

2010 WL 7809109 (N.M.) (Appellate Petition, Motion and Filing)
Supreme Court of New Mexico.

STATE OF NEW MEXICO, ex ret Gary K. King, Attorney General of the State of New Mexico, Petitioner,
v.
Patrick H. LYONS, Commissioner of Public Lands for the State of New Mexico, Respondent.

No. 32,197.
February 25, 2010.

Original Proceeding on Petition for Writ of Mandamus

Response of the Commissioner of Public Lands in Opposition

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***1 INTRODUCTION AND SUMMARY OF ARGUMENT**

The Commissioner of Public Lands for the State of New Mexico ("the Commissioner") has broad legal authority and discretion to manage the State's public trust lands. This case concerns the exercise of that discretion in a series of land exchanges designed to resolve land management and land integrity issues that have plagued the White Peak area of Northern New Mexico for

decades. By consolidating existing parcels of state trust lands scattered throughout the area, the exchanges will increase the value of state trust lands by more than 13 million dollars, increase revenues to the state institutions supported by those lands, resolve access issues, mitigate serious trespass, vandalism, and boundary problems, and allow the Land Office to manage state trust lands that have been unmanageable for more than a decade, and render the land accessible for lawful recreational and other use by future generations of New Mexicans.

The Attorney General asks this Court to exercise the extraordinary step of issuing a writ of mandamus and to find that the Commissioner's manner of proposing to exchange lands violates a non-discretionary and purely legal duty in how to satisfy the "public auction" requirement of the New Mexico-Arizona Enabling Act, Pub. L. No. 61-219, 36 Stat. 557 (1910) ("Enabling Act"). The Petition must be denied, however, because the exchanges, only one of which has been completed, have been conducted in strict conformity with the authority to *2 conduct land exchanges granted to the Commissioner under the Enabling Act, the New Mexico Constitution and applicable statutes, and regulations. Specifically, the Commissioner has taken steps to ensure that:

- (1) the value of land and other consideration acquired in any exchange will exceed the value of checkerboarded lands transferred;
- (2) the value determinations made are demonstrated by independent appraisals reviewed and confirmed by the State Land Office's certified appraiser; and
- (3) the proposed exchanges were or will be advertised for 10 weeks to attract competing exchange proposals.

Indeed, the Enabling Act, the New Mexico Constitution, and state statutes entrust the determination as to how to conduct an auction for public land to the discretion of the Commissioner and mandamus is, therefore, unavailable. In addition, there are factual disputes about whether the auctions are the unconstitutional proceedings that the Attorney General asserts they are, and mandamus is not a proper vehicle to resolve factual disputes. In any case, and regardless of the vehicle by which the Attorney General challenges the exchanges at issue, the Commissioner has exercised his discretion within the express limits established by law in determining that the exchanges that have been advertised and bid were both *3 procedurally and substantively in the best interest of the trust that he is charged with serving.

The Attorney General points to three main features of the exchange procedure in claiming that they result in unconstitutional transfers. Each issue raised by the Attorney General, however, is an attack on the exercise of discretion entrusted to the Commissioner by law. As such, those decisions are not reviewable on a petition for mandamus.

First, the Attorney General contends that the Commissioner violates a constitutional duty when he requires competing bidders to offer, at a minimum, at least as much land value as the Commissioner is proposing to exchange. In requiring bidders to offer in exchange at least as much value as they would obtain from the Commissioner, however, the New Mexico State Land Office ("Land Office") was merely ensuring compliance with the Enabling Act requirement that any disposal of trust land be for equal, or better, value. *See* Enabling Act, § 10 ("All lands ... before being offered shall be appraised ... and no sale or other disposal thereof shall be for a consideration less than the value so ascertained...."). There is no constitutional issue here.

The second complaint of the Attorney General is that the Commissioner required bidders to offer land. The Attorney General contends that the Commissioner violates a non-discretionary duty if he prohibits all-cash or cash- *4 and-land bids. But the Commissioner acts well within his discretion to manage, preserve, and protect the permanent fund's land assets when he determines that he does not want to deplete the value of the publicly owned land base of the trust. The Commissioner's authority to manage and preserve the permanent trust lands of New Mexico is broad enough to give him the right to insist on an exchange, rather than a partial or complete sale of permanent state trust lands. In this case, the Commissioner decided to exchange, rather than sell, certain trust lands because he determined that (a) maintaining as much of the trust acreage as possible is more important than obtaining cash to be invested in a Permanent Fund in crisis;¹ (b) the current income potential of White Peak holdings, and hence the immediate benefit to the trust's supported institutions, can be satisfactorily increased by adding to the quality

and amount of available grazing acreage; and (c) the trust obtains a long-term benefit by retaining land because it is an asset that can be enjoyed by future *5 generations. All of these determinations fall well within the management discretion reposed in the Commissioner by law.²

The third complaint of the Attorney General is that the Commissioner has required, in the case of the proposed Stanley and UU Bar exchanges, that any competitive bidder offer a bid for all of the state lands proposed to be exchanged. This requirement raises no constitutional issue. In this and in many other instances, auctions of state trust land require that the property being offered for exchange or sale be identified into “lots.” The Commissioner’s decision to offer collections of parcels in single lots is not only within his discretion, but absolutely necessary where he is trying to dispose of a series of relatively small, checkerboarded parcels that are difficult to manage and protect, and where he was trying to attract to the bidding process, at a minimum, the adjoining landowners who were able to offer equal-value lands that would “fill in” the holes in the existing state lands. The Attorney General nearly concedes this point, acknowledging that “*a requirement that bidders bid upon a certain minimum size *6 parcel may often be justifiable and, perhaps, necessary.*” See Petition at 49 n.11 (emphasis added).

Additionally, if the Commissioner were to allow the kind of cherry-picking bids that the Attorney General seemingly asserts are required by the “public auction” requirement of the Enabling Act, the result would be that the best parcels would be taken, the worst parcels would remain unsold, and the problems resulting from checkerboard ownership in the White Peak area would remain. Moreover, there is no evidence offered by the Attorney General that there was any significant “bid-chilling” resulting from how the lands were bundled in the proposed exchanges. A bidder who sought some, but not all, of the lands offered could either have joined with other bidders to offer a single “joint bid,” or could have acquired all of the land and simply subdivided or sold off that which the buyer did not want. Neither approach is unfamiliar to those who deal in raw land.

While the Attorney General seems to make much of the point that, in the case of the proposed Stanley Ranch and UU Bar exchanges, only one bid was received in each proposal, that observation means nothing in the context of checkerboard exchanges. It is hardly surprising that the party willing to offer the most value for the state lands was an adjoining landowner who, by submitting a bid, would be solving its own checkerboard problem and consolidating its own land. Indeed, the absence of any other bidders after 10 weeks of advertising, or *7 any formal protest of the bid proceeding, may well be the best evidence that the consideration obtained by the State was the highest obtainable in the two exchanges that have so far gone to auction.

As more fully demonstrated in the background and legal sections below, the Attorney General’s Petition should be denied because mandamus is not available to address the exercise of the Commissioner’s discretion in how to conduct “public auctions” in the context of land exchanges and because there are significant factual disputes about whether the public auctions conducted here are unconstitutional. Finally, even if the Court were inclined to address the exercise of the Commissioner’s discretion in this original mandamus proceeding, the only evidence in the record shows that the Commissioner has acted well within his discretion in regard to the land exchanges at issue. The Attorney General’s Petition should be denied.

BACKGROUND

Fundamentally, this case concerns the land management policies of the Commissioner, and how those policies are implemented to address the land management problems that have resulted from the fragmentation of public lands, a problem known commonly as “checkerboarding.”³ The land in the White Peak *8 Management Area of New Mexico that is the subject of this Petition provides a prime example of the problems that arise as a result of checkerboarding.

The White Peak area straddles the border between Colfax and Mora counties and lies approximately 25 miles to the west of the town of Springer and to the east of the town of Angel Fire. See Affidavit of Brian G. Henington ¶ 8 [Supp. App. 4]. The area is bordered to the north by lands from the former Maxwell land grant and to the south by what is now State Road 120. See *id.* The state trust lands within the White Peak area of New Mexico consist of approximately 54,000 acres divided *9 among 130

parcels.⁴ *See id.* ¶ 9. Prior to statehood, these lands were owned by the federal government. *See id.* For many years, beginning in the nineteenth century, the United States permitted homesteading in the area and a number of parcels, especially those with access to grazing and water, were acquired by private owners. *See id.* Land not attractive to homesteaders remained owned by the United States and, at statehood, became part of the state trust lands entrusted to the Commissioner to manage for the benefit of specified institutions. *See id.* The beneficiaries of the state trust lands in the area include New Mexico's common (public) schools, New Mexico State University, Las Vegas Medical Center, New Mexico Military Institute, New Mexico Tech, New Mexico School for the Deaf, the State Penitentiary, Miners' Colfax Medical Center, the School for the Blind, and Charitable and Penal Reform. *See* [App. 1 at 29].

As a result of the homesteading carve-outs of publicly owned lands in the White Peak area, and the consolidation of homesteaded properties, the White Peak area took on the characteristics of a checkerboard, with many parcels of state land situated as jigsaw pieces within larger parcels of privately held land. *See* Henington Aff. ¶ 9 [Supp. App. 4]. Likewise, many small private parcels of homesteaded property were interspersed among larger state land tracts, creating the *10 Swiss-cheese, or jigsaw effect seen on maps of the area that identify the various owners.⁵ *See id.*

For decades, however, the jigsaw nature of state landholdings in the area has posed multiple management issues for the State Land Office. *See id.* ¶ 10 [Supp. App. 5]. The jigsaw nature of the state landholdings in the area makes it nearly impossible to identify the boundaries of state land in an effective manner. *See id.* Past efforts to post boundary signs have resulted in the theft and destruction of the signs. *See id.* Fencing relatively small parcels has proven impractical, particularly when the property is leased for grazing to neighboring ranches that need their cattle to be able to cross both private and public spaces. *See id.* Trespass, both intentional and unintentional, has been a problem for years, as hunters authorized by private land owners often stray onto state lands and New Mexico Game and Fish-permitted hunters traverse and hunt on private property. *11 *See id.* Poaching and vandalism are pervasive and the lack of marked boundaries impedes enforcement of the game and fish and trespass laws. *See id.*

The relatively small parcels that are a result of the checkerboarding also make it nearly impossible for the State Land Office to monitor and inspect state property in the area. The Land Office's budget is very limited and each District Resource Manager is responsible for monitoring approximately one million surface acres, and the lack of contiguous parcels in the White Peak area means that the single local resource manager cannot effectively monitor or patrol the area. *See id.* ¶ 11 [Supp. App. 5-6].

The lack of good access to many of the parcels in the area has made it difficult for the State to engage in much of the land management that needs to be done. Large portions of the state-owned land consist of densely populated forest on steep elevations. It is nearly impossible for the State to engage in the thinning of the dense forests that is necessary to reduce the risk of harm from potential fires in the area and enhance wildlife habitat. *See id.* ¶ 12 [Supp. App. 6].

There are only four public access points to the numerous state land parcels in the area. *See id.* ¶ 13. The roads in the area are not well defined and their location and route of travel is often in dispute. *See, e.g., State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, 145 N.M. 769, 205 P.3d 816. Where passable roads do exist, they often cross both state and private land. Fences in the *12 area tend to follow only grazing patterns and are not a reliable indicator of ownership or state land boundaries. *See* Henington Aff. ¶ 13 [Supp. App. 6].

Land Exchanges in New Mexico

Land exchanges are a prime tool in resolving the checkerboarding problem and New Mexico's Land Commissioners have long engaged in exchanges involving state trust lands. Exchanges for land from other governmental entities began as early as the 1930s,⁶ and the Land Office maintains documentation of exchanges with private parties going back to 1984.⁷ By 1992, then-Commissioner Jim Baca formalized the exchange process by promulgating SLO Rule 21, a rule that authorized exchanges of trust land

for any purpose that materially benefits trusts lands or that tends to permit the lands' more efficient or improved administration including, but not limited to, such purposes as the consolidation of trust land holdings, the straightening of trust land boundaries, the acquisition of adequate access for landlocked trust lands ... or for the protection and prevention of waste of trust lands.

See State Land Office Rule 21.001(C) (August 5, 1992) [Supp. App. 36] (former rule). Both Commissioners Jim Baca⁸ and Ray Powell⁹ maintained lists of targeted *13 lands that the Land Office was potentially interested in acquiring by exchange with public and private entities. Recent land exchanges have resulted in significant public benefits.¹⁰

Despite the long-standing recognition of the Commissioner's authority to conduct any transaction not expressly prohibited by the Enabling Act, questions arose as to whether the Commissioner could exchange trust lands rather than selling those lands for cash. In response to these early misgivings, Congress debated legislation authorizing New Mexico to resolve any doubt by amending its Constitution to allow for exchanges. The debate highlights a widespread agreement regarding the purpose and benefit of trust land exchanges. All five *14 members of New Mexico's Congressional delegation supported the amendment. See 136 Cong. Rec. H7230 (daily ed. Sept. 10, 1990) (statement of Rep. Vento). Senator Pete Domenici introduced the bill. See 136 Cong. Rec. S5900 (daily ed. May 9, 1990) (statement of Sen. Domenici). Representative Joe Skeen offered the following comment:

The New Mexico Commissioner has responsibility over lands that encompass approximately 12 percent of the land mass in the State. Much of this land is fragmented in a checkerboard pattern and involves hundreds of small parcels of land. The need to consolidate State lands is obvious. It will improve the management of these lands and will assist other entities who, for whatever reasons, would like to exchange for State lands.

136 Cong. Rec. H7230 (daily ed. Sept. 10, 1990) (statement of Rep. Skeen).

In explaining the need for land exchanges, then-Commissioner Bill Humphries stated that there were approximately 8,000 separate tracts of state trust land, creating a variety of problems for resource management, including conflicts with adjacent owners. See 136 Cong. Rec. S11803 (daily ed. July 10, 1990) (statement of W.R. Humphries). Consolidating trust lands through exchanges, he explained, would reduce conflict between the State and other landowners, allow the adjustment of ownership boundaries, and allow the Commissioner to directly help beneficiary institutions.¹¹ See *id.*

*15 Congress's amendment, however, was not necessary, because the Enabling Act in its original form authorized the Commissioner to conduct land exchanges. Although Attorney General Hal Stratton had concluded, in 1988, that the Commissioner did not have the authority to conduct land exchanges, that opinion was reversed in 1991. See N.M. Att'y Gen. Op. 91-15 (1991) ("The Commissioner of Public Lands may exchange state trust lands for other public or private lands of equal or greater value provided that the exchange transaction is in substantial conformity with the requirements of the Enabling Act."). The 1991 Opinion, issued by Attorney General Udall, explained that the New Mexico Constitution grants the Commissioner the power to not only sell, but "dispose of" trust lands, and that early case law from this Court and the United States Supreme Court recognized that the power to dispose of lands is broader than the power to sell lands. See *id.* (quoting *State ex rel. Otto v. Field*, 31 N.M. 120, 144, 241 P. 1027, 1037 (1925) and passages from *Phelps v. Harris*, 101 U.S. 370, 380 (1879) indicating that "the expression 'to dispose of' is very broad, and signifies more *16 than 'to sell.' Selling is but one mode of disposing of property.").¹² The opinion also explained that the Enabling Act "contains no prohibitions against exchanges," and that the Commissioner's authority is not limited to those powers specifically recognized in the Enabling Act, but is only constrained by the specific prohibitions in that statute. N.M. Att'y Gen. Op. 91-15 (1991).

The 1991 Opinion also concluded that "strict compliance with the Enabling Act's requirement of auction and public notice are not necessary" when the Commissioner is exchanging, rather than selling, land. *Id.* The 1991 Opinion relied on the United States Supreme Court opinion in *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 464-65 (1967), which held that strict compliance with those requirements was not necessary when "the abuses they are intended to prevent are not likely to occur,

and in which the trust may in another and more effective fashion be assured full compensation,” and requiring compliance would be nothing more than an “empty formality.” The 1991 Opinion *17 concluded that, while “the Commissioner must appraise the land being exchanged and must determine that the land being received is of equal or greater value than the land being exchanged,” he need not comply with the auction and public notice requirements if he is able to “develop a procedure that ... ‘most nearly reproduces the results of an auction prescribed by the Act.’ ” N.M. Att’y Gen. Op. 91-15 (1991) (quoting *Lassen*, 385 U.S. at 469).

In 2004, the Land Office adopted a new set of regulations expanding on former Rule 21, which had previously governed the exchange of state trust lands. The expanded set of procedures were to “provide for the orderly and lawful exchange of trust lands when such exchanges will result in a material benefit to the trust not otherwise available, and when the exchange of such trust lands would benefit the trust more than their retention.” 19.2.21.6 NMAC. The regulations allow the Commissioner to enter into an exchange “when the commissioner determines that the exchange will result in a material benefit to the trust and the purpose of the exchange would serve the best interests of the trust.” 19.2.21.8(A) NMAC.

As with prior Rule 21, the new regulations allow an exchange to be initiated by the Commissioner or by a private party interested in obtaining trust lands. See 19.2.21.9(A) NMAC. To initiate an exchange, a private party must submit an application to the Land Office. See 19.2.21.9(B)(1) NMAC. If the Commissioner *18 determines that further investigation into the proposed exchange is warranted, he notifies the applicant, who then must submit an exchange proposal meeting specific requirements. See 19.2.21.9(B)(3) and (4) NMAC.

The Commissioner then reviews the exchange proposal to determine “whether or not the proposed exchange appears to offer sufficient benefit to the trust to warrant proceeding further with the exchange process.” 19.2.21.9(B)(6) NMAC. If he so does, a request for exchange proposal is advertised for no less than 10 weeks. 19.2.21.9(D) NMAC. The advertised proposal will include, among other things, a description of the lands offered for exchange, and may also include “information regarding the types and locations of non-trust lands the commissioner is interested in acquiring.” See *id.* In addition, “the commissioner may, in his discretion, include in the publication the minimum value of non-trust lands that will be considered for exchange.” *Id.* Any member of the public may submit a proposal in response to the request. The regulations incorporate the guiding principle that “the trust must receive at least true value for the trust lands that are conveyed to an exchange party.” 19.2.21.8(C) NMAC.

The White Peak Exchanges

For many years, the Land Office had explored the possibility of exchanging the checkerboarded state lands in the White Peak area for other, equally valuable land in the same area in a way that would allow consolidation of the existing state *19 lands.¹³ See *Henington Aff.* ¶ 14 [Supp. App. 7]. See also May 4, 1992 Letter from J. Baca to Dudley Stanley [Supp. App. 49] (Commissioner Jim Baca letter explaining interest in exchanging lands with Dudley Stanley.). None of these efforts proved successful. By 2007, however, the incumbent Commissioner, having dealt unsuccessfully with problems and complaints in the area for many years, began exploring in earnest the potential for land exchanges to solve the resource management issues in the White Peak area.

The Stanley Exchange

On October 11, 2007, David Stanley, owner of the Stanley Ranch, submitted an “Initial Application” for a land exchange with the Commissioner in which he proposed to trade certain lands he owned in the White Peak area for state trust lands. See [App. S-1].

*20 The Stanley Ranch owned numerous parcels that lie within existing state lands in the center of and on the east side of the White Peak area. See [App. 1 at 11]. The Land Office, in turn, managed several checkerboarded parcels of state land within Stanley's property in the center of the White Peak area. See *id.*

Stanley's application initially proposed to exchange 3,863 acres of ranch land for 6,374.63 acres of state land. *See* Henington Aff. ¶ 16 [Supp. App. 7]. After an initial evaluation and analysis of the preliminary proposal, the Commissioner determined that substantial changes would need to be made in order to meet constitutional criteria (namely, that the value of land acquired exceed the value of state lands traded) and be in the best interests of the trust (by, for example, solving access and range management and access issues). *See id.* After further discussion, the Commissioner notified Stanley that there was a sufficient basis for a possible exchange such that a more detailed exchange proposal should be submitted, along with, among other things, appraisals of the state trust land and the land offered in exchange, prepared by an approved certified real estate appraiser in accordance with State Land Office appraisal standards. *See* [App. S-2]; *see also* 19.2.21.9(B)(3) NMAC.

Pursuant to Land Office regulations, 19.2.21.8(C) and (J) NMAC, Stanley was required to pay for and arrange for an independent appraisal of the land by an appraiser approved by the Land Office. That appraisal, in turn, was subject to *21 review and approval by the Commissioner's own staff certified real estate appraiser. *See* Affidavit of R. Scott McDowell ¶ 2 [Supp. App. 50-51].

Stanley ultimately submitted a proposal that met the Commissioner's minimum objectives and that satisfied the constitutional, statutory and regulatory requirements. Under that proposal, Stanley would convey 15 tracts of land consisting of 4,380 acres on the east side of the White Peak area, having a value of \$6,413,000, that would fill in much of the checkerboard in that area, in return for 14 tracts containing 5,684.51 acres worth \$6,356,000 held by the State in the center of the White Peak area.¹⁴ *See* Henington Aff. ¶ 17 [Supp. App. 8]. Much of the land to be acquired by the State under the proposal consists of productive forest suitable for grazing, while most of what would be conveyed to Stanley consists of treed hilly land not suitable for grazing. *See id.* [Supp. App. 8-9]. In addition, the exchange in Stanley would give the Land Office a parcel to the south with a point of access, suitable for a new road, fronting on State Road 120. *See id.* ¶ 18 [Supp. App. 9]. This new access point, when considered with the new in-fill parcels acquired from Stanley on the east side, gives the State the opportunity to build an all-weather continuous loop road on the east side of the property. *See id.* Such a road is not possible now because of the checkerboard nature of the east area of White Peak. The Land Office's plan is to facilitate the construction of campsites *22 along the loop road, thus creating a prime recreational and quality hunting area. *See* Henington Aff. ¶ 18 [Supp. App. 9].

After concluding that Stanley's modified exchange proposal would both meet constitutional and statutory requirements and would achieve various land management objectives, the Commissioner issued a Notice of Public Auction identifying the state trust lands available for disposition by way of land exchange and establishing standards for the submission of competing land exchange proposals. *See* [App. S-7].

Pursuant to statute and Land Office regulations, Stanley was required to pay for the costs of obtaining competing proposals. *See* NMAC 19.2.21.8(J) ("Exchange applicants or exchange parties shall pay all costs of exchanges, including but not necessarily limited to costs of publication, land appraisal, appraisal of improvements, surveying and recording, unless such requirement is waived by the commissioner."); NMSA 1978, §§ 19-7-1, 19-7-16.

The Notice of Public Auction was published for 10 weeks, from September 18, 2009 through November 19, 2009. *See* Affidavit of Publication, November 19, 2009 [Supp. App. 53]. No bidder filed any objection or protests in response to the bid request, and Stanley offered the only bid. *See* Henington Aff. ¶ 20 [Supp. App. 9].

*23 The bid package required competitive proposals both to offer land of at least equal value to that offered by the Commissioner and also required a successful bid to take all of the checkerboarded lands offered by the Commissioner. *See* [App. S-7 at 1]. The Commissioner required a minimum land bid (but permitted additional cash "bonuses" to be bid in addition) pursuant to a policy not to deplete the value of the state's permanent land holdings and based on his belief that the trust is better served by permanent land holdings than by other investments. *See* Henington Aff. ¶ 21 [Supp. App. 10]. He required a successful bidder to take all of the offered lands in order to avoid the problem of cherry-picking that would occur if bidders were able to take just the choice properties on the east side of White Peak and leave the trust with all of the least desirable parcels, including the continuing problems of managing them. *See id.*

The exchange with Stanley closed on January 7, 2010. *See id.* ¶ 23.

UU Bar Exchange Application

The UU Bar filed its initial application for exchange on March 5, 2008. [App. U-1 at 1]. The UU Bar's initial proposal was to exchange 3,655 acres of private ranch land for approximately 4,700 acres of state trust land. *See id.* ¶¶ 1, 2. The UU Bar proposal was of interest to the Land Office because UU Bar is the owner of several in-fill parcels of land on the east side of the White Peak area. *See* [App. 1 at 10] (showing location of UU Bar lands). After negotiations *24 between the Land Office and the UU Bar, the Commissioner agreed to solicit competing bids in response to a final UU Bar exchange proposal pursuant to which the UU Bar Ranch would convey to the Commissioner the in-fill properties on the east side of the White Peak area, and a large grazing parcel directly to the south of State Road 120 in return for state trust land in the area that lies further to the east of the properties the Commissioner seeks to consolidate. *See* Henington Aff. ¶ 24 [Supp. App. 10-11]. The land that the Commissioner proposed to exchange consists of 3,431.34 acres with a value of \$2,383,000 in return for 3,610.19 acres of ranch land valued at \$6,413,000. *See* [App. 1 at 22]. The Commissioner advertised for such bids for a 10-week period beginning October 1, 2009. *See* Affidavit of Publication, December 3, 2009 [Supp. App. 54]. UU Bar submitted the sole bid. *See* Henington Aff. ¶ 25 [Supp. App. 11].

As with the Stanley bid proposal, the Commissioner required that a competitive bidder make a proposal to acquire all of the acreage that the Land Office proposed to exchange and that a bidder agree to supply in return land of at least comparable value. *See* [App. U-6 at 1]. The UU Bar submitted the sole bid and has been notified that it was the winning bidder. *See* Henington Aff. ¶ 25 [Supp. App. 11]. The transaction has not closed, pending resolution of this action. *See id.*

CS Ranch Exchange Application

*25 The Commissioner received an initial exchange application from CS Ranch on April 9, 2008. [App. CS-1]. In subsequent negotiations, the Commissioner's staff has been seeking to structure an exchange that would attract a bid from CS Ranch that would allow the Commissioner to exchange lands held outside the White Peak area in return for numerous parcels that would fill in and consolidate the state lands on the west of the White Peak area. *See* [App. 1 at 22]. Preliminary discussions with CS Ranch have involved an exchange under which CS Ranch would convey to the State Land Office approximately 2,600 acres having a value of \$13,480,000. *See id.* If the Commissioner is able to negotiate an exchange that he believes would be in the best interest of the trust, it is his intention to publish a Notice of Public Auction for competitive exchange proposals and to advertise the notice for 10 weeks. *See* Henington Aff. ¶ 26 [Supp. App. 11]. If the proposal currently under consideration were to be consummated, an exchange with CS Ranch would result in the Land Office being able to build a loop road on the west side of the White Peak area and to consolidate those lands for management, grazing, and recreational use. *See id.* The Commissioner has not yet decided on a final structure for the proposal, and has not issued any bid notices. *See id.*

Galloway Exchange Application

William Galloway filed an Initial Exchange Application with the Commissioner on July 8, 2008. *See* [App. G-2 at 1]. The Commissioner has been *26 involved in negotiations with Galloway over an exchange proposal that would have the State convey 160 acres to Mr. Galloway valued at \$840,000 in return for 109.94 acres valued at \$951,500. *See* [App. 1 at 22]. The proposal has not been placed for competitive bid and is not final. *See* Henington Aff. ¶ 28 [Supp. App. 12]. However, if the exchange proposal is bid as most recently negotiated, and Galloway is the successful bidder, the State will acquire an important parcel on the west side of the White Peak area. That parcel is an in-fill holding to the south and west of the White Peak area that borders State Road 120. *See id.* The parcel has an all-weather 1.2 mile road that would provide direct access from State Road 120 to the state lands on the west side of White Peak. Acquisition of this parcel would give the Land Office an additional point of road access to the west side lands. *See id.*

If all of the White Peak exchanges under consideration by the Commissioner are offered for bid, and no superior proposals to those negotiated with UU Bar, CS Ranch and Galloway are received, the State Land Office would own 25,000 contiguous acres on the east side of White Peak and another 18,000 contiguous acres on the west side. *See id.* ¶ 29 [Supp App. 12-13]. The Land Office has determined that consolidation would cause the total value of state lands to increase by more than \$13 million. *See* McDowell Memorandum [Supp. App. 55] (appraisal evaluation).

*27 ARGUMENT

The Attorney General's effort to limit the Constitutionally granted authority of the Land Commissioner is flawed on several levels. First, the Attorney General improperly seeks, through the vehicle of mandamus, to override discretionary decisions made by the Land Commissioner, to obtain a ruling from this Court on disputed issues of fact, and to bypass remedies provided by statute and available in the district courts. Second, the Petition seeks to impose limitations on the Land Commissioner's authority that are found nowhere in the law, and in so doing ignores discretion afforded to the Land Commissioner under the Enabling Act, the New Mexico Constitution and this State's statutes and regulations. Third, although framed as a challenge to the four White Peak auctions, the Petition is an improper attack on the Land Commissioner's Constitutional, statutory and rule-making authority.

The Attorney General's Petition ignores the clear grant of authority to the Land Commissioner to establish land management policies, and flies in the face of nearly a century of jurisprudence recognizing that discretion, all without evidence to establish the central contention that the bidding on the White Peak auctions was or will be "chilled." If granted, the Petition would strip the Land Commissioner of the power to manage the state trust lands and to address the problems that result from the checkerboard ownership pattern in the White Peak area. Because this *28 untenable result is not only unsupported by, but in direct contravention to well established law, the Petition must be denied.

I. THE ATTORNEY GENERAL HAS FAILED TO ESTABLISH A BASIS FOR THIS COURT TO EXERCISE ITS MANDAMUS JURISDICTION.

The Attorney General asks this Court to use its jurisdiction in mandamus to second-guess the Commissioner's policy decisions as to the structure of a public auction and what consideration to accept in exchange for state trust lands. The relief is not only entirely unprecedented and inappropriate, but cannot be obtained through a mandamus proceeding.

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." *Brantley Farms v. Carlsbad Irrigation Dist.*, 1998-NMCA-023, ¶ 12, 124 N.M. 698, 954 P.2d 763. This Court has recognized two general types of mandamus claims. In its original application, mandamus applied "**only** to compel a public officer to perform an affirmative act where, on a given state of facts, the public officer has a clear legal duty to perform the act and there is no other plain, speedy, and adequate remedy in the ordinary course of the law." *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 11, 140 N.M. 168, 140 P.3d 1117. This Court, however, has also been willing to exercise its mandamus jurisdiction in cases where the key issue is whether a public official should be prohibited from performing an unconstitutional act. *See, e.g.,* *29 *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995) (court exercised mandamus jurisdiction to decide whether the Governor of New Mexico should be prohibited from implementing gaming compacts with Indian tribes). Neither circumstance is present here.

A. The Attorney General Is Not Seeking To Compel a Ministerial Act, But Is Seeking To Impose New and Unprecedented Limitations on the Commissioner's Discretion.

The Attorney General attempts to frame its request as one involving a "ministerial duty" by arguing that he is asking the Court to compel the Commissioner "to adhere to the stringent procedural requirements of the Enabling Act, including a requirement

to hold a public auction before selling State Trust Lands.” See Petition at 20-21. In fact, there is no ministerial duty at issue in this case. Instead, the Attorney General is attempting to substitute his judgment for that of the Commissioner.

“A ministerial act, as applied to a public officer, is an act or thing which he is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case.” *State ex rel. Four Corners Exploration Co. v. Walker*, 60 N.M. 459, 463, 292 P.2d 329, 332 (1956). Although the writ can be invoked to compel a public official to perform ministerial duties, “it will not lie when the matter has been entrusted to the judgment or discretion of the public officer.” *Mimbres Valley Irrigation Co.*, 2006-NMCA-093, ¶ 11; see also *State ex *30 rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1977) (“Executive discretion cannot be controlled by mandamus.”).

“Discretion in performing an act arises when it may be performed in one of two or more ways, either of which would be lawful, and where it is left to the will or judgment of the performer to determine in which way it should be performed, but when a positive duty is enjoined and there is but one way in which it can be performed lawfully, then there is no discretion.” *Walker*, 60 N.M. at 463, 292 at 332 (quoting 27 C.J.S. *Discretion*). Thus, mandamus is not appropriate to “direct the performance of a particular act from among two or more allowed alternatives.” *El Dorado at Santa Fe, Inc. v. Bd. of County Comm’rs*, 89 N.M. 313, 317, 551 P.2d 1360, 1364 (1976); see also *State ex rel Shell W. E&P, Inc. v. Chavez*, 2002-NMCA-005, ¶ 8, 131 N.M. 445, 38 P.3d 886 (where an official has the discretion to choose between two or more alternatives, mandamus will not lie).

In the most clear examples delineating this distinction, the Court exercised its mandamus jurisdiction to compel the Santa Fe Board of County Commissioners to approve a subdivision plat when it had already determined that the applicant met all the statutory requirements, see *El Dorado at Santa Fe, Inc.*, 89 N.M. at 319, 551 P.2d at 1366, and to compel the New Mexico Department of Alcoholic Beverage Control to issue a liquor license after it had determined that the applicant met all the statutory requirements. See **31 Perea v. Baca*, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980).¹⁵ In contrast, this Court has refused to issue a writ where the public official would be required to make a discretionary determination. For example, this Court refused to issue a writ to require an irrigation district to release water, where the district board had discretion to determine whether there was sufficient water available for release. *Brantley Farms*, 1998-NMCA-023, ¶ 18. The Court also refused to compel the state auditor to provide funding for an irrigation district to hire a hydraulic engineer where he had the power to approve the funding, but was in no way required to do so. See *Carson Reclamation Dist. v. Vigil*, 31 N.M. 402, 404, 246 P. 907, 908 (1926). The Court explained:

There is a fatal weakness in appellant's case. No statutory or legal duty is shown to be cast upon the state auditor. It is only claimed that he has the power. If he has such vast discretionary power as claimed by appellant, it is not within the province of the courts to direct its exercise by mandamus. Only a clear right can be so enforced.

Id.

This Court explored the distinction between affirmative acts that must be performed, and thus are subject to mandamus, and the exercise of discretion, which is not, in *State ex rel. Richardson v. Fifth Jud. Dist. Nominating Comm’n*, 2007-NMSC-023, ¶ 10, 141 N.M. 657, 160 P.3d 566. In that case, a dispute arose **32* between Governor Bill Richardson and the Fifth Judicial District Nominating Commission regarding the duties of the Commission to recommend nominees for a judicial vacancy. See *id.* ¶ 1. When a vacancy arose in the Fifth Judicial District, the Commission submitted one name to the Governor for consideration. See *id.* ¶ 4. The Governor rejected the nominee and asked the Commission to submit additional names. See *id.* The Commission refused, and Governor filed a petition for writ of mandamus, asking the Court to compel the Commission to meet and submit additional names. See *id.* ¶ 8.

In granting the petition only in part, the Court was careful to distinguish between the Commission's mandatory duties, those it is required to perform, and its discretionary duties. See *id.* ¶ 20. The Court recognized that the Commission had a right to “exercise its discretion in recommending such qualified applicants to the Governor.” *Id.* ¶ 18. On the other hand, it had duties

“to actively solicit qualified applicants” and “to make all reasonable efforts to provide the Governor with additional names upon request.” *Id.* ¶ 22. The Court issued a writ of mandamus to compel the Commission to exercise those duties, and those duties alone. *See id.* ¶ 24. The Court was clear that it could not tell the Commission who to recommend to the Governor. *See id.* ¶ 18.

The Attorney General does not ask the Court to compel the Commissioner to take any action, but seeks to limit the Commissioner's authority in three ways, *33 arguing that the Commissioner cannot (1) require bids for a minimum land value, (2) exclude either cash-only or mixed land-and-cash bids, or (3) refuse to consider bids for a less than all of the land being offered at auction. *See* Petition at 47-48. Notably, while asking the Court to limit the ability of the Land Commissioner to conduct auctions in the manner he deems appropriate, the Attorney General is unable to articulate a rule this Court could adopt or a guiding principle as to how the auctions should be conducted. And he actually concedes, at least in part, that the Commissioner has the discretion -- and that indeed it may be *necessary* -- to require bids to meet “a certain minimum size parcel.” *See* Petition at 49 n.11. He only takes issue with the Commissioner's decisions as to what the minimum size should be and what types of bids are acceptable. *See id.* In essence he admits that the Commissioner has the discretion to make these important decisions, but simply argues that, in his opinion, the Commissioner made the wrong choice.

This is not a proper issue to be decided on mandamus. *See Fasi v. King*, 41 Haw. 461, 472 (1956) (“In this case, as to imposition of building requirements, the commissioner had two choices, to sell with such requirements, or to sell without such requirements ... It is not for this Court to say that her choice was wrong.”). These decisions unquestionably involve a choice between “two or more alternatives.” The Attorney General also fails to identify a non-discretionary duty that the Commissioner is required, but failed, to perform. He points to no authority *34 imposing a non-discretionary duty on the Commissioner to accept cash in exchange for lands or to allow bids for only a portion of the lands offered at an auction. Nor can he. The Enabling Act is silent as to how auctions are to be conducted,¹⁶ and the New Mexico Constitution, as well as statutes enacted by the State's very first Legislature, gives the Commissioner the power to adopt regulations in those areas where there is no specific statutory or Constitutional guidance.

The Attorney General is not asking the Court to compel the Commissioner to hold an auction, because he cannot do so, as the Commissioner unquestionably has the power to decide whether or not to hold a public offering. *See Otto v. Field*, 31 N.M. at 150-51, 241 P. at 1039 (the Commissioner “may exercise ‘entire discretion as to the time of selling these lands and the extent to which they should be sold,’ and [] no one has the right to compel the commissioner to sell the lands in its entirety or otherwise ...”). He is really asking the Court to tell the Commissioner *how* to hold an auction, something that not only cannot be done in mandamus, but that this Court has refused to do in the past. *See id.* at 139, 241 P. at 1035 (“[I]f the state land commissioner had the power to deal with this property *35 as a manager, then the question of policy on his part, and as to whether he acted wisely and with good business sense, is not a matter which the court would undertake to control or direct.”).

Indeed, there should be no question that this case involves the discretion of a public official, because this Court has expressly recognized the discretion of the Commissioner to decide what land will be auctioned, when it will be auctioned, and how it will be auctioned, offering the following proposition: ***“That the commissioner has discretion to decide the policy of how he will offer for sale and sell the public lands in the absence of any limitations or restrictions imposed by law cannot be questioned.”*** *Stovall v. Vesely*, 38 N.M. 415, 418-19, 34 P.2d 862, 864 (1934) (emphasis added). Accordingly, the Commissioner has the discretion to decide whether to sell lands for cash, to conduct a land exchange, or to maintain the lands within the trust. He also has the discretion to decide the terms under which he is willing to exchange land, and that he is only willing to conduct separate single-lot exchanges. Indeed, as discussed in detail below, *supra* Part II, decisions regarding the appropriate structure for a land auction lie at the heart of the Commissioner's discretionary authority. Because the Attorney General is not seeking to compel the Commissioner to perform a specific duty, his characterization of this case as involving a ministerial act is incorrect, and he cannot invoke this Court's mandamus jurisdiction on that basis.

***36 B. This Case Does Not Meet Any of the Standards for Prohibitory Mandamus.**

Nor does this case raise the type of question that would otherwise be appropriate for the second kind of mandamus action, sometimes referred to as prohibitory mandamus, in order to determine whether a public official has the authority to take a certain action. Mandamus, even when applicable in such circumstances, is only appropriate to decide such question “when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.” *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55. As discussed above, this case is not appropriate for mandamus because it involves solely the discretionary duties of the Commissioner. Further, mandamus is inappropriate because this case presents factual questions that cannot be decided in a mandamus proceeding, and there are adequate remedies at law for those who seek to challenge the administrative decisions of the Commissioner.

1. This case does not present a “purely legal issue,” but involves significant questions of fact.

*37 First, mandamus is not appropriate because there are multiple factual issues raised by the Attorney General's Petition, and mandamus is not a proper vehicle to decide fact-specific disputes.

This Court has refused to consider writs of mandamus unless they “involve a legal and not a factual determination.” *Bird v. Apodaca*, 91 N.M. at 282, 573 P.2d at 216. When a case requires factual determinations, a claim should be brought in district court, not the Supreme Court, so that the courts on appeal “may have the benefit of a complete record and so the issues may be more clearly defined.” *Id.* Even as framed by the Attorney General, this case presents significant factual issues that would make mandamus inappropriate. The Attorney General posits the following question: “Does the Commissioner violate the duty imposed on him by the Enabling Act, the New Mexico Constitution, and his fiduciary obligations to the trust by conducting substantially constrained ‘public auctions’ in order to achieve a predetermined result?”¹⁷ See Petition at 6. Assuming that this Court would accept the proposition that the Constitution imposes limitations on the discretion of the Commissioner to structure sales of state trust lands, the question *38 raised by the Attorney General is not a “purely legal” question. Embedded in this question are three distinct factual issues to be determined: (1) whether two completed the auctions were, in fact, “substantially constrained” as a result of the conditions imposed by the Commissioner, (2) whether the auctions, in fact, “favor[ed] predetermined deals,” and (3) whether the Commissioner designed the bid for the purpose of achieving a predetermined result. These are questions of fact. Cf. *State ex rel. State Hwy. Transp. Dep't v. Garley*, 111 N.M. 383, 386, 806 P.2d 32, 35 (1991) (holding that affidavits claiming that the party would not have entered into a lease had he not been mistaken and that his inability to build a structure caused him to go out of business and sustain a substantial loss were sufficient to give rise to issues of fact as to the matters they covered); *Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-020, ¶ 17, 125 N.M. 401, 962 P.2d 1236 (recognizing that the first step in reviewing agency decisions is to determine if the decision presents a question of law, of fact, or a combination of the two). This Court simply cannot conclude that the auction was “substantially constrained” or that the conditions “favored a predetermined result” without the benefit of a fully developed factual record.

Indeed, the Attorney General not only asks this Court to conclude that bidding was, in fact, “chilled” without allowing for the development of a factual record below, but initially did so without identifying a single party that would have *39 submitted a bid at either of the two auctions if the Commissioner had imposed different conditions, as would be necessary for the Attorney General to meet his burden to establish this fact. Now, one party has come forward and asserted, in an Amicus brief, that it might have bid on some unspecified portion of the state trust land if the Commissioner had made some of the lands available separately. See Proposed Amicus Brief of the New Mexico Wildlife Federation and the National Wildlife Federation as Amici Curiae in Support of Petition. The Amici supporting the Attorney General only introduce new factual questions -- indeed, a multitude of factual questions -- that further show why mandamus is improper. Among the many, Amici introduce questions as to whether they had the means to bid on any state trust lands, whether their expression of interest in specific tracts of land can be credited when they never submitted an application proposing an exchange for those lands, whether Amici were in fact “chilled” from bidding, or whether they would have been able to submit a bid if they had attempted to join forces with other parties, and whether Amici exhausted their administrative remedies with respect to the challenged auctions. Amici also question

the wisdom of the Commissioner's policies, arguing that the Commissioner targeted lands of questionable value, and in so doing demonstrated a fundamental misunderstanding as to the goals of the exchange. These policy issues are not appropriate for review on mandamus.

***40** The Attorney General also makes the astounding statement that “there is no compelling reason for requiring acquisition of these multiple tracts of thousands of acres of State Trust Lands by a single party in one transaction.” See Petition at 49. The factual premise of this statement is incorrect, as multiple parties could have worked together to submit a single bid. Moreover, there were, in fact, strong reasons for the Commissioner's actions. The checkerboarding problems in the White Peak area created a “compelling reason” for the Commissioner to target specific lands for exchange in order to consolidate, or “unitize,” the existing state trust lands in the area, thereby increasing the value of those lands by more than \$13 million, enhancing the Commissioner's ability to protect that land, increasing the recreational opportunities available within the area, increasing access to the trust lands, and augmenting grazing revenues. But certainly the question of whether the Commissioner had reason to structure the bid the way he did is a question of fact, and thus not an appropriate issue to be determined in a mandamus proceeding.¹⁸

***41** Because the issues raised by the Attorney General are factual issues that cannot be decided in a mandamus proceeding in this Court, the Attorney General's Petition should be dismissed.

2. There is an adequate remedy at law to challenge decisions of the Commissioner.

Second, mandamus is inappropriate because there are adequate remedies available to challenge decisions of the Commissioner.

“Like all other extraordinary writs, mandamus is an extraordinary remedy which is available only in cases wherein other remedies fail or are inadequate.” *Cobb v. State Canvassing Bd*, 2006-NMSC-034, ¶ 20, 140 N.M. 77, 140 P.3d 498. Indeed, “[t]he writ **shall not issue** in any case where there is a plain, speedy and adequate remedy in the ordinary course of law.” *NMSA 1978, § 44-2-5 (1953)*.

There are remedies available to those who seek to challenge the Commissioner's decisions. First, any party “aggrieved” by a decision of the Commissioner may file an administrative contest and appeal to the district court pursuant to *NMSA 1978, §§ 19-7-64 to -67 (1912, as amended through 1999)*.¹⁹ ***42** Second, a party with standing may initiate a general civil action for declaratory, injunctive or other appropriate relief if there is a basis to believe that the Commissioner has failed to fulfill his fiduciary duties to the beneficiaries of the trust. See *Forest Guardians v. Powell*, 2001-NMCA-028, ¶ 19, 130 N.M. 368, 24 P.3d 803 (holding that a coalition of environmental groups did not have standing to bring suit, but recognizing the potential for a party with standing to bring such a suit). In addition, the Administrative Procedures Act provides a method to challenge the regulations enacted by the Commissioner that authorize the procedure he followed in conducting the challenged exchanges. See *NMSA 1978, § 12-8-8(A)(1969)*.

***43** Although the Attorney General asserts in various places that the Commissioner has breached his fiduciary duty to the trust, he does not allege, anywhere in his Petition, that the transactions he seeks to undo did not benefit the trust. To the contrary, he acknowledges that there was a net increase in value to the state trust lands. See Petition at 2. His challenge is limited to the Commissioner's decision to offer different areas of land in a single auction and to exclude cash-only bids. Such a challenge should be brought by way of administrative contest, which this Court has held provides adequate relief for those who seek to challenge a decision of the Commissioner, by a party that has standing. See *Heimann v. Adee*, 122 N.M. 340, 349, 924 P.2d 1352, 1361 (1996) (“[T]he Legislature's provision of a right of contest recognizes the Commissioner's plenary authority [with respect to management and disposition of state trust lands] and provides an administrative remedy.”); *Andrews v. Walker*, 60 N.M. 69, 70-71, 287 P.2d 423, 424 (1955) (denying writ of mandamus because applicant seeking mining permits had adequate remedy by way of administrative contest and district court appeal); *Ellison v. Ellison*, 48 N.M. 80, 83, 146 P.2d 173, 174 (1944) (district court lacked jurisdiction to rule on a lessee's right to renew its lease except on appeal from a decision of the Commissioner)

The Attorney General, however, argues that the statutory remedy is inadequate because he is seeking, through this action, a ruling that would “prevent *44 the Commissioner from engaging in any more auctions that have the same constitutionally infirm limitations” that he alleges were present in this case. See Petition at 24-25. To the extent that the Attorney General seeks a ruling as to the constitutionality of hypothetical future actions, he is seeking an improper advisory opinion. He is, of course, not entitled to such an opinion, see *City of Las Cruces v. El Paso Elec. Co.*, 1998-NMSC-006, ¶ 18, 124 N.M. 640, 954 P.2d 72 (“We avoid rendering advisory opinions.”), and his inability to obtain one does not render the statutory remedy inadequate. To the extent that he has raised the question as to the scope of the Commissioner's authority to design and structure land auctions, the Attorney General has failed to establish that there is no adequate remedy through the district courts for those parties with standing to bring such an action.

The Attorney General also argues that mandamus in this Court will provide the only adequate remedy because two of the auctions have been completed, and that those exchanges will be completed unless he is able to mount a challenge. This purported exigency, however, is one of his own making. In regard to the auctions that have already been completed, there was ample opportunity for a proper party to bring an administrative contest before now, and the Attorney General has offered no explanation as to why he waited to bring this action.²⁰ As *45 to the exchanges that are under consideration, the Commissioner has not yet decided on a final structure for the proposal, and has not issued any auction notices, and thus any request for a ruling from this Court is premature and amounts to a request for an improper advisory opinion.

C. The Authority That the Attorney General Relies Upon Shows That Mandamus Is Not Appropriate.

The Attorney General relies on three cases from Arizona, where the courts have held that the Land Commissioner in that state cannot impose conditions that would “chill the bidding” at a public auction. Far from supporting the Attorney General's position, these cases demonstrate that mandamus is inappropriate here.

First, these cases expressly recognize that the Arizona Land Commissioner has the authority to impose conditions on a public auction, and whether to impose such conditions is a discretionary determination to be made by the [Arizona Land Commissioner](#). See *Ewing v. Arizona*, 745 P.2d 947 (Ariz. 1987) (rejecting argument that a right of first refusal granted to former lessee was *per se* impermissible); *Campana v. Arizona State Land Dep't*, 860 P.2d 1341 (Ariz. Ct. App. 1993) (concluding that the Arizona Land Commissioner can establish “terms of sale that are in the best interest of the trust,” has the “discretionary authority to *46 determine the structure of a proposed sale,” and “great discretion concerning the disposition of trust lands and has authority to devise detailed plans for the sale, lease, and use of state lands. These decisions will not be overturned absent illegal action, an abuse of discretion, or unfair bidding.”).

Second, the Arizona courts did not suggest that a condition imposed by the Land Commissioner could be deemed impermissible “on its face,” as the Attorney General argues here. To the contrary, in each case decided by the Arizona courts, the question of whether the condition “chilled the bidding” was treated as one of fact, and the aggrieved bidder had the burden to establish that the conditions had the effect of discouraging people who might have otherwise bid on the land. See *Ewing*, 745 P.2d at 950 (noting that “[t]estimony was taken as to the possible chilling effect the statutory preference would have on the bidding and whether or not it prevented the auction from obtaining the highest and best bid for the lease” from “numerous witnesses” before the district court determined that there was no such effect); *Campana*, 860 P.2d at 1343-45 (affirming decision of Arizona Land Department, made after an evidentiary hearing, that the petitioner had failed to present sufficient evidence to establish that the Land Department's requirements improperly chilled the bidding).²¹ The additional case cited by the Attorney *47 General was decided through summary judgment proceedings, upon the presentation of undisputed facts to the district court. See *Farmers Inv. Co. v. Arizona State Land Dep't*, 666 P.2d 469, 470 (Ariz. Ct. App. 1982).

Third, these cases do not support the Attorney General's claim that there is no adequate remedy through district court proceedings. None of these cases were decided through a mandamus petition filed directly with an appellate court; each was

initially raised in a separate forum -- either a state district court or a hearing before the Land Commissioner -- and then brought to the appellate courts. See *Ewing*, 745 P.2d at 948 (Arizona Land Department denied petitioner's protest after conducting an evidentiary hearing; protestor then filed petition for special action with the Arizona Supreme Court); *Campana*, 860 P.2d at 1343 (Arizona Land Department denied protest after conducting an evidentiary hearing, protestor then filed a special action with the Arizona Court of Appeals); *Farmers Inv. Co.*, 666 P.2d at 470 (plaintiff brought declaratory judgment action in district court). The *48 Attorney General offers no reasonable explanation as to why the comparable remedies available in New Mexico are inadequate.

For each of these reasons, mandamus is inappropriate here. At bottom, the Attorney General is attempting to override the policy and land management decisions made by the Commissioner. The Attorney General may have adopted a different policy, proceeded with the land exchanges in a different manner, or chosen not to proceed with these exchanges at all. But that was not his call to make. The Commissioner is vested with the power to make these policy decisions, and his judgment is not subject to review on mandamus.

II. THE COMMISSIONER HAS THE CONSTITUTIONAL AUTHORITY TO DECIDE WHAT LANDS TO OFFER AND WHAT CONDITIONS TO IMPOSE ON ACCEPTABLE BIDS.

In addition to being procedurally deficient, the Attorney General's Petition asks the Court to adopt a rule that is contrary to a century of jurisprudence recognizing the discretion of the Commissioner to manage the state trust lands, would deprive the Commissioner of power that is vested in him through the Constitution, and would wholly undermine his ability to perform his Constitutional duty to manage the state trust lands. Because the limitations the Attorney General seeks to impose are contrary to the Enabling Act, New Mexico Constitutional and statutory law, and this Court's longstanding recognition of the discretionary *49 authority of the Land Commissioner to manage the state trust lands, the Attorney General's position must be rejected.

A. The Commissioner Has the Discretion To Decide the Terms Under Which He Will Dispose of State Trust Lands.

The trust lands at issue in this case were granted to the State of New Mexico by the United States government through the Enabling Act, which provides, in pertinent part:

It is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

See Enabling Act, § 10. As expressly accepted and confirmed by the State and its people, the Enabling Act became a part of New Mexico's fundamental law to the same extent as if the Enabling Act had been incorporated into the New Mexico Constitution, which establishes the Commissioner of Public Lands as the officer charged with oversight of those lands, and grants him the power and duty to “select, locate, classify and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law.” N.M. Const. art. XIII, § 2; see also *Otto v. Field*, 31 N.M. at 176, 241 P. at 1049 (“The land commissioner and the *50 Legislature got their power from the same source; that is, from the people and their Constitution, and within their respective spheres of duties and responsibilities are of equal dignity.”). The first Legislature seated in the State of New Mexico further provided that the Commissioner of Public Lands “shall have jurisdiction over all lands owned in this chapter by the state, except as may be otherwise specifically provided by law, and shall have the management, care, custody, control and disposition thereof in accordance with the provisions of this chapter and the law or laws under which such lands have been or may be acquired.” NMSA 1978, § 19-1-1(1912).

While the Legislature has prescribed certain aspects of the leasing and sale process, particularly in certain contexts such as grazing leases, see [NMSA 1978, §§ 19-7-28 to-52](#) (1912, as amended through 1975), or installment sale contracts, [NMSA 1978, § 19-7-9 \(2009\)](#), the Commissioner's authority to conduct auctions and convey trust lands is set forth in broad and general terms. Accordingly, this Court recognized, in the early years of statehood,

The grant is of the fee, and when the required preliminaries of selection by the state had been performed, and the government had clear-listed the same to the state, it became the absolute owner of the lands, subject only to the trust imposed by the granting act. In order to avail themselves of the grant, the people in their Constitution created the office of commissioner of public lands (section 1, art. 5), and clothed him with power to select, locate, classify, and have the direction, control, care, and disposition of all public lands, under the provisions of the act of Congress relating thereto, and such regulations as might be provided by law ([section 2, art. 13](#)).

***51** [State ex rel. Evans v. Field](#), 27 N.M. 384, 386, 201 P. 1059, 1060 (1921)

This Court further recognized that the Land Commissioner has “almost unlimited power with respect to the public lands owned by the state, except as may be otherwise specified by law” and that

[n]owhere in [the Enabling Act] is any provision made for any supervisory control over the acts of the commissioner, excepting in the case of contest concerning lands when an appeal may be taken from the decision of the commissioner to the district court. He is responsible to the electorate alone for any lack of proper business capacity or any misdoings in office.

[Otto v. Field](#), 31 N.M. at 153, 155-56, 241 P. at 1040-41. In the decades that followed, this Court continued to affirm the scope of discretion granted to the Commissioner. See, e.g., [Heimann](#), 122 N.M. at 349, 924 P.2d at 1361 (discussing Commissioner's “plenary authority” over state trust lands); [Burguette v. Del Curto](#), 49 N.M. 292, 295-96, 163 P.2d 257, 259 (1945) (“It's well settled in New Mexico that under the Enabling Act, our Constitution and the statutes based thereupon, the Commissioner of Public Lands has complete dominion, which is to say complete control, over state lands. This ‘dominion’ is, of course, subject to the restrictions imposed by the Enabling Act, the Constitution, and the statutes, and the manner of its exercise is subject to review by the courts.”); [Am. Mortgage Co. v. White](#), 34 N.M. 602, 604, 287 P. 702, 703 (1929) (“[T]he jurisdiction of the commissioner over the public lands extended to all cases, except as otherwise specifically *52 provided by law. Except as otherwise specifically limited by law, the power of the commissioner is very broad, and he is a sort of business manager of the lands under his control.”).

This Court has also held that the Commissioner's powers are not limited to those expressly referenced in the Enabling Act and the New Mexico Constitution and statutes. Indeed, this Court has rejected that very contention, explaining that:

We do not agree to that narrow construction of the powers of the commissioner. If it was intended by the Constitution makers and the Legislature to cover every contingency, they would not, at the time of giving specific directions, also repose general jurisdiction or power of control and disposition over the state lands... “Whenever the statute grants power to do an act with an unrestricted discretion as to the manner of executing the power, all reasonable and necessary incidents to the manner of executing the power are also granted.”

[Otto v. Field](#), 31 N.M. at 143, 145, 241 P. at 1036-37 (quoting Black on Interpretation of Laws); see also [Am. Mortgage Co.](#), 34 N.M. at 603, 287 P. at 703 (“Except as otherwise specifically limited by law, the power of the commissioner is very broad, and he is a sort of business manager of the lands under his control.”).

The Commissioner's authority includes the power to enact regulations in order to fulfill his Constitutional duties. See [Otto v. Field](#), 31 N.M. at 132, 241 P. at 1032 (“The commissioner was given ample power to make rules and regulations ‘for the control,

management, disposition, lease and sale of lands.’ ”); *State ex rel. McElroy v. Vesely*, 40 N.M. 19, 26, 52 P.2d 1090, 1094 (1935) (Buckley, J., concurring) (“By the 1912 act the power was vested or confirmed in the *53 commissioner to make rules and regulations for ‘the control, management, disposition, lease and sale of state lands.’ Such rules and regulations, when made, if not in conflict with any superior law, have the effect of ‘laws.’ ”); *Heimann*, 122 N.M. at 349, 924 P.2d at 1361 (noting that rulemaking is within the commissioner’s “plenary authority” over state trust lands); see also *Leonard v. Lennox*, 181 F. 760, 766 (8th Cir. 1910) (“The power of those officers under the law to adopt such a regulation is not reasonably open to question ... [T]hey possess ample power to enforce, by appropriate regulations, every part of those laws, as to which it is not otherwise specially provided.”).

Courts in other western states have concluded that public officials who hold similar positions have considerable discretion over the management and disposition of public lands. See *Campana*, 860 P.2d at 1344 (recognizing the Arizona Land Commissioner’s “great discretion concerning the disposition of trust lands”); *Pike v. State Bd. of Land Comm’rs*, 113 P. 447, 453 (Idaho 1911) (because “the constitution vests the control, management and disposition of state lands in the state board of land commissioners,” the commissioners are the “sole and exclusive judges so long as they do not run counter to the provisions of the constitution or statute”); *Thompson v. Babcock*, 409 P.2d 808, 811 (Mont. 1966) (“There is no doubt that the State Board of Land Commissioners has considerable discretionary power when dealing with the disposition of an interest in land they hold in trust for *54 the people of this state.”); *Geierman v. Washington Dep’t of Natural Res.*, No. 17608-8-III, 1999 Wash. App. LEXIS 2089, at *1 (Wash. Ct. App. Dec. 14, 1999) (“As trustee of the common school trust lands for this state, the Department of Natural Resources is vested with considerable discretion in accepting or denying lease applications for the trust land.”).²²

1. The Commissioner has the discretion to decide the structure of an auction for trust lands.

The Attorney General’s Petition is based on the unprecedented, and unsupported, contention that the Land Commissioner cannot impose any “conditions” that would, in any way, “narrow the universe of potential bidders.” See Petition at 5, 28. This claim is fundamentally at odds with the discretion granted to the Commissioner to decide if, when, and how to dispose of trust lands. In seeking to limit the Land Commissioner’s authority, the Attorney General is attempting to read terms into the Enabling Act that are not there and ignoring this Court’s longstanding interpretation of the Enabling Act as granting the Land Commissioner all powers not expressly proscribed under that statute. The Attorney General can point to no specific provision of the Enabling Act that was violated in the challenged exchanges. To the contrary, he concedes, as he must, *55 that the Land Commissioner complied with the Act’s public notice requirements, opened the bidding to all members of the public, and that the value of the lands that the Land Commissioner will receive through the exchanges -- both those completed and those proposed -- will exceed the value of the trust lands to be exchanged. Thus, the auctions not only complied with the specific terms of the Enabling Act, but comported with the purpose of that Act, which is to prevent “private sales at unreasonably low prices.” See *Lassen*, 385 U.S. at 520; see also *Branson School District RE-82 v. Romer*, 161 F.3d 619, 637 (10th Cir. 1998) (purpose of Enabling Act is to ensure that state obtains the “fair market value of whatever property is being sold.”).

Nor can the Attorney General point to any provision of the Enabling Act, any part of the New Mexico Constitution, any New Mexico statute or regulation, or any authority from New Mexico’s appellate courts, to support his position. Instead, he turns to cases from Arizona and a legal encyclopedia entry regarding auctions. See Petition at 40-43. But even these sources do not support his position. First, Arizona’s courts have not prohibited that state’s Land Commissioner from setting out specifications and minimum bid requirements when auctioning public lands; they clearly and unequivocally recognize his power to do so. See *Campana*, 860 P.2d at 1344 (concluding that the Arizona Land Commissioner had the “discretionary authority to determine the structure of a *56 proposed sale” and to “devise detailed plans for the sale, lease, and use of state land”); see also *Ewing*, 745 P.2d at 950 (conditions imposed by the Arizona Land Commissioner did not violate the Enabling Act); *Foster v. Anable*, 19 P.3d 630, 635 (Ariz. Ct. App. 2001) (Commissioner did not abuse his discretion in selecting a particular tract of land to be auctioned).²³

*57 Similarly, and contrary to the representations in the Attorney General's Petition, the general law on auctions does not support the Attorney General's position. In fact, it is well recognized that an owner of property sold at auction has the right to determine the conditions and terms of the sale, so long as they are within reasonable limits. See *Cuba v. Hudson & Marshall*, 445 S.E.2d 386, 987 (Ga. Ct. App. 1994) (the seller has the right to establish any terms or conditions for sale); *Keske v. Boeder*, 170 N.W. 247, 248 (Wis. 1919) ("Auction sales have always been subject to the conditions announced upon the opening of the sale by the auctioneer..."); *Moore v. Berry*, 288 S.W.2d 465, 468 (Tenn. Ct. App. 1955) (upholding condition that seller reserved right to reject any and all bids because it is the right of the owner to prescribe the conditions and terms of the sale); 7 Am. Jur. 2d. *Auctions and Auctioneers* § 17 (2007) ("The manner of conducting the sale," including the rules of bidding, and the right to reject bids that are not in conformity with the terms and conditions of the auction, "lies wholly within the auctioneer's discretion."). Even the case relied upon the Attorney General, which did not involve an auction for public land or the unique authority granted to the Commissioner, recognized that "it is the seller's right in connection with the sale of property at a public auction to prescribe, within reasonable limits, the manner, *58 conditions, and terms of sale." *Hamrick v. Summey*, 320 S.E.2d 703, 705 (S.C. 1984).²⁴

More fundamentally, the contention that there can be no conditions that "narrow the universe" of potential bidders is wholly illogical. Any auction or public offering, by necessity, has conditions that will have that effect, and public officials have the right to include specifications when soliciting bids or proposals. If the Commissioner decides to auction land in Northern New Mexico, for example, he excludes those interested in land in the southern part of the state. If he auctions 40-acre land parcels, he excludes those who could only afford, or are only interested in, 20-acre parcels, or those who are interested only in larger holdings. Public agencies routinely impose specific eligibility requirements when issuing requests for proposals, and thus "narrow the universe" of people who can submit proposals. Indeed, New Mexico's Procurement Code expressly requires state agencies to identify bidding requirements when issuing a request for proposals, and *59 thus narrow the universe of people who are eligible to submit bids. See *NMSA 1978, § 13-1-103(A)* (2006) (requires an invitation for bids to include "the specifications for services, construction or items of tangible personal property to be procured, all contractual terms and conditions applicable to the procurement, the location where the bids are to be received and the date, time and place of the bid opening"); § 13-1-84 (1984) (defines a responsive bid as one that "conforms in all material respects to the requirements set forth in the invitation for bids" including, but not limited to price, quality, quantity or delivery requirements); see also *Shed Indus., Inc. v. King*, 95 N.M. 62, 63, 618 P.2d 1226, 1227 (1980) (holding that because bidder failed to conform with the bid specifications, his bid was not responsible and was properly rejected under the Public Purchases Act); *New Mexico Bus Sales v. Michael*, 68 N.M. 223, 226-28, 360 P.2d 639, 641-43 (1961) (affirming the defendant school district's rejection of the lowest bid because it did not meet the specifications and requirements of bidding).²⁵

*60 The same principle has been repeatedly applied, more generally, in the sale of trust assets by a trustee. See *Restatement (Second) of Trusts* § 190 cmt. h (1990) ("If the trustee is empowered to sell trust property, he may in the exercise of sound discretion sell it by public auction or private sale, in parcels or as a whole ... unless it is otherwise provided by the terms of the trust."); *Gregory v. Moose*, 590 S.W.2d 665, 670 (Ark. Ct. App. 1979) (court would not overrule trustee's decision as to whether to sell in bulk or in separate transactions); *Loveland v. Clark*, 18 P. 544, 549 (Colo. 1888) (trustee had discretion to decide whether to sell land in whole or in parcels). The same approach has also been adopted in both judicial and private foreclosure sales. See *McHugh v. Church*, 583 P.2d 210, 211, 218 (Alaska 1978) (trustee selling real property at a non-judicial foreclosure sale did not abuse his discretion by offering the property as a single lot, rather than individual parcels); *Voluntown v. Rytman*, 573 A.2d 336, 338 (Conn. Ct. App. 1990) (court ordering a foreclosure sale for a tax lien possesses the discretion to allow the sale to be done in parcels of land or as an entire tract).

*61 As this extensive authority shows, there is no basis for the Attorney General's contention that the Land Commissioner cannot establish the terms under which he will dispose of state trust lands. The Commissioner's authority to impose conditions is part and parcel of his discretion to decide whether or not to make land available at all. The Commissioner can determine that he is only willing to offer land under certain circumstances, and that otherwise he would prefer to hold on to those lands.

2. *The Commissioner has the discretion to reject piecemeal bids.*

More specifically, there is no support for the Attorney General's attempt to create a *per se* rule requiring the Commissioner to accept piecemeal bids.

The Commissioner has the discretion to decide how much land, whether contiguous or non-contiguous, to include in one auction. The fact that a potential bidder would have been able to bid on a smaller lot is immaterial. Not only is this authority found in the Land Commissioner's discretion to decide if, when and how to dispose of trust lands, but other courts have routinely rejected claims that a land commissioner abuses his discretion because some potential bidders did not have the resources to bid on the lot that was auctioned, but could have bid on smaller lot. See *Foster*, 19 P.3d at 632 (rejecting the argument that Arizona Land Commissioner abused his discretion by making a large lot available for bulk sale, rather than leasing land for commercial purposes); *Big Island Small Ranchers Ass'n v. Hawaii*, 588 P.2d 430, 437 (Haw. 1978) (Board of Land Commissioners did not abuse its discretion by auctioning 42,000 acres of land at one time); *Pike*, 113 P. at 454-55 (rejecting argument that the Board of Land Commissioners abused its discretion in advertising auction for 24,000 acres of land, without allowing bids for smaller parcels); *Bassett v. Mayor & Bd. of Comm'rs of Borough of Wildwood Crest*, 4 A.2d 393, 394 (N.J. 1939) ("The grouping of the lots for sale was a question of policy within the discretion of the governing body. We are unable to say on the evidence before us that the discretion was abused or that the proceeds of the sale would likely have been greater had the sale been of individual lots and not in bulk."); cf. 43 U.S.C. § 1713(e) (1976) (federal regulation regarding sales of federal land by the Secretary of the interior states that the Secretary "shall determine and establish the size of tracts of public lands to be sold on the basis of the land use capabilities and development requirements of the lands").

A rule requiring the Commissioner to accept piecemeal bids would encourage the very type of "cherry-picking" that the Commissioner is seeking to avoid, allowing bidders to demand the right to obtain only the most valuable, select trust lands, such as those having all the water, while rejecting the less desirable land, and would strip the Commissioner of his power to manage lands through exchanges designed to address the checkerboarding problems in various parts of the state. See *Henington Aff.* 1) 21 [Supp. App.10] (describing problem with *63 cherry-picking bids). The Court should not allow the Attorney General to overrule the policies of the Commissioner by imposing such a rule.

3. *The Commissioner has the discretion to decide whether to accept cash bids.*

Similarly, there is no support for the Attorney General's attempt to create a *per se* rule requiring the Commissioner to accept cash bids.

A land commissioner has the authority to decide what form of payment he will accept, and to adopt a policy preference for land-for-land exchanges over cash sales. See *Fasi*, 41 Haw. at 479 (rejecting argument that Land Commissioner abused her discretion by requiring payment over a four-year term instead of a ten-year term; "If a prospective purchaser proposed payment in four years, the commissioner would not have served the interest of the Territory by prescribing more liberal terms of payment."). Moreover, a land commissioner is required to determine what is the best bid, not merely to accept the highest cash bid. See *Forest Guardians v. Wells*, 34 P.3d 364, 371 (Ariz. 2001) ("What is highest is decided arithmetically. ...What is best is a mixed question of fact and law on which the Commissioner has considerable discretionary decision-making power."); *Campana*, 860 P.2d at 1344 (although Commissioner "has the duty to maximize revenue to the trust ... immediate revenue is not the sole consideration in determining the best interests of the trust."). As the Arizona Court of Appeals explained, "Lease revenue is not the sole factor which governs the department's *64 decision. The legislature chose a broader, 'best interest' standard that permits other considerations, such as the public benefits flowing from employing state land in uses of higher value than would the applicant for a lease." *Havasui Heights Ranch & Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 807 P.2d 1119 (Ariz. Ct. App. 1991).²⁶ Accordingly, it is within the Commissioner's discretion to determine that cash bids are not the best bids, and that he would instead prefer to maintain the aggregate value of the land holdings of the trust, while at the same time obtaining lands that are of particular value to trust and achieving his land management goals by consolidating the State's trust holdings.

And it would make *65 no sense to bar the Commissioner from announcing, in advance, that he is not willing to consider cash bids for a given exchange.

The very fact that exchanges are authorized under New Mexico law makes it clear that the Commissioner has the authority to refuse cash-only bids. Indeed, the Attorney General's attempt to require the Commissioner to accept cash payments is not only contrary to the prior opinion issued by his office, which held that the Commissioner was permitted to conduct land exchanges, see N.M. Att'y Gen. Op. 91-15 (1991), but contrary to the common-sense, generally accepted, and preferred understanding of the word "exchange." "Exchange" does not, in common parlance, or even in the commonly accepted usage at law, involve the payment of money. See Black's Law Dictionary 505 (5th ed. 1979) (defining an exchange to mean "to barter; to swap. To part with, give or transfer for an equivalent."). The Commissioner has always interpreted an exchange to be the transfer of land-for-land. See 19.2.21.7 NMAC ("Exchange means a conveyance of trust lands by the commissioner to a party in exchange for a conveyance of non-trust lands by that party to the commissioner.")²⁷ Even when issuing their contradictory opinions, Attorneys General Hal Stratton and Tom Udall understood an exchange to be a *66 like-for-like transfer. Compare N.M. Att'y Gen. Op. 88-35 (1988) (relying on the distinction between exchange and sale in denying the commissioner's authority to engage in exchanges) with N.M. Att'y Gen. Op. 91-15 (1991) (authorizing the Commissioner "to exchange public lands for lands of equal or greater value").

The Attorney General's attempt to limit the Commissioner's authority to refuse cash bids is based on a fundamental misunderstanding of the Commissioner's duties. The Attorney General assumes that the Commissioner has the singular duty to maximize the immediate revenue to the trust. The Commissioner, however, is not merely an auctioneer; his purpose is not simply to sell off trust lands. The Commissioner is charged with the responsibility for managing the lands, and indeed his management concerns in some circumstances are often paramount to short-term revenue goals. Accordingly, he has determined that he will consider land exchanges if they both increase the aggregate value of the trust's land holdings and further his land management goals. He has also made a policy determination that land exchanges are preferable to cash sales except in limited circumstances, as land-for-land exchanges not only preserve the aggregate value of the trusts land holdings, but are preferable to cash sales in a recessionary market, because the land exchanged will be of equal or greater value and will increase in value as the real estate market improves. See McDowell Aff. ¶ 5 [Supp. App. 50-51]. The Commissioner therefore determined, reasonably, and as *67 he has the power to do, that it would be poor policy for the Commissioner to reduce the trust's real estate holdings and sell off the State's best holdings for cash. Indeed, if faced with only this choice, the Commissioner would not make these lands available at all, because he does not believe such sales are in the best interest of the trust. The Court should reject the Attorney General's attempt to impose a *per se* rule requiring the Commissioner to accept cash bids.

B. The Land Commission Has the Duty and Authority To Determine Whether the State Will Obtain Sufficient Value Before Deciding to Hold an Auction.

Moreover, the Attorney General is wrong in asserting that the Commissioner acts improperly in considering a specific land-exchange proposal and determining through discussions with an exchange applicant what value he can receive in an exchange before deciding whether to hold a public auction. Such action is not only constitutionally permissible, and indeed authorized by the regulations promulgated by the Commissioner, but necessary for the Land Commissioner to protect the trust assets.²⁸

This question has been decided in other western states with public officers who hold similar positions. For example, the Commissioner of Public Lands for the State of Hawaii employed a process similar to the one adopted by New Mexico *68 before auctioning a tract of land. See *Fasi*, 41 Haw. at 471. A prospective purchaser approached the Land Commissioner and expressed interested in purchasing a particular tract of state trust land. See *id.* The purchaser indicated that it was willing to make improvements to the lot. See *id.* The Land Commissioner, after concluding that the purchaser's proposal was in the best interest of the state, offered the land for sale, but required any bidders to promise the same improvements. See *id.*

The Hawaii Supreme Court rejected a claim that this process was inappropriate, and offered the following explanation:

The decision is not that the sale be made to this prospective purchaser. The decision is that here is a proposal for improvement which is in the interest of the development of the area; here is a prospective purchaser who is willing to meet the minimum standard of improvement which is deemed desirable by the commissioner and the board; there may be other prospective purchasers who may be willing to exceed that standard; so let the Territory offer the land for sale with conditions to assure that at least that minimum standard will be met.

When a proposal is made containing a certain standard of improvement, the commissioner, as a responsible public official, will be derelict in her duty if she does not prescribe the conditions to assure that such minimum standard will be met. Such conditions include not only requirements as to minimum cost of improvements but also requirements as to time of performance and assurance of performance.

Id. at 471-72.

The Hawaii Supreme Court is not alone in reaching this conclusion. The Idaho Supreme Court faced a similar situation in *Pike*, where that state's Board of *69 Land Commissioners entered an agreement with the Potlatch Lumber Company, granting it the rights to harvest timber from a 24,000 acre tract of land for a period of 20 years. *See Pike*, 113 P. at 448. The Company later submitted an application to purchase the same lands in fee. *See id.* Before agreeing to auction the lands, the Board required the Company to sign a contract promising that it would submit a bid for at least the appraised value. *See id.* If the company submitted the winning bid, it would own the land outright. If, however, another party submitted the winning bid, Potlach would retain its timber harvesting rights.

The petitioner filed a protest, arguing that auction as structured was designed to solicit a bid only from Potlach. *See id.* at 449-50. The Court disagreed, concluding that

It was eminently proper for the board to require the company to enter a contract agreeing to pay the appraised value of the land before it went to the trouble and expense of advertising the land for sale. This is a similar practice to that adopted by the Department of the Interior in selling fractional subdivisions of the public domain. An applicant to purchase is required to enter into an agreement to bid as much as the minimum price before the government will advertise the land for sale.

Id. at 454. That Court further held that these types of preliminary agreement do not render the public auction a sham because the applicant must still submit the highest bid in order to obtain the lands. *See id.* ("These type of conditions do not change a sale from the character of a public auction to the condition of a private sale.").

*70 In other contexts, courts have held that a public entity has the right to conduct negotiations with prospective bidders before holding a public auction. A New York Court, for example, rejected an argument that the City of New York acted improperly by entering a tentative contract with New York University before putting city lands up for auction. *See Bleeker Luncheonette, Inc. v. Wagner*, 141 N.Y.S.2d 293, 298 (N.Y. Sup. Ct. 1955). The Court explained that

[T]he terms of sale here invite, rather than limit, open competition and that plaintiff appears to disregard the fact that the contract with New York University is only tentative, and can be effective only in the event such university is the successful bidder at the public auction to be held.

Id.

If the Commissioner did not have the discretion to determine the structure of a land offer, in a manner designed to allow for a specific exchange proposed by a specific land holder, while also soliciting competing proposals, those entities would have no incentive to enter arrangements with the State, but would seek other land to fulfill their development goals. The Commissioner,

in turn, could not target specific tracts for acquisition, which would severely hinder his ability to achieve land management objectives, such as the consolidation of state trust holdings, the reduction in “checkerboarding.”

Indeed, a ruling prohibiting the Commissioner in engaging in the same level of investigation before deciding whether to offer lands for exchange, would have *71 the effect of prohibiting the Commissioner from conducting land exchanges altogether, or would unduly limit his power to facilitate land exchanges in a manner that will benefit economic development and the trust.

Ultimately, the Attorney General is asking the Court to construe the Constitutional requirements as removing all ability of the Commissioner to structure auctions so that the Attorney General can veto the Commissioner's policy decisions. Those decisions, however, are properly subject to the approval or disapproval of the electorate, not the Attorney General, and this Court should not turn its back on a century of jurisprudence and allow the Attorney General to invade the independent executive functions of the Commissioner and prevent the Commissioner from acting in the best interest of the State and the trust.

III. THE ATTORNEY GENERAL IS ASKING THIS COURT TO EITHER OVERRULE THE COMMISSIONER'S PROPERLY PROMULGATED REGULATIONS.

In addition to its other flaws, the Attorney General's Petition is also an improper attack on the Commissioner's rule-making authority.

As discussed above, the Commissioner enacted a comprehensive set of procedures that govern land exchanges, refining a similar set of regulations that had been established previously by Commissioner Baca. He followed those procedures when considering and evaluating the White Peak exchanges. Indeed, each of the actions that the Attorney General seeks to challenge were done in *72 accordance with, and expressly authorized by, those regulations. In particular, the regulations contemplate that the Commissioner can, and will, exclude cash bids. NMAC 19.2.21.9(D) (permitting the Commissioner to include in his request for exchange proposals “information regarding the types and locations of non-trust lands the commissioner is interested in acquiring.”). In addition, the Commissioner is authorized to consider land exchange proposals and, if he determines the proposals would be in the best interest of the trust, to advertise a request for exchange proposals based on the terms set out in the proposal that was submitted to the Land Office. See 19.2.21.9(B)(6) NMAC.

The Commissioner is specifically authorized by Legislature to promulgate regulations necessary to carry out his Constitutional and statutory duties. See [NMSA 1978, §19-1-2\(1912\)](#) (“He shall make rules and regulations for the control, management, disposition, lease and sale of state lands and perform such other duties as may be prescribed by law.”). This Court has long recognized that an administrative body's established construction of a statute, as embodied in regulations, is binding on the State. See [High Ridge Hinkle Joint Venture v. City of Albuquerque](#), 1998-NMSC-050, ¶ 5, 126 KM. 413, 970 P.2d 599 (noting that courts will “give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them”); *73 [Pub. Serv. Co. of New Mexico v. New Mexico Taxation & Revenue. Dep't](#), 2007-NMCA-050, ¶ 41, 141 N.M. 520, 157 P.3d 85.²⁹ This principle applied with equal force to statutory interpretations adopted by the Commissioner. See [State v. McElroy v. Vesely](#), 40 N.M. 19, 52 P.2d 1090 (1935) (Buckley, J., concurring) (court deferred to commissioner's interpretation of statute as allowing for renewal of leases).

*74 Both this Court and the Court of Appeals of New Mexico have repeatedly held that the authority of an administrative agency to make rules and regulations includes not only the powers expressly granted by statute, but all powers that may fairly be implied from the statute. See, e.g., [Howell v. Heim](#), 118 N.M. 500, 504, 882 P.2d 541, 545 (1994) (“The agency's authority [to promulgate rules and regulations] is not limited to the express powers granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication.”); [New Mexico Dep't of Health v. Ulibarri](#), 115 N.M. 413, 416, 852 P.2d 686, 689 (Ct. App. 1993) (same). This is consistent with the principle that an agency's regulations are entitled to a presumption of validity. See, e.g., [New Mexico Mining Ass'n v. New Mexico Mining Comm'n](#), 122 N.M. 332, 337, 924 P.2d 741, 746 (Ct. App. 1996) (recognizing the presumption of validity of regulations of administrative agencies). Applying

those standards to this case, the Commissioner's land exchange regulations are entitled to a presumption of validity, and are to be accorded deference by the Court.

The decision of an agency charged with the responsibility of administering an act of the New Mexico Legislature to employ a particular regulation is entitled to deference and a court may not substitute its judgment for the judgment of the administrative agency. See *Howell v. Heim*, 118 N.M. 500, 505, 882 P.2d 541, 546 (1994) (New Mexico courts will not substitute their judgment for that of the *75 administrative agency responsible for administering an act of the legislature); W. *Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶ 26, 122 N.M. 495, 927 P.2d 529 (noting that deference is generally afforded to an agency's interpretation of its regulations because of the superior expertise, knowledge, and resources).

That the Commissioner's exchange regulations are legal and binding on the State is further reinforced by the fact that the Legislature has not acted in any way to overturn the Commissioner's regulations. As the Court of Appeals observed in upholding Taxation and Revenue Department regulations in *Alexander v. Anderson*, 1999-NMCA-021, ¶ 17, 126 N.M. 632, 973 P.2d 884:

[T]he Legislature, which is presumed to have known of the regulation's existence and effect, apparently accepted it as valid and consistent with the previous Section 7-36-20, Therefore, we determine that TRD's promulgation of 3 NMAC 6.5.27.1.1 was a legal exercise of delegated legislative authority.

(internal citations omitted).

The Legislature is presumed to have been aware of the Commissioner's exchange regulations and they should be deemed a legitimate exercise of the Commissioner's authority.

The Commissioner followed the procedures established in his regulations governing land exchanges. Because his interpretation of the statute entrusting him with the responsibility to control and manage state trust lands, and his properly *76 promulgated regulations, are entitled to deference, the Attorney General should not be allowed to challenge the Commissioner's discretionary authority to determine the proper method for conducting land exchanges.

CONCLUSION

The petition for writ of mandamus should be denied and the emergency stay dissolved.

Footnotes

- 1 A sale of land not only depletes the value of the permanent state land base, but also results in the cash proceeds from the sale being invested by the State Investment Council. N.M. Const. art. XII, §§ 2 and 7; NMSA 1978, §§ 6-8-1 to -22 (1997, as amended through 2009) and 19-1-17 (2005). The Commissioner, by law, sits as a member of the Council, and is aware of the advantages and disadvantages of investing permanent funds through the Council. A value-for-value land exchange, in contrast, does not deplete the value of the permanent land base and preserves assets that were intended to be maintained and managed as part of the perpetual Enabling Act Trust for the benefit of future generations.
- 2 Additionally, it is simply not true that a cash bidder would be barred from acquiring the lands proposed to be exchanged in the White Peak area. A cash bidder would merely have to locate and put under contract other lands of equal value to those the Commissioner proposed to exchange in order to participate in the competitive bidding. A cash bidder would not need to have land equal to the minimum bid amount in order to place a bid; she would merely have to be able to deliver land of that value at the time of closing. See [App. S-9] (reflecting requirement that land not owned at application stage need only be owned in fee simple "at the time of the closing" of the proposed exchange).
- 3 The fragmentation of public lands results in a "checkerboard problem" in which neither a private owner nor the public owner can gain access to its property without encroaching on the other's land. The problems resulting from checkerboarding have plagued the management of state and federal lands. Merry J. Chavez, *Public Access to Landlocked Public Lands*, 39 Stan. L. Rev. 1373, 1377-78

(1987) (“Approximately 40 to 60 percent of all public lands in the West have serious access problems and one-third of the public lands have no legal overland access at all.”); George Cameron Coggins and Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Commons and the Taylor Act*, 13 *Envtl. L. J.* 10 (1982) (“As with the checkerboarded railroad grants, the location of state holdings also raises a variety of access problems.”). Fragmentation makes management of public lands difficult and inefficient. Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States*, 48 *Nat. Resources J.* 303, 331 (2008) (stating that fragmentation of state trust lands hinders “comprehensive, sustainable management”); Bill Paul, *Statutory Land Exchanges that Reflect “Appropriate” Value and “Well Serve” the Public Interest*, 27 *Pub. Land & Resources L. Rev.* 107, 111 (2006) (“From the outset, . . . the dispersed nature of the government’s lands, as well as accompanying access problems, created impediments to management.”).

- 4 As used here, “parcel” means a section of land (640 acres) or a smaller piece of state trust land within a section.
- 5 The checkerboard nature of state trust lands is not unique to New Mexico. See generally, Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 *Land & Water L. Rev.* 1 (1994). See also Coggins and Lindberg-Johnson, *supra*, at 4-22; George Cameron Coggins, *Overcoming The Unfortunate Legacies of Western Public Land Law*, 29 *Land & Water L. Rev.* 381, 384, 394 (1994); Sally K. Fairfax *et al.*, *The Federal Forests Are Not What They Seem: Formal and Informal Claims to Federal Lands*, 25 *Ecology L.Q.* 630, 634-35 (1999); Nicholas G. Vaskov, *Continued Cartographic Chaos, or a New Paradigm in Public Land Reconfiguration? The Effect of New Laws Authorizing Limited Sales Public Land*, 20 *UCLA J. Env’tl. L. & Pol’y* 79, 80-82(2001/2002).
- 6 See History of State Land Office Exchanges, 1933-1987 [Supp. App. 21-28].
- 7 See Exchange Agreement [Supp. App. 29-35] (detailing an exchange of trust lands located in McKinley County with private lands located in Cibola County.).
- 8 See December 7, 1993 Exchange Rpt. [Supp. App. 45-47]. Commissioner Baca’s list of potential exchanges even included parts of the Stanley Ranch.
- 9 See December 20, 1993 memorandum from Deputy Commissioner Bob Langsenkamp to Pleas Glenn [Supp. App. 48] (reflecting Commissioner Powell’s conclusion that it would be desirable to shift toward a “restructuring of our trust land portfolio to include more commercial, residential, and industrial-development potential lands” and a directive to maintain a listing of properties which the Land Office would be interested in acquiring in order to be “. . . able to react in a logical and responsible way to any potential exchange partner. . .”).
- 10 In just the last several years, land-for-land exchanges conducted by the State Land Office have facilitated the creation of additional open space for Albuquerque-area residents, the construction of new school buildings for Albuquerque Public Schools, the construction of a new satellite campus for the University of New Mexico in Rio Rancho, New Mexico, the creation of jobs associated with commercial and residential development in the South Valley of Albuquerque through the Mesa del Sol exchange, the construction of a new campus in central New Mexico for the New Mexico School for the Blind and Visually Impaired, and the development of a community service center that will allow the non-profit Easter Seals Santa Maria El Mirador organization to better serve the developmentally disabled and **elderly**. See Henington Aff. ¶ 5; Ex. A [Supp. App. 3, 14-20].
- 11 The importance of land exchanges in New Mexico has been discussed in other contexts as well. In 1991, then-Representative Bill Richardson, speaking before the House of Representatives regarding energy introduced a memorandum from then-Commissioner Jim Baca describing the checkerboard problem and explaining that he hoped, through consolidation of state trust lands, to “improve management capabilities, financial return to [the trust] beneficiaries, and environmental protection for the State of New Mexico.” See 137 Cong. Rec. E861 (daily ed. Mar. 7, 1991) (statement of Rep. Richardson).
- 12 Accordingly, Attorney General Udall indicated that the analysis by his predecessor was flawed because it “failed to consider the general power of disposal granted to the Commissioner by the New Mexico Constitution. Moreover, the opinion analyzed whether the term ‘exchange’ could be considered part of the term ‘sale,’ which term is only mentioned in the Enabling Act and not in the Constitution, and failed to consider whether ‘exchange’ was included within the term ‘dispose’ in both the Constitution and the Enabling Act. In addition, the opinion failed to consider the broad construction repeatedly given the Commissioner’s powers by the New Mexico Supreme Court and that the Court had decades ago rejected the narrow construction advanced by the opinion.” N.M. Att’y Gen. Op. 91-15 (1991).
- 13 Prominent academic commentators have also urged land exchanges to consolidate lands and address checkerboard issues. See, e.g., Coggins and Lindberg-Johnson, *supra*, at 10. Land exchanges between federal and state governments and between government and private landholders have become a common means of consolidating land holdings. Daniel Dansie, *The Washington County Growth and Conservation Act of 2006: Evaluating a New Paradigm in Legislated Land Exchanges*, 28 *J. Land Resources & Env’tl. L.* 185, 188 (2008); Ryan M. Beaudoin, *Federal Ownership and Management of America’s Public Lands Through Land Exchanges*, 4 *Great Plains Nat. Resources J.* 229 (2000); Holly Chamberlain, *A Plan of Action: A New Alternative to Traditional School Trust Land Exchanges in the West?* 23 *J. Land Resources & Env’tl. L.* 241, 247-253 (2003).

- 14 A11 listed values were established by independent appraisal and then confirmed by the Land Office's internal appraiser. See McDowell Aff, ¶ 4 [Supp. App. 51].
- 15 This Court has also exercised its mandamus jurisdiction to compel the Commissioner to perform certain ministerial acts. See *Walker*, 60 N.M. at 463, 292 P.2d at 332 (compelling the Commissioner to accept and file lode mining location notices in accordance with former statute providing for the filing of such notice); *State ex rel. Evans v. Field*, 27 N.M. 384, 201 P. 1059 (1921) (compelling Commissioner to issue a deed where petitioner had paid off land sale).
- 16 The Attorney General acknowledges that the Commissioner followed the specific requirements set out in the Enabling Act. See Petition at 45 (conceding that the Commissioner provided public notice as required under the Enabling Act) and at 2 (conceding that the appraised value of the lands that will be added to the trust lands exceeds the value of those to be exchange).
- 17 The Attorney General later rephrases what is essentially the same question in the following way: “[D]o conditions imposed by the Commissioner on a public auction that, on their face, favor predetermined deals with private parties and substantially circumscribe the universe of potential bidders violate the public auction requirement of Section 10 of the Enabling Act, as well as Article XIII, Section 2 and Article XXI, Section 9 of the New Mexico Constitution?” See Petition at 21-22.
- 18 Moreover, the Attorney General's representations regarding the limitations on the bid are factually inaccurate. The Commissioner did not limit bids to those from a single party. Multiple parties could have collaborated to bid on the parcels as a collective. Similarly, the Attorney General is wrong in asserting the bid structure excluded those parties without land currently available. A bidder who would otherwise bid cash may put under contract, by option or otherwise, land that he would propose to deliver at closing. Thus, cash bidders are not, in fact, excluded from the process; they merely have to deliver payment in land if they succeed in making the “highest and best” bid. See [App. S-9]. Thus, the process allows a cash bidder to participate, while at the same time ensuring that the aggregate value of trust land base is not diminished.
- 19 Indeed, there are serious doubts concerning the Attorney General's standing to bring this action. When a state attorney general brings an action, “it must be for redress of wrongs done to the interests of the people as a whole and not merely to vindicate the individual or private interests of certain citizens.” *Abrams v. New York City Conciliation & Appeals Bd.*, 472 N.Y.S.2d 839, 841 (N.Y. Sup. Ct. 1984); see also *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 607 (1982) (stating that in order to sue under the doctrine of *parens patriae*, a state attorney general must articulate an interest apart from the particular private parties, and that the injury alleged must be to more than an identifiable group of individual residents, but the state must show an injury to a substantial segment of its population). Moreover, “[i]f the aggrieved individual has an adequate remedy at law, then the State is merely a nominal party with no real interest of its own. As a nominal party the State would not have the capacity to sue as *parens patriae*.” *Abrams*, 472 N.Y.S.2d at 841. The Attorney General bases this action on the claim that the parties that may have been interested in bidding on the lands made available through the challenged auctions -- or may be interested in bidding on the additional lands that may be auctioned in the future -- were discouraged from bidding because of the required bidders to offer a minimum land value and to bid on all land being offered at the auction. See Petition at 4-5, 40. This claim is one that involves purely private interests: the interests of a limited number of private parties that might have the interest and resources to bid at a land auction. Those private parties, however, have a remedy available to challenge the decisions of the Commissioner: they have the right to bring an appeal, within the applicable 30-day time limit, pursuant to NMSA 1978, Section 19-7-67 (1999). The Attorney General should not be allowed to circumvent the administrative process by bringing an untimely claim on behalf of parties who failed to exhaust their administrative remedies.
- 20 Moreover, the Attorney General has sought a stay of the challenged exchanges. While the Commissioner denies that the Attorney General has the basis for a stay, this is not a form of relief unique to the Supreme Court in mandamus proceedings. The Attorney General could have similarly requested a stay in a proceeding before a district court, and that court could have conducted the appropriate proceedings, including an evidentiary hearing, if necessary, in order to determine whether a stay is appropriate.
- 21 Incredibly, the Attorney General asks this Court to accept his argument that there are no factual issues while at the same time asking the Court to draw a factual distinction between the circumstances in *Campana* and the circumstances here. See Petition at 43. In particular, he argues that, while the *Campana* court determined that the lack of bidders in that case was not the result of improper conditions, but was “explainable by a host of reasons from lack of interest to lack of money,” the lack of bids in the challenged auctions cannot be explained on the same grounds. See *id.* This argument is directly contrary to his contention that there are no factual disputes: whether this is a valid distinction, or whether in fact the same situation is present here, cannot be when there has been no opportunity for a full factual inquiry.
- 22 See also 73B C.J.S. *Public Lands* § 288 (2004) (“Authority for the leasing of state lands is, where provided, in a designated public body, which may be vested with wide discretion in the matter.”); 63C Am. Jur. 2d *Public Lands* § 64 (1997) (“As a trustee for the state in handling these lands, an officer or board has a certain amount of discretion in controlling, managing, disposing of state lands.”).
- 23 The remaining cases cited by the Attorney General do not support his position that the Court can adopt a per se rule barring the Commissioner from preferring land exchanges to cash sales or imposing a minimum or maximum acreage requirement for land auctions. To note just a few examples, the Attorney General cites *Pyles v. Goller*, 674 A.2d 35 (Md. Ct. Spec. App. 1996) and *Preske*

v. Carol, 16 A.2d 291, 295 (Md. 1940), for the proposition that an auction, to be public, must be held in a public forum, see Petition at 40, and to *Rogers v. South Charleston*, 256 S.E.2d 557 (W.Va. 1979) for the proposition that access to a public auction ensures that the auction results in a fair sales price. See Petition at 42. The Attorney General, however, does not dispute that the challenged auctions were properly advertised and that bidding was open to the public and does not dispute that the Commissioner received lands that exceed the value of the lands he is offering in exchange. Moreover, far from supporting the Attorney General's position, the *Pyles* court held "[t]he terms of an auction can be established by the advertisements or other publications released by the sellers" and that "[t]hese terms are binding unless modified or changed prior to the start of the auction." *Pyles*, 674 A.2d at 42 (citing to Restatement (Second) of Contracts and § 28(2) (1981); 7 Am. Jur. 2d §§ 14 & 17, and *Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 520 (1925)). The Court held that the auction in that case was invalid not because the seller imposed conditions, but because he failed to disclose those conditions to the bidders. See *id.* Similarly, *Rogers* is inapplicable because in that case the public board did not hold any auction, but entered into a sale contract with an interested buyer. See *Rogers*, 256 S.E.2d at 559-60. *Preske*, also offers no support for the Attorney General's position, because the Court treated the claim that the auctioneer had stifled bidding -- by closing out bidding too early -- as a question of fact, and rejected the plaintiff's claim on the grounds that he failed to present any evidence that anyone was prevented from making a bid. See *Preske*, 16 A.2d at 295.

24 One purpose for the seller setting terms and conditions is to allow everyone to be on a level playing field, playing by the same rules on the same day. See Alliance Land Auction, The Auction Process, http://www.alliancelandauction.com/auction_process.php (last visited Feb. 16, 2010). Indeed, when no terms are set, or set terms are deviated from, an auction sale will be invalid. See e.g., *Mohave County v. Mohave-Kingman Estates, Inc.*, 586 P.2d 978, 981 (Ariz. 1978) (stating the general rule that a public agency cannot contract with a low bidder for terms not included within the bidding requirements of the auction); *Ariz. Bd. of Regents v. Main Street Mesa Assoc.*, 891 P.2d 889, 893 (Ariz. Ct. App. 1994) (explaining that where obligation was to sell property to the "highest and best bidder" the agency could not contract, even with the highest bidder, for terms not included in the specifications).

25 Indeed, courts regularly rebuff attempts to limit the authority of an agency to propose specific requirements when soliciting bids. See, e.g., *Powercorp Alaska, LLC v. Alaska*, 171 P.3d 159, 163-64 (Alaska 2007) (holding agency acted within its discretion when limiting potential bidders for public project to only those using one type of operating system because an agency is best suited to understand how best to meet its objective needs); *Fleetcor Techs. Operating Co., LLC v. Louisiana*, No. 2009CA0976, 2009 La. App. LEXIS 2184, at *23 (La. Ct. App. Dec. 23, 2009) (it is within the agency's discretion to choose the responsible bidder based on who offered features that best met the requirements of the request for bids); *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 370 (Minn. Ct. App. 1999) (city had discretion to require bidders to enter into a project labor agreement as a condition to being awarded a construction contract; bidder had heavy burden of proof, because "[t]he decision whether to impose a bid specification on a public contract is left to the discretion of the public entity."); *Direnzo Coal Co. v. Dep't of Gen. Servs.*, 825 A.2d 773, 774 (Pa. Commonw. Ct. 2003) (state agency had discretion to require bidders for a statewide coal contract to become certified coal vendors and provide coal with a specific ash content; the agency had "discretion to prepare necessary specifications to meet its minimum needs," and the fact that only one bidder may be able to meet the requirements did not, alone, make the specifications invalid).

26 See also *Williams v. Topeka*, 118 P. 864, 866 (Kan. 1911) ("In determining who is the lowest responsible bidder, or the lowest and best bidder, the duty of the board or officer is not merely ministerial, but *partakes of a judicial character* requiring the exercise of discretion and judgment. Consideration must be given not only to the pecuniary ability of the bidders to perform the contract, but also to the skill, ability, and integrity necessary to do faithful, conscientious work, and to fulfill the terms of the contract.") (emphasis in original); *Bancamerica-Blair Corp. v. State Highway Comm'n*, 95 S.W.2d 1068, 1070-71 (Ky. Ct. App. 1936) (rejecting disappointed bidder's challenge that he should have been awarded the contract as he submitted the highest bid because the commission was required to determine which was the "highest and best bid" and this decision was within the discretion of the commission; "The requirement that the commission take the highest and best bid is enacted for the benefit of the public, and not for the benefit of the bidders."); *MCI Telcoms. Corp. v. Bd. of Franklin County Comm'rs*, 711 N.E.2d 1050, 1058 (Ohio Ct. App. 1998) (affirming judgment for defendants and holding that "highest and best" bid did not require award to the bid offering the highest percentage of commission, but that the determination of the highest big is ministerial in nature, and that "the issue of who is the best bidder is not susceptible of definition, and in such cases the matter is left to the discretion of the officers awarding the contract.") (internal citations and quotations omitted).

27 As discussed in more detail below, see *supra* Part III, this regulation has never been challenged by the Attorney General or any other party. Moreover, this regulation stands as the Commissioner's interpretation of the statute granting him both the power and duty to manage state trust lands, and that interpretation is entitled to deference.

28 We do not understand the Attorney General to argue that the Commissioner is barred from any prior contact with a potential bidder. Such a rule would be entirely unworkable and has no support in the law.

29 See also *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 71, 129 N.M. 1, 1 P.3d 383 ("The Court will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function."); *Gonzales v. Allstate Ins. Co.*, 1996-NMSC-041, ¶ 23, 122 N.M. 137, 921 P.2d 944 ("This

Court has frequently said that ‘the statutory interpretations of the agency charged with administration of the statute are persuasive and will be given deference by the courts. . . . This rule of law is, of course, subject to the condition that the agency’s interpretation be a *reasonable* one.’”) (internal citations omitted) (emphasis added); *Regents of Univ. of New Mexico v. Hughes*, 114 N.M. 304, 312, 838 P.2d 458, 466 (1992) (“[I]t is hornbook law that an interpretation of a statute by the agency charged with its administration is to be given substantial weight, and is entitled to judicial deference.”); *Stokes v. Morgan*, 101 N.M. 195, 202, 680 P.2d 335, 342 (1984) (“The special knowledge and experience of the state agencies should be accorded deference.”); *Raton v. Vermijo Conservancy Dist.*, 101 N.M. 95, 99, 678 P.2d 1170, 1174 (1984) (“[T]he statutory interpretations of the body charged with administration of the statute are persuasive.”); *Martinez v. Research Park, Inc.*, 75 N.M. 672, 681-82, 410 P.2d 200, 206 (1965), (long-standing interpretations of statutes by an agency are persuasive); *Clark v. New Mexico Children, Youth & Families Dept.*, 1999-NMCA-114, ¶ 7, 128 N.M. 18, 988 P.2d 888 (“[G]enerally, an agency’s *reasonable* statutory interpretation, when that agency is charged with the statute’s administration, is persuasive and given deference by the courts.”); *State ex rel. Battershell v. Albuquerque*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989) (“[A] reviewing court may, where appropriate, accord substantial weight to the interpretation given a statute or regulation by a body charged with administering such law.”); *Pharm. Mfrs. Ass’n v. New Mexico Bd. of Pharmacy*, 86 N.M. 571, 576, 525 P. 2d 931, 936 (Ct. App. 1974) (“Reviewing courts overturn the administrative interpretation of statute[s] by appropriate agencies only if they are clearly incorrect.”).

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