

## July 28, 2005: Use of Proceeds From Sale of State Aircraft

Representative Greg Payne  
4646 Inca NE  
Albuquerque, NM 87111

Re: **Opinion Request—Use of Proceeds From Sale of State Aircraft**

Dear Representative Payne:

You have requested our opinion on whether proceeds from the sale of an aircraft in the state's existing fleet may be expended on a new aircraft without further legislative action, or must expenditure of those sale proceeds await future legislative appropriation. Under existing law and the facts and analysis set out here, we conclude that no further action by the legislature is necessary prior to such an expenditure of those sale proceeds.

Since 1994, all state aircraft has been owned and held by the General Services Department, who is responsible for their ownership, operation and maintenance. NMSA 1978, § 15-9-3(A) and (B) (2) (1994). That Department (like any state agency, local public body, school district, or state educational institution) has statutory authority to sell items of tangible personal property. NMSA 1978, § 13-6-2(A) (2004). In light of the aircraft's current resale value of more than \$5,000, any such sale must be approved by the State Budget Division of the Department of Finance and Administration. *Id.* at (D). Further, pursuant to that statute, "[T]he appropriate approval authority may credit a payment received from the sale of...tangible personal property to the governmental body making the sale." *Id.* at (G).

The only question that arises given these statutes under these facts is whether, upon such a credit, there is further need for a separate, specific appropriation of the sale proceeds by the legislature, or whether by authorizing such a credit, the legislature has taken all the action required.

In 1969, this office reviewed a similar situation involving the construction of a new state police headquarters. A.G. Op. 69-56. The state police department proposed to dispose of its existing facilities to the state highway department, and use part of the proceeds of that sale towards the construction of the new facility, in addition to proceeds from severance tax bonds that were sold to fund this construction. Because the old facility was worth more than \$100,000, legislative approval of the sale was sought and received. Neither the statute requiring legislative approval nor the legislative resolution authorizing the sale contained any specific direction as to the use of any sale proceeds. In the absence of such direction, this office looked to the authorization provided to the State Board of Finance, whose approval was required for disposition of real property worth \$100,000 or less. That legislation authorized the director of the Department of Finance and Administration "to credit any payment received from the sale of such real...property to whatever fund of such state department...he deems appropriate."

NMSA 1953, §6-1-8 (1961). This office applied that authority to the sale of the old state police headquarters that had been authorized by the legislature, and opined that if the director chose to credit the sale proceeds to a capital outlay fund specifically for construction of the new headquarters, he could do so. Id. at 86.

Although the language of the statute authorizing disposition of tangible personal property in effect today contains slightly different language—authorizing the approving authority to grant a credit to the selling agency without any language referring to funds—that change appears immaterial to the analysis contained in the 1969 opinion.

A narrow view of the constitutional provision that governs payments from the treasury requires a separate legislative appropriation before proceeds from the sale of a state aircraft could be used—in this instance, to partially pay for a new aircraft. Article IV, Section 30 of our State Constitution requires, except for payments on the public debt, that “money shall be paid out of the treasury only upon appropriations made by the legislature,” and that “every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.” The purpose of this constitutional provision is to “insure legislative control, and to exclude executive control, over the purse strings of the state.” Gamble v. Velarde, 36 N.M. 262 at 266, 13 P.2d 559 (1932). Although one question posed in the 1969 opinion was whether a legislative appropriation of sale proceeds was necessary prior to their expenditure, the opinion contains no analysis or discussion of this constitutional provision; rather, it relies on the prior action of the legislature in section 6-1-8 granting to the approving authority the power to credit the sales proceeds to the selling agency. That language remains in the governing statute today, with the same effect.

If in fact the statute authorizing a credit must be analyzed for sufficiency as an appropriation, the two constitutional factors are present. The sum—which the Gamble court recognized as “only a statement of the maximum amount which may be spent”, 36 N.M. at 267—is clear: the amount of proceeds resulting from the sale. And the object is specified—the agency who has disposed of the property. Further, in so analyzing, every presumption is ordinarily to be indulged in favor of the validity and regularity of legislative acts and procedures,” and legislation should not be unnecessarily or arbitrarily hampered. 36 N.M. at 265. Further, the Gamble court noted that prior judicial interpretations of this constitutional provision “have not leaned toward strict construction”. Id. at 268. Since it is the legislature that authorized the granting of a credit to a state agency upon sale of property belonging to it, the validity of that legislative act should be recognized, along with action by the Budget Division crediting the Department with the proceeds upon sale of a state aircraft it owned.

Finally, we take note of the Aviation Services Fund, created by the legislature in section 15-9-45.1 of the State Aircraft Act. It is funded by travel charges paid by agencies who use state aircraft, which charges both by statute and regulation are to be in sufficient amount to cover operation, maintenance and depreciation. See NMSA 1978, § 15-9-4(1994) and 1.5.5.14(B) NMAC. The money in that fund is in fact appropriated to the

Department “for the purpose of operating, maintaining and repairing” state aircraft. This fund may be an appropriate fund in which to credit the sale proceeds.

If we may be of further assistance, please let us know. 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 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.

Very truly yours,

Patricia A. Madrid  
Attorney General  
Martha A. Daly  
Assistant Attorney General