

**MINUTES
of the
FIFTH MEETING
of the
ECONOMIC AND RURAL DEVELOPMENT COMMITTEE**

**October 2, 2017
Hernandez Community Center
Hernandez**

**October 3, 2017
Rio Arriba County Senior Citizen Center
Chama**

The fifth meeting of the Economic and Rural Development Committee (ERDC) was called to order by Senator Benny Shendo, Jr., chair, on October 2, 2017 at 9:19 a.m. at the Hernandez Community Center in Hernandez.

Present

Sen. Benny Shendo, Jr., Chair
Rep. Debbie A. Rodella, Vice Chair
Sen. Jacob R. Candelaria (10/2)
Rep. Rebecca Dow
Sen. Ron Griggs (10/2)
Rep. Rick Little
Sen. Richard C. Martinez
Rep. Matthew McQueen
Sen. John Pinto
Rep. Jane E. Powdrell-Culbert
Rep. Nathan P. Small

Absent

Rep. Tim D. Lewis
Rep. Patricia A. Lundstrom
Sen. Michael Padilla
Rep. Candie G. Sweetser
Sen. Pat Woods

Advisory Members

Rep. Eliseo Lee Alcon
Rep. Gail Armstrong
Rep. Alonzo Baldonado (10/2)
Rep. Kelly K. Fajardo (10/2)
Rep. David M. Gallegos
Rep. Bealquin Bill Gomez
Rep. Sarah Maestas Barnes (10/2)
Rep. William "Bill" R. Rehm
Sen. Elizabeth "Liz" Stefanics (10/2)
Sen. Bill Tallman (10/3)

Sen. Craig W. Brandt
Sen. William F. Burt
Rep. George Dodge, Jr.
Rep. Joanne J. Ferrary
Rep. Yvette Herrell
Rep. D. Wonda Johnson
Sen. Carroll H. Leavell
Rep. Rod Montoya
Sen. Mark Moores
Sen. Mary Kay Papen
Rep. Patricia Roybal Caballero
Rep. Angelica Rubio

Rep. Patricio Ruiloba
Rep. Nick L. Salazar
Sen. William E. Sharer
Rep. James E. Smith
Rep. Linda M. Trujillo
Rep. Bob Wooley
Rep. Monica Youngblood

(Attendance dates are noted for members not present for the entire meeting.)

Staff

Shawna Casebier, Staff Attorney, Legislative Council Service (LCS)
Celia Ludi, Staff Attorney, LCS
Rebecca Griego, Staff, LCS

Guests

The guest list is in the meeting file.

Handouts

Handouts and other written testimony are in the meeting file.

Monday, October 2 — Hernandez Community Center, Hernandez

Call to Order — Introductions

Senator Shendo called the meeting to order and welcomed members of the committee and guests to the meeting. Committee members and staff introduced themselves.

Welcome

Tomas Campos, county manager, Rio Arriba County; Barney Trujillo, commissioner, Rio Arriba County Board of Commissioners; Chris Madrid, director of economic development, Rio Arriba County; David Trujillo, deputy county manager, Rio Arriba County; and Thomas Romero, executive director, Northern Rio Grande National Heritage Area, welcomed the committee and discussed current and future economic development initiatives in the county, including:

- a certified nurse assistant certificate program offered by Luna Community College, which is a two-week program that provides entry-level training leading to jobs in health care;
- an expanded substance abuse center in Velarde to address the opioid crisis;
- a partnership with the City of Espanola and private entities to develop the Hunter Arts and Agricultural Center, similar to Green Jeans Farmery in Albuquerque;
- a new wastewater system in Tierra Amarilla;
- a state forest grant for forest thinning; and

- a public-private partnership to develop the Northern Rio Grande National Heritage Area.

It was also noted that Rio Arriba County is the second-highest natural gas producer in the state, but natural gas extraction is not a steady industry, so it is necessary to diversify the economy. A continuing issue is the availability of broadband, which is a necessity for twenty-first century economic development.

New Mexico's Legal Environment for Business

Grace Philips, general counsel, New Mexico Association of Counties (NMAC), and Brian Moore, lobbyist, NMAC, described two primary legal issues that affect counties specifically and the business climate generally in New Mexico: the Whistleblower Protection Act (WPA) and the Fair Pay for Women Act (FPWA). Ms. Philips noted that these laws were passed with good intentions but that the details of the laws have serious consequences.

The WPA protects public employees from retaliation by their employers for disclosing an act, or a failure to act, by a public employer, which act the public employee believes in good faith is an unlawful or improper act. New Mexico's WPA applies to all state and local government entities and some public officers; it does not apply to federal or private employers. The WPA has a low standard for actionable complaints, and the procedures for complaining, combined with extraordinarily high penalties (actual damages, two times the amount of back pay with interest, special damages, costs and attorney fees, plus 15% interest on appeal), result in most cases being settled. In the past six years, \$31 million was paid out by public employers under the WPA. The NMAC does not want the WPA repealed, but it strongly supports some amendments to balance the interests of government employers with the interests of employees, including a higher standard for proving retaliation against those who report government corruption or wrongdoing, better defining the individuals to whom a complaint may be communicated and reducing available damages.

The FPWA, despite its name, is gender-neutral. It prohibits all employers, public and private, with four or more employees from paying different wage rates to men and women who work in the same establishment under similar working conditions and who perform work requiring equal skill, effort and responsibility. An employer may pay men and women different wages as long as the wage differential is based on a seniority or merit system or a system that measures earnings based on the quality or quantity of production. Employees may bring their wage discrimination claims directly to state court without exhausting administrative remedies first, and they have up to two years from their last date of employment to file suit. Because of this, an employee may have left employment up to two years before filing suit, and the employer has had no notice of a discriminatory pay grievance. Damages can be unpaid wages for the employment period times three (triple damages), plus costs and attorney fees. Even for very small awards, the total liability for the employer can be huge.

The NMAC fully supports New Mexico's very progressive antidiscrimination laws but strongly believes that some amendment is necessary to be fair to employers as well as employees. The penalties are so high that they attract lawsuits even for minor infractions, and because of the cost of litigation, they force settlement even when the employer believes it is not at fault. Insurance premiums are increasing, and the availability of insurance to protect against liability for employee discrimination claims is decreasing. The problem affects every employer in the state with four or more employees; some small grocery stores are unable to purchase liability insurance at all. In the case of both the WPA and the FPWA, one amendment that would make a big difference is requiring exhausting administrative remedies before filing a suit in court, which would require employees to come forward sooner and allow employers the opportunity to correct the complained-of action if appropriate.

Quinn Lopez, co-chair, Workplace Issues and Legal Reform Policy Committee, and director, New Mexico Association of Commerce and Industry, asserted that the workers' compensation system has become skewed toward workers at the expense of employers, resulting in higher premiums that are unaffordable for some small businesses. New Mexico has the twentieth-highest premiums in the country.

Minda McGonagle, American Tort Reform Association and National Federation of Independent Business, remarked that the U.S. Chamber Institute for Legal Reform (ILR) publication, "101 Ways to Improve State Legal Systems", has good suggestions for the legislature to consider. She noted that the ILR's "2017 Lawsuit Climate Survey Ranking the States" places New Mexico in the middle, neither best nor worst of states on a variety of issues. She commented that lawyers and the legal process are necessary to enforce laws, but filing a lawsuit against a person is an accusation of wrongdoing, and settlement is seen as a loss in the public's view. Litigation is time-consuming and expensive, and most small businesses cannot afford to litigate legal issues.

Questions, comments and discussion from committee members included:

- the role of human resources policies and procedures in bringing and settling lawsuits;
- the notion that summary judgment motions are disfavored in state court;
- the standards in state and federal court for a frivolous lawsuit; and
- the cultural differences between judges being elected in state court and appointed at the federal level.

Supporting Small Businesses Through Government Procurement

Chris Weil, president and owner, Weil Construction, referring to his handout, "Support for New Mexico Small Business, A Construction Industry Perspective", opined that the current public procurement system benefits a few large companies at the expense of small businesses, particularly in the construction industry, and stifles the growth of small businesses. Although New Mexico is experiencing a construction boom, and construction jobs are now at mid-2009 levels, the boom is due to a handful of large projects, and larger firms are now bidding on smaller

projects that in earlier years they would have left to the smaller construction firms. The result is that the large firms are achieving record volume and smaller firms are struggling to survive.

One area where the legislature could support smaller construction companies is in the procurement process. The current process, which requires a request for proposals (RFP) that demonstrates qualifications and quotes a price to bid on public construction projects, can effectively preclude participation by smaller construction companies because proposals are prohibitively expensive to develop. Most smaller companies do not have marketing divisions to assemble proposals as larger firms do. Relating an experience he had with a response to an RFP for school construction, Mr. Weil said that he tied with another bidder on total points. He was the low bidder, but the other bidder had higher project points. On debriefing, he was told that the other bidder won the contract because its marketing presentation was better. The winning bidder went over budget and subcontracted all of the work.

Two actions that would make the procurement process more welcoming to participation by smaller construction firms are pre-qualifying contractors based on standard and objective evaluations of bonding capacity, financial health, personnel, experience and references, followed by an award based on the best responsible price proposed by a pre-qualified contractor.

Lonnie Cruz, president and owner, Colt Builders, referred to his handout, "Challenges for New Small Business", and discussed with the committee that, as a new business, he is at a disadvantage in the procurement process. Although Mr. Cruz has personal experience with projects up to \$10 million, his company is not able to bid on these projects because the company does not have a history of such projects. He suggested that public bodies should allow companies to work on projects up to the amount for which they are bonded and should subject projects under \$1 million to a regular bid process instead of requiring a costly RFP.

Roxanne Rivera-Weist, president, Associated Builders and Contractors, New Mexico Chapter, referred to her handout, "Building America, the Merit Shop Scorecard, A Review and Ranking of State Construction Environments". She pointed out that New Mexico is graded D or F on the measures for government-mandated project labor agreements, called PLA mandates; the prevailing wage; right to work; public-private partnerships; workforce development; career and technical education; and the job growth rate. She suggested that the issues that would deliver the most bang for the public buck are expansion of public-private partnerships, workforce development and career and technical education.

Questions, comments and discussion from committee members included:

- the need to bring trades back into the education system and to encourage younger generations to enter the construction trades because there is a lack of qualified, trained individuals in New Mexico; and
- how the RFP process uses various factors to determine which company is awarded a bid as opposed to only a low bid driving the award.

Native Fuel Tax

Carolyn Abeita, attorney, Native American Petroleum Coalition, and Teresa Leger, attorney, Leger Law & Strategy, LLC, referring to the handout, "Dual Taxation, New Mexico's Tribal State Solution: 'Tax Peace'", provided legal background on the tribal state tax situation.

A 1982 U.S. Supreme Court case, *Merrion v. Jicarilla Apache Nation*, recognized that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management...[It derives] from a tribe's general authority as a sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services...". New Mexico tribes have exercised their taxation power to impose taxes on fuel sold, and on minerals such as oil and gas extracted, on tribal lands. The state also imposes severance taxes on oil and gas extracted on tribal lands, resulting in a system of dual taxation of oil and gas extracted on tribal lands.

In 1982, a non-Indian company, Cotton Petroleum, which was drilling for oil and gas on Jicarilla tribal lands, sued the state, claiming that state severance taxes were preempted by federal law. The case worked its way through various courts until, in 1989, the U.S. Supreme Court held that the company had to pay both state and tribal severance taxes. In a different case involving regulation and taxation of timber on tribal lands in Arizona that was decided around the same time, the U.S. Supreme Court came to the opposite conclusion. After the Cotton Petroleum case was decided, drilling on Jicarilla tribal lands dropped significantly, and tribal and state revenues suffered because no severance taxes were being paid to either the tribe or the state. Instead of relitigating in light of the Arizona case, the tribe sought cooperation with the state and corresponding legislation. In 1995, the legislature passed laws governing intergovernmental tax credits. The statutes impose a single tax on new oil and gas wells, with the revenues from the tax being apportioned 75 percent to the tribe and 25 percent to the state. Even with the credit to the tribes, the state received over \$56 million in severance taxes from drilling on tribal lands in the last five years.

Although tribal agreements with the state regarding taxation date back to 1995, the Native American Petroleum Coalition, whose membership includes all New Mexico tribes, was established in 2001 to jointly address fuel tax issues with the state. The tribes and the state have committed to fuel tax policies that honor the tribes' sovereignty and benefit the state by providing accurate reporting of fuel sales. The solution to dual taxation is referred to by the U.S. Department of Transportation as "tax peace". The tax peace solution allows tribes to enact and administer their own fuel tax. Under the regulatory framework established in the intergovernmental tax credits statutes, a tribal fuel tax in the same amount as the state's fuel tax is collected on all gallons distributed to retailers on tribal lands, and the distributors report tribal fuel sales to the state, showing how much fuel was sold to tribal retailers and showing proof that they paid the tribes' fuel tax. Tribes retain all revenue from fuel sales on tribal lands.

New Mexico's tax peace has been cited by numerous sources as a model for state-tribal relations, and it has broad support in the state. A recent legislative proposal would change that structure and impose the state gasoline tax on tribal gas stations. To avoid the loss of revenue that would accompany imposition of dual taxation on fuel sold on tribal lands, the Native American Petroleum Coalition proposes a tax credit similar to the severance tax credit.

Regis Pecos, senior policy analyst for the Office of the House Majority Floor Leader, New Mexico Legislature, provided a summary of the legal development of the tribal sovereignty doctrine, beginning with an 1883 federal law prohibiting the free exercise of religion by Native Americans, including laws appropriating Native American lands, attempting to force Native American children to assimilate into non-native culture through required attendance at federally run boarding schools, prohibiting native people from voting and, finally, in 1950, attempting to terminate the status of Indian nations. Beginning in 1970, the federal government recognized education as a basic right, and by the early 1980s, the U.S. Supreme Court also affirmed the right to health care and the power to tax.

Questions, comments and discussion from committee members included:

- how the gas tax is tied to land over which the tribe has jurisdiction, such as tribal trust land, and not to land owned by a tribe in fee simple;
- how approximately \$12 million is generated for tribes by the gas tax; and
- that 20 tribes, including the Navajo Nation, Jicarilla Apache Nation, Mescalero Apache Tribe and 17 pueblos, have gas stations.

Jobs Council Retirement Attraction Initiative

John Garcia, executive vice president, Home Builders Association of Central New Mexico and former New Mexico secretary of economic development, told the committee that New Mexico is a great place to retire, but the state does not market itself as a retirement destination. Charles Lehman, staff consultant, Jobs Council (2016 interim), referring to his handout, "Retire in New Mexico", described a proposed "Retirement Attraction Economic Development Initiative". Despite New Mexico's advantages in the cost of living, weather, natural attractions, culture, events and property taxes, New Mexico is not known as a retirement destination. A publicity campaign entitled "Retire New Mexico" is proposed that would parallel the New Mexico True campaign. The campaign would establish a "RetireNM.com" website and create a "certified retirement community" designation that would rate infrastructure, recreation and medical facilities of communities hoping to attract retirees. Legislation that would study the costs and benefits of exempting pension income from state income tax should be introduced.

Mr. Garcia requested committee endorsement of an appropriation of \$100,000 to develop a marketing plan for the campaign.

Questions, comments and discussion from committee members included:

- the quality of health care available in rural areas of the state and incentives to attract doctors to non-urban areas;
- what other states are doing to attract retirees; and
- how even though New Mexico taxes social security, the overall tax burden in New Mexico is less than in other states.

Recess

The committee recessed at 4:03 p.m.

Tuesday, October 3 — Rio Arriba County Senior Citizen Center, Chama

Reconvene — Introductions

Senator Shendo reconvened the meeting at 9:13 a.m. and welcomed members of the committee and guests. Committee members and staff introduced themselves.

Welcome; Village of Chama Economic Development Priorities

Billy Elbrock, mayor, Village of Chama, explained that he was appointed mayor at the beginning of September 2017. Mr. Elbrock introduced Mayor Pro Tem Scott Flury.

Mr. Flury commented that Chama and Dulce provide mutual support. Dulce is the tribal headquarters and largest community of the Jicarilla Apache Nation. The tribe is the biggest employer in the area, so many people live in Chama and work in Dulce. A free "blue bus" service between Chama and Dulce just started on Monday, October 2.

Clayton Ten Eyck, P.E., vice president, Water Resources, Molzen Corbin Engineers/Architects/Planners, referring to his handout, described the nearly completed wastewater treatment plant. The previous wastewater system, installed in the early 1980s, consisted of a series of lagoons that had become insufficient to process the waste generated by the village and that did not meet the standards for discharge into the Rio Chamita. The new system has a capacity of 250,000 gallons per day, protects the area water quality and within a couple of months should be producing high-quality effluent. The new system is approximately 92 percent complete. As of September 30, all of the sewage in the city is running through the new system. By the end of October or beginning of November, Molzen Corbin will turn over operation of the system to the village. The wastewater treatment plant has four full-time employees. Current sewer rates are \$4.00 per month, which will be raised to \$8.00 per month in March 2018.

Mr. Campos commented that small communities have a smaller tax base but the same infrastructure needs as larger communities, so they often need more state infrastructure support. The Cumbres and Toltec Scenic Railroad (CTSR), which is state-owned, is a vital economic

component of the area. It is a big tourist draw, generating substantial income for area businesses, including lodging and restaurants.

There was general discussion about some of the challenges the village faces. Tourism is its primary economic driver, but the Tourism Department recently closed the visitor center on weekends without consulting with the community and later closed it altogether because it did not generate enough tourist traffic to justify the expense of keeping it open. The village reopened it on a seven-day-a-week schedule and had 14,000 visitors. A local state park lake only allows veterans, seniors over age 60 and children under age 12 to fish there. Chama is the number-one hunting destination in the state, but the state does not allow hunters to use motorized vehicles to pack animals out; elk may weigh several hundred pounds.

Jicarilla Apache Nation: State of the Nation and Wildlife Program

Levi Pesata, president, Jicarilla Apache Nation, remarked that the nation is a major contributor to the economic base of the area. The tribe has its own power company that provides electricity and jobs. It is located in an area rich with natural gas, and the tribe is considering developing natural gas drilling. The game and fish operation is also a big contributor to the local economy. President Pesata introduced Eudane Vicenti, director, Jicarilla Game and Fish Department, and Kyle J. Tator, Jicarilla Apache Nation Wildlife Program.

Referring to his handout, "Jicarilla Apache Nation Wildlife Program", Mr. Tator described the program's history and mission. Today, the program has four divisions — law enforcement, parks and recreation, wildlife and fisheries management and administration — that together are responsible for conservation, management and law enforcement. The Jicarilla Apache Nation is the first Indian nation to conduct in-house, management-based wildlife research to support its mission, and the nation is known for high-quality fish and game management.

Questions, comments and discussion from committee members included:

- predator control is site-specific. Poachers are addressed by the law enforcement division of the Jicarilla Game and Fish Department. Predators are managed as necessary. The department's goal is not to eliminate predators, but to manage them to protect the wildlife for hunting;
- elk on private property is a recurring issue. If an elk is pursued by a hunter onto private land, the appropriate procedure is to call the nation's central office, which will dispatch a conservation officer to help the hunter get the elk. The same procedure is available to private property owners who encounter trespassing elk; and
- the department spends a lot of time making sure the habitat is as healthy as possible to support wildlife for hunting and fishing. Fencing is built for livestock and must be friendly to wildlife, allowing natural migration.

Cultivating Economic Growth Through New Mexico's Movie Industry

Jessa Grazioplene, director of operations and business affairs, Albuquerque Studios, told the committee that the film industry provides a lot of resident jobs. Currently, there are 1,500 people working on Albuquerque Studios' 28-acre property on various productions. Vendors are also local. Income not directly associated with the industry, such as housing and groceries for resident workers, is also important to the community. The tax incentive program is a big draw for the industry, which is extremely sensitive to any changes. Her handout, "New Mexico's 25% to 30% Refundable Film Production Tax Credit", based on statistics from the New Mexico Film Division of the Economic Development Department, shows the increasing importance of the film industry to New Mexico's economy and illustrates the effects of the changes to the film tax credit. In 2013, the phones stopped ringing when the incentive was capped, and Albuquerque Studios nearly had to close. When the incentive was increased by a small percentage, the phones started ringing again the next day. Certainty of the availability of the incentive is crucial to decisions made about where to locate a production. Every time there is talk about changing the incentive, the local industry loses business statewide almost immediately.

Crystal McAlerney, president and owner, Studio Concierge, explained that her business is basically a travel agent for the film industry. She finds hotels and related services for out-of-state crews and finds talent for productions. This summer, she had to lay off employees for the first time, but she is slowly hiring them back as business picks up.

Jack R. Smith, sales manager, Ahern Rentals, told the committee that Ahern Rentals started as a traditional construction business, but it partnered with film production companies 10 years ago and now has an entertainment division with 30 employees that exclusively serves the film industry. He said that without the film industry, the company would be hurting because construction is still depressed.

All of the presenters agreed that when the industry hits the tax incentive cap, they will lose business, and if the cap is increased, business will also increase. Other states have adopted various film incentives to lure the industry. For instance, Georgia does not have a cap, and it provides a 30 percent tax credit. New Mexico's incentive is a tax deduction. The Georgia film industry is growing steadily.

CTSR Capital Outlay Needs

Mr. Elbrock, New Mexico commissioner, CTSR Commission, introduced the panel.

Richard Cowles, New Mexico commissioner, CTSR Commission, said that 2017 bookings are seven percent higher than this time last year. Referring to the handout, "Analysis of C&TSRR Funding", he explained that the CTSR has four sources of funding: revenues from passengers and train operations; grants and appropriations from the states of New Mexico and Colorado; federal grants; and grants from private institutions and individuals. The 1977 agreement between New Mexico and Colorado provides that each state has a one-half interest in the train and is obligated to contribute equally to maintenance, purchase of additional property

and payroll. Between 2004 and 2010, New Mexico provided the bulk of the funds for the CTSR, but since 2013, Colorado has appropriated \$2.00 for every \$1.00 from New Mexico. This continuing disparity is stalling the commission's plans to achieve self-sufficiency and may lead to off-season layoffs of key staff.

However, also since 2013, the CTSR has realized sufficient revenue from its train operations to show a small and continuing operating profit that supports increasing the marketing budget. Annual ridership is projected to increase three to five percent in the coming decade. A *USA Today* poll voted the CTSR the best train in the country and the best tourist attraction in New Mexico. It is a National Historic Landmark, and the goal is to become a UNESCO World Heritage Site.

The CTSR's ongoing 10-year self-sufficiency plan is dependent on marketing programs to increase ridership at a three to five percent annual rate and on completion of major track and equipment upgrade programs. The upgrades are dependent upon continuing state funding until they are completed. An economic impact report performed by BBC Research & Consulting in 2014 found that the CTSR had a positive economic impact of \$15 million annually on the region.

John Bush, general manager, CTSR, referring to the handout, "Cumbres & Toltec Scenic Railroad Ongoing Capital Programs", emphasized that maintenance of the locomotives and track is mandated by federal regulations. The locomotives must be continuously maintained, and a comprehensive upgrade of the track is now 75 percent complete but is delayed because of a lack of funding. Deferred maintenance means costs increase the longer the maintenance is put off. The passenger cars are also in need of upgrading. The CTSR needs a recurring annual appropriation of \$1.3 million from both New Mexico and Colorado to keep a stable workforce of skilled labor to continue the maintenance and upgrading of the train. The train only operates five and one-half months a year, and maintenance and upgrades in the off season are what keep people employed year round.

Public Comment

Olivia Reid, a member of the community, suggested that the El Rito campus of Northern New Mexico College be used for a treatment and rehabilitation center for youth, similar to Delancey Street.

Adjournment

There being no further business before the committee, the fifth meeting of the ERDC for the 2017 interim adjourned at 12:24 p.m.