



# NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW SECTION

of the State Bar of New Mexico

SPRING 2001

## NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW SECTION

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### EDITOR:

Kathy Blackett  
(505) 842-1950  
kblackett@mstlaw.com

## NEW MEXICO'S ENABLING ACT

By Steve Hughes

New Mexico's Enabling Act granted roughly thirteen million acres in trust to the state for the purpose of establishing and maintaining essential institutions such as schools, hospitals, and prisons. The trust is administered by the Commissioner of Public Lands through the New Mexico State Land Office. The benefits of the trust inure primarily to the public schools.

In a recent case before the New Mexico Court of Appeals, conservation groups, and several school children through their parents, challenged the statutory scheme under which the Commissioner manages grazing leases. The real purpose of the suit was to effect conservation and environmental goals. However, trust lands are not held for public use, so the direct application of environmental law and standards, which has succeeded in similar suits against the federal government, was precluded. The Plaintiffs sought instead to make grazing lands more available to conservation groups by attacking the management of those lands as not being in the best interests of the trust beneficiaries. The statutory scheme that defines grazing lease management clearly prefers established lessees, most of whom are ranchers. The Court never reached the merits of the case, affirming the District Court's decision that the Plaintiffs lacked standing to raise such claims.

The New Mexico Court of Appeals held that New Mexico's Enabling Act trust is a charitable trust. Other state and federal courts have found similar federal grants to states to be express trusts, but no court has applied the careful and precise analysis found in this opinion, and none have reasoned far enough to apply charitable trust law. The Court correctly found that because the beneficiaries of the trust are indefinite and the term is perpetual, the trust is charitable. In so doing, the Court found that neither the conservation groups nor the school children had standing. This conclusion derives from an understanding of what charity is.

Persons who receive benefits from a trust ("beneficiaries") generally have a right to sue the trustee if they believe he/she is not managing it so as to obtain

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## NM ENABLING ACT

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a reasonable return for them. But a charitable trust is for the benefit of the public or a particular community. Regardless of who actually receives the direct benefit of charity (eg. "the poor"), it is the public that actually benefits: there is less need for publically supported social services, and the general condition of the community is improved. If the public at large were treated like ordinary trust beneficiaries, and could effect management through litigation, charitable trusts would be potentially subject to a wide range of conflicting public interests and burdened with litigious micro-management. The law of charitable trusts accordingly provides that the only person with the right to sue a charitable trust for mismanagement is the appropriate public officer (usually the state attorney general) who is charged with protecting the public interest.

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## STATE BAR OF NEW MEXICO

### NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW SECTION - MINUTES OF MEETING OF APRIL 6, 2001

**Members present:** Maria O'Brien, Tessa Davidson, Karen Fisher, Greg Nibert, and appearing by telephone were Lou Rose and Bill Brancard

The meeting was called to order by the Chair, Maria O'Brien at 12:15 p.m. The Chair reported that Tessa Davidson is filling the vacancy position on the Board pending the Section elections this year.

The By-Laws of the Section require an election of officers. Maria O'Brien as Chair Elect automatically assumes the position of Chair of the Section. Bill Brancard nominated Lou Rose to serve as Chair Elect. Greg Nibert seconded the motion. After some discussion, the Board voted unanimously that Lou Rose shall serve as Chair Elect of the Section for the 2001 year. Lou Rose nominated Alletta Belin as Budget Officer/Secretary for the year 2001. The motion was seconded and after some discussion. Alletta Belin was unanimously chosen to serve as Budget Officer/Secretary for the Section for the year 2001.

Maria O'Brien then sought input on a Nomination Committee. It will be the duty of the Nomination Committee to fill the two Board positions that will be vacant, the seat currently being filled by Tessa Davidson and Steve Hernandez' position. The Nominating Committee selected was Bill Brancard of Santa Fe, Karen Fisher of Santa Fe, Richard T.C. Tully of Farmington, Greg Nibert of Roswell, and Walter Stern of Albuquerque.

Maria O'Brien distributed the Budget Report maintained by the State Bar of New Mexico for the Section. A copy is attached hereto. No changes were suggested. It was noted that the Section has 206 members. Some discussion was held with respect to the scanning project and a desire that we not leave any monies in the budget that will be forfeited to the State Bar.

Continuing Legal Education was discussed. There was no interest in holding a CLE program at the State Bar Convention in June and it was the desire of the Board to look at opportunities for a stand alone CLE program in the Fall. The first topic discussed was the Technology CLE Program regarding the use of the internet for natural resource issues. Maria will check with Steve Hernandez to see if this program is a viable program and whether it can get off the ground. A second topic of discussion was Electric Deregulation and Generation Issues. Bill Brancard and Karen Fisher will look into this topic to see if the program is viable. This program would be a half day or day program in the Albuquerque/Santa Fe area. A third topic presented as a potential future program was legal access to land. This topic should discuss access by natural resource users to fee, state and federal land.

The Section has not had a Law School liaison for a couple of years. Maria O'Brien and Tessa Davidson will contact Kip Bobroff to see if there is any interest in being the Law School liaison with the Section.

Kathy Blackett has expressed an interest in continuing as the Newsletter Editor for the Section. It was suggested that the Newsletter try to maintain

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## MINUTES

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some breadth of issues across the various subject matters covered by the Section. It was further suggested that a legislative update be published in the next Newsletter and the New Mexico Oil and Gas Association has traditionally provided a compilation of legislative bills enacted into law. It was further discussed that in prior years various people in the Section were responsible for reporting on substantive areas of the law to the Newsletter Editor. The following persons were appointed for the 2001 year to report to the Newsletter Editor with articles or updates on the following substantive areas:

Oil and Gas	Greg Nibert
Mining	Stuart Butzier
Water	Tessa Davidson
Environmental	Lou Rose
Public Lands	Bill Brancard
Wildlife	Karen Fisher
Energy	Jeff Albright

The Chair urged everyone to get something to Kathy Blackett within two weeks for publication in the next Newsletter.

Maria O'Brien gave the Natural Resources Reporter update. Three articles will be published this year. A discussion occurred regarding a possible name change of the Natural Resources Reporter and it was suggested that before the name is changed, that Larry Ausherman be contacted in that regard.

The Rocky Mountain Mineral Law Foundation Annual Institute will be in Santa Fe on July 19, 20 and 21, 2001. Maria O'Brien will get with Walter Stern, the Rocky Mountain Institute Chair, to discuss whether the Section could sponsor an event during the Foundation's Annual Institute proceedings.

The Annual Meeting of the Section will be held next Fall and Maria O'Brien will set the time, place and date. The date selected must be 60 days in advance of the publication of a notice in the *Bar Bulletin*. It was discussed that the Annual Meeting coincide with a CLE program and a convenient place may be the State Bar Center in Albuquerque.

No additional items were discussed under Old Business or New Business and the meeting was adjourned at 1:10 p.m.

## RECENT LEGISLATION

*The Forty-Fifth New Mexico Legislature passed the following legislation of interest to natural resources practitioners:*

**HB 278: Air Quality Control Act Amendments (Heaton).** Amends the existing Air Quality Act to allow permits for facilities based on "potential to emit", rather than on actual emissions. The change would conform the state act to federal law and would allow a facility operator to demonstrate, and claim an offset for, controls that actually limit emissions.

**HB 279: Pipeline Safety (Heaton).** The proposed legislation is a response to safety concerns precipitated by the explosion of the El Paso Natural Gas Company pipeline near Carlsbad last year. The bill calls for the Commissioner of

Public Lands to require operators of pipelines on rights-of-way across state lands verify compliance with the Federal Pipeline Safety Act. HB 279 was amended to adopt the federal definition of "hazardous liquids" found at 49 CFR 195.2.

**HB 533: Solid Waste Act Amendments. (Taylor).** This legislation corrected an administrative interpretation of the Solid Waste Act by the New Mexico Environment Department purporting to shift regulation of the disposal of non-hazardous, non-domestic wastes in New Mexico landfills from the New Mexico Oil Conservation Division

(NMOCD) to NMED. The legislation clarified that disposal of such wastes generated in connection with oil and gas production, transportation, storage and refining activities may be approved by the NMOCD rather than NMED exclusively which had recently moved to prohibit activities not authorized by it. The legislation has been signed by the Governor. On March 30<sup>th</sup>, the New Mexico Oil Conservation Commission convened a hearing preparatory to the promulgation by it of new Division Rule 712 setting forth the procedures for obtaining authorization for the disposal of such non-domestic waste with the concurrence of the NMED.

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## RECENT LEGISLATION

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**HB 587: “One-call” Pipeline and Utility Excavation. (Martinez).** A bill promoted by the Public Regulation Commission intended to reconcile the PRC’s pipeline excavation rules with the federal regulatory scheme. Adopts penalties for violations.

**HB 926: Amendments to Oil and Gas Proceeds Payment Act (Coll).** Requires the operator or lessee to make a “diligent effort” to provide the payor of production proceeds with the “correct” name, address and division of interest of each owner entitled to payment. Where there is a failure to make a diligent effort, the operator or lessee is liable to the interest owner for “damages” in an amount equal to 18% annual interest where payment is not received.

**SB 333: Regulatory Authority over Above Ground Storage Tanks; Amendments to Underground Storage Corrective Action Program. (Leavell).** Clarifies that safety rules promulgated by the Public Regulation Commission shall not conflict with the New Mexico Environment Department’s (NMED) regulation of storage tanks under the Hazardous Waste Act or the Ground Water Protection Act. Originally, the bill provided that tank, refinery and pipeline facilities currently regulated by the New Mexico Oil Conservation Division would be regulated by NMED as they were not clearly included under the bill’s exclusions from the definition of “above ground storage tank”. Otherwise, pipelines and pipeline facilities are exempt, and tanks “adequately regulated” under other federal or state laws may obtain exemptions. Above Ground tanks are added to the State’s Underground

Storage Tank Corrective Action program. The bill was amended to exclude pipeline and refinery facilities.

**SB 446: Confidentiality of Business Records (Feldman).** Provides that information provided to the New Mexico Environment Department in connection with its “Green Zia” award program may be protected as trade secrets.

### *Legislation of note:*

**SB 730: Creating the Water Resources Department and the Natural Resources and Environment Department. (Snyder).** Although it did not receive a committee hearing during the regular session and consequently did not pass, this bill proposes a major re-organization of natural resources regulatory agencies, including, among others, the State Engineer’s Office, the Environment Department, the Natural Resources Trustee, the Game and Fish Department, and the Energy, Minerals and Natural Resources Department.

Under the current version of the bill, a new Water Resources Department would assume the current water quality protection and water rights

adjudication functions of the State Engineer’s office and the Environment Department. A new Natural Resources and Environment Department would be established and would assume the functions of the energy conservation and management division, the environmental protection division, the forestry division, the mining and minerals division, the natural resources and environment litigation division, the oil conservation division, state parks and the state wildlife division. Current administrative rulemaking and adjudicatory procedures would undergo significant change.

The bill, or at least administrative reorganization, has the backing of the administration. The topic is expected to be the subject of further analysis by one or more interim legislative committees.

Those bills not signed or vetoed by the governor by April 6<sup>th</sup> will be pocket-vetoed. The effective date for all legislation is June 15<sup>th</sup>, unless the bill carried an “emergency clause” making it effective on the governor’s signature.



State Bar of New Mexico  
**NATURAL RESOURCES, ENERGY & ENVIRONMENTAL LAW SECTION**  
P. O. Box 25883  
Albuquerque, NM 87125

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