STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

December 1, 2022

Joseph Cervantes
State Senator
901 E. University Ave., Suite 965L
Las Cruces, NM 88001
joseph.cervantes@nmlegis.gov

Re: Opinion Request – Government Forest or Watershed Restoration Projects and Article IX, Section 14, of the New Mexico Constitution

Dear Senator Cervantes:

You requested our advice regarding forest or watershed restoration projects conducted by government agencies. Specifically, you have asked whether forest or watershed restoration projects violate Article IX, Section 14, of the New Mexico Constitution (the "Anti-donation Clause"), if said projects incidentally (but not purposefully or primarily) benefit privately-owned lands. As discussed in more detail below, based on the language in the Constitution and the applicable case law, we conclude that such projects would not violate the Anti-donation Clause.

As a preliminary matter, we limit our analysis and discussion to the hypothetical situation you provided in which a state or local government agency plans, organizes, participates in, or otherwise conducts a forest or watershed restoration project. The project is designed to benefit the public, and the people of New Mexico are the primary beneficiaries of the project. However, the project has the unintended consequence of benefitting non-state land. This incidental benefit accrues to private individuals or corporations but is not the purpose of the project.

The Anti-donation Clause provides, in relevant part:

> Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation…

N.M. Const. art. IX, § 14. For the purposes of the Anti-donation Clause, a donation is "a gift, an allocation or appropriation of something of value, without consideration to a person, association or public or private corporation." *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 62 N.M. 18, 28 (internal quotation marks omitted).

Courts generally interpret the Anti-donation Clause "with reference to the evils it was intended to correct." *City of Clovis v. Sw. Pub. Serv. Co.*, 1945-NMSC-030, ¶ 23, 49 N.M. 270, 276, 161 P.2d 878, 881. "[T]he evil addressed by the antidonation clause is the investment of public funds in private enterprises." N.M. Att'y Gen. Op. No. 92-03 (1992). This has meant that courts will find violations only where government aid takes on the character of a donation in both substance and effect. *See Village of Deming*, 1956-NMSC-111, ¶ 37 (holding that violations of the Anti-donation Clause are found when "by reason of its nature and the circumstances surrounding it" government aid takes on the character of a donation in both substance and effect). S*ee also State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 49, 141 N.M. 1 (observing that consideration "can be a defining element"), *Treloar v. Cty. of Chaves*, 2001-NMCA-074, ¶ 32, 130 N.M. 794, 803, 32 P.3d 803, 812 (holding that a severance provision in a contract between a county hospital and a doctor did not violate the Anti-donation Clause because severance pay qualified as earned and therefore "consideration had been given"), and N.M. Att'y Gen. Op. No. 12-01 (2012) (noting that government "may not confer something of value to a private entity or individual without receiving something of value in return"). Our office has observed in the past that, "in construing the anti-donation clause, courts are more prone to find a violation when the 'donation' is in the form of an outright cash gift." N.M. Att'y Gen. Op. No. 75-07 (1975).

The Supreme Court of New Mexico's decision in *Village of Deming* provides some guidance as to the limits of the Anti-donation Clause. There, the legislature had created a statute authorizing the issuance of municipal revenue bonds designed to promote industry and manufacturing. *Village of Deming*, 1956-NMSC-111, at ¶ 3. Relying on that statute, the plaintiff Village of Deming had passed an ordinance issuing revenue bonds to create a manufacturing project, which the ordinance also leased to a private company. *Id.* at ¶ 12. Interpreting the Anti-donation Clause, the Court explicitly stated that it was "leaving the door open for incidental aid or resultant benefit to a private corporation or other named recipients from given legislation, without necessitating a declared breach of this provision of our Constitution." *Id.* at ¶ 34. This was, per the Court, "a somewhat cautious interpretation" of the word "donation." *Vill. of Deming*, 1956-NMSC-111, at ¶ 35. Emphasizing the village ordinance's benefit to the public, the Court found that it did not take on the character of a donation in both substance and effect, so it was not a violation of Article IX, Section 14. *Id.* at ¶ 37.

Similar to the municipal ordinance at issue in *Village of Deming*, it would strain credulity to find that forest and watershed restoration projects violate the Anti-donation Clause merely because they incidentally benefit private land. These projects provide an immeasurable benefit to the public,[1] even in the absence of (strictly speaking) direct consideration from private individuals. As stated in Senate Memorial 124, "watershed restoration projects constitute the performance of an essential government function." S.M. 124, 53rd Leg. Sess. (N.M. 2017). The primary benefit accrues to the public, meaning that, in effect, the project does not take on the character of a donation. If the project benefitted primarily private lands or was conducted exclusively on private lands, a court

[1] Senate Memorial 124 stated that forest and watershed restoration projects "are designed to increase the adaptability and resilience to recurring drought and extreme weather events of the state's forests and watersheds; protect water sources; reduce the risk of wildfire and maintain the water storage and release capacity of watersheds; and may include projects to restore burned areas, thin forests and support related economic or workforce development projects." S.M. 124, 53rd Leg. Sess. (N.M. 2017).

might reach a different result. But here, where these projects primarily benefit the public and only incidentally benefit private individuals, they would not constitute "donations" for the purposes of Article IX, Section 14. As an analogy, state-funded improvements to highways inarguably result in an incidental benefit to private individuals, yet no court would find that these violate the Anti-donation Clause. Given that courts interpret Article IX, Section 14, in light of "the evils it was intended to correct," *City of Clovis,* 1945-NMSC-030,,i 23, it is highly unlikely that a court would find that forest or watershed restoration projects resulting in only incidental benefits to private land are unconstitutional. Thus, even where some of the work is done on private land, the benefit would still accrue primarily to the public and not constitute, "in effect," a donation (much like the government project in *Village of Deming).*

Other states with similar constitutional provisions have concluded, as we have, that an "incidental benefit to a private individual or organization will not invalidate an otherwise valid public transaction." *King Cty. v. Taxpayers of King Cty.,* 949 P.2d 1260, 1266, 133 Wash. 2d 584, 596 (Wash. 1997). *See also Schettler v. Cty. of Santa Clara,* 141 Cal. Rptr. 731, 739-40, 74 Cal. App. 3d 990, 1003 (Cal. Ct. App. 1977) (noting that California's constitutional prohibition against governmental gifts to private entities was "not violated even though there may be incidental benefits to private persons") and *Engelking v. Inv. Bd.,* 458 P.2d 213, 218, 93 Idaho 217, 222 (Idaho 1969) (noting that "where such a benefit is merely an incidental consequence of efforts to effectuate a broad public purpose, then it cannot be said to violate" the state constitution's prohibition against the loaning of public credit to a private entity).

Your request to us was for a formal Attorney General's opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide this letter to the public.

Sincerely,

John Kreienkamp
Assistant Attorney General