

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
SPECIAL EXAMINATION REPORT  
PERFORMED BY  
OFFICE OF STATE AUDITOR  
DATED DECEMBER 8, 2010**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

# New Mexico State Land Office

Patrick H. Lyons, Commissioner of Public Lands



December 13, 2010

The Honorable Hector H. Balderas  
Office of the State Auditor  
2540 Camino Edward Ortiz  
Suite A  
Santa Fe, New Mexico 87507

Re: State Auditor's Special Audit

## **ENCLOSED SUPPORTING MATERIALS**

1. Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Response to Findings Nos. 8 and 14 -Financial Analyses of Land Sales and Exchanges
2. Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Response to Finding No. 9 - Planning and Development Leases
3. Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Response to Finding No. 12 - State Land Office Advisory Board Minutes
4. Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Response to Risk Observation No. 1 -Land Sales and Land Exchanges Beneficiary Letters
5. General Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Sample of the only known procedure or protocol for land exchange & land sales for the period prior to the Lyons administration
6. General Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Showing the comprehensive Protocol and Procedures Manual, Recordkeeping Lists, Checklists, and Outlines for Land Sales and Exchanges initiated and established during Commissioner Lyons' Administration

7. General Support Materials to Commissioner's Response to Special Examination Report performed by Office of State Auditor dated December 8, 2010:  
Past Auditor's Reports from 2003 thru 2010 showing a few minor findings, all of which were corrected, as shown in the Final Audit - 2010

## **OVERVIEW**

The State Auditor's report fails to see the forest for the trees. Where an agency merely handles public money, such myopic scrutiny might be justified, but the Auditor has overlooked the distinct mission of the Land Office and the extent to which, despite certain streamlining of procedures and discretionary rejection of internal recommendations, the Land Office has fulfilled its mission during the Lyons administration as well, or better than, any prior administration. Significant increases in the trust's land base, increased contributions to the Permanent Fund, and consistent praise from the supported institutions are only a few ways in which the superior performance of the Land Office over the last eight years can be measured.

Although the State Auditor's Report attempts to identify procedural faults and "internal control" failures, the report fails to recognize the extent to which the procedures represent an attempt to do business in the "real world" in accordance with the legal constraints of the unique laws that govern the Commissioner's actions. For an agency that earns over one half-billion dollars from the management and disposition of roughly 10 million acres of land, the Commissioner and the State Land Office have accounted for every dollar and emphatically stand by the results. The State Auditor's review is littered with numerous misstatements or omissions of material facts, poorly reasoned attempts to re-state the law, and, as evidenced in the opening sections of the Report, a simple ignorance of the law and the operations of business in an ever-

changing economic environment. Some examples of shortcomings in the opening sections of the Report are discussed below.

**A. Confusing the Delivery System with the Recipient.**

The Auditor begins the Executive Summary with a significant misunderstanding of who the trust serves (*i.e.*, the “trust beneficiaries”). The Enabling Act trust is an express, charitable trust. *Forest Guardians v. Powell*, 20012-NMCA-028, 130 N.M. 368. The beneficiaries of the Enabling Act trust are all the citizens of New Mexico, not the supported institutions (referred to by the auditor as “beneficiary institutions” and “beneficiaries”). *Id.*; *see also*, *Restatement of Trusts 2<sup>nd</sup>*, §§ 126, 127. The institutions supported by the trust are simply conduits through which the trust provides to all New Mexicans the benefit of essential civil infrastructure. *Id.* This distinction is fundamental to understanding the conduct of the trust. Ultimately, the Commissioner’s primary accountability is to the state’s citizens through the electoral process, and the true measure of his performance is the extent to which his actions benefit the citizens of the state. *Otto v. Field*, 31 N.M. 120, 139, 241 P. 1027, 1035 (1925).

**B. Blurring the Difference Between Improvements and Costs.**

Hampered in his efforts to improve highly developable trust real estate by business lease Rule 9 (19.2.9 NMAC), which was promulgated by a prior Democratic administration, the Commissioner succeeded in devising a new “planning and development” lease Rule 22 (19.2.22 NMAC). Unlike Rule 9, Rule 22 specifically provides the means by which a developer-lessee can recapture the costs of planning and development that increase the value of the trust land leased. The old Rule 9 looks at “improvements” and seeks to value them as a means of measuring the amount a developer can recover of the investment in improving trust lands. Both

the prior and current administrations employed the concept of "improvements" creatively in order to negotiate realistic deals with developers. The new Rule 22 provides a more sophisticated and realistic approach to dealing with developer investment in trust lands, as opposed to the limited Rule 9 appraisal of "improvements."

The auditor's report recklessly but deliberately asserts (at p. 17) that "the terms 'improvement value credit' and 'planning development credit' are synonymous in the context of planning and development leases." The Auditor's subsequent analysis of payments or credits to developers in the planning and development context is as blurred as this critical distinction.

#### **C. Substituting Purported Audit Rules for the Commissioner's Discretion.**

The Auditor appears to suppose that "the best interests of the trust" is solely calculated and defined by "internal controls," ignoring the extent to which the Commissioner, as trustee, can and must exercise discretion to ensure that the process does not unduly interfere with efficient and effective management of trust resources. Each commissioner may have a different, yet entirely legitimate and defensible, determination of what the best interests of the trust may be. For example, one commissioner may feel that the need to assure long-term viability of the trust calls conserving the trust lands as much as possible, thus assuring, in the face of a diminished current income, that a productive corpus remains to support the future of the state's civil institutions. Another commissioner may believe that current economic conditions and the consequent needs of the state's civil institutions call for maximizing current revenue, even at the expense of the long-term productivity of the lands, thus assuring the present viability and hence the foundational future of our civil institutional infrastructure. Both decisions reflect proper

trustee discretion; each reflects a different business outlook; neither is impeachable, because both are premised on a proper devotion to the best interests of the trust.

Such discretion cannot be defined solely and blindly by the kind of "internal controls" that persons applying mechanical audit standards are comfortable and familiar with. This is true because no single set of standards can embrace the amplitude of proper business discretion required of a commissioner. This is not to say, however, that the commissioner has unbridled discretion. The State Constitution and the state statutes wisely and correctly discern that **the commissioner's discretion is subject to external controls detailed in the Constitution, the Enabling Act and by statute. The law further provides that the Commissioner alone determines what shall constitute "internal controls" by promulgation of rules and establishment of staff practices and procedures. The extent to which the Commissioner utilizes these "internal controls" is the definition of discretion.**

The cases examining this point are entirely consistent. In *State ex rel. Otto v. Field*, 31 N.M. 120, 241 P. 1027 (1925), the New Mexico Supreme Court observed that the Commissioner has, in the management of trust lands, the discretion of a business manager, and as such, "then the question of policy on his part, and as to whether he acted wisely and with good business sense, is not a matter which the court would undertake to control or direct." In particular, the court later reiterated this view regarding the sale and disposition of land in *Stovall v. Vesely*, 38 N.M. 415, 34 P.2d 862, 865 (1934): "That the commissioner has discretion to decide the policy of how he will offer for sale and sell the public lands in the absence of any limitations or restrictions imposed by law cannot be questioned. *State ex rel. Otto v. Fields, supra*. We need not go afield for additional authority."

This discretion of the Commissioner is not unbridled, as it is limited by clear law. In *State ex rel. Del Curto v. District Court of Fourth Judicial District* 51 N.M. 297, 306, 183 P.2d 607, 613 (1947), the court was concerned principally with the fact that there was no specific statute authorizing the Commissioner to waive the state's sovereign immunity and substitute himself for the state in litigation, to make the state a party, or to enter the state's appearance without specific legislative authority. *Id.*, at 308, 183 P.2d at 614. The *Del Curto* case stands for the self-evident proposition that the Commissioner cannot act **outside** his grant of authority. *Harvey E. Yates Co. v. Powell*, 98 F.3d 1222 (10<sup>th</sup> Cir. 1996) considered the Commissioner's range of authority in promulgating a rule that governed the calculation and payment of royalties under oil and gas leases whose terms were specifically spelled out by statute. The court found that the rule contained provisions inconsistent with the leases. *Id.*; see also Chapter 19, in particular § 19-10-4 (1985). Had the rule been consistent with the specific terms of the statutory leases, its promulgation would have been within the Commissioner's power. *Id.* The *Yates* opinion stands for the self-evident proposition that the Commissioner cannot act in contravention of a specific statutory limitation.

In short, there is a clear parameter within which a commissioner must operate. This parameter is defined by easily identifiable standards found in specific places: (i) the Enabling Act; (ii) the New Mexico Constitution; (iii) NMSA 1978 § 19-1-1 *et seq.*; (iv) NMAC 19.2.1 *et seq.*; and (v) the relevant case law. What the legislature and our courts have understood, and what neither the State Attorney General nor the State Auditor appear to appreciate, is that proper business judgment entails a certain amount of discretion that goes beyond narrow and inflexible audit standards. The economic and business climate is constantly changing, and even within a single time, business conditions vary from one circumstance to another. In *Yeo v. Ulibarri*, 34

N.M. 184, 192, 279 P. 509, 513 (1929) our Court declared that "Congress, the donor, did not assume to dictate policy. It left that to the trustee in order that it might have the *elasticity* necessary to meet changes of conditions and advances in scientific knowledge." It requires business judgment and discretion to operate successfully, as commissioners have done for over one hundred years. The success of the trust depends on the discretion of the Commissioner, not on the imposition of narrow and inflexible internal controls and needless bureaucratic red tape.

In short, the State Auditor, desperate to arrive at a conclusion not otherwise available because of the superior recent performance of the Land Office, reaches far outside the realm of the Auditor's knowledge and understanding, seeking to audit the constitutional grant of discretion vested in the Commissioner by imposing a requirement of mechanical and inflexible process, none of which are mandated anywhere in the law. Discretion, by its very nature, contemplates breadth and flexibility, as Congress and our legislature understood in giving such a broad grant of authority to the Commissioner. The State Auditor is unable, except through occasional flights of twisted logic, to find any violation of the applicable controls imposed by law.

A clear example of the Commissioner's discretion is in the case of an appraisal of land which, though poorly done, clearly over-valued the land from a strict appraisal-practice perspective. The Commissioner, without having to invoke much complex reasoning, determined that, despite the flaws in the appraisal, it was better to accept a higher value estimate so long as that higher value could actually be realized by the trust. The Commissioner's in-house appraisal review accordingly accepted the appraisal. The State Auditor completely overlooked the actual and tangible benefit to the trust from this simple exercise of the Commissioner's discretion, and attacks the methodology by which the appraisal was approved. This is a clear illustration of how



the Auditor fails to understand the relevant law and the Commissioner's discretion within the law.

## **BACKGROUND**

Throughout the three-year audit process the State Land Office was cooperative and compliant. This was not always easy; however, the nature of the review and the authority granted the State Auditor required compliance. From the outset the State Auditor appointed Steve Archibeque to lead the audit. Mr. Archibeque's level of professionalism was non-existent and his demeanor with the Land Office staff was deplorable, creating an air of contention. Mr. Archibeque was harassing and rude to State Land Office employees and particularly abusive to female staff members. Mr. Archibeque's behavior continued and became progressively worse until the Office of General Counsel had to inform the State Auditor that Mr. Archibeque would no longer have access to State Land Office staff and was not welcome within the building.

The next three auditors assigned to this audit interviewed staff at length, received timely and accurate responses and were afforded unfettered access to State Land Office records. It became immediately evident that the auditors had virtually no business experience and were surprisingly unaware of the legal constraints that govern day-to-day operations at the Land Office. As a result, and as will be evidenced in the enclosed State Land Office responses, the auditors largely ignored the interview responses by Land Office staff.

This audit was not initiated by the institutions supported by the trust, but rather by politicians with a specific non-trust agenda. From the minutes of the last Land Office advisory board meeting, which we are provided with this response, it is clear that the supported institutions have a uniformly positive view of the Commissioner's performance, specifically

thanking Commissioner Lyons for his efficient stewardship of the Land Office. Dr. Dan Lopez, President of New Mexico Institute of Mining and Technology, called the Commissioner's performance during his tenure in office "tremendous."

The special audit was initiated when, on April 28, 2008, several anti-development partisan Democrat legislators requested it in an effort to hinder real estate development in Las Cruces. Notably, the father of one of the requesting legislators, Representative Jeff Steinborn, is a real estate developer and stood to gain by limiting the activities of other developers in the area. Rather than analyze the ulterior motives for the request, the State Auditor chose to expend taxpayer money and OSA staff resources to pacify political whims. Considering the numerous pay-for-play allegations and indictments within the current gubernatorial régime, it seems curious that the office of the State Auditor chose not to initiate a "special audit" to review those numerous allegations of misconduct. Nevertheless, after two and a half years of scrutiny and at great taxpayer expense, the State Auditor has produced a document that is factually deficient, legally unsound, clearly misleading, poorly supported and of no actual value to this or any other administration. The lack of business acumen exhibited in the State Auditor's recommendations shock the conscience. The State Auditor has obtusely criticized deals where our "internal controls" coupled with the Commissioner's discretion managed to increase profits for our supported institutions, and inexplicably questioned why the Commissioner did not specifically act in accordance with advice from classified staff members that would have decreased Land Office revenues and directly harmed our supported institutions. These findings clearly illustrate an intentional bias, and suggest that the State Auditor would prefer the Commissioner of Public Lands abandon his constitutionally mandated discretion and blindly follow recommendations made by unelected classified staff members, regardless of the consequences to the trust.

The State Land Office tolerated the ongoing intrusions on staff time and resources making documents available for scrutiny, wasting hundreds of man-hours that frankly could have and would have been better spent generating income for our supported institutions with the hope that at the end of the audit the Land Office would receive a useful document. Unfortunately that did not occur.

One recurring theme of the State Auditor's report involves transparency. Oddly enough, when Commissioner Lyons attempted to push for legislation to codify the planning and development process and create a better and more defined process, which would provide the very transparency allegedly sought by the office of the State Auditor, the State Auditor not only did not help move the legislation but stood indifferently mute.

Undeniably, Patrick H. Lyons has been the most proficient Commissioner in the history of the State Land Office. In the last eight years, Commissioner Lyons generated more money for the trust than was produced in the previous twenty years. His administration has been a model of governmental efficiency that should be duplicated, not denounced. While the budgets of departments and agency under the control of Honorable Governor Bill Richardson, the State Auditor and other executive officials exploded at an alarming rate, Commissioner Lyons held steadfast to his core beliefs of limited government and fiscal responsibility. The results are incontrovertible; Commissioner Lyon's administration generated record income totals, and did so with a flat budget for five years and a budget that decreased the ensuing three. In this climate of big state government, such accomplishments are unheard of. None of Commissioner Lyon's employees make more than one hundred thousand dollars a year, and he has operated as a fiscal conservative while maintaining a level of service second to none. Commissioner Lyon's motto has remained constant, "do more for less".

The State Land Office welcomes the chance to respond to the various findings and risk observations in the State Auditor's Special Examination Report, despite the limited time-frame afforded and obvious political bent of the review. Considering the fact that the Office of the State Auditor spent two and a half years reviewing our policies and practices, and the fact that the Land Office has been afforded less than ten days to respond, even a cursory review of the audit report has uncovered gross incompetence, ignorance of applicable law and, most concerning, purposeful deceit with regard to the reported conclusions and recommendations.

The responses of Commissioner Lyons and the State Land Office are as follows:

# New Mexico State Land Office

Patrick H. Lyons, Commissioner of Public Lands



## MEMORANDUM

**To:** Honorable Hector Balderas, State Auditor  
**From:** Scott McDowell  
**Date:** December 13, 2010  
**Subject:** Response to State Auditor Findings

As you requested, I have reviewed certain findings by the State Auditor relating to Land Office appraisals and appraisal reviews.

For the most part, these findings are not based on fact, but rather on unsupported opinions of the Auditor. What is most disturbing about them is that they suggest numerous wrongdoings on my part, and that of my predecessor.

I have over 30 years of real estate appraisal experience in both the private and public sectors, and have completed thousands of appraisals and reviews for a wide variety of clients, properties and purposes. Not once have I had a report rejected or even challenged for a standards violation. Furthermore, while holding general appraiser certificates in Arizona, Colorado, Nevada, Texas, and New Mexico, I have never had an appraisal board complaint filed against me.

Having spent considerable time with Auditors in an effort to help them understand basic appraisal concepts and my role as Chief Appraiser, I can safely say that none of them have the qualifications to be rendering opinions on appraisal issues, let alone challenging mine.

The following are my responses to their findings, which clearly support this contention.

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING 01**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

## BOWLIN TRAVEL CENTER

The Audit criticizes the Commissioner for exchanging land for \$7500.00 an acre when the appraised value was \$4500.00 an acre (The Commissioner was able to sell the land for over 66% more than its appraised value.)

Although law is referenced there is no citation to the law, or discussion of, the broad powers of the Commissioner in disposing of State Trust Land.

### Evidence that the Auditors are making a case against the exchange rather than objectively evaluating it

The Audit analyzes the income value of the land given up by the State Land Office in the exchange but does not analyze the income value of the land received. In fact the income value of the land received is likely to be substantially greater than the income of the property disposed of owing to its commercial location in close proximity to a major truck stop on the west side of Las Cruces. Las Cruces is currently developing westward

The statement that the net gain to the trust was 14,400.00 is false. It is based on the per acre value of \$7500.00 when the appraised value was \$4500.00. The net gain to the trust was in fact plus or minus \$105,000.00 based on the appraised value of \$4500.00.

### Other points

The emphasis of the audit is that a substantially larger value should not have been accepted without a "financial analysis."

First, while an "analysis" is required a "financial analysis" is not required.

Second, even if a "financial analysis" was required it is clear on the face of the increased value that this is a large increase in per acre value and in the best interest of the trust:

The report says that the Commissioner did not use an "objective reliable and commercially acceptable method to determine the true value of the land." However, the Commissioner used an external certified appraiser to appraise the land. The Commissioner determined that the appraisal was substantially lower than what the market would bring.

The Auditor's suggestion that the letter to the beneficiaries is unclear has some validity. Although the beneficiaries are free to contact the State Land Office for clarification, if they had not done so, they may have misunderstood due to ambiguous language in the letter. To suggest that the letter was intentionally ambiguous is ludicrous.



PATRICK H. LYONS  
COMMISSIONER

*State of New Mexico*  
*Commissioner of Public Lands*

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COMMISSIONER'S OFFICE

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October 30, 2008

Dr. Veronica Garcia  
State Dept. of Public Education  
300 Don Gaspar  
Santa Fe, New Mexico 87501

Dear Dr. Garcia:

As required by State Land Office Rule 21 (pertaining to land exchanges), please be advised that the State Land Office recently conducted a 10-week public auction for 30 acres located within Section 36, Township 23 South, Range 2 West, N.M.P.M. in Doña Ana County, New Mexico. The land is currently lease for the purpose of a truck stop and travel center. Public Schools of New Mexico is the designated beneficiary of this land.

The public auction concluded on August 27, 2008. Commissioner of Public Lands, Patrick H. Lyons selected Bowlin Travel Centers, Inc., a Nevada Corporation as the highest and best bid.

The lands offered for exchange are located in Doña Ana County, New Mexico. An analysis of the proposed land exchange has been completed. Based upon the analysis, it has been determined that the exchange/sale is in the best interest of the trust and the beneficiary.

Attached is a report that describes the properties to be exchanged, the reasons for the exchange and a brief analysis.

If you have any questions, or would like more information on the land exchange, please call me at (505) 827-5094.

Sincerely,

Jerry King, Assistant Commissioner  
Special Projects

Cc: Patrick H. Lyons, Commissioner of Public Lands

-State Land Office Beneficiaries -

Carrie Tingley Hospital • Charitable Penal & Reform • Common Schools • Eastern NM University • Rio Grande Improvement • Miners' Hospital of NM • NM Boys School • NM Highlands University • NM Institute of Mining & Technology • New Mexico Military Institute • NM School for the Deaf • NM School for the Visually Handicapped • NM State Hospital • New Mexico State University • Northern NM Community College • Penitentiary of New Mexico • Public Buildings at Capital • State Park Commission • University of New Mexico • UNM Saline Lands • Water Reservoirs • Western New Mexico University



**SUMMARY REPORT OF THE LAND EXCHANGE LE-0606**

Beneficiary Land (land exchanged to Bowlin Travel Centers, Inc., a Nevada Corporation.)

**Beneficiary:** Public Schools

**General Location  
And Description:**

The Beneficiary property consists of land totaling approximately 167 acres located on about eleven miles west of the Las Cruces, New Mexico on Interstate 10. The property has been leased under a business lease for the purpose of a truck stop and novelty store.

**Legal Description:**

Pt. SW1/4NW1/4 (6.212 acres),  
Pt. SE1/4NW1/4 (6.724 acres), Pt.  
NW1/4SW1/4 (7.541 acres), Pt.  
NE1/4SW1/4 (2.319 acres), Pt.  
SW1/4NE1/4 (6.425 acres), Pt. SE1/4NE1/4  
(0.712 acres), Pt. NW1/4SE1/4 (0.144  
acres), Section 36, Township 23 South,  
Range 2 West N.M.P.M., Dona Ana County,  
New Mexico containing 30.077 ± acres.

**Highest and Best Use:**

**Appraised Value:**

A recent formal appraisal was conducted by Riley & Associates Appraisals, on September 15, 2007, The minimum bid was established at \$225,600 resulting in a \$7500.00 per acre.

**Total Value Estimate  
Of Exchange Lands:**

\$225,600.00

Bowlin Travel Centers, Inc., a Nevada Corporation (land exchanged to the State Land Office)

**Assigned Beneficiary:**

Public Schools of New Mexico

**General Location  
And Description:**

This approximately 1 ± acres of land is located between Interstate 10 and Stern Drive off Mesilla in the City of Las Cruces.

**Legal Description:**

Plat of Survey Lot #1, Hacienda De Mesilla, Subdivision No. 2 as recorded January 21, 1998 in Plat Book 21, Page 44 of the Doña Ana County records, located in the SE1/4 of the SE1/4 of projected section 24 and the NE1/4 of the NE1/4 of projected section 25, T23S, R1E, N.M.P.M. of the U.S.R.S. surveys, City of Las Cruces, Doña Ana County, New Mexico

**Size:**

1.00 acres, more or less

**Highest and Best Use:**

Commercial

**Appraised Value:**

A recent formal appraisal was conducted by Riley & Associates on September 16, 2007, resulting in a market value estimate of \$240,000.00..

**Total Value Estimate Fee Lands:** \$ 240,000.00

**Total Value of State Trust Lands** - \$ 225,600.00

**Increasd Land Value to the Trust** \$ 14,400.00

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING 02**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

## LEA COUNTY SALE (SALE 5951) (2008)

### Finding 02 – Land Sale Not in the Benefit of the Trust

**ERROR:** In stating that the Commissioner “appears to have arbitrarily allocated and valued” unappraised land that was included in the February 2008 sale to Lea County (Sale 5951), the audit report fails to acknowledge and address what is clearly stated in the Recitals on the first page of the Agreement to Sell Land:

Of the 26.33 acres of Sale Land, **11.634 acres were appraised as non-usable** being comprised of railroad, State Highway and County Road rights of way, and county beautification projects, and which will encumber the Land upon its sale to the County.

The appraisal of 11.634 acres as “unusable” was clearly and repeatedly noted in the April 10, 2007 appraisal report by Tere Boyd of Zia Appraisal. See pages 2, 3, 15.

While the County applied to purchase only the 14.3 acres it was leasing to use as a parking lot for the Lea County Cultural Events Center and not the additional 6.082 acres it was leasing for a road beautification program and other acreage encumbered by railroad and highway rights-of-way, the decision was made to dispose of all of the 26.33 acres that the State owned in Section 8 of Twp. 18 South, Range 38 East. By disposing of non-usable land, the State was relieved of the burden of managing that land.

This is all clearly spelled out in a letter from SLO counsel to the Lea County attorney dated August 17, 2007, a copy of which is in the sale file. As the letter states:

The county has already agreed on the appraisal price for the BL-0629 land, and has tendered that price (\$71,500.00). Without increasing the consideration due, the Land Office proposes to simply convey all the State Trust Land remaining after Patent 2783 – the business lease area plus all the various rights-of-way. Thus, everything remaining in the Southwest corner since Patent 2783 would be conveyed. The various right-of-way strips were valued at zero by the appraiser because they were already occupied by various uses. Keeping these strips of land on our tract books is frankly not worth the trouble; and when the easements expire, the land will revert to the County rather than the Land Office, which has no use for such strips of land.

Exhibit 2 to the Sale Agreement and the SLO Title Search Report specifically enumerate right-of-way encumbrances in favor of the railroad (8.08 acres), the State Highway Commission (3.75 acres and 2.522 acres), and the City of Hobbs (0.48 acres and 0.33

acres), each of which will continue to exist, without further compensation, so long as the right-of-way is used for the permitted purpose. A Lea County right-of-way covering 5.695 acres would have continued until August of 2037, and thus the County was purchasing land that it already had the right to use under a long-term easement. Two utility easements and an agricultural lease (14.81 acres) also encumbered the land, as well as an oil and gas lease. The sale file contains an SLO plat (also included in the bid packet) and aerial photographs showing the location of the encumbrances in relation to the land sold, making clear the greatly encumbered state of the land sold.

As stated in Patent No. 4346, the County took the land subject to "all valid and existing rights, restrictions, reservations, covenants, conditions, rights-of-way, and easements affecting the Land, including but not limited to matters on file in the records of the New Mexico State Land Office," and also subject to the State's reservation of the mineral rights and an active oil and gas lease.

Therefore, there was an appraisal covering all of the land sold, which provided a specific and well-reasoned basis for not requiring additional compensation for the encumbered land not currently leased to Lea County. Moreover, the sale was done by public auction, and no other bids were received. If the land had the kind of value that the audit report suggests, other bidders would have sought to make offers above what the County was offering to pay. An alternative purchaser would have taken the risk that the County would simply condemn the property to maintain its use as a parking lot for the Cultural Events Center before any alternative development occurred.

**ERROR:** In stating that the external appraisal used for the sale had an effective date of October 1, 2003 and that the appraisal "was performed almost three years before the County applied to purchase the land," the audit report fails to note that the appraisal was done in April of 2007, less than a year before the sale was completed. The file makes it clear that the appraisal was used both to modify the 2003 re-set of the rental rate called for in the business lease and to set the minimum bid for the sale. Indeed, the file makes it clear that the County sought to purchase the land in large part to resolve their protest of the 2003 adjustment of the rental rate, which the 2007 appraisal showed to be far in excess of the true value of the land. Given that the recession started in late 2007, an update of the appraisal likely would have further reduced the appraised value, which is confirmed by an October 30, 2007 email by the SLO in-house appraiser to the Commercial Division analyst managing the County's commercial lease.

**ERROR:** In stating that the SLO should have collected unpaid rent from the County at an adjusted rate that went into effect in 2003 and more than doubled the rent, based on a field reviewer's estimate of value that was more than four times greater than the 2007 appraisal, the audit report fails to acknowledge a November 1, 2007 memorandum in the sale file in which SLO counsel states that the Commissioner agreed to collect one year of back rent at the original rate because of issues with the appraisal and delays in processing the application to purchase. The field reviewer was not a certified real estate appraiser, the purpose of the field report was to re-set the lease rate and not to set a sale price, the field report misstates the amount of acreage covered by the lease, and the cursory 2003

in-house review of the field report indicated that the value estimate did not comply with USPAP and was approved only for the limited purpose of re-setting the rent under the County's lease. In an October 30, 2007 email message to a Commercial Division analyst handling the lease issues, the SLO in-house appraiser recommended that more weight be placed on the April 2007 appraisal report than the August 2003 field report because the appraisal was "much more current, is based on sales that are more comparable to the subject, and more adequately addresses the apparent flood plain effects on the property."

**ERROR:** The audit report states that a SLO field report "notes that the County received approximately \$35,000 a year in sub-lease revenue." In fact, the field report says that the sublease was for \$25,000/year, and other SLO records (such as the ONGARD leasing report) indicate that there was no sublease. Earlier field reports omit any mention of sublease or other revenue. Moreover, to the extent that there was sublease or other revenue, the field report discusses gross revenue and does not report or consider County expenses associated with the revenue producing activity. There is no support for the audit report's assertion that all of this revenue could simply be paid over to SLO to cover the County's rent obligation, and the assertion is inaccurate.

**ERROR:** The audit report raises an issue concerning an offhand comment in the Division Notification in which the Oil, Gas and Mineral Resources Division asked whether the Commercial Division would generate more money by continuing to lease the land. The Commercial Division personnel who actually had responsibility for, and specific data concerning, the business lease and the sale made a business judgment that a sale was preferred, and the decision and its rationale are well documented. They did not address OGM's query directly because they do not report to the OGM manager and the offhand comment was not seen as something that required a direct response.

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING 03**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

### **Finding 03 – Land Sale 5941 Rio Rancho / Lionsgate**

**Issue 1:** The forty (40) acres of state trust land were sold to the city of Rio Rancho for \$35,200/acre plus in addition the Commissioner received 7.2 acres back of the 40 acres; and retained all the money.

**Facts:** The City of Rio Rancho applied to purchase 40 acres from the Commissioner of Public Lands (the “Commissioner”) for the specific purpose of “sponsor[ing] private development of a film studio campus consisting of production facilities for film and television production activities, and a media and entertainment business park, with different types of businesses catering to media and entertainment. This will create a center on a large scale that is new to the State, that will create high-paying jobs and a sustained film and entertainment industry presence. The project is scheduled to be formally adopted as a Local Economic Development Act project....” (See City’s application to purchase). The project was approved pursuant to the Local Economic Development Act. NMSA 5-10-3.

An appraisal was completed by Riley and Associates (“Riley”) which valued the land at \$32,000/acre. (See pages 2 of Vacant Land One tract in Sandoval County Lions Gate Entertainment appraisal report.) The State Land Office Appraiser at the time recommended that the Commissioner reject the appraisal because Riley’s report did not “sufficiently convey and report the prevalent changes in market conditions.” (Interoffice Memorandum July 13, 2006.). The State Land Office Appraiser did not state that the report violated USPAP standards or other applicable laws.



The 40 acres was sold to the city for \$35,200/acre; \$3,200/acre more than the appraisal. In addition to the increased money for the supported institution, the sale agreement set forth the provision that the city would convey 7.12 acres to Lionsgate and that Lionsgate must construct a movie studio within 2 years, the studio must be operational within 5 years and that if Lionsgate failed to make these bench marks Lionsgate would pay the Commissioner an additional sum. A mortgage was executed against Lionsgate's promise to perform.

Lionsgate did fail to perform and the parties agreed to entering into a termination agreement which could be executed more quickly. The termination agreement between Lionsgate and the Commissioner caused 7.2 acres to be return to the trust.

**Legal Analysis:** It is fully within the Commissioner's discretion as to accept or decline the recommendation of a State Land Office Appraiser when provided no law has been broken. The New Mexico Constitution Article XIII Section 2 vests the commissioner of public lands with "the direction, control, care and disposition of all public lands." Upon statehood, the legislature reaffirmed the commissioner's authority over trust lands by proclaiming the commissioner "shall have jurisdiction over all lands owned in this chapter by the state." NMSA 19-1-1. The Supreme Court of New Mexico confirmed the authority of the commissioner over trust lands and determined "the commissioner may sell or hold the state lands as his judgment and discretion may dictate." Otto v. Field pg 16.

The limits placed upon the Commissioner's jurisdiction over trust lands are those specifically provided by law. Such an exception to the Commissioner's jurisdiction is

found within Section 10 of the Enabling Act. New Mexico received lands to be held in a charitable trust from the Federal Government through the Arizona - New Mexico Enabling Act. Enabling Act Section 10. The Enabling Act required that trust lands "being offered *shall be appraised at their true value*, and no sale ...*shall be made for a consideration less than the value so ascertained.*" Enabling Act Section 10. (emphasis added). Therefore, the Commissioner, when selling trust land, must receive *at least* the appraised value. In this land sale, there was an appraisal of the land which valued the trust lands at \$32,000/acre. The Commissioner was able to negotiate a higher price than the appraisal value and obtained \$35,200/acre. In addition, the Commissioner also negotiated benchmarks for the party which would be the ultimate holder of the land and consequences to that party if they failed. This allowed for even greater protection to the trust. When Lionsgate failed to meet the benchmarks, the parties agreed to expedite the matter and chose to return the 7.2 acres to the trust.

The Sale Agreement states:

**Issue #2:** The land was sold to Rio Rancho, a governmental entity that applied to acquire the land for a specific purpose which only the city could effectuate, the need to submit the land sale to public notice was not required.

**Legal Analysis:** The Enabling Act requires when trust lands are sold, the land shall be sold "to the highest and best bidder at a public auction to be held at the county seat" and the public auction "shall first have been duly given by advertisement." Enabling Act

Section 10. This provision arose from concern that the trust would be exploited for private advantage. Lassen v. Arizona ex rel. Arizona Highway Department pg 4. This requirement was intended to insure that the trust not be "exploited for private advantage" and to insure the trust would receive full compensation. Lassen pg 4.

In *Lassen v. Arizona*, 385 U.S. 458 (1967), the United States Supreme Court addressed whether the Arizona State Land Department was required to notify the public and conduct a public sale when the Arizona Highway Department sought state trust land for public highways. The Supreme Court of the United States determined there was "no need to read the Act to impose these restrictions on transfers in which the abuses they were intended to prevent are not likely to occur, and in which the trust may in another and more effective fashion be assured full compensation." Lassen.

The transfer to Rio Rancho for the Lionsgate movie studio is similar to *Lassen*. Only the city of Rio Rancho has the ability to fund a movie studio through the Local Economic Development Act within the boundaries of the city, just like the Arizona Highway Department is the only entity which can construct Arizona Highways. The trust land Rio Rancho sought to acquire was within the city's boundaries. Rio Rancho paid more than appraised value for the land and agreed, along with the movie studio, to reversionary language required by the Commissioner. In the present instance the Commissioner received \$32,500/acre plus received 7.12 acres back because Lionsgate failed to build its studio. The trust earned money and retained 7.12 acres for the corpus.

**Issue #3:** The Improvement Value Credit (IVC) Calculation was properly made.

**Legal Analysis:** The first appraisal of the land was conducted on October 15, 2005, the land was valued at \$15,000/acre. The second appraisal of the land was conducted on April 28, 2006 at \$32,000/acre and was sold for \$35,200/acre. The Auditor failed to include within his report the first appraisal which was in the BL-1713 file. Instead of using the second appraisal value of \$32,000/acre to determine the IVC, the sale price of \$35,200 was utilized. By choosing to use the sale price over the second appraisal value the trust received more money per acre. Per the information which was in the file: utilizing the sale price the lessee received \$305,982.88 and the Commissioner received \$1,102,017.12. If the Commissioner used the second appraisal value the lessee would have received \$254,782.88 and the Commissioner would have collected \$1,025,217.12. It was in the best interests of the trust that the Commissioner chose to utilize the sale price when determining IVC because it created a \$76,800 gain to the trust. Plus the Lessee paid \$5000 / year for the lease even though the lease had less acreage in it. So over a five year period the lessee paid \$25,000 in rent to the Commissioner plus on this one land sale the commissioner made \$1,102,017.12 for the trust.

**Issue #4:** Contractual Obligations and Termination

**Legal Analysis:** A basic principle of contract law is that if the parties agree, they may choose to alter a contract or enter into a new one. Specifically, Lionsgate and the Commissioner agreed, through formal contract within the file, to allow Lionsgate to return the land to the Commissioner instead of enforcing the original contract provisions.

This allowed for 7.2 acres, prime acreage in Rio Rancho, to return to the trust corpus. According to the plat in both LS-5941 and LS-5953, the 7.2 acres is within ~1400 feet from land which sold for \$87,120/acre. The 7.2 acres is likely worth \$627,264.00 which is greater than the \$540,000 Lionsgate would have had to pay the Commissioner. In addition the payment would not have been contractually enforceable until 2011, whereas in 2009 the Commissioner received the land back from Lionsgate, a full two years before the original contract allowed for.

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING 04**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

#### **Finding 04 – True Value of Land Not Reflected in Land Exchanges**

This finding illustrates the Auditor's complete lack of understanding of not only exchanges, but the basic function of the Land Office.

While the "Test Items" are apparently intended to prove a detriment to the Trust from adjustments made to values and/or land sizes in certain exchanges, in fact each Test Item proves the additional benefit received by the Trust:

- Test Item 1    The value of the Trust land was increased; a 52% additional benefit to the Trust.
- ~~Test Item 2    While the amount of offered land was decreased, tracts of Trust land with much higher values were also removed from the exchange. The end result was a 20% benefit to the Trust.~~
- Test Item 3    The amount of land given up was decreased; a 19% additional benefit to the Trust.
- Test Item 4    The amount of land received was increased; a 2% additional benefit to the Trust.
- Test Item 5    The amount of land received was increased; a 27% additional benefit to the Trust. (The small decrease in unit value is due only to rounding).
- Test Item 6    The amount of land received was increased; a 23% additional benefit to the Trust.
- Test Item 7    The value of the offered land was adjusted downward; a 17% additional benefit to the Trust.
- Test Item 8    The amount of land received was increased; a 9% additional benefit to the Trust.
- Test Item 9    The value of the Trust land was increased; a 67% additional benefit to the Trust.
- Test Item 10   The amount of land received was increased; a 10% additional benefit to the Trust.

Unless the appraisals come in at exactly the same values used for structuring an exchange, the amount of lands involved will have to be adjusted once the appraisals are received in order to keep the exchange balanced. Furthermore, it's not practical to order surveys until the lands are specifically defined, which may mean further adjustments to the land areas.

In other words, the lands involved in a proposed exchange are always subject to change, which an auditor who spent three years analyzing should have learned in the process.

It's also not practical to bring back the appraiser(s) for every little change to the land areas, particularly when it's just a matter of removing lands or adding adjacent lands. Accordingly, the

Scott McDowell  
December 13, 2010  
Response to State Auditor Findings

most efficient and productive solution is to have the Land Office Review Appraiser make any necessary adjustments to land areas in an exchange, as he or she is also a "certified" appraiser.



**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING 05**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

## **Finding 05 – Appraisal Review Omission**

The “Certification” included with my appraisal reviews states:

“I certify that

...

I have no present or prospective interest in the subject property, and I have no personal interest or bias with respect to the parties involved in this assignment

...”

According to the Uniform Standards for Professional Appraisal Practice (USPAP);

“Each written Appraisal Review Report must contain a signed certification that is *similar in content* to the following form:

I certify that, to the best of my knowledge and belief:

...

I have no (or the specified) present or prospective interest in the property that is the subject of the work under review and no (or the specified) personal interest with respect to the parties involved.

I have no bias with respect to the property that is the subject of the work under review or to the parties involved with this assignment...”<sup>1</sup>

The Auditor claims that the exclusion of the word “bias” with respect to the property in my statement creates the perception of non-compliance with USPAP.

As may be noted, the USPAP version is poorly worded (i.e., “...to the best of my knowledge and belief: I have no... interest in the property”). Fortunately, the requirement is only that the certification statement be “similar in content,” which my statement clearly meets. Although I personally informed the Auditors of this, they chose to simply ignore it.

Since the implementation of USPAP in 1990, I have always used a modified version of the recommended certification language in my appraisal and review reports, and no one has ever questioned it.

Obviously, the Auditor failed to find any material issues with my reviews and had to rely upon a deficiency as subtle as this to challenge my work. So, in one way, this finding may be taken as a vindication of everything else about my work.

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<sup>1</sup> USPAP Standards Rule 3-6

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING O6**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

### **Finding 06 – Proposed Exchange with Unsupported Values**

This finding relates to the *proposed* UU Bar Ranch exchange, which has *not closed*. As such, the Auditor's claims as to the *effect* of this transaction are based solely on conjecture ("if this", "if that"), rather than on fact.

The fact is, the Auditor's review was limited to the Management Analyst's file, which contrary to the Auditor's claim, does include my documentation supporting the change in acreage. As stated in my "Amendment to Reviewer's Opinion of Value" dated January 22, 2010:

"Since the date of my review, it has been discovered that title to a small portion of the property (26.05-acres) is questionable, which could potentially reduce the size of the tract to 2,844.14 acres. However, after careful consideration, I have concluded that removal of this land would have *no effect* on my opinion of value for the subject for the following reasons:

- The area in question is less than one percent (1%) of the total and is located on the extreme northeasterly end, which is considered the least useful part of the tract. As such, its value contribution to the whole is minimal, if any.
- The appraiser's analysis produced a value range for the tract of \$388 to \$482 per acre. While the appraiser selected a round figure of \$400 per acre to arrive at a total value indication, a figure of \$403.64 ( $\$1,148,000 / 2,844.14$  acres) would have been equally acceptable."

I personally directed the Auditors' attention to this document in the file. Apparently, they chose to ignore it.

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING 07**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

### **Finding 07 – Appraisal Accepted by Appraiser with Expired License**

The only requirements for issuance of a Temporary Practice Permit by the Real Estate Appraisers Board are that the applicant (1) hold a certificate or license in another state, and (2) submit the appropriate application and fee to the Board. The application is not subject to approval by the Board.

The appraiser in question, John Widdoss, ARA, MAI, FRICS, held at the time of appraisal, and continues to hold, active General Appraiser Certificates in good standing for both South Dakota and Wyoming. As one of the most highly-respected appraisers in the country<sup>2</sup>, he has been issued temporary practice permits on numerous occasions in 20 other states, including New Mexico.

Mr. Widdoss has never applied for a temporary practice permit that was not subsequently issued precisely as requested, and has never been cited for any violation of permit provisions.

Mr. Widdoss submitted the appropriate application and fee for such permit in August 2008, which the Board routinely processed and made effective on September 10, 2008. It is highly doubtful that Mr. Widdoss' inspection of two (2) of the four (4) properties, only 1 and 2 days prior to this date would be considered a violation of the Real Estate Appraisers Act.

Furthermore, the quality of an *appraisal* is not affected in anyway by a licensing issue with the *appraiser*, particularly one so minor. Accordingly, the interests of the beneficiaries are not at risk as the Auditor claims.

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<sup>2</sup> Named Appraisal Professional of the Year for 2009 by the American Society of Farm Managers and Rural Appraisers.

**STATE OF NEW MEXICO  
NEW MEXICO STATE LAND OFFICE**



**COMMISSIONER'S RESPONSE TO  
FINDING O8**

**Patrick H. Lyons  
Commissioner of Public Lands  
December 17, 2010**

PAGE 44: FINDING 08 – LACK OF SUPPORT FOR MATERIAL BENEFIT TO TRUST:

For test items 1 – 4 of “Finding 08 – Lack of Support for Material Benefit to Trust,” the auditor places an inordinate and unsubstantiated emphasis on the creation of split estate. The fact is that **5,243** wellbores of varying current status have been drilled on state trust lands where the SLO does not have ownership of the surface estate (split estate). There are currently **3,873** SLO oil and gas leases on split estate. From the period of September 2009 through August 2010, bonuses at the monthly SLO oil and gas lease sale for split estate properties have generated **\$27,244,678.36**. Royalties from production for that same time period on SLO split estate was **\$205,213,152.00**. There is absolutely no indication in the factual data that split estate has resulted in any loss of revenue to the trust.

Furthermore, the properties that are bid on during the monthly SLO oil and gas lease sale have royalty requirements should a well go into production as follows: Permian basin, 1/6 or 3/16 based on internal SLO staff determination, San Juan Basin, 1/6 or 3/16, based on internal SLO staff determination, Frontier Basin 1/8. These rates are all set **regardless** of the status of SLO ownership of the surface estate.

Additionally, the auditor and his findings to not take into account the mineral reservation (reservation) that is part of every patent and exchange agreement that the Commissioner enters into with a private party. That reservation clearly reserves “...all minerals of whatsoever kind in, under or upon the granted land.” The reservation then goes on to enumerate a lengthy list of items reserved “...whether or not now known to exist or to have value, of whatever form or type, at whatever depth, in whatever nature of deposit, whether solid, semi-solid, liquid, or gaseous, whether similar or dissimilar to any of those minerals enumerated.” The reservation then

reserves the right to extract the reserved minerals by any means whatsoever, whether by wells, including input wells, underground mining, open-pit, or strip mines, surface or subsurface leaching, or any other means now or hereafter known or employed. The State reserves the right of access and surface use necessary for or reasonably incident to exploration for and extraction and removal of the reserved minerals, the right to execute leases for mineral development and operations, the right to sell or dispose of the minerals, the right to grant rights-of-way and easements for mineral purposes, the right to prospect for, mine, produce and remove minerals and the right to perform any and all acts necessary in connection therewith.

While the individual patents and exchange agreements may vary slightly over time and the enumerated minerals has grown, the intent by the SLO is quite clear. That if, and/or when a mineral is discovered, it is solely at the discretion of the Commissioner whether or not the minerals will be developed.



In the over two year special audit, no oil, gas, and minerals division (OGMD) staff at the SLO were interviewed by the state auditor. Instead, the auditor chose to use inference and opinions to discount the material benefits to the trust, based on the estate being split rather than look at the facts. The continual reference to a loss in potential and current revenue and benefit to the trust in numerous findings in addition to test items 1 – 4 is simply the unfounded opinion of the auditor. (see also response to finding 11)

For test item 5, while the exchange did result in the state trust lands being reduced by 695 acres of surface estate; other material benefits are unrecognized or considered by the auditor. The nearly 9 million acres of surface estate and 13 million acres of mineral estate managed by the SLO are not all equivalent in value. The only method currently available and specified in law for SLO to determine value for an exchange is through appraisal by a licensed professional. The value of each tract of land is a unique combination of its mineral potential and geology, vegetative cover and grazing potential, proximity to other SLO lands, proximity to urban and commercial centers, topology and topography, revenue producing potential, environmental hazards, water resources, etc... which may or may not be fully considered in an appraisal. The value, as established through the appraisal process is then augmented by SLO staff using their specialized knowledge of state trust lands and land management. The determination and the most relevant factors are then presented to the Commissioner and beneficiary at the appropriate phase of the exchange process. Those analyses are presented for each test case more fully below and were made available at all times during the special audit. This and the other findings by the auditor fail to explain why the considerations contained in the reports to the Commissioner and the beneficiary reports were inconsequential and did not constitute a material benefit to the trust. The fundamental lack of understanding by the auditor that lands can have differing inherent value, and that the appraisal process is the only method available and proscribed by law, has lead to this and other unsubstantiated findings.

For test item 6, the comment under *Monetary Gain* is false, as the \$57,000 gain is derived directly from appraisals. (see also, response to test item 5 above)

For test item 7, the acreage figure under *Private Land Acreage Conveyed...* is incorrect, and should be 3,610.19 acres, which increases the land benefit to the Trust to 179 acres. (see also, response to test item 5 above)

Both of the exchanges listed in test items 6 and 7 are part of the Whites Peak project, and to cite them out of context from the project as a whole is a distortion of the facts. Moreover, test item 7, is the "UU Bar Ranch" exchange, which has yet to close. To base a finding on an exchange that has yet to close is premature at best. The Commissioner explicitly "...reserves the right to reject all proposals submitted" up to, and until the patent(s) are issued and the exchange closes, as specified in the public notice and other bid documents. This finding is equivalent to charging someone for a crime simply for thinking about breaking a law, regardless of whether or not a crime was actually carried out or committed.

The following are summary reports for each of the seven (7) land exchanges listed in the audit as "Finding 08" as test items. These summary reports explain the material benefits to the Trust and validate that the exchanges were in the best interest of the trust.

This information was available in the summary reports attached to letters to the beneficiary and/ or in the reports to the Commissioner. These reports were located in the exchange files that were made available during the audit and this information supports the determination that the exchange resulted in a material benefit to the trust. When necessary, additional supporting evidence has been added to further validate the original decision that the exchange was in the best interest of the Trust.

#### **1. RESPONSE FOR LE-0308 IMC KALIUM POTASH EXCHANGE:**

##### **SUMMARY:**

The state trust land office exchanged lands containing 280± acres valued at \$5,600, for vacant land owned by IMC Potash containing 160± acres valued at \$5,600. In addition, IMC Potash offered a cash sum of \$5,000, increasing the Trust asset over and above the existing land value.

The state trust property was primarily mining related with limited grazing. The state land was located adjacent to the IMC tailing ponds. These ponds are produced from a potash refinery and have continued to grow. Heavy rains could cause the ponds to spill over onto trust land, causing environmental damage. Due to the salt lake and poor soils, vegetation did not grow on the majority of the state land. Therefore, 200 surface acres were not leasable for agriculture purposes, and the remaining 80 acres located out of the drainage were located on a hillside. The offered land is adjacent to the Pecos River and was located in a remote area primarily used for ranching activity. The offered lands offered more leasing potential.

**Legal Description:** *State Land* – NW ¼ NW ¼ of Section 25, NE ¼, E ½ NW ¼ of Section 26 all in Township 22 South, Range 29 East, 280± acres.

*Offered Land* – E ½ SE ¼, of Section 1, Township 25 South, Range 28 East, 80± acres, and the W ½ SW ¼ of Section 6, Township 25 South. Range 29E, 80± acres for a combined 160 acres.

##### **ECONOMIC CONSIDERATIONS:**

###### **Appraised Value**

Based on appraisals performed by Jim Witt & Associates and approved by Tyra Sandoval, SLO Chief Appraiser, the estimate of market value of the IMC land, containing 160± acres, is \$5,600, or \$35.00 per acre; and the estimate of market value for the state land, containing 280± acres is \$5,600, or \$20.00 per acre.

Following is a summary of the appraised value estimates and the differences, which indicates that the exchange is beneficial.

Private Land	160 acres	x	\$35.00/ac.	=	\$5,600 + \$5,000 cash
State Land	280 acres	x	\$20.00/ac.	=	<u>\$5,600</u>
Cash Increase Over Existing Land Value					\$5,000

Based on the bid, the Trust received land that was of equal value but in addition, the Trust received \$5,000 cash increasing the Trust asset over and above the existing land value. The additional \$5,000 offered, will be deposited into the permanent fund and will continue to earn a projected 5% per annum which will be a benefit to the beneficiary.

### **Leasing Potential**

Due to the vegetation on the offered land, versus very little or no vegetation on the majority of the state trust land, there was greater potential for revenue from agriculture leasing. The state trust land was located in a playa salt lake, known as Lindsey Lake, which covered about 50% of the surface. Due to the salt lake and poor soils, vegetation did not grow on the majority of the State land. Therefore, 200 surface acres were not leaseable for agriculture purposes, while the remaining 80 acres located out of the drainage were located on a hillside historically leased for grazing. The annual revenue from the grazing lease (80 acres) was \$50.66 per year. The potential revenue from the offered land, if under an agriculture lease, would have been \$101.32 per year. The offered land historically was used for irrigated cropland; however, the water rights have been severed from the property, returning it to grazing land.

### **NEIGHBORHOOD GROWTH PATTERNS:**

The land use pattern around the state trust property was primarily mining related with limited grazing, and no residential uses. The offered land was adjacent to the Pecos River and in a remote area primarily used for ranching activity. Residential development was not likely in the foreseeable future. Historically there has been sand and gravel mining along the Pecos River on Trust land that is adjacent to the offered land. The sand and gravel pit has been reclaimed.

### **OIL, GAS AND MINERALS:**

#### **State Trust Land**

The Oil and Gas and mineral rights remained with the state land office, which was rated as high for Potash, Salt, Gas and Oil. IMC Kalium Potash had a mineral lease on the property for Potash and Salt at the time. The area was rated as having a high potential for Oil in the Delaware formation, and high potential for gas in the Morrow formation.

#### **Offered Land**

The Oil and Gas and mineral rights were not be transferred to the State Land Office, in the land exchange, and were rated as high for, Gas and Oil. The area was rated as having

a high potential for Oil in the Delaware formation, and high potential for gas in the Morrow formation.

### **LAND MANAGEMENT CONSIDERATIONS:**

#### **SUMMARY OF THE MATERIAL BENEFITS:**

- The revenue to the state Land Office is expected to increase due to surface land that is usable versus land that is non usable.
- Even though the land values are similar, the state land office will receive an additional \$5,000 in cash value.
- The offered land has legal access from a county road.
- The offered land is in a superior location, next to the Pecos River.
- The offered land is adjacent to currently owned state land, allowing for more efficient management.
- The state land office will retain the mineral rights where the surface is not encumbered and will not be encumbered due to the salt playa.
- The land exchange will allow the trust to avoid environmental damage from ponds with tailings from the potash mines spilling onto the state trust land.

#### **State Trust Land**

The state trust land was located within the drainage of a natural occurring salt lake, which was being utilized by the mining industry. The 280± acres of state trust land was an isolated tract surrounded by BLM land. The nearest section of state land was located about ½ mile to the southeast, which is located out of the drainage and is leased for grazing purposes.

#### **Offered Land**

The offered land is adjacent to several sections of State Trust land that was currently under an agricultural lease to IMC Kalium Potash, who also owns the adjacent private land. IMC Kalium is willing to amend the current agriculture lease to include the offered land in their agriculture lease.

The surface of the offered land is marketable for agricultural leasing, while the surface of the state land to be exchanged is not marketable in the foreseeable future. As proposed, the surface land management issues will be enhanced due to the consolidation of the offered land to existing state land, and there will be better access.

Based on these issues the land exchange proposal did appear to be in the best interest of the Trust beneficiary.

## **2. RESPONSE FOR LE-0601 GOFF DAIRY LAND EXCHANGE (HOBBS):**

Trust Assets increased by \$29.606.

### **SUMMARY:**

The state trust land office exchanged lands containing 760 ± acres valued at \$114,000, for vacant lands owned by Goff Dairy Trust containing 760 ± acres valued at \$114,000. In addition Goff Dairy Trust offered a cash sum of \$22,800 or 20% of the appraised value of the state trust lands plus an additional \$6,806 for improvements on the lands acquired by the trust, increasing the trust asset over and above the existing land value by \$29,606.

The state trust property that was exchanged abutted the private lands used for the dairy operation and posed a serious danger of environmental concern. The dairy planned to expand its operation and they needed the land to create a buffer around their dairy facilities for bio-security reasons. The lands acquired by the trust were adjacent to other state trust lands and eliminated the concern of environmental liability from the dairy spilling over onto trust land.

### **Legal**

Description: *State Land* - Section 16, S1/2SW1/4, SW1/4SE1/4 of Section 16, SW1/4, S1/2SE1/4 of Section 17, SE1/4 of Section 18, SE1/4 of Section 21, N1/2NE1/4 of Section 28, Township 17 South, Range 37 East, N.M.P.M., Lea County, NM, containing 760 acres, more or less.

*Offered Lands* - S1/2NW1/4 of Section 8, NW1/4, S1/2NE1/4 of Sec. 17; SW1/4 of Section 19; NW1/4 of Section 20; N1/2SW1/4, SW1/4SW1/4 of Section 27, Township 17 South, Range 37 East, N.M.P.M., Lea County, NM, containing 760 acres, more or less.

### **ECONOMIC CONSIDERATIONS:**

#### **Appraised Value**

Following is a summary of the appraised value estimates and the differences, which indicates that the exchange is beneficial.

APPRAISALS UP-DATED 5/17/08 & APPROVED ARE BASED ON \$150/ac FOR BOTH SLO & DEEDED LAND:

<b>Appraised Land Value:</b>	\$114,000.00
<b>Cash Portion of Transaction:</b>	\$ 22,800.00
<b>Ag Lease Improvements:</b>	\$ 6,806.00
<b>Total Sale of Trust Land</b>	\$143,606.00

#### **Leasing Potential**

Acquired land was leased for agricultural purposes. Annual rental income to the beneficiary from both the land exchange and the land acquired averaged \$290 per year. There was no loss or gain in the direct rental revenue of the grazing lease but the additional cash value of \$29,606 deposited to the permanent fund will yield approximately \$1,480.00 annual revenue to the beneficiary based upon the money earning a projected 5% per annum in the permanent fund.

## **ENVIRONMENTAL CONCERNS & LAND MANAGEMENT**

### **CONSIDERATIONS:**

Goff Dairy would like to block up their lands and provide a buffer around the Dairy for bio-security concerns. This exchange would also allow the trust to remove land adjacent to the dairy operation and remove the threat of environmental damage to state trust lands.

### **OIL, GAS AND MINERAL REPORT ON STATE LAND:**

The Oil and Gas and mineral rights will remain with the land exchanged by the state land office. The Oil, Gas & Minerals Division is concerned about split estate in a very active oil and gas leasing area. However, these state trust lands are adjacent to other state trust land and it appears that these lands would be only minimally affected if production from the leases move forward to the drilling phase.

### **SUMMARY OF THE MATERIAL BENEFITS:**

- The trust land was located directly adjacent to the dairy operation. Acquiring like lands in the area, but farther from the operation, will lessen the chances of environmental damage to occur on trust land.
- Goff Trust offered more than the appraised value of the land. Goff Trust offered \$136,800.00 for the state trusts land (\$114,000.00 land value and \$22,800.00 cash bonus).
- The value of the improvements on the offered land was purchased by the grazing lessee for \$6,806.00. This money was deposited to the permanent fund making the total value of the sale \$143,606.00 or \$26,606 above the value of the offered land.

Based on a 5% annual interest assumption, the money deposited to the permanent fund will increase the beneficiary's annual income from the permanent fund by \$1,480.00.

### **3. RESPONSE FOR LE-0405 RICO RANCH LAND EXCHANGE:**

The State Trust assets increased by \$136,000.

### **SUMMARY:**

The state trust land office exchanged lands containing 640 ± acres of agriculture land valued at \$384,000 and located approximately 6.5 miles southwest of Thoreau, N.M., for 65 ± acres of commercial potential land, valued at \$520,000, located in the western part of Gallup adjacent the city limit and the existing Gallup-McKinley high school. The trust land was surrounded by private fee land with no public access and was over encumbered by a ranch home and other amenities, which make competitive bidding for an agriculture lease impossible. The current leasing revenue was \$1,448 per year on the agriculture lease and ranch home in comparison to the potential for \$6,000 lease on the commercially acquired property.

**Legal Descriptions:** *State Land* - All of Section 16, T13N, R14W, McKinley County, containing 640 ± acres

*Offered Land* – portion of Sec. 26, T15N, R19W, McKinley County, containing 65.07± acres.

### **ECONOMIC CONSIDERATIONS:**

#### **Appraised Value**

Following is a summary of the appraised value estimates and the differences, which indicate that the exchange was in the best interest of the trust.

Appraised Land Value of Offered Fee Land \$520,000.00

Appraised Land Value of State Trust Land \$384,000.00

Increase in Land Value by the Trust \$136,000.00

#### **Leasing Potential**

Acquired land intended to be leased to Gallup/McKinley School District for the purpose of building a middle school adjacent to the high school.

The lease income on the state trust land was \$1,448.00. The acquired land was leased to the Gallup McKinley School District for \$6,800.00 per year.

### **SUMMARY OF THE MATERIAL BENEFITS:**

- The State will increase the value of the trust asset by \$136,000.00. The appraised value of the State Trust land is \$384,000.00. The value of the offered land is \$520,000.
- Common Schools of NM was the beneficiary of the lands. The Gallup/McKinley School District cited a number of reasons why the land would be advantageous to the Gallup-McKinley School District and was a party to the negotiations in support of the state land office acquiring the property.
  - (1) The district had funded infrastructure (road, utilities, and athletic facilities) to the high school and the adjacent lands would eliminate duplication of the cost for these improvements which would occur if the Middle School was built in another part of town.
  - (2) The opportunity to lease land to build a 3<sup>rd</sup> middle school allowed the district to create smaller classrooms which has proven to benefit the instructional process. The NM PSFA has ranked the existing 2 Gallup middle schools in the top 100 out of almost 900 statewide for needs due to building, age, and use of portable buildings and deteriorating structures. The opportunity for the district to lease this land from the N.M. State Land Office would provide the needed space for a new middle school that would eliminate these deficiencies.

- The Trust would increase annual revenue by \$5,360 by leasing the acquired acreage to the Gallup-McKinley School District for expiation of school facilities for a middle school. The money paid into the trust goes back to the Common Schools as the beneficiary.
- Common Schools are the beneficiary of these lands so the excess income would go back toward funding education, thus making this a "win-win" situation for both the Trust and the Beneficiary.

Based on these factors the exchange was a material benefit to the trust and was in the best interest of the trust.

#### **4. RESPONSE FOR LE-0414 LAS UVAS VALLEY DAIRY EXCHANGE:**

##### **SUMMARY:**

The state land office exchanged lands contained 7 scattered parcels of surface estate totaling approximately 5988 ± acres valued at \$749,000 located in Dona Ana County, Luna, and Sierra Counties for 3548 ± acres valued at \$781,000 of contiguous ranch land, formerly known as the Rancho Del Aguila (Scoggin) Ranch located 10 miles west of Anton, Chico in San Miguel and Guadalupe Counties of New Mexico. In addition, Las Uvas Valley Dairy offered a cash sum of \$21,000, increasing the Trust asset over and above the existing land value. The current range condition computation estimated an approximate seventy-nine (79) Animal Units for the total beneficiary exchange acreage while the acquired fee land would afford a carrying capacity of an estimated sixty (60) Animal Units. This would result in higher annual revenues to the beneficiary from the agriculture lease.

##### **ECONOMIC CONSIDERATIONS:**

###### **Appraised Value**

The added value along a cash sum of \$21,000, increased the trust asset over and above the existing land value by \$32,000 based on appraisals performed by James Jones ARA for Chisum Trail Real Estate Services resulting in a market value estimates of \$749,000 or approximately \$125 per acre for the 5988 acres of state trust land; and the estimate of market value of the 3548± acres of offered land at market value estimate of \$781,000 or approximately \$220 per acre.

###### **Leasing Potential**

Due to the vegetation on the offered land in San Miguel County verses very little vegetation on the state trust lands scattered in Dona Ana, Luna and Sierra counties, there was greater potential for annual revenue even though there were fewer acres.

\$ 2,930 Rent on acquired Fee Land (10cc on 3533/ac)

+1,000 Water easement annual rent

+1,050 Estimated revenue based on projected 5% per annum from permanent fund



\$4,980 Total

\$2,450 Rent on exchanged SLO land (5cc on 5908/ac)

\$2,530 additional revenue to the beneficiary per year.

#### **ENVIRONMENTAL CONCERNS:**

Las Uvas Valley Dairy would like to block up their lands and provide a buffer around the Dairy for bio security concerns. This exchange would also allow the trust to remove land adjacent to the dairy operation to prevent any environmental damage to state trust lands.

#### **LAND MANAGEMENT CONSIDERATIONS:**

Potentially inaccessible lands are made accessible. The state trust land was located within three counties and surrounded by private fee lands. The offered property consisted of 3,548 ± acres of contiguous ranch land. The contiguous parcel will allow the state land office to open the land up for competitive bidding and the land management issues will be enhanced due to the consolidation of the offered land which offers better access.

#### **SUMMARY OF THE MATERIAL BENEFITS:**

- The beneficiaries will be receiving an increased value in land base of \$32,000.
- The trust will be receiving an approximate increase of \$21,000 to the permanent fund.
- The beneficiary will receive an increase in grazing income of approximately \$1,000 per year owing to increased carrying capacity.
- The School for the Blind will receive an additional \$1,000 per year from a Water Well Easement.

The State Land Office will benefit from a management prospective via the consolidation of scattered tracts with limited access to a large contiguous parcel.

#### **5. RESPONSE FOR LE-0413 OROZCO EXCHANGE:**

##### **SUMMARY:**

Increased value to the trust \$5,500., and land received by the trust has greater potential for commercial development. The state trust land office exchange lands containing 733 ± acres located two miles south of La Union in Dona Ana county valued at \$167,000 for vacant land owned by Orozco Development containing 41 ± acres located on the west side of Moon Mountain in the Village of Ruidoso valued at \$144,000. In addition Orozco offered a cash sum of \$28,000, increasing the trust asset over and above the existing land value by \$5,000.

The lands acquired in Ruidoso allowed the land office to attain legal access to 640 acres of pristine mountainside property called Moon Mountain. The state trust land exchanged was agriculture land and the land acquired in Ruidoso was commercial real estate with a potential for residential development.

**Legal Description**     *State Land* – All of Section 36, T27S, R2E and part of Section 32, T27S, R3E containing 733 ± acres, Dona Ana County, NM

*Offered Land*- Northwest corner of Gavial Canyon Road & Meander Drive outside the Village of Ruidoso at the base of Moon Mountain and father described as The Montgomery Tract consisting of 41.12 ± acres of land in the NW1/4NW1/4 & the SW1/4NW1/4 of Section 25, T11S, R13E, Lincoln County, NM.

### **ECONOMIC CONSIDERATIONS:**

#### **Appraised Value**

Based on appraisals performed the estimate value of the state trust land was \$167,000 containing 733 ± acres; the market value of the offered land was \$144,000 plus the \$28,000 cash offer resulted in an increase for the trust.

#### **LAND MANAGEMENT CONSIDERATIONS:**

The trust owns 640 acres of pristine mountain property to the west of the acquired property. The mountain had been surrounded by private land but the exchange opened up access to the west side of the mountain via the newly acquired state trust land.

#### **SUMMARY OF THE MATERIAL BENEFITS OF LAND EXCHANGE:**

- The State will increase the value of the trust asset by \$5,000.00. The appraised value of the state trust land is \$167,000. The value of the offered land is \$144,000 plus an additional \$28,000 cash value to the state.
- The 41.122 acres offered a highly developable area and income potential for future residential or commercial development.
- The offered lands have significant potential to be assembled into a "Mountain Resort" and residential development with the abutting Moon Mountain tract, providing for long term commercial opportunity to the beneficiary.

**Additional Note:** Please see attached article February 2010 in which the City Counselors were discussing purchasing private property to cut off access to Moon Mountain. The purchase of the Orozco property will prevent anyone from land locking the state trust property.

### **6. RESPONSE FOR LE-0713 OCATE LAND EXCHANGE:**

The following information was included in a Report to the Commissioner dated 9/27/2008 and was located in the file provided to the auditor. A beneficiary report was not completed as the exchange has not been completed due to an order issued by the Supreme Court.

#### **SUMMARY:**

The state trust land office exchanged land containing 7,206 ± acres valued at \$6,356,000. for 3,330 ± acres valued at \$6,413,000. a material increase of \$57,000. in land value to the trust. The lands involved are located approximately 11 miles south of Angel Fire, NM in Mora and Colfax counties. The offered land is suitable for livestock grazing, biomass production, and hunting/recreational opportunities. The current range condition computation estimated higher Animal Units for the land exchanged to the CPL whereas the land transferred from the trust had a lower carrying capacity. This would result in higher annual revenues to the beneficiary from the agriculture lease even though the trust will be losing acreage.

#### **ECONOMIC CONSIDERATIONS:**

##### **Appraised Value**

\$6,413,000 appraised value 3,330 ± acres of state trust land  
-6,356,000 appraised value 7,206 ± acres of offered land  
\$ 57,000 increase in appraised value and material benefit to the state

##### **Agricultural Leasing**

\$2,702.62 offered land based on 16 head carrying capacity  
\$2,415.00 state trust land based on 6.5 carrying capacity under the current lease  
\$ 287.62 annual increase to the beneficiary

*Note – LOSS OF INCOME DUE TO SUPREME COURT: The state land office is unable to place the acquired land under a grazing lease due to the restriction placed on the land office by the Supreme Court until a decision is rendered.*

#### **POTENTIAL EARNINGS:**

Currently, the highest potential for earnings would be a biomass lease. The SLO acres received in the trade do not have a biomass lease yet, but there is a current biomass lease to the west and some interest to the east. Thus the potential for income from the property received is moderate as it relates to biomass potential better than that of the land disposed of.

#### **CONSOLIDATION STRATEGY:**

The White's Peak area is one of the SLO's most unique continuous land tracts. Encompassing over 54,000 acres of state trust land, the area is rich in natural resources, including abundant sub-alpine trees species and wildlife diversity. This area provides the SLO with an opportunity to manage a large tract of land under one management plan and philosophy.

One of the most important management goals is to consolidate state trust ownership. This desired goal will help mitigate some of the pressing issues of trespass and access. In the 1850's, the federal government offered certain land tracts in White's Peak as homestead opportunities for settlers. Those lands that were not occupied as homesteads were transferred to the SLO. When this occurred, problems with trespass, access issues, and boundary distinction originated. White's Peak has been a source of lawsuits, conflicts and agency disputes over the last several decades. In order to provide a permanent solution, the SLO believes that the first step to accomplish this is exchange, thus consolidating separate parcels.

This exchange was the first of four (4) proposed exchanges. The main focus on all the exchanges was consolidation and access *White's Peak Consolidation Proposed Land Exchanges*

#### **OIL/GAS ACTIVITY:**

The Oil and Gas Division has noted that exchanging the SLO lands for deeded lands will create thousands of acres of split estate. In doing so, "split estate does not benefit the mineral estate. Instead, it creates additional burden on an operator and makes state minerals less attractive." However oil and gas development is feasible. There is recent interest in oil/gas leasing on the southern edge of the proposed exchange.

#### **CULTURAL RESOURCES:**

There is some concern about potential archaeological sites on State Lands. An archaeological survey may have to be considered on some of the State lands; however, there are no planned changes to historic uses, so according to David Eck, state land office archaeologist, any archaeological impacts should be minimal.

#### **LAND MANAGEMENT CONSIDERATIONS:**

This proposed land exchange affects the Trust in a positive manner by providing access and consolidation for both entities. Ultimately, the exchange would consolidate State Lands that are currently scattered and landlocked. In addition, the exchange would facilitate the State Land Office management and control of the surface estate and improve access to State Lands.

#### **7. RESPONSE TO LE-0805 UU BAR LAND EXCHANGE:**

The following information was included in a Report to the Commissioner dated 9/30/2008 and was located in the file that had been provided to the auditor. A beneficiary report was not completed as the exchange has not been completed due to an order issued by the Supreme Court.

#### **SUMMARY OF REPORT TO COMMISSIONER:**

The purpose of this memo is: (1) to provide you with a brief summary of the key elements of this proposed land exchange; (2) provide you with the results of an initial investigation, and (3) a staff recommendation of the land exchange as proposed.

***Our recommendation is to proceed with the land exchange as proposed:***

- ✓ +/- 3,583.49 acres of deeded land for
- ✓ +/- 5,883.33 acres of SLO land (acreage will be determined after appraisal is complete and is expected to be equivalent to the deeded land)

***We believe this proposed exchange is in the best interest of the trust,*** as it will ultimately provide for consolidation of a "checkerboard" area and provide access on the east side of White's Peak. This exchange is the final of four exchanges in the White's Peak Area that will ultimately help the SLO consolidate our holdings while providing continuous access. This exchange will also help set the foundation for developing a Quality Hunt area in the White's Peak Management Area that will help establish all weather roads and camping locations.

***(1) Brief summary of the key elements of the proposed land exchange***

An applicant has proposed the State Land Office exchange  $\pm$  5,883.33 acres of state trust **surface estate** land located approximately 10 miles south of Rayado, NM in the area known as the White's Peak Management Area. The exchange will involve two (2) counties: Colfax and Mora. In exchange, the applicant is offering  $\pm$  3,583.49 acres of fee **surface estate** land in the same general area.

The applicant and SLO Staff are in negotiations related to value for value as the basis for the exchange. The appraisal will be the instrument used to determine the final acreage.

The State Trust Land is under two (2) agriculture leases: GM-2670 Express Ranches and GM-1702 Express Ranches. In order for this exchange to occur, the CS Cattle Exchange must occur first. There are no active rights-of-way leases and/or commercial leases on the proposed SLO acreage.

The offered land is suitable for livestock grazing, biomass production, and hunting/recreational opportunities.

***White's Peak Consolidation Strategy:***

The White's Peak area is one of the SLO's most unique continuous land tracts. Encompassing over 54,000 acres of state trust land, the area is rich in natural resources, including abundant sub-alpine trees species and wildlife diversity. This area provides the SLO with an opportunity to manage a large tract of land under one management plan and philosophy.

One of the most important management goals is to consolidate state trust ownership. This desired goal will help mitigate some of the pressing issues of trespass and access. In the 1850's, the federal government offered certain land tracts in White's Peak as homestead opportunities for settlers. Those lands that were not occupied as homesteads were transferred to the SLO. When this occurred, problems with trespass, access issues,

and boundary distinction originated. White's Peak has been a source of lawsuits, conflicts and agency disputes over the last several decades. In order to provide a permanent solution, the SLO believes that the first step to accomplish this is an exchange, leading to consolidation.

This exchange is the final of four (4) proposed exchanges. The main focus on all the exchanges will be consolidation and access. The SLO is confident that the exchanges will be the first step to ultimately ease the tensions and provide consistent access for both land owners and hunters.

#### *White's Peak Consolidation Proposed Land Exchanges*

- |               |                                   |
|---------------|-----------------------------------|
| ✓ Ocate Ranch | (waiting for completed appraisal) |
| ✓ CS Cattle   | (waiting for completed appraisal) |
| ✓ UU Bar      | (waiting for completed appraisal) |
| ✓ Elk Ridge   | (waiting for completed appraisal) |

(2) Summary of the exchange proposal investigation.

#### **ECONOMIC CONSIDERATIONS:**

***Agricultural Leasing:*** Currently, Express Ranches pays \$0.94 per acre for the agricultural leasing rights. The annual fee is \$5,530.33 for the 5,883.33 acres identified for exchange. If the exchange occurs and the fee remains the same for the deeded property, then Express Ranches would pay \$3,368.48 per year for the 3,583.49 acres. The loss to the trust would be \$2,161.85/year.

***Rights of Ways:*** There are no active rights-of-ways in this proposed exchange.

***Commercial Leasing:*** There is no active commercial leasing in the proposed acreage.

***Oil/Gas Activity:*** The Oil and Gas Division has noted that exchanging the SLO lands for deeded lands will create thousands of acres of split estate. In doing so, "split estate does not benefit the mineral estate. Instead, it creates additional burden on an operator and makes state minerals less attractive." Oil and gas development is nonetheless feasible. There is recent interest in oil/gas leasing on the southern edge of the proposed exchange.

#### **POTENTIAL EARNINGS:**

Currently, the highest potential for earnings would be a biomass lease. The SLO acres involved in the trade do not have a biomass lease as of yet. There is a current biomass lease to the west and some interest to the east, thus the potential for income is moderate as it relates to biomass potential.

***Agricultural Leasing:*** Express Ranches has requested to lease the deeded acres once they become state trust acreage. A carrying capacity evaluation would have to be

completed to determine leasing fees. Using the current fees that are paid by Express Ranches, earning potential would be \$43,368.48/year.

***Rights of Ways:*** A title search would determine what ROW's exist on the deeded land. Potential for future earnings could be electrical (biomass/development), roads (biomass/access), telecommunications (biomass/development), and/or pipelines (oil/gas activity).

***Commercial Leasing:*** As mentioned before, the most likely revenue earner would be a biomass lease. Fees would be negotiated and based on comparables.

***Oil/Gas Activity:*** There has been recent oil/gas speculation on the southern end of the proposed exchange.

#### **CULTURAL RESOURCES:**

There is some concern about potential archaeological sites on State Lands. An archaeological survey may have to be considered on some of the State lands; however, there are no planned changes to historic uses, so any archaeological impacts should be minimal.

#### **LAND MANAGEMENT CONSIDERATIONS:**

This proposed land exchange is expected to significantly affect Trust and/or Private Lands in a positive manner by providing access and consolidation for both entities. Ultimately, the exchange would consolidate State Lands that are currently scattered and landlocked. In addition, the exchange would facilitate the State Land Office's management and control of the surface estate and improve access to State Lands by acquiring a continuous block of property that will allow the enhancement or development of road to access the eastern part of White's Peak.

#### **(3) Recommendation**

***We believe the proposed land exchange is in the best interest of the trust.*** This exchange is the final of four exchanges in the White's Peak Area that will help the SLO consolidate our holdings while providing continuous access. This exchange will also help set the foundation for developing a Quality Hunt area in the White's Peak Management Area.



**INTEROFFICE MEMORANDUM**

**To:** Bob Stranahan, Office of General Counsel  
**From:** Scott McDowell  
**Date:** December 12, 2010  
**Subject:** Additional Responses to State Auditor Findings

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As requested by Dell Bearden, I am submitting the following responses to certain appraisal-related issues in the State Auditor's Findings to which she was asked to respond:

**Finding 08 – Lack of Support for Material Benefit to Trust**

Test Item 6:

The comment under *Monetary Gain* is false, as the \$57,000 gain is derived directly from appraisals.

Text Item 7:

The acreage figure under *Private Land Acreage Conveyed...* is incorrect, and should be 3,610.19 acres, which increases the land benefit to the Trust to 179 acres.

Both of these exchanges are part of the Whites Peak project, and to cite them out of context from the project as a whole is a distortion of the facts. Moreover, *Text Item 7*, is the "UU Bar Ranch" exchange, which has yet to close.