

LFC Requester:	Emily Hilla
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**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original **Amendment**
Correction **Substitute**

Date 1/30/2024
Bill No: SB 45

Sponsor: Sen. Michael Padilla
Short Title: BROADBAND
INFRASTRUCTURE

Agency Name and Code State Land Office - 539
Number: _____
Person Writing Sunalei Stewart
Phone: 505-827-5755 **Email:** sstewart@slo.state.nm.us

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		
None	None		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		
None	Intermediate but positive	Indeterminate but positive	Recurring	Land Maintenance Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	None	None	None			

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: SB 43, related to broadband.
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

The bill makes a number of additions and changes to existing law with the aim of expanding education technology and broadband infrastructure, including issuance of severance tax bonds, creation of a new fund, and transferring existing programs and infrastructure to the Office of Broadband Access and Expansion (“OBAE”).

Section 7-12-12 NMSA 1978 would be amended to allow for the authorization of bonds for public education technology solely by the “director of the office of broadband access and expansion.”

A new section of Chapter 62 NMSA 1978 would be enacted to allow for new lines to be added to existing power poles. Although impliedly for broadband, as written the bill could potentially allow for any lines to be added. SB45 specifies that for utility poles not regulated by federal law, the Public Regulatory Commission (“PRC”) and OBAE will establish “reasonable” prices and rules for utility pole attachments. There is no specific formula for the rate for the broadband lines.

Section 7-12-12 NMSA 1978 would be amended to allow for the issuance of additional bonds for public education technology infrastructure.

The Public Schools Utility Authority’s broadband deployment and connectivity program would be transferred to the OBAE.

The bill provides that the Board of Finance may issue and sell supplemental severance tax bonds up to \$10,000,000 when the OBAE director provides a “certification.”

The bill would amend the Procurement Code (Section 13-1-150 NMSA 1978) to create an exception to the four-year limitation on contracts for the design, engineering or operation of broadband infrastructure pursuant to the Broadband Access and Expansion Act.

The bill would remove the \$10 million cap on the amount that may be expended from the public

school capital outlay fund on certain education technology infrastructure.

FISCAL IMPLICATIONS

While the fiscal impact is unknown, it is likely that SB 45 would lead to additional funding sources for broadband infrastructure projects that would in turn lead to new rights of ways being issued on state trust lands. While rights of way for broadband are not a significant revenue source for the State Land Office due to the agency's low pricing of rural areas, there would be a positive impact on earnings.

SIGNIFICANT ISSUES

SB 45 would further the important goal of facilitating the development of broadband infrastructure in underserved areas. Commissioner of Public Lands Stephanie Garcia Richard supports the expansion of high-speed internet to underrepresented populations and has taken steps to efficiently process applications received by the State Land Office.

However, Section 7 of the bill conflicts with the New Mexico State Land Office's ("NMSLO") authority to manage state trust land under the Enabling Act to the extent that it confers authority to the PRC to establish "rates, terms and conditions for utility pole attachments" located on state trust lands. State trust land were granted from the federal government to the state with specific conditions as a matter of federal law, including the requirement to earn appropriate compensation for the use of lands. The bill should be amended to make clear that noting in this section shall restrict the Commissioner of Public Lands authority to authorize and set rates for the use of state trust lands.

A related broadband bill, SB 43, includes explicit language excluding state trust land from the bill's easement provisions. That exclusion that is well-considered in light of constitutional and legislative constraints on the disposition of state trust lands. A similar exclusion from SB 45 would bring the two bills into harmony and avoid potential conflict with the Enabling Act.

Section 8 of the bill amends the definition of "authority," as part of the Wireless Telecommunications Act (Section 63-9I-2 NMSA 197), to include the "State of New Mexico." The Act requires an "authority" to allow co-location of broadband infrastructure on pre-existing utility poles. To the extent that companies would be allowed to piggyback off of existing utility rights of way on state trust land without seeking authorization from the Commissioner of Public Lands, this would also violate the Enabling Act. The definition of "authority" should be amended to state that it includes the state of New Mexico with the exception of "lands under the custody or control of the commissioner of public lands."

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

The bill could result in an increase in the number of rights of way on state trust lands, creating an indeterminate amount of new work for archeological, environmental and other internal reviews, and providing an indeterminate amount of additional revenue.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 43 relates inasmuch as easements for broadband are likely to be associated with the contemplated pole attachments.

TECHNICAL ISSUES

The bill should make clear whether the OBAE director may cause infrastructure bonds to be issued in the amount of \$10,000,000 one time, or on a recurring basis.

OTHER SUBSTANTIVE ISSUES

State Trust Lands –Enabling Act Restrictions

The Enabling Act of 1910 confirmed this foundational principle guiding the management of the state trust lands, and provides that that leases and other conveyances or contracts involving state trust lands or their resources must be appraised at and sold for “true value,” and that leases or other transactions “not made in substantial conformity with the ... [A]ct shall be null and void.” Act June 20, 1910, § 10, 36 Stat. 557.

The New Mexico Constitution vests the Commissioner of Public Lands with the “direction, control, care and disposition of all public lands,” that is, the state trust lands conveyed by the United States to New Mexico. N.M. Const., art. XIII, § 2; see also N.M. Const., art. V, § 1 (creating the office of Commissioner of Public Lands); NMSA 1978, § 19-1-1 (creating State Land Office as agency through which the Commissioner maintains “jurisdiction over all lands owned [in trust] by the state”). The Commissioner’s core statutory duty is as a fiduciary for the land trust, which includes “maximizing revenues and profits” for New Mexico’s schools and other public beneficiaries. *King v. Lyons*, 2011-NMSC-004, ¶ 103, 149 N.M. 330.

In *State ex rel. State Highway Commission v. Walker*, the New Mexico Supreme Court considered whether the Commissioner could be required to waive right of way fees for the state Highway Department (now DOT), which intended to construct a public highway across state trust land. 1956-NMSC-080, 61 N.M. 374. Although the Court recognized that the highway provided a public benefit, it determined that the Enabling Act requires the Commissioner to administer state trust lands “solely for the purpose of the trust imposed – that is, for the benefit of the various state institutions for which the lands were granted.” *Id.*, ¶ 5. Rejecting the Highway Department’s argument that “an agency of the state [should not] be charged for the use of state property,” the Court held that the Enabling Act “permit[s] no license of construction” for free use of state trust land or resources, and that the Highway Department “must ... compensate the trust for rights-of-way...” *Id.*, ¶¶ 12, 29. *Walker* makes clear that easements or rights of way across state trust land cannot be obtained without consideration. There is a further consideration that to the extent easements or rights-of-way are intended for private party use, obtaining state land (including state trust land) for such use without consideration would violate the Anti-Donation Clause of the New Mexico Constitution.

Bonding

The bill amends Section 7-27-12.2 and 7-27-12.6 NMSA 1978 to allow for the issuance of bonds for broadband infrastructure in public schools upon the “certification” of the OBAE director. “Certification” is not defined in the bill and appears to allow the OBAE director to authorize the

issuance of bonds at their discretion. This alternative process contemplated by the bill would transfer the authority from the Public-School Capital Outlay Council, which is responsible for implementing a process for prioritizing and funding school capital needs. The Public-School Capital Outlay Council has checks and balances, oversight and customary financial safeguards. The Legislature may consider adding additional transparency and safeguards to the bond issuance process so that other stakeholders beyond the OBAE director have an opportunity to initiate bond issuance requests. The bill does not specify if a single \$10,000,000.00 bond authorization was intended, or if the OBAE director can obtain issuance of an unlimited number of bonds, up to a cap of \$10,000,000 per issuance.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS

In order to comply with the Enabling Act and the New Mexico Constitution, SB 45 should be amended as follows:

Page 33, line 12, before “SECTION 8,” insert, “C. Nothing in this section shall limit the authority of the commissioner of public lands to set rates, terms and conditions for the use of lands within the custody and control of the commissioner of public lands.”

Page 34, line 11, after “New Mexico” insert “, excluding lands under the custody and control of the commissioner of public lands”