obligations for the Carlsbad Project



water supply.<sup>16</sup> The OSE has also authorized fifteen of the ISC’s applications to transfer irrigation water rights to its augmentation well field for the purpose of augmenting flows of the Pecos River pursuant to the Pecos River Settlement.

The OSE will also approve instream flow permit applications outside the Strategic

Water Reserve program, as it did last year as part of an agreement on federal reserved rights under the Wild and Scenic Rivers Act on the East Fork of the Jemez River.<sup>17</sup> Moreover, the OSE continues to rely on the 1998 A.G. Opinion, recognizing instream flow as a beneficial use, and can grant permits to water rights holders applying to change the place and purpose of use from irrigation, for example, to instream flow, so long as there is no impairment to existing users and the transfer is not against the conservation of water or the public welfare of the state. The Nature Conservancy has targeted the Pecos and the Gila and Mimbres regions as possessing outstanding ecological values warranting purchases of agricultural land and appurtenant water rights that can be dedicated to instream uses as needed.

Despite the Strategic Water Reserve’s recent expansion of such instream flow protection options in New Mexico, it may be sobering to realize that Colorado, with a three-decade head start, has recently recognized that additional stimulus was needed to energize its own ambitious and, by most accounts, highly successful instream flow program. The Colorado Assembly has either passed or appeared ready to pass several significant bills: HB 1280 provides an exception to “use it or lose it” for long-term leases or loans of instream rights to the Water Conservation Board; HB 1346 infuses more funding into the instream flow program; and HB 1369 provides tax credits of up to \$250,000 for permanent donations of water rights to the program.<sup>18</sup> (New Mexico in 2007 amended the “Land Conservation Incentives Act” to provide for up to \$250,000 in transferable tax credits for conservation easements, and the Act’s definition of “interest in real property” includes water rights,<sup>19</sup> but its application to instream flows is still unclear.) Similarly, California continues to seek input into how best to incorporate ecological or “public trust” values into its overhaul of the massive “Bay-Delta” restoration project.<sup>20</sup> Back in New Mexico, there are rumored to be

*continued on page 5*

# Unadjudicated Reserved Water Rights: Tensions Between Montana and the Confederated Salish and Kootenai Tribes

Christina Kracher

States and Tribes have a long history of conflicting interests. As the demand on shrinking water supplies in the arid west increases, Tribes' reserved rights, state water rights, and tribal and state administrative authority continue to collide. Tribes are often put in a precarious position because their federally reserved rights are adjudicated in state courts or their rights remain unadjudicated as the state tries to exercise administrative authority within reservation boundaries. In Montana, federal and tribal water right claims are brought before the Reserved Water Rights Compact Commission (RWRCC). In part, the purpose of RWRCC is to enter into compacts for the "equitable division and apportionment of waters between the State and its people and the several Indian Tribes claiming reserved water rights within the State."<sup>1</sup> In addition to finalizing compacts already negotiated with three Tribes, Montana is currently negotiating compacts with the Blackfeet Tribe and the Confederated Salish & Kootenai Tribes of the Flathead Reservation (CSKT), and has a 2009 deadline set for a completed compact with CSKT.

Negotiations between the Confederated Salish and Kootenai Tribes and the Commission have been a complex and litigious process, due to the reservation's population, ownership demographics and checkerboard ownership of land within the reservation boundaries.<sup>2</sup> In 2001, CSKT introduced a controversial proposal that recognized the reserved and aboriginal rights of the Tribes. Many non-Indian water users of the reservation strongly opposed the proposal because of distinct provisions calling for the Tribes' exclusive administration of all reservation waters instead of parallel administration between the respective Tribe and the State, as the other compacts have done.<sup>3</sup> The proposal has never entered into the compact negotiation process.

Contradicting the Tribes' proposal is the Montana Water Use Act, which calls for a general adjudication of all existing water rights in the state, enunciating a system of statewide adjudication, administration and record keeping, and designed to quantify and administer *all* water within the state under a



single and comprehensive body of state law.

Unsurprisingly, this opposition and the absence of a compact or adjudication have spurred the Tribes to litigate in an attempt to protect their reserved rights. In a series of Montana Supreme Court cases, CSKT has challenged the regulatory authority of the Montana Department of Natural Resource Conservation (DNRC) to approve applica-

tions for new permits and changes to existing permits from non-Indian water right holders living on the reservation.

The first case, *In re Application for Beneficial Water Use Permit Nos. 63023-s76L, Ciotti; 64988-G77L, Starner; and Application for Change of Appropriation Water Right No. G15152-s76L, Pope*, 278 Mont. 50 (1996) (hereinafter called *Ciotti*) was decided after three non-Indian applicants sought permits for new water rights from sources on the reservation. The Montana Supreme Court examined whether DNRC had authority to grant new permits to non-Indians on the reservation before the Tribes' reserved water rights had been adjudicated. The Tribes and the state based their arguments on the Montana Water Use Act criteria for approving permits, which provides that "the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved"<sup>4</sup>. The court held that applicants for new permits and for changes to existing permits on the reservation could not prove that their proposed uses would not unreasonably interfere with the Tribe's rights until they become quantified.<sup>5</sup> The court read Indian water rights as including non-consumptive and consumptive uses, noting, "the elusive nature of Indian reserved water rights underscores both the difficulty of quantifying those rights and the difficulty a water permit applicant would have proving that his proposed use will not interfere with those rights."<sup>6</sup>

The Montana legislature reacted swiftly to the Court's ruling by amending the Montana Water Use Act and eliminating the criterion used in *Ciotti*. The legislature replaced it with the requirements that water be "physically and legally avail-



able” at the proposed point of diversion. However, the legislature’s tactic proved futile. In *Confederated Salish and Kootenai Tribes v. Clinch*, 297 Mont. 448 (1999) (hereinafter called *Clinch*), the court examined whether DNRC should be enjoined from issuing further permits on the reservation until the Tribes’ right are quantified. The court interpreted the term “legally available” to mean there is water available, including that which is not federally reserved for the Tribes. The court held that water is therefore not legally available for permitting until reserved rights are quantified. The court also criticized the legislature’s tactical response to *Ciotti*, stating “it is clear.... the legislature’s purpose...was to negate the protection for Indian reserved water rights previously provided for at subsection (e) as interpreted by the *Ciotti* decision.”<sup>7</sup>

In the third case, *Confederated Salish and Kootenai Tribes v. Stults*, 312 Mont. 420(2002), another applicant sought a permit to use groundwater for a commercial water bottling business. Citing the first two cases and *Cappaert v. U.S.*, 426 U.S. 128 (1976), the court reasoned that in establishing a reservation, the government intended the water to come from those sources available to the reservation to accomplish the reservation’s purpose. The court applied the same principles from *Ciotti* and *Clinch* without distinguishing between groundwater and surface water, and prohibited DNRC from processing or issuing permits until the Tribes’ rights are adjudicated.

In the fourth and final case concerning the Tribes’ reserved rights and the State’s authority, the Montana Supreme Court took a sharp turn from its trilogy and expanded the state’s regulatory authority on unadjudicated reservation waters. In *Confederated Salish and Kootenai Tribes v. Clinch*, 336 Mont. 302 (2007) (hereinafter called *Clinch II*), non-Indian water right holders on the reservation applied for a change of use permit from irrigation to recreation for a water ski pond. The court began by “resolving the tension” between the state and the Tribes as sovereigns and addressed the relationship between state regulatory power and the right of tribes to govern their lands.<sup>811</sup> The court turned to *Nevada v. Hicks*, 533 U.S. 353 (2001), and applied its narrow interpretation of tribal sovereignty in relation to state regulatory authority:

Though tribes are often referred to as “sovereign” entities, it was “long ago” that “the Court departed



from Chief Justice Marshall’s view that the laws of a state can have no force within reservation boundaries.” “Ordinarily”, it is now clear, “an Indian reservation is considered part of the territory of the State.”<sup>913</sup>

After establishing state authority, the court distinguished new permits from change of use permits, finding that new permits would take water

from an available supply while changes to an existing permit results in no additional water being depleted. The court used this distinction to remove the presumption of impossibility for state water right holders to show the “legal availability” of water under the Montana Water Use Act: thereby aiding the Montana legislature to meet its objective in amending the act. Instead of presuming impossibility, the court reasoned state water right holders on the reservation should be given the opportunity to prove by a preponderance of the evidence that proposed changes would not adversely affect tribal water rights.<sup>1015</sup>

Although the court decided *Clinch II* while the Tribes’ reserved rights remain unadjudicated, it has far-reaching consequences for the compact negotiation process and the post-settlement period. First, the presumption of state authority and ownership strains relations between state and tribal water right holders on the reservation, and between state and tribal governments, therefore making a final state-tribal compact a more challenging task. Additionally, state water right holders who receive a change of use permit may be placed in a precarious position once the tribe’s rights are quantified. If state water right holders are found to be impairing reserved rights, additional litigation could ensue, further straining relations between the Tribes and non-Indian residents. Though this problem could be addressed during the negotiation process Tribes could be required to compromise their reserved rights and state authority on the reservation would be expanded.

The Tribes and Montana would benefit by continuing to work toward a compact that addresses the gaps left by the recent *Clinch II* decision in the process, including the subjective standard in determining whether a non-Indian water user impairs unadjudicated reserved water rights.<sup>16</sup> However, as the state assumes authority absent express language protecting the Tribes’ rights, the Tribes will need to protect their rights and the 2009 deadline set by the Reserved Water Rights Compact Commission could pass without a finalized

compact in place. Thus, in light of treaty rights, the federal reserved rights doctrine, and the Montana Water Use Act, adjudication may be the only viable means for providing both parties some finality. Achieving that finality, however, will be a greater strain on the parties' time and fiscal resources as well as the relationships between non-Indian and Indian water users, and tribal and state governments. New Mexico state and tribal agencies should follow these issues in Montana closely, considering the complex unquantified water rights of six Pueblos on the overtaxed middle Rio Grande, the unrestricted use of those rights within Pueblo boundaries, and the competing stakeholders living downstream.

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#### Endnotes

<sup>1</sup> MCA §85-2-701

<sup>2</sup> According to the 2000 Census Report, about 26, 172 people live within the boundaries of the Flathead Indian Res-

ervation and about 26.7% of that population is American Indian. <http://www.sktcorp.com/AboutSKT/tabid/56/Default.aspx> (follow "Salish and Kootenai Tribes" hyperlink).

<sup>3</sup> The Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, *A Proposal For Negotiation Of Reserved And Aboriginal Water Rights in Montana*, June 2001. I don't remember if you can find an online report.

<sup>4</sup> MCA §85-2-311(1)(e).

<sup>5</sup> *Ciotti* at 61.

<sup>6</sup> *Id.*

<sup>7</sup> *Clinch*, 297 Mont. at 454.

<sup>8</sup> *Clinch II*, 336 Mont. at 311.

<sup>9</sup> *Id.* at 311.

<sup>10</sup> *Id.* at 319.

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## Instream Flow Protection *continued from page 2*

forthcoming revisions to OSE regulations providing for instream flow, but nothing has materialized yet. As many other states have placed a higher priority on such refinements and new directions, New Mexico's lawmakers have only just begun to scrawl upon our "Blank Slate."

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#### Endnotes

<sup>1</sup> Jesse A. Boyd, *Hip Deep: A Survey of Instream Flow Law from the Rocky Mountains to the Pacific Ocean*, 43 Nat. Resources J. 1151 (2003).

<sup>2</sup> Sasha Charney, *Decades Down the Road: An Analysis of Instream Flow Programs in Colorado and the Western United States* 1 (2005) available at [cwcb.state.co.us/NR/rdonlyres/140CFE4B-65FC-47C5-9A26-99CCB45A8D45/0/ISFCompStudyFinalRpt.pdf](http://cwcb.state.co.us/NR/rdonlyres/140CFE4B-65FC-47C5-9A26-99CCB45A8D45/0/ISFCompStudyFinalRpt.pdf).

<sup>3</sup> Boyd, *supra* note 1, at 1202.

<sup>4</sup> *Id.* at 1153.

<sup>5</sup> DAVID M. GILLILAN & THOMAS C. BROWN, *INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE* 54-55 (1997).

<sup>6</sup> N.M. Op. Att'y Gen. 98-01 (1998).

<sup>7</sup> N.M. CONST. art. XVI, § 2.

<sup>8</sup> N.M. CONST. art. XVI, §§ 2, 3.

<sup>9</sup> GILLILAN & BROWN, *supra* note 5, at 31-32.

<sup>10</sup> *Id.*

<sup>11</sup> COLO. REV. STAT. ANN. § 37-92-102(3) (West 2004).

<sup>12</sup> ARIZ. REV. STAT. ANN. §§ 45-2101 to -2114 (2003).

<sup>13</sup> Boyd, *supra* note 1, at 1159, 1171; Charney, *supra* note 2, at 17-18.

<sup>14</sup> See, e.g., *El Dorado Irrigation Dist. v. State Water Resources Control Board*, 48 Cal. Rptr. 3d 468, 490-92 (Ct. App. 2006) (citing California's seminal "Mono Lake case," *National Audubon Soc'y v. Superior Court of Alpine County*, 189 Cal. Rptr. 346, 360-61, 658 P.2d 709, 724 (1983)).

<sup>15</sup> N.M. STAT. § 72-14-3.3 (Supp. 2007).

<sup>16</sup> See U.S. BUREAU OF RECLAMATION, *LONG-TERM LEASE OF GROUNDWATER RIGHTS, PECOS RIVER NEAR FT. SUMNER: FINAL ENVIRONMENTAL ASSESSMENT* (July 27, 2007), <http://www.usbr.gov/uc/albuquerque/envdocs/ea/pecosRiv/gwLease/index.html>.

<sup>17</sup> Consent Order, *United States ex rel. Pueblos of Jemez, Santa Ana & Zia v. Abousleman*, No. 83 Civ. 1041 (D.N.M. Sept. 18, 2007).

<sup>18</sup> *Colorado Trout Unlimited, Legislation* (2007), <http://www.cotrout.org/Conservation/Legislation/tabid/86/Default.aspx>.

<sup>19</sup> N.M. STAT. ANN. § 75-9-3(A) (West Supp. 2007). See also HB 990 Fiscal Impact Report, available at <http://legis.state.nm.us/Sessions/07%20Regular/firs/HB0990.pdf>.

<sup>20</sup> See CAL. ENVTL. PROT. AGENCY, *STATE WATER RES. CONTROL BD., STRATEGIC WORKPLAN, ATTACHMENT B* (Mar. 19, 2008), [http://www.waterrights.ca.gov/baydelta/strategic\\_workplan.htm](http://www.waterrights.ca.gov/baydelta/strategic_workplan.htm) (undertaking to consider a proceeding to "protect public-trust resources and balance competing demands for water").

# New Mexico's Climate Future: Addressing Legal Issues in Carbon Sequestration

After more than 70 years as a national leader in energy development and production, New Mexico, the fossil-fuel state, blessed with the geologic richness of vast oil, gas, and coal reserves, is now looking at ways to position itself as a leader in the field of climate change mitigation strategies, including the injection of carbon dioxide emissions into deep subterranean geologic formations. Soon the state's new slogan could be: New Mexico – the carbon-sequestration state.



Since the first commercial oil well was drilled here in the 1920s, New Mexico has always been an energy state. A quick glance at recent state tax revenues from the oil and gas industry emphasizes the importance of energy production to the New Mexico economy and state coffers – in 2006 the state generated nearly \$1.2 billion dollars in tax revenue from oil and gas production, a 155 percent increase over 2002 figures. Nationally, New Mexico ranks third in natural gas production and reserves, first in coal-bed methane production and reserves, fifth in crude oil production, fourth in proven crude oil reserves, and eleventh in production of coal. But now, in a twist, the same geology that blessed New Mexico with its vast mineral reserves also means that the state's subterranean cavities and its oil and gas infrastructure already in place could make it an ideal location for permanent underground repositories of future greenhouse gas emissions.

Governor Bill Richardson's Climate Change Advisory Group identified carbon dioxide sequestration and re-use in its December 2006 final report as a primary climate change mitigation strategy, estimating that it can account for a reduction in New Mexico's emissions of up to 25.1 million metric tons (MMT) through 2020 (for comparison, a 500-megawatt, coal-fired power plant emits roughly 4 MMTCO<sub>2</sub>/yr). According to the Advisory Group's rankings, carbon dioxide sequestration was the fourth most effective greenhouse gas mitigation strategy they evaluated behind reducing methane emissions in the state's oil and gas fields, mandating renewable energy generation, beginning at 10 percent in 2011 with a 2 percent increase per year through 2021, and financial incentives for centralized renewable energy sources. As a result of the

Advisory Group's findings and recommendations, the New Mexico Oil Conservation Division of the Energy, Minerals, and Natural Resources Department has been studying over the last year the legal and technical barriers to implementing large-scale commercial carbon sequestration in the state and is preparing

draft statutes and regulations needed to accommodate this new industry. In December 2007, after several working group sessions and public comments, the Division issued its final carbon dioxide sequestration report.

New Mexico is not alone in the realization that carbon sequestration could serve as an effective, if relatively short-term, climate change mitigation strategy that can buy the time necessary to transition away from a fossil-fuel based economy. Across the West and around the country carbon sequestration pilot projects are being funded by the U.S. Department of Energy, though the vast majority of them are still in the development and planning phase. After issuing a guidance document on regulating and permitting carbon sequestration projects under the Safe Drinking Water Act's Underground Injection Control (UIC) program for regional directors in March 2007, the U.S. Environmental Protection Agency announced in October 2007 plans to issue draft regulations under the UIC by summer 2008. In 2005, the Intergovernmental Panel on Climate Change (IPCC), the group that periodically issues scientific consensus projections on carbon emissions and climate change, released a special report on carbon capture and storage. In that report, the IPCC concluded that sequestration can work: "Based on observations from engineered and natural analogues as well as models suggest that the fraction [of sequestered carbon dioxide] in appropriately selected and maintained geological reservoirs is very likely to exceed 99% over 100 years and likely to exceed 99% over 1,000 years." Researchers at the Massachusetts Institute of Technology concluded in a 2007 interdisciplinary study, entitled "The Future of Coal," that "CO<sub>2</sub> capture and sequestration is the critical enabling technology that would reduce CO<sub>2</sub> emissions significantly while also allowing coal to meet the world's pressing energy needs."



Despite its promise, many questions, aside from its technical feasibility, remain unanswered about how carbon sequestration would actually work – most prominently cost. In a major blow to the advancement of the technology, DOE announced in January that it was pulling federal funding for the FutureGen power plant and carbon sequestration project, which was to have been the first near-zero emissions coal-fired power plant (275 megawatts), effectively terminating the project. It was to have injected 1 MMTCO<sub>2</sub> each year over a four-year period, making it the largest sequestration pilot project in the United States. Seven states were vying to host FutureGen, but Illinois was ultimately selected, only to have the project's funding pulled by DOE. The agency's official reason for terminating the project was cost overruns after the expenses were projected at double the original \$950 million price tag. But beyond the question of costs, carbon dioxide sequestration faces numerous legal hurdles that, unlike its technical feasibility, have received little attention.

Recognizing this gap, states like New Mexico, Wyoming, and California, as well as quasi-governmental groups like the Interstate Oil and Gas Compact Commission, have started looking at potential legal barriers and solutions for wide-scale implementation of carbon sequestration and have already started making recommendations for the necessary statutory and regulatory changes. In its December report, the New Mexico Oil Conservation Division analyzed several prominent issues, including: its authority to regulate carbon sequestration; ownership of subsurface pore space and potential conflicts with other subsurface interests, such as the mineral estate; the unitization of hydrocarbons in injection fields; the condemnation of subsurface pore space and transportation corridors; legal liability; sequestration fees to pay for regulatory oversight; and bonding requirements for injection wells and drilling activities. Many of these legal issues, such as the question about pore space ownership and conflicts with other subsurface interests, have useful legal analogues and ready answers in oil and gas case law or, as is the case for questions of liability, starting points based on current environmental regulatory frameworks, such as the Price-Anderson Act (42 U.S.C.A. § 2210) which strives to offset risks in the nuclear power industry, and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C.A. § 9607), which holds numerous parties jointly and strictly liable for their roles in the hazardous waste lifecycle.

Among the identified issues, liability and conflicts with subsurface interests hold the greatest potential for being the most in-scrutable. Given the areal extent of sequestration projects and the necessary size of the target formations, numerous property

rights and subsurface interests are liable to intersect and may rarely align owing to the fact that sequestration fields must remain intact and uncompromised for hundreds to thousands of years. Similarly, environmental and human health liability will be as large as the target formations themselves should leakage cause crop damage, acidify drinking water sources or cause some unforeseen or low-probability, high-consequence event, such as catastrophic escape. One model that was to be adopted by FutureGen is to have the state take on the liability for all or a portion of the projects, or for a limited timeframe to limit industry liability and spur development. But this approach fails to incentivize injectors to select the best sites and take all possible precautions. Likely, some hybrid approach would be best.

Governor Richardson's original goal was to have draft statutes and regulations prepared, as recommended by his Climate Action Team, a select group of cabinet-level appointees, ready by January 2008. That aggressive schedule appears to have been modified out of necessity, due to conflicting priorities and time constraints, but draft statutes and regulations could be forthcoming sometime in the next year, though OCD may wait to see what regulations EPA proposes this summer. In the meantime, carbon sequestration, despite its cost concerns and other as-yet unresolved legal issues, continues to gain steam. In October 2007, OCD approved its first carbon sequestration well, operated in San Juan County by Burlington Resources Oil & Gas Company, that is to inject carbon dioxide into the Fruitland formation. Sooner or later, it seems, New Mexico will be making use of its estimated 18 gigatons of subsurface carbon dioxide storage space.

#### Online Resources:

- EPA Overview: [http://epa.gov/climatechange/emissions/co2\\_geosequest.html](http://epa.gov/climatechange/emissions/co2_geosequest.html)
- EPA UIC and Sequestration: [http://www.epa.gov/safewater/uic/wells\\_sequestration.html](http://www.epa.gov/safewater/uic/wells_sequestration.html)
- DOE: <http://www.fossil.energy.gov/sequestration/partnerships/index.html>
- Carbon Sequestration Leadership Forum: <http://www.cslforum.org/>
- IPCC: [http://www.ipcc.ch/pdf/special-reports/srccs/srccs\\_wholereport.pdf](http://www.ipcc.ch/pdf/special-reports/srccs/srccs_wholereport.pdf)
- New Mexico Oil Conservation Division Report on Carbon Sequestration: <http://www.emnrd.state.nm.us/OCD/documents/CarbonSequestrationFINALREPORT1212007.pdf>
- IOGCC: <http://www.iogcc.state.ok.us/PDFS/Road-to-a-Greener-Energy-Future.pdf>
- Climate Change New Mexico: <http://www.nmclimatechange.us/>

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## Thank You!

THE UNIVERSITY OF NEW MEXICO SCHOOL OF LAW would like to say a special "Thank You" to the State Bar's Natural Resources, Energy and Environmental Law section for contributing to the James Quinn Memorial Scholarship. The memorial scholarship will be awarded to an incoming law student who demonstrates commitment to pursuing conservation and sustainability through environmental law and evidences the characteristics and values that made James unique. James passed away in September of 2007, just five weeks into his first year of law school. However, in that short time, James made an incredible impact on the school and his fellow classmates. The scholarship was established by law students as a way to honor James' life and commitment to environmental ethics.

If you are interested in making a contribution to the James Quinn Memorial Scholarship, please contact the UNM Development Office at (505) 277-8184.

## Your Section Dues at Work

### 2008 SECTION BUDGET

<b>EST. FUND BALANCE CARRY FORWARD</b>	<b>\$4,660.00</b>
<b>PROJECTED DUES REVENUE:</b>	<b>\$4,660.00</b>
<b>TOTAL FUNDS AVAILABLE:</b>	<b>\$9,320.00</b>
<b>BUDGETED EXPENDITURES:</b>	
Administrative Expense	\$50.00
Board Meetings	\$750.00
CLEs	
Spring - Utton Center	\$0.00
Winter - with Annual Meeting	\$1,350.00
Fall - Proposed Global Warming	\$1,350.00
State Bar CLE	\$900.00
Section Member/Law Student Mixer	\$300.00
Newsletter	\$2,100.00
Law Student Writer Section Memberships	\$75.00
Awards - Law Student Support/Scholarships	\$822.00
Web Site Support - Law Student	\$350.00
Website Fee	\$125.00
<b>TOTAL PROPOSED EXPENDITURES:</b>	<b>\$8,172.00</b>