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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/19/11

SPONSOR Varela LAST UPDATED 02/02/11 HB 50

SHORT TITLE Removal of State Transportation Commissioners SB \_\_\_\_\_

ANALYST Wilson/Soderquist

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files  
 Constitution of the State of New Mexico, October 2009

#### Responses Received From

New Mexico Department of Transportation (NMDOT)

### SUMMARY

#### Synopsis of Bill

House Bill 50 amends NMSA 1978, § 67-3-5 by providing that members of the State Transportation Commission (Commission) shall not be removed from office except for incompetence, neglect of duty or malfeasance in office. The removal of a member shall not be made without the prior approval of the senate.

Furthermore, HB 50 re-defines the role of the Commission to include the following:

- (1) the express authority to issue bonds and to promulgate rules;
- (2) the limited authority to set policy for the department;
- (3) allows the chair of the Commission and the Commission itself to determine its own organization and administration; and,
- (4) when a provision of law expressly requires interaction between the Commission and the DOT or the DOT Secretary.

Finally, HB 50 requires an annual report to the Governor and Legislative Finance Committee relating to the statewide transportation improvement plan and the statewide transportation improvement program and establishes a submittal date of November 1 of every fiscal year. Currently, a report on the Governor Richardson Infrastructure Program (GRIP) is required for

submittal January 1 of every fiscal year. The bill expands the issues to be covered in the annual report by the Commission to include more details and explanation with regard to the planning, financing, implementation, and decision-making which goes into development of the statewide transportation improvement plan and the statewide transportation improvement program. This will create more transparency in the allocation of highway funding, establish a greater degree of oversight of highway funding, and allow information related to highway funding to be more effectively integrated in the budget formation process.

## **FISCAL IMPLICATIONS**

There is no fiscal impact.

## **SIGNIFICANT ISSUES**

DOT provided the following comments:

Modifying the governor's authority to remove commissioners from a purely discretionary function to requiring a finding of incompetence, neglect of duty or malfeasance in office is constitutionally permissible. However, requiring prior approval of the senate before a commissioner may be removed by the governor for cause is likely an unconstitutional encroachment upon the executive branch.

The DOT is a department of government within the executive branch and the commissioners are executive appointments so the Commission is also considered to be within the executive branch.

The separation of powers doctrine, as embodied in the New Mexico constitution prohibits one government branch from exercising powers properly belonging to another.

The New Mexico constitution authorizes the governor to remove appointed officials unless otherwise provided by law. The New Mexico constitution further authorizes the governor to appoint executive officers with the consent of the legislature. However, requiring that removal of executive appointees be subject to the consent of the legislature is likely an unconstitutional encroachment of the legislative branch into the executive branch.

While no New Mexico case law specifically addresses the issue presented by HB 50, it is well settled in New Mexico that the separation of powers doctrine originated on the federal level and New Mexico's constitution provides for a similar separation of powers clause which mirrors the federal constitution.

Therefore, federal case law on the issue has precedential value. Recently, the United States supreme court invalidated an act because its limitations on removal of government officials violated the Constitution's separation of powers because, while Congress had the power to impose good-cause restrictions on appointees' removal, it could not impose an added layer of tenure protection which will, in effect, vest legislative power over executive officers and in doing so will infringe on the executive power vested in the president.

The response to the Administration criticism is that HB50 reflects New Mexico law prior to the legislative changes that occurred in 2003. Constitution NM Article 5 Section 14 states “state transportation commissioners shall only be removed as provided by law”, and as this is the constitutional mandate, the concern related to a separation of powers issue is questionable. Furthermore, other state boards and commissions have similar requirements in statute. As an example, see EDD Section 9-15-11, Tourism, Section 9-15A-8, and Farm and Ranch Heritage Museum, Section 18-11-5.

### **ADMINISTRATIVE IMPLICATIONS**

The Commission will be required to submit an annual report on the statewide transportation improvement plan and the statewide transportation improvement program to the Governor and LFC November 1 every fiscal year. The period of time covered by the annual report will be redefined to run from December 1 to November 30. No additional FTEs will be required to implement the change.

DW/svb:bym