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FISCAL IMPACT REPORT

SPONSOR: McSorley DATE TYPED: 02/25/03 HB _____

SHORT TITLE: Access to Leased Public Lands SB 761

ANALYST: Gilbert

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Response Received From
 State Land Office (SLO)
 Attorney General's Office (AGO)
 Game and Fish Department (GFD)

SUMMARY

Synopsis of Bill

Senate Bill 761 amends NMSA 1978, § 19-7-28, to require the State Land Office (SLO) to include provisions in grazing or agricultural leases allowing reasonable public access across a lessee's private property if it is the only way to get to the state's leased property.

Significant Issues

Landowners that do not have a public road going through their private property to the lease land often deny the public access or charge a trespass fee.

ADMINISTRATIVE IMPLICATIONS

The Game and Fish Department (GFD) sends officers to state land during the hunting season upon receipt of complaints from hunters stating that landowners are not opening their leased state

lands (via public access) as per the state land hunting lease agreement. This takes time and manpower and routinely occurs during the fall hunting season.

OTHER SUBSTANTIVE ISSUES

An easement by necessity occurs when a party cannot get to their land without crossing through another's land. The New Mexico Supreme Court has ruled that the State Land Office can require that a lessee agree to an easement within the State's leased property. See *Lea County Water Co. v. Reeves*, 43 N.M. 221 (1939). The Court has not ruled on whether the State can require an easement for itself or its citizens over private property in order to gain access to the State's leased property.

TECHNICAL ISSUES

The State Land Office identified the following concerns with this bill:

This bill may violate the New Mexico Enabling Act, § 10 and the New Mexico Constitution, Art. XIII, Sec. 1 by providing the public free and unfettered access to state trust lands. Under the Enabling Act state trust lands are held in trust for specifically designated beneficiaries, not for the public at large. See, e.g., *Powell v. Forest Guardians*, 130 N.M. 368, 24 P.3d 803 (2001) (Conservations groups do not have standing to en-force provisions of the state trust). The New Mexico Enabling Act forbids as a breach of trust the use of any trust lands, "or of any money or thing of value directly or indirectly derived there from" for other than the purposes for which the trust was created or other-wise contrary to the Act. Enabling Act. of June 20, 1911, § 10, 36 Stat. 557. In recognition of the Enabling Act's mandates, NMSA 1978, § 19-6-3 criminalizes public entrance onto state trust lands unless pursuant to a lease or other legal right to enter those lands that in turn provides some benefit to the trust, and NMSA 1978, § 19-6-5 imposes an affirmative duty upon trust land lessees to prevent trespass. Thus, authorizing public access to state trust land is in irreconcilable opposition to the governing federal and state constitutional law.

Requiring a potential or existing lessee to allow access to his or her private land without compensation may result in an unconstitutional taking of the potential or existing lessee's private property. See, e.g. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992).

RLG/prr/njw