March 16, 2011

Raul E. Burciaga, Director
Legislative Council Service
490 Old Santa Fe Trail, #411
Santa Fe, NM 87501-2780

Re: Opinion Request – Partial Veto of Senate Bill 10

Dear Mr. Burciaga:

Last year, while she was still a member of the legislature, Representative Janice E. Arnold-Jones requested our advice regarding the proper exercise of the governor's constitutional veto authority. In particular, she questioned whether Governor Richardson violated Article IV, Section 22 of the New Mexico Constitution by vetoing certain provisions of Senate Bill 10 ("SB 10"), which was enacted during the special legislative session in 2010. See S.B. 10, 49th Leg., 2d Spec. Sess. (N.M. 2010).[1] As discussed in detail below, we conclude that SB 10 was a "bill appropriating money" under Article IV, Section 22 and was properly subject to the governor's line item veto authority.

During the special session, the legislature introduced and passed SB 10, which was the Senate Finance Committee's substitute for Senate Bills 10, 12 and 13. SB 10 contained a number of provisions relating to taxation. The most important provisions for purposes of this letter were those repealing the deduction from taxable gross receipts for receipts from the sale of food, making corresponding changes in the distributions of gross receipts tax revenues to municipalities and counties and increasing the low-income comprehensive tax rebate ("LICTR").[2] Other provisions in the bill increased the gross receipts and compensating tax rates,

[1] Although Representative Arnold-Jones no longer holds her legislative office, we are issuing this advisory letter because Attorney General Gary King believes that it will provide useful guidance on the constitutional issues raised in the request.

[2] The LICTR is a rebate of income taxes for certain individuals with low incomes. See NMSA 1978, § 7-2-14 (1998).

clarified the applicability of the compensating tax in certain situations and included state and local taxes in taxable income for state income tax purposes.

After it passed both houses of the legislature, SB 10 was sent to the Governor Richardson for approval as required by the state constitution. See N.M. Const. art. IV, § 22. The Governor signed SB 10, with the exception of certain provisions that he vetoed. The Governor's veto message described SB 10 as "a bill appropriating money" and stated that the partial veto was made "pursuant to the authority granted me in Article IV, Section 22 of the Constitution of New Mexico." Senate Executive Message No. 4 (Mar. 24, 2010). The Governor's veto was intended to eliminate SB 10's provisions that imposed the food tax and increased the LICTR. According to the Governor's veto message, "[v]etoing the food tax eliminates the rationale behind the LICTR increase," which was to "offset the cost to low income families of the food tax." Id. at 3.

Under the state constitution, every bill passed by the legislature must be presented to the governor for approval or veto before it becomes law. See N.M. Const. art. IV, § 22. Although Article IV, Section 22 generally limits the governor to approving or vetoing a bill in its entirety, the governor may

> approve or disapprove any part or parts, item or items, of any bill appropriating money, and such parts or items approved shall become a law, and such as are disapproved shall be void unless passed over his veto….

As discussed above, Governor Richardson characterized SB 10 as "a bill appropriating money," which signaled his intent to invoke his line-item veto authority under Article IV, Section 22. If the Governor's characterization of SB 10 was incorrect, then his authority to line item veto the bill would be questionable.

The New Mexico Supreme Court has long held that the governor's line item veto power is not limited to general appropriations bills. See Dickson v. Saiz, 62 N.M. 227, 308 P.2d 205 (1957). According to the Court, that power includes "bills of general legislation which contain[] incidental items of appropriation." Id. at 235, 308 P.2d at 210. Accord State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974) (governor's partial veto authority covers "bills of general legislation, which contain incidental items of appropriation, as well as general appropriation bills…").[3]

[3] Of course, the governor's line item veto of bills appropriating money is not without limitation. As the New Mexico Supreme Court explained in Sego:

> The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge or increase the effect of the remaining parts or items.

86 N.M. at 365, 524 P.2d at 981.

The New Mexico Constitution permits expenditures from the state treasury only "upon appropriations made by the legislature." N.M. Const. art. IV, § 30. To pass constitutional muster, a law making an appropriation "shall distinctly specify the sum appropriated and the object to which it is to be applied." Id. This does not mean that a law making an appropriation necessarily must specify the amount appropriated in dollars and cents. See Gamble v. Velarde, 36 N.M. 262, 267, 13 P.2d 559, 562 (1932). As interpreted by the New Mexico Supreme Court, an appropriation comports with Article IV, Section 30 if its object is clearly defined and the maximum amount to be spent is fixed. Id. Applying this standard, the Court held that a law providing for a refund of gasoline taxes under specified conditions and creating a special suspense fund in the state treasury for payment of the refunds was a valid appropriation. Id. at 269, 13 P.2d at 563.[4]

Neither SB 10's title nor its substantive provisions contain any express language making an appropriation. The bill primarily addresses gross receipts and compensating tax revenues and the distribution of those revenues to the state general fund, counties and municipalities. However, the bill passed by the legislature also amended the Income Tax Act's provision governing the LICTR. See SB 10, § 8 (amending NMSA 1978, § 7-2-14 (1998)). Subsection F of that provision states:

> The tax rebates provided for in this section may be deducted from the taxpayer's New Mexico income tax liability for the taxable year. If the tax rebates exceed the taxpayer's income tax liability, the excess shall be refunded to the taxpayer.

(Emphasis added.) The underlined language expressly allows refund payments from the state treasury[5] if a qualifying taxpayer's rebate exceeds his or her income tax liability. Under Gamble v. Velarde, the refund provision constitutes an appropriation for purposes of Article IV, Section 30.

As discussed above, a "bill appropriating money" that is subject to the gubernatorial partial veto authority under Article IV, Section 22 includes general legislation containing incidental items of appropriation. The provision authorizing refunds of the LICTR was an incidental item of appropriation contained in SB 10. Although it was not the focus of the bill or directly affected by the amendments made by the bill, the refund provision was sufficient to justify Governor Richardson's exercise of his line item veto authority.

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[4] In contrast, an earlier Supreme Court decision held that a law allowing repayment from the state treasury "[a]ny money erroneously paid on account of any lease or sale of State lands" was an invalid appropriation because the determination of whether money had been erroneously paid was left entirely to the discretion of the state land commissioner and there was no limit on the amount to be used for the repayments. See McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322 (1930).

[5] As in Gamble v. Velarde, the refunds authorized by Section 7-2-14(F) are paid from a special dedicated suspense fund. See NMSA 1978, § 7-1-6(C), (D) (2009).

If we may be of further assistance, please let us know. The 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 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,

Elizabeth A. Glenn
Deputy Attorney General