

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 01/26/12
 LAST UPDATED 02/13/12 HJR 15a/HJC

SPONSOR Miera

SHORT TITLE Permanent Funds for Education, CA SB _____

ANALYST Smith

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY12	FY13	FY14		
		\$124,564.0	Recurring	General Fund
		\$24,436.0	Recurring	Other LGPF Beneficiaries
		\$149,000.0	Recurring	Land Grant Permanent Fund

(Parenthesis () Indicate Revenue Decreases)

Duplicates SJR 9

SOURCES OF INFORMATION

LFC Files

Responses Received From

- State Investment Council (SIC)
- State Land Office (SLO)
- Department of Finance and Administration (DFA)
- Attorney General's Office (AGO)
- Public Education Department (PED)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Joint Resolution 15 strikes the phrase "public schools or pursuant to contracts between the state and private entities" and replaces it with the word "state" wherever it is found in the resolution. The effect of the amendment is to conform the resolution to a recent AGO opinion which would allow an increased distribution to public schools.

Synopsis of Original Bill

House Joint Resolution 15 amends Article 12, Section 7 of the State Constitution to make permanent the current 5.5% annual distribution from the Land Grant Permanent Fund (LGPF) to

public schools and other LGPF beneficiaries starting in FY 2013. It also calls for additional distributions from the LGPF of 1.5% specifically earmarked for early childhood education programs, to be operated by the public schools or through contracts with authorized private administrators.

The proposal allows that should the 5-year average of the LGPF drop below \$8 billion, the additional 1.5% be suspended for the fiscal year. The proposal also allows the additional 1.5% to be suspended by a 3/5 vote by both House & Senate.

If approved by the legislature, the constitutional amendment would be brought to voters in the next general election or at a special election for this purpose.

FISCAL IMPLICATIONS

In the short term, additional contributions from the LGPF will produce significant revenue to the general fund and other LGPF beneficiaries, primarily being public education. In the long term, and taking into consideration Fund contributions from the oil and gas revenues, as well as expectations for general inflation and fluctuations in investment income, this proposal increases the risk that the LGPF will not be able to deliver the same benefits to the general fund and other beneficiaries as the Fund does today.

The Public Education Departments Reports that “This policy has dangerous potential to drastically reduce the value of the fund as the levels contained in the joint resolution remain unsustainable”.

This increased distribution will deplete the fund over time. Under the distribution schedule of 7.0% which ratchets down to 5.5% in 2025, SIC notes the following:

- 20 years after implementation, the LGPF has \$5.5 billion less in its corpus than it would under current expectations
- That translates to more than \$275M/yr less in distribution at 5% rate after 2031
- The LGPF growth rate is significantly decreased

Among other issues, the AGO has opined on the ability of the Legislature to reorder the percentages each current beneficiary receives (see attached). It is a truism that an increase to the public schools is necessarily at the expense of other beneficiaries regardless of the short run increase in the payout rate. Further, the majority of these beneficiaries receive the bulk of their operating monies from the General Fund. Therefore, the ultimate fiscal impact of this resolution is to put additional long-run pressure on the General Fund.

PED notes that “This policy has dangerous potential to drastically reduce the value of the fund as the levels contained in the joint resolution remain unsustainable.”

SIGNIFICANT ISSUES

In 2007, New England Pension Consultants studied the effect that the current spending rate will have on the real (inflation adjusted) value of the Land Grant Permanent Fund. The study focused on the likelihood that the LGPF will maintain its real value over the next 10 years with the higher spending levels to maintain intergenerational equity for future citizens of New Mexico. They

concluded that the scheduled increases as shown in Table 1 were not likely to permanently erode the real value of the LGPF as long as the rate was permanently set at 5% at 2017. However, they also concluded that the probability of a real (inflation adjusted) erosion of the fund is very high at a 5.8 % distribution rate.

Table 1. Current Payout Rates for the Land Grant Permanent Fund

FY2010	5.8%
FY2011	5.8%
FY2012	5.8%
FY2013	5.5%
FY2014	5.5%
FY2015	5.5%
FY2016	5.5%
FY2017	5.0%

As can be seen from Table 2 below, the average spending rate for U.S. higher education endowments above \$1B was 4.6% in 2009. It is probably much lower today because of the deterioration of the market. That is a figure much smaller than the LGPF’s current payout of 5.8%. While this comparison is not exact, these colleges and universities have a very similar goal to the LGPF, maximizing current payout while ensuring that the value of the fund does not erode in real terms. Many other similar funds either pay-out all dividends and income while retaining capital gains to maintain the corpus (Oklahoma Tobacco Trust), pay out a percentage of all earnings while retaining the rest in the fund (Wyoming Mineral Trust – 52%), or in the case of the Alaska Permanent Fund pay out a flat 5%. Against any of these measures, the 5.8% payout ratio is high.

**Table 2
Annual Reported Spending Rates for US Higher Education Endowments**

Size of Fund	2009	2008	2007	2006	2005	2004	2003	2002
	%	%	%	%	%	%	%	%
Over \$1 Billion	4.6	4.2	4.4	4.6	4.7	5.2	5.3	4.9
\$501 Million to \$1 Billion	4.9	4.5	4.4	4.5	4.8	5.2	5.3	5.1
\$101 Million to \$500 Million	4.4	4.2	4.5	4.6	4.7	4.9	5.2	5.1
\$51 Million to \$100 Million	4.7	4.6	4.8	4.7	4.7	4.9	5.2	5.3
\$25 Million to \$50 Million	4.3	4.3	4.8	4.8	4.7	4.8	5	4.9
Under \$25 Million	3.9	4.1	4.6	4.6	4.8	4.6	4.8	4.7

The AGO has also opined that while an increased public school distribution is permissible, it must be used by the public schools. Distributions to other beneficiaries, such as private early childhood providers and sectarian organizations, are ineligible and would violate the anti-donation clause. The HJC amendment substitutes “state” for public schools or pursuant to contracts between the state and private entities.” Presumably public schools, which are a currently allowable beneficiary would still be the only allowable beneficiary under the term “state” though it is not entirely clear.

However, the concept of a perpetual endowment is not in itself “good policy”. Julius Rosenwald was President of Sears and Roebuck and major 20th century philanthropist. He wrote that “I am opposed to the permanent or what might be styled the never-ending endowment... Permanent

endowment tends to lessen the amount available for immediate needs; and our immediate needs are too plain and too urgent to allow us to do the work of future generations.”

In short the decision to deplete an endowment is a policy decision rather than a financial dictum or “best practice”. The real question is whether the benefits of the expenditures today will outweigh the benefits of greater income tomorrow.

The incremental increase in funds distributed due to the 1.5 percent increase for early childhood program would provide significant increases for early childhood services through public schools. A 2009 LFC report found that in FY08, eighteen major state and federal programs invested an estimated \$300 million on services for pregnant women and very young children, not including Medicaid. These included programs such as federal Head Start Public, state and local funded preschool and child care subsidies among others.

Public schools currently provide education to school age children, but also operate prekindergarten (PreK) programs for four year old children through separate state appropriations and federal funds. Public schools provide preschool services to children with developmental delays ages 3 and 4; and full day kindergarten for 5 year olds which are already funded through the State Equalization Guarantee program. The amount of funding made available through this amendment could conceivably fund a full expansion of PreK and still have substantial excess funding. Currently, the state appropriates about \$14.5 million for the NM PreK program that serves, depending on the county, between 0 and about 20 percent of four year olds. About 13 percent of four year olds are enrolled in Bernalillo County according to data compiled by the Center for Education Policy and Research. Assuming a per student cost of \$3,000, the cost to serve every four year old would be about \$75 million. However, this amount would likely be substantially less given that many four year olds are already enrolled in federal Head Start and NM PreK programs. Universal PreK delivered through public schools likely would have an adverse impact on the day care industry. Public schools would have to expand their service delivery beyond school age, or preschool age, children to provide other early childhood services. The impact to private business or nonprofits could be negative if public schools expand their service delivery further into early childhood care and cannot use this distribution to contract with private or sectarian providers.

SS/svb



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

February 1, 2012

OPINION
OF
GARY K. KING
Attorney General

Opinion No. 12-03

BY: Susan Sita
Assistant Attorney General

TO: The Honorable Mimi Stewart
New Mexico State Representative
313 Moon Street NE
Albuquerque, NM 87123

The Honorable Rick Miera
New Mexico State Representative
1011 Forrester NW
Albuquerque, NM 87102

QUESTIONS:

- (1) Would the anti-donation clause of Article IX, § 14 of the New Mexico Constitution permit the distribution of money from the land grant permanent funds to finance private or sectarian early childhood education programs?
- (2) Would the anti-donation clause permit the distribution of money from the funds to a public agency or entity, such as the Children, Youth and Families Department, to finance contracts between agents of the state government and private sectarian early childhood education programs?

(3) Does the New Mexico Legislature possess the authority to enact a law or propose a constitutional amendment to:

- (a) add a private or sectarian entity to the roster of designated beneficiaries of the land grant permanent funds; or
- (b) alter the distribution of the funds to the currently designated beneficiaries to accommodate a new additional beneficiary?

(4) Would any other state or federal law or regulation impede the addition of a new, private or sectarian entity to the list of designated beneficiaries of the land grant permanent funds or impede the execution of contracts between a governmental or other public entity and a private or sectarian entity for services in exchange for money distributed from the fund?

(5) Are there any legal issues with respect to a joint resolution and proposed constitutional amendment to increase the base distribution from the land grant permanent funds by one and one-half percent for ten years in order to provide early childhood learning programs for New Mexico children younger than age five?

CONCLUSIONS:

(1) & (2) An analysis of the effect of the anti-donation clause is not necessary at this time because the federal Enabling Act of June 20, 1910, 36 Stat. 557, ch. 310 (“Enabling Act” or “Act”) and corresponding provisions of the state constitution directly prohibit the state from using money from the land grant permanent funds for private, sectarian or denominational entities.¹

(3) & (4) Unless Congress amends the Enabling Act, the legislature has no authority to propose amendments to the constitution or enact laws that add a private or sectarian entity to the roster of designated land grant beneficiaries. If the Enabling Act were amended to permit a new beneficiary, the legislature could propose a constitutional amendment to alter the distribution of funds to accommodate the new beneficiary.

(5) A proposed constitutional amendment to increase distributions from the land grant permanent funds for early childhood learning programs would be permissible only if the increased distributions were limited to early childhood learning programs provided by the public schools.

¹ If the Enabling Act and state constitution were amended to expressly permit the state to finance a private or sectarian entity with land grant permanent funds, the anti-donation clause’s prohibition against grants of public money to private individuals and entities would not apply. See Denish v. Johnson, 1996 NMSC 5, ¶ 32, 910 P.2d 914, 922 (constitutional provisions should be read together and harmonized if possible, “rather than [construed] as groupings of isolated and discordant rules”).

BACKGROUND:

During the current 2012 legislative session, a senate joint resolution has been introduced that proposes an amendment to Article XII, Section 7 of the New Mexico Constitution. See S.J. Res. 9 (50th Leg., 2d Sess. 2012). The proposed amendment would increase distributions from the land grant permanent funds and allow use of the funds for early childhood education programs provided by the public schools or under contracts between the state and private entities, some of which could be based in religious institutions.

ANALYSIS:

Without an Amendment to the Federal Enabling Act, Land Grant Permanent Funds Cannot be Distributed to Sectarian, Denominational or Private Schools

A. The land grant permanent funds.

The land grant permanent funds are those funds “derived from lands under the direction, control, care and disposition of the commissioner of public lands conferred by Article 13, Sections 1 and 2 of the constitution of New Mexico.” NMSA 1978, § 6-8-1. Article XIII, Section 1 of the New Mexico Constitution declares that all lands granted to the state by congress are public lands of the state to be held or disposed of as provided by law for the purposes for which they have been granted, donated or otherwise acquired. The land grant permanent funds are derived from the lands granted to the state by Congress in the Enabling Act and are therefore subject to the requirements of the Act.

B. The Enabling Act and the state constitution.

The Enabling Act set the terms by which New Mexico would be admitted as a state. See Forest Guardians v. Powell, 2001 NMCA 28, 130 N.M. 368, 372, 24 P.2d 803, 807. The state consented to all the terms of the Act in Article XXI, Section 9 of the New Mexico Constitution. Article XXI, Section 10 of the New Mexico Constitution states that “[t]his ordinance is irrevocable without the consent of the United States and the people of this state, and no change or abrogation of this ordinance, in whole or in part, shall be made by any constitutional amendment without the consent of congress.”

The Act granted to New Mexico land in each township “for the support of common schools.” Enabling Act § 6. Other grants of land were made to New Mexico specifically for, among other things, “university purposes,” “schools and asylums for the deaf, dumb, and the blind,” “normal schools,” “agricultural and mechanical colleges,” a “school of mines” and “military institutes.” Enabling Act § 7. The lands granted to New Mexico and any proceeds from them are to be held in trust. Enabling Act § 10, ¶ 1. If the lands or the money derived from them are used for something other than the named purpose, it is a breach of trust. Enabling Act § 10, ¶ 2. The New Mexico Supreme Court has stated that “[s]ection 10 of the Enabling Act became a part of our fundamental law to the same extent as if it had been directly incorporated into the Constitution when thus expressly consented to by the state and its

people in Article XXI, Section 9 of the Constitution.” State ex rel. Interstate Stream Commission v. Reynolds, 71 N.M. 389, 396, 378 P.2d 622, 627 (1963). “The trust is binding and enforceable and the legislature is without power to divert the fund for another purpose than that expressed.” Id.

Section 8 of the Enabling Act requires:

[t]hat the schools, colleges, and universities provided for in this Act shall forever remain under the exclusive control of the said State, and no part of the proceeds arising from the sale or disposal of any lands granted herein for educational purposes shall be used for the support of any sectarian or denominational school, college or university.

Section 7 of the Act further states that the permanent school fund of the state “shall be used for the maintenance of the common schools of said State.”²

The New Mexico Constitution contains the same limitations as the Act and specifically mentions private schools:

[t]he schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or *private* school, college or university.

Article XII, § 3 (emphasis added).

The Enabling Act and the New Mexico Constitution require that schools receiving land grant funds must remain under the exclusive control of the state and prohibit the distribution from proceeds of the sale or disposal of land granted for educational purposes to a sectarian, denominational or private school, college or university. Accordingly, a public school under the control of the state can receive funds, but a private school not under the exclusive control of the state cannot.

We believe the Enabling Act’s and constitutional prohibitions apply to indirect as well as direct land grant fund distributions. The prohibitions cannot be avoided by appropriating the funds to a state agency to, in turn, distribute or contract with a sectarian, denominational or private school not under the exclusive control of the state. Such a scheme would simply be an artificial attempt to circumvent the prohibitions of the Act and state constitution.

² The Enabling Act uses the term “common schools” which is synonymous with “public schools.” See, e.g., Andrus v. Utah, 446 U.S. 500, 506 (1980) (using the terms “common schools” and “public schools” interchangeably); Board of Education v. Corey, 163 P. 949, 953 (Okla. 1917) (“the phrase ‘common schools’ being synonymous with ‘public schools’”).

Regardless of the number of intervening state entities, the transaction would still amount to the use of permanent fund money for the support of private or sectarian schools contrary to the prohibitions of the Enabling Act and state constitution.

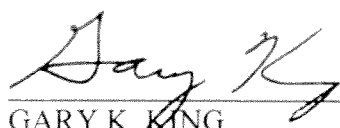
Because it is now prohibited by federal law and the state constitution, the distribution of land grant funds to a private, sectarian or denominational school would require amendments to the Enabling Act by the United States Congress and an amendment to the state constitution proposed by the legislature and adopted by the state's voters.³

The State Constitution May be Amended to Make Distributions from the Land Grant Permanent Funds to Public Schools for Early Childhood Learning Programs

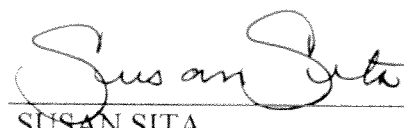
Distributions from the land grant permanent funds may be increased and used for the support of early childhood learning programs, provided the funds go to public schools and the increased distribution is accomplished by amending Article XII, Section 7 of the state constitution.

As discussed above, the Enabling Act dictates that the schools provided for must be public schools under the exclusive control of the state. However, the Act does not prescribe how the funds are to be divided among public school institutions or the amount of the percentage distribution from the funds. Instead, distributions from the funds are governed by Article XII, Section 7 of the New Mexico Constitution. In 1996, New Mexico voters adopted amendments to Article XII, Section 7 regarding investment and distribution of the fund. The United States Congress subsequently approved the amendments to the state constitution and made requisite amendments to the Enabling Act. One of the amendments changed Section 10 of the Act to read: “[d]istributions from the trust funds shall be made as provided in Article 12, Section 7 of the Constitution of New Mexico.”

Therefore, changes to exactly how the funds are distributed may be made as long as it is accomplished by an amendment to Article XII, Section 7 and the funds are used for the purposes allowed in the Enabling Act. Because the Enabling Act currently limits the use of land grant permanent funds to the support and maintenance of public schools and prohibits their use for private, sectarian and denominational schools, the use of any increased distribution for early childhood learning programs is limited to programs provided by the public schools.



GARY K. KING
Attorney General



SUSAN SITA
Assistant Attorney General

³ If both the Enabling Act and the state constitution were amended to allow for distribution to entities other than public schools, then NMSA 1978, § 19-1-17 would also have to be amended to include an additional beneficiary.