



2016 Annual Report
New Mexico Office of the Attorney
General

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New Mexico Office of the Attorney General

Attorney General Hector Balderas
NM Office of the Attorney General
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
Toll Free: 1-844-255-9210
Phone: (505) 490-4060
Fax: (505) 318-1050
Web: www.nmag.gov

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Since taking office, I have worked hard to uphold the promise I made to protect New Mexico families. Over the course of 2016, my office made great strides in our efforts to connect with constituents across the state, engage in litigation to protect New Mexico consumers, bring justice to victims, and hold the worst offenders accountable. I am pleased to present this annual report which highlights some of our significant achievements from the last year.

I am honored to serve as your Attorney General, and will continue to work diligently to help us build safe and prosperous communities in which all New Mexicans can thrive.

Sincerely,

A handwritten signature in blue ink, appearing to read "Hector Balderas". The signature is stylized and fluid.

HECTOR BALDERAS
Attorney General of New Mexico

PREAMBLE

Attorney General Balderas continues to work diligently to uphold the priorities he established upon taking office in January 2015. This report details the activities of the various divisions of the New Mexico Office of the Attorney General (OAG) over the course of the 2016 calendar year. In addition to accounting for the activities and successes of the OAG, the text of all Attorney General Opinion letters issued during the year, as required by law, is included in Appendix A.

OAG LEADERSHIP TEAM

The Attorney General's Office continues to benefit from the leadership of highly qualified and dedicated public servants. The following individuals make up the executive leadership team:

- **Tania Maestas, Deputy Attorney General for Civil Affairs**
- **Sharon Pino, Deputy Attorney General for Criminal Affairs**
- **Sonya Carrasco-Trujillo, Chief of Staff for Policy and Public Affairs**
- **Kenneth Stalter, General Counsel**
- **Matt Baca, Senior Counsel**

ORGANIZATIONAL CHANGES

As part of ongoing efforts to serve all New Mexicans in the most expedient and effective way possible, in 2016 the Attorney General took significant steps to restructure the office's consumer and civil affairs divisions.

Consumer protection is a hallmark of the work of the Attorney General's Office and continues to be one of Attorney General Balderas's highest priorities. Recognizing the need to modernize the office's approach to protecting consumers, in May 2016, the Attorney General shifted resources, creating a new division with two goals in mind: providing timely resolution for consumers and constituents filing complaints with the office; and arming New Mexicans with the knowledge, skills, and abilities to be informed and savvy consumers through educational outreach efforts.

To achieve these goals, the Attorney General formed the Consumer and Family Advocacy Services Division (CFASD). The new division is staffed by consumer advocates and constituent services representatives, whose sole responsibility is to field incoming complaints regarding a wide array of issues, from car buying and warranties on purchased goods to complaints about businesses and scams.

CFASD is committed to responding to every complaint it receives within three working days, with the goal of reaching full resolution within 60 calendar days. CFASD is focused on finding real solutions for consumers and constituents. Since its inception, CFASD advocates have returned \$1,226,435.92 to New Mexican consumers.

In addition to re-focusing the work of consumer advocates, OAG attorneys in the Consumer and Environmental Protection Division work diligently to bring affirmative litigation on behalf of New Mexico consumers who have been impacted by harmful and unlawful business practices.

CIVIL AFFAIRS

The Office of the Attorney General has broad statutory authority over civil legal matters and proceedings involving the State. The Office of the Attorney General Civil Affairs Division is responsible for: defending and prosecuting civil actions and proceedings in court when the state is a party or interested, or when the Attorney General believes the interest of the state requires it; defending state officers and employees who are named as parties in civil actions arising from the performance of their official duties; providing legal representation and advice to state agencies, boards and commissions; and providing written opinions on legal questions submitted by legislators, state officials and district attorneys.

In addition to the Attorney General's role as lawyer for the state and for the public interest, the agency is charged with administering and enforcing a wide variety of laws that benefit New Mexico residents. These include laws that protect consumers' rights, such as the Unfair Practices Act, and laws intended to make state government more transparent and accountable, such as the Open Meetings Act (OMA) and the Inspection of Public Records Act (IPRA).

Deputy Attorney General Tania Maestas oversees the Civil Affairs divisions: Consumer and Environmental Protection; Open Government; and Civil Litigation.

The Consumer and Environmental Protection Division brings civil actions on behalf of the citizens of New Mexico to protect, preserve, and enhance New Mexico's environment, water, and natural resources through affirmative litigation. Additionally, the Division enforces New Mexico consumer laws intended to shield the public from fraudulent and unfair business practices. The State's principal consumer law is the Unfair Practices Act (UPA). Under the UPA, the Division provides services to the public to ensure that consumers have safe and fair interactions with businesses operating in New Mexico. The Division also represents the interests of New Mexico's residential and small business consumers in matters related to gas, electric, and telecommunications regulation.

Protection of New Mexico's scenic and fragile environment is a priority of the Attorney General's Office. The Consumer and Environmental Protection Division works closely with a diverse group of stakeholders including law enforcement and state agencies to safeguard our State's natural resources, recover compensation for damages to our environment, and prosecute businesses and individuals who violate our environmental protection laws. Additionally, the Division's utility unit represents residential and small business utility ratepayers and has been involved in all three investor owned utilities' rate undertaken in 2016. The utility unit is focused on ensuring that all New Mexicans have access to affordable energy, while at the same time seeking to integrate renewable energy and resiliency into the grid without drastically raising rates.

The Consumer and Environmental Protection Division also conducts investigations and takes enforcement actions to protect New Mexicans from unlawful solicitation practices by New Mexico charities and ensures that charity assets are used for their intended purposes.

Consumer and Environmental Protection Priority Case Updates:

Texas v. New Mexico

The Division continues to vigorously defend the Texas v. New Mexico and Colorado water litigation, an original jurisdiction lawsuit filed by Texas in the United States Supreme Court. Texas has alleged New Mexico is diverting water from the Rio Grande River before it reaches Texas, in violation of the 1938 Compact. The Division continues to mount a strong defense in this matter. On February 22, 2017, the Special Master circulated his Report on New Mexico's Motion to Dismiss and the Motions to Intervene of EBID and EPCWID. Briefing on exceptions to the report will likely occur during the early summer.

In February 2017, the Attorney General met with New Mexico's Lower Rio Grande stakeholders and created a newly formed joint defense strategy in the decades-long water fight that Attorney General Balderas inherited from previous administrations. The Attorney General has adopted a new approach to the litigation that partners with relevant stakeholders to create a joint defense team after New Mexico's hands have been tied for the last two years by the courts. The Attorney General has now shifted to a new legal team that's based on a targeted, data-driven strategy that uses the most up to date science and the best experts in order to create more accountability and goals as the parties move toward a resolution. The Attorney General had already been working closely with the Office of the State Engineer on all technical matters, so he is excited to reinforce and expand that relationship. This is all part of New Mexico's long-term resolution to protect the state's water and regional economy.

New Mexico v. EPA

In May 2016, the Division, along with the New Mexico Environment Department, sued the Environmental Protection Agency and private parties responsible for the August 2015 spill of acid mine drainage into the Animas River, which has caused contamination of sediment along both the Animas and San Juan rivers in New Mexico. In June, the Division filed for leave to initiate an original action in the United States Supreme Court against Colorado for its part in the Gold King Mine/Animas River spill. The litigations are in their early stages of motion practice. In September the Division argued its appeal of the Copper Mine Rule in front of the Supreme Court in an effort to protect groundwater from toxic mine tailings.

New Mexico v. Volkswagen

The Division sued to enforce New Mexico consumer environmental protection laws in New Mexico v. Volkswagen. The lawsuit, originally filed in New Mexico Courts, has been removed and transferred to the Northern District of California where it is pending before in the multidistrict litigation.

The Division continues to pursue cases in New Mexico state courts to protect homeowners and consumers from deceptive and unfair trade practices. The Division is involved in numerous investigations in collaboration with other states to identify and pursue litigation against nationwide bad actors who operate in New Mexico and harm consumers through illegal practices. In the next year the Division will be sharpening its focus on litigation against some of the biggest bad actors in New Mexico and the nation.

The Open Government Division provides a broad range of legal services to state government and works to increase the public's understanding of and access to government activities. The Division's areas of responsibility include providing legal representation and advice to more than 100 state agencies, boards, commissions, departments, divisions, and other governmental entities throughout the state; and researching and drafting Attorney General opinions and advisory letters at the request of the state legislature, state officials, and district attorneys. The Division also educates members of the public and state and local public bodies about their rights and responsibilities under the Open Meetings Act (OMA) and the Inspection of Public Records Act (IPRA). This effort includes conducting training seminars throughout the State, producing compliance guides that detail the laws' requirements and applicability, and responding to complaints from public officials, the news media, concerned citizens and others alleging violations of these laws.

Open Government 2016 Accomplishments:

During 2016, the Open Government Division experienced a major uptick in the number of OMA and IPRA complaints. The number of incoming complaints in 2016 was almost triple what it was in previous years. The Division received over 100 complaints and issued determinations on approximately 70% of those complaints.

In order to improve the efficiency with which the Division handles OMA and IPRA complaints, it adopted a streamlined review process. Under the new process, within 10 days of receiving a complaint of a sunshine law violation, an Assistant Attorney General determines whether the complainant raises a valid issue under either law. If the complaint is valid, contact is initiated with both the complainant and public body and an attempt is made to resolve the issue. If the issue is not resolved within the first 10 days, the Open Government Division dedicates an attorney to open a full inquiry into the complaint. Once an inquiry is opened, an attorney in the division drafts a determination letter. In order to uphold the new process, two employees have been dedicated to handling these types of complaints.

During 2016, in response to the increased number of complaints, the Division focused efforts on educating public bodies and members of the public on sunshine law compliance. To that end, the Division conducted 12 OMA/IPRA trainings around the state. Additionally, during the 2016 legislative session, the Open Government Division prepared over 500 bill analyses to assist lawmakers in understanding the legal implications of proposed legislation.

The Litigation Division works to protect the citizens of New Mexico and the state treasury by conducting administrative prosecutions that further the policy goals of the various state boards and commissions while protecting the due process of licensees. The Division serves as administrative prosecutor to approximately 30 state boards and commissions which regulate licensed professions. The Division accepts summons, complaints, and other legal documents alleging civil causes of action against the state, a state agency, or a state official or employee acting in an official capacity.

The Litigation Division also enforces the Tobacco Master Settlement Agreement by filing lawsuits against cigarette companies that fail to abide by their legal obligations; auditing escrow payments made by non-participating manufacturers for sales in the state; requiring compliance by the manufacturers to the statutory reporting requirements; and working closely with the Taxation and Revenue Department to assure that sales are compliant and escrows are paid.

2016 Accomplishments:

The Litigation Division was active in litigating civil matters on behalf of the State of New Mexico and the public interest, and defending state entities in civil matters in both state and federal courts over the course of 2016. The Division was particularly active and successful in pursuing recoveries for New Mexico taxpayers in anti-trust and qui tam (whistleblower) actions. Additionally, the Division was an active part of a multistate settlement against a drug company for anticompetitive conduct relating to delayed entry of generic drugs on the market, and a multistate settlement against Barclay's bank, winning reimbursement of losses for public entities that had investments that were effected by manipulated borrowing rates resulting from the bank's manipulation and fraud.

The Treaty of Guadalupe Hidalgo Division was created by the New Mexico Legislature in 2003 to "review, oversee and address concerns relating to the provisions of the Treaty of Guadalupe Hidalgo that have not been implemented or observed in the spirit of Article 2, Section 5 of the constitution of New Mexico" (NMSA 1978 §8-5-18). The Division has been formally staffed since the fall of 2016 and has begun to develop a work plan for addressing its statutory mission in order to support New Mexico's community land grants and acequias, which are a rich and critical part of our State history and remain a vital part of our present day culture. The Division provides legal representation to the New Mexico Land Grant Council and the New Mexico Acequia Association.

During 2016, Division staff worked closely with the Land Grant Council to learn about the needs of the community and develop a knowledge base to begin formulating legal goals. Division staff attended individual community land grant meetings to gather and assess the concerns of the various community land grants throughout the State. To date, the Division has met with the Cebolleta, Atrisco, and Chilili Land Grants and is scheduled to meet with each remaining community land grant over the next year. The Division also participated in a strategy meeting hosted by the Land Grant Consejo with members of different community land grants, state and federal agencies, and representatives of the New Mexico congressional delegation.

The Treaty Division recognizes the need for New Mexico land grant culture to be preserved, and in collaboration with the New Mexico Land Grant Council, New Mexico Highlands University Southwest Studies program, the University of New Mexico's Land Grant Studies program and members of various community, plans to present an outreach and education program to students throughout the State. The Division also offers Open Meetings Act training to members of community land grants.

CRIMINAL AFFAIRS

Under NMSA 1978 §8-5-2, the criminal jurisdiction of the Attorney General is to prosecute and defend all criminal related cases in the Supreme Court and Court of Appeals in which the State is a party. The Attorney General has authority to prosecute and defend any criminal action and proceedings when, in his judgment, the interest of the state requires such action or when requested by the Governor. The Attorney General also has statutory jurisdiction when any district attorney either refers and/or fails to prosecute any criminal matter and shares concurrent jurisdiction with district attorneys for some specific criminal offenses, including but not limited to, human trafficking and violations of the Governmental Conduct Act.

The Criminal Affairs Division investigates and prosecutes matters ranging from public corruption to the most violent and heinous of crimes, further upholding the Attorney General's top priority of protecting the children and families of New Mexico. The primary goal of the division is to aggressively and successfully secure criminal convictions for the most extreme criminal offenders, and to ensure that these convictions are upheld through the criminal appeals process.

Deputy Attorney General Sharon Pino oversees the four divisions within Criminal Affairs: Special Prosecutions; Special Investigations; Criminal Appeals; and Medicaid Fraud and Elder Abuse.

The Special Prosecutions Division is responsible for prosecuting complex and specialized criminal cases throughout New Mexico. The Division specializes in handling cases related to internet crimes against children, child exploitation, violent crimes, fraud, and government accountability. The Division also has a Border Violence Unit specializing in foreign extraditions, human trafficking, and money laundering prosecutions. The Division provides technical assistance and trial support to local prosecutors and law enforcement, and it also provides training for federal, state, and local agencies.

In 2016, the Special Prosecutions Division conducted 12 trials throughout New Mexico, while maintaining a caseload of nearly 140 cases. Cases tried during 2016 include charges of aggravated criminal sexual penetration, criminal sexual penetration of an inmate, criminal sexual penetration of a minor, attempted criminal sexual penetration of a minor, child solicitation by an electronic communication device, sexual exploitation of children, voyeurism, aggravated battery, and homicide.

In addition to the matters tried in 2016, the Special Prosecutions Division also initiated, handled, and resolved cases involving human trafficking, domestic violence, child abuse, money laundering, embezzlement, and public corruption.



New Mexico Attorney General's Criminal Affairs Team, December 2016

In 2016, attorneys in the Special Prosecutions Division conducted 26 sex offender parole board hearings, and maintained a caseload of 15 international extraditions while working in conjunction with local law enforcement, district attorney's offices, the U.S. Marshal Service and the U.S. Department of Justice to recover violent fugitives.

Prosecutors in the Special Prosecutions Division regularly conducted training for law enforcement and local prosecutors, including over 35 presentations on investigation and prosecution of internet crimes against children, human trafficking, criminal sexual penetration, public corruption, money laundering, driving while intoxicated and traffic offenses, domestic violence, and international extraditions.

Special Prosecutions 2016 Notable Cases:

Barion Solorzano

Defendant was prosecuted for sexual exploitation of children and criminal sexual contact of a minor. Defendant sexually abused a six year old child and photographed her during the sexual abuse. Defendant faces 35 years in the Department of Corrections at sentencing.

Adan Munoz-Bustillos

Defendant sentenced to 10 years in the Department of Corrections and 5-20 years of indeterminate parole after convictions for sexual exploitation of children by manufacture and criminal sexual contact of a minor.

Kyle Sanchez

Defendant convicted at trial of two counts of attempt to commit criminal sexual penetration in the first degree after defendant requested to meet with an 11 year old child for the purpose of committing acts of sexual abuse after engaging in graphic discussions with undercover officers online.

Craig Highfill

Defendant sentenced to 3 years in the Department of Corrections followed by 5-20 years of parole for sexual exploitation of children by manufacture after filming two female children in the bathroom utilizing a hidden camera.

John Meister

Defendant sentenced to 10 years in the Department of Corrections and ordered to pay his victims more than \$100,000.00 in restitution stemming from convictions for Money Laundering after failing to comply with terms of his sentence.

Joseph Apodaca

Defendant convicted of 2 counts of aggravated criminal sexual penetration at trial after brutally raping a college student and leaving her in a vacant lot after causing permanent injury to her during the assault.

Enoch Arviso

MDC officer indicted on several counts of criminal sexual penetration for raping female inmates while working as a correctional officer.

Davon Lymon

Defendant indicted on an open count of murder and other felony charges for murdering APD Officer Daniel Webster.

Xavier Nelson

Defendant indicted for vehicular homicide by reckless driving after killing a 10 year old girl while drag racing. This matter will be jointly prosecuted by the 2nd Judicial District Attorney's Office and the Office of the Attorney General.

Eduardo Estrada

Defendant successfully extradited and plead to homicide charges in October, 2016 in the 3rd judicial district.

The Special Investigations Division works to provide a safe environment for New Mexico's most vulnerable populations, including children and the elderly. The unit is responsible for reviewing and investigating crimes that are referred to the Office of the Attorney General, which often results in the arrest and incarceration of dangerous and corrupt criminal offenders. Additionally, the Division regularly supports efforts to secure restitution for victims of financial crimes and fraud.

The Division is comprised of separate units, each handling investigations in its own specialty area; these units include Special Investigations; Internet Crimes Against Children; the Human

Trafficking Task Force; and the Anti-Money Laundering Unit. The Special Investigations Division also oversees investigations conducted by Agents assigned to the Medicaid Fraud and Elder Abuse Division.

Special Investigations 2016 Accomplishments:

2016 was an especially successful year for the Special Investigations Division (SID), which executed several significant law enforcement achievements. Among the Division's successes was the award of federal human trafficking grant money to establish the Human Trafficking Task Force (NMHTTF). The NMHTTF received \$750,000 to support its efforts to combat human trafficking. This grant funding cycle began January 1, 2016, and will continue through January 1, 2019. The grant pays for two full-time agents, one part-time administrative assistant, and covers administrative costs incurred by the Unit.

The NMHTTF serves as the principal specialized investigative entity within the State of New Mexico for human trafficking. The NMHTTF is primarily dedicated to prevention, prosecution, and protection. During 2016, NMHTTF achieved the following statistical outputs:

- **6 Arrests**
- **8 Search warrants**
- **23 Outreach presentations**
- **33 Sex trafficking cases**
- **4 Labor trafficking cases**
- **31 Victims interviewed**
- **8 Law enforcement operations**

The Special Investigations Division experienced several additional notable successes in 2016, detailed below:

Operation Broken Heart III

In April, Internet Crimes Against Children (ICAC) task forces around the country—including the New Mexico Office of the Attorney General ICAC Task Force—launched a two-month long Operation called, *Operation Broken Heart III*. The operation was a coordinated effort by law enforcement representing more than 3,000 federal, state, and local law enforcement agencies for the purpose of investigating and arresting child predators. The operation also included internet safety education and outreach. The annual operation concentrates on identifying and apprehending offenders who: (1) possess, manufacture, and distribute child pornography; (2) engage in online enticement of children for sexual purposes; (3) engage in the commercial sexual exploitation of children (commonly referred to as child prostitution), and (4) engage in child sex tourism (traveling abroad for the purpose of sexually abusing foreign children).

During Operation Broken Heart III, the New Mexico ICAC Task Force conducted:

- **63 Search Warrants**
- **21 Arrests/Arrest Warrants**

- **156 Internet Safety presentations reaching over 5400 attendees**
- **3 Public Safety Events impacting over 8770 attendees**

Looking forward, the Special Investigations Division will continue to conduct comprehensive criminal investigations in a wide variety of specialty areas throughout the State of New Mexico. We will continue to leverage collaborative partnerships and resources to provide these services to victims in rural communities where they otherwise might not exist.

The Criminal Appeals Division represents the State of New Mexico in all cases filed in the New Mexico appellate courts, as well as represents the wardens of various prisons throughout New Mexico in habeas corpus litigation filed by inmates. The Division also reviews DNA expungement requests filed by defendants and handles other post-conviction litigation on behalf of the State including requests for DNA testing.

2016 Criminal Appeals Accomplishments:

- **Filed 183 briefs in the New Mexico Court of Appeals and Supreme Court**
- **Filed 56 memoranda in opposition to the Court of Appeals' summary calendar**
- **Conducted 21 oral arguments in the New Mexico Court of Appeals and Supreme Court**
- **Filed 58 petitions for writ of certiorari or responses thereto, and other petitions for extraordinary relief in the New Mexico Supreme Court**
- **Reviewed 19 DNA expungement requests from defendants**
- **Filed 21 other substantive motions in the appellate courts**
- **Conducted 47 hearings in state district court related to habeas corpus litigation**
- **Filed 62 responses or briefs in state district court**
- **Filed 17 answers, seven other responses, and conducted one hearing in federal district court related to federal habeas corpus litigation**

The attorneys in the Criminal Appeals Division routinely consult with and advise various assistant district attorneys around the State. The Division also conducts trainings on appellate law and new developments in appellate cases for the District Attorneys' Association and other groups as requested. In 2016, the Division was invited to present at one of the largest annual statewide conferences, Advocacy in Action, attended by law enforcement, victim advocates, attorneys and other justice personnel. Members of the Division participate in the New Mexico Supreme Court's rule-making process through their membership on the appellate rules committee, the ad hoc committee on pretrial release, and the joint committee on rules of procedure.

In particular, the Division has been active in defending valid convictions against claims of speedy trial violations and claims of search and seizure violations. Additionally, although a new constitutional amendment has just been passed to allow for pretrial detention of accused persons,

the Division has defended trial courts' decisions, under the existing language of the New Mexico Constitution, to detain persons accused of first-degree murder without bail.

The Medicaid Fraud and Elder Abuse Division is the Medicaid Fraud Control Unit (MFCU) for the State of New Mexico, vested with the responsibility and authority to investigate and prosecute providers who commit fraud against the Medicaid program and incidents of abuse, neglect, or exploitation of individuals residing in facilities throughout the state. The Unit works to ensure the fiscal integrity of the New Mexico Medicaid program and the well-being of the State's Medicaid recipients by investigating and prosecuting those who attempt to abuse, neglect or exploit facility residents or defraud the program. The Unit's mission is to maintain the integrity and solvency of the Medicaid Program and protect the most vulnerable members of our community from physical or financial harm.

The Division is uniquely able to investigate these complex cases due to its interdisciplinary personnel structure, which includes attorneys, financial investigators, medical investigators, special agents, and legal staff. Unlike some of the other criminal divisions within Criminal Affairs, the Medicaid Fraud and Elder Abuse Division is able to pursue both criminal and civil actions to fulfill its mission.

Medicaid Fraud and Elder Abuse 2016 Accomplishments:

- **Obtained settlements totaling \$6.19 million in ordered recoveries**
- **Opened 48 new civil cases, including local and global *qui tams* that remain under seal—of the 48 opened, 14 were declined or closed and 17 settled for a total recover of \$5,960,849**
- **Indicted five individuals in fraud schemes, resulting in five convictions and \$398,290 in ordered restitution**
- **Received 580 referrals for investigation, 52 of which were turned into new cases, 134 of which were referred to outside agencies including Department of Health, Adult Protective Services, and other law enforcement agencies**

In April 2016, the division completed its investigations of the fifteen behavioral health agencies that were placed on check holds by the Human Services Department in 2013. The Attorney General obtained authority to use \$1.8 million of the office's Consumer Fund to enable the Division to contract with an auditing firm to expeditiously complete the investigations. Division staff worked with the contractor to gather and organize massive amounts of documentation from numerous locations, review and analyze documents and claims information, and complete the investigations.

Preferred Care Inc.

The civil area of the Division is currently engaged in a large-scale lawsuit against a nursing home chain, Preferred Care Inc., its related companies, and predecessor, Cathedral Rock, Inc, to recover damages and civil penalties arising from false and fraudulent statements and claims submitted to the government by seven nursing facilities and their owners and management companies.

The Complaint also alleges that Defendants made false and misleading statements to New Mexico consumers and engaged in unconscionable trade practices in violation of the New Mexico Unfair Practices Act. Cathedral Rock Corporation sold its New Mexico nursing facilities to Texas-based Preferred Care, Inc. following Cathedral Rock's plea bargain and civil settlement of False Claims Act litigation involving its Missouri nursing facilities. The New Mexico facilities have generated more than \$229 million in revenue since Preferred took over—nearly 80% of it paid by Medicare and Medicaid. The Complaint outlines dozens of specific accounts of the impact on residents, including residents being left in their own waste for long periods or suffering injuries because they were not receiving the assistance paid for by the Medicaid program. In 2016, the Office defeated the defendants' multiple legal maneuvers attempting to have the case dismissed. It is currently set for trial in April 2018. The case is being jointly handled with outside counsel.

The Division continues to evolve its focus and structure to better enable it to serve the entire State. In 2016, the Division opened a regional office in Las Cruces, New Mexico, which serves the southern half of the State. The office is staffed by three Special Agents, one nurse medical investigator, and one Certified Public Accountant. Since approximately 30% of the Division's cases come from the southern part of the state, this transition has begun to increase the efficiency of the Division's investigations. By reducing travel time for personnel and with the benefit of five additional investigators, the Division is better able to handle the significant number of referrals and active cases, which will likely enhance its productivity over coming years.

Currently, the Division relies on referrals from the Human Services Department (HSD) and Managed Care Organizations (MCOs), which identify patterns in medical claims that may be indicative of fraud. In addition, for all cases and referrals, the Division currently depends on these outside organizations to gather and produce claims data. Recently, the Division has gained access to Medicaid claims data and is currently building a system to enable in-house access to the data. Once the system is in place, the Division will be able to pull its own data for case investigations, increasing the accuracy and efficiency of its investigations, and reducing the workload placed on outside organizations. In addition, upon approval, the Department of Health and Human Services permits MFCUs to conduct their own data mining for aberrant billing practices. The Medicaid Fraud and Elder Abuse Division is currently working on its waiver application.

The Division has become increasingly involved in the National Association of Medicaid Fraud Control Units and Global Case Committee. The Division is also experiencing an increase in locally filed qui tam cases, which are generally worked in conjunction with federal agencies, the US Attorney's Office, and Department of Justice. These cases require significantly more resources due to their size and complexity, but if meritorious, have the potential to result in significant recoveries for the New Mexico Medicaid Program.

POLICY AND PUBLIC AFFAIRS

The Policy & Public Affairs Division is committed to protecting New Mexico Families by engaging communities—especially those with underserved populations—in order to fully understand and work to address the systemic failures that perpetuate cycles of violence, victimization, and poverty across the State. The Division includes Victim Services, Community

Outreach, and Consumer and Family Advocacy Services. While each subdivision of Policy and Public Affairs has a distinct purpose and function, they are all primarily focused on interacting directly with and providing services to New Mexicans, from legislators and business owners to students and victims of violent crime.

Chief of Staff for Policy and Public Affairs Sonya Carrasco-Trujillo oversees the three divisions of Policy and Public Affairs.

Under the leadership of Ms. Carrasco-Trujillo, the Division has successfully launched a streamlined Consumer and Family Advocacy Services unit that works to address the needs of all constituents and consumers in a timely and sensitive manner. Additionally, Ms. Carrasco-Trujillo has guided the Division's education and outreach efforts, which are focused on connecting with and empowering New Mexicans from all walks of life. Among the policy achievements of the Division undertaken during 2016 is an ongoing project focusing on working with the Department of Higher Education and public institutions of higher learning across New Mexico to address issues around sexual violence on college campuses. The Division will host a series of Conscious Campus events during the 2017 spring semester and will continue to work with schools in order to make campuses safer and more responsive in the wake of such tragic events.

The Victim Services Division is staffed by two full-time victim advocates who work diligently to assist victims of enumerated crimes as they navigate the criminal legal process. In addition to providing support for victims during the time their case is active, the Victim Services Division relies on a network of service providers across the state to whom victims may be referred for services that fall outside the scope of what the Office of the Attorney General can provide.

Victim Services 2016 Accomplishments:

- **Took 159 intake calls from victims who were not part of active OAG cases, but who were seeking information, referrals, or services**
- **Made 203 notifications to victims related to cases in the New Mexico Court of Appeals**
- **Attended 16 adult sex offender parole board hearings on behalf of victims and their families**
- **Assisted 44 victims or victims' family members in cases being prosecuted by the OAG**

Throughout 2016 victim advocates provide assistance and notification to victims/survivors of violent crime, including information regarding medical and crisis intervention services and other case information. Furthermore, victim advocates provided notification and assistance to victims and their families, during the often lengthy appellate process, including notification of appeal status and accompaniment.

The Community Outreach Division focuses primarily on engaging constituents of all ages in a variety of educational settings. The Community Outreach team delivers free presentations to students and community groups across New Mexico on topics including cyber safety/cyber bullying, financial literacy, suicide awareness, and teen dating violence awareness.



Attorney General Balderas talks to Hero Junior Police Academy attendees about cyber safety

Community Outreach 2016 Accomplishments:

- **Delivered 155 presentations on cyber safety in 10 counties, reaching 23,894 attendees**
- **Delivered 135 presentations on teen dating violence prevention in 12 counties, reaching 7,950 attendees**
- **Delivered 19 presentations on financial literacy in 4 counties, reaching 951 attendees**

- **Delivered 20 presentations on silver cyber safety and consumer protection (specifically for retired and elderly populations) in 5 counties, reaching 660 attendees**
- **Delivered 17 presentations on healthy minds/suicide awareness in 5 counties, reaching 3,163 attendees**

In 2017, the Community Outreach Division will continue to offer in-person trainings and will focus on building a digital strategy and platform, enabling it to reach more New Mexicans than ever before.

The Consumer and Family Advocacy Services Division was created as part the exciting merger undertaken in May of 2016 to increase the efficiency with which the OAG responds to and protects consumers. The Attorney General merged consumer protection advocates and constituent affairs managers into the Consumer and Family Advocacy Services Division (CFASD). The new Division is focused on handling consumer and constituent complaints in a timely manner, and supporting the consumer-focused educational outreach efforts put forward by the OAG.

CFASD advocates are committed to making first contact with consumers and constituents who reach out to the office within three business days, with a goal of reaching full resolution and closing a case in no more than 60 calendar days. To date, the Division has been very successful in meeting these benchmarks.

Consumer and Family Advocacy 2016 Accomplishments:

- **Handled 6,709 constituent or consumer complaints**
- **Recovered \$1,226,435.92 for New Mexico consumers**
- **Worked with the Community Outreach Division to develop and deliver three consumer protection presentations pertaining to buying used cars responsibly**

APPENDIX A



Attorney General Of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

January 22, 2016

Senator Gerald Ortiz y Pino
New Mexico State Senator
400 12th NW
Albuquerque, NM 87102

Re: Opinion Request – Liens on Charter School Improvements

Dear Senator Ortiz y Pino:

You requested our advice regarding liens on school improvements described in the Charter School Act (“Act”), NMSA 1978, Section 22-26A-5(H) (2015). Specifically, you asked whether the lien on school improvements described in Section 22-26A-5(H) takes first priority over all other liens on the real property, regardless of the date that a school or district makes a qualifying capital improvement on the property. Additionally, you asked whether Section 22-26-5(H) violates the Anti-Donation Clause of Article IX, Section 14, or Article IV, Section 31 of the New Mexico Constitution. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that there is no express first priority provision under Section 22-26A-5(H). We further conclude that Section 22-26A-5(H) does not violate the Anti-Donation Clause nor Article IV, Section 31 of the New Mexico Constitution.

According to your letter, the New Mexico Public Education Department (“NMPED”) has recently changed its interpretation of Section 22-26A-5(H) to require that all lease purchase agreements (“LPAs”) include language granting these liens first priority. It is presumed that NMPED’s position is based on an assumption that all four of the following events will occur: (1) after execution of LPA, the school has made capital improvements on the property using public funds; (2) the LPA is terminated prior to title transferring to the school; (3) the school elects to foreclose on its lien; and (4) the sale proceeds are not sufficient to pay all the superior liens *and* to recover the value of additional improvements made by the school. Thus, NMPED contends that the added value of the capital improvements constitutes an excess benefit to the lessor of the property.

Section 22-26A-5(H) of the Act reads as follows:

Lease purchase arrangements: ...

shall provide that, if state, school district or charter school funds, above those required for lease payments, are used to construct or acquire improvements, the cost of the improvements shall constitute a lien on the real estate in favor of the school district or charter school and then, if the lease purchase arrangement is terminated prior to the final payment and the release of the security interest or the transfer of title at the option of the school district or charter school:

(1) the school district or charter school may foreclose on the real estate lien; or

(2) the current market value of the building or other real property at the time of termination, as determined by an independent appraisal certified by the taxation and revenue department, in excess of the outstanding principal due under the lease purchase arrangement shall be paid to the school district or charter school....

Emphasis added.

A plain reading of the statute reveals no mention of the priority of school improvement liens. In giving effect to a statute, “the text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § ~~12-2A-19~~ (1997). When a statute is silent on a matter, the law must give effect to the plain meaning of the statute’s text. *Id.* Unless an intent to do otherwise is clearly manifested, a statute is to be read and given effect as written and words used in that statute are to be given their ordinary and usual meanings. *See Waggoner v. Town of Mesilla*, 2011-NMCA-041, ¶ 12, 149 N.M. 596.

The legislature, in drafting the CSA, did not choose to include a priority provision in Section 22-26A-5(H). The legislature has included priority provisions in other lien statutes, which clearly indicates an intent to include priority provisions. *See e.g.*, NMSA 1978, Section 3-51-24 (1965) (municipal parking liens); NMSA 1978, Section 73-16-16 (1927) (conservancy district liens); NMSA 1978, Section 7-38-48 (2003) (property tax liens). It is contrary to long established statutory construction concepts to imply a priority provision when none is stated in the statute.

Section 22-26A-5(H) provisions with regard to the lien’s priority should be interpreted by its plain language. There is no express first priority provision in the plain language of the statute. Therefore, the lien on school improvements does not take first priority over all other liens on the real property.

The Anti-Donation Clause provides in pertinent part that “neither the state, nor any county, school district, or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit, or make and donation to or in aid of any person, association or public or private corporation . . .” N.M. Const. Art. IX, §14. New Mexico Courts have found a violation of the Anti-Donation Clause when a state or local government has made outright gifts of money or property, or have effectively relieved private persons and entities from obligations that

would otherwise have to be met. *See, Chronis v. State ex rel. Rodriguez*, 1983-NMSC-081, 100 N.M. 342; *City of Clovis v. Southwestern Pub. Serv. Co.*, 1945-NMSC-030, 49 N.M. 270. Thus, an Anti-Donation Clause violation occurs when there has been an outright gift of money or property to a private entity with no exchange of adequate consideration.

Under the facts presented, when a charter school enters into a LPA, there is no investment to private landlords, there is no assumption of the private landlord's obligations, no gift or subsidy given to the landlord, and the NMPED is in complete control of the allocation of money used for school improvements. In entering into an LPA, a school receives the lion's share of the exchanged consideration in that the Act imposes terms that significantly favor the school. For example, the school is not required to purchase the property and has no obligation to continue the lease from year to year, while the owner is bound to continue in the lease agreement for a period of up to thirty years. Section 22-26A-5. Consideration is also to be found in the fact that the school will have the benefit and value of the use of any improvements for the life of the LPA, to better provide education to New Mexico schoolchildren.

Moreover, because the charter school is entitled to either foreclose on the lien or obtain payment by the property owner of the fair market value of the property less the outstanding principal due under the lease, the charter school always has an option of realizing the fair market value of the capital. Sections 22-26A-5(H)(1) and (2). Whether the value of the school improvements reverts to the landlord is within the school's control. Therefore, a speculative benefit to a private entity is not sufficient to find a violation of the Anti-Donation Clause when governmental services to the public are facilitated or when governmental functions are accomplished.

With regards to the constitutionality of Section 22-26A-5(H), the law presumes that the legislature kept within the bounds fixed by the state's constitution when enacting a statute. *See, State ex rel. Pub. Emp. Ret. Assoc. v. Longacre*, 2002-NMSC-033, ¶ 10, 133 N.M. 20. Whenever possible, statutes must be construed as consistent with the constitution giving effect to the statute, with all doubts resolved in favor of constitutionality. *See City of Raton v. Sproule*, 1967-NMSC-141, ¶ 9, 78 N.M. 138 (a statute will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the constitution in enacting the challenged legislation).

Article IV, Section 31 of the New Mexico Constitution provides that "[N]o appropriation shall be made for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community, not under the absolute control of the state..." Our understanding is that the legislature does not make appropriations directly to charter schools and school districts. Accordingly, we do not believe that the prohibition in Article IV, Section 31 applies to lease purchase arrangements authorized under Section 22-26A-5.

In cases addressing when a statutory landlord's lien attaches, the New Mexico Supreme Court and Court of Appeals determined that the landlord's lien attaches at the time the tenant signed the lease. *See e.g., Chessport Millworks Inc. v. Solie*, 1974-NMCA-036, ¶ 14, 86 N.M. 265 (Landlord's lien attached on date that lease period began and was superior to subsequently perfected security interest on property); *Gantham v. First Am. Indian Land, Inc.*, 1965-NMSC-003, ¶ 7, 74 N.M. 729 (Landlord's statutory lien attached at beginning of tenancy for rental due or to become due under

Senator Gerald Ortiz y Pino
January 20, 2016
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terms of lease and had priority over execution lien arising out of judgment recovered against tenants during lease.). In the instance of a landlord's lien, the lien arises by virtue of the tenant acquiring an interest under the lease. The lien attaches upon the tenant's interest in the lease commencing.

Because Section 22-26A-5(H) contemplates that the lien arises "if" capital improvements are made, a school improvement lien arises at the time the funds are secured. The lien attaches on the date the charter school has expended monies to make improvements on the property.

As to priority date of the lien, New Mexico law looks first to the language of the statute creating the lien itself. However, when the statute is silent, the common law doctrine of "first in time, first in right" controls the priorities between the parties. *Kuemmerle v. United New Mexico Bank at Roswell, N.A.*, 1992-NMSC-028, 113 N.M. 677. Therefore, the lien takes priority from the date it is filed or other act done, and it does not take precedence over a prior recorded mortgage or lien, unless so provided by statute. *Eccles v. Will*, 1918-NMSC-020, ¶ 3, 23 N.M. 623. In a scenario under Section 22-26A-5(H), the "other act done" that creates a lien and establishes its priority under the statute is the expenditure of monies. At this time, the lien both attaches and vests with the requisite priority, taken in consideration with pre-existing liens. Only the legislature can enact a law to change this common law doctrine. The pertinent statute cannot be amended by the adoption of an alternate policy.

To summarize, we conclude that the lien on school improvements does not take first priority over all other liens on the real property. A speculative, future and uncertain contingency cannot be the basis for an Anti-Donation Clause violation, especially when adequate consideration is exchanged in the agreement. Additionally, Section 22-26A-5(H) does not conflict with Article IV, Section 31 of the New Mexico Constitution. Of course, in all instances where a charter school enters into a lease purchase arrangement with a private lessor as authorized under Section 22-26A-5(H), the focus should remain on the best interest of students and the educational mission of the school rather than on the personal financial interests of the parties to the arrangement. Upon receiving an appropriation of public funds, administrators and fiduciary should collaborate with proper oversight authority to mitigate waste, fraud and abuse.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,


for Peter Auh
Deputy Attorney General



Attorney General of New Mexico

HECTOR H. BALDERAS
Attorney General

March 14, 2016

The Honorable John Sanchez
Lieutenant Governor
Office of the Governor
State Capitol, Room 417
Santa Fe, NM 87501

Re: Opinion Request – Lieutenant Governor’s Role While Serving as Acting Governor

Dear Lieutenant Governor Sanchez:

You have requested an Attorney General’s Opinion concerning whether the lieutenant governor may preside over the New Mexico Senate when acting as governor. For the reasons explained below, we conclude that the lieutenant governor cannot preside over the senate when acting as governor.

The New Mexico Constitution charges the lieutenant governor with the duty of presiding over the senate. *See* N.M. Const. art. V, § 8¹; N.M. Const. art. IV, § 8². In the governor’s absence, the constitution provides that the lieutenant governor “shall act as governor, with all the powers, duties and emoluments of that office” until the governor’s return. N.M. Const. art. V, § 7.

You ask whether the lieutenant governor can simultaneously fulfill both of these constitutional duties, which raises an issue of constitutional interpretation. The rules of statutory construction “apply equally” to an interpretation of the constitution. *State v. Boyse*, 2013-NMSC-024, ¶ 8, 303 P.3d 830 (internal quotation marks and citation omitted). Under the rules of constitutional construction, “constitutional provisions should be read together and harmonized in their application if possible.” *Denish v. Johnson*, 1996-NMSC-005, ¶ 32, 121 N.M. 280, 910 P.2d 914 (internal quotation marks and citation omitted); *see also In re Generic Investigation into Cable Television*

¹ Article V, Section 8 of the New Mexico Constitution states: “The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided.”

² Article IV, Section 8 of the New Mexico Constitution states, in relevant part: “The senate shall be called to order in the hall of the senate by the lieutenant governor. The senate shall elect a president pro tempore who shall preside in the absence of the lieutenant governor and shall serve until the next session of the legislature.”

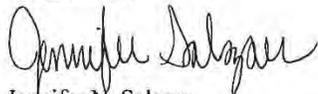
Lt. Governor Sanchez
March 14, 2016
Page 2 of 2

Servs., 1985-NMSC-087, ¶ 13, 103 N.M. 345, 707 P.2d 1155 (“The provisions of the Constitution should not be considered in isolation, but rather should be construed as a whole.”).

Under the state’s constitution, the lieutenant governor is designated to preside over the senate. *See* N.M. Const. art. V, § 8. In addition to this duty, Article V, Section 7 provides for the lieutenant governor to “act as governor” in the governor’s absence. Article IV, Section 8 of the New Mexico Constitution allows for the president pro tempore to preside over the senate in the absence of the lieutenant governor. *See* N.M. Const. art. IV, § 8 (“The senate shall elect a president pro tempore who shall preside in the absence of the lieutenant governor and shall serve until the next session of the legislature.”). By including this provision, the framers contemplated a situation in which the lieutenant governor would not be able to preside over the senate. Thus, applying the rules of statutory construction to harmonize these provisions, the lieutenant governor may either act as the lieutenant governor, or the governor, but not both. *See* Wash. Att’y Gen. Op. 1951-53 No. 469 (1953) (explaining that the lieutenant governor “assumes all of the duties, powers, and prerogatives of the governor while he so acts” but cannot have “greater power or duty than that of [the] qualified governor”).

For these reasons, we conclude that the lieutenant governor cannot preside over the senate when acting as governor. You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Respectfully,



Jennifer N. Salazar
Assistant Attorney General

cc: Mark Van Dyke, Chief of Staff, Office of the Lt. Governor

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

TANIA MAESTAS
Deputy of Civil Affairs

SHARON PINO
Deputy of Criminal Affairs

CARLA MARTINEZ
Chief of Staff for Operations

SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

April 29, 2016

The Honorable Mary Kay Papen
New Mexico State Senator
904 Conway Avenue
Las Cruces, NM 88005

Re: Opinion Request - Valuation of In-Kind Services

Dear Senator Papen:

You have requested additional guidance from the Office of the Attorney General regarding a 2011 Attorney General advisory letter, which addressed your inquiry into the legality of leasing county-owned property at below market rates to private organizations under the Anti-Donation Clause of Article IX, Section 14 of the New Mexico Constitution. *See* Letter from Zachary Shandler, Assistant Attorney General, to Senator Mary Kay Papen (Mar. 30, 2011) (“2011 AG Advisory Letter”). You now seek clarification and guidance pertaining to the valuation of in-kind services – specifically, “the extent to which the value of services provided by nonprofit health and social services organizations may be taken into account as in-kind contributions toward the value of space provided to them by units of local government . . . [and] advice as to the establishment of guidelines for the valuation of such in-kind contributions.” As discussed in more detail below, we conclude that the value of services can be consideration for the lease of property, in whole or in part, as long as the total consideration is reasonably equivalent to the value of the lease.

An exchange in which services rendered by a private nonprofit are treated as consideration for property leased from a unit of local government implicates the Anti-Donation Clause, which provides in relevant part, “Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation....” N.M. Const. art. IX, § 14. A “donation” for purposes of the Anti-Donation Clause, is “a ‘gift,’ an allocation or appropriation of something of value, without consideration.” *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920 (1956).

TELEPHONE: (505) 827-6000 • FAX: (505) 827-5826 • www.nmag.gov
MAILING ADDRESS: P.O. BOX 1508 • SANTA FE, NEW MEXICO 87504-1508
STREET ADDRESS: 408 GALISTEO STREET • SANTA FE, NEW MEXICO 87501

The Anti-Donation Clause does not preclude the use of services as adequate consideration in exchange for the lease of government property, and the legislature has expressly recognized the use of services as consideration in otherwise lawful property transactions with government entities. For example, in the context of the use of county buildings by nonprofit organizations with a history of service to sick and indigent persons, the state legislature has provided “that consideration be extended as real value recognition of the indispensable part these services contribute to the fabric of life in New Mexico.” NMSA 1978, § 4-38-13.2 (2005). More generally, the New Mexico State Board of Finance rules governing real property transactions authorized by statute expressly allow state agencies and local public bodies, including counties, to accept services as consideration for the lease of their real property. *See* 1.5.23.7(C), 1.5.23.10(B)(6) NMAC.

As noted in the 2011 AG Advisory Letter, in-kind services may be valued as complete consideration in exchange for space provided by units of local government, so long as the services are valued as adequate consideration for the value of the property. The State Board of Finance rules referenced above define “consideration” as “*something which is of a value at least equal to the real property interest being conveyed*, including but not limited to cash, another piece of real estate, *services*, or other form of compensation” (emphasis added). 1.5.23.7(C) NMAC. *See also* 1.5.23.10(C) NMAC (requiring rent or other consideration from a private entity at “fair market value,” with limited exceptions).

Absent any applicable law, regulation or policy to the contrary, a county or other unit of local government is not bound to any particular method of valuing services, as long as the results are reasonable and verifiable. An example of a market-based approach to valuing services is cost-based valuation – determining the real value of services based on the operating expenses of the nonprofit. A unit of local government may also value services by calculating the cost it would bear in providing identical services to those provided by the nonprofit in question. Alternatively, a unit of local government may utilize a value-based approach, allowing a non-profit to reasonably demonstrate the value of the services it provides to the community. The value claimed by the non-profit may then be compared to similarly situated service providers in order to verify the value of the services. While our office deems such methods of valuation appropriate under the law, these are not necessarily the only acceptable methods of valuation.

If we may be of further assistance, please let us know. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



James J. Torres
Assistant Attorney General

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

TANIA MAESTAS
Deputy of Civil Affairs

SHARON PINO
Deputy of Criminal Affairs

CARLA MARTINEZ
Chief of Staff for Operations

SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

May 17, 2016

The Honorable Benny Shendo, Jr.
New Mexico State Senator
New Mexico State Senate
PO Box 634
Jemez Pueblo, NM 87024

Re: Opinion Request – Sandoval County Treasurer

Dear Senator Shendo:

You requested our advice regarding the role, delegation of authority, and responsibility between the Sandoval County Treasurer and the Sandoval County Commissioners acting as the Board of Finance, as it relates to duties, contractors/agents, the investment policy, and investment committee. We have reviewed the request submitted on behalf of Sandoval Country Treasurer, Laura Montoya. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that a county may not appoint a contractor to eliminate the authority or to perform the services of the County Treasurer or the Board of Finance regarding investments.

In her letter, Treasurer Montoya expresses concern that Sandoval County Commissioners, acting as the Board of Finance ("Board"), have hired a contractor to formulate an investment policy for the County. It is our understanding that in 2013, a contractor was hired by the Board to be the financial advisor to Treasurer Montoya. In June 2014, the same contractor was hired again by the County Commissioners to advise the Board on financial matters. As stated in the financial advisor's contract, the contractor will:

"Conduct and complete an independent review and analysis of county investments, investment strategies . . . to include any recommended changes to the County's investment policy; perform an independent review of statements received from the Treasurer's Office on investment activities, earnings and the value of the investment portfolio and recommend investment opportunities in accordance to the county's investment policy and submit monthly reports; on a quarterly basis submit a report to the Board of Finance on current county investment and deposit portfolio, performance, and provide advice on developing an investment approach that is consistent with county's approved investment policy; provide the board of finance with recommendations for amendments and updates to the County Investment policy."

TELEPHONE: (505) 827-6000 • FAX: (505) 827-5826 • www.nmag.gov
MAILING ADDRESS: P.O. BOX 1508 • SANTA FE, NEW MEXICO 87504-1508
STREET ADDRESS: 408 GALISTEO STREET • SANTA FE, NEW MEXICO 87501

The Honorable Benny Shendo, Jr.
May 17, 2016
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Therefore, the primary issue is whether the duties contractually assigned to the financial advisor usurp those statutorily delegated to either the County Treasurer or the Board.

The County Treasurer is authorized with investment power, by and with the “advice and consent” of the County Board of Finance. NMSA 1978, §§ 6-10-8 and 6-10-10. In *Board of Cnty. Comm’rs of Bernalillo County v. Padilla*, 1990-NMCA-125, 111 N.M. 278, the New Mexico Court of Appeals analyzed a similar issue. In *Padilla*, the Court reviewed whether the County Commission, as the designated Board of Finance, could determine investment policy of the County and direct investment of County funds. The Court of Appeals held that while the County Treasurer determines how to deposit and invest county funds, such decision must be approved by the County Board of Finance. *Id.* ¶ 34. Thus, both the Treasurer and the Board of Finance must agree on any investment. *Id.* ¶ 35. The Court further found no statutory prohibition against delegation to the Treasurer by the Board of Finance of specific investment decision-making. *Id.* ¶ 36. Thus, the Board may adopt a policy and permit the Treasurer to make investment decisions that conform to the policy.

The Local Government Division of the Department of Finance and Administration promulgates the procedures for county treasurers, pursuant to the authority of NMSA 1978, Sections 6-6-2 and 6-6-3. Those procedures require a county board of finance to adopt an investment policy and permit the treasurer to make investment decisions that conform to the policy. 3.6.50.8(D) NMAC.

In a prior Attorney General’s Opinion, our office reviewed the authority of the state treasurer to make specified investments with the advice and consent of the state board of finance. *See* N.M. Att’y Gen. Op. 14-05 (2014). In that opinion, our office found that, like the county board of finance in *Padilla*, the state board of finance has only the power of approval or denial over the state treasurer’s investments, rather than the exclusive power of investment. We further concluded that the “advice and consent” requirement allows the board of finance to oversee investment decisions of the treasurer. Thus, neither entity has the sole policy-making authority over county investments. *Padilla*, 1990-NMCA-125, ¶ 35.

The Office of the Attorney General also previously determined that a county commission may not supervise, dictate, or otherwise interfere with the substantive duties of employees hired by the County Treasurer. *See* N.M. Att’y Gen. Op. 87-18 (1987). Further, a board of county commissioners does not unlawfully infringe upon a county treasurer’s prerogatives unless it undermines the treasurer’s ability to perform the duties of the office by means that are not granted to the board by statute. *Padilla*, 1990-NMCA-125, ¶ 17. A board of county commissioners is prohibited from employing and paying a person to perform services that the law requires be performed by other county officials. *See e.g., Fancher v. Board of Comm’rs*, 1921-NMSC-039, 28 N.M. 179, 210 P. 237 (1921) (county commission could not employ private persons to perform duties imposed by statute on county clerk and state tax commission); *State ex rel. Miera v. Field*, 24 N.M. 168, 172 P. 1136 (1918) (finding ultra vires a contract between county board and person employed to perform duties required of county assessor). A county commission may not use its authority to effectively control the tasks and responsibilities of their elected officials’ employees. *See* N.M. Att’y Gen. Op. 90-05 (1990).

Thus, the general rule is that county commissioners are without power to employ a person to perform acts that are part of the official duties imposed by statute on another county or state officer, or where the

The Honorable Benny Shendo, Jr.
May 17, 2016
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matter of employment of persons is expressly and fully covered by statute. New Mexico courts have confirmed that a board of county commissioners may delegate its "advice and consent" authority to the county treasurer through the adoption of a county investment policy. Yet, it may not delegate its statutory "advice and consent" authority to a contractor. As discussed above, the "advice and consent" powers found in NMSA 1978, Section 6-10-8, require that the county treasurer determine how to deposit and invest county funds.

The Sandoval County Commission, acting as Board of Finance has no power to modify the county treasurer's decision without the treasurer's concurrence. The Board does not have the power to eliminate the authority of the County Treasurer in county investment decisions.¹ Therefore, the Board cannot contract a financial advisor to perform acts which are part of the official duties imposed by statute on the County Treasurer. However, the Board may contract with a financial advisor to help discharge the functions of the county; thus, to aid in the "advice and consent" provided to the County Treasurer.

Regarding the composition of an investment committee, it has been established that the Board has the authority to set policy for managing all County investments and distribution of funds. The Sandoval County Investment Committee was created with the adoption of the December 10, 2015, Investment Policy. The investment committee is comprised of the County Treasurer, County Manager, County Finance Director, a member of the County Commission, and a resident of the county chosen by the County Treasurer. The purpose of the investment committee is to "make recommendations regarding the investment policy and related matters." As written, this body has no power to bind either the Board of Finance in managing county investments or the County Treasurer in investing county funds. This body is merely advisory.

The fact that the investment committee is advisory, it is our opinion that the composition of the investment committee can be selected at the discretion of the Board of Finance. This authority comes from the broad authority granted to the Board to set policy and manage all of the county investments. Reiterating N.M. Att'y Gen. Op. 62-71 (1962), "Boards of county commissioners have exclusive authority and responsibility to act as county boards of finance, the only limitations upon their authority being imposed by statute." Thus, the advisory investment committee is established to aid in the discharge of the Board of Finance's statutory grant of authority. This being said, the investment committee can only recommend or advise the Board of Finance; the investment committee can in no way usurp the County Treasurer's statutory authority in the deposit and investment of county funds.

In summary, and to specifically address the questions presented within your request, we conclude that a contractor may aid the County Commissioners, acting as the Board of Finance, in the formulation of an investment policy. While we conclude that the Board has the authority to hire a financial advisor, this contractor may not be delegated the statutory authority to supervise, demand or oversee the roles and responsibilities of the Treasurer. The Board may also designate an investment committee under written investment policies established by the Board.

¹ Further clarifying the power, the NMAG stated, "the advice and consent requirement found in NMSA 1978, Section 6-10-10, constricts the treasurer's ability to invest public monies only to the extent that the state treasurer must first obtain the advice and consent of the Board of Finance." N.M. Att'y Gen. Op. 14-05 (2014).

The Honorable Benny Shendo, Jr.
May 17, 2016
Page 4

Promulgation of an investment policy must be made in compliance with the Open Meetings Act, NMSA 1978, Sections 10-15-1 to -4 (1974, as amended through 2013), upon the approval of a quorum of the County Commissioners, acting as the Board of Finance. Without such explicit approval, specific investment decision-making remains with the Board and is not delegated to the Treasurer. Therefore, unless a policy is in place, the statutory procedure found within Sections 6-10-8 and 6-10-10 regarding investment approval with the Board's "advice and consent" dictates.

Elected county officials and public bodies who fail to perform their office's duties are subject to removal, civil suit, or criminal prosecution if they violate the law. Aggrieved parties may also seek a declaratory judgment order from a district court.

You have also requested additional advice regarding permissible investments for Class A counties. These issues should be initially directed to your County Attorney. If, after consultation with your legal counsel, you are still unable to reach a decision on these matters, please feel free to contact our office for guidance.

Your request was for a formal Attorney General's Opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public.

Sincerely,



Dylan K. Lange
Assistant Attorney General

cc: Laura Montoya, Sandoval County Treasurer

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

TANIA MAESTAS
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SHARON PINO
Deputy of Criminal Affairs

CARLA MARTINEZ
Chief of Staff for Operations

SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

May 24, 2016

The Honorable Yvette Herrell
New Mexico State Representative
New Mexico House of Representatives
P.O. Box 4338
Alamogordo, NM 88311

Re: Opinion Request – Necessity of a Real Estate Broker’s License to Auction Real Estate

Dear Representative Herrell:

You have requested our opinion regarding the applicability of the licensing requirements contained in the Real Estate Brokers and Salesmen Act, NMSA 1978, Section 61-29-1 to -29 (1959, as amended through 2013) (hereinafter “the Act”) to persons conducting auctions of real property in New Mexico. Specifically, you have asked: (1) whether a person hired by a real estate owner to conduct a sale by auction of that real estate must hold a valid broker’s license issued by the New Mexico Real Estate Commission (“Commission”); (2) whether a person hired by a licensed broker to conduct an auction sale of real estate must hold a valid broker’s license issued by the Commission, and; (3) the applicability of 16.61.32.8 NMAC to advertisements of real estate auctions. Based on our examination of the relevant New Mexico statutes, case law, regulations and opinions, as well as on the information available to us at this time, we first conclude that a person hired by the owner of real estate to auction that real estate must hold a broker’s license. Second, we conclude that a person hired by and working under the direction of a New Mexico-licensed real estate broker to auction real estate in New Mexico must hold a broker’s license. Finally, we conclude that the Commission’s regulation governing advertisements, 16.61.32.8 NMAC, applies to advertisements of real estate auctions to the same extent it applies to other real estate sales and services performed by licensed brokers.

Requirement of Licensure of Associate Brokers and Qualifying Brokers under the Act

The very first section of the Act provides that “[i]t is unlawful for a person to engage in the business or act in the capacity of real estate associate broker or qualifying broker within New Mexico without a license issued by the [C]ommission.” NMSA 1978, § 61-29-1. In order to

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determine if a person is engaging in the business or acting in the capacity of an associate broker or qualified broker, we must look to the definition of those two terms provided in the Act. *See* Section 61-29-2(A)(3), (11). The Act provides that “associate broker” means:

[A] person who, for compensation or other valuable consideration, is associated with or engaged under contract by a qualifying broker to carry on the qualifying broker's business as a whole or partial vocation, and:

(a) lists, sells or offers to sell real estate; buys or offers to buy real estate; or negotiates the purchase, sale or exchange of real estate or options on real estate;

(b) is engaged in managing property for others;

(c) *leases, rents or auctions or offers to lease, rent or auction real estate;*

(d) advertises or makes any representation as being engaged in the business of buying, selling, exchanging, renting, leasing, auctioning or dealing with options on real estate for others as a whole or partial vocation; or

(e) engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract under which the qualifying broker undertakes primarily to promote the sale of real estate through its listing in a publication issued primarily for that purpose or for the purpose of referral of information concerning real estate to other qualifying brokers or associate brokers.

Section 61-29-2(A)(3) (emphasis added).

In corresponding fashion, the Act defines “qualifying broker” to mean:

[A] licensed real estate broker who has qualified a proprietorship, corporation, partnership or association to do business as a real estate brokerage in the state of New Mexico, who discharges the responsibilities specific to a qualifying broker as defined by the commission and who for compensation or other consideration from another:

(a) lists, sells or offers to sell real estate; buys or offers to buy real estate; or negotiates the purchase, sale or exchange of real estate or options on real estate;

(b) is engaged in managing property for others;

(c) *leases, rents or auctions or offers to lease, rent or auction real estate;*

(d) advertises or makes any representation as being engaged in the business of buying, selling, exchanging, renting, leasing, auctioning or dealing with options on real estate for others as a whole or partial vocation; or

(e) engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract under which the qualifying broker undertakes primarily to promote the sale of real estate through its listing in

a publication issued primarily for that purpose or for the purpose of referral of information concerning real estate to other qualifying brokers or associate brokers.

Section 61-29-2(A)(11) (emphasis added).

Both definitions enumerate specific real estate-related conduct or activities that, when performed for another and for compensation, bring a person within the definition of associate or qualified broker for purposes of the Act. Significantly, both definitions specifically identify auctions or the offer to auction real estate as conduct that brings one within these definitions. See Section 61-29-2(A)(3)(c), (A)(11)(c). In addition, both definitions reference the advertising of real estate auctions. See Section 61-29-2(A)(3)(d), (11)(d).

Accordingly, we interpret Sections 61-29-1 and -2 to express the legislature's intent that persons not otherwise exempt from the Act¹ who auction or offer for auction the real estate of another for compensation are acting as associate or qualifying brokers and must possess a broker's license issued by the Commission. We also conclude that the requirement for licensure under the Act applies regardless of whether the auctioneer is hired by the owner of the property to be auctioned, or by a licensed broker assisting the owner in the sale of the property.

While we find no New Mexico cases that directly address the question of the applicability of the Act to persons who auction or offer to auction the real estate of others for a fee, our conclusion is consistent with judicial interpretations of the Act and prior Attorney General Opinions. The Court of Appeals, interpreting an earlier version of the Act, has recognized generally that "[a] real estate broker's or salesperson's license is required for a variety of activities, including buying, selling, exchanging, renting, leasing, auctioning, or dealing with options in real estate." *Garcia v. New Mexico Real Estate Comm'n*, 1989-NMCA-034, ¶ 7, 108 N.M. 591. The rationale for such a requirement has been clearly stated by the New Mexico Supreme Court:

The Legislature intends to protect the public by requiring the New Mexico Real Estate Commission to evaluate the competence and moral character of persons in the real estate business through licensing and examination requirements. The Legislature ensures the furtherance of its purposes by prohibiting unlicensed persons acting as real estate brokers from maintaining an action to recover a commission.

Watts v. Andrews, 1982-NMSC-080, ¶ 11; 98 N.M. 404, 407 (internal citations omitted).

¹ The Act contains express exemptions, which, if applicable, operate to negate a requirement for licensure for certain real estate transactions, including auctions. See, e.g., Section 61-29-2(C)(5) (attorneys acting in the performance of their duties as an attorney); Section 61-29-2(C)(6) (persons acting in their capacity as a receiver, bankruptcy trustee, or estate executor); Section 61-29-2(C)(7) (salaried government employees acting within the scope of their employment).

The Honorable Yvette Herrell
May 24, 2016
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Courts in other jurisdictions, ruling in the context of their states' real estate broker licensing statutes, have generally found the auctioning of real estate to require a broker's license, unless expressly exempted by statute. *See, e.g., Younkin v. Bureau of Prof'l & Occupational Affairs, State Real Estate Comm'n*, 774 A.2d 1281, 1284-85 (Pa. Commw. Ct. 2001) (noting the Pennsylvania statute's recognition of an overlap between the work of a broker and an auctioneer in the profession of selling real estate); *Adair v. Alabama Real Estate Comm'n*, 53 Ala. App. 621, 624, 303 So. 2d 119, 122 (Civ. App. 1974) (holding only licensed real estate brokers could auction real property).

Commission Rule Governing Advertisements Applies to Advertisements of Real Estate Auctions

The Commission has adopted a rule governing real estate advertising. *See* 16.61.32.8 NMAC. This rule requires that all real estate advertising "be a true and factual representation of the property and real estate services being advertised. . . ." 16.61.32.8(A) NMAC. The rule also requires qualified brokers and associate brokers advertising real property of others for sale to include in such advertisements the trade name and current brokerage office phone number. 16.61.32.8(B) and (C) NMAC. Given our conclusion stated above that, unless exempt from the Act, auctioning or offering for auction the real estate of another for compensation is a real estate service that requires a broker's license, it follows that advertisements regarding the sale of real estate by auction come under this rule.

In sum, it is our opinion that a person who auctions or offers for auction the real estate of another person for compensation is acting as associate or qualifying broker under the Act and must possess a broker's license issued by the Commission, regardless of whether the auctioneer is hired by the seller or by a licensed broker. It is also our opinion that because 16.61.32.8 NMAC applies to advertisements by associate brokers and qualifying brokers for the sale of real estate, it necessarily applies to advertisements by persons who auction the real property of others in New Mexico.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



Richard B. Word
Assistant Attorney General

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

TANIA MAESTAS
Deputy of Civil Affairs

SHARON PINO
Deputy of Criminal Affairs

CARLA MARTINEZ
Chief of Staff for Operations

SONYA CARRASCO-TRUJILLO
Chief of Staff for Policy & Public Affairs

August 5, 2016

The Honorable Luciano "Lucky" Varela
New Mexico State Representative
1709 Callejon Zenaida
Santa Fe, NM 87501

Re: Opinion Request – Access to Public Waters on Private Property

Dear Representative Varela:

You requested our advice regarding the constitutionality of Senate Bill 226, which was enacted in 2015 and amended state law governing hunting and fishing on private property. *See* S.B. 226, 52nd Leg., 1st Sess. (2015) ("SB 226"), codified at NMSA 1978, § 17-4-6 (2015). SB 226 added a prohibition against accessing private property through public water or accessing public water through private property without the property owner's consent. *Id.* § 17-4-6(C). As discussed below, based on the applicable constitutional and statutory provisions, case law and previous Attorney General opinions, we conclude that SB 226 is constitutional, provided it is interpreted to allow the use of streams and other public water that are accessible without trespassing on private property for fishing and other recreational activities.

SB 226 amended Section 17-4-6 to provide, in pertinent part:

No person engaged in hunting, fishing, trapping, camping, hiking, sightseeing, the operation of watercraft or any other recreational use shall walk or wade onto private property through non-navigable public water or access public water via private property unless the private property owner or lessee or person in control of private lands has expressly consented in writing.

NMSA 1978, § 17-4-6(C).

Because it purports to regulate the use of public waters, the amendment implicates Article XVI, Section 2 of the New Mexico Constitution, which states:

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The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.

See also NMSA 1978, § 72-1-1 (1941) (“[a]ll the natural waters flowing in streams or watercourses, whether such be perennial or torrential..., belong to the public and are subject to appropriation for beneficial use”).

In a 2014 opinion, the Office of Attorney General addressed the constitutional right to use public streams. *See* N.M. Att’y Gen. Op. No. 14-04 (2014) (“AG Op. No. 14-04”). The opinion’s focus was on the right to use public streams flowing through private property for fishing and other recreational purposes. The opinion reviewed the history of Article XVI, Section 2 and its interpretation by New Mexico courts, particularly the New Mexico Supreme Court’s interpretation in the seminal case of *State ex rel. State Game Comm’n v. Red River Valley Co.*, 1945-NMSC-034, 182 P.2d 421.

Red River involved a landowner who owned land bordering Conchas Lake and attempted to prevent members of the public from fishing in the lake from boats. The lake was accessible to the public without trespassing on private property. *See* 1945-NMSC-034, ¶ 56, 182 P.2d at 433. After an exhaustive analysis of the history and laws relating to public waters in New Mexico, the Supreme Court held that water flowing in streams and collected in the lake were public waters and subject to use by the public for fishing and recreation. According to the Court, the landowner’s ownership of land surrounding the lake or beds underlying the streams flowing into the lake did not give the landowner any special interest in the water in the lake or streams. *See* 1945-NMSC-034, ¶¶ 59, 235, 182 P.2d at 434, 463. As the Court stated, “the waters in question ... are public waters; and ... [the landowner] has no right of recreation or fishery distinct from the right of the general public.” *Id.* ¶ 59, 182 P.2d at 434.

Based on the analysis and holding in *Red River*, the 2014 Attorney General opinion concluded that the water flowing in New Mexico streams belongs to the public and even when a stream runs through private property, the property owner may not exclude the public from using water in the stream for fishing and other recreational activities. The opinion explained that “[t]he public’s right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters,” such as “walking, wading and standing in a stream in order to fish.” AG Op. No. 14-04, p. 7. Permissible incidental activities do not include trespassing on private property to gain access to public waters, *id.*, and the use of public streams running through private property is subject to state regulation to the same extent as the use of public streams on public lands, *id.* at 4, note 4.

Under the rules of statutory construction, a statute must “be construed, if possible, to ... avoid an unconstitutional, absurd or unachievable result.” NMSA 1978, § 12-2A-18(A)(3) (1997). *See also* *Benavides v. Eastern New Mexico Med. Ctr.*, 2014-NMSC-037, ¶ 43, 338 P.3d 1265, 1275 (court will adopt the construction of a statute that supports its constitutionality). Applying this principle

Representative Luciano "Lucky" Varela
August 5, 2016
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to SB 226, it must be construed consistently with Article XVI, Section 2's declaration that "the unappropriated water of every natural stream ... belong[s] to the public...." As discussed above, the New Mexico Supreme Court has construed Article XVI, Section 2 to give members of the public the right to use public water in streams and lakes for fishing and other recreational activities, even when those streams and lakes are on private property.

SB 226 precludes a person engaged in hunting or other recreational activities from "walk[ing] or wad[ing] onto private property through non-navigable public water or access public water via private property" without the written consent of the person who owns, leases or controls the private property. While Article XVI, Section 2 prohibits the legislature from limiting the public's right to use public water, that use is otherwise subject to state regulation, including laws against trespassing on private property. We believe that SB 226 appropriately regulates the use of the state's public waters, provided it is interpreted and applied only to prohibit a person, absent the required consent, from gaining access to private property from a stream or other public water and from gaining access to a stream or other public water from private property.

To state our conclusion another way, the constitution does not allow an interpretation of SB 226 that would exclude the public from using public water on or running through private property for recreational uses if the public water is accessible without trespassing on private property. In particular, the term "non-navigable" in SB 226 cannot be applied to limit the public's access to public waters. Under Article XVI, Section 2, the water of "every natural stream" in New Mexico belongs to the public, whether it is navigable or non-navigable. *See Red River*, 1945-NMSC-034, ¶¶ 35-37, 182 P.2d at 430-31 (explaining that because Art. XVI, § 2 expressly provides for public ownership of the "water of every natural stream," the "test of navigability" used in other states to determine the public character of water does not apply in New Mexico).

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



Jennie Lusk
Assistant Attorney General

cc: Tania Maestas
Deputy Attorney General of Civil Affairs

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

December 14, 2016

The Honorable Bealquin Bill Gomez
New Mexico State Representative
400 Dawson Road
La Mesa, NM 88044

Re: Opinion Request - Compensation for Depredation Caused by Game Animals

Dear Representative Gomez:

You have requested our advice regarding whether the New Mexico Department of Game and Fish ("DGF") may compensate landowners for damage to crops or property caused by elk and other game animals. In particular, you ask:

(1) Does the antidonation clause of Article IX, Section 14 of the New Mexico Constitution ("Antidonation Clause") preclude DGF from paying landowners for damage caused by game animals, such as paying or reimbursing a farmer for hay that has been consumed by a herd of elk or that is needed to feed livestock after a herd of elk has consumed the farmer's pasture?

(2) Would restricting payments to low and moderate income landowners address any barriers otherwise posed by the Antidonation Clause?

As discussed below, we conclude that the Antidonation Clause of Article IX, Section 14 of the New Mexico Constitution prohibits the DGF from paying landowners for property damage caused by game animals. If limited to low income landowners, the payments might be permissible under the "indigent" exception to the Antidonation Clause.

Background

In 2001, the legislature created the Big Game Depredation Damage Fund. NMSA 1978, § 17-3-13.4(A) (2001) (the "Fund"). Money in the Fund includes revenues received by DGF from the sale of big game depredation damage stamps. *Id.* See also NMSA 1978, § 17-3-13.3 (2001) (requiring licenses to hunt big game to include a big game depredation damage stamp). The legislation

creating the Fund directs DGF to “establish a program to correct damage to federal, state or private land caused by big game and to prevent such damage in the future.” *Id.* § 17-3-13.4(C).

DGF’s implementing regulations define “depredation” as “private property damage, including growing crops or harvested and stored crops, caused by game animals on privately owned or leasehold private land such that the damage caused results in a measurable loss of value.” 19.30.2.7(B) NMAC. Once depredation is confirmed, DGF offers “interventions” to the landowner “that are reasonable and effective, for preventing, resolving or correcting the wildlife caused damage.” 19.30.2.8(A)(2) NMAC. *See also* 19.30.2.8(C) NMAC (“[i]ntervention methods ... shall be designed to achieve fiscally responsible, reasonable, effective, and, if practical, long-term solutions to depredation on private lands”). The regulations restrict expenditures from the Big Game Depredation Damage Fund to “the procurement of goods and services intended to resolve or mitigate depredation,” and expressly state that “[d]irect compensation shall not be allowed.” 19.30.2.13(A) NMAC.

Applicable Law

In pertinent part, the Antidonation Clause provides that, with certain exceptions, the state shall not “directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation. ... N.M. Const. art. IX, § 14. A “donation” for purposes of this section has been described as “a ‘gift,’ an allocation or appropriation of something of value, without consideration.” *Village of Deming v. Hosdreg Co.*, 62 N.M. 18, 28, 303 P.2d 920 (1956). By its terms, the Antidonation Clause does not prohibit “the state ... from making provision for the care and maintenance of sick and indigent persons.” *Id.* § 14(A).

In one of the leading cases interpreting the Antidonation Clause, the New Mexico Supreme Court addressed a challenge to an appropriation to pay the state’s share of emergency hay and roughage certificates issued to livestock owners to purchase hay for their herds of livestock, in cooperation with the U.S. Department of Agriculture. *State ex rel. Mechem v. Hannah*, 1957-NMSC-065, ¶ 2, 314 P.2d 714, 715. Proponents of the appropriation contended that it was justified by the emergency conditions caused by drought, the need to preserve herds that otherwise would have to be sold into a glutted market, and the importance of the livestock industry to the economy of the state, and that “the appropriation was for a public purpose.” *Id.* at ¶ 16, 314 P.2d at 718. The Court found it significant that participation in the program was not limited to persons who were “sick or indigent” within the meaning of the Antidonation Clause. *Id.*

The Supreme Court characterized the appropriation for hay and roughage certificates as amounting to “direct grants of state money” to private persons. 1957-NMSC-065, ¶ 31, 314 P.2d at 720. The Court then analyzed the appropriation under three of its previous cases interpreting the Antidonation Clause that were “directly on point.” 1957-NMSC-065, ¶¶ 32-38, 314 P.2d at 720-21. Those cases – *Harrington v. Atteberry*, 1915-NMSC-058, 153 P. 1041, *Hutcheson v. Atherton*, 1940-NMSC-001, 99 P.2d 462, and *State ex rel. Sena v. Trujillo*, 1942-NMSC-044, 129 P.2d 329 – hold that a donation of public money to a private individual or entity violates the Antidonation Clause regardless of whether it serves a public purpose. As the Court quoted from *Trujillo*: “The constitution makes no distinction as between ‘donations,’ whether they be for a good cause or a

questionable one. It prohibits them all “ 1957-NMSC-065 at ¶ 38, 314 P.2d at 721, quoting *State ex rel. Sena v. Trujillo*, 1942-NMSC-058, ¶ 22, 129 P.2d at 333.

While the Supreme Court in *Mechem* acknowledged that the hay and roughage program “was a wonderful thing for the livestock industry” and benefitted the state’s economy, it nevertheless concluded that these incidental public benefits were not enough to change its conclusion that the appropriation was an unconstitutional donation. *See id.* at ¶¶ 33-40, 314 P.2d at 720-21. According to the Court:

The act in question attempts to give public money to private individuals in violation of article IX, section 14, of our Constitution. They are not indigents or paupers, and the money is not to be given to them to prevent their becoming such.... The fact that it was promised to maintain the foundation herds of livestock is not sufficient to save the appropriation....

Id. at ¶ 40, 314 P.2d at 721.

Permissibility of Compensation for Property Damage Caused by Game Animals

Based on the unambiguous language of the Antidonation Clause and applicable New Mexico case law, we believe there is little doubt that DGF may not use the Big Game Depredation Damage Fund to compensate private persons for damage to their property by game animals. In general, a state is not legally responsible for damage caused by game or other wildlife it regulates or protects. *See, e.g., Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (citing numerous cases holding that federal and state governments do not owe compensation for damage to private property by protected wildlife); *Moerman v. State*, 21 Cal.Rptr.2d 329 (Cal. Ct. App. 1993) (California Dep’t of Fish and Game was not liable for damage to crops and private property caused by tule elk protected by state law). Absent liability by the state, or consideration in exchange, the payments would be “direct grants of state money” to private landowners and, like the appropriation for hay and roughage certificates in *Mechem*, violate the Antidonation Clause’s prohibition against donations to private persons.¹

As discussed above, the Supreme Court in *Mechem* considered it important that payments under the hay and roughage program before it were not limited to people who were indigent or would become indigent without the payments. This suggests that if the program had been limited to people with low incomes, the Court might have found it constitutional under the Antidonation Clause’s exception for the “care and maintenance of ... indigent persons.” N.M. Const. art. IX, § 14(A). Similarly, the exception might apply to a program for making payments from the Big Game Depredation Damage Fund that was limited to low income or impoverished landowners whose

¹ Consistent with our conclusion, DGF’s current regulations, as quoted above in the text, expressly prohibit “direct compensation” for damage to private lands caused by game animals, *see* 19.30.2.13(A) NMAC. *See also* Fiscal Impact Report for H.B. 149, 52nd Leg., 2nd Sess. (2016) (not enacted) (proposed amendments permitting compensation to landowners from the Big Game Depredation Damage Fund for financial damages caused by big game could be considered a donation prohibited by the Antidonation Clause).

Representative Bealquin Bill Gomez
December 14, 2016
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property is damaged by elk and other game animals. Because the exception specifically applies to "indigent" persons, we believe the Antidonation Clause would prohibit DGF from making payments, without consideration, to middle income or other landowners who cannot reasonably be categorized as "indigent."

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,



JENNIE LUSK
Assistant Attorney General