January 20, 2010 Advisory-Railway agreement with the New Mexico Department of Transportation

Honorable Janice E. Arnold-Jones
State Representative
7713 Sierra Azul NE
Albuquerque, NM 87504-1508

Re: Opinion Request--BNSF Railway Agreement with the New Mexico Department of Transportation

Dear Representative Arnold-Jones:

You have requested an opinion regarding the agreement between BNSF Railway Company and the New Mexico Department of Transportation. Specifically, you ask:

1. Did the New Mexico Department of Transportation exceed its authority in the joint use agreement with BNSF Railway Company dated December 5, 2005 by providing that the Rail Runner commuter rail service would always be operated by a private party?

2. Do the provisions of the joint use agreement and similar provisions of the purchase and sale agreements under which the Department of Transportation agrees to pay or reimburse BNSF Railway Company for any taxes owed by BNSF Railway Company attributable to the sale of the rights-of-way violate Article IV, Section 32 of the New Mexico Constitution?

3. Did the Department of Transportation improperly waive the State's immunity from suit?

Based on our review of the relevant statutory and case law, we believe that (1) the Department of Transportation did not exceed its statutory authority by agreeing to the operation of the commuter rail by a private entity; (2) the tax reimbursement provision is not contrary to Article IV, Section 32; and (3) a reasonable argument can be made that the Department of Transportation did not improperly waive the State's immunity from suit.

INTRODUCTION.

In 2005, the New Mexico Department of Transportation announced a proposed joint-use agreement with BNSF Railway Company to purchase portions of the company's rights of way in northern and central New Mexico as part of the State's plan to provide a commuter rail service ("Rail Runner project"). Former Attorney General Patricia Madrid, by letter dated February 28, 2006, opined, "to a reasonable legal certainty, that the joint use agreement is lawful under the laws of the State of New Mexico." The Attorney General expressly stated that she expressed no view whether the joint use agreement is beneficial or detrimental to the interests of the State of New Mexico.

The purchase of the rail tracks from BNSF Railway Company was accomplished by three separate purchase and sale agreements. The first purchase and sale agreement was for the rail tracks and associated rights-of-way between Belen and Bernalillo, and that contract closed on March 17, 2006. The second purchase and sale agreement was for the rail tracks and associated rights-of-way between Bernalillo and Lamy, and that contract closed on February 27, 2007. The third purchase and sale agreement is for the rail tracks and associated rights-of-way between Lamy and the New Mexico-Colorado state line, and that contract presumably closed on January 10, 2008.

It is our understanding that extensive negotiation with BNSF Railway Company preceded the finalization of these agreements, that several state agencies were involved in drafting and reviewing these agreements, that the legislative finance committee reviewed the agreements, and that the Department of Transportation testified to House and Senate Committees regarding the Rail Runner project and the joint use agreement. Further, the Rail Runner project, in general, and the agreements with BNSF Railway Company, in particular, were subject to extensive review and revision by multiple agencies and committees in both the executive and legislative branches of State government.

ANALYSIS.

Operation of Rail Runner by a Private Entity.

Section 2.5(A) of the joint use agreement provides, in part:

> NMDOT must at all times have a private party operator (the "Operator") operate the Commuter Service. NMDOT must never operate the Commuter Service with its own or any other public agency's employees or through any other public body or agency. NMDOT shall cause the Operator and all of NMDOT's other contractors to perform all activities in accordance with the obligations of NMDOT under this Joint Use Agreement….[1]

That paragraph makes further provision for BNSF Railway Company's approval of the Department of Transportation's proposed operator of the Rail Runner.

The Public Mass Transportation Act, NMSA 1978, Sections 67-3-67 to -70 (1975, as amended) and Section 67-3-71 (1975) give broad authority to DOT. Section 67-3-68 provides:

> It is the intent of the legislature to assign to the state highway and transportation department all functions and powers necessary to develop a coordinated program with the United States government, and others, in the field of public mass transportation. In order to accomplish this purpose and obtain all possible funds available to implement this program, the Public Mass Transportation Act shall be liberally construed.

Under Section 67-3-70, "[t]he department may expend such portion of its appropriated funds as it deems necessary to effectuate the purposes of the Public Mass Transportation Act." Under Section 67-3-71, "[t]he state highway and transportation department may: (A) acquire property by purchase … for the purpose of construction and operation of a transportation system; and (B) negotiate for the acquisition of property from any person … for the construction and operation of a transportation system." As defined in NMSA 1978, Section 67-3-77 (1997), "transportation system" means "facilities used for the transportation of … passengers and includes communication and transportation structures and other facilities necessary for the operation of the transportation facilities."

"When a power is conferred by statute, everything necessary to carry out the power and make it effective and complete will be implied." Kennecott Copper Corp. v. Employment Security Comm'n, 78 N.M. 398, 402, 432 P.2d 109 (1967). In addition, there is no legislative restriction against the utilization of a private contractor in the Public Mass Transportation Act and related statutes. The purchase of rail property was funded from GRIP Bonds. The legislature specifically authorized the use of the bond proceeds for that purpose, and no legislative restriction against the utilization of a private contractor appears in that legislation. See 2003 N.M. Laws (Spec. Sess), Ch. 3, § 27.[2]

The Department of Transportation's counsel indicates that the Department was required to, and did, follow the Procurement Code, NMSA 1978, Sections 13-1-28 to -199 (1984, as amended), in selecting the contractor to operate the Rail Runner. The contract term is limited, and the contract will again be subject to competitive procurement requirements when that term concludes.

The agreement to use a private operator of the railroad does not appear to have substantially modified existing law, particularly in light of the statutory directive in Section 67-3-68 that the provisions of the Public Mass Transportation Act are to be liberally construed in order to accomplish the purposes of that Act. Cf. State ex rel. Taylor v. Johnson, 1998-NMSC-343, ¶ 25, 125 N.M. 343, 961 P.2d 768 (executive's substantial adjustments to the public assistance program constituted executive creation of substantive law, encroaching upon the legislature's role of declaring public policy). The executive's choice of contractor may be viewed as the

exercise of prerogatives that are within the executive's managerial function. See State ex rel. Coll v. Carruthers, 107 N.M. 439, 446-47, 759 P.2d 1380, 1387-88 (1988) (upholding the governor's veto of a condition attached to an appropriation to the commodities support bureau that the appropriation not be expended to contract with a nongovernmental contractor for warehousing and delivery; concluding that the condition unacceptably hampered the governor's control over the expenditure of funds to accomplish the purpose for which the funds were appropriated).

Therefore, we believe that the Department of Transportation did not exceed its statutory authority by agreeing to the operation of the commuter rail by a private entity.

Tax Reimbursement Obligation.

As part of the consideration underlying the purchase and sale agreements and the joint use agreement with BNSF Railway Company, the Department of Transportation is obliged to reimburse BNSF Railway Company for taxes as provided in section 3.5(B)(1) of the joint use agreement: "NMDOT shall pay or reimburse BNSF for any Taxes which are attributable to the receipt by BNSF of any amounts under the Purchase and Sale Agreements." The manner in which tax reimbursements are determined is further specified section 3.5(B)(2). Section 3.5(B)(4) of the joint use agreement requires BNSF Railway Company to pay taxes when due. That paragraph provides, in part: "BNSF shall pay all Taxes attributable to amounts received under this Section at the time and in the amounts that such Taxes are due."[3]

Article IV, Section 32 provides, in part:

> No obligation or liability of any person, association or corporation held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, released or postponed or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court….

"Article IV, Section 32 is a relevant consideration whenever certain public entities want to extinguish an obligation owed by a private party to that public entity." See N.M. Att'y Gen. Op. No. 02-02 (2002). The purpose of Article IV, Section 32 is to "prevent public officials from releasing debts justly owed to the state and to discourage collusion between public officials and private citizens." See N.M. Att'y Gen. Op. 69-69 (1969).

The constitutional prohibition is not implicated because under the joint use agreement, BNSF Railway Company's taxes are to be paid by BNSF Railway Company, thus, itself, extinguishing the tax obligations when paid. The Department of Transportation's reimbursement obligation is part of the consideration that the Department pays for acquiring from BNSF property interests under the purchase and sale agreements. This exchange is permissible both under Article IV,

Section 32 and under a classical antidonation clause analysis. See N.M. Att'y Gen. Op. No. 02-02 (2002) (City of Rio Rancho could, under Article IV, Section 32 and under the antidonation clause, Article IX, Section 14, reimburse a developer his impact fees in exchange for the developer's building public infrastructure to support commercial development of retail business establishments). We believe, therefore, that the tax reimbursement provision is not contrary to Article IV, Section 32.

Sovereign immunity.

This question whether the State improperly waived its sovereign immunity from suit arises from the language of section 9.3 (E) of the agreement, which provides: "For the purposes of this Article, BNSF and NMDOT, by mutual negotiation, hereby waive, only

with respect to the other, any immunity against claims for which they have assumed an indemnification obligation in this Article that would otherwise be available under applicable disability benefits or employee benefits acts." Section 9.3 (C) provides: "To the maximum extent permitted by law, each party shall pay all loss or damage for which such party will be liable under the provisions of this Article IX, and shall defend, indemnify and hold harmless the other Party … against this loss or damage."

It is difficult to opine upon the question asked, because precisely what the parties intend by section 9.3 (E) may be susceptible to a court's determination that the section is ambiguous, which would permit the court to consider collateral evidence of surrounding facts and circumstances to determine, factually, the parties' intent. See Mark V. v. Mellekas, 114 N.M. 778, 781-82, 845 P.2d 1232, 1235-36 (1993). Section 9.3 (E) does not mention "sovereign immunity," and the thrust of Article IX is to allocate the respective liabilities of the parties such that each party would be liable only for its own use of the rail property. Nor does that section identify precisely the "applicable" employee benefits and disability benefits acts. The meaning of "otherwise be available," as used in section 9.3 (E), might be susceptible to differing interpretations. Also, section 9.3 (E) references the assumption of the indemnification obligation, and that obligation is qualified by the language "to the maximum extent permitted by law." This qualifying language indicates that the parties are reserving to another day any litigation about the legal enforceability of this obligation.

To try to analyze section 9.3 (E), therefore, is somewhat speculative, but it does appear that the contractual indemnification obligation, which itself is susceptible to litigation defining its enforceability, is the underpinning of that section. Cf. Cockrell v. Bd. of Regents, 2002-NMSC-009, ¶18; ¶23, 132 N.M. 156, 45 P.3d 876 (university employee's suit brought under the Fair Labor Standards Act was statutory, not contractual; the State had not consented to the remedial damages provision of the federal law and, therefore, the federal damages remedies were not enforceable and could not be incorporated into a state employment contract by operation of law).

As to contractual claims, the Legislature has waived the State's sovereign immunity with respect to valid written contracts that the State makes, and, therefore, the State is amenable to contractual suit within the applicable limitations period by parties with whom it makes written contracts.

See NMSA 1978, § 37-1-23 (1976). In addition to the sovereign immunity issue, the validity of the indemnification obligation potentially giving rise to claims requires examination of the sources of debt repayment. Indemnification obligations that require, for satisfaction, resort to general taxation or general revenues can run afoul of the "debt" provisions of the constitution. See Att'y Gen. Op. No. 00-04 (absent compliance with the constitution's debt provisions, a municipality generally is prohibited from obligating itself to pay out of general revenues beyond the current fiscal year).

The agreement here does not appear to create unconstitutional "debt." The agreement provides: "No provision of this Agreement shall be construed as creating any obligation

that is a general debt of the State, nor shall any obligation on the part of the NMDOT be payable from revenues derived from general taxation." See Section 3.10 of First Amendment to Joint Use Agreement. Section 3.10 further provides: "NMDOT represents, warrants and agrees that all of the funds being used to satisfy its obligations … including, but not limited to, the GRIP bonds, currently permit, and any refunding of such bonds will permit, the proceeds to be used for the purposes contemplated by such Agreement, including … indemnity obligations…." Because obligations arising under the agreement are to be paid from a special fund rather than the state's general revenues, we do not believe the indemnification provision implicates the constitutional debt limitations. Cf. Montaño v. Gabaldon, 108 N.M. 94, 95-96, 766 P.2d 1328, 1329-30 (1989) (agreement that commits the county to make payments out of general revenues in future fiscal years, without voter approval, violated the debt limitation provisions of New Mexico's Constitution); Seward v. Bowers, 37 N.M. 385, 389, 24 P.2d 253 (1933) (municipal bonds payable solely from water system revenues, which are not derived from general taxation, are not debt in constitutional sense).

Therefore, based on our review of existing law, and realizing that future litigation could occur that would provide an answer to the question, we believe that a reasonable argument can be made that the Department of Transportation did not improperly waive the State's immunity from suit.

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of 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 copies of this letter to the public.

Sincerely,

ANDREA R. BUZZARD
Assistant Attorney General

cc: Albert J. Lama, Deputy Attorney General

[1] We are informed that BNSF Railway Company required this provision because the Department of Transportation's use of the rail property to operate the Rail Runner could lead to increased liability for BNSF Railway Company. By employing an experienced private contractor, rather than using a state agency with no experience in the operation of a railroad, the Department of Transportation would limit, in some measure, its own and BNSF Railway Company's potential liability.

[2] The memorandum of the legislative counsel service, which you provided with your opinion request, in arguing the "private operator" issue, points to the Regional Transit District Act, NMSA 1978, Sections 73-25-1 to -18 (2003) as a possibly better vehicle to

implement the Rail Runner, but that Act imposes no affirmative requirement or disability respecting the ability to hire a private operator of such rail system.

[3] Similar provisions are found in the purchase and sale agreements at section 3.2 (b)(4), pertaining to the Belen-Albuquerque-Bernalillo, Bernalillo-Lamy and Lamy-Trinidad agreements.