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LEGISLATIVE FINANCE  
COMMITTEE

Information Memorandum No. 202.148137

TO: Representative Max Coll

FROM: Paula Tackett and Gary Carlson

SUBJECT: LEGISLATIVE APPROPRIATION AUTHORITY OVER THE  
TEMPORARY STATE FISCAL RELIEF PROVISIONS OF THE  
MEDICAID FMAP AND THE PROVIDING GOVERNMENT SERVICES  
RELIEF OF THE FEDERAL JOBS AND GROWTH TAX RELIEF  
RECONCILIATION ACT OF 2003 (H.R. 2)

You have asked for our analysis of whether the new temporary fiscal relief funds that will soon be made available to the state under the Federal Jobs and Growth Tax Relief Reconciliation Act of 2003 are subject to legislative appropriation and possible suggestions for legislative-executive cooperation on the use of those funds. The following is submitted in response to your request. The opinions expressed are those of the authors and do not necessarily reflect the opinions of the legislative council or any other member of its staff.

#### Introduction

This issue raises major separation of powers concerns, the proper handling of which may set a precedent of enormous proportion with respect to the relationship between the executive and legislative departments of New Mexico state government. Both the legislature and the executive must approach the problem with great care and attention, so that future governors and legislative leaders — whoever they might be, and from whatever political parties they may come — will understand that such questions must be resolved with great respect for the proper roles of each of their co-equal departments.

## Analysis

There are fundamental principles that are settled in New Mexico law, some of which, upon first blush, may appear to be contradictory. On further examination, however, those principles are understandable pieces of the larger picture concerning the role of the state legislature with respect to federal funds that come to the state.

First, in New Mexico, the executive branch has only such power as is given to it by the constitution and legislation, i.e. the power to establish state policy and all residual power is retained by the legislature. *Torres v. State*, 119 N.M. 609, 894 P. 2d 386 (1995), *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P. 2d 11 (1995). Thus, if the governor has not been authorized by the legislature or required by federal law to receive and expend federal funds, then he has no power to do so.

Second, as a matter of state constitutional law, "money shall be paid out of the treasury only upon appropriations made by the legislature". N.M. Const. Art. IV, § 30. Thus, if federal block grants or other federal funds are directed to a state general account, they cannot be expended without an appropriation by the legislature. As a result, items such as federal Mineral Lands Leasing Act revenues, that flow to the state general fund, have always been subject to state legislative appropriation. Also, Section 6-4-2 NMSA 1978 creates the state general fund and provides that the "state treasurer shall credit all revenues not otherwise allocated by law" to that fund. It further provides that expenditures from this fund shall be made only in accordance with appropriations authorized by the legislature.

Third, our supreme court, in *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 524 P. 2d 975 (1974), has held that federal grants that are expressly given to constitutionally constituted and independently governed state institutions of higher learning are not subject to state legislative appropriation. While, of course, the legislature needs to be informed and may take cognizance of those funds in making appropriation decisions, the funds flow directly to the institutions for whatever purpose the federal government designates and, therefore, it is for those institutions (rather than the legislature) to make the decisions allocating those funds (subject of course to any federal conditions on the grant of those funds).

Thus, although the federal government has much to say about the question of the state legislature's role with respect to federal funds made available to the state, the state constitution, as interpreted by the courts, provides the proper parameters. If the federal government directs that the funds be allocated to a specific purpose, without leaving a policy choice of how the funds are to be expended, *see Sego*, then those funds may flow directly to the agency or department designated by the legislature to administer such a program, without any appropriating role for the legislature. If, on the other hand, the federal funds are given to the state for more generalized purposes, requiring a state policy decision as to what purposes such funds shall be applied, then, since such decisions are clearly for the legislature to make, the funds must be deposited in the general fund subject to the "upon appropriation made by the legislature" requirement of Art. 4, Section 30 and Section 6-4-2 NMSA 1978.

Although some courts have held that virtually all federal funds are subject to legislative appropriation (See *Anderson v. Regan*, 53 N.Y.2d 356, 425 N.E.2d 404 (1981) and *Shapp v. Sloan*, 480 Pa. 449, 391 A.2d 595 (1978)), a more rational and balanced approach is that taken by the supreme court of Massachusetts in *Opinion of the Justices to the Senate*, 375 Mass. 851, 378 N.E.2d 433 (1978). In that case, the court first struck down legislation that required all federal funds to be paid into the state treasury and expended only on appropriation by the legislature: "If federal funds are received by state officers or agencies subject to the condition that they be used only for objects specified by federal statutes or regulations, the money is impressed with a trust and is not subject to appropriation by the legislature.". However, the court then qualified its holding: "To be sure, not all federal money is received in trust. Federal reimbursements may be made to a state without conditions imposed as to expenditure. This money would be subject to the legislative power of appropriation.". The balanced approach of the Massachusetts court seems to be the route taken by the majority of state courts that have examined the issue. (We have been unable to find any state court decision that allows the governor to unequivocally expend all federal funds granted to the state.)

If, then, there is no clear statement in the federal law directing how, and to what end, such funds are to be expended, it must, as a matter of separation of powers, fall to the

legislature to make those policy judgments regarding allocation. As our supreme court made clear in *State ex rel. Taylor v. Johnson, supra*, in striking down the executive attempt to formulate its own welfare program without legislative involvement:

The test is whether the Governor's action disrupts the proper balance between the executive and legislative branches. If a governor's actions infringe upon the essence of legislative authority — the making of laws — then the governor has exceeded his authority. *A violation occurs when the Executive, rather than the Legislature determines how, when, and for what purpose the public funds shall be applied in carrying on the government.* (Citations omitted and emphasis added.)

Consistent with the foregoing and pursuant to long-standing practice in this state, the current New Mexico general appropriation act, as passed by the legislature and signed by the governor, expressly declares that our "general fund" includes "federal Mineral Lands Leasing Act receipts and those payments made in accordance with the federal block grant(s)". Federal block grants are those given to the state for a broad general purpose (for example, health care). The state is then charged with the specific policy decisions (within the broad general purpose) as to how to best expend the block grant. Therefore, such decisions, and the corresponding appropriating power, properly belong with the legislature. Similarly, federal Mineral Lands Leasing Act receipts (a portion of the amounts derived from mineral leasing of federal lands in New Mexico and distributed to the state pursuant to federal law) have essentially no federal requirements as to how they are expended by the state. To our knowledge, no one within the executive branch has ever argued that the revenues can be expended without legislative appropriation. Rather, Section 22-8-34 NMSA 1978 specifically states that: "Except for an annual appropriation to the instructional material fund and to the bureau of geology and mineral resources..., all other money received by the state pursuant to the provisions of the federal Mineral Lands Leasing Act ... shall be distributed to the public school fund.". Each year in the general appropriation act, a distribution is made from the public school fund. Again, to our knowledge, no governor has ever questioned the authority and duty of the legislature to appropriate this money.

In the instance of the temporary fiscal relief funds, Congress has not made the policy choice of how these temporary funds are to be allocated. It has only required that such funds be utilized for "essential government services", or to cover so-called unfunded federal mandates, so long as expenditure of these temporary funds are limited to the "types of expenditures permitted under the most recently approved budget for the State." (i.e. for existing programs of the state). Federal Jobs and Growth Tax Relief Reconciliation Act of 2003, § 401(b). Of course, there are a host of "essential government services" (including various unfunded federal mandates) to which the funds might be applied, even when limited to those "types of expenditures" contained in the General Appropriation Act of 2003. Because there are no specific requirements for expenditure imposed by the federal government and because there are a host of policy decisions to be made concerning "how . . . and for what purpose the public funds shall be applied in carrying on the government", *State ex rel. Taylor v. Johnson, supra*, as is the case with federal block grants and federal Mineral Lands Leasing Act revenues, the funds must be deposited in the general fund and be subject to legislative appropriation before expenditure.

It should also be noted that Section 401(a) of the federal act provides for a temporary increase of the Medicaid FMAP (federal medical assistance percentage), which seems to be the kind of single-purpose federal allocation that needs no state appropriation as provided in *Sego, supra*. Medicaid, although it is a cooperative state-federal program generally requiring a state match for the federal funds that are received by the state, does not appear to require any additional legislative action in this case because of the mechanism used of increasing the FMAP. Thus, it does not appear that any legislative appropriation would be necessary for the Medicaid funds.

Although we conclude that funds received pursuant to the temporary state fiscal relief provisions of the Federal Jobs and Growth Tax Relief Reconciliation Act of 2003 need to be appropriated by the legislature before being expended by the executive branch, a secondary issue that needs discussion is whether those funds have indeed already been appropriated. The General Appropriation Act of 2003 contains the following three provisions:

"federal funds" means any payments by the United States government to state government or agencies, except those payments made in accordance with the federal Mineral Lands Leasing Act (Subsection E of Section 2);

"unforeseen federal funds" means a source of federal funds or an increased amount of federal funds that could not have been reasonably anticipated or known during the first session of the forty-sixth legislature and, therefore, could not have been requested by an agency or appropriated by the legislature (Subsection R of Section 2); and

... agencies whose revenue from unforeseen federal funds... which exceeds specifically appropriated amounts may request budget increases from the state budget division. If approved by the state budget division, such money is appropriated... (Subsection I of Section 3).

The governor's attorneys have argued that these provisions mean that the legislature has already appropriated the subject revenue and therefore the legislature has no additional duties or powers regarding those revenues. Conversely, it could be argued that the definition of "federal funds" clearly envisions at least two classes: those payments made to state government and those payments made to agencies; and the provision for requesting budget increases for those unforeseen federal funds applies only to those federal payments made to agencies. Consequently, since the revenues received under the temporary state fiscal relief provisions are made to the state and not to any agencies, they have not been appropriated.

We believe, however, that these are close issues and therefore, we dare not predict how a court would rule. Because an unfavorable ruling could have unintended consequences, a lawsuit over these issues could be risky for both the legislative and executive branch.

#### Possible Resolutions

There are several options to resolve this difference short of filing a lawsuit. Each of the options outlined below is predicated upon the assumption that the governor and legislative leaders agree on how the federal funds will be spent. The only question is whether the funds are expended with or without further action by the legislature.

Some of the practical ways for the executive and legislative leadership to reach an

agreement on the items for which the funds would be expended include interim committee hearings, a joint executive-legislative task force or simply ongoing discussions between the legislative leaders and the executive.

Three options for resolving *the mechanism of how* the funds are expended are:

1. The governor could agree that the funds are subject to legislative appropriation.

While this would be the preferred position of the legislature, it does not preclude involvement by the executive. As noted above, this option, like the others, is predicated upon the assumption that legislative leaders and the governor agree on the items on which the funds are to be expended. Even if such an agreement on how the funds were to be expended was not reached, the executive would still play a major role in the appropriation process, including the exercise of his veto power. The executive prepares and presents an annual budget to the legislature, and executive recommendations with respect to this newly available general source of federal revenue should be taken seriously by the legislature. The legislature, as the law-making body of the state, would make the ultimate policy choices that are called for, but cooperation between the legislature and the executive in making these decisions will resolve these issues in an effective and efficient manner.

2. Legislative leaders and the governor could agree that the first \$31 million payment could be expended without appropriation by the legislature but that the second \$31 million would be subject to appropriation.

This option simply splits the difference, but leaves neither side with a plausible rationale for the decision.

3. Legislative leaders and the governor could agree that the funds are subject to appropriation but that they have, in fact, already been appropriated.

This option allows the legislative to preserve its position that it holds the power to appropriate, but also allows the governor the authority, in this instance, to expend these funds without further formal action by the legislature.