



2015 Annual Report
New Mexico Office of the Attorney General



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I am pleased to report that during our first year in office we worked hard to serve and protect the State of New Mexico. I grew up facing many of the hardships that New Mexicans experience every day, and it is that shared experience that motivates me to be a fierce advocate and a voice for our communities. This annual report highlights some of our most significant achievements from 2015.

Over the next year, we will continue to build on our successes, doing everything in our power to make all New Mexico communities safer and more prosperous.

Sincerely,

A handwritten signature in blue ink, appearing to read "Hector Balderas". The signature is stylized and fluid.

HECTOR BALDERAS
Attorney General of New Mexico

PREAMBLE

On taking office in January 2015, Attorney General Hector Balderas established priorities that reflect his commitment to improve the safety, health and prosperity of every New Mexican. This report of the activities of the New Mexico Office of the Attorney General (OAG) during the first year of the Balderas administration reflects those priorities and includes the text of all opinions issued, as required by law, as Appendix A.

In order to become more responsive to the needs of New Mexicans, Attorney General Balderas made efficient agency operation a top priority. He reviewed staffing levels, internal policies and procedures, and worked to improve efficiency and performance through innovation, consolidation and cooperation. The Attorney General streamlined senior staff into an effective cross-disciplinary leadership team with an eye toward making OAG operations among the most professional, accomplished and reputable in the country through efficient use of every resource.

OAG was reorganized into four divisions, discussed below: Policy and Public Affairs, improving communications among OAG and other agencies, constituents and legislators; OAG's traditional criminal and civil affairs divisions; and Operations, concentrating on administrative services including human resources, finances and procurement.

OAG LEADERSHIP TEAM

Immediately on taking office, Attorney General Balderas assembled a smart, hard-working, ambitious team to lead OAG's divisions through sweeping changes implemented to serve his commitment to protecting New Mexico families.

The leadership team has been led by Chief Deputy Attorney General Elizabeth Glenn, an attorney with experience across the administrations of four attorneys general. The leadership of Ms. Glenn allowed OAG to maintain a solid foundation for communications among divisions. At the same time, the consistent leadership of Ms. Glenn has allowed for division directors to come on board and begin to change OAG's direction to becoming increasingly transparent, accountable and efficient.

The team members are:

- **John Wheeler, Chief Counsel**
- **Sonya S. Carrasco-Trujillo, Chief of Staff for Policy and Public Affairs**
- **Sharon L. Pino, Deputy Attorney General for Criminal Affairs**
- **Peter Auh, Deputy Attorney General for Civil Affairs**
- **Carla Martinez, Chief of Staff for Operations**

IMPROVEMENTS IN ACCESSIBILITY OF OAG

In conjunction with Attorney General Balderas' commitment to efficiency was his effort to make the Office of the Attorney General more accessible to the general public. Part of the effort towards accessibility caused staff to design a new, more user-friendly website. In place as of June, 2015, the website offers 24/7 access in both Spanish and English to information about the office, and simple complaint forms for those wishing to submit concerns regarding Medicaid fraud, consumer fraud, charities fraud and criminal activities. Because of the online access, consumers even in very remote areas can command the resources of OAG for a meritorious complaint with ease.

The internet era has united New Mexicans in many ways, making it possible for a consumer in Aztec to gain access to OAG's expertise through our website and, conversely, making it possible for investigators from the OAG's Internet Crimes Against Children (ICAC) task force to lend technical expertise and internet capability to local police in Clovis to identify and prosecute predators that could otherwise go undetected. Even so, there is no real substitute for in-person contact with policymakers.

Attorney General Balderas therefore has made geographic accessibility a priority at OAG, traveling throughout the state himself, scheduling community meetings outside the Rio Grande Corridor when possible, and assigning educational and constituent outreach staff to bring trainings to the far corners of the state.

In keeping with the goal of being more accessible to people in New Mexico's smaller and/or relatively remote communities, the Attorney General:

- In June, convened the first of the meetings as chair of the Law Enforcement Academy Board in Espanola, NM.
- In July, met with pecan growers and others in Las Cruces to discuss water rights in the wake of state and federal litigation in the U.S. Supreme Court. After the meetings, the attorney general traveled in August to New Orleans to observe as New Mexico attorneys argued before a special master appointed by the U.S. Supreme Court in two lawsuits--*Texas v. NM*, brought by Texas against New Mexico and Colorado for more water delivery under the Rio Grande compact and *New Mexico v. E.B.I.D.*, a lawsuit challenging agreements entered into among private irrigators with the U.S. government and without the involvement of New Mexico.
- In August, traveled to Farmington after the Animas River spill to meet with his counterparts from three other states and with leaders of the Navajo Nation to discuss response to the release of potentially dangerous chemicals including heavy metals and sulfuric acid into northwestern New Mexico waters. Within a day of the August 5, 2015 release of what the Environmental Protection Agency (EPA) estimated at 3 million gallons of contaminated water at approximately 500 gallons per minute, the attorneys general met face-to-face with EPA representatives, Navajo Nation representatives and scientists to observe the spill. Although ultimately the effects of the spill were determined not to be a danger to humans or cattle, the timely and aggressive response to federal error was key in the commencement of cleanup operations. Also in August, the Attorney General addressed the New Mexico Sheriff's Association state conference in Ruidoso.
- In September, convened the Law Enforcement Academy Board in Gallup and spoke in Farmington for the Daughters of the American Revolution's "Constitution Day" festivities, emphasizing the importance of preserving the rule of law.
- In October, convened the Law Enforcement Academy Board in Santa Rosa.
- In November, addressed the regional meeting of the federal TRIO program that provides resources for students from poor areas to attend college as well as serving as keynote speaker for the state NAACP conference, conducting a 90-minute lecture for educational leadership students from New Mexico Highlands University attended by students across the state accessing materials on the web and training the New Mexico Society of Fundraising Executives in the requirements and application of the state's Charitable Solicitation Act, reminding fundraising executives of their duties to report and register.



All the living New Mexico Attorneys General assembled in October, 2015 when Attorney General Balderas opened a gallery of photographs and portraits of New Mexico Attorneys General. They are—(l. to r.): Paul Bardacke, Gary King, Hal Stratton, David Norvell, Attorney General Balderas, Sen. Tom Udall, Sen. Jeff Bingaman, and Gov. Toney Anaya.

POLICY AND PUBLIC AFFAIRS

The existence of a Policy and Public Affairs Division at OAG is an innovation already having an impact on relationships among OAG employees and on OAG’s interactions with constituents, legislators and policy-makers. At Attorney General Balderas’ direction, the Policy and Public Affairs Division has established a practice of holding regular high-level meetings with other agency heads, legislators, educators and media to develop positive relationships and respond to emerging issues. Under the guidance of Sonya Carrasco-Trujillo, OAG has developed a sensitive and responsive constituent services department that guides education and outreach for OAG, connects with constituents, and fosters strong, positive relationships with legislative leaders and elected officials.

Constituent Affairs:

The constituent affairs function of OAG’s Policy and Public Affairs Division allows for all New Mexicans to make contact with OAG and make their voices heard. Over the past year, the intake process for constituent concerns and comments has been streamlined in order to improve response time and quality of interaction for each constituent with whom the office has contact. Since January, the constituent affairs division has been in contact with over 1,100 constituents and each individual has received either direct services from the office or has been referred to another agency that offers services better suited to constituent’s needs. The division continues to respond timely to constituent inquiries and is committed to assisting as many New Mexicans as possible in 2016.

Victim Services:

OAG continues to build a robust Victim Services Division. Since January 2015, the division has focused on providing services to victims in significant criminal cases including the successful prosecution of Wallace Carson (see more discussion in “Special Prosecutions”), who victimized three young women, all of whom were present during the trial, and who, with the help of victim advocates, offered key testimony. Further, in 2015, OAG organized a Summit on Community Violence, bringing together 169 attendees from across the state. The summit was attended by members of the law enforcement community, educators, outreach coordinators, intervention/prevention specialists, juvenile probation officers, social workers, chaplains, and community members, and covered topics ranging from neighborhood safety and gang awareness, to intimate partner violence and internet safety.

Community Outreach:

The Community Outreach Division is engaging communities across the state by putting on town hall events and offering presentations in schools to empower youth. The presentations cover internet safety; financial well-being; healthy minds; and teen dating violence. Taking a harm reduction approach to community engagement allows the division to work collaboratively with local governments and community organizations in order to break cycles of victimization and empower New Mexicans. The Community Outreach team has traveled the state, from Wagon Mound and Carlsbad, to Bloomfield and Bernalillo County, delivering over 200 presentations to students and parents. Sessions on cyber safety and financial literacy were presented in cities including Carlsbad, Ruidoso, Portales, Los Lunas, Roswell, Acoma, Wagon Mound, Capitan, Bloomfield, Eunice, and Las Cruces, as well as Santa Fe and Albuquerque. To date, presentations have reached more than 20,000 New Mexicans.

The Policy & Public Affairs team is committed to extending the reach of the office beyond the Rio Grande corridor to ensure that OAG is serving the needs of New Mexicans from all corners of the state. Over the course of 2015, activities and initiatives undertaken by the Policy & Public Affairs Division have laid the groundwork for gaining a better understanding of constituent needs, responding to the concerns of all New Mexicans, and developing programming that is relevant and best serves all communities in 2016.

CRIMINAL AFFAIRS

As the state’s chief law enforcement officer, the Attorney General works to convict criminals who threaten the lives of New Mexico’s families and vulnerable populations. OAG investigations and prosecutions are critical in shielding children and families from violence and fraud. During 2015, OAG undertook hundreds of criminal investigations, prosecutions and appeals and scored many victories within the four divisions of Criminal Affairs.

Collaborations among OAG Criminal Affairs Divisions in Multidisciplinary Violent Crime Review Team:

After the 2015 murder of Rio Rancho Police Officer, Gregg ‘Nigel’ Benner, the OAG Criminal Affairs Division, at the instruction of the Attorney General, identified law enforcement leaders, agency heads whose work affected violent crime and sentences, and individual stakeholders who have special knowledge of the impact of violence in New Mexico and formed the Multidisciplinary Violent Crime Review Team to analyze the history of defendant Andrew Romero, charged with Officer Benner’s death. The team sought to review responses of existing New Mexico agencies to such violence. The team, comprised of multiple state agencies, law enforcement, district attorneys, defense attorneys and other

critical stakeholders including social workers and educators, worked to develop recommendations for improving systemic responses to violent criminal offenders. At the close of 2015, the team was discussing recommendations for and preparing for Phase III of the review process. The work of the MVCRT promises to be among the most significant efforts ever undertaken by a state Attorney General, using a model for analyzing systemic problems that has proven useful in other arenas.

Special Prosecutions:

The Special Prosecutions Division of OAG secured convictions in all cases that proceeded to trial throughout the State of New Mexico in 2015, and prosecuted high level public corruption matters in addition to violent offenses by repeat offenders and sex offenses against adults and children. At year-end, the Special Prosecutions Division had substantially increased the volume and type of case prosecuted by the OAG, had 36 cases in review or pending indictment and 49 open cases pending trial. Cases handled by the Special Prosecutions Division include homicide, violent crimes, human trafficking, domestic violence, criminal sexual penetration, child abuse, child sexual abuse, child exploitation, money laundering, embezzlement, fraud, and public corruption.

Among the high-profile cases brought by the division was the one against New Mexico's Secretary of State Dianna Duran, who pled guilty to offenses including money laundering, embezzlement, campaign practices and reporting violations. Duran was sentenced in December 2015 to 30 days of incarceration followed by five years of supervised probation. The state legislature convened a bipartisan panel to consider impeaching the official. Ultimately, Duran resigned from office on October 22, 2015.

In addition to handling trial matters statewide from initiation to completion, the Special Prosecutions Division handled all sex offender parole hearings for the State of New Mexico; a total of 23 hearings with all but four parolees continuing on indeterminate sex offender probation in 2015. The Border Violence Unit of the Special Prosecutions Division at year-end had 11 foreign extraditions pending and was active in working with law enforcement and local district attorneys to recover violent fugitives. In 2015, the OAG was successful in the international extradition of Mario Talavera from Mexico on homicide charges pending in New Mexico.

Special Prosecutions Trial highlights of 2015 include:

- **Human Trafficking—Wallace Carson** was convicted at trial of first degree kidnapping and human Trafficking of a 17-year-old girl from Albuquerque and a 21-year-old woman from Texas. He was sentenced to 54 years in the Department of Corrections. **Sharoski Jackson** was sentenced for human trafficking of a minor and related crimes and sentenced to 49 years in the Department of Corrections.
- **Sexual Exploitation of Children—Thomas Dolphus** was convicted of sexual exploitation of children by possession and two counts of sexual exploitation of children by manufacture and sentenced to 12 years in the Department of Corrections followed by five to 20 years indeterminate sex offender probation and parole and lifetime sex offender registration.
- **Child Abuse Resulting in Death—Curtis Jones** was convicted of child abuse resulting in death for the 2004 homicide of a 10-month old girl in Carlsbad, NM. The defendant, a 17-year-old, will face sentencing after an amenability hearing and could be sentenced in the discretion of the court up to 18 years in the Department of Corrections.
- **Child Solicitation by an Electronic Communication Device—Adam Kerns and Thomas Horn** were both convicted after jury trial for child solicitation by an electronic communication device. Kerns is facing three years for soliciting sex acts from a child that he believed to be 13 years old and Horn is facing nine years for soliciting sex acts from a child that he believed to be 12 and appearing to meet the perceived child for that purpose. Both are also facing 10-year sex offender registration due to these trial convictions.

- **Homicide- Dallas Hnulik** was sentenced to 12 years in the Department of Corrections after he was convicted of 2nd degree murder after a jury trial in Carlsbad, NM. Hnulik murdered Brandy Capps in 2010 and the case was prosecuted by the OAG after the local district attorney’s office decided to close the case.

Special Prosecutions Training Highlights

In 2015 the division provided training to law enforcement and prosecutors statewide regarding prosecution and best practices in the investigation of child exploitation cases, DWI cases, gang violence, human trafficking, money-laundering and economic crimes. In addition, the division trained local law enforcement agencies in Bernalillo County on a new Supreme Court rule, LR2-400.



Attorney General Balderas introduces critical leaders with the Multidisciplinary Violent Crimes Review Team meeting for the first time at the National Hispanic Cultural Center in Albuquerque. They are Deputy Attorney General for Criminal Affairs, Sharon Pino (left) and Julie Benner, widow of Office Gregg ‘Nigel’ Benner.

Special Investigations:

The **Special Investigations Division** maintains four highly active, specialized units. These units investigate a wide variety of criminal activity ranging from governmental conduct act violations and possession and manufacture of child pornography to Medicaid fraud and elder abuse.

- **The Internet Crimes Against Children (ICAC) / Human Trafficking Units** were involved in over 98 arrests and 126 state prosecutions, trained law enforcement throughout the state and documented over 8000 child pornography reports. ICAC, which consists of 82 federal, military, state, local and tribal law enforcement agencies, reported receiving 429 cyber tips for review and investigation and investigating 303 discreet instances of child pornography possession, manufacture and distribution during 2015. The unit also made 71 arrests, executed 280 or more unrelated federal and state search warrants, completed 775 forensic examinations and handled over 433 technical assistance calls from statewide law enforcement. In addition, it reached over 15,000 persons through public events and awareness campaigns.

Some notable ICAC cases include:

- **Juan Santos Torres**, a previously licensed pediatrician in Pennsylvania and in Texas, was working on his application for a medical license in New Mexico when OAG Special Agents identified his computer with a specific IP address that was being used to share child pornography files. Santos Torres was convicted and sentenced to 14 months in prison.
- A person “self-reported” threats to the National Center for Missing and Exploited Children (NCMEC) website that he was going to rape a 6-year-old child he was baby-sitting. He further bragged that he “has been doing this for years, and can’t believe he hasn’t been caught yet.” NCMEC sent the cybertip to OAG ICAC Special Agent in Charge (SAC). The SAC immediately tracked Internet Protocol address of the server that was linked to the computer Randall Martinez used to file the report with NCMEC. Subject was taken into custody within hours of making the threat. He was found in possession of numerous files of child pornography. Further investigation determined that the man was part of child predator-pornography network nationwide. The persons who were part of that network were identified, and the NM ICAC Task Force facilitated efforts to serve search warrants at 18 different locations nationwide for them.
- **Human Trafficking Unit** applied for and was awarded a \$750,000 grant to investigate and prosecute incidents of human trafficking in the State of New Mexico. The funds will allow OAG to hire two additional Special Agents and support staff, to investigate human trafficking statewide even more aggressively and to provide much-needed training to our law enforcement partners and community.
- **OAG’S Special Investigations Unit** investigates the widest variety of criminal matters within the office. In 2015 these investigations ranged from violations of the governmental conduct act to violent crimes including sexual assaults and stalking. Agents within the Special Investigations unit participated actively in the investigation of former Secretary of State Dianna Duran. Agents within the division maintain a high volume caseload and are regularly assigned matters where governmental or law enforcement conflicts exist.
- **The Southwest Border Anti-Money Laundering Alliance grant to OAG**, which continues channeling grant funds to OAG through 2019, allows OAG investigators and prosecutors to focus on New Mexico money laundering crimes, often perpetrated by transnational gangs, drug traffickers and cartels. As part of those efforts, OAG facilitated the extradition of a violent offender from Mexico and continues to work with local district attorneys, the U.S. Marshal and the Office of International Affairs to pursue foreign extraditions of offenders wanted for trial in New Mexico on violent offenses.
- **OAG’s Anti Money-Laundering Unit** secured a federal criminal indictment against New Mexico resident **Arthur Herlihy** and **Bruce Beckner** of the Republic of Honduras for wire, mail and bank fraud, conspiracy and aiding and abetting these activities. It provided substantial support as well as subject matter expertise in several agency investigations involving violations of the New Mexico Governmental Conduct act as well as human trafficking investigations. Further, New Mexico resident John Meister pled guilty in 2nd Judicial District Court to Racketeering, Money Laundering and Fraud stemming from his 2014 involvement in stealing over \$300,000 from New Mexicans.

Medicaid Fraud and Elder Abuse:

The Medicaid Fraud and Elder Abuse Division expedited a review of behavioral health investigations, begun in response to the New Mexico Governor’s allegations that the providers were engaged in fraud and overbilling, resulting in the Governor’s decision to halt payment to the providers. The division identified a contractor able to assist in performing the investigations within six months, and dedicated significant resources to ensuring the six-month timeline would be met. The expedited investigations will eliminate a backlog threatening to keep some providers closed without confirmation of the allegations.

- The Medicaid Fraud and Elder Abuse Division is also litigating against one of the country's largest nursing home chains, alleging that the company's nursing homes failed to provide basic care to the residents. The lawsuit targets a number of nursing homes run by Preferred Care, Inc. and the previous owner of many of those nursing homes, Cathedral Rock Corporation.
- In addition, during the past year, the division has continued its active criminal and civil litigation, obtaining seven convictions against individuals for Medicaid Fraud, and twelve civil settlements. The division has continued to aggressively pursue charges against providers committing Medicaid Fraud, filing charges against behavioral health provider, Carlsbad Mental Health Center and four of its top managerial employees.
- The division expanded to include a presence in Las Cruces and plans to continue to add personnel to handle the significant number of cases in the southern part of the state.



Attorney General Balderas tests the use of force simulator used to train state, federal and local law enforcement at Dona Ana Community College.

Criminal Appeals:

The Criminal Appeals Division, at the close of 2015, had over 400 open cases including direct appeals in the New Mexico Court of Appeals and New Mexico Supreme Court, state habeas corpus actions, and federal habeas corpus actions. The division filed some 206 briefs in the New Mexico appellate courts in the 2015, 56 memoranda in opposition in the New Mexico Court of Appeals, 44 petitions for writ of certiorari or responses thereto in the New Mexico Supreme Court, and conducted 35 oral arguments in the New Mexico appellate courts.

Among the published opinions that originated with the division were those on behalf of the state on the issue of admission of child pornography evidence (*State v. Dinapoli*) and prior acts of abuse against a child victim (*State v. Bailey*); on kidnapping (the *Herrera* brothers), on standards for conviction on possession

of narcotics (*State v. Hernandez*), on the use of DWI checkpoints (*State v. Swain*) and on closing the courtroom to admission by certain individuals (*State v. Hobbs*).

- **OAG argued before the New Mexico Supreme Court** that use of a helicopter during a drug investigation was not unconstitutional. Although the Court found the specific helicopter surveillance in the case before the Court was unconstitutional, its opinion was expressly limited to the particular facts of the case before it, avoiding a general holding against use of aerial surveillances.
- **OAG argued before the New Mexico Supreme Court** that warrantless arrests for misdemeanors do not necessarily require exigent circumstances. The Supreme Court agreed, reversed the Court of Appeals, and held that a warrantless arrest for shoplifting was constitutional under the New Mexico Constitution and the most reasonable action for law enforcement to take.
- **First degree murder convictions were affirmed** in *State v. Anaya*, *State v. Stanfield*, *State v. King*, *State v. Pagan-Rivera*, *State v. Ferri*, *State v. Ferran*, and *State v. Mark*.
- **In state habeas corpus litigation**, the division filed 38 habeas corpus responses and conducted 69 hearings in state district court.
- **In federal habeas corpus litigation**, the division filed one brief in the Tenth Circuit Court of Appeals, conducted one oral argument in the Tenth Circuit, and filed 33 answers to federal habeas corpus petitions in the United States District Court for the District of New Mexico.

CIVIL AFFAIRS

OAG's Civil Affairs Division works to protect the health and security of New Mexico families by initiating lawsuits on behalf of the State; to recover funds wrongfully taken from the State and its taxpayers; and to defend state law and public agencies in a variety of cases. The Civil Affairs Division's core practice areas include:

- Enforcement of New Mexico's Fraud Against Taxpayers Act through which the State can recover for false claims presented to the State; The Attorney General assigned division directors to work with bureau chiefs for the Medicaid Fraud, Fraud Against Taxpayers and Civil Litigation bureaus of OAG to form the Fraud Recovery Unit. That unit is assigned the work of identifying and collaborating on investigations and prosecutions against individuals and companies that misuse public dollars.
- Action to protect consumers from fraudulent and unfair business practices, utilizing the New Mexico Unfair Practices Act and other laws;
- Administrative prosecutions before more than 30 state boards and commissions that regulate licensed professions;
- Defense of the validity of state laws and court rules, and of judges and other state officials sued in connection with their official duties other than for tort claims;
- Ongoing efforts to protect New Mexico's annual settlement payments under the tobacco Master Settlement Agreement; and
- Advocacy on behalf of the State and its people in antitrust matters (in conjunction with the U.S. Department of Justice, the Federal Trade Commission and other state attorneys general) and in bankruptcy cases in federal court in New Mexico and nationwide.

Environmental Protection:

- OAG's Environmental Protection Division continued to mount a strong defense in *Texas v. New Mexico and Colorado* before a special master appointed by the United States Supreme Court. The Special Master heard oral arguments on New Mexico's motion to dismiss both Texas' and the United States' Complaints in August. Of particular note, New Mexico argued that Texas' claim that New Mexico was not complying with the Rio Grande Compact should be dismissed as well as the United States'

unprecedented claim that it owned all of New Mexico's groundwater in the lower Rio Grande below Elephant Butte Reservoir.

- **OAG attorneys continued to participate** actively in both litigation and settlement negotiations surrounding the changes at the San Juan Generating Station in New Mexico's Four Corners area in a dispute triggered by the Environmental Protection Agency's order to reduce regional haze. The state's Public Regulation Commission (PRC) ultimately approved a settlement reached by the parties that allowed the plant to close down half of its coal processing towers while incorporating new sustainable energy resources and preserving jobs in communities near the northwestern facility.
- The division continued its efforts to protect New Mexico's groundwater quality through its challenge of the Copper Mine Rule which allows extensive groundwater pollution around and under copper mines. The New Mexico Supreme Court has agreed to hear the Attorney General's appeal of that rule.
- In its efforts to protect both New Mexico water uses and endangered species, the division continued its leadership role in working with federal and state agencies as well as water users to implement a Recovery Implementation Plan (RIP) for the endangered species. The RIP is expected to provide for recovery of the endangered species and protection of New Mexico's ability to use water for municipal, industrial and agricultural purposes in the middle Rio Grande.
- In other important efforts to protect and restore New Mexico's environment, the division is representing the Natural Resources Trustee to negotiate or litigate settlement of damages to the environment at sites including Los Alamos National Lab, NASA White Sands Test Facility, Rio Algom Mining and the Fort Wingate Army Depot. In addition, the division is representing New Mexico in negotiations to finalize a consent decree to implement remediation of the Superfund site at Questa, New Mexico.
- In addition to the San Juan case mentioned above, the division continues to represent New Mexicans in numerous utility matters before the Public Regulation Commission. These include a PNM rate case, an SPS rate case, EPE case where the utility is seeking to abandon its interest in the Four Corners Power Plant and numerous other electric, gas and telecommunication cases before the PRC.

Open Government:

OAG's Open Government Division expedited its processes, assigning dedicated staff to resolution of complaints against public bodies and state agencies and continuing its legal representation of the State's agencies.

- **The Open Government Division provides** legal representation to 105 boards, commissions and state agencies. As counsel to these entities, the 10 attorneys within the division travel around the state to attend rules committee meetings, rules hearings, meetings governed by the Open Meetings Act, administrative disciplinary hearings and court appearances.
- The Open Government Division also reviews citizens' complaints filed pursuant to the Open Meetings Act (OMA) and the Inspection of Public Records Act (IPRA). During the first year of the Balderas Administration, the division received over 90 complaints. This is more than double what was received in either 2013 or 2014. The Open Government Division recently revised its complaint process, dedicating staff duties to responses to complaints of government violations of sunshine laws. The division has a full-time attorney dedicated to OMA and IPRA complaints, who contacts both parties within 10 days of receiving a complaint, with a goal educating the parties and seeking voluntary compliance. In the case of an IPRA complaint, the OAG outreach may result in the quick release of public records improperly withheld or an explanation to the complainant of the valid exception of the public body.

Consumer Protection:

In connection with its litigation initiatives, OAG monitors business practices; helps to resolve complaints between consumers and businesses including immigrant consumers targeted by predatory businesses; investigates businesses when staff recognizes a pattern of consumer complaints; and issues regulations to implement the Unfair Practices Act.

During the first year of the Balderas administration, OAG's Civil Litigation Division joined in national litigation and cooperative settlements focusing on children and vulnerable victims, advocating vigorously behalf of New Mexico consumers and families. OAG has identified and is taking action against unscrupulous and unfair business practices including:

- Cancer charities that stole donations for cancer research and treatment to enrich the organization's executives;
- For-profit private colleges that prey on working students with promises of flexible schedules and on the validity of certificates and diplomas for getting jobs, while failing to deliver on those promises even as they leave their students saddled with debt. OAG has advocated for students misled by the promises of the for-profit colleges and succeeded in getting steep school loans forgiven for colleges who broke state law;
- Mastercard and Visa for unfairly imposing fees for every use of a retail credit card in New Mexico;
- Volkswagen, for misrepresenting the safety of its cars on New Mexico roads;
- Verizon for unfairly charging fees for cell phone use by its New Mexico customers;
- Drug giant Amgen, for overcharging for prescription drugs in New Mexico;
- Suntrust Mortgage and other mortgage lenders who misrepresented their ability and intent to protect consumers against foreclosure; and
- An Albuquerque car repair shop that demanded money for work never undertaken.

Litigation:

NMAG also defends the validity of state laws and court rules. These illustrative cases from the past year demonstrate the breadth of NMAG's responsibilities, including the following actions:

- Successfully arguing before the New Mexico Supreme Court that the state Inspection of Public Records Act exists to promote governmental transparency, not to enrich litigants and their attorneys (*Faber v. King*, New Mexico Supreme Court, S-1-SC-34,204);
- Filing an amicus brief in support of several unions' successful effort to require the New Mexico Department of Workforce Solutions to set prevailing wage rates after failing to do so for many years (*New Mexico Building and Construction Trades Council v. Dean*, New Mexico Supreme Court, S-1-SC-34,719);
- Advocating for a legislative, rather than a court-imposed, response to the issue of how to regulate the administration of drugs to terminally ill New Mexicans (*Morris v. Brandenburg*, New Mexico Supreme Court, S-1-SC-35,478) and;
- Defending state election laws in several cases currently pending before the federal Tenth Circuit Court of Appeals (including *Parker v. Duran*, No. 15-2088) and the New Mexico Court of Appeals (*Crum v. Duran*, No. 34,586).
- Pursuant to statute, the Open Government Division is also responsible for drafting advisory opinions, as requested by legislators and other public officials. In 2015, the division received 26 requests. Prior to the current administration, the average timeframe within which an opinion request was completed was approximately one year. We are currently reevaluating the drafting process and hope to expedite these requests.



Attorney General Balderas meets with New Mexico tribal leaders after the Animas River chemical spill.

OPERATIONS

The Operations Division focuses on internal improvements—among them hiring over 50 staff members in 2015 and implementing policies that make purchasing more competitive and administration more efficient. In addition, Operations issued Requests for Proposals (RFP) allowing the agency to expand its efforts through a competitive contracting process.

Across the country, governments are recognizing that a core group of permanent staff at the offices of attorneys general can accomplish much—but that the core group cannot do *everything* that could potentially benefit taxpayers and constituents. Contract attorneys are bringing cases on behalf of the state attorney general in many venues, but the practice of contracting the state’s business to private attorneys has been criticized on occasion. Attorney General Balderas has weighed the challenges of limited permanent staffing against criticisms of using private law firms and launched a program that maximizes the ability to recover taxpayer dollars without risking charges of favoritism.

At the Attorney General’s direction, the Operations division published a competitive “request for proposals” advertisement for law firms willing to submit their credentials and proposals for taking on litigation on behalf of the state. Firms will be asked for proposals only after the AG and his senior staff determine (1) what issues lack resources for litigation; and (2) the parameters of the desired litigation. Under the competitive process, law firms will undertake litigation at the direction of permanent staff, maintaining the ability of the firms to collect attorney fees not already promised to the state general fund while maximizing the ability of the OAG to expand litigation undertaken on the public’s behalf.

Among other 2015 initiatives of the Operations Division are these:

- Finding and hiring an effective grant writer, who has already applied for and secured funding for operations of the Human Trafficking initiatives;
- Securing \$1.8 million for consumer fund money for the Behavioral Health Provider investigation;
- Selecting a vendor to assist with \$1.8 million Behavioral Health Provider investigation RFP;
- Making information technologies more secure by improving wireless connections, internet access and phone service;
- Streamlining computer hardware the agency is using and have better controls over the resources being used;
- Maximizing cost effectiveness and security of cell phone network;
- Consolidating supplies, copying services and software such as Westlaw; and
- Acquiring a scanning system to help the agency move towards a paperless system, allowing OAG to automate document cataloguing and to create an electronic database tracking information, briefs, position papers and other correspondence throughout the agency's history.

APPENDIX A



Attorney General of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

February 26, 2015

Chief Pete N. Kassetas
Deputy Secretary of Operations
New Mexico Department of Safety
P.O. Box 1628
Santa Fe, NM 875804-1628

Re: Opinion Request – Magistrate Court Venue Involving Motor Vehicle Law Violations

Dear Chief Kassetas:

You have requested our advice regarding NMSA 1978, Section 35-3-6(A) (2007). Specifically, whether the authority conferred to law enforcement to initiate a cause of action in a magistrate court that neighbors the magistrate district in which the crime is alleged to have occurred violates the Constitution of New Mexico. After reviewing the relevant law, we conclude that Section 35-3-6(A) is not in conflict with the Constitution.

In relevant part, the New Mexico Bill of Rights provides that “[i]n all criminal prosecutions, the accused shall have the right to...a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.” N.M. Const. art. II, § 14. Thus, our Constitution provides a constitutional right to venue. *See State v. Lopez*, 1973-NMSC-041, ¶ 11, 84 N.M. 805, 508 P.2d 1292.

Our statutes reiterate the above constitutional right as the general venue rule—a defendant has a right, or privilege, to venue in the locality of the alleged criminal act. *Id.*; *see also* NMSA 1978, § 30-1-14 (1963) (“All trials of crimes shall be had in the county in which they were committed.”); NMSA 1978, § 35-3-5(A)(2) (1968) (“Venue of action in the magistrate courts lies...in criminal actions, in the magistrate district where the crime is alleged to have been committed.”).

However, the constitutional right to venue does not deprive a court of jurisdiction. *See Lopez* 1973-NMSC-041, ¶ 12. “The framers of our [C]onstitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury in the county wherein the crime is alleged to have occurred.” *Id.*, ¶ 15 (citing *State v. Holloway*, 1914-NMSC-086, 19 N.M. 528, 146 P. 1066).

As our Court of Appeals has observed:

Although the terms 'jurisdiction' and 'venue' are often used interchangeably in criminal cases, they are distinguishable. Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried.

State v. Ramirez, 1976-NMCA-101, ¶ 26, 89 N.M. 635, 556 P.2d 43. Even though our Constitution affords a defendant the right of venue such right may be waived, because there is no absolute right to venue. *See Lopez*, 1973-NMSC-041, ¶ 12-15.

The State may initiate an action in any court that has jurisdiction and proper venue. *See id.*, ¶ 14. After the action is initiated, if a defendant wishes to assert his or her constitutional right to move venue to the county or district where the crime is alleged to have been committed, that defendant must affirmatively act. *See id.*, ¶ 13. If a defendant does not affirmatively act to move for a change of venue as provided by the statutes and rules of criminal procedure, then his or her constitutional right of venue has effectively been waived. *See id.*, ¶ 15. This process has not been deemed unconstitutional by our Supreme Court.

Relevant to the question you posed, the statutes governing venue in magistrate court establish that there may be multiple magistrate courts that have jurisdiction and proper venue. Section 35-5-5, cited above, which provides the general rule for venue in magistrate courts further establishes that "[t]he provisions of Section 35-3-6 or 35-3-7 NMSA, supersede this section whenever they become applicable." Section 35-3-5(B). Thus, Section 35-5-6 (delineating jurisdiction and territorial limits of a magistrate court), the statute to which your question was addressed, may alter the general venue rule established by Section 35-3-5(A).

Generally, "[t]he territorial jurisdiction of a magistrate is coextensive with the magistrate district in which the magistrate serves." Section 35-3-6(A). However, this general grant of territorial jurisdiction may be modified:

A magistrate also has jurisdiction in any criminal action involving violation of a law relating to motor vehicles arising in a magistrate district adjoining at any point that in which the magistrate serves and within magistrate trial jurisdiction; provided that the defendant is entitled to a change of venue to the district where the cause of action arose if the defendant so moves at, or within fifteen days after, arraignment.

Chief Kassetas
February 26, 2015
Page 3 of 3

Section 35-3-6(A). Therefore, where there is a violation of a law relating to motor vehicles, law enforcement may properly initiate a criminal action in a magistrate court when the crime that is alleged to occur arose in a neighboring magistrate district. Consistent with our Supreme Court's opinion in *Lopez*, Section 35-3-6(A) further provides that a defendant may affirmatively assert his constitutional privilege to move venue "to the district where the cause of action arose." As such, if the action is filed in any magistrate court where venue is proper, unless a defendant affirmatively asserts his or her right to change venue as provided by the statutes and procedural rules of the court that right is deemed waived.

In summary, since Article II, Section 14 of the Constitution does not provide an absolute right to venue Section 35-3-6(A) does not conflict with that constitutional article when it provides that venue is also proper in a magistrate court that adjoins the magistrate district where the crime is alleged to have occurred.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore we may provide copies of this letter to the public.

Sincerely,



BRIAN PARRISH
Assistant Attorney General



Attorney General of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

February 26, 2015

The Honorable Cliff R. Pirtle
New Mexico State Senator, District 32
5507 Y.O. Road
Roswell, NM 88203

Re: Opinion Request – Magistrate Court Venue Involving Motor Vehicle Law Violations

Dear Senator Pirtle:

You have requested our advice regarding NMSA 1978, Section 35-3-6(A) (2007). Specifically, whether the statutory grant of authority to magistrate courts to hear certain cases that arise in adjoining magistrate districts violates Article II, Section 14 of the Constitution of New Mexico. After reviewing the relevant law, we conclude that it does not.

In relevant part, the New Mexico Bill of Rights provides that “[i]n all criminal prosecutions, the accused shall have the right to...a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.” N.M. Const. art. II, § 14. Thus, our Constitution provides a constitutional right to venue. *See State v. Lopez*, 1973-NMSC-041, ¶ 11, 84 NM. 805, 508 P.2d 1292.

Our statutes reiterate the above constitutional right as the general venue rule—a defendant has a right, or privilege, to venue in the locality of the alleged criminal act. *Id.*; *see also* NMSA 1978, § 30-1-14 (1963) (“All trials of crimes shall be had in the county in which they were committed.”); NMSA 1978, § 35-3-5(A)(2) (1968) (“Venue of action in the magistrate courts lies...in criminal actions, in the magistrate district where the crime is alleged to have been committed.”).

However, the constitutional right to venue does not deprive a court of jurisdiction. *See Lopez* 1973-NMSC-041, ¶ 12. “The framers of our [C]onstitution sought to guarantee the right to trial by an impartial jury, rather than an absolute right to trial by a jury in the county wherein the crime is alleged to have occurred.” *Id.*, ¶ 15 (citing *State v. Holloway*, 1914-NMSC-086, 19 N.M. 528, 146 P. 1066).

As our Court of Appeals has observed:

Although the terms ‘jurisdiction’ and ‘venue’ are often used interchangeably in criminal cases, they are distinguishable. Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried.

State v. Ramirez, 1976-NMCA-101, ¶ 26, 89 N.M. 635, 556 P.2d 43. Even though our Constitution affords a defendant the right of venue such right may be waived, because there is no absolute right to venue. *See Lopez*, 1973-NMSC-041, ¶ 12-15.

The State may initiate an action in any court that has jurisdiction and proper venue. *See id.*, ¶ 14. After the action is initiated, if a defendant wishes to assert his or her constitutional right to move venue to the county or district where the crime is alleged to have been committed, that defendant must affirmatively act. *See id.*, ¶ 13. If a defendant does not affirmatively act to move for a change of venue as provided by the statutes and rule of criminal procedure, then his or her constitutional right of venue has effectively been waived. *See id.*, ¶ 15. This process has not been deemed unconstitutional by our Supreme Court.

Relevant to the question you posed, the statutes governing venue in magistrate court establish that there may be multiple magistrate courts that have jurisdiction and proper venue. Section 35-5-5, cited above, which provides the general rules for venue in magistrate courts further establishes that “[t]he provisions of Section 35-3-6 or 35-3-7 NMSA, supersede this section whenever they become applicable.” Section 35-3-5(B). Thus, Section 35-5-6 (delineating jurisdiction and territorial limits of a magistrate court), the statute to which your question was addressed, may alter the general venue rule established by Section 35-3-5(A).

Generally, “[t]he territorial jurisdiction of a magistrate is coextensive with the magistrate district in which the magistrate serves.” Section 35-3-6(A). However, this general grant of territorial jurisdiction may be modified:

A magistrate also has jurisdiction in any criminal action involving violation of a law relating to motor vehicles arising in a magistrate district adjoining at any point that in which the magistrate serves and within magistrate trial jurisdiction; provided that the defendant is entitled to a change of venue to the district where the cause of action arose if the defendant so moves at, or within fifteen days after, arraignment.

Senator Cliff R. Pirtle
February 26, 2015
Page 3 of 3

Section 35-3-6(A). Therefore, where there is a violation of a law relating to motor vehicles, law enforcement may properly initiate a criminal action in a magistrate court when the crime that is alleged to occur arose in a neighboring magistrate district. Consistent with our Supreme Court's opinion in *Lopez*, Section 35-3-6(A) further provides that a defendant may affirmatively assert his constitutional privilege to move venue "to the district where the cause of action arose." As such, if the action is filed in any magistrate court where venue is proper, unless a defendant affirmatively asserts his or her right to change venue as provided by the statutes and procedural rules of the court that right is deemed waived.

In summary, since Article II, Section 14 of the Constitution does not provide an absolute right to venue, Section 35-3-6(A) does not conflict with that constitutional article when it provides that venue is also proper in a magistrate court that adjoins the magistrate district where the crime is alleged to have occurred.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore we may provide copies of this letter to the public.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Parrish", with a stylized flourish extending from the end.

BRIAN PARRISH
Assistant Attorney General



Attorney General of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

March 20, 2015

The Honorable Nancy Rodriguez
New Mexico State Senator
1838 Camino La Cañada
Santa Fe, NM 87501

Re: Opinion Request – Limits on Taxes Imposed by Home Rule Municipalities

Dear Senator Rodriguez:

You requested our advice regarding whether home rule municipalities are permitted to impose taxes without a specific grant of authority from the legislature. Specifically, you asked:

Can a home rule municipality impose a tax on items (i.e. telecommunications services, Styrofoam use tax, plastic bottle use tax, carbon emission tax or plastic bag use tax) that are not expressly prohibited from being taxed pursuant to state law?

As discussed below, we conclude that a home rule municipality may not impose taxes unless specifically authorized to do so by the legislature.

The New Mexico Constitution provides home rule municipalities with broad legislative authority. "A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter." N.M. Const. art. X, § 6. The New Mexico Supreme Court determined that this constitutional amendment means "a home rule municipality no longer has to look to the legislature for a grant of power to act, but only looks to legislative enactments to see if any express limitations have been placed on their power to act." *Apodaca v. Wilson*, 1974-NMSC-071, ¶ 14, 86 N.M. 516, 521.

Based on our research, we believe that the legislature has effectively limited the authority of a home rule municipality to impose taxes by general law. Two statutory provisions are of particular significance. First, the Municipal Charter Act, NMSA 1978, §§ 3-15-1 to -16 (1965, as amended through 1990), provides, in pertinent part, that a municipality adopting a charter "shall not authorize the levy of any tax not specifically authorized by the laws of the state." NMSA 1978, §

3-15-7. This statutory provision is directed to home rule municipalities and expressly denies them the power to tax without specific legislative authority.

The second significant statute is NMSA 1978, Section 3-18-2, which prohibits a municipality from imposing an income tax, property tax or "excise taxes on any incident relating to: (a) tobacco; (b) liquor; (c) motor fuels; and (d) motor vehicles," unless otherwise provided by law. Subsection (D) of Section 3-18-2 goes on to allow a municipality to:

impose excise taxes of the sales, gross receipts or any other type on specific products and services, other than [tobacco, liquor, motor fuels and motor vehicles], if the products and services taxed are each named specifically in the ordinance imposing the tax on them and if the ordinance is approved by a majority vote in the municipality.¹

Apodaca v. Wilson, cited above, was the first New Mexico Supreme Court case interpreting Article X, Section 6 of the state constitution. See 1974-NMSC-071, ¶ 8, 86 N.M. at 520. Significantly, the decision in that case pointed to the predecessor to the current Section 3-18-2 as "an example of [a] specific denial of power" to a home rule municipality contemplated under Article X, Section 6. *Id.* ¶ 14, 86 N.M. at 521. See also *Casuse v. City of Gallup*, 1987-NMSC-112, ¶ 5, 106 N.M. 571, 572 (discussing *Apodaca* and its reference to what is now Section 3-18-2 as an example of a general law expressly limiting a municipality's home rule power).

We conclude that the Municipal Charter Act, a general law, prohibits a home rule municipality from imposing any tax absent specific legislative authorization. Section 3-18-2, twice described by the Supreme Court as an express statement in the general law effectively limiting home rule power, precludes a municipality, including a home rule municipality, from imposing income and property taxes unless otherwise provided by law and allows excise taxes on certain products and services. Excise taxes permitted under Section 3-18-2 may be imposed only if the products or services subject to the tax are named specifically in the ordinance imposing the tax and the ordinance is approved by a majority of the voters in the municipality.


We caution that even if an excise tax is permitted under Section 3-18-2, there may be other statutory provisions that affect whether and how a home rule municipality exercises its authority to impose the tax. See, e.g., *Waksman v. City of Albuquerque*, 1984-NMSC-114, ¶ 7, 102 N.M. 41, 43 ("A municipality lacks the power to alter, by ordinance, a legislatively-mandated tax limitation").

¹ Article X, Section 6(D) of the state constitution provides: "No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality." We interpret this provision to condition the effectiveness of a tax imposed by a home rule municipality on the approval of voters in the municipality unless a general law authorizes the municipality to impose the tax without voter approval. In this case, Section 3-18-2(D) expressly requires a municipality to submit an ordinance imposing a permissible excise tax to voters for their approval.

Senator Nancy Rodriguez
March 20, 2015
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If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



CAROLINE MANIERRE
Assistant Attorney General



Attorney General of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

April 10, 2015

The Honorable Kelly Fajardo
New Mexico State Representative
1125 North Molina
Belen, NM 87002

Re: Opinion Request – Municipality’s Authority to Impose a Technology Infrastructure Fee

Dear Representative Fajardo:

You requested our advice regarding whether the Village of Los Lunas is authorized to impose a technology infrastructure fee on utility customers. Specifically, you asked:

1. Is the Village of Los Lunas authorized to adopt a technology infrastructure fee by ordinance?
2. If yes, may the governing body place a question on the municipal election ballot allowing the voters to vote on the adoption of the ordinance and imposition of the specified fee?
3. If the answer to 2 is no, is there a method for the governing body to place the question on the municipal election ballot?

As discussed below, we conclude:

1. If the proposed technology infrastructure fee constitutes a tax, the Village may be authorized to impose it under Section 3-18-2 of the Municipal Code.
2. Section 3-18-2 permits a municipality to impose an excise tax if the products or services to be taxed are specifically named in the authorizing ordinance and the ordinance is approved by a majority of the municipality’s voters.

Your request suggested that the Village of Los Lunas is exploring the option of imposing a “technology infrastructure fee that would be collected from all utility customers on a monthly basis to help fund a public wifi system and other technology related projects.” Before determining whether the Village is authorized to impose this fee, we examine whether the proposed fee constitutes a “tax.”

Representative Kelly Fajardo
April 10, 2015
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The New Mexico Supreme Court has recognized that “[a] tax is a charge imposed that is not related to the services rendered. In contrast, a fee is related to a particular benefit or service.” *El Paso Elec. Co. v. New Mexico Pub. Regulation Comm’n*, 2010-NMSC-048, ¶ 15, 149 N.M. 174, 179 (citation omitted). According to the New Mexico Court of Appeals, “a trait that distinguishes fees from taxes is that fees, unlike taxes, only cover the agency’s reasonably anticipated costs of providing the services for which the fees are charged.” *New Mexico Mining Ass’n v. New Mexico Mining Comm’n*, 1996-NMCA-098, ¶ 24, 122 N.M. 332, 339 (citation omitted).

In this instance, the proposed technology infrastructure fee would be collected from utility customers “to help fund a public wifi system and other technology related projects.” From the information provided in your request, it does not appear that the Village would be charging the fee for utility services or other services, or that the fee would reflect the Village’s reasonably anticipated cost of providing services. Instead, the Village apparently intends to use the proceeds of the fee charged to utility customers to fund future technology projects, such as a public wireless internet system. Because, under the current proposal, the fee imposed on utility customers would not relate to services or benefits provided to the utility customers, we believe the fee is more properly characterized as a tax.

The Village of Los Lunas is organized as a mayor-council form of government under NMSA 1978, Sections 3-11-1 to -7 (1965, as amended through 1985). Because the Village is not a home-rule municipality, state law must grant express or implied authority for the Village to act. *See State ex rel. Haynes v. Bonem*, 1992-NMSC-062, 114 N.M. 627; *State ex rel. Vill. of Los Ranchos de Albuquerque v. City of Albuquerque*, 1994-NMSC-126, ¶ 17, 119 N.M. 150, 157 (“A municipality may exercise only those powers granted to it by the legislature.”).

The New Mexico legislature has specifically authorized municipalities to impose excise taxes. With certain exceptions not relevant here, a municipality may impose

excise taxes of the sales, gross receipts or any other type on specific products and services, other than ... [tobacco, liquor, motor fuels, and motor vehicles], if the products and services taxed are each named specifically in the ordinance imposing the tax on them and if the ordinance is approved by a majority vote in the municipality.

NMSA 1978, § 3-18-2(D). While Section 3-18-2 constitutes specific authorization for municipal taxing authority, it also creates certain restrictions. An excise tax authorized by Section 3-18-2(D), such as the tax on utility customers contemplated here, may come into effect only if the municipality first names in an ordinance the specific services to be taxed and the ordinance is approved by a majority of voters in the municipality.

Although Section 3-18-2, on its face, does not preclude the Village from imposing an excise tax on utility customers, the Village should consider other laws that might affect its authority to impose the tax. For a tax on customers of a utility service under the jurisdiction of the Public Regulation Commission (“PRC”), this would include the Public Utilities Act. The Public Utilities Act authorizes a municipality and a utility to establish rates and service regulations by contract with the approval of the PRC. *See* NMSA 1978, § 62-6-15 (1979). Nevertheless, “local governments

Representative Kelly Fajardo
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cannot create the equivalent of a statewide policy governing utilities or use their police power in a manner that will detrimentally affect utility rates for the State as a whole.” *City of Albuquerque v. New Mexico Pub. Regulation Comm’n*, 2003-NMSC-028, ¶ 8, 134 N.M. 472, 477 (citations omitted). Depending on the utility customers affected, the Village’s proposed charge might be restrained by the PRC’s “general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations....” NMSA 1978, § 62-6-4(A) (2003). *See also City of Albuquerque v. New Mexico Public Service Commission*, 1993-NMSC-021, ¶¶ 24, 25, 115 N.M. 521, 530 (because the PRC retains plenary authority over ratemaking, a municipality’s statutory authority to establish rates by contract with a utility is not binding without the PRC’s approval).

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



CAROLINE MANIERRE
Assistant Attorney General



Attorney General Of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

July 27, 2015

Shawn Lerch
Chief Executive Officer
Miners' Colfax Medical Center
203 Hospital Drive
Raton, NM 87740

Re: Opinion Request – Recruitment and Retention of Health Care Professionals

Dear Mr. Lerch:

You requested our advice regarding the use of funds held by the Miners' Colfax Medical Center ("MCMC") for the recruitment and retention of health care professionals. Specifically, you stated that "MCMC would like to be able to pay for travel expenses, hotel expenses and meals for doctors' on site recruitment visits as well as for retention bonuses to keep the doctors for extended periods of time." You reference an advisory letter from Attorney General Patricia Madrid in 2001 where MCMC posed a question on the same issues. See letter to Gary Gabriele, Budget Director, Miners' Colfax Medical Center from Zachary Shandler, Assistant Attorney General (Feb. 12, 2001). Our review of the 2001 letter, the New Mexico Constitution, statutory authority, and recent case law leads us to the same conclusions reached in the letter. MCMC may pay for recruitment of health care professionals and retention bonuses, so long as MCMC receives consideration for those payments.

The Anti-Donation Clause of the New Mexico Constitution provides in part that, "Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation...." N.M. Const. art. IX, § 14. The New Mexico Supreme Court in Village of Deming v. Hosdreg Co., 1956-NMSC-111, 62 N.M. 18, determined that "donation" under the Anti-Donation Clause "has been applied its ordinary sense and meaning, as a 'gift,' an allocation or appropriation of something of value, without consideration to a person...." Id. ¶ 36. The courts are still using this definition of a donation. See, e.g., Moses v. Skandera, 2015-NMCA-036, ¶ 42, cert. granted, 2015-NMCERT-001 (No. 34,974, Jan. 26, 2015), State ex rel. Office of State Eng'r v. Lewis, 2007-NMCA-008, ¶ 49, 141 N.M. 1.

The crucial issue in this situation is whether MCMC is providing an allocation or appropriation to physicians *without consideration*. The New Mexico courts have held that the state does not violate the Anti-Donation Clause where the state receives consideration in return for the allocation or appropriation of something of value. For example, in Treloar v. County of Chaves, 2001-NMCA-074, 130 N.M. 794, the New Mexico Court of Appeals addressed an Anti-Donation Clause claim in the context of a county contract that provided for severance benefits after involuntary termination. The court held that the Clause was not violated, reasoning that “severance pay is deemed to be in the nature of wages that have been earned. Thus, consideration had been given for the severance obligation, and there was no gift.” 2001-NMCA-074, ¶ 32. See also State ex rel. Office of State Eng’r v. Lewis, 2007-NMCA-008, ¶ 49, 141 N.M. 1 (“Consideration for the allocation can be a defining element.”). In contrast, in a subsequent, unreported case, the Court of Appeals found a violation of the Anti-Donation Clause where a “bonus did not represent compensation for any past or expected work, for any enhanced job qualification, or for any quality or longevity standard, and it therefore constituted forbidden extra and retroactive pay in violation of the public policy behind the constitutional provisions.” Nat’l Union of Hosp. Employees v. Bd. of Regents, No. 28,960, mem. op. at 1 (N.M. Ct. App. Aug. 10, 2010).

We reiterate our advice from 2001 that MCMC can provide for reimbursement of physician travel for purposes of recruitment or for retention bonuses only so long as it receives adequate consideration in return. Our previous decisions have differentiated between permissible and impermissible reimbursement of funds. In N.M. Att’y Gen. Op. 81-5 (1981), we found that the state would be permitted to reimburse a prospective employee for travel expenses, so long as it was not an “outright gift to the state” because “[t]his ‘public benefit’ to the department constitutes consideration for whatever payment the applicant may receive for his own travel expenses.” Id. at 2. However, in N.M. Att’y Gen. Op. 89-22 (1989), we determined that a county could not pay a physician’s relocation costs because “the county must receive some benefit or consideration in exchange” and in that case the physicians did not “assume any obligation in exchange for relocation payments.” Id. at 1.

For recruitment, MCMC would not be violating the Anti-Donation Clause if it could demonstrate that MCMC was receiving adequate consideration for travel reimbursements. Your request explained that “payment of this type [of recruitment reimbursement] of expenses is a common recruitment practice, to refuse to make such payments would reduce the likelihood that physicians would consider MCMC.” Additionally, you stated that “[a]s to the payment of retention bonuses, MCMC receives an agreement that the doctor will remain in the community providing services at MCMC.” From the information provided in your letter, we find the analysis in N.M. Att’y Gen. Op. 81-5 that “if the department needs to fill a position for which there are no qualified applicants in Santa Fe, a prospective employee who agrees to travel to Santa Fe for an interview does so for the benefit and convenience of the department” would appear to apply equally in this case. Additionally, if MCMC contracts with a physician and a longevity bonus is included in the contract, this would likely be sufficient consideration and, consequently, would not violate the Anti-Donation Clause.

Mr. Shawn Lerch
July 27, 2015
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If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,


CAROLINE MANIERRE
Assistant Attorney General



Attorney General Of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

October 20, 2015

The Honorable Richard C. Martinez
New Mexico State Senator
P.O. Box 762
Española, New Mexico 87532

Re: Opinion Request –Northern New Mexico College

Dear Senator Martinez:

You requested our advice regarding whether the New Mexico Constitution requires Northern New Mexico College (“NNMC”) to provide a minimal level of activity, programming and/or courses on the El Rito Campus.” As discussed below, our review of the New Mexico Constitution, the Enabling Act, statutes, and case law authorities leads us to conclude that, as a constitutional state educational institution, NNMC is not prohibited from moving the majority of its coursework from the El Rito campus so long as the school’s trust lands and their proceeds are used for the purpose of maintaining NNMC as a state educational institution.

Article XII, Section 11 of the New Mexico Constitution confirms NNMC, among others, as a state educational institution and describes its location as “El Rito.” According to your request, NNMC plans to relocate all of its academic coursework to the Española campus in an effort to centralize NNMC’s resources. The request states that you have been “assured by [NNMC]’s administration that the El Rito campus will remain open to conferences, academic retreats, public gatherings and as a host site for research expeditions.”

The 1910 Enabling Act was an act signed by the U.S. Congress that “provided for New Mexico’s admission as a state into the federal union and set forth certain basic conditions for statehood.” State ex rel. King v. Lyons, 2011-NMSC-004, ¶ 3, 149 N.M. 330, 248 P.3d 878. The Enabling Act “granted over thirteen million acres of federal land to the State of New Mexico, to be held in trust for the benefit of various public schools and other institutions.” Lyons, 2011-NMSC-004, ¶ 5, 149 N.M. 330. “By the Enabling Act certain grants of public lands were made to New Mexico for purposes of which there was a specific enumeration.” Ervien v. United States, 251 U.S. 41, 45 (1919). The U.S. Supreme Court has confirmed that “the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should be deemed a breach of trust.” Id. at 47 (quotation marks omitted). See

also Enabling Act, § 10 (“[d]isposition of [these lands]...for any other object other than that for which such particular lands...were granted or confirmed, or in any manner contrary to the provisions of this act, shall be deemed a breach of trust”). The Enabling Act’s terms concerning lands granted or confirmed by the federal government were incorporated into the New Mexico Constitution. See N.M. Const. art. XXI, § 9.

In Article XII, Section 11 of the state constitution, New Mexico enumerated the state educational institutions to benefit from the Enabling Act. Article XII, Section 12 reasserts the Enabling Act’s restrictions on land, applying them specifically to state educational institutions: “All lands granted under the provisions of the [Enabling Act,] for the purposes of said several institutions are hereby accepted and confirmed to said institutions, and shall be exclusively used for the purposes for which they were granted[.]” N.M. Const. art XII, § 12. NNMC is confirmed in the state constitution as a state educational institution under the name “northern New Mexico state school, at El Rito.” See N.M. Const. art XII, § 11.¹

The New Mexico Constitution provides that “[t]he schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state.” N.M. Const. art XII, § 3. The Constitution further provides that “[t]he legislature shall provide for the control and management of each of the [state educational] institutions, except the university of New Mexico, by a board of regents for each institution....” N.M. Const. art. XII, § 13(A).

Under pertinent case law and other legal authority, the state will meet the restrictions of the Enabling Act and the state constitution so long as the trust land and its proceeds are used for the purposes for which they were granted. In United States v. State of New Mexico, 536 F.2d 1324 (10th Cir. 1976), the Tenth Circuit Court of Appeals determined that the Enabling Act required New Mexico to establish and maintain a licensed and certified general miners’ hospital. Id. at 1327-29. Under Article XIV, Section 1 of the New Mexico Constitution, “the miners’ hospital at Raton” and other listed entities are confirmed as state institutions. The Tenth Circuit acknowledged that the Enabling Act required the trust funds be used for the purpose of a miners’ hospital, not necessarily the miners’ hospital at Raton, stating that “the trust funds are allotted solely for use at Miners’ Hospital at Raton or any other hospital New Mexico may wish to maintain as a ‘miners’ hospital.’” Id. (emphasis added). Although not stated expressly, the Tenth Circuit’s opinion suggests that, with regard to the Enabling Act, the court was relatively indifferent to the hospital’s location within the state, as long as funds derived from public land grants were used for a miners’ hospital.

Various Attorney General opinions address the constitutionality of moving a constitutionally-confirmed state institution from its constitutionally-specified location. Attorney General Opinion No. 5628 (1953) addressed whether the penitentiary (a state institution, like the miners’ hospital, confirmed by Article XIV, Section 1) could be moved out of Santa Fe County. The opinion

¹ By statute, the legislature has determined that “[e]xcept for financial transactions, the use of the name northern New Mexico college is hereby permitted in lieu of northern New Mexico state school, for common convenience.” NMSA 1978, § 21-4-2 (2005).

concluded that the state constitution did not prevent the penitentiary from being moved out of Santa Fe County, stating that “[t]he language ‘The Penitentiary at Santa Fe’ is merely descriptive and not mandatory in our opinion[.]” Id.

A subsequent Attorney General opinion determined that the Carrie Tingley hospital could be moved from Truth or Consequences without a constitutional amendment, despite being listed in Article XIV, Section 1 as “the Carrie Tingley crippled children’s hospital at Truth or Consequences.” N.M. Att’y Gen. Op. No. 80-16 (Apr. 30, 1980). Similar to the 1953 opinion, the later opinion determined that “[t]he purpose of Section 1 [of Article XIV] is to identify land grant beneficiaries, not to permanently fix their locations.” Id. (emphasis in original). Consequently, according to the opinion:

If Carrie Tingley should move to another location, but, nevertheless, remain as essentially the institution defined in Section 1, it would retain its entitlement to the funds...the reference to the location of the various institutions named in Section 1 was meant to identify the institutions, not to locate them. Funds derived from lands granted under the Enabling Act go to institutions because of the purposes they serve, not because of the places where they are located.

Id. (emphasis in original). See also Att’y Gen. Advisory Letter to Representative Garcia, New Mexico House of Representatives, and Senator Harden, New Mexico State Senate, from Assistant Attorney General Stephen A. Vigil (Jan. 26, 2012) (stating that “the references to locations for the state institutions listed in Article XIV, Section 1 are merely descriptive” and do not prevent a state institution from moving to a different location).

We believe that the reasoning employed in the aforementioned opinions applies equally to NNMC. The term “at El Rito” is a description and does not require that NNMC remain solely at the El Rito campus. We conclude that the New Mexico Constitution does not prohibit NNMC from moving the majority of its coursework to the Española campus so long as NNMC continues to exist as a state educational institution defined in Article XII, Section 11 and trust lands granted under the Enabling Act are used for the benefit of NNMC.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General’s Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,


CAROLINE MANIERRE
Assistant Attorney General



Attorney General Of New Mexico

HECTOR H. BALDERAS
Attorney General

ELIZABETH A. GLENN
Chief Deputy Attorney General

November 16, 2015

Doug Moore, Chair
Colonias Infrastructure Board
c/o New Mexico Finance Authority
207 Shelby Street
Santa Fe, New Mexico 87501

RE: Opinion Request – Housing Infrastructure and the Anti-Donation Clause

Dear Mr. Moore:

You requested our advice regarding whether the Anti-Donation Clause of the New Mexico Constitution applies to housing infrastructure projects financed by the Colonias Infrastructure Board (“Board”) and the New Mexico Finance Authority (“NMFA”). Specifically, you discussed the affordable housing exception to the Anti-Donation Clause, N.M. Const. art. IX, § 14(E), and whether the Board or NMFA can grant funds to counties or municipalities “to then be granted on to private entities in order to provide infrastructure to the homes of low income residents of the colonias.” As discussed below, we conclude that the Anti-Donation clause is not implicated where the Board and NMFA are providing financial assistance to counties and municipalities because they are political subdivisions of the state. We further conclude that upon receipt of these funds, counties and municipalities may then provide the funds for housing infrastructure projects so long as they conform to the requirements of the Affordable Housing Act and the New Mexico Constitution.

The Board was created for the purpose of providing funding for infrastructure in colonias. The Colonias Infrastructure Act, NMSA 1978, Sections 6-30-1 to -8 (2010), provides specific legislative findings related to colonias, defines the specific parameters of colonias, and describes the powers of the Board, including evaluating applications by qualified entities for colonias infrastructure projects. Qualified entities are defined as “a county, municipality or other entity recognized as a political subdivision of the state[.]” § 6-30-3(F). Qualified projects are defined to include “a water system, a wastewater system, solid waste disposal facilities, flood and drainage control, roads or housing infrastructure.” § 6-30-3(G). The Colonias Infrastructure Act authorizes the Board to evaluate and prioritize qualified projects to be provided financial assistance by NMFA.

The Anti-Donation Clause of the New Mexico Constitution provides in part that, “[n]either the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation...except as provided in [this section.]” N.M. Const. art. IX, § 14. The Board and NMFA do not violate the Anti-Donation Clause by providing these infrastructure grants to counties and municipalities, even if the grant money is subsequently provided to a private entity, because the financial assistance is being transferred from the Board, an agency of the state to other political subdivisions of the state. *See City of Gallup v. New Mexico State Park and Recreation Commission*, 1974-NMSC-084, 86 N.M. 745, 527 P.2d 786; *Wiggs v. City of Albuquerque*, 1952-NMSC-013, 56 N.M. 214, 242 P.2d 865. *See also* N.M. Att’y Gen. Op. 81-27 (“The prohibitions of Article IX, Section 14 have been held to be inapplicable to ‘donations’ between the state or one of its governmental agencies to another such agency.”); N.M. Att’y Gen. Op. 86-23 (“Intragovernmental transfers (between one subordinate governmental agency to another)...are outside the constitutional prohibition.”).

The affordable housing exception to the Anti-Donation Clause provides authorization for the state, counties, and municipalities to finance “infrastructure necessary to support affordable housing projects.” N.M. Const. art. IX, § 14(E)(3). Under subsection F of the Anti-Donation Clause, this provision is not self-executing, but rather requires the legislature to create enabling legislation, which it did in the form of the Affordable Housing Act, NMSA 1978, Sections 6-27-1 to -9 (2004, as amended through 2015). The Colonias Infrastructure Board would not have the authority under the affordable housing exception to provide funds directly to private entities. However, this does not prohibit the Board from allocating funds to qualified entities who may then be permitted under the Affordable Housing Act to provide funds to private entities.

The Affordable Housing Act provides that the state, counties, and municipalities may “provide or pay the costs of financing or infrastructure necessary to support affordable housing projects.” § 6-27-5. The Affordable Housing Act defines “infrastructure improvement” to include water systems for domestic purposes and sewage systems, as well as transport and dispersal. § 6-27-3. The language regarding infrastructure in both the Affordable Housing Act and the Colonias Infrastructure Act, along with the expressed legislative purposes of these acts, covers the projects currently receiving financial assistance under the Colonias Infrastructure Act and the projects that counties and municipalities are permitted to provide or finance under the Affordable Housing Act. As such, when a county or municipality is awarded financial assistance by the Board for a qualified project, these entities, under the Affordable Housing Act, are then permitted to donate or pay for, among other things, “financing or infrastructure necessary to support affordable housing projects.” § 6-27-5. Qualified entities that meet their statutory and constitutional requirements under the New Mexico Constitution and the Affordable Housing Act, do not violate the Anti-Donation Clause by providing financial assistance authorized under the Clause and the Act.

We conclude that the Anti-Donation Clause is not implicated when the Board provides financial assistance to qualified entities under the Colonias Infrastructure Act, even if, as here, the funds are subsequently provided to private entities, because the qualified entities are political subdivisions of the state. The qualified entities in turn must follow the requirements of the affordable housing

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exception to the Anti-Donation Clause and the Affordable Housing Act should they wish to grant funding to private entities for the purpose of developing infrastructure.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



CAROLINE MANIERRE
Assistant Attorney General