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TO: Honorable James B. Lewis, State Treasurer, La Villa Rivera Building Santa Fe, New Mexico 87501 Representative Jerry Sandel Chairman, Legislative Finance Committee 716 Rosa Street Farmington, New Mexico 87401 Dr. Daniel H. Lopez Secretary Department of Finance and Administration 425 State Capitol Santa Fe, New Mexico 87503

OPINION

When Governor Anaya announced the administration's plans to address the projected general fund revenue shortfall for the 75th fiscal year, this office had already been asked to render its legal opinion on various legal issues raised by the projected general fund revenue shortfall in the 74th and 75th fiscal years. After the Governor's announcement of his proposal to address this problem, additional requests were made to this office.

Formal opinion requests have been received from the State Treasurer, the Chairman of the Legislative Finance Committee and, most recently, the Secretary of the Department of Finance and Administration. Informal requests for opinions have been received from members of the legislature as well as other concerned state officials. To date this office has not formally responded to any of these requests. Now, mindful of the seriousness and complexity of the fiscal issues facing the state and in the interests of providing, to the extent possible, legal guidance from the Attorney General for both the executive and the legislative branches, we will address within this opinion all the legal issues we have identified and that have been identified to us pertaining to the revenue shortfall issue. At the same time we respond formally to the three formal opinion requests made to this office.

There are two important considerations to keep in mind in addressing the general fund revenue shortfall issue. First, while we have carefully reviewed the legal issues presented and researched the pertinent case law and statutory and constitutional authorities, our legal research reveals a lack of legal precedent on most of the issues, especially in New Mexico, and what is available is frequently not dispositive. Several of the statutes at issue are antiquated and have not been previously subject to legal review. Consequently, only the New Mexico courts can finally resolve many of the legal questions. The conclusions herein represent our reasoned opinion on how New Mexico courts might rule.

A second consideration is that the administration's proposal continues to evolve, thereby rendering legal analysis undertaken by this office moot in certain areas. Our legal analysis addresses the proposals made thus far. To the extent new proposals, or modifications to existing proposals, continue to be made after the date of this opinion, such proposals must be examined separately. Similarly, proposals which now may have been discarded by the administration are still reviewed in this opinion to the extent they could be revived at a later point and are still of concern to some state finance officials.

There are two components to the fiscal problem: (1) cash flow problems and (2) underfunding of appropriations caused by the projected revenue shortfall. It has been difficult to sort out these two components in the administration's plan, for that plan treats them as one. Of course, any short term cash flow solution may well have an impact on the underfunding problem. We now turn to the list of questions, submitted formally and informally, that have been identified as relating to the cash flow and revenue shortfall issues.

I. SUMMARY OF QUESTIONS AND ANSWERS

The thirteen questions we have identified can be divided into four broad categories:

A. Composition of the state general fund and the status of the operating reserve fund, the highway department revolving fund and other state funds. (Questions 1-5).

B. Tax suspense funds and the repeal of certain credits and rebates. (Questions 6 and 7).

C. Reduction of general fund allotments to minimize effects of revenue shortfall and non-expenditure of general fund allotments. (Questions 8 and 9).

D. Authority of the executive to transfer between allotment accounts and application of Section 8-6-7 NMSA 1978 to the Secretary of Finance and Administration and the State Treasurer in the drawing and payment of warrants. (Questions 10-13).

Our legal analysis has been conducted within the organizational structure of these four categories. However, recognizing the need to answer the specific questions which have been presented to us, we have listed below the questions asked, followed in each instance by a summary answer. Of course, we urge the consideration of the detailed legal analysis because it expands upon the summary answers. We have taken the liberty of combining and rewording some questions in the interests of clarity.

1. What makes up the general fund?

ANSWER: The general fund consists of all revenues not otherwise allocated by law and includes the unappropriated surplus, the severance tax income fund and Federal Minerals Lands Leasing Act receipts.

2. Can amounts in the operating reserve fund be used to pay general fund warrants? Can that fund be used on an interim basis to meet cash flow requirements if its beginning of the year balance is restored at the end of the fiscal year, less any legislatively authorized transfers?

ANSWER: We have considered three possible alternatives with respect to the availability of the operating reserve fund to pay general fund warrants: (1) that the operating reserve fund is a separate fund apart from the general fund; (2) that the operating reserve fund is a part of the general fund which cannot be touched without legislative authorization; or (3) that the operating reserve fund may not have been properly created as a permanent fund and therefore is part of the general fund unappropriated surplus. After careful review and consideration of these three alternatives it is not possible for this office to determine which would be considered correct should there be a court challenge. Persuasive and compelling arguments can be made for each alternative citing statutory provisions, case law and prior legislative action for each proposition. There are different implications created by the three possible alternatives.

a. Under the first alternative, the operating reserve fund would be a separate fund apart from the general fund. Therefore, it could not be used to pay general fund warrants, even on an interim basis. Moreover, at the end of the fiscal year, if the state does not have sufficient cash in the general fund to meet expenditures, the state would be in violation of Art. IX, Sec. 7 and 8. Those sections provide that the state may not borrow money exceeding the sum of $200,000 to meet "casual deficits or failure in revenue, or for necessary expenses" and may not borrow money except as authorized by law for some specific work or object.

If the second alternative is deemed correct, that the operating reserve fund is a part of the general fund but can only be touched with legislative authorization; then there would be no deficit and the legislature could come back into session after the end of the fiscal year and transfer funds not previously authorized for transfer from the operating reserve fund to the general fund to make up for any deficit.

Finally, if the third alternative is selected, that the operating reserve fund may not have been created properly as a permanent fund; then that entire fund would be available to pay general fund warrants as unappropriated surplus.

3. Can the highway department revolving fund be expended as part of the general fund without legislative authorization?

ANSWER: The administration has informed us that they do not intend to expend the highway department revolving fund without legislative authorization. Legal support exists for two interpretations of the status of this fund. One is that the fund was properly created as a fund separate from the general fund subject to administration of the highway department. The other interpretation is that it was not properly created as a permanent revolving fund. However, the General Appropriations Act of 1982 provided:

"the balance in this fund shall not revert." Therefore, it would appear that under either interpretation this fund cannot be expended as part of the general fund.

4. Can balances in the following accounts be drawn upon to address a revenue shortfall:

Unappropriated general fund surplus;

b. 74th fiscal year savings carryover;

c. Miscellaneous funds and

d. Federal Minerals Leasing Act receipts?

ANSWER: Unappropriated general fund surplus may be drawn upon to address the revenue shortfall. Any amounts not expended or encumbered at the end of the 74th fiscal year are added to unappropriated surplus and may be used to offset the revenue shortfall. As to miscellaneous funds, without a list of the specific funds to be used, it cannot be determined whether it would be legal to use the funds. However, we have been advised that the administration does not propose to use any miscellaneous funds without asking for legislative authorization. Finally, as to Federal Mineral Leasing Act receipts, while a part of the general fund, they can only be used pursuant to state law for the use and benefit of the public schools of this state for instructional purposes. To the extent that these funds are available, they will be used to reduce the amount of the general fund appropriation to the public school fund, thereby freeing other general fund money for use for another purpose, as proposed in the Governor's plan.

5. Are the state support reserve fund, public school fund and current school fund available to pay warrants for non-public school purposes?

ANSWER: No. The state support reserve fund may only be used to ensure, to the extent of the amount undistributed in the fund, that the amount of the program unit guarantee will not be reduced. The current school fund must be transferred monthly to the public school fund and from there is distributed to the public schools. Balances remaining in the public school fund at the end of the fiscal year revert to the general fund unless otherwise provided by law.

6. Are the Tax Administration Act suspense fund ("TAA suspense fund") and the Income Tax suspense fund ("PIT suspense fund") part of the general fund?

ANSWER: No. The TAA suspense fund and PIT suspense fund are not part of the general fund because they contain revenues otherwise allocated by law. Transfers to the general fund must be made monthly from the TAA suspense fund after such other transfers and distributions required by law are accomplished. Section 7-1-6.1 NMSA 1978. Transfers to PIT suspense fund from the TAA suspense fund are limited to those required for the payment of income tax refunds. Section 7-1-6(H) NMSA 1978.

7. When must the law repealing credits and rebates take effect to affect the 1986 tax year?

ANSWER: In order for any repeal of the rebates and credits to be effective for the 1986 tax year, the legislature must meet prior to December 31, 1986 and enact repealing legislation which will be effective on or before December 31, 1986. Such legislation must be enacted with an emergency clause if not enacted at least 90 days before December 31, 1986.

8. May general fund allotments, typically made to state agencies and public schools monthly at the rate of 1/12th of the overall general fund appropriation, be reduced in order to minimize the effects of a revenue shortfall?

ANSWER: In a situation such as the current one where there is a projected revenue shortfall, reductions in allotments will, of necessity, result in a reduction of the appropriation and therefore cannot be made by the executive. In a situation where revenues are merely delayed, with a reasonable expectation that they will come in within the fiscal year, the general fund monies typically credited monthly to the allotment accounts of state agencies and public schools may be reduced provided the following conditions are met: (1) such amounts are periodically allotted; (2) appropriations for the fiscal year as a whole will not be altered, other than as authorized by the legislature; (3) the reduction complies with all applicable federal, state and local laws with respect thereto; (4) the legislative purpose for a given appropriation is not frustrated; and (5) the monies will be replaced as soon as possible.

9. May state agencies, higher education institutions and public schools that receive general fund allotments decline to expend a portion of the amount that is monthly credited to them in anticipation of budget cuts to be made by the legislature?

ANSWER: State agencies, higher education institutions and public schools may legally decline to expend a portion of the amount that is monthly bill. It was also designed to prevent the inclusion of general legislation in the appropriations bill. The Court noted that the constitutional provision does not preclude the insertion of provisions in the general appropriations bill which provide for the expenditure and accounting for the money appropriated, or other provisions directly connected with the appropriation.

In **State ex rel. Delgado v. Sargent,** 18 N.M. 131, 134 P. 218 (1913) the Supreme Court again discussed the violation of this constitutional provision. The Court held that a provision in the general appropriations bill which provided that all receipts of the Insurance Department, including surplus money in the insurance fund, had to be paid to the state salary fund was general legislation. The Supreme Court held that this provision in the 1912 general appropriations act was unconstitutional. The following reasons were given:

That the paragraph is general legislation of a permanent character seems to be clear. It provides for a certain disposition of monies collected by the Insurance department

which disposition of the said monies is to continue indefinitely. It bears some relation to the appropriations made in the act out of the Salary fund, but it goes further and provides a permanent policy thereafter to be pursued which can bear no relation to the appropriations made in that act. Had the paragraph limited the transfer of the funds to that year and to meet the appropriations made in the act a different proposition would be presented. In such case the paragraph might well be held to be germane to the appropriation act and allowable, under the doctrine announced in **State v. Marron,** 128 P. 485. But the permanent character of the provision takes it out of the doctrine of the Marron case and clearly renders it violative of the Constitution.

State v. Sargent, 18 N.M. at 137, 138.

An argument can be made that the monies in the operating reserve fund are different from the monies at issue in the **Sargent** case. With the operating reserve fund, the general appropriation acts provide that a specific sum either be transferred into or out of the general fund balance. One can argue that this is not a continuing disposition, such as that in the **Sargent** case. The provision referred to in the **Sargent** case provided that Insurance Department receipts which were collected periodically be paid to the state salary fund. This continual collection and subsequent disposition of money was found by the Court to constitute a permanent policy which had no relation to the appropriations in the act and therefore violated Article IV, Section 16 of the Constitution. One can argue, however, that the permanent nature of the operating reserve fund may violate this constitutional provision since such a permanent character bears no relation to the appropriations in the act.

The legislature never created the operating reserve fund by general law. The operating reserve fund has only been mentioned as part of a general appropriations act. The legislature, however, has created numerous other reserve funds by general law. See, e.g., state support reserve fund created pursuant to Section 22-8-31 NMSA 1978; the long term lease guarantee fund created pursuant to Section 15-3-11 NMSA 1978; the capital outlay project reserve fund created pursuant to Laws 1979, Chapter 404, Section 7 and continued pursuant to Section 15-3-23.1 NMSA 1978; the state revenue-sharing trust fund created pursuant to Section 6-4-3 NMSA 1978; the public property reserve fund created pursuant to Section 13-5-1 NMSA 1978; the workmen's compensation retention fund created pursuant to Section 15-7-6 NMSA 1978 and the state government unemployment compensation reserve fund created pursuant to Section 51-1-45 NMSA 1978. The capital outlay project reserve fund and the reappraisal loan fund are two examples of funds that the legislature originally created in the general appropriations act, and later created by general law. It is apparent from these funds created by general law that the legislature is aware that such a fund may be created by general law; however, this was not done in the case of the operating reserve fund. Therefore, an argument can be made that it was never properly created as a permanent fund and does not now exist. Such a result would lead to the conclusion that the funds in the operating reserve are just part of the general fund cash balance unappropriated surplus.

We have looked at two other alternatives. One is that the operating reserve fund is a fund separate and apart from the general fund. As previously noted, the operating reserve fund has never been created by general law and only appears in general appropriations acts. However, the legislature seems to consider it a separate fund. Furthermore, subsequent appropriations acts contained express provisions prohibiting its use without legislative authority.

In 1983, the legislature took action which made it appear that the state general fund does not include the operating reserve fund, the state-support reserve fund, the educational retirement fund, the long-term lease guarantee fund, the capital outlay project reserve fund, the state revenue-sharing trust fund, the public property reserve fund, the workmen's compensation retention fund, and the state government unemployment compensation reserve fund. In the Laws of 1983, Chapter 23 the legislature passed an act relating to state fiscal matters. The legislation authorized the transfer of certain amounts from the funds specified above to the state general fund. The reason for the transfer was to compensate for the anticipated revenue shortfall in the seventy-first fiscal year. The argument can be made that, based on such legislative history, the legislature does not consider the operating reserve fund to be part of the general fund.

The third alternative for which an argument can be made is that the operating reserve fund is part of the general fund but, it cannot be used without legislative authorization. Throughout its history, the operating reserve fund is to be used when there are insufficient funds in the general fund; moreover, the funds in the operating reserve fund come from the general fund itself. The intent of the legislature is that the fund only be used with specific legislative authorization. Whenever, the legislature allows it to be used, specific procedures are included in the general appropriations act as to how it shall be used.

If this alternative is deemed correct, that the operating reserve fund is a part of the general fund but can only be touched with legislative authorization; then there would be no deficit and the legislature could come back into session after the end of the fiscal year and transfer funds not previously authorized for transfer from the operating reserve fund to the general fund to make up for any deficit.

Finally, there is a presumption that all legislative acts are legal and valid and their provisions presumed constitutional. See, **City of Albuquerque v. Jones,** 87 N.M. 486, 535 P.2d 1337, (1975). The courts have repeatedly stated that every presumption is to be indulged in favor of the validity and regularity of legislative enactments and they will not be declared unconstitutional unless the court is satisfied beyond all reasonable doubt that the legislature went outside the Constitution in enacting them. **Board of Trustees v. Montano,** 82 N.M. 340, 481 P.2d 702 (1971). There is a strong presumption that the creation of the operating reserve fund whether as a separate fund or as part of the general fund is valid. The court must be satisfied beyond all reasonable doubt that the legislature went outside the constitution in the creation of the fund before it would find the legislature's action unconstitutional.

Our review and consideration of the three alternatives has not led us to a determination as to which of these alternatives would be considered correct should there be a court challenge. Persuasive arguments can be made for each alternative. A definitive answer can only be reached by a court.

The Highway Department's so-called "Revolving Fund" was established by Chapter 38, Laws of 1981, making general appropriations and authorizing expenditures by state agencies. Twenty million dollars was appropriated from the general fund for that purpose, accompanied by the following legislative instruction:

The appropriation in Item (6) shall be used to create a revolving fund. The advance fund may be used only under the following special conditions:

1. As additional matching money for federal participating projects listed in the five-year plan that may be advanced because of an unanticipated availability of additional federal money;

2. As matching money for federally funded programs such as advanced construction interstate, advanced construction primary or discretionary programs, regardless of whether the payback period is short or long term, as well as any other federal programs for which the State Highway Department may be eligible on an immediate basis; and

3. As additional money in case of revenue shortfall in the State Road Fund to match federal funds and provide State funds for the current year projects. The advance fund may also provide State funds for the maintenance effort in the year of the shortfall.

Any Federal funds received as reimbursements for expenditure from the advance fund shall be returned to that fund by the Department. The activities for which the advance fund is to be used shall be subject to prior approval by the department of finance and administration.

The following year the legislature did confirm the longevity of the revolving fund by providing that "the balance of the appropriation made to the Highway Department in Laws 1981, Chapter 38, Subsection 1, Item (6), shall not revert to the General Fund." Laws of 1982, Chapter 4.

While something more than a fiscal year fund is implicit in the term "revolving" (commonly defined as "recurrently available"), the 1982 provision clearly avoids the general provision found in each general appropriations act requiring that end-of-the-year unencumbered balances revert to the general fund. It may be argued that the non-reversion provision only preserved the fund for the seventy-first fiscal year. On the other hand it could be argued that a permanent fund was created because (1) the legislature has used explicit language to limit the existence of a fund to a particular period; (2) the 1982 provision quoted above explicitly states that the money appropriated into the revolving fund "shall not revert to the General Fund;" and (3) since its establishment, the

fund has been retained and managed by the Highway Department as a recurrently available fund.

Therefore, we believe that under either alternative it will take specific legislature action to transfer the revolving fund balance into the general fund. See Chapter 23, Laws of 1983, as an example of legislative action requiring the transfer of funds into the general fund during the revenue shortfall of the seventy-first fiscal year.

We have been asked whether the state support and public school funds may be used to pay warrants for non-public school purposes. The public school fund is created by statute in Section 22-8-14 NMSA 1978 which provides:

22-8-14. Public school fund.

A. The "public school fund" is created.

B. This fund shall be distributed to school districts in the following parts:

(1) state equalization guarantee distribution;

(2) transportation distribution; and

(3) supplemental distributions:

(a) out-of-state tuition;

(b) emergency; and

(c) program enrichment.

C. The distributions of the public school fund shall be made by the chief [director of public school finance] within limits established by law. The balance remaining in the public school fund at the end of each fiscal year shall revert to the general fund unless otherwise provided by law.

In the 75th fiscal year the public school fund will consist of amounts from general fund appropriations, amounts transferred from the current school fund and the Federal Mineral Land Leasing Act (30 USCA 181, et seq.) receipts otherwise unappropriated. See, Laws of 1986, Chapter 19, Section 4(L), (Public School Support). It is our understanding that, historically, general fund monies are transferred to the public school fund monthly; therefore the public school fund is not part of the general fund. Once the transfer is made these funds are no longer part of the general fund and cannot be used for cash flow purposes.

The current school fund was created by the New Mexico Constitution in Article XII, Section 4 which provides:

Sec. 4. [Current school fund.]

All fines and forfeitures collected under general laws; the net proceeds of property that may come to the state by escheat; the rentals of all school lands and other lands granted to the state, the disposition of which is not otherwise provided for by the terms of the grant or by act of congress; and the income derived from the permanent school fund, shall constitute the current school fund of the state. (As amended November 2, 1971.)

Section 22-8-32 NMSA 1978 also discusses the current school fund and explains its disposition. It states:

22-8-32. Current school fund; receipts; disposition.

A. As they are received, the state treasurer shall deposit into the current school fund revenue received from the following sources:

(1) all fines and forfeitures collected under general laws;

(2) the net proceeds of property that may come to the state by escheat; and

(3) all other revenue which by law is to be credited to the current school fund.

B. At the end of each month, the state treasurer shall transfer the amount in the common school current fund, also known as the common school income fund, to the current school fund.

C. At the end of each month, after the transfer authorized in Subsection B of this section, the state treasurer shall transfer any unencumbered balance in the current school fund to the public school fund.

Section 22-8-14(C) provides that any balance remaining in the public school fund at the end of the fiscal year shall revert to the general fund unless otherwise provided by law.

The state-support reserve fund was created by Section 22-8-31, NMSA 1978. Section 22-8-31(A) provides that the fund "shall be used only to augment the appropriations for the state equalization guarantee distribution in order to ensure, to the extent of the amount undistributed in the fund, that the maximum figures for such distribution established by law shall not be reduced." The New Mexico state equalization plan guarantees that each school district will receive 100% of the calculated program cost. Funding for public schools is achieved through a combination of state, local and federal resources, with the state providing more than 90% of the total. In the event that school population estimates are too conservative or that local or federal revenues are insufficient to ensure that the school districts operating revenue can meet the program unit guarantee amounts, the state-support reserve fund can be used.

III. **TAX SUSPENSE FUNDS AND THE REPEAL OF CREDITS AND REBATES.**

We have been asked whether funds in the tax administration act suspense fund (TAA suspense fund) and income tax suspense fund (PIT suspense fund) may be used to minimize the effects of a revenue shortfall. Those suspense funds are not part of the general fund since their revenues are otherwise allocated by law.

The TAA suspense fund was created by Section 7-1-6C NMSA 1978 for the purpose of providing a fund from which disbursements authorized by the Tax Administration Act could be made. Those disbursements may include disbursements for tax credits, tax rebates, refunds, the payment of interest, distributions to cities and counties and "other transfers."

The PIT suspense fund is created by Section 7-1-6H NMSA 1978 which provides as follows:

From the tax administration suspense fund there may be disbursed each month amounts approved by the director of the revenue division or his delegate necessary to maintain a fund hereby created and to be known as the "income tax suspense fund". The income tax suspense fund shall be used for the payment of income tax refunds.

The state is acting as an escrow holder of the money deposited in those suspense funds because the money therein does not belong to the state. Op. Atty. Gen. No. 67-7 (1967). The suspense funds are like trust accounts and are not part of the general fund. They may not be used to pay general fund warrants directly, and may only be used for the purposes set forth in the statutes above.

We have also been asked whether the executive may require the transfer of an increased amount, representing food and medical tax rebates, from either the TAA suspense fund or the PIT suspense fund to the general fund in anticipation of those rebates being repealed. Any legislation repealing the food and medical rebates, in order to be effective for the tax year 1986, must be adopted and become effective on or before December 31, 1986.

Presently, non-dependent resident New Mexico taxpayers may claim a food tax rebate for gross receipt taxes paid on food purchases to which they have been subject during the taxable year in an amount equal to $45.00 pursuant to Section 7-2-14.1 NMSA 1978. Taxpayers may also claim $7.50 or 4% of the gross amount of expenditures in New Mexico for medical and dental expenses allowable in computing the deductible medical and dental expenses for federal income tax purposes pursuant to Section 7-2-15 NMSA 1978. Article IV, Section 34 of the New Mexico Constitution prohibits the application of retroactive legislation to "pending cases." In **Phelps Dodge v. Revenue Division of New Mexico,** 103 N.M. 20 (Ct. App. 1985) the Court determined that a taxpayer's formal request for refund was a "pending case" and that legislation not in effect at the time of the claim could not be applied retroactively. It is therefore our opinion that if the law repealing Sections 7-2-14.1 and 7-2-15 NMSA 1978 has not gone

into effect prior to any taxpayer filing a claim for those rebates then the Taxation and Revenue Department must consider any such claim to be a "pending case" and the law allowing the rebates would still apply. If the rebate is allowed to one taxpayer the department must, pursuant to Article VIII, Section 1 of the New Mexico Constitution, allow the rebate for all taxpayers similarly situated.

With respect to the question regarding reduction of amounts transferred to the PIT suspense fund, it is our opinion that the Taxation and Revenue Department ("TRD") may cooperate with the governor and **slightly** increase the amount transferred from the TAA suspense fund to the general fund by reducing the amount transferred to the PIT suspense fund. This is allowable only if enough revenue is left in those funds to meet refund obligations if the rebate laws are not repealed, or if TRD estimates that timely revenue receipts would cover refunds if those rebates are not repealed.

Generally, TRD receives tax revenues which are placed in the TAA suspense fund. Some withholding revenue is transferred from TAA suspense fund to the PIT suspense fund, and to cities and counties with the remainder being transferred to the state general fund monthly. The amounts contained in the PIT suspense fund are used to pay refunds to taxpayers. Any amount remaining in that fund is then transferred to the state general fund.

Section 7-1-6.1 NMSA 1978 provides as follows:

After the necessary disbursements have been made from the tax administration suspense fund, the money remaining the in the suspense fund as of the last day of the month shall be identified by tax source and distributed or transferred in accordance with the provisions of Sections 7-1-6.2 through 7-1-6.18 NMSA 1978. After the necessary distributions and transfers, any balance shall be transferred to the general fund.

This section does not permit retention of funds in the TAA suspense fund after the last day of the month.

An analysis of that statute leads us to conclude that TRD has an obligation to place funds which may be needed to meet refund obligations into the PIT suspense fund where they must remain until such time as a determination is made as to whether they are needed to meet refund obligations. We recognize that such a determination is to be made on a good faith basis by TRD and may be based upon reasonable estimates that revenues received during the last two quarters of the calendar year will be sufficient to meet refund obligations. It is our opinion that those estimates may not be based upon the possible repeal of statutes granting rebates. If the rebate provisions are not repealed and too much money has been transferred to the general fund, legislative appropriation would be required to meet refund obligations because of Article IV Section 30 of the New Mexico Constitution which prohibits the payment of money out of the treasury except by appropriations made by the legislature.

IV. **REDUCTION OF GENERAL FUND ALLOT MENTS TO MINIMIZE EFFECTS OF REVENUE SHORTFALL AND NON-EXPENDITURE OF GENERAL FUND ALLOTMENTS.**

A. **Whether DFA Has Authority to Reduce Monthly Allotments to State Agencies, Institutions of Higher Education and Public Schools>** :

Section 6-3-6 NMSA, 1978 provides in part:

The state budget division, subject to the approval of the secretary of finance and administration, is authorized to provide regulations for the periodic allotment of funds that may be expended by any state agency . . .

Inasmuch as Section 6-3-6 authorizes the State Budget Division to "provide for" the periodic allotment of funds made to state agencies and institution of higher education it appears that, if only this section is considered, the Division could reduce the amount credited to the allotment accounts of state agencies and institutions of higher education.

With respect to public schools, Section 22-8-15 NMSA, 1978 provides:

The chief (director of public school finance) shall determine the allocations of each school district from each of the distributions of the public school funds, subject to the limits established by law.

General fund money going to public schools is primarily disbursed through the public school fund. In addition, Section 22-8-36 NMSA, 1978 provides in part:

The chief (director of public school finance) shall certify periodically to each county treasurer the allocations of funds to each school district in the county.

If only these sections are considered it appears that the Public School Finance Division could reduce the monthly allotments made to public schools.

Such apparent authority, however, must be reconciled with the powers possessed by the recipient public entities. For example, DFA's apparent authority may conflict with those powers bestowed upon those educational institutions listed in Article XII, Section 11 of the New Mexico Constitution and those elected officers listed in Article V, Section 1 of the New Mexico Constitution.

B. **Whether a reduction of monthly allotments is legally permissible:**

In order to adequately address the ability of DFA to reduce monthly allotments, it is necessary to determine the parameters of the respective powers of the executive and legislative powers of the executive and legislative branches of state government. The New Mexico Constitution expressly provides for the separation of powers among the legislative, executive and judicial departments of state government. N.M. Const. Article

111, § 1. It mandates that "no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted." **Id.** Deeply rooted in American jurisprudence is the realization that state constitutions do not grant power to the three departments of government but provide limitations on the powers of each. **State ex rel. Hovey Concrete Products v. Mechem,** 63 N.M. 250, 252, 316 P.2d 1069 (1957). No branch of the state may add to or detract from its clear mandate. **Id.**

The legislature is the entity given the power over appropriations. **State ex rel. Holmes v. State Board of Finance,** 69 N.M. 430, 433, 367 P.2d 925, 928 (1961). Consequently, the executive is denied the right to exercise the power over appropriations except to the extent allowed by the Constitution. **Gamble v. Vaelarde,** 36 N.M. 262, 13 P.2d 559 (1932). While recognizing these principles, the New Mexico Supreme Court has, as a practical matter, been cognizant of the fact that there can never be a complete and absolute separation of the governmental powers and that our Constitution contemplates "that there are certain instances where the overlapping of power exists." **State ex rel. Holmes v. State Board of Finance,** 69 N.M. 430, 433, 367 P.2d 925, 928 (1961); see also **State v. Roy,** 40 N.M. 397, 60 P.2d 646 (1936).

While it is a legislative prerogative to appropriate funds, it is the executive branch which executes the laws. N.M. Const. Article V, § 4. There are, however, limits as to how the executive executes appropriations. The activity of spending money must therefore be carried on by the executive within the limits of appropriations. **Opinion of Justices to the Senate,** 376 N.E.2d 1217 (Mass. 1978). Furthermore, the executive does not have the authority to change legislative appropriations.

The New Mexico Supreme Court has held that the reduction of a legislative appropriation by the executive does in fact violate the separation of powers. **State ex rel. Lee v. Hartman,** 69 N.M. 419, 367 P.2d 918 (1961). In that case, the legislature appropriated $200,000 to the Oil and Gas Accounting Commission for that amount to the State Budget Division. The Division reduced this amount by approximately $7,900. The New Mexico Supreme Court determined that, because there was no express statutory authority for such a reduction in the appropriations act or elsewhere, the reduction was improper.

The Governor's plan to reduce monthly allotments to state agencies, institutions of higher education and public schools would result in a reduction prohibited under **Hartman.** That is, because of the projected revenue shortfall, a reduction in monthly allotments is also a reduction of appropriations. If adequate revenues sufficient to fund appropriations for a particular fiscal year could reasonably be expected to be forthcoming, a temporary reduction in monthly allotments would not appear to violate **Hartman.**

In the event that a particular reduction is not prohibited under **Hartman,** all other applicable laws must be considered to determine the legality of the reduction. Generally,

this includes a consideration of any federal, state and local laws that apply directly to the manner, amount or time within which such allotments must be made or the manner or time the appropriation must be expended. Also, with respect to public schools, if a particular reduction is not prohibited under **Hartman,** the Public School Finance Act (Sections 22-8-1 to 22-8-42 NMSA, 1978) contains certain provisions that must be complied with when reducing monthly allotments.

We now turn to the issue of whether state agencies, institutions of higher education and public schools may decline to expend a portion of the allotments in anticipation of budget cuts made by the legislature. There does not appear to be any legal requirement that a state agency, institution of higher education or a public school expend the amount of money appropriated to it. **Gamble v. Velarde.** Rather, legal constraints go the to maximum amount that may be expended by these public entities. For example, Section 6-3-6 NMSA 1978 prohibits any state agency from expending more than 50% of its general fund appropriation within the first six-month period in an odd-numbered fiscal year. Additionally, the general legal constraints identified in the discussion of whether a reduction is permissible is also applicable in determining whether a state agency, institution of higher education or public school may decline to expend a portion of their allotments.

Any use of the amount not expended by a state agency or institution of higher education must conform with Subsection G of Section 3 of the General Appropriations Act of 1986. Any other transfers may only be made with DFA approval. In this regard, it is clear that the executive may not effect transfers that would unconstitutionally interfere with the legislature's appropriation power. **State ex rel. Holmes** Additionally, transfers made by public schools are governed by Section 22-8-12 of the Public School Finance Act.

V. **AUTHORITY OF THE EXECUTIVE TO TRANSFER BETWEEN ALLOTMENT ACCOUNTS AND APPLICATION OF SECTION 8-6-7 NMSA 1978 TO THE SECRETARY OF FINANCE AND ADMINISTRATION AND THE STATE TREASURER IN THE DRAWING AND PAYMENT OF WARRANTS.**

We will now examine proposals of the administration relating to the transfer authority of the executive and the application of Section 8-6-7 NMSA 1978 to the State Treasurer and Secretary of Finance and Administration. In addition, we shall discuss the current fiscal practices as they relate to the projected revenue shortfall.

While the administration's initial proposal contemplated transfers of balances between allotment accounts, the latest proposal is to reduce monthly allotments. The administration's first proposal was to use at least $65 million from allotment accounts to address cash flow problems. Based upon initial discussions with administration officials, the use would be in the nature of borrowing from allotment accounts, with the intent being that at some future date, as yet undisclosed, funds so borrowed would be replenished in order to ensure compliance with legislatively authorized appropriations In a subsequent proposal, the use of allotment accounts was modified to one which contemplated, instead, depletion of the $65 million in allotment accounts before any

additional allotments are made to a state agency. The latest proposal contemplates withholding approximately $67 million from monthly allotments, an amount equal to the salary packages. In order to address these proposals, we will first define the nature of allotment accounts.

A. **Definition of Allotment Accounts.**

The term, "allotment," is defined as "(a) share or portion; that which is allotted; apportionment, division..." Black's Law Dictionary, Rev'd 4th Ed. (1968). In **City of Bridgeport v. Agostinelli,** 163 Conn. 537, 316 A.2d 371, 376 (1972), the court cited the following definition from Connecticut law:

'allotment' means a portion of an appropriation or special fund set aside to cover expenditures and encumbrances for a certain period or purpose.

The only statutory reference in New Mexico to allotments appears in Section 6-3-6 NMSA 1978, which provides in part:

The state budget division, subject to the approval of the secretary of finance and administration, is authorized to provide regulations **for the periodic allotment of funds** that may be expended by any state agency. (emphasis added).

DFA Regulations, DFA 69-1, 111-3 & 4, provide, with respect to the administration of the budget, for such periodic allotment of funds to be made in monthly or 1/12th installments:

Allotments - If a budget is to be properly implemented, state agencies must stay within their appropriations and also within the amounts allotted to them for a particular period. Appropriation allotments are normally made to agency accounts in equal monthly installments. However, agencies with major seasonal variations in operation requirements may be affected adversely unless financial relief may be obtained. . . . To alleviate financial distress, other agencies may request an allotment other than the normal one-twelfth per month-either in their annual operating budget requests or at a later date during the year.

An allotment request must be formulated on a line item basis by month or quarter. The request must be accompanied not only by full justification, but also by a schedule showing anticipated revenues on the same monthly or quarterly basis when such revenues are from sources other than the General Fund. Actual cash balances must be available prior to authorization of expenditures.

As provided in Section 11-4-1.7, NMSA 1953 Compilation, (recodified as Section 6-3-6) State Budget-Financial Control Division approval of an allotment request constitutes authority for seasonal expenditures-subject always to the limitations of the allotment and within available cash. Advanced allotments should not be requested without good

reason, since the continual adjustment of allotments is likely to upset the budget program.

The **Manual of Central Accounting for New Mexico State Agencies,** DFA 69-1, (**"Manual of Accounting"**) discusses the allotment account under the heading of "The General Fund." These accounts have been assigned a fund code within those codes set aside for the general fund. The **Manual of Accounting** provides at 1-10 as follows:

Reverting and non-reverting allotment accounts are those governmental operations which are financed chiefly from the General Fund. A main characteristic of this type of account is its requirement of periodic allotment of general revenues for operation. Allotment accounts may have minor sources of revenue other than the General Fund; separate classification of minor earmarked revenues to carry on a general fund activity is not essential to fund accounting. The appropriations accounts are control accounts into which general revenues are distributed and out of which periodic allotments are made to the individual allotment accounts. Accounts held in suspense for future disposition are separated in order to properly record a reserve against total assets of the fund.

There may be many allotment accounts set up for each agency and for each function in order to allocate revenues for operation. According to the Department of Finance and Administration Financial Control Division's **Summary of Cash Transaction by Fund on Deposit with the State Treasurer Report, ("Report")** there are some 265 allotment accounts whose total ending balance on April 30, 1986 was $182 million. However, not all these allotment accounts represent general fund monies. For example, we are aware of at least three accounts ("Public School Capital Outlay," "Capital Projects" and "Capital Building Repair Fund") whose total on April 30, 1986 was approximately $15 million that are not part of the general fund but which the **Report,** as well as the **Manual of Accounting,** would erroneously suggest are within the general fund. We anticipate that there are other allotment accounts which are also not part of the general fund.

In order to be certain as to which allotment accounts contain general fund monies it will be necessary to verify both the source of revenues of, and the purposes for, each of the 265 accounts. Lacking the resources to independently do so, and respecting the need to respond quickly on this issue, we have not done such an analysis.

Pending further information and legal analysis, at this juncture it can be determined only that: (1) not all allotment accounts are within the general fund, (2) non-general fund allotment accounts cannot be used for general fund purposes, (3) allotment accounts cannot be treated as one large account because numerous appropriations are involved and because of the mix of general fund and other funds and (4) caution should be taken against proceeding under any proposal until a determination as to the legal nature of monies (general fund vs. other funds.) in these 265 accounts has been made. As to the legality of the administration's proposal to allow depletion of the $65 million purportedly available in these accounts before the making of additional allotments, the legal propriety of such action depends upon a resolution of whether in so doing the DFA is

seeking to use allotment account balances carried over from the prior fiscal year, seeking only to control the expenditure process or whether such action results in a reduction of the appropriation. In this regard, see the legal analysis elsewhere in this opinion concerning the DFA'> ability to reduce monthly allotments to state agencies depending upon whether the state is in a revenue shortfall situation or facing a delay in revenue receipts. The same analysis applies to the administration's proposal on withholding approximately $67 million from monthly allotments.

B. **Transfer between Allotment accounts**.

Assuming that certain allotment accounts can be identified containing general fund balances potentially susceptible of transfer to meet cash flow problems, the next question is whether transfer may be made between general fund allotment accounts to meet those problems. There are two areas of inquiry in this regard: first, laws governing transfer and second, use of transfers as part of controlling the expenditure process. We begin by examining laws pertaining to transfer.

Section 6-10-42 NMSA 1978, addresses the transfer of funds to meet cash flow problems. It provides:

The state board of finance shall have power in case of emergency when there is a shortage of money in the current funds appropriated by the legislature for any state institution or purpose **due to delay in the collection of revenues provided therefor,** to direct, the transfer from any current fund in the state treasury in which there may be a surplus over current requirements of a sufficient sum to meet such emergency, the same **to be replaced as soon as possible from receipts of revenues for such institution or purpose**. In the event that there are no funds available for transfer as herein provided at the time of the existence of such emergencies, then said board of finance may, upon the best terms obtainable, borrow moneys from such sources as it may determine proper until such moneys are available for transfer as herein provided, or until such moneys so borrowed can be repaid from the receipts of revenues for such institution or purpose; provided, that the total sum so transferred or borrowed under the provisions of this section, when added to the total sum received by the said institution from taxes already collected, shall in no case exceed in the aggregate ninety per centum of the total appropriation for such institution. [emphasis added].

It shall be unlawful for any state official or board, or officer of any state institution or agency, except as herein provided, to borrow any money for or on behalf of the state or such institution or agency unless directly authorized by law.

Violations of the provisions of Section 6-10-42 are deemed a felony punishable " . . . by a fine not to exceed two thousand dollars ($2,000), or by imprisonment in the penitentiary for a term of not more than three years, or by both such fine and imprisonment." Section 6-10-52 NMSA 1978.

Section 6-10-42 is inapplicable to the current state financial crisis. The threshold requirement for invoking the State Board of Finance's transfer powers under the statute is that the shortage of money be " . . . due to delay in the collection of revenues . . . " with the additional requirement that the amount transferred be " . . . replaced as soon as possible from receipts of revenues . . . . " Since the state is facing a shortfall in revenue collections rather than a delay in revenue collections for the fiscal year, the requirements for invoking the statute do not appear to exist. Moreover, in view of the DFA's official projections, the replacing of amounts transferred from future receipts of revenues would depend upon legislative action to increase revenue. See, DFA General Fund Report, May 15, 1986.

Aside from Section 6-10-42, the only other law conferring authority upon the executive to engage in transfers of amounts under the general fund which could have applicability here is found in Laws 1986, Chapter 19, Sec. 3, subsection (G), otherwise known as the 75th fiscal year General Appropriations Act ("Act"). However, provisions in that Act are limited to intra-agency transfers between budget categories of a subdivision of an agency and between subdivisions of the same agency as opposed to inter-agency transfers. Thus, transfers between allotment accounts for the same agency could be made, provided compliance with the requirements of Chapter 19, Sec. 3, are met (e.g., budget division approval etc). Transfers between different general fund agencies could not be accomplished under the authority of Chapter 19.

Finally, while not a practical solution for the current situation, from time to time, agencies have either pooled their funding or transferred their funding pursuant to a validly executed and approved joint powers agreement entered into pursuant to the Joint Powers Agreement Act. Sections 11-1-1 to 11-1-7 NMSA 1978. However, there are constraints on executing such agreements which make such transfers workable only in a handful of cases, namely that the agreement must be for the purpose of jointly exercising any power common to two or more agencies. Section 11-1-3 NMSA 1978. One agency providing funding to continue the operations of another agency is not a valid power common to two agencies.

There being no applicable law directly conferring authority upon the executive to make transfers between allotment accounts in the current circumstances, consideration must still be given to whether the executive can authorize such transfers as part of controlling the expenditure process.

In **State ex rel. Holmes v. State Board of Finance,** 69 N.M. 430, 435,367 P.2d 925 (1961), the Supreme Court observed that the legislature " . . . may provide in the general appropriation bill, for the executive to control the expenditure of amounts appropriated." The Court also noted a distinction between appropriations and expenditures and cited provisions in general appropriations acts to the effect that, since 1933, appropriations have been limited by the phrase "not in excess of available revenues" or similar language as well as by language to the effect that the appropriation is made in an amount" or so much thereof as may be necessary within available revenues." **See e.g.,** Laws 1986, Chapter 19, Sec. 3, subsection (D). However, the

Court was not convinced that this language was sufficient to confer authority upon the executive, specifically there the State Board of Finance, to reduce operating budgets because of the lack of standards. As stated by the Court in holding that the State Board of Finance could not impose a reduction:

As we read the section, the grant is absolute and is totally devoid of restraints, direction or rules. Accordingly, the fact that respondent acted only under certain self-imposed restraints can in no way serve to supply what has been omitted. It is not what has been done but what can be done under a statute that determines its constitutionality. (Citations Omitted).

As we see it, the Respondent is free to impose a reduction of 1%, 5%, or 10% on the operating budgets, simply if it is of the opinion the legislature has been overly generous. This might be applied to one agency, department, or institution or to all. It could be applied equally to those agencies and departments supported by the general fund and to those getting their support from dedicated funds, or to one or more of them. [69 N.M. at 440.]

Similarly, if the executive were to make transfers between allotment accounts, a question would necessarily arise as to whether there was interference with legislatively prescribed appropriations. **See, Gamble v. Velarde,** 36 N.M. 262, 13 P.2d 559 (1939). Only the legislature may determine how the money appropriated for a specified object may be spent. **State ex rel. Constitutional Convention v. Evans,** 80 N.M. 720, 460 P.2d 250 (1969). And as observed in **State ex rel. Lee v. Hartman,** 69 N.M. 419, 427, 367 P.2d 918 (1961), on the question of whether the Director of the Department of Finance and Administration could reduce appropriations: " . . . if the budget as submitted is within the amounts appropriated and the items are proper, he (the Director) is given no discretion except to approve them." A recent Colorado case is particularly instructive on this point.

In **Colorado General Assembly v. Lamm,** 700 P.2d 508 (Colo. 1985), fiscal transactions undertaken by Governor Lamm to address a fiscal crisis were challenged as unauthorized. One of the transactions concerned the transfer of funds from certain departments of the executive branch for which funds were appropriated by the General Assembly to other executive departments. The Court held that these transfers were an unlawful infringement by the executive upon the General Assembly's power of appropriation:

The appropriations and cash funds spending authorities transferred by the Governor in 1980 and 1982 were initially designated by the General Assembly for the use of particular executive departments. Each executive department is responsible for a particular area of governmental concern, as defined by the statute creating the department. When the General Assembly determines the amount of appropriations or cash funds spending authority to be used by a particular executive department, it is clear that one object of that legislative decision is regulation of the activity level of the department. The transfers challenged here altered dramatically the objectives which the

General Assembly had determined were to be achieved through use of state monies. We conclude that whatever inherent authority to administer the executive budget may exist in the office of the chief executive, such authority may not normally be invoked to contradict major legislative budgeting determinations. In our view, the initial appropriations to the department involved here constituted such major legislative budgetary determinations. [700 P.2d 520-521.]

* * *

We conclude that the transfers between executive departments here undertaken impermissibly infringed upon the General Assembly's plenary power of appropriation, and, therefore cannot be deemed to fall within the inherent administrative authority of the Governor over the state budget. However accurate the perception of the executive branch that emergency conditions existed might have been, the means ultimately chosen in good faith to remedy those conditions were not within the inherent authority of the chief executive. [700 P.2d at 522-523.]

It might be argued that the **Lamm** case is not controlling on the basis that transfers contemplated under the administration's original proposal (as compared to those made by Governor Lamm) are not intended to permanently alter legislative appropriations but instead are meant to address only cash flow problems. **Compare, Fawcett v. Ball,** 80 Cal.App. 131, 251 P. 679 (1926). As we understand the original proposal, this would be accomplished through continuously (or as needed) moving or transferring funds from those allotment accounts not currently being charged with warrants to those allotment accounts against which warrants are currently being charged so as to show sufficient balances in those accounts and to avoid overdrafts. **See,** Section 6-5-6 NMSA 1978. In our opinion, such actions would ignore and defeat existing control methods. Such accounting transfers do not create cash but merely move balances from account to account on an "as needed" basis. In a situation where a revenue shortfall exists, some agencies will necessarily be deprived of use of their funds if their funds are expended elsewhere to cover needs of other agencies. More importantly, the short-term cash flow solution has become an unlawful interference by the executive with the legislative appropriation process in violation of principles articulated in the **Lamm** case. **See also, West Side Organization Health Services v. Thompson,** 73 III. App. 3d 1979, 29 III. Dec. 129, 391 N.E.2d 392 (1979); **State ex rel. Board of Education, etc. v. Rockefeller,** 281 S.E.2d 131 (W.Va. 1981); **Board of Education of Wyoming County v. Board of Public Works,** 109 S.E.2d (W.Va. 1959); **Gamble v. Velarde,** 36 N.M. 262, 13 P.2d 559 (1939). In order to understand how this will occur it is necessary to examine both the current fiscal structure and the applicable statutory control mechanisms.

C. **Current Fiscal Practice**

Under the current fiscal practices, each month amounts are credited from the general fund appropriations account to the various allotment accounts. As stated previously, 1/12th of the total authorized budget for an agency or purpose has traditionally been the

amount transferred from the appropriations account each month to the allotment accounts. Unfortunately, since much of the state's income comes in during the last half of the fiscal year (corporate income tax, personal revenues) the appropriations account often does not contain sufficient amounts to make monthly 1/12th disbursements to the allotment accounts. Since the need by an agency for its funds cannot, in most cases, be postponed until receipts match expenditures (salaries, fixed expenses, etc.) this transfer has, apparently nevertheless been made by reflecting a temporary deficit or negative balance in the appropriations account. As shown by a chart dated May 19, 1986, provided by the DFA, in the 73rd fiscal year the appropriations account was carried throughout eleven months of the fiscal year in the negative, although in June it showed a positive balance of $21.6 million. In the current fiscal year, the 74th, as of April 30, the appropriations account reflects a negative balance of $198.3 million.

To the best of our knowledge, this situation has been addressed at the close of fiscal years by drawing upon all revenues then available to the general fund such as the severance tax income fund and available revenues not otherwise appropriated to cover the appropriations account. What has been key to the state's ability to close its fiscal year with all accounts in the black is availability of unappropriated revenues, many of which come in during the second half of the fiscal year. Availability of these revenues does not appear to be a situation the state will continue to enjoy. As a consequence, we see a strong potential for a violation of Section 8-6-7 NMSA 1978 to occur. That section provides:

If the secretary of finance and administration shall draw any warrant on the treasurer of the state, or if the treasurer of the state shall pay any warrant when there is no money in the treasury in the particular fund for which the warrant is drawn, he shall be liable to a fine of not less than one thousand dollars ($1,000) and imprisoned for not less than one year.

It is not clear from the statute what the legislature intended by the term, "the particular fund," that the Treasurer must check to determine whether to pay a warrant so as not to violate Section 8-6-7. Conceivably, the "particular fund" could be the balance in the fiscal agent account. We have been advised that the fiscal agent balances is basically comprised of three accounts: (1) the Treasurer's Checking Account which consists not only of general fund money but also of money belonging to other funds such as P.E.R.A. and .E.R.A., (2) the Warrant Clearing Account which is the account against which warrants are charged to the state by the fiscal agent and (3) the Employment Security Department Account which consists of a series of accounts comprised of federal funds which are not relevant to the instant inquiry. It could be argued that so long as, after deducting amounts belonging to other funds to arrive at the amount actually belonging to the general fund, there is a sufficient amount of cash in the Treasurer's Checking Account to write a check to redeem a warrant the Treasurer has complied with Section 8-6-7. However, as explained to us by the Treasurer's staff, before redemption of a warrant takes place the procedure in place at the Treasurer's Office is to check the expenditure account of that agency (as shown on records kept by the State Treasurer) prior to paying a warrant for that agency. According to the State

Treasurer, transfer from allotment accounts (wherein balances are encumbered) to expenditure accounts (from which warrants are paid) are supposed to take place at the time warrants are drawn by the DFA Secretary. There are approximately 500 expenditure accounts set up for this purpose at the Treasury. The same accounts exist within the DFA and the two sets of accounts are reconciled monthly (DFA balances vs. Treasurer's balance) on the **State Treasurer's DFA Reconciliation Summary Report**. See, Section 6-5-7 NMSA 1978. Often, transfers from an agency's allotment account to its expenditure account are not timely made. Often, insufficient balances exist in an agency's expenditure account to pay a warrant. If the "particular fund "referenced in Section 8-6-7 is the expenditure account, and these two situations occur with no other funds available to redeem a warrant, then the Treasurer may be violating the statute when he pays a warrant.

Previously, the State Treasurer, who appears to be without much of the information needed in order to decide whether to pay a warrant presented to him for redemption pursuant to Section 8-6-3 NMSA 1978, could at least take comfort in the fact that revenues would be forthcoming (mostly from surpluses) sufficient to cover warrants redeemed. However, in the current situation this is not the case. Yet, as stated in Op. Atty. Gen. No. 61-9 at page 16:

The responsibility for determining that funds to be disbursed from the State Treasurer are paid for a proper and legal purpose falls upon the Department of Finance and Administration and more specifically upon the Division of Financial Control.

Thus, we now turn to the statutes and control mechanisms within the DFA that must be complied with.

Section 6-4-2 NMSA 1978 provides that expenditures from the general fund " . . . shall be made only in accordance with appropriations authorized by the legislature." Art. IV, Sec. 30, N.M. Const. prohibits expenditures of money from the Treasury except " . . . upon appropriations made by the legislature." In order to secure compliance with these directives a method of disbursement through warrants to be drawn upon the Treasury is used. Section 6-10-46 provides:

All payments and disbursements of public funds of the State of New Mexico shall be made upon warrants drawn by the secretary of finance and administration upon the treasury of the State of New Mexico based upon itemized vouchers as provided by law.

The control mechanism for disbursement of funds is the Financial Control Division of the DFA. Sections 6-5-1 to 6-5-9 NMSA 1978.

The Financial Control Division is charged with the responsibility of setting up a control system of state accounts. Section 6-5-2 NMSA 1978. Prior to the execution of any contracts, purchase orders or controls involving the expenditure of money, Financial Control both verifies the authority for the expenditure and encumbers the appropriate fund to the extent of the proposed expenditure. Section 6-5-3 NMSA 1978. When the

agency requests actual disbursement of its funds, three determinations are to be made by the Financial Control Division of the DFA before a warrant can be issued by the Secretary of the DFA pursuant to Section 6-5-5 NMSA 1978. These are that the warrant:

A. does not exceed the appropriation made to the agency;

B. does not exceed the periodic allotment made to the agency or the unencumbered balance of funds at its disposal; and

C. is for a purpose included within the appropriation or otherwise authorized by law.

Section 6-5-6 NMSA 1978.

The purpose in making periodic allotments of funds to agencies is to ensure compliance with appropriations for specified purposes and to ensure that expenditures are carefully controlled. In the current situation, the shifting of funds already allocated among the various allotment accounts would interfere with the budget process and the ability of the Financial Control Division to control disbursements. Most importantly, it will eventually, due to the present shortfall in revenue collections, result in a reappropriation by the executive of funds appropriated by the legislature.

D. **Conclusion**.

In summary, it is our opinion, first, that the ability of the executive to effect transfers among general funds allotment accounts is limited to the following three types of transfers:

(1) transfers pursuant to Section 6-10-42 NMSA 1978 to address a delay in revenue collections which transfers are to be replaced as soon as possible from available revenues;

(2) transfers between accounts of the same agency (so-called intra-agency transfers) but only in accordance with the provisions of Laws 1986, Chapter 19; and

(3) transfers of balances which do not alter legislative appropriations.

Second, we believe that existing methods of controlling expenditures are not adequate except in years in which the state is able to maintain sufficiently large surpluses to cover the redemption of warrants. And third, it is our opinion that to the extent the appropriations account is debited when there are no funds capable of paying a warrant or when an expenditure or allotment account is debited when there are insufficient balances in those accounts and no other funds are available to pay a warrant; the Secretary of DFA or the Treasurer so knowing such information, or being aware of information under which they should know of such a situation, when issuing warrants or

paying upon those warrants in the face of such a circumstance, violates Section 8-6-7 NMSA 1978.

ATTORNEY GENERAL

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