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FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/09

SPONSOR Cote LAST UPDATED _____ HJR 18

SHORT TITLE State Lands Oversight Commission SB _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 New Mexico State Auditor (OSA)
 Department of Finance and Administration (DFA)
 State Land Office (SLO)

SUMMARY

Synopsis of Bill

House Joint Resolution 18 proposes to amend Article 13 of the New Mexico Constitution to add a new section that would create the “state lands oversight commission.” This commission would consist of (1) the state auditor; (2) the attorney general; (3) the president pro tempore of the senate; (4) the speaker of the house; (5) two members of the public appointed by the governor; and (6) two members representing beneficiaries of the state land trusts appointed by the governor. The Commission’s duties are stated in paragraph (C): “The state lands oversight commission shall review and approve or disapprove proposed sales or trades of state land and shall review and approve or disapprove proposed surface leases of state land for planning or development purposes. No sale or trade of state land and no surface lease of state land for planning or development purposes shall be effective until the sale, trade or lease is approved by the state lands oversight commission.” This new section of the constitution is self-executing. However, the legislature is obliged to provide, by law, procedures to implement. Those procedures would include, as mentioned in paragraph (B), procedures to provide for the removal of the members who the governor appoints.¹

¹ Attorney General response dated 2-12-08 which bears the caveat *This analysis is neither a formal Attorney*

FISCAL IMPLICATIONS

The State Auditor advises that the joint resolution creates a commission that would create a recurring expense to fund its functions. Funds would also be expended for per diem and mileage for the appointed commissioners. The costs for commission staff, office space and other expenses are unknown. However, these expenses would not require funding until fiscal year 2011 because the amendment is not subject to approval until the next general election in 2010.

SLO indicates that the proposed amendment, if passed by the state electorate and approved by federal Congress, would have a predictably negative, and possibly substantial impact on the ability of the State Land Office to generate income from (a) the advantageous sale or exchange of lands, and (b) the planning and development of state trust lands through its lessees. SLO notes that the major assumptions underlying fiscal impact are: Commercial leasing for the planning and development of in its entirety constitutes less than one percent (approximately .0094%) of trust revenues.

SIGNIFICANT ISSUES

The State Auditor notes: “Under the Audit Act, the State Auditor is charged with annually auditing the financial affairs of every governmental agency. The State Auditor also may audit the financial affairs of any governmental agency, in whole or in part. The State Auditor’s membership and oversight functions on the ‘state lands oversight commission’ may impair the State Auditor’s independence with regard to auditing the financial affairs of the State Land Office and reviewing and releasing the annual audit report for the State Land Office.”

The State Land Office states, “The proposal is unconstitutional. If adopted, it would require the amendment of a number of other sections of our constitution before it could be effective:

(A.) A politically derived oversight commission with legislative, executive, and public members having veto power over the Commissioner would violate the constitutional principle of separation of powers.

(B) The proposed commission, with veto powers over the Commissioner, would violate the Constitutionally mandated independence of the executive branches. N.M. Const. Art. V. Sec. 1; *Thompson v. Legislative Audit Comm.*, 79 N.M. 693 (1968).

(C) Any grant of authority to a commission not also vested with constitutionally and federally mandated trust responsibilities would be an unlawful delegation of the Commissioner’s federally mandated fiduciary duties. Enabling Act, Sec. 10; *Forest Guardians v. Powell*, 2001-NMCA-028.

(D) The establishment of a committee with veto powers over the Commissioner would violate the state constitutionally defined independence of the Commissioner. N.M. Const. Art. XIII, Sec. 2; *Otto v. Field*, 31 N.M. 120 (1925).”

PERFORMANCE IMPLICATIONS

The State Land Office raises a number of discussion points:

1. There is no apparent, legitimate reason for establishing such an oversight commission. The income derived from the planning and development of real estate (presumably what is intended to be targeted here) constitutes less than one percent (.0094 or .94%) of trust income. This is too insignificant to warrant a constitutional amendment.
2. It is not clear whose interests would be served by such an oversight commission. Legally, the only entities with a proper interest in the conduct of the trust are the citizens of New Mexico as a whole, and the supported institutions. *Id. Forest Guardians*. In addition, the municipalities and counties where planning and development of state trust lands would occur have, as a practical matter, an interest in such matters. (A.) The interests of the civil institutions supported by the trust are protected by their involvement in the state land trusts advisory board, NMSA 1978, Sec. 19-1.1 through 19-1-1.4; those interests are also protected by the Land Office Rules' requirement that any of the transactions, intended to be targeted by this Resolution, be disclosed to the supported institutions before they are given effect. (B.) The interests of municipalities and counties are already protected by their own zoning and related ordinances, and lessee-developers on trust lands are required by the Commissioner to abide by those. (C.) The "beneficiaries" of the trust, mistakenly identified in the Resolution as the supported institutions, are all the citizens of New Mexico; and their interests are also protected by representatives on the state trust lands advisory board as well as by the fact that the Commissioner is an elected official. An unelected oversight commission would infringe on the power of the electorate to determine whether the Commissioner is acting in concert with his fiduciary duties.
3. As a practical matter, a politically derived oversight commission will interject interests and issues, unrelated to the function of the trust and the commissioner's fiduciary duties, into the decision-making process. This will inevitably result in diverting the trust from its single purpose (to generate a reasonably maximum income for the support of essential state civil institutions) to serve other personal, political, and financial interests.
4. As a practical matter, the addition of a second, unrelated layer of decision-making, into the already complex and sophisticated considerations given to commercial planning and development, will impede and likely prevent that development. (A.) The Land Office will require additional staff and resources to prepare for and present each and every sale, exchange, and lease before the commission. This preparation will be different in kind from any that is required now. (B.) The same additional allocation of resources to preparation and planning, as well as to lobbying, will be required of lessee-developers. This will substantially discourage development opportunities on state trust lands, and would accordingly diminish trust income, thus defeating the purpose of the trust.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

DFA indicates: H605, H606, H607, H610, S474, S475 and S540

SLO states: “As indicated above, the proposed commission would violate various constitutional and statutory provisions. Further, both the state auditor and the state attorney general already have the power to review practices at the land office (and their involvement in the trust decision-making process would constitute a patent conflict of interest, and a probable violation of their own statutory roles).”

TECHNICAL ISSUES

SLO states:

1. “beneficiaries” are wrongly indicated as the supported institutions; the only beneficiaries of the charitable Enabling Act trust administered by the Commissioner are the citizens of New Mexico. The supported institutions are simply the conduits through which certain proscribed benefits are guaranteed to those citizens.
2. The bill lacks any standards for the contemplated review, and as such it is impossible to further determine where it might conflict with the law.
3. The bill speaks generally of the “surface lease of state land for planning and development purposes.” This very broad phrase would include any number of things such as billboard leases, saltwater disposal leases, cell-and radio tower leases, landfill leases and the like, and increasingly, the planning and development of alternative energy on State Trust Lands. All of these require planning and development to a greater or lesser extent.

OTHER SUBSTANTIVE ISSUES

DFA notes that this legislation is “...part of a package of bills intended to check the power of the State Land Commissioner:

H 607 and S 474 restrict developer compensation to tangible improvements on state trust land.

H 606 and S 540 would require notice and a competitive bidding process for SLO planning and development leases.

H 610 would require the SLO to develop a uniform system of accounting, budgeting and reporting.

H 605 would require local government review before SLO development leases take effect.”

ALTERNATIVES

SLO states, “A bill specifically authorizing the Commissioner to promulgate rules and regulations regarding commercial and residential real estate development of state trust lands would not run afoul of the applicable constitutional or statutory provisions, and such rules and regulations would be subject to the scrutiny and comment of all members of the public before they became law.”

AMENDMENTS

None suggested by respondents.

BW/svb