



Aubrey Dunn
COMMISSIONER

State of New Mexico
Commissioner of Public Lands

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December 8, 2016

The Honorable Members of the
McKinley County Board of County Commissioners
Chairman Anthony Tanner – District III
Hon. Carol Bowman-Muskett – District I
Hon. Genevieve Jackson – District II
207 West Hill Avenue
Gallup, NM 87301

Re: Ordinance No. Nov-16-04 (Proposed) (An ordinance establishing a moratorium on uranium mining, processing and exploration)

Dear County Commissioners:

In anticipation of the Board's discussion regarding the above-referenced proposed county ordinance at its regular meeting on December 13, 2016, I am writing to object to the Board's consideration of any ordinance that purports to regulate the use of state trust lands, as the county has no jurisdiction to regulate the use of state trust lands. In addition, I object to the consideration of any ordinance that regulates the use of lands surrounding state trust lands in a manner that hinders or prevents the highest and best use of state trust land and thus negatively affects the revenue state trust lands produce for public schools, universities and the other institutions supported by state trust land revenues.

The New Mexico State Land Office currently leases roughly 1,600 acres of trust mineral estate in McKinley County for exploration, mining, removing and processing uranium. Each one of these projects includes additional federal and/or privately-owned lands, the development and use of which are essential to realizing the full benefit of the State Land Office leases.

The New Mexico courts have made it clear that counties and municipalities have no jurisdiction to regulate the use of state trust lands unless specifically granted that authority by the state legislature. *See City of Santa Fe v. Armijo*, 1981-NMSC-102. Significantly, the proposed ordinance contains an acknowledgement that it "shall not

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be effective on any lands within the jurisdiction of any Indian tribe.” Because the County lacks jurisdiction over state trust lands, the ordinance should contain a similar provision stating that it shall not be effective on any lands owned by the State of New Mexico.

Further, the State as a whole has a trust responsibility to ensure that state trust lands serve their intended purposes; *i.e.*, providing the maximum support to the beneficiaries. *See Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 463 (1967) (interpreting New Mexico-Arizona Enabling Act as requiring the State to pay the trust for the true value of easements taken for public highways). Thus, in addition to state law prohibiting the County from regulating the use of state trust lands, the Enabling Act and the New Mexico Constitution prohibit any State entity from taking action that would diminish the value of state trust lands or hinder them from producing the maximum support possible for the beneficiaries. Therefore, I oppose any action that directly or indirectly restricts development of state trust lands, which would include a moratorium on mining and related activity on lands surrounding state trust lands.

In addition, to the extent that the proposed ordinance would completely prevent mining activity regulated at the state level within the Mining Division of the New Mexico Energy, Minerals and Natural Resources Department, the proposed ordinance would be pre-empted and rendered unenforceable by the New Mexico Mining Act, NMSA 1978, § 69-36-1 *et seq.* *See San Pedro Min. Corp. v. Bd. of County Comm'rs of Santa Fe County*, 1996-NMCA-002, ¶ 11 (a county ordinance may be preempted if it conflicts with a state statute or regulation, or if the statute demonstrates an intent to occupy the entire field). While the Mining Act did not preempt the Santa Fe County mine permitting regulations at issue in *San Pedro Min. Corp.*, the Santa Fe County regulations did not completely prevent mining, as would the proposed ordinance to be discussed by the Board. Because the proposed ordinance would completely prevent mining activity regulated under the Mining Act, the Mining Act would preempt the ordinance and render it unenforceable. *See Swepi, LP v. Mora County*, 81 F. Supp. 3d 1075 (D.N.M. 2015) (enjoining Mora County ban on oil and gas development because it conflicted with New Mexico Oil and Gas Act regulation of oil and gas development). As the *Swepi* court said, “By banning hydrocarbon exploration-and-extraction

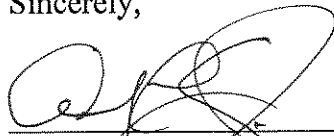
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activities, the Ordinance is antagonistic to state law, because it prohibits activities that New Mexico state law permits." *Id.* at 1198.

Finally, the United States Supreme Court and other courts have held that a temporary moratorium on development can constitute an unconstitutional taking of property without just compensation where it imposes an undue burden on the landowner disproportionate to the public need and benefit from the moratorium. *See, e.g., Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337 (2002); *Manning v. N.M. Energy, Minerals & Nat. Res. Dept.*, 2006-NMSC-027, ¶ 15. Thus, the Board should note that adoption of the ordinance could give rise to monetary liability.

State Land Office staff and I would be happy to discuss this matter further with you or County staff. Thank you in advance for your cooperation.

Sincerely,



Aubrey Dunn
Commissioner of Public Lands

cc: Anthony Dimas Jr., County Manager
Douglas W. Decker, Esq., County Attorney