F I S C A L I M P A C T R E P O R T

SPONSOR Fischmann **ORIGINAL DATE** 02/08/09 **LAST UPDATED** **HB**

SHORT TITLE AG Review Of Development Land Leases **SB** 475

ANALYST Woods

APPROPRIATION (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HBs 605, 606, 607, 610; SB 474

SOURCES OF INFORMATION
LFC Files

Responses Received From
State Land Office (SLO)
Attorney Generals Office (AGO)

SUMMARY

Synopsis of Bill

This legislation seeks to provide for review of state land business leases for real estate planning or development by the attorney general and the beneficiaries of the lands included in the lease. The bill requires the attorney general to issue an opinion on the proposed lease indicating whether the lease is in compliance with the applicable statutes and Enabling Act for New Mexico and whether it is in the best interest of the beneficiaries. The state land commissioner is required to consider the attorney general's opinion before entering into the lease, unless the commissioner does not receive an opinion from the attorney general within forty-five days of submitting it for review.[1]

There is no appropriation attached to this legislation.

[1] Extracted from the AGO response which carries the caveat, *This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request.*

FISCAL IMPLICATIONS

AGO notes that, as drafted, Senate Bill 475 requires the Attorney General to review all state land leases for real estate or development and render an opinion within forty-five days, but provides no appropriation or additional staff.

SLO advises that the fiscal implications of this bill are threefold:

- Land Office to generate income from the development of trust lands by complicating the leasing process. The extent of this is unknown. The proposed legislation would (A) delay the leasing process by adding review features not required in private land development; (B) add time and dollar costs to the leasing process by requiring the commissioner's staff and interested developers to meet with or otherwise communicate with the attorney general before or during the review process; (C) increase uncertainty in the leasing process by involving persons who (i) lack experience and expertise with respect to the operation of the trust and the kinds of lease transactions that they will be reviewing and (ii) lack the specific and focused fiduciary obligation that the commissioner and the State Land Office are charged with.
- Second, if revenue generated by the trust falls, the legislature may need to increase General Fund appropriations to trust-supported institutions to make up for the decrease in trust support. For example, the trust currently provides at least 40% of the public schools' budget resources. If trust support is reduced, the shortfall would have to be made up through General Fund appropriations and consequent increased taxation.
- Third, the bill does not provide for, but likely would require, the Attorney General to hire and train new staff attorneys and non-attorneys with expertise in evaluating real estate development in order to review the increasing number of such leases in light of current and future economic and market conditions and opine on them in a meaningful way.

SIGNIFICANT ISSUES

AGO advises that Senate Bill 475 does not appear to expressly conflict with other laws. It should be noted, however, that the bill requires the attorney general to determine whether certain state land leases are in the best interest of the beneficiaries but does not provide a process or scheme for making such a determination. The bill also requires that the beneficiary review the proposed lease before the lease is entered into, but does not provide a means for such beneficiary to respond or otherwise present its position after it has completed its review of the lease. In addition, the land commission is not required to consider the beneficiary's position.

SLO raises a number of discussion points:

Under the bill, the attorney general opinion is merely advisory and is not binding on the commissioner. Further, the institution deriving support from the land is to conduct a "review," but no result of that review is specified. It is unclear what the purpose of the review process is. Under existing law, the attorney general may review the State Land Office's leasing practices, and has done so on occasion. One certain effect of the bill would be to add a 45-day delay, and a degree of uncertainty, to commissioner's ability to enter into real estate planning and development leases.

Under the New Mexico Constitution (Article XXIII, § 2), the commissioner is charged with managing the trust lands. The primary purpose of the Enabling Act trust, and the Commissioner's paramount fiduciary duty as trustee, is to obtain the best return for the benefit of the institutions supported by the trust.[2] To the extent that the NMAG "review" replaces the commissioner's discretion in the management of the Enabling Act trust, this bill would violate the New Mexico Constitution and basic trust law, and run counter to the statutes governing the State Land Office (and possibly those governing the attorney general). The laws involved have been thoroughly reviewed by the United State Supreme Court and the Supreme Court of New Mexico.

To the extent that the attorney general review interferes with the commissioner's discretion in managing the trust, it violates the constitutional separation of powers between the State's five independent executives.[3] Further, the proposed NMAG review may invade the discretionary powers, granted to the commissioner alone, by the New Mexico Constitution[4] and NMSA 1978, Article 19.[5] Because the commissioner is an independently elected, constitutionally designated executive, it is to him or her alone that the electorate commits the exercise of that discretion. Such an invasion of the commissioner's decision-making by an outside agency also violates the fundamental trust law, relied upon by Congress when it created the trust, in that it delegates to an outside party, the most important discretionary function of the trustee in the area of real estate planning and development by divesting the commissioner of the ability to determine the best interests of the Enabling Act trust. This would invoke the authority of the United States Attorney General to challenge the legislation as a breach of the state's trust obligations under the Enabling Act.[6]

In addition, a delegation of commissioner's trust authority removes the essential checkpoint to trust management that the attorney general represents, and that the framers of our Constitution intended when they divided the remarkable power of the executive between five independent offices. The attorney general cannot both exercise discretion in trust management and review it for abuses. Further, the attorney general is necessarily concerned with interests broader, and possibly conflicting with, those of the trust and its beneficiaries.[7]

In providing for a review to determine whether a proposed lease "is in the best interests of the beneficiary of the lands to be included in the lease," the bill reflects a misunderstanding of the Enabling Act trust. While each parcel of land is designated to generate support for a particular purpose (e.g., common schools), the beneficiary of the trust is the citizens of New Mexico.[8] The institutions supported by the trust are simply the conduits through which the trust provides to all New Mexicans the essential

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[2] *Lassen v. Arizona*, 385 U.S. 458, 463 (1966) (stating that the Enabling Act was drafted with strict trust provisions to "assure that the trust received in full fair compensation for trust lands"); *Terry v. Midwest Refining Co*. 64 F.2d 428, 434 (10th Cir. 1933) ("The manifest and predominating purpose of Congress was that the lands were to be disposed of in a manner that would bring the greatest returns to the beneficiary of the grant. That, of course, is always the duty of a trustee.").

[3] NM Const., art. V, §. 1; *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 448 P. 2d 799 (1968).

[4] *See Otto v. Field* 31 N.M. 120 (1925).

[5] *Id. Otto v. Field*.

[6] *Id.* Enabling Act, Section 10; *Id. Ervien v. United States.*

[7] *Id.*, § 8-5-2.

[8] *Forest Guardians v. Powell*, 2001-NMCA-028.

benefits of education and a developed civil infrastructure. Because of this, leasing decisions involve a much broader duty: the commissioner must determine whether the proposed planning and development is in the *best interests of the trust*. Because the Enabling Act trust is perpetual, this necessarily requires conservation of trust assets for the future. At times, an immediate gain from planning and development might appear to be in the best interests of a particular supported institution, but may compromise the long-term ability of the trust to generate the revenue it is designed to provide for future generations. If the attorney general were to exercise this necessary level of discretion on behalf of the trust as a whole, that office would essentially assume all of the commissioner's fiduciary duties and entirely displace him as trustee, not just in the management of real estate development, but in the general management of the trust.

Also, the bill fails to contemplate the very real possibility of a conflict between the opinion of the NMAG and the view of an affected institution. The Commissioner has an advisory group to help deal with such instances,[9] and has a developed means of working with them to fulfill his fiduciary duties to the state's citizens while keeping in view the needs of the supported institutions. The NMAG has no such means, and has no statutory authority to do so. Were a conflict to develop, there is no means provided for resolution. Presumably the attorney general would disregard the conflicting view of the affected institution(s), thus rendering any institutional view pointless. Similarly, the bill fails to provide for the possibility that, if more than one institution is involved (which is not infrequently the case) there might be a conflict between institutions.

In any event the foregoing analysis of the attorney general's "review" applies equally to any review of the supported institutions that would seek to replace the commissioner's discretion and function as a trustee. Finally, not only does the bill fail to provide any standards of review for affected institutions, but it does not require the commissioner to even "consider" their opinions, so the utility of their review is even less evident.

In short, the bill would provide the attorney general with review powers identical to what is already given by statute, and would give a meaningless review to trust-supported state institutions. If any more is intended, the bill would be unconstitutional.

PERFORMANCE IMPLICATIONS

AGO again indicates, as drafted, Senate Bill 475 requires the Attorney General to review all state land leases for real estate or development and render an opinion within forty-five days, but provides no appropriation for additional staff, which may impact the agency's other performance based budget targets.

ADMINISTRATIVE IMPLICATIONS

AGO again indicates, as drafted, Senate Bill 475 requires the Attorney General to review all state land leases for real estate planning or development and render an opinion with forty-five days, which may result in staff time dedicated to such review and opinion drafting.

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[9] NMSA 1978, § 19-1-1.4.

SLO states: "Adding attorney general review of State Land Office business leases will unnecessarily complicate the leasing process and add to the staffing requirements of both agencies."

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

AGO advises that Senate Bill 475 conflicts with House Bill 605 and House Bill 606. While Senate Bill 475 provides for review by the attorney general to determine, in part, whether the proposed lease is in the best interests of the beneficiaries of the lands to be included in the lease, House Bill 605 provides for review by the pertinent municipal governing body and board of county commissioners in order to determine whether the proposed lease in the best interests of the municipality or county. House Bill 606 does not require such review of leases but rather requires that leases be issued only after notice and competitive bid.

TECHNICAL ISSUES

SLO states that, except for new text § 19-7-9(C) and § 19.7.9.1 (discussed above), the bill also seeks, in its opening section to amend certain typographical or other technical errors out of the existing NMSA 1978 § 19-7-9. These amendments are of no effect except to make the current statute slightly more readable. Further, the bill does not specify who constitutes the "beneficiary" for purposes of review of a proposed lease. For example, if the land at issue is designated to provide support for common schools, it is not clear to whom the commissioner is supposed to submit the lease for review and to whom the attorney general is supposed to submit his opinion regarding the proposed lease.

OTHER SUBSTANTIVE ISSUES

AGO states: "Business leases that contain payment for intangibles have been found to be unauthorized under AG Opinion 08-02 (2008)."

ALTERNATIVES

SLO states: "If the legislature is concerned that the current business practices of the commissioner regarding real estate planning and development are not maximizing trust income, state general funds could be provided to hire business consultants to review, and, if necessary, work with the Commissioner to streamline current leasing practices."

AMENDMENTS

None suggested by respondents.

BW/svb