New Mexico Department of Justice

January 14, 2025

OPINION
OF
RAÚL TORREZ
Attorney General

Opinion No. 2025-05

To: The Honorable Robert E. Doucette, Jr., Cabinet Secretary, NM General Services Department

Re: Attorney General Opinion – State Constitutional Restrictions on Indemnification Agreements with the United States Department of Agriculture

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Questions

1. Has the Department of Justice (NMDOJ) changed its position stated in a 2004 letter to the United States Department of Agriculture (USDA) regarding the authority of a state agency to indemnify the United States from injury, loss, or damage it might suffer as a result of claims or judgments caused by the state's use or occupancy of federal property under special use permits issued by the United States Forest Service?

2. May the Risk Management Division (RMD) of the General Services Department (GSD) add the USDA as an additional insured for the statutory coverages provided to the Department of Information Technology (DoIT) in connection with a lease of Forest Service real property used for cell towers and related activity?

3. Does naming the USDA as an additional insured violate the Anti-donation Clause of Article IX, Section 14 of the New Mexico Constitution?

4. Does naming the USDA as an additional insured create a "contingent liability" or an "unlawful debt" under Article IX, Section 8 of the New Mexico Constitution?

5. Does the proposed indemnity language and insurance coverage in the special use permit related to the lease of Forest Service real property resolve the issues raised in the 2004 letter and questions posed above?

Conclusions

1. No. There has been no change in the law informing NMDOJ's position in its letter of 2004. Article IX, Section 8 of the New Mexico Constitution prohibits a state agency from agreeing to indemnify the United States by taking on a contingent liability of an unlimited amount.

2. The USDA can be an additional insured on commercial liability insurance, but RMD has no authority to name the USDA as a co-insured on a certificate of coverage under the public liability fund.

3. Naming the USDA as an additional insured does not violate the Anti-Donation Clause when the State receives consideration in exchange for doing so.

4. Naming the USDA as an additional insured does not violate Article IX, Section 8 of the New Mexico Constitution provided that the insurance is authorized by the Legislatur.

5. The USDA's proposed indemnity language and insurance coverage partially address the issues raised in NMDOJ's 2004 letter in that indemnity is restricted to statutory limits in the Tort Claims Act (the TCA) and state law does not prevent the State from purchasing commercial liability insurance with the United States as a co-insured for permits issued for communications uses. However, the proposed language in the special use authorization related to the lease of federal forest lands for non-communications uses conflicts with the TCA by providing for tort liability self-insurance by the State, and potential reimbursement to the United States, in an amount that exceeds the liability limits of the TCA for which the Legislature has not waived sovereign immunity.

Background

Under federal law, the United States Forest Service may grant leases or permits for the use of national forest land through the issuance of a special use authorization (SUA). 36 C.F.R. § 251.53. This includes leases issued to states to build communication systems. *Id.* As a condition of using federal land, the holder of an SUA must "indemnify the United States for any and all injury, loss, or damage, including fire suppression costs, the United States may suffer as a result of claims, demands, losses, or judgments caused by the holder's use or occupancy." 36 C.F.R. § 251.56(d)(1).

In January 2004, NMDOJ issued a letter to the USDA in which NMDOJ concluded that state law prevents New Mexico from agreeing to indemnify the United States as part of an SUA. Specifically, NMDOJ determined that an indemnity clause in an SUA would violate the prohibition against the State contracting a debt in Article IX, Section 8 of the New Mexico Constitution. As stated in the letter, the State could not satisfy the indemnity requirement in federal law by agreeing to "a contingent liability of an unlimited amount that may arise in future fiscal years." The letter concluded by suggesting that the State and the Forest Service "negotiate appropriate risk coverage, including insurance, in connection with the special use permits that will adequately protect the United States without requiring the State of New Mexico to run afoul of the State constitution."

Since the issuance of this letter, the USDA and GSD worked together on proposed solutions to the indemnity problem. They ultimately agreed on modified language that would fulfill the indemnity requirement of 36 C.F.R. § 251.56(d)(1) in three principal ways: (1) the State would agree to indemnify the United States for tort liability associated with the State's use of National Forest Service lands up to the liability limits in the Tort Claims Act, NMSA 1978, § 41-4-19 (2007); (2) the State would acquire commercial general liability (CGL) insurance for communications use leases with a minimum amount of coverage of $1 million per occurrence and $2 million in the aggregate and with the United States named as an additional insured; and (3) the State would provide for self-insurance for all SUAs issued for non-communications uses of Forest Service lands with a minimum amount of coverage of $1 million per occurrence and with the United States named as an additional insured. At the USDA's request, GSD sought NMDOJ's answer to the questions posed above.

Analysis

I. The 2004 Letter

GSD's first question asks whether NMDOJ's position has changed on indemnity under Article IX, Section 8 of the New Mexico Constitution. The 2004 letter relied on established New Mexico precedent interpreting Article IX, Section 8, *Henning v. Town of Hot Springs*, 1939-NMSC-029, 44 N.M. 321, and *City of Santa Fe v. First National Bank in Raton*, 1937-NMSC-009, 41 N.M. 130. These cases addressed municipal obligations under the analogous anti-debt provision for municipalities, N.M. Const. art. IX, § 12, and held that "any agreement by which a municipality obligates itself to pay out of tax revenues, and commits itself beyond revenues for the current fiscal year, falls within the terms of the constitutional debt restriction." *Hamilton Test Sys., Inc. v. City of Albuquerque*, 1985-NMSC-075, ¶ 9, 103 N.M. 226; s*ee Montaño v. Gabaldon*, 1989-NMSC-001, 108 N.M. 94. The 2004 letter also relied on an Attorney General opinion. *See* N.M. Att'y Gen. Op. No. 00-04 (concluding that a contractual provision obligating a city to indemnify a vendor against liabilities arising from the vendors breach of the contract or city's negligence violated the constitutional restrictions on municipal indebtedness). There has been no change in the law since the 2004 letter that would support a different interpretation of Article IX, Section 8. *See* N.M. Att'y Gen. Advisory Letter to Rep. Janice E. Arnold-Jones (Jan. 20, 2010) ("Indemnification obligations that require, for satisfaction, resort to general taxation or general revenues can run afoul of the 'debt' provisions of the constitution.").

An Idaho Attorney General opinion addressed the constitutional implications of indemnification in the context of an SUA issued by the USDA.

> An indemnification is a contractual promise to pay for and provide a legal defense for a claim related to the contract and made against another contracting party. In addition, an indemnification is a promise to pay any costs arising from the claim, such as costs imposed through a settlement or court judgement. When the promise will be called is indefinite. An indemnification obligation can arise during the current Idaho budget year or in a future budget year.

Idaho Att'y Gen. Op. No. 19-1 (Sept. 30, 2019). Under a similar anti-debt provision in the Idaho Constitution, "an indemnification obligation in a state agency contract not funded by legislative appropriation is void." *Id.* The 2004 NMDOJ letter properly concluded that Article IX, Section 8 prohibits the State from agreeing to a contingent liability of unlimited amounts for an indefinite term.

II. The United States as an Additional Insured

GSD's second through fourth questions focus on the statutory and constitutional implications of naming the United States as an additional insured, both in a CGL insurance policy and with self-insurance. Indemnification is a contractual obligation, and the Legislature has waived sovereign immunity for valid written contracts. NMSA 1978, § 37-1-23 (1976). For tort liability, however, the Legislature has waived sovereign immunity only "within the limitations of the Tort Claims Act." NMSA 1978, § 41-4-2 (1976). A state agency cannot contractually expand the Legislature's restriction on state tort liability.

The first component of the proposed liability language from the USDA and GSD provides that the State's indemnity obligation is subject to "the limits of liability" under the TCA. This proposed language is therefore consistent with the Legislature's limited waiver of sovereign immunity under Section 41-4-2 and complies with state law.[1]

The second component of the proposed liability language provides for the State to purchase CGL insurance and name the United States as an additional insured. Although liability insurance purchased by the State must be "authorized by the Tort Claims Act," NMSA 1978, § 41-4-20(C) (1981), the TCA authorizes RMD to purchase liability insurance for state agencies, NMSA 1978, § 41-4-23(B)(1) (2001), and the Legislature created a separate "insurance fund" for the purchase of insurance for the state and its employees, NMSA 1978, § 41-4-22 (1977). The TCA does not address the naming of an additional insured on a state insurance policy, but the TCA generally applies to all risks "for which immunity has been waived" under the TCA. Section 41-4-20(A). Naming an additional insured does not expose the State to any greater risk under the TCA and only obligates the State to pay for insurance costs that must be budgeted under Section 41-4-20(B). Further, the TCA provides for coverage of liability arising under the law of the United States. NMSA 1978, § 41-4-28(A) (1986). It thus appears that there is no statutory prohibition against the State naming the United States as an additional insured on a CGL insurance policy purchased to satisfy the indemnity requirements of 36 C.F.R. § 251.56(d)(1).

Nor would doing so violate the Anti-Donation Clause of the New Mexico Constitution, N.M. Const. art. IX, § 14. This Clause states as follows:

[1] The proposal purports to hold New Mexico strictly liable to the United States. However, the proposal provides that this "strict liability" is subject "to the limits of liability under the New Mexico Tort Claims Act." The Legislature provided that the TCA "in no way imposes a strict liability." Section 41-4-2(B). We therefore interpret the reference to "strict liability" in the proposal as contract liability after tort liability has been determined "based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty." *Id.*

> [n]either 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 or in aid of any private enterprise for the construction of any railroad except as provided in [this section].

We assume for purposes of this analysis that the Federal Government and its agencies, such as USDA, are included within the Anti-Donation Clause. The term "donation," in the context of Article IX, Section 14, does not apply when the State receives consideration for an expenditure. The term has instead "been applied, in its ordinary sense and meaning, as 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 (emphasis added) (holding that municipal bonds or the construction of buildings for sale or lease to industries did not violate the Anti-Donation Clause); *see City of Raton v. Ark. Riv. Power Auth.*, 600 F. Supp. 2d 1130, 1161 (D.N.M. 2008) ("The Court does not believe that the Anti-Donation Clause is implicated when there is true consideration—money exchanged for a real product."); *State ex rel. Off. of the State Eng'r v. Lewis,* 2007-NMCA-008, ¶¶ 49-52, 141 N.M. 1 (determining that the purchase of water rights did not violate the Clause because the State received value in exchange for the spending). Here, the State proposes to lease land from the USDA for cell towers and other infrastructure and would name the United States in an insurance policy in exchange for this consideration. Therefore, this proposal, by including true consideration, would not implicate the Anti-Donation Clause.

Naming the United States as an additional insured on a CGL insurance policy also does not implicate the debt restriction in Article IX, Section 8. As discussed above, this provision prevents the government from contracting a contingent debt of an unspecified amount through future fiscal years. An insurance policy payable by a commercial insurance company is not a debt of the state.

Self-insurance, with the United States as a named insured, is the final component of the proposed liability language from the USDA and GSD, and the self-insurance language would apply to an SUA issued for non-communications uses. The TCA creates New Mexico's self-insurance system, which the Legislature labeled the public liability fund. Section 41-4-23. Under the TCA, GSD administers the fund through RMD, and RMD uses the fund to pay for insurance, to defend and indemnify "any state agency or employee of a state agency or a local public body for any claim or liability covered by a valid and current certificate of coverage to the limits of such certificate of coverage," and to pay claims and judgments covered by a certificate of coverage. Section 41-4-23(B). In other words, the public liability fund covers all liability risks associated with the State's limited waiver of sovereign immunity for tort claims, plus all liability risks created by the laws of other states or the United States. It applies to the liability of governmental entities, meaning "the state or any local public body." NMSA 1978, § 41-4-3(B) (2015).

The self-insurance proposal from the USDA and GSD conflicts with the TCA in at least two respects. First, the proposal would go beyond the statutorily authorized indemnity for the state and local public bodies to create indemnity for the United States as an additional named insured. Second, this indemnity would exceed the maximum liability in the TCA and would not be

restricted to the limited waiver of liability in the TCA. These two departures from the TCA would expand the State's liability risk beyond the Legislature's waiver of sovereign immunity. As a result, the proposed self-insurance provision would violate New Mexico law and exceed GSD's authority.

The Idaho Attorney General reached the same conclusion with respect to a similar self-insurance proposal by the USDA. Idaho Att'y Gen. Op. No. 19-1 ("The retained risk program cannot insure third parties, including the USDA."). To be valid under New Mexico law, the USDA's self-insurance proposal in excess of the liability limits of the TCA would require legislative authorization.[2]

Conclusion

NMDOJ's analysis of the anti-debt clause in Article IX, Section 8 has not changed since 2004. NMDOJ has reviewed the proposed liability language and has determined that it is consistent with New Mexico law with respect to indemnity subject to the limits of liability in the TCA and with respect to naming the United States as an additional insured on a commercial general liability insurance policy. However, the self-insurance provision in the proposal conflicts with the TCA and would require legislative approval of the self-insurance.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

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ATTORNEY GENERAL

/s/ Lawrence M. Marcus
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[2] Assuming the Legislature were to authorize payment from the fund to the United States in amounts in excess of the maximum liability limits in the TCA, such legislation would not violate Article IX, Section 8 of the New Mexico Constitution. *See §* 41-4-23(D) (providing that payments from the public liability fund in any particular fiscal year cannot exceed the amount in the fund); *see also* N.M. Att'y Gen. Advisory Letter to Rep. Janice E. Arnold-Jones (Jan. 20, 2010).