

## January 30, 2017 Advisory Letter – Opinion Request – State Liability for Brine Well Remediation

Hon. Cathrynn N. Brown  
N.M. State Representative, Dist. 55  
1814 North Guadalupe  
Carlsbad, New Mexico 88220

**Re:** Opinion Request – State Liability for Brine Well Remediation

Dear Representative Brown:

This Office has completed its review of the questions raised in your October 19, 2016 request for an Attorney General opinion relating to House Bill 112 (“HB 112”), introduced during the 2016 regular legislative session and endorsed by the Interim Radioactive and Hazardous Materials Committee. HB 112 proposed creation of the Carlsbad Brine Well Remediation Authority (“CBWRA”) to oversee and coordinate remediation of a Carlsbad brine well.[1] Specifically, you have asked:

- (1) whether the State of New Mexico, by creating a political subdivision for the purpose of remediating the site, would assume liability directly or indirectly for any portion of potential damages resulting from its efforts;
- (2) what the federal bankruptcy code says about liability of the owner of record for the brine well, considering its status under the present stage of Chapter 7 proceedings;
- (3) what the further liability is, if any, of the owner of record under the current state of the bankruptcy case; and
- (4) how the departments and agencies of the state and political subdivisions are insured.

For purposes of this analysis, we grouped questions (1) and (4) as a discussion of the State’s potential liability and questions (2) and (3) as discussion of the liability of the owner of record, given its status in Chapter 7 bankruptcy. Based on our examination of the state constitution, statutes, case law and other information available to us at this time, we conclude that in creating “a political subdivision of the State,” the State generally would be immune from liability for attempts to remediate the Carlsbad brine well, unless it expressly waives immunity; and while I&W, Inc., the owner of record, remains liable, it likely is unable to pay any damages assessed against it.

### **I. POTENTIAL STATE LIABILITY**

The New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30 (1976, and as amended through 2015) (“TCA”), was enacted in response to the judicial abrogation of

sovereign immunity. *Board of County Commissioners v. Risk Management Division*, 1995 –NMSC- 046, ¶ 11, 120 N.M. 178, 180 (1995) (citation omitted). It restores government immunity while simultaneously creating specific exceptions for which the government might be sued. *Id.* Section 41-4-4(A) of the TCA provides government entities and public employees acting within the scope of their duties with immunity from liability for any tort, except as waived in specific sections of the TCA. *Bierner v. City of Truth or Consequences*, 2004-NMCA-093, ¶ 10, 136 N.M. 197. Courts have validated such State limitations, citing the legislative declaration in § 41-4-2(A) that “the area within which the government has the power to act for the public good is almost without limit, government should not have the duty to do everything that might be done.” See *Marrujo v. New Mexico State Hwy. Transp. Dept.*, 1994-NMSC-116, ¶ 22, 118 N.M. 753.

Under the TCA, a “governmental entity” means “the state or any local public body” as further defined in the TCA. § 41-4-3(B). “State” or “state agency” means “the state of New Mexico or any of its branches, agencies departments, boards, instrumentalities, or institutions” and “local public body” means “all political subdivisions of the state and their agencies, instrumentalities and institutions and all water and natural gas associations organized under” certain statutes. § 41-4-3 (H) and (C). Assuming that the CBRWA is expressly created as a governmental entity, whether as a state agency or a local public body, it will fall under the State’s umbrella of sovereign immunity, except as waived by the TCA. To ensure that the CBRWA shall not be liable for any tort associated with its efforts to remediate the Carlsbad brine well, legislation creating the CBRWA “as a political subdivision of the state” also should provide that “nothing in the [proposed legislation] shall be construed as a waiver of alteration of the immunity from liability granted under the Tort Claims Act and/or as a waiver of any other immunity or privilege under law,’ as stated in other provisions of law. See, e.g., § 12-12-20 (2005) of the Hazardous Materials Emergency Response Act.[2]

With respect to insurance for state agencies and political subdivisions of the State, the Risk Management Division of the New Mexico General Services Department (the “Division”) is charged with ensuring that the State has adequate financial protection against tort and other claims. The Division procures insurance against successful claims made against the State, § 15-7-1 (E) (1996), and may provide such coverage for local public bodies, § 41-4-3 (2015), through multi-line insurance coverage. The Division assesses payments from state agencies and cooperating local public bodies, § 15-7-2 (1989), to pay for the insurance coverage it procures and it may transfer funds to maintain financial stability and liquidity of fund, § 15-7-11 (2013). Additional risks may be borne by state agencies and participating educational entities or paid through reserve funds comprised in part from assessments to government entities, e.g., the public property reserve fund, § 13-5-1 (E) (2000). The Division also insures the State against liabilities that are commercially uninsurable through creation of a “liability fund” to which participating entities contribute, proceeds from which may be pro-rated if a claim threatens to exhaust the fund in any single fiscal year. § 41-4-25 (1989).

The Division’s coverage also is limited by exclusions for punitive damages, fines, penalties and sanctions as detailed in a Letter of Administration and Certificate of

Liability, which may be reviewed at  
[http://www.generalservices.state.nm.us/riskmanagement/Resources\\_1.aspx](http://www.generalservices.state.nm.us/riskmanagement/Resources_1.aspx).

## **I. POTENTIAL LIABILITY OF I & W, Inc.**

Under the U.S. bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*, the last owner of record of the Carlsbad brine well, I & W, Inc., remains liable for any damages associated with the sinkhole created by the brine well. Generally, in a Chapter 7 liquidation, 11 U.S.C. §§ 701-766 (1982 & Supp. IV 1986), the assets of the debtor are converted to cash and then distributed to creditors. The Chapter 7 Trustee may “abandon” remaining property that burdens the estate or that is of inconsequential value. Property not otherwise administered at the time of the closing of a case is abandoned to the debtor. 11 U.S.C.A. § 554.

I & W’s Chapter 7 bankruptcy proceeding was made final as of October 21, 2014, after a final decree was entered, the corporate bond cancelled, the bankruptcy case closed. See *In re: I & W, Inc.*, EIN 85-0129678 (Bankr. D. N.M.), Case No. 7-10-12366-JA. We understand that during the bankruptcy proceeding the Chapter 7 Trustee converted I & W assets to cash, except for the Canal Street property, which not surprisingly was unmarketable as a result of the sinkhole and its associated dangers. See Trustee’s Final Report, *In re: I & W, Inc.*, EIN 85-0129678 (Bankr. D. N.M.), Case No. 7-10-12366-JA, Doc. #254. Thereafter, the Canal Street property was deemed abandoned by the bankruptcy estate when the case closed in 2014, and full ownership reverted to I & W, Inc., where it remains as the corporation’s only asset. Id. Eddy County assessed no value for the property “due to the sink hole” as of August, 2016. Eddy County Assessor Book 231, Page 857. The corporation, though not immune from suit, has no marketable assets from which recovery may be made.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

Jennie Lusk  
Assistant Attorney General

[1] An underground cavern created by the brine well operation is reported to be nearing collapse at 3005 S. Canal Street in Carlsbad.

[2] Other statutes limiting the State’s liability for remediation efforts include the Orphan Materials Recovery Fund, § 12-12-29 (2005) (allowing the State board of finance to disburse additional funds when and if the costs of disposing hazardous materials

exceeds the fund balance available); the Good Samaritan law, §12-12-28, (exempting most persons from liability for mitigating or attempting to mitigate the effects of an actual or threatened release of hazardous materials); and the Emergency Petroleum Products Supply Act, § 12-12-16 (2005) (limiting punitive damages to three times the amount of actual damages for a willful violation of the Act), among others.