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FISCAL IMPACT REPORT

SPONSOR Rubio **ORIGINAL DATE** 02/05/19
LAST UPDATED 02/14/19 **HB** 287/aHGEIC/ec

SHORT TITLE No Use of State Resources for Border Wall **SB** _____

ANALYST Hanika-Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)

State Land Office (SLO)

General Services Department (GSD)

SUMMARY

Synopsis of Amendment

The House Government, Elections and Indians Affairs Committee Amendment to House Bill 287 strikes Section 2 that would have prohibited the state from contracting with an entity that is providing or has provided goods or services to the federal government for wall construction.

Synopsis of Original Bill

House Bill 287 relates to use of state lands and resources. In Sections 1 and 2, the bill prohibits the use of state lands or resources to construct or replace a wall or barrier on the border between New Mexico and Mexico, except to construct a barrier to contain livestock, and prohibits using “state resources” to contract for a barrier with an entity that is providing or has provided goods or services to the federal government for the construction or replacement of a federally funded wall, fence or other barrier along New Mexico’s international border. Section 3 clarifies that the provisions of the bill only apply to state resources and real property owned or held in trust by the state after the effective date of the bill, and Section 4 includes an emergency clause.

FISCAL IMPLICATIONS

The bill does not carry an appropriation.

Section 2 prohibits using State resources for the border wall, including using them to “award or renew a contract for goods or services with an...entity...that at the time of bid or proposal for a new contract or renewal of an existing contract is providing or *has provided* goods or services to the federal government for the construction or replacement of a federally funded infrastructure project wall, fence or other barrier along New Mexico’s international border with Mexico.” Despite the Section 3 statement that the bill’s provisions in Section 1 and 2 only apply after the effective date of the Act, agencies suggested the State could apply the prohibition to an individual or “any legal or commercial entity” that “has provided” goods or services retrospectively.

GSD reports the only property identified as Facilities Management Division property is the Port of Entry in Santa Teresa, New Mexico. The property is 0.4 miles from the Mexican border. The bill could increase costs if the division was required to do work in an area close to the border and they had to deny a lower bid because a company had provided goods or services for the wall.

SIGNIFICANT ISSUES

HB 287 prohibits involving the State of New Mexico with the construction of a border wall that the federal government may construct or replace along its international border with Mexico.

SLO reported it has no plans to use state trust land for the construction or replacement of a barrier wall along the border beyond fencing that prohibits vehicular traffic and the movement of cattle.

SLO further reported that while there are 22.25 miles of state trust lands along the international border, a 60-foot strip of land was excluded from the operation of federal land laws, including the Enabling Act grant of lands to the state. Hence, nearly all of state trust lands along the border are set back from the border by the 60-foot strip. It is unclear whether the federal government’s intended construction of a barrier is confined to that 60-foot strip. In addition, the federal government has eminent domain authority, which the state has no power to regulate. The bill could create uncertainty as to compliance if the federal government were to initiate condemnation.

PERFORMANCE IMPLICATIONS

NMAG addressed the following jurisdictional issues:

The state constitution grants the Commissioner of Public Lands jurisdiction over all state lands, including having the “direction, control, care and disposition” of public lands, subject to the provisions of congress and “such regulations as may be provided by law.” N.M. Const. Art. XIII, Sec. 2. New Mexico statutes confer upon the commissioner the direction, control, care and disposition of all public lands “except as otherwise specifically provided by law.” NMSA 1978, Sec. 19-1-1 to 19-1-24. However, state courts have recognized that laws can limit the authority of the commissioner. See e.g. Dasburg, Application of, 1941, 45 N.M. 184, 113 P.2d 569 (The State Land Commissioner has the power to alienate public lands which are held in trust for the

public schools within the limits, and under the terms, of the Enabling Act, the Constitution and laws of the state).

It has been held that the Secretary of the U.S. Department of Homeland Security (DHS) has the authority to claim “authority over lands held in trust for the People of New Mexico.” See F.R. Vol. 83 No.14, pg. 3012 (announcing effective January 22, 2018 that “it is necessary to waive certain laws, regulations and other legal requirements in order to ensure the expeditious construction of barriers and roads in the vicinity of the international land border of the United States near the Santa Teresa Land Port of Entry in the state of New Mexico.” The determination was based on Presidential Order 13767 and the authority of the Secure Fence Act of 2006, Public Law 109–367, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1701). Further, federal law authorizes the U.S. Attorney General essentially to condemn land along the international border when DHS determines that there is an influx of aliens. 8 U.S.C. Sec. 1103 (a) (10) and (b) (3).

The bill would not limit the federal government’s power of eminent domain. See United States v. Carmack, 67 S.Ct. 252; Condemnation Act, § 1, 40 U.S.C.A. § 257; Public Buildings Act, § 1, 40 U.S.C.A. § 341; U.S.C.A.Const. Amend. 5 (The power of eminent domain is essential to a sovereign government, and if the United States has determined its need for certain land for a public use that is within its powers, it is entitled to take the land, subject to the limitations of the Fifth Amendment, free from interference by states or local officials or individual grantors and regardless of the present uses to which such land is put).

ALTERNATIVES

The sponsor could change the prohibition against contracting with an entity that “has provided” goods or services for wall construction or limit such prohibition to a period of days or months.

AHO/al/gb