

## **The Governor's Unconstitutional Spending of Public Funds Without Legislative Authorization**

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The Governor has been spending over \$110 million of public funds that have been received into the state treasury from the Federal government. This sum comprises \$53.6 million provided under the American Reinvestment and Recovery Act of 2009 and \$61 million under 2003 Jobs and Growth Tax Relief Reconciliation Act. He has been making these spending decisions on his own, without any authorizing legislation, an act illegal under the New Mexico State Constitution. That document gives the Legislature sole power to determine how funds from the treasury are spent. He has ignored objections that his actions are unconstitutional. The question is whether the Legislature will ever act decisively to assert its constitutional authority or will continue to abdicate its spending powers to the Governor.

### I. The New Mexico Constitution Gives The Spending Power Exclusively To The Legislature

Like the Federal government, the powers of the New Mexico state government are divided into three branches, the legislative, executive and judicial. Article III, Section 1 of the New Mexico State Constitution declares that these branches are “distinct,” and “no person or collection of persons charged with exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.”

The power to appropriate funds is reserved exclusively to the Legislature. Article IV, Section 30 of the New Mexico State Constitution provides that “money shall be paid out of the treasury only upon appropriations made by the legislature.” The only exceptions are payments of interest or other payments on the public debt. Further, the state constitution requires that “every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.”

### II. The Legislature's Bad Precedent in 2003

To address economic declines persisting after the 9/11 terrorist attacks, in 2003 Congress passed the Jobs and Growth Tax Relief Reconciliation Act. This law allocated over \$61 million to the State of New Mexico. Those funds went into the state treasury. Unlike other federal funds designated for specific programs, these funds were received into the treasury as unallocated funds, meaning it was up to each state to determine how they should be spent. Governor Bill

Richardson promptly began spending the money without any appropriating authorization by the Legislature.

The Governor's unilateral decisions on how these funds would be spent only came to light when the leadership of the Legislative Finance Committee met with the Governor following the 2003 legislative session. Legislators' concerns about the Governor's unconstitutional usurpation of their exclusive spending power were raised in the leadership's report to the entire LFC at its Gallup meeting on July 16, 17 and 18, 2003. According to the minutes, the LFC's leadership reported that the Governor wanted to "keep the money out of the legislative session; he would like to spend it before, if the executive and the [LFC] leadership could come to agreement."

Several Senators and Representative Max Coll raised concerns about the constitutionality of the Governor's intentions. Senator Linda Lopez stated "she believes there is still some separation between the legislative and executive branch and the Legislature to her knowledge still has authority to work with these dollars." Representative Coll reported that the Governor was reminded that the appropriating power rests with the Legislature. Senator John Arthur Smith said he was concerned that, by not acting quickly, the Legislature might have abrogated some of its legislative powers.

Despite these concerns, by inaction, the Legislature permitted Governor Richardson to exercise the appropriation power reserved to the Legislature. Since 2003, his office, without the passage of any legislation, has determined how more than \$61 million of public funds will be spent. He has directed which state agencies and local governments will receive funds from what has turned into a huge pot of money over which he has sole discretion.

His expenditures might have met resistance had they been considered beforehand by the Legislature. For instance, he gave \$1 million to Department of Transportation for the Rail Runner. The May 26, 2006, report by the Department of Finance and Administration, entitled "Status Report on Federal Fiscal Relief Funds," describes this as a grant for the "bullet train."

According to the same report, the Governor spent \$100,000 on a Las Cruces field office for himself. He gave \$225,000 in unrestricted funds to Lt. Governor Diane Denish for something described with no more particularity than "various projects." He gave \$500,000 to his Natural Resources Trustee for the vague objective of "environmental studies." His Economic Development Department received \$700,000 for "research" and "business recruitment." The Energy, Minerals and Natural Resources Department received \$1 million for something called "bosque remediation." The Children, Youth and Families Department received \$3.15 million for "childcare initiatives." A "domestic violence czar" got the nice round sum of \$100,000.

The State Fair got \$50,000 for "horse arena improvements." The Department of Transportation got \$500,000 for "ABQ-Santa Fe park & ride." The Lensic Performing Arts Center received \$50,000. The Economic Development Department received \$800,000 for "border projects." He gave his own office \$20,000 for the Otero Mesa litigation. In fact, he gave his own office a total of \$370,000.

The Governor also doled out millions to state and local governments of his own choosing. The most favored recipient was the City of Santa Fe, which landed \$5,000,000 for a "regional water system." Espanola and Alamogordo received \$3.7 and \$3 million, respectively, for a similar

purpose. Portales, Taos and Chimayo got \$1 million each for vaguely described water projects. Zia Pueblo got \$50,000 for a “business development plan.” Acoma Pueblo got \$100,000 for a “new water tank.”

And the Governor’s favorite project, the Rail Runner, received another cool \$1 million, in the form of a transfer of funds from the state treasury to the Mid-Region Council of Governments.

Each of these appropriations was made by the Governor for purposes determined solely by him. The recipients are not required under law to meet any performance standards, to produce any results, or even account to the Legislature on how these funds were spent, for the simple reason that they received these funds outside of the usual, constitutional process by which state funds are appropriated.

### III. The 2009 Stimulus—The Governor’s \$53.6 Million Walking-Around Money

Under the American Reinvestment and Recovery Act of 2009 (ARRA), of the \$3 billion allocated to New Mexico, approximately \$53.6 million is not specifically covered by Congressional directives and guidelines. The Governor has asserted authority over the appropriations of these funds, as he did with respect to the 2003 Federal relief funds. According to several legislators who spoke off the record, he took the position during the 2009 legislative session that under ARRA Congress gave governors complete discretion in determining how these funds would be spent. His position was not well received. In nearly unanimous votes, the House and Senate sought to assert their constitutional authority over appropriations of this pool of public money.

That effort to assert the Legislature’s constitutional authority over appropriations took shape as House Bill 578. That legislation provided, very simply: “The Legislative Finance Committee shall oversee expenditures of federal funds that are not subject to appropriation. All agencies shall cooperate with the committee and provide information as requested.” The bill passed the House 65 to 1 and passed the Senate 36 to zero. Governor Richardson subsequently pocket-vetoed the legislation without explanation.

Legislators and legislative staff in off-the-record interviews expressed concern that the 2003 precedent was growing into a recurring excuse for abdication of the Legislature’s constitutional authority. If the Legislature does not overrule the Governor’s pocket-veto, he will shortly spend all the unallocated ARRA funds without any legislative oversight. A lawsuit, others speculated, may be the only way to check an unconstitutional power grab by the executive branch. This option was discussed by several members of the LFC in 2003, but no one pursued that course of action.

A very recent decision by the South Carolina Supreme Court strongly suggests the Legislature would prevail in a challenge to the Governor’s usurpation of its power over appropriations. That case, *Edwards and Williams v. State of South Carolina and Sanford* (Supreme Court of South Carolina, No. 26662 6/4/09), upheld the legislature’s exclusive authority over appropriation of ARRA funds like those at issue here. Though not binding in New Mexico, the reasoning of that case would likely be applied by New Mexico courts since it is based on similar state constitutional provisions and decisions of the United Supreme Court with nationwide force.

South Carolina Governor Mark Sanford took the position, like Bill Richardson, that ARRA gave the Governor sole authority over these funds, including turning them down completely if he so chose. The South Carolina state constitution, as does New Mexico's constitution, vests the power to appropriate public funds exclusively in the legislature. The South Carolina Supreme Court held that in ARRA Congress did not express any intention to override the separation of powers in state constitutions. While Congress may impose conditions on states receiving federal funds pursuant to its powers under the Spending Clause, the conditions must be stated unambiguously, must bear some relationship to the purpose of the spending, and cannot require states to engage in unconstitutional activities.

In ARRA, Congress clearly intended to provide funds to states desiring to receive those funds. But ARRA also reveals Congress's intent to include state legislatures in that decision. "The ARRA contains no plain statement of Congress' intention," the court wrote, "to alter the unquestionable right of a state to constitutionally provide for the establishment and operation of its government." Under ARRA, at most, "the Governor is the officer designated by Congress to perform the ministerial act of submitting the State's application for the funds." Under the state constitution, the legislature remains "the sole authority to direct the appropriation of funds...."

#### IV. Will The Legislature Defend Its Constitutional Authority To Appropriate Public Funds?

In the July 2003 LFC meeting, legislators were facing a Governor intent on exercising their constitutional powers. He stared them down and they blinked. According to the minutes, "Representative [Max] Coll stated the committee should ask that the leadership offer to work with governor on a settlement that does not embarrass either branch...." Instead, the LFC and the entire Legislature failed to act decisively and the Governor stepped into the void of leadership, the very scenario predicted at the meeting by State Senator John Arthur Smith.

Governor Richardson has now established an Office of Reinvestment and Recovery to dispense millions of dollars received under ARRA. He has appointed former Gov. Toney Anaya and an advisory team to assist him in disbursing these funds. Neither the office itself nor the appointees were approved by the Legislature. The ultimate decision on how these millions of dollars will be appropriated, like the 2003 Federal relief funds, will again be exercised unilaterally by the Governor.

In the upcoming October 2009 special session the Legislature faces another severe budget shortfall. It must find ways to meet crucial public needs with fewer public funds. In the course of that difficult task, it should look at the ARRA funds the Governor contends are his to appropriate without legislative authorization. The Legislature should assert its constitutional authority over all public funds, including these ARRA funds, or it will face the prospect of further erosion, by inaction and acquiescence, of its constitutional powers. Individual legislators may also consider instituting litigation to challenge the Governor, as happened several times during Gary Johnson's terms in the Governor's office. The recent decision from the South Carolina Supreme Court is directly on point and indicates that such a challenge has a good chance of success.