

LFC Requester:	Mary McCoy
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**AGENCY BILL ANALYSIS
2013 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

And

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

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

Check all that apply:

Original X **Amendment**
Correction **Substitute**

Date Feb. 5, 2013
Bill No: HB 292--305

Sponsor: Y. Herrell/R.C. Martinez **Reviewing** Attorney General's Office
Short TRANSFER OF PUBLIC **Person Writing** Sarah Bond, AAG
Title: LAND ACT **Phone:** 827-7481 **Email** sbond@nmag.gov

SECTION II: FISCAL IMPACT **FOR LFC OFFICIAL PURPOSES******
AGO STAFF SHOULD LEAVE SHADED AREAS BLANK

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
-0-	-0-	NONE	N/A

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:

Duplicates/Relates to Appropriation in the General Appropriation Act

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15		
N/A	N/A	N/A	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion Letter. This is a staff analysis in response to the agency’s committee’s or legislator’s request.

BILL SUMMARY

Summary Synopsis:

HB 292 purports to direct the federal government to “extinguish” and transfer title to all “public lands” (as defined) in the State of New Mexico by Dec. 31, 2015, with certain exceptions (including, among others, (i) state trust lands; (ii) specifically enumerated national parks, national monuments, and national wilderness areas; (iii) federally owned lands within a municipality; and (iv) lands and water rights held in trust for Indian tribes and pueblos). After receiving title, if the State then transfers the land to another, the State would pay the federal government 95% of the net proceeds received, with the remaining 5% deposited into the permanent school fund.

The bill would also create a 15-member Public Lands Transfer Task Force (PLTTF) co-chaired by the Commissioner of Public Lands and the EMNRD Secretary and consisting of numerous cabinet secretaries and other state public officials. Staff would be provided by LCS, the State Land Office and EMNRD. The PLTTF would report annually to the legislature, once during the interim to the LFC and otherwise as requested.

During the 2013 interim, the PLTTF is directed to hold its first meeting on or before July 1, 2013, study, and prepare proposed legislation relating to implementing the transfer, including, a) creating a public lands commission to administer transfer of title and address land management, b) establish actions to enforce the federal government’s obligation to transfer the land to the State, c) modifying the scope of public lands to be transferred to the State, d) setting up a process to determine third party rights to the land to be transferred (e.g., easements, grazing rights, mineral rights, etc.). The PLTTF would also hold public hearings and study and determine whether to prepare and propose other relevant implementing legislation.

FISCAL IMPLICATIONS WITH ENACTING THIS BILL

Although the bill requires much work to be done immediately, there appears to be no appropriation requested to fund the work. Further, it is not clear that that the bill could ever be fully implemented. The basic concept that a state of the United States could impose on the United States an obligation to transfer to the state certain federally owned lands conflicts with

several provisions of the New Mexico Constitution and Enabling Act. If the state were to take any action to enforce its demand on the United States that it commence transfer, litigation would ensue.

Estimates from the Office of the Commissioner of State Lands for New Mexico indicate that the Bureau of Land Management's (BLM) base program budget for New Mexico is \$127,453,000, and the agency has about 750 Full Time Employees (FTEs). The U.S. Forest Service's base budget for New Mexico is \$91,008,000 and the agency has 1,087 FTEs. (Estimates from the EMNRD- Forestry are similar, indicating those federal agencies have about 1300 employees working in New Mexico. See, EMNRD-Forestry FIR) Other federal funds are allocated for federal land management, but at a minimum, if the state were to take control of these lands the State could need almost 2,000 more employees and an additional estimated \$218 million dollars per year to administer the land at the same level as the federal government. (See, SLO FIR) The bill provides no mechanism for funding its implementation or paying costs for maintaining the public lands to be transferred to the State. The extent to which the State Land Office will administer the public lands received is not clear and so the impact to the State Land Office is undetermined. Land Maintenance Fund revenue cannot be used to support the taskforce activities under this act since they are not generating revenue for state trust land beneficiaries. Further, the economic loss to New Mexico of around 1300 to 1800 federal jobs (if they were not replaced by new state jobs) and the direct and induced economic benefits those jobs generate for the State would be staggering.

Additionally, if the bill's transfer provisions were actually implemented and the lands transferred to the state, the federal government presumably would stop or reduce payments under the current payments-in-lieu-of-taxes (PILT) program. In the most recently completed fiscal year, the federal government made \$34.8 million in PILT payments to New Mexico counties. How that might be netted out by new economic activity or new taxes assessed cannot be estimated at this time.

SIGNIFICANT LEGAL ISSUES

The bill raises numerous constitutional issues under the state and Federal Constitutions. Under the Supremacy Clause of Article IV of the U.S. Constitution and Article II, Section 1 of the New Mexico Constitution, federal law is the "supreme law of the land," and cannot be countermanded by conflicting state laws. See *e.g.*, *Bourguet v. Atchison, T. & S.F.R.R.* 65 N.M. 200, 206, 334 P.2d 1107, 1111 (1958) ("[t]he supremacy clause of the Federal Constitution is as binding on the legislature of a state as it is on its courts . . ."). The New Mexico legislature cannot impose its will on the United States without agreement from Congress. In other words, the PLTTF could convene and do much of the work that the bill directs, but the work would be ineffective in the absence of corresponding federal legislation disclaiming ownership of the subject lands and authorizing federal officials to take the necessary action to transfer the land to state ownership in accordance with the plans of the PLTTF and subsequent legislation.

Furthermore, the "Property Clause," authorizes that, "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States..." U.S. Const. Art. IV, Sec. 3, Cl. 2. The U.S. Supreme Court has held that "Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation..." *United States v. Gratiot*, 39 U.S. 526, 537 (1840). See Also *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). Pursuant to

its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land. Legislation Congress enacts “necessarily overrides conflicting state laws under the Supremacy Clause.” *Kleppe*, 426 U.S. at 543. Thus, the state has no authority to direct the United States in its management of federal lands.

When New Mexico became a state and joined the United States, it agreed to function within the federal system, which includes the notion of supremacy of federal law. NM Const. Art. II, Sec. 1, “The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.” The constitution of New Mexico also contains a Compact with the United States, enacted as required by Congress as a condition of admittance into the United States, and which includes the consent of the people to the provisions in the Enabling Act. NM Const. Art. XXI. Under Section 2 of the New Mexico Enabling Act, the State agreed to “forever disclaim all right and title to the unappropriated and ungranted public lands” in New Mexico. The New Mexico Constitution can only be changed as provided therein by action of the legislature and vote of the people, or by constitutional convention. NM Const. Art. XIX.

PERFORMANCE IMPLICATIONS WITH ENACTING THIS BILL

The bill establishes an additional state bureaucracy charged with studying and implementing a sea change in land management in New Mexico. The issues required to be studied are enormous but there is no appropriation requested to fund the work. The cost and performance implications associated with the study, and certainly any ultimate transfer, cannot be reliably estimated. The bill terminates the PLTTF in 2016, but it is unlikely the groundwork needed to identify involved lands and study the mandated issues would require many years more.

ADMINISTRATIVE IMPLICATIONS WITH ENACTING THIS BILL

See, above. The bill could commit the state to protracted litigation with the United States concerning the enforceability of the requirement that federal title be extinguished and transferred. If there were an attempt to enforce the transfer demand on the United States, the action could also generate litigation with other parties who hold an interest in federal lands (e.g., grazing permittees, mineral lessees) or support continued federal title and management of the land.

In addition to the state bureaucracy needed to implement and arrange the transfer, and assuming the Congress agreed and did in fact transfer these lands, long term state management would require the addition of perhaps 2,000 state employees and associated resources, e.g., office space, equipment and supplies. In addition to the transfer of title, process would have to be established to transfer management of various third party rights and land use authorizations.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP WITH BILLS INTRODUCED THIS SESSION

SB 404, the identical bill in the Senate, raises the same concerns.

TECHNICAL ISSUES OR DRAFTING ERROR

It is not clear what it means for the United States to “extinguish title to public lands,” as provided in Section 4 of the bill.

OTHER SUBSTANTIVE LEGAL ISSUES

Depending on how the PLTTF interprets its charge, additional legal issues could arise, including various state governmental function issues as well as associated title disputes with private parties holding current leases or other rights to use federal lands which would be extinguished or changed by the transfer.

ALTERNATIVES TO ENACTING THIS BILL

None.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

None.

AMENDMENTS NEEDED TO IMPROVE THIS BILL

None.