December 30, 2009

OPINION
OF
GARY K. KING
Attorney General

BY: Adrian Terry
   Assistant Attorney General

TO: Duston L. Hunt, Chairman
   New Mexico Soil & Water
   Conservation Commission
   11 McMillen Road
   Silver City, New Mexico 88061

QUESTION:

1. Is the Water Conservation Commission a subdivision of the Department of Agriculture or its own separate entity?

2. Is the Soil and Water Conservation Commission responsible for the oversight of the state's forty-seven soil and water districts?

3. What is the relationship between the Soil and Water Conservation Commission and the Department of Agriculture?

4. Is the Soil and Water Conservation Commission authorized to directly acquire and administer a Technical Service Provider Program from another agency?

5. Does the Soil and Water Conservation Commission have the authority to hire staff?
CONCLUSION:

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, our office makes the following conclusions: the Commission is a separate and independent agency; the Commission and the Department have a joint oversight role with specific duties prescribed to each agency under the Act: the Commission has authority to adopt rules that the Department must follow; the Commission does not have authority to acquire and administer a Technical Service Provider Program; and, the Commission does not have authority to hire its own staff.

ANALYSIS:

A. Statutory Construction

There are three rules of statutory construction that apply to this matter. First, "the starting point of statutory analysis must always be the statute itself which represents the primary expression of the intent of the Legislature." State v. Ellenberger, 96 N.M. 287, 288, 629 P.2d 1217 (1981). Second, "[a] fundamental rule of statutory construction is that all provisions of a statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241 (1992). Third, when the legislature expressly authorizes a certain act to be done in a prescribed manner, the act may be done only in that manner and all other modes are excluded. See Bettini v. City of Las Cruces, 82 N.M. 633, 635, 485 P.2d 967 (1971).

B. Legislative History of the Commission

The purpose of the Act is to provide for the creation of local districts ("districts") to "(1) control and prevent soil erosion; (2) prevent flood water and sediment damage; (3) further the conservation, development, beneficial application and proper disposal of water..." NMSA 1978, § 73-20-26 (B) (1965). In 1937, the legislature created the Commission "to serve as an agency of the State and to perform the functions conferred upon it." 1937 N.M. Laws, ch. 219, § 4. The Commission's powers included: (1) rule-making authority; (2) authority to help create the districts; (3) power to advise and assist the districts on instituting the best practices; and (4) the authority to hire staff and technical experts. See 1937 N.M. Laws, ch. 219, § 4(a), (b). In 1977, the legislature chose to place limitations on some of these powers when it authorized the Commission and the newly created Soil and Water Conservation Division ("Division") of the State Natural Resources Department to jointly promulgate regulations. The legislature also granted the Division the sole power to hire staff and assist and advise districts. See 1977 N.M. Laws, ch. 254, §§ 60, 61. In 1997, the legislature modified the structure again to insert the Department and provided that the "department, with the advice of the commission, shall...assist districts..." 1997 N.M. Laws, ch. 137, § 4(13) (emphasis added). In 2003, the legislature reinstated the Commission's sole authority to adopt rules under the Act. 2003 N.M. Laws, ch. 88, § 5(Cr2).

1 The 1978 legislature re-authorized the Division and Commission to jointly employ staff, but the 1987 legislature removed this power from the Commission. See 1978 N.M. Laws, ch. 175, § 1; 1987 N.M. Laws, ch. 324, § 79.
C. Discussion of Conclusions

1. Is the Commission a subdivision of the Department of Agriculture or its own separate entity?

Although the legislature’s original statement that the Commission is “an agency of the State” is no longer found in statute, the legislature has always retained the Commission’s autonomy as a governing body. See Fischer v. Rakakis, 59 N.M. 463, 469, 286 P.2d 312 (1955) (the legislature has authority to create state commissions and vest them with administrative powers). The Commission has retained its ability to perform the functions as provided for it in the Act and the legislature has never moved the Commission to within the Department. See NMSA 1978, §§ 73-20-27 (2003) (providing separate definitions for the Commission and Department), 73-20-28 (2003) (providing the governor shall appoint Commission members), 73-20-29 (2003) (providing Commission quorum requirements) and 73-20-31 (2003) (providing Commission duties). Therefore, the Act, based on reading all of its sections together, provides that the Commission is a separate entity and is not a “subdivision” of the Department.

2. Is the Commission or the Department responsible for the oversight of the state’s forty-seven soil and water districts?

Each local district’s board of supervisors governs the implementation of the Act and day-to-day operations of the district, but the Commission and Department have prescribed oversight administrative duties. For instance, the Department, after seeking input and advice from the Commission, is charged with the duty of providing information and assistance to districts and providing for coordination of soil and water conservation activities. See NMSA 1978, § 73-20-31(B) (2003).

The Commission is assigned a variety of duties related to the creation and structural organization of the districts. See NMSA 1978, §§ 73-20-31 (2003) to -39 (2003). The Commission may “promulgate rules to carry out the provisions of the Soil and Water Conservation District Act.” See NMSA 1978, § 73-20-31(C)(2) (2003); see also §§ 73-20-58(C) (2005), -39 (2003). These regulations are presumed to be valid and binding on all parties. See New Mexico Mining Ass’n v. New Mexico Mining Comm’n, 322 N.M. 332, 335, 924 P.2d 741 (Ct. App. 1996). The Commission is responsible for assisting in the creation and modification of districts and their boundaries, assisting in holding a referendum as to whether a district should be created, and conducting a hearing to “determine the necessity and desirability of the proposed district.” See NMSA 1978, § 73-20-33 (2003). The Commission is likewise authorized to make determinations on petitions to consolidate or separate existing districts and supervise the reorganization of district affairs upon such modification. See NMSA 1978, §§ 73-20-36(B), (E)-(F) (2003); 73-20-36(D) (2003). Finally, the Commission has a role in the appointment and removal of district supervisors and the oversight of budgetary matters in the districts. See NMSA 1978, §§ 73-20-55 (A) (2003); 73-20-36(G)(2003); 73-20-37(A)(2003); 73-20-42 (2003); 73-20-46(F) (2003); 73-20-41(F)(2) (2003), 73-20-46(F) (2003); and 73-20-41(1)(4) (2003).
For the reasons identified above, it appears that the legislature intended the Commission and the Department to have a joint oversight role and endowed each agency with the necessary authority to perform the administrative duties prescribed to it under the Act.

3. **May the Department disregard Commission rules?**

As discussed above, rulemaking has been a principal activity of the Commission since its inception. Presently, the Commission is vested with the sole statutory authority to "promulgate rules to carry out the provisions of the Soil and Water Conservation District Act." See NMSA 1978, § 73-20-31(C)(2) (2003). Rules promulgated by the Commission that are consistent with statutory authority and the purpose of the Act, as stated in NMSA 1978, § 73-20-26(B) (1965), are binding upon all parties, including the Department.

4. **Is the Commission authorized to acquire and administer a Technical Service Provider Program from another agency?**

The United States Department of Agriculture ("USDA") has created several cost-share programs to reimburse landowners for costs incurred or income foregone for certain conservation practices and activities. One principal program is the Environmental Quality Incentives Program ("EQIP"), which is authorized under the Farm Security and Rural Investment Act of 2002 ("Farm Bill"). See Pub. L. No. 107-171, 116 Stat. 134 (amending miscellaneous provisions of 7 U.S.C. § 7901 et seq.). Under EQIP and similar conservation programs, a landowner may perform conservation improvements individually or through the assistance of a contractor. In either instance, a technical service provider ("TSP") may be used to assist in program design, or otherwise establish the guidelines for an effective conservation program. A technical service provider is defined as an individual, entity, or public agency, properly certified by the Natural Resources Conservation Service ("NRCS"), that provides technical services to program participants.

The legislature has placed limitations on the Commission's role under the Act. For example, the power to "acquire or administer the project of any other governmental agency undertaken to provide for the conservation, development and utilization of natural resources within the district" is vested in the local districts. NMSA 1978, § 73-20-44(11) (2003). Consequently, the power to acquire and administer a Technical Service Provider Program is not prescribed within the Commission's authority.

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Other common USDA cost-share conservation programs include the Wetlands Reserve Program (WRP) and the Grassland Reserve Program (GRP) under the Farm Bill, as well as the Wildlife Habitat Incentive Program (WHIP) under the Food, Conservation, and Energy Act of 2008.
5. Is the Commission authorized to hire staff?

The Act states: "[t]he supervising officer of any state agency or post-secondary educational institution shall within the limitations of his budget and the demands of his agency or institution, assign staff or personnel...for the commission...as requested." NMSA 1978, § 73-20-31(A) (2003). In addition, the general authority to hire staff and experts for the day-to-day implementation of natural resource conservation is now vested in district supervisors. See NMSA 1978, § 73-20-41(A)-(C) (2003). Therefore, the Commission depends on other state agencies and universities (usually New Mexico State University) to provide it with staff and has no independent authority to hire staff.

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.

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