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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/20/11

SPONSOR Bandy LAST UPDATED \_\_\_\_\_ HB 45

SHORT TITLE Eminent Domain Federal Property Condemnation SB \_\_\_\_\_

ANALYST Archuleta

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>	*See Fiscal Impact	*See Fiscal Impact	*See Fiscal Impact		Recurring	

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AG)  
 General Services Department (GSD)  
 Department of Transportation (DOT)

#### No Responses Received From

Energy, Minerals and Natural Resources (EMNRD)  
 State Land Office (SLO)

### SUMMARY

#### Synopsis of Bill

House Bill 45 provides for a new section of the Eminent Domain Code which would allow certain federal property to be taken by condemnation pursuant to the Code. The bill excludes federal property that was acquired by the federal government with consent of the State legislature and in accordance with Article I, Section 8, Clause 17 of the U.S. Constitution. The State would be described as the plaintiff in any action to condemn federal property under the bill.

### FISCAL IMPLICATIONS

\*The AG's office indicates that HB 45 does not carry an immediate fiscal implication. However, if the authority granted in the bill were to be exercised and challenged by the federal government, costs would be incurred by the Attorney General's Office in the ensuing litigation.

## SIGNIFICANT ISSUES

The AG's office indicates that HB 45 may violate the New Mexico Enabling Act, the New Mexico Constitution, and the U. S. Constitution. The AG's office cites the New Mexico Enabling Act, passed by Congress on June 20, 1910, 36 Stat. 557, provides in Section 2B that the "people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof ...." The same provision appears in Article XXI, Section 2 of the New Mexico Constitution.

In addition, the Property Clause of the U.S. Constitution (article IV, section 3, clause 2) vests Congress with "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ...." The U.S. Supreme Court has noted that Congress has complete power over public lands entrusted to it including the power to prescribe the conditions upon which others may obtain rights in them. *See Kleppe v New Mexico*, 426 U.S. 529, 539-541 and cases cited therein.

DOT indicates that HB 45 purports to make lands possessed by the federal government subject to the State's exercise of its eminent domain authority unless the property was acquired by the federal government in accordance with the U.S. Constitution Article I, Section 8, Clause 17, also known as the "Enclave Clause." The Enclave Clause provides:

*"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; - And"* (emphasis added)

Federal property acquired pursuant to the Enclave Clause would be exempt from the State's new eminent domain power under HB 45. If federal lands were acquired for the purposes described in the Enclave Clause and consent of the State legislature was obtained, this bill would not affect those federal lands. However, other federal lands would be subject to condemnation under HB 45.

The federal government holds federal lands other than those acquired by the Enclave Clause, by application of the Property Clause, U.S. Const. art. IV, sec. 3, cl. 2, which provides:

*"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."*

These federal lands are generally lands which were under control of the federal government at the time of the admission of the Territory of New Mexico as a state pursuant to the Enabling Act for New Mexico, Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310. It should be noted that as a condition of becoming a state, the people of New Mexico "do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States..." See Sec.2, B.

Thus, these federal lands are deemed to remain under the jurisdiction of the United States and subject to the power of Congress “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Presumably, the federal government control or jurisdiction would be to the exclusion of the power of state jurisdiction to pass laws affecting such federal ownership.

Generally, the eminent domain authority, or the right to take and dispose of land for public use and necessity, belongs to the sovereign government of the land (i.e. federal or state government). See *Pollard v. Hagan*, 44 U.S. 212, 223 (1845). It appears to be well-settled law that a state or city cannot take by eminent domain land owned by the United States and devoted to governmental uses. Public lands of the United States are not subject to eminent domain, either directly or indirectly, without the consent of the government of the United States. State laws relating to the exercise of the power of eminent domain have no bearing on the question, save as they may have been adopted or made applicable by Congress. See *Am Jur 2d* § 89; *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 5 S. Ct. 995, 29 L. Ed. 264 (1885); *Com., Natural Resources and Environmental Protection Cabinet v. Stearns Coal and Lumber Co.*, 678 S.W.2d 378 (Ky. 1984) (stating rule); *State of Minnesota v. U.S.*, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235 (1939); *Utah Power & Light Co. v. U.S.*, 243 U.S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1917).

It has been recognized that Congress has the same power over territory and other property belonging to the United States, and this power is vested in Congress without limitation. See *United States v. Gratiot*, 39 U.S. 526, 537 (1840). See also *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts “necessarily overrides conflicting state laws under the Supremacy Clause.” *Kleppe*, 426 U.S. at 543. See U.S. Const. art. VI, cl. 2.

HB 45 directly contests the fundamental authority or jurisdiction of the federal government over its lands. If HB 45 is passed, any eminent domain action filed by the State against federal lands would be undoubtedly be contested by the federal government. In view of the Property Clause and the Supremacy Clause of the U.S. Constitution, it is most probable that HB 45 would be declared unconstitutional. In summary, the State cannot acquire federal property by eminent domain under State law unless federal law provides for such acquisition.

### **OTHER SUBSTANTIVE ISSUES**

The AG’s office indicates that Utah enacted a provision very similar to HB 45 in 2010 (HB 143, codified as Utah Code Ann. § 78B-6-503.5 (2011)), recognizing the legal challenges and expense that will most likely result when the authority granted is exercised. To date, Utah has apparently not attempted to test the statute.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Federal lands will be acquired by the State only with federal consent or pursuant to appropriate federal legislation.

DA/mew