

EXECUTIVE SUMMARY

(LCS Information Memorandum re Proposed State Financial Support for Amtrak's
"Southwest Chief" Train in Light of the Anti-Donation Clause,
Arthur J. Waskey, November 6, 2014)

Amtrak has proposed that New Mexico participate with Kansas and Colorado to help Amtrak finance improvements to the rail line in northern New Mexico, southern Colorado and western Kansas along which the Southwest Chief passenger train currently runs. The proposal, which is encouraged by Congress, is due to an announcement by BNSF Railway Company, the owner of the rail tracks that Amtrak uses pursuant to an operating agreement, that beginning January 1, 2016, BNSF will no longer maintain the tracks for passenger train use. If Amtrak does not pay in the future for track maintenance required for passenger trains, the Southwest Chief will cease to operate through Raton, Las Vegas, Lamy and perhaps Albuquerque and could be rerouted on a different rail line east from Belen, through Texas and into eastern Kansas.

Amtrak's proposal raises issues under the Constitution of New Mexico's Anti-Donation Clause, Article 9, Section 14, the principal part of which states:

Neither the state . . . 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 or in aid of any private enterprise for the construction of any railroad . . .

There are exceptions, but none germane to the Amtrak proposal. The New Mexico Supreme Court has recognized that the Anti-Donation Clause contains two distinct prohibitions regarding the pledge of credit or making a donation: one involving "any person, association or public or private corporation" and the second pertaining to "private enterprise for the construction of any railroad". Rules of constitutional construction lead to the conclusion that the second prohibition is intended to be independent of the first. It is the second prohibition that is appropriate to Amtrak's proposal.

The second prohibition is centered on "private enterprise"; that is, if private enterprise is not the recipient of a pledge of credit or a donation for the construction of a railroad, then the Anti-Donation Clause is not implicated. That leads to the question, is Amtrak private enterprise? Although Amtrak was created by Congress in 1970 as a federally chartered corporation to take over long-distance rail passenger service in the United States, the United States Supreme Court has ruled that it is a federal agency or instrumentality, at least for civil rights purposes. If that is the case, Amtrak is not "private enterprise". As a federal agency or instrumentality, Amtrak would be an appropriate partner for the state, likely through its

Department of Transportation, to enter into an agreement, pursuant to New Mexico's Joint Powers Agreement Act, to exercise joint powers to provide financial support to keep the Southwest Chief running through northern New Mexico. Those powers to exercise jointly are the power given by Congress to Amtrak to operate long-distance, interstate passenger trains and the power given by New Mexico's Railroad Planning and Projects Act to the Department of Transportation to "take all practical steps to improve the quality of rail freight and passenger services in New Mexico".

Even if Amtrak were considered "private enterprise", an agreement to procure from Amtrak the continued operation of the Southwest Chief along its traditional route would be valid if the Anti-Donation Clause prohibitions against loaning or pledging credit and making a donation are not violated. Case law in New Mexico looks at the kind of debt created by a pledge of credit to determine if the pledge violates constitutional limitations. A pledge of the state's general faith and credit supported by general taxing power creates the kind of debt subject to constitutional limitations; however, a pledge of credit that does not engage the general taxing power, but comes from a special fund, such as a fund that supports revenue bonds, does not create debt in the constitutional sense. Thus, if the state provides financial support to Amtrak from a debt source relying on a special fund for repayment, the pledge of credit will not violate the Anti-Donation Clause.

The Anti-Donation Clause prohibition against donations would only be violated if financial support to Amtrak was given as a gift without consideration of commensurate value back to the state. But that would not be the case here since any support would require Amtrak to make an obligation to continue the Southwest Chief service in northern New Mexico, a service the value of which the legislature can determine by its importance to New Mexico. The obligation to continue the service would certainly be fulfilling a governmental function, which the New Mexico Court of Appeals and attorney general have found to be sufficient consideration in other cases. As noted above, the New Mexico Department of Transportation is tasked by statute with the duty to improve rail passenger transportation in the state.

Considering contract form and procedure, a joint powers agreement would not only allow the state to contract with Amtrak, but also with the other states, if that is necessary, and within their authority. As an alternative, each state has a cooperative procurement process for use with other states that would also provide a contracting process and documentation subject to New Mexico's Procurement Code.