



**Report
to
The LEGISLATIVE FINANCE COMMITTEE**



Department of Public Safety
Southwest Border Prosecution Initiative
May 2, 2007

Report #06-99

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State of New Mexico
LEGISLATIVE FINANCE COMMITTEE

325 Don Gaspar, Suite 101 • Santa Fe, New Mexico 87501
Phone: (505) 986-4550 • Fax: (505) 986-4545

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April 19, 2007

John Denko, Secretary
Department of Public Safety
P.O. Box 1628
Santa Fe, New Mexico 87504

Dear Secretary Denko:

On behalf of the Legislative Finance Committee (Committee), we are pleased to transmit the report of our review of the Southwest Border Prosecution Initiative (Initiative) administered by the Department of Public Safety (DPS). The purpose of the review was to identify issues surrounding DPS withholding Initiative funds designated for several district attorneys offices.

The process for evaluating the withholding of Initiative funds involved discussions with staff from DPS, the Administrative Office of the District Attorneys, and the U.S. Department of Justice. It further involved examination of pertinent documents and the review of relevant laws, regulations and guidelines. In addition, information was obtained from the other participating states regarding their administration of the same Initiative.

The contents of this report were discussed with your senior staff on March 20, 2007. The report will be presented to the Committee most likely in May.

We believe this report addresses issues the Committee asked us to review and hope DPS and other State agencies benefit from this effort. Thank you and your staff for your prompt and courteous assistance.

Sincerely,

A handwritten signature in cursive script that reads "David Abbey".
David Abbey
Director

Table of Contents

Page No.

EXECUTIVE SUMMARY	1
BACKGROUND INFORMATION	4
FINDINGS & RECOMMENDATIONS	6
DPS SITE VISITS	
Recent Audits By DPS Identified An Additional \$3.6 Million In Questioned Costs And Ineligible Reimbursements.	6
OFFICE OF THE INSPECTOR GENERAL AUDIT	
The OIG Identified \$1,098,036 In Questioned Costs And Ineligible Reimbursements In An Audit of the New Mexico Southwest Border Prosecution Initiative.....	8
The OIG Recommended the Second District Attorney Return \$569,955 to the DOJ for Criminal Cases Determined Ineligible for Reimbursement.....	8
Questioned Costs Of \$466,327 Must Be Returned To The DOJ by The Third Judicial District Attorney	9
The DOJ Reimbursed The Eleventh District Attorney, Division I, \$42,270 For Cases Not Supported By A Master Case Log	10
Inadequate Program Oversight by the Department Of Public Safety	11
INITIATIVE GUIDELINES	
Initiative Guidelines Contribute to Issues Identified in Both the OIG Audit and DPS Reviews....	12
BUDGET SUPPLEMENTAL	
A \$1.798 Million Budget Supplemental May Be Necessary to Relieve the District Attorneys of the Liability Owed the Department Of Justice	13
DEPARTMENT RESPONSE	15
APPENDIX A	
Department of Justice response to DPS Request for Clarification and Instruction in Regards to OIG Audit.....	16

Federal audit of Southwest Border Prosecution Initiative identifies \$1.1 million in questioned costs at the Second, Third and Eleventh (2nd Division) District Attorneys.

Further reviews by DPS staff identify more deficiencies at other District Attorneys' offices.

DPS withholds future payments to offset questioned costs.

The United States Office of the Inspector General (OIG), Audit Division, performed an audit of the Southwest Border Prosecution Initiative (Initiative) administered by the Department of Public Safety (DPS) on behalf of New Mexico's District Attorneys. The audit identified approximately \$1.1 million in questioned costs and ineligible reimbursements to the Second, Third and Eleventh (Division 1) District Attorneys offices.

The objective of the OIG audit was to determine if claims for reimbursement of prosecutorial costs were supported by the appropriate documentation and allowable in accordance with applicable laws, regulations, guidelines and terms of the Initiative. The audit scope covered case files used to support applications for reimbursement to the three District Attorney offices identified above. The audit was limited to the October 1, 2003, through March 31, 2005, funding of phases IV through VIII of the Initiative. During this time the three offices accounted for 57 percent or almost \$3.8 million of the \$6.6 million of Initiative funds received by all District Attorneys statewide.

Following the OIG audit, DPS staff performed their own review at each of the remaining 10 District Attorneys offices and of Division 2 of the Eleventh District Attorney. The DPS review covered phase I through IX to determine additional questioned costs and ineligible reimbursements. The monies received by DPS and disbursed to the District Attorney offices subsequently determined ineligible must be returned to the Department of Justice (DOJ) before future reimbursements are released. Several District Attorney offices do not have sufficient uncommitted cash balances to cover the liabilities due the DOJ.

Key Observations.

In addition to the questioned costs identified in the OIG audit, audits performed by DPS identified an additional \$3.6 million in questioned costs and ineligible reimbursements at remaining district attorneys. Table 1 summarizes questioned costs at each District Attorneys office, funds held by DPS to offset questioned costs, payments received from District Attorneys to close the OIG audit and the total liability due to the DOJ.

More than \$4.6 million in questioned costs identified between DPS and federal audit of the Border Prosecution Initiative.

Liability owed the DOJ for questioned costs and ineligible reimbursements surpass \$2.6 million.

The inability by District Attorneys to establish proof of the required federal initiation of an eligible case accounts for the bulk of cases identified as ineligible.

Develop standardized procedures for processing Initiative applications.

Table 1. Questioned Costs by District Attorney Office

District Att'y	Identified Questioned Costs - DPS and OIG	Funds Withheld by DPS to offset	Payments received from DA's to Close OIG	Liability Owed to Dept. of Justice
1st	\$208,913.87	\$0.00	\$0.00	\$208,913.87
2nd	\$539,713.22	\$379,575.61	\$160,137.61	\$0.00
3rd	\$433,846.52	\$287,957.47	\$145,889.05	\$0.00
4th	\$36,016.00	\$0.00	\$0.00	\$36,016.00
5th	\$1,032,098.88	\$340,235.10	\$0.00	\$691,863.78
6th	\$191,735.60	\$119,796.47	\$0.00	\$71,939.13
7th	\$0.00	\$0.00	\$0.00	\$0.00
8th	\$90,672.93	\$88,354.97	\$0.00	\$2,317.96
9th	\$309,004.01	\$106,367.47	\$0.00	\$202,636.54
10th	\$235,139.00	\$0.00	\$0.00	\$235,139.00
11th(1)	\$44,734.00	\$0.00	\$44,734.00	\$0.00
11th(2)	\$235,909.50	\$82,792.97	\$0.00	\$153,116.53
12th	\$1,005,715.25	\$139,031.93	\$0.00	\$866,683.32
13th	\$287,158.21	\$88,877.47	\$0.00	\$198,280.74
Totals	\$4,650,656.99	\$1,632,989.46	\$350,760.66	\$2,666,906.87

Source: LFC Analysis from DPS records.

- To offset questioned costs and ineligible reimbursements, DPS is withholding disbursements to the District Attorneys.
- Deficiencies identified in DPS reviews include missing case logs for cases filed, no evidence to support federal involvement, cases not prosecuted per guidelines (Nolle Prosequi) and miscalculated reimbursements.
- DPS sent final site-visit worksheets to each District Attorney for review and response providing an opportunity to the Districts to resolve questioned costs.
- The OIG audit recommended the Second District Attorney in Albuquerque return \$539,713 to the DOJ for 171 cases determined ineligible or that received excess reimbursements.
- The OIG audit recommended the Third District Attorney in Las Cruces return \$433,847 to the DOJ for 232 cases determined ineligible or received excess reimbursements.
- The OIG audit recommended the Eleventh District Attorney (Division 1) in Farmington return \$44,734 to the DOJ for cases determined ineligible or received excess reimbursements.
- The OIG report cited DPS for not providing adequate program oversight and support.

Key Recommendations.

- The Administrative Office of the District Attorneys (AODA) coordinate with all District Attorneys to develop standardized processes and procedures for identifying, tracking and

Resolve as many questioned costs as possible by providing missing documentation to DPS.

Transfer administration of the Initiative from DPS to the Administrative Office of the District Attorneys.

The District Attorneys need a supplemental appropriation from the Legislature to cover the liability owed the DOJ.

**The State Legislature recently appropriated \$1.7 million to the Administrative Office of the District Attorneys to repay questioned costs and ineligible reimbursements.*

calculating reimbursement for cases eligible for Initiative reimbursement.

- The District Attorneys with questioned costs coordinate with DPS to provide documentation to resolve findings and further reduce the liability each District Attorney owes the DOJ.
- AODA coordinate with all District Attorneys and DOJ to clarify and resolve disputes regarding Initiative guidelines to prevent issues like those identified in the OIG audit and DPS review from recurring.
- DPS obtain guidance from DOJ regarding repayment of questioned costs as soon as possible to close the OIG audit so that reimbursements withheld by DOJ for phases X through XII may be released for disbursement to the District Attorneys.
- DPS request to DOJ the transfer administration and oversight of Initiative to the AODA to directly administer the Initiative through an agency specifically in tune with the needs and operations of the District Attorneys.
- Allow the AODA to retain a reasonable percentage of Initiative reimbursements to cover such costs as administration, oversight and monitoring, training and technical assistance.

Conclusion.

The New Mexico State Legislature may consider providing a supplemental appropriation to the Administrative Office of the District Attorneys to cover the balance shortfall owed the DOJ by individual District Attorneys beyond their uncommitted Southwest Border Prosecution Initiative fund balance so they can repay the questioned costs and ineligible reimbursements identified in DPS reviews. This appropriation shall not be disbursed by the AODA until final resolution of the questioned costs has been obtained by DPS from the United States Department of Justice. The amount of supplemental appropriation could be determined as follows:

Total Liability Due to Dept. of Justice	\$2,666,907
Less: Uncommitted Initiative cash held by DA's	
1 st District Attorney	\$ 117,156
4 th District Attorney	36,016
8 th District Attorney	2,318
10 th District Attorney	20,579
12 th District Attorney	42,463
13 th District Attorney	<u>51,622</u>
	(\$370,154)
	\$2,296,753
Less: Contribution from the 11 th (Division 1)	(\$498,000)
Supplemental Appropriation to AODA	<u>\$1,798,753</u>

BACKGROUND INFORMATION

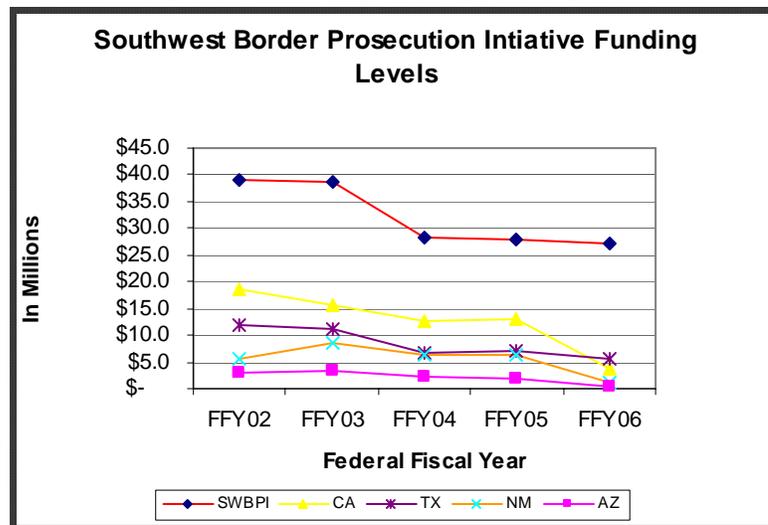
Background Information.

The Legislative Finance Committee (Committee) requested an LFC performance review of issues surrounding the Department of Public Safety (DPS) withholding quarterly reimbursements designated for several judicial district attorneys (District Attorneys). DPS and the U.S. Department of Justice (DOJ) are withholding current and future reimbursements in the wake of questioned costs identified in the federal audit of the Southwest Border Prosecution Initiative (Initiative). The audit was performed by the DOJ Office of the Inspector General (OIG). The OIG identified questioned costs at the Second, Third and Eleventh (Division 1) District Attorneys offices.

The DOJ, Office of Justice Programs (OJP), avails funding to the border states of Arizona, California, New Mexico, and Texas, to reimburse local governments for costs associated with the prosecution of crimes declined/referred by local U.S. Attorneys' offices. The DOJ appointed DPS as the authorized designee for the State of New Mexico responsible for requesting reimbursements on behalf of the 14 District Attorneys.

Graph 1 illustrates gradually declining federal funding levels of the Initiative since inception in 2002.

Graph 1.



Senior Policy Advisors from the DOJ indicate DPS is the authorized designee for the Initiative since they administer another DOJ program, The Bullet Proof Vests Partnership. Among participating states, New Mexico's program is the only one that administers the Initiative with a law enforcement agency. The Initiative is administered by county governments or agencies directly tied to court administration in the other three states. In Arizona, for instance, the Initiative is administered by each county choosing to participate and the State Attorney General's office individually.

California and Texas do not participate at the state level (i.e. Attorney General's office) but participate at the individual county level. Table 2 presents the participating governments and agencies, cases submitted for reimbursement and the amount of reimbursement received to date.

The graph further illustrates New Mexico's aggressiveness in submitting claims for reimbursement for its relative population.

Table 2. Southwest Border Prosecution Initiative

State	Participating Governments and Agencies	Number of Cases Submitted for Reimbursement	Total Funds Received To Date
Arizona	Att'y General, Eight counties	2,115	\$10,702,560
California	31 Individual Counties	15,738	\$63,796,489
New Mexico	14 District Attorneys	9,421	\$28,304,403
Texas	23 Individual Counties	6,192	\$37,962,252
Totals		33,466	\$140,765,704

Source: U.S. Department of Justice

The Initiative reimburses applicants at 100 percent of the calculated dollar amount of cases meeting eligibility criteria, providing sufficient funding is available. Otherwise, funding is distributed on a pro-rated basis as was the case in phases VI through IX.

The process for evaluating withholding of Initiative funds and questioned costs identified in the OIG audit involved discussions with staff from DPS, the Administrative Office of the District Attorneys (AODA), First District Attorney, and the U.S. Department of Justice. It also involved reviewing the OIG audit report, Independent Auditor reports for several District Attorneys, examination of pertinent documents and the review of relevant laws, regulations and guidelines. In addition, information was obtained from the other participating states regarding their administration of the Initiative.

Authority for Review. The Legislative Finance Committee (committee) has the statutory authority under Section 2-5-3 NMSA 1978 to examine laws governing the finances and operations of departments, agencies and institutions of New Mexico and all of its political subdivisions, the effects of laws on the proper functioning of these governmental units and the policies and costs. The committee is also authorized to make recommendations for change to the legislature. In furtherance of its statutory responsibility, the committee may conduct inquiries into specific transactions affecting the operating policies and cost of governmental units and their compliance with state law.

Review Team

M. Manu Patel, LFC Deputy Director for Performance Audit
J. Scott Roybal, LFC Performance Auditor

Report Distribution. This report is intended for distribution to the Office of the Governor; Department of Public Safety, Administrative Office of the District Attorney, State Auditor, and the Legislative Finance Committee. This restriction is not intended to limit distribution of this report which is a matter of public record.



Manu Patel
Deputy Director for Performance Audit

FINDINGS & RECOMMENDATIONS

DPS SITE VISITS

Recent Audits By DPS Identified An Additional \$3.6 Million In Questioned Costs And Ineligible Reimbursements. The United States Office of the Inspector General (OIG), Audit Division, performed an audit of the Southwest Border Prosecution Initiative (Initiative) administered by the Department of Public Safety (DPS) on behalf of New Mexico's District Attorneys. The audit identified approximately \$1.1 million in questioned costs and ineligible reimbursements to the Second, Third and Eleventh (Division 1) District Attorneys offices.

Following the OIG audit, the Grant Accountability and Compliance section of DPS performed reviews of cases included in applications for reimbursement from the remaining ten District Attorneys offices and Division 2 of the Eleventh District Attorney. DPS reviewed applications submitted in phases I through IX from late 2001 through June 30, 2005.

The results of DPS reviews were compiled by Committee staff and illustrated in Table 3. The table lists the total dollar value of reimbursements received by each District Attorney. Column three is the cumulative amount of questioned costs for phases I-IX identified by DPS. Column four is the questioned costs for the three District Attorneys subject to the OIG audit. They are included here for informational purposes. The last column is the ratio of ineligible and questioned costs, identified in either review, as a percent of reimbursements claimed and received by District Attorneys.

Table 3. Questioned Costs Identified by DPS

District Attorney	Total Reimbursement Phases I - IX	Questioned Costs Per DPS Reviews	Questioned Costs Per OIG Audit**	Ineligible as a Percent of Total Reimbursements
1st	\$226,611	\$208,914		92.2
2nd	\$2,085,835		\$583,700	25.9
3rd	\$5,031,219		\$466,327	8.6
4th	\$77,647	\$36,016		46.4
5th	\$1,385,542	\$1,032,099		74.5
6th	\$965,686	\$191,736		19.9
7th	\$68,163	\$0.00		0.0
8th	\$118,545	\$90,673		76.5
9th	\$508,082	\$309,004		60.8
10th	\$235,137	\$235,137		100.0
11th(1)	\$3,262,554		\$48,009	1.4
11th(2)	\$306,222	\$235,909		77.0
12th	\$1,541,533	\$1,005,715		65.2
13th	\$315,371	\$287,158		91.1
Totals	\$16,128,147	\$3,632,361	\$1,098,036**	29.3

Source: LFC Analysis

****Note:** Subsequent to the OIG audit, DPS was able to locate documentation at the Second, Third and Eleventh (Div.1) District Attorneys offices that will potentially resolve \$79,742 in questioned costs reducing their cumulative liability to \$1,018,294. Dollar amounts in the table are rounded to the nearest whole dollar.

According to DPS staff, methodology used to determine questioned costs involved verifying cases on applications submitted for reimbursement with the "case log" maintained at each District Attorney's office in the Case Management System (CMS). Individual case files were

selected from the case log to review and determine if documentation existed to support eligibility criteria per Initiative guidelines. Discrepancies were compiled into “finding worksheets” for each reimbursement phase. All finding worksheets were then summarized into single worksheets of application totals, questioned costs and net reimbursements due each District Attorney. Several worksheets provided examples where DPS rejected the application for reimbursement in its entirety because case logs were missing or unavailable. Other reasons DPS determined cases ineligible for reimbursement include:

- No evidence to support federal involvement;
- Case not prosecuted as per Initiative guidelines (Nolle Prosequi); and
- Miscalculation of amounts to be reimbursed.

Table 3 indicates that questioned costs and ineligible reimbursements as determined by DPS staff ranged from none identified at the Seventh District Attorney to over \$1 million dollars at the fifth and twelfth District Attorneys. As a percent of total individual reimbursements, questioned costs and ineligible reimbursements ranged from 0 percent, again at the Seventh District Attorney, to 100 percent at the Tenth District Attorney.

To test the DPS review methodology and results, Committee staff met with the First District Attorney, his Fiscal Officer and a Fiscal Contractor responsible for preparing the application for reimbursement. Preliminary observations from that meeting indicated various discrepancies between information submitted on applications for reimbursement by the First District Attorney staff and actual case file information. Committee staff concluded the results of DPS reviews as reasonably reliable at that point.

In an attempt to reduce the additional potential liability of \$3.6 million, DPS sent each District Attorneys office a summary of questioned costs and ineligible reimbursements for review and response. This was done to allow the Districts an opportunity to provide the evidence to support the eligibility of cases submitted for reimbursement and subsequently determined ineligible in DPS reviews. District Attorneys were given a deadline of March 9, 2007 to provide to DPS any and all documentation to resolve questioned costs.

Recommendations.

- Each District Attorneys office owing a liability to the DOJ should immediately remit to DPS their uncommitted Initiative fund cash balances up to the liability owed to DOJ as payment of questioned costs and ineligible reimbursements.
- The AODA should coordinate with all District Attorneys to develop written standardized processes and procedures for determining case eligibility, enhancing tracking mechanisms of eligible cases and accurately calculating reimbursement for cases eligible for Initiative reimbursement.
- The District Attorneys with questioned costs should coordinate with DPS to provide documentation to resolve questioned costs to further reduce the liability each District Attorney owes the DOJ by the March 9, 2007 deadline.
- AODA should coordinate with all District Attorneys and DOJ to clarify and resolve disputes regarding Initiative guidelines to prevent issues like those identified in the OIG audit and DPS review from recurring.

OFFICE OF THE INSPECTOR GENERAL AUDIT

The OIG Identified \$1,098,036 In Questioned Costs And Ineligible Reimbursements In An Audit of the New Mexico Southwest Border Prosecution Initiative. Questioned costs were identified at the Second, Third and Eleventh (Division 1) District Attorneys. Furthermore, whereas the DPS review covered nine funding phases, the OIG audit only covered funding phases IV through VIII.

Initiative guidelines allow reimbursement for criminal cases that are declined/referred for prosecution by a U.S. Attorney or through a pre-established blanket federal decline/referral process via memorandum of understanding (MOU) in which there is federal agency participation. The U.S. Attorney for the District of New Mexico has prosecution guidelines that govern violations of federal law, including the minimum thresholds for a case to be filed in federal court. These prosecution guidelines are used by law enforcement to determine whether to file a case in federal, state or county court.

Questioned costs are expenditures that do not comply with legal, regulatory or contractual requirements, do not meet eligibility criteria, are not supported by adequate documentation at the time of the audit or were calculated incorrectly. Questioned costs may be remedied by payment offset, waiver, recovery of funds, or the provision of supporting documentation to resolve discrepancies.

The OIG audit report indicated DPS must address all findings adequately which includes the return of monies reimbursed to the three District Attorney for cases determined ineligible to “close the audit report”. Further correspondence from the DOJ indicated non-compliant grantees may be subject to administrative action, withholding of funds or non-certification of new grant awards.

Southwest Border Prosecution Initiative – Eligible Case

An eligible case is any federally initiated and declined/referred criminal case prosecuted by a state or county prosecutor and disposed of (the time from a persons arrest to the time of case dismissal, plea or conviction) during a period where SWBPI funding is available. A case is eligible regardless of:

- When the case was declined/referred.
- The Type or number of criminal offenses involved (misdemeanors, felonies, violent crimes, property or public order).
- The defendant's age or citizenship.
- Whether the case was formally declined by a U.S. Attorney or through a blanket federal declination/referral policy.
- Whether state and local law enforcement participated with federal authorities in the investigation.

The OIG Recommended the Second District Attorney Return \$569,955 to the DOJ for Criminal Cases Determined Ineligible for Reimbursement. From October 1, 2003, through March 31, 2005, (funding phase IV through VIII), the Second Judicial District Attorney submitted five applications containing 245 criminal cases requesting reimbursement of \$1,208,750. The DOJ remitted received reimbursements totaling \$863,330 for those same applications. From the population of 245 cases originally submitted, the OIG identified 161 cases totaling \$559,033 that were ineligible for reimbursement under Initiative guidelines because federal initiation and involvement could not be proved. The cases determined ineligible at the Second Judicial District Attorney for lack federal initiation or involvement include:

- \$168,391 for 45 weapons cases;
- \$164,775 for 50 extradition cases;

- \$101,621 for 28 gang cases;
- \$95,966 for 28 cases filed by the Isleta and Sandia Tribal police;
- \$14,526 for six fraud cases the district argues the defendants could have been charged under federal law but were not; and
- \$13,754 for four juvenile cases that did not involve federal law enforcement agencies.

Subsequent to the OIG audit, DPS was given an opportunity to resolve the findings identified at the Second District Attorney. DPS found documentation that established federal participation in 12 cases which reduced the liability due by \$43,987. Documentation was not found, to refute OIG findings on the remaining 153 ineligible cases leaving a liability due of \$539,713.

DOJ guidelines state a case must be *federally* initiated and declined/referred by a U.S. District Attorney, prosecuted by a state or county prosecutor *and* disposed of during a period when funding is available.

In a letter dated August 29, 2006, DPS informed the Second District Attorney they would withhold \$379,576 in reimbursements (\$139,852 for Phase VII reimbursements, \$121,221 for phase VIII and \$118,503 for Phase IX) to offset the total amount due the DOJ and requested immediate payment on the balance of \$160,138. DPS confirmed they received full payment from the Second Judicial District Attorney.

Questioned Costs Of \$466,327 Must Be Returned To The DOJ by The Third Judicial District Attorney. The OIG audit of the Third District Attorney involved 543 files and reimbursements of \$1,723,254. Among the questioned costs are 42 cases totaling \$147,131 determined ineligible for reimbursement as mandated by grant guidelines because there was no evidence of federal involvement. Third Judicial District Attorney findings include but are not limited to:

- \$110,956 for 31 weapons cases not federally initiated;
- \$36,175 for 11 probation violation cases not federally initiated;
- \$41,683 received for 34 cases that were not prosecuted (Nolle Prosequi);
- \$189,764 must be returned for cases resolved during the quarter ended September 30, 2004, for which no federal funds were available for reimbursement but submitted for reimbursement on the following quarter's application;
- \$77,185 in excess reimbursements due to using the case closure date instead of the shorter case disposition date; and
- \$8,100 in cases that were disposed of prior to the inception of the Initiative.

DPS staff reviewed Third District Attorney cases identified in the OIG audit and found documentation supporting federal participation in 10 cases, which reduced the liability due the DOJ by \$32,480. DPS withheld the Phase IX reimbursement of \$287,957 to further offset the amount due. Payment of \$145,889 was rendered by the Third District Attorney to cover the balance.

The DOJ Reimbursed The Eleventh District Attorney, Division I, \$42,270 For Cases Not Supported By A Master Case Log. The OIG reported 204 cases were claimed for reimbursement for phase V and phase VI by the Eleventh Judicial District Attorney, Division I. OIG auditors compared the number of cases claimed in each disposition category to the detailed listing of cases provided by the District Attorneys office. Of the 204 cases reimbursed, only 190 could be verified.

The audit also identified an additional five cases that received \$5,739 in excess reimbursements that must be returned to the DOJ. In these cases reimbursements were calculated using the case *closure* date (the date the case is closed by the District Attorney) instead of the case *disposition* date (the date the defendant is convicted, pleas or the case is dismissed in a judicial proceeding).

The District Attorneys argue that in many cases substantial resources are dedicated to the sentencing phase of a criminal trial. In a drug case for instance, the trial is straight forward and the only remaining question is the length of sentence. The defendant's lawyers will argue for a short sentence and the District Attorneys will argue for the maximum sentence allowed by law. Therefore, District Attorneys argue they are entitled to reimbursement for the time spent in the sentencing phase of cases declined/referred by U.S. Attorneys.

The Department of Justice explained that Initiative guidelines clearly define case length as the time between a suspects arrest and the case disposition (e.g., dismissals, pleas, convictions, etc.) of the criminal charges through a county or state judicial process not through sentencing. DOJ further explained that the focus of the Initiative is *prosecution* and often the time between disposition and sentencing is considerable which would consume substantial funding thus reducing the amount available for prosecution. The District Attorneys, on the other hand state that not receiving reimbursement for costs associated with the sentencing reduces the incentive to prosecute federally declined/referred criminal cases.

Maximum Reimbursements of Eligible Cases
Eligible cases may receive the following maximum reimbursement based on length of disposition and availability of funds.
<ul style="list-style-type: none">• \$1,250 for each case of 1 to 15 days;• \$2,500 for each case of 16 to 30 days;• \$3,750 for each case of 31 to 90 days; and• \$5,000 for each case in excess of 90 days.

DPS found documentation resolving an incorrect disposition and reduced the liability by \$3,275. The Eleventh Judicial District Attorney was ordered to pay DPS \$44,734 by December 22, 2006. DPS confirmed they received payment in full on February 8, 2007.

Recommendations.

- The AODA coordinates with all District Attorneys to develop written standardized processes and procedures for ensuring case eligibility, enhancing tracking mechanisms for eligible cases and accurately calculating reimbursement for cases submitted for reimbursement.
- The District Attorneys review current Southwest Border Prosecution Initiative guidelines to better understand case eligibility criteria.
- The AODA coordinate with all the District Attorneys and DOJ to clarify uncertainties and grey areas of Initiative guidelines to prevent findings like those in the OIG audit and DPS review from recurring.

- DPS forward payments received from the Second, Third and Eleventh (Division 1) Districts Attorneys as soon as possible so that future reimbursements may be released by the DOJ.

Inadequate Program Oversight by the Department Of Public Safety. The OIG report cited DPS for inadequate oversight as program administrator and recommended improving monitoring efforts of District Attorney requests for reimbursement to ensure that cases submitted are allowable, supported and in compliance with Initiative guidelines. Shortly after the completion of the OIG audit DPS received a follow-up letter from DOJ with a list of 20 issues that required resolution to close the audit. Prevalent among the 20 items was the repayment of questioned costs and DPS providing a corrective action plan specifying controls implemented to ensure adequate monitoring of the District Attorneys requests for reimbursement.

DPS insists they were never required to provide extensive oversight and monitoring of the District Attorneys participating in Initiative. They further argued it was not their understanding they were to scrutinize each case submitted for reimbursements against eligibility criteria. DPS claims their understanding from discussions with DOJ staff led them to believe their sole responsibility would be to submit the combined application during periods of funding availability on behalf of the District Attorneys. They further argued they do not have budget to provide the level of oversight recommended in the audit. DPS does not withhold any portion of the reimbursements to cover costs of administering the Initiative.

Currently New Mexico is the only state that administers the Initiative through a law enforcement agency and not an entity with direct ties to prosecutorial efforts. In Arizona, the Initiative is administered by each individual county government choosing to participate. It was decided early on by the Arizona Criminal Justice Commission to let counties administer the Initiative themselves since funding is not available or authorized for program administration. In Texas, the Governor’s Criminal Justice Division administers federal and state funding to local and statewide criminal justice related projects but declines to participate in the Initiative. Twenty-three counties participate independently. In California, Governor Schwarzenegger’s Office of Criminal Justice Planning does not participate but over 30 counties do independently.

<p align="center">Administrative Agencies of States Participating in the Border Prosecution Initiative</p> <ul style="list-style-type: none"> • Arizona, California and Texas – Individual participating county governments and agencies. • New Mexico – Department of Public Safety.
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Recommendations.

- Request from DOJ the transfer of Initiative administration and oversight from DPS to the AODA to directly administer the Initiative through an agency specifically in tune with the needs and operations of the District Attorneys.
- Allow the AODA to retain a reasonable percentage of Initiative reimbursements to cover such costs as administration, oversight and monitoring, and training and technical assistance.

INITIATIVE GUIDELINES

Initiative Guidelines Contribute to Issues Identified in Both the OIG Audit and DPS Reviews. Guidelines posted on the Office of Justice Programs Southwest Border Prosecution web-site are minimal, vague in some cases, lack case examples and are thus open to wide interpretation. DPS contends that training was not provided by DOJ with regards to the Initiative. DOJ advised DPS staff, who in turn advised the District Attorneys offices to use the web-posted guidelines and associated instructions to determine case eligibility, reimbursement calculation and application completion.

In addition to the confusion surrounding the definition of case disposition described in an earlier finding, other problems attributable to Initiative guidelines regard interpretation *federal participation vs. federal initiation* per Initiative guidelines. The District Attorneys argue they are entitled to reimbursement for any case involving a federal agency. Committee staff spoke directly with DOJ officials who clarified the issue by explaining even though there may be federal participation, the case *must* be declined/referred by a U.S. attorney or through a blanket MOU to a state or local judicial system and it *must be* prosecuted.

Therefore, if a criminal investigation is initiated by the New Mexico State Police (NMSP) in a task force with federal agencies such as the Federal Bureau of Investigation (FBI) or the Drug Enforcement Agency (DEA), but the U.S. Attorney is *not interested* in pursuing charges and a blanket referral does not exist, the case is *ineligible (emphasis added)* even if prosecuted locally. DOJ emphasized that the case was not declined/referred by the U.S. Attorney. If the U.S. Attorney accepted the case then declined/referred to the local DA or a blanket referral existed it then it would be reimbursement *eligible*.

Cases determined ineligible by the OIG or DPS staff due to not being prosecuted is another issue of contention with District Attorneys that can be attributed to weak federal guidelines. Often District Attorneys dispose cases declined/referred by the U.S. Attorney via *Nolle Prosequi*. This is a Latin term meaning "we shall no longer prosecute". It is a declaration made by a prosecutor in a criminal case either before or during trial, meaning the case against the defendant is being dropped. The declaration may be made because the charges cannot be proved, or the evidence has demonstrated either innocence or a fatal flaw in the prosecution's claim. It is generally made after indictment, but is not a guarantee that the person will not be re-indicted.

Resources; however, are applied up to the point it is dismissed via *Nolle Prosequi* which District Attorneys believe entitles them to some reimbursement. The OIG audit indicated that cases *not prosecuted* were ineligible for reimbursement. Staff from the DOJ argued Initiative guidelines clearly state a case *must be prosecuted*. Cases dismissed by a judge *are* eligible because they were prosecuted by the local District Attorney.

Recommendations.

- AODA contact the DOJ and coordinate with all the District Attorneys to clarify uncertainties and grey areas of Initiative guidelines to prevent findings like those in the OIG audit and DPS review from recurring.

- The DOJ enhance Initiative guidelines with more detail, concrete examples and a resource the District Attorneys offices can tap for technical assistance to reduce the likelihood of misinterpretation.

BUDGET SUPPLEMENTAL

A \$1.798 Million Budget Supplemental May Be Necessary to Relieve the District Attorneys of the Liability Owed the Department Of Justice. Insufficient uncommitted cash balances of approximately \$868 thousand may require consideration by the New Mexico State Legislature providing a supplemental appropriation in the range of \$1.798 million to the Administrative Office of the District Attorneys (AODA).

Table 4 summarizes questioned costs at each District Attorneys office, disbursements withheld by DPS to offset, payments received from the Second, Third and Eleventh (Division 1) District Attorneys and the total liability due back to the DOJ. The second column from right represents uncommitted Initiative funds available for remittance to DPS to relieve some of the liability. The last column depicts the amount of supplemental appropriation needed at each District Attorneys office.

Table 4. Supplemental Needed to Relieve Liability

DA	Questioned Costs	Disbursements Withheld by DPS to Offset	Payments received from DA's	Liability still owed to Dept. of Justice	Uncommitted Fund Cash Balances Held by DA's	Supplemental Needed to Relieve Liability
1st	\$208,913.87	\$0.00	\$0.00	\$208,913.87	\$117,155.62	\$91,758.25
2nd	\$539,713.22	\$379,575.61	\$160,137.61	\$0.00	\$0.00	\$0.00
3rd	\$433,846.52	\$287,957.47	\$145,889.05	\$0.00	\$0.00	\$0.00
4th	\$36,016.00	\$0.00	\$0.00	\$36,016.00	\$36,016.00	\$0.00
5th	\$1,032,098.88	\$340,235.10	\$0.00	\$691,863.78	\$0.00	\$691,863.78
6th	\$191,735.60	\$119,796.47	\$0.00	\$71,939.13	\$0.00	\$71,939.13
7th	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00	\$0.00
8th	\$90,672.93	\$88,354.97	\$0.00	\$2,317.96	\$2,317.93	\$0.03
9th	\$309,004.01	\$106,367.47	\$0.00	\$202,636.54	\$0.00	\$202,636.54
10th	\$235,139.00	\$0.00	\$0.00	\$235,139.00	\$20,578.68	\$214,560.32
11th(1)	\$44,734.00	\$0.00	\$44,734.00	\$0.00	\$498,000.00	(\$498,000.00)
11th(2)	\$235,909.50	\$82,792.97	\$0.00	\$153,116.53	\$0.00	\$153,116.53
12th	\$1,005,715.25	\$139,031.93	\$0.00	\$866,683.32	\$42,463.14	\$824,220.18
13th	\$287,158.21	\$88,877.47	\$0.00	\$198,280.74	\$151,622.15	\$46,658.59
Totals	\$4,650,656.99	\$1,632,989.46	\$350,760.66	\$2,666,906.87	\$868,153.52	\$1,798,753.35

Source: LFC Analysis

As the table illustrates, questioned costs were discovered at all but one District Attorneys office. DPS is withholding over \$1.6 million in Initiative disbursements to offset the \$4.6 million in questioned costs. Payments exceeding \$350 thousand were received from the three District Attorneys offices audited by the OIG to close the audit. In some cases the amount due the DOJ is quite substantial and poses a significant financial concern for several District Attorneys.

The second column from right in Table 4 indicates uncommitted Southwest Border Prosecution Initiative funds from individual District Attorneys offices that can contribute to resolving the amounts they owe the DOJ. Although, the liability owed by the Eleventh District Attorney

(Division 1) was resolved via the repayment of questioned costs and finding resolution, they graciously committed \$498 thousand of uncommitted funds to help the other District Attorneys owing the DOJ for questioned costs and ineligible reimbursements. The contribution will reduce the amount of supplemental appropriation needed by the District Attorneys to \$1.798 million.

Recommendations.

- New Mexico State Legislators consider a supplemental appropriation to the Administrative Office of the District Attorneys to cover the balance owed the DOJ by individual District Attorneys beyond their uncommitted cash to repay questioned costs and ineligible reimbursements.
- Require each of the District Attorneys offices owing a liability to the DOJ submit their uncommitted fund cash balances to DPS as soon as possible as partial payment of the total amount identified as questioned costs and ineligible reimbursements.
- Obtain final resolution of questioned costs and ineligible reimbursements from the U.S. Department of Justice prior to expending the supplemental appropriation.

*Note: Laws 2007 Chapter 28 Section 6 appropriated \$1.7 million to the Administrative Office of District Attorneys for the repayment of questioned costs resulting from the United States Office of the Inspector General audit of the Southwest Border Prosecution Initiative funds administered by the Department of Public Safety.

**NEW MEXICO
DEPARTMENT OF PUBLIC SAFETY**

Bill Richardson
Governor

John Denko Jr.
Cabinet Secretary

March 14, 2007



Faron W. Segotta
Deputy Secretary—Operations
Chief—State Police

Paul E. Cook
Deputy Secretary—Administration

Timothy W. Manning
Deputy Secretary—Emergency Services

Mr. David Abbey, Director
Legislative Finance Committee
State Capitol Building, Room 416
Santa Fe, NM 87501

Dear Mr. Abbey:

Thank you for the opportunity to respond to the performance review of the Southwest Border Prosecution Initiative. Throughout the process, the auditors kept the department informed as to their progress and preliminary information.

The department has been working diligently with the Department of Justice, Office of Inspector General, District Attorney's Offices and the Legislative Finance Committee toward rectifying noted findings/issues surrounding the Initiative. I have found the LFC review to be valuable and instrumental in working toward resolving the issues and providing for a more effective and efficient means of administering the Initiative.

In addition, the LFC auditors provided the department with opportunities to work on the report's recommendations. The recommendations provided will be considered by the department for immediate implementation.

Again, we thank you for your assistance in helping us continue to serve the prosecutorial needs of New Mexico.

Sincerely,

John Denko, Jr.
Cabinet Secretary

JD/lb

Office of the Secretary 827-3370	Office of the Chief New Mexico State Police 827-9219	Office of Emergency Management 476-9600	Forensics and Records / Technical Support 827-3329
Information Technology 827-9121	Motor Transportation 827-0321	Special Investigations 841-8053	Support Services 827-9016
			Training and Recruiting 827-9251

P. O. Box 1628 • Santa Fe, New Mexico 87504-1628



U.S. Department of Justice

Office of Justice Programs

Office of the Comptroller

Washington, D.C. 20531

April 9, 2007

New Mexico Department of Public Safety
Office of the Secretary
P.O. Box 1628
Santa Fe, New Mexico 87504
Attn: John Denko, Jr.

Mr. Denko,

I am writing in response to your letter dated February 21, 2007, requesting written clarification and instructions in regards to the Department of Justice Office of the Inspector General (OIG) audit report related to the Southwest Border Prosecution Initiative (SWBPI). You requested clarification over the SWBPI guidelines, the authorized designee, and the questioned costs. Below is my response:

SWBPI Guidelines: To address issues raised by the OIG audit of the SWBPI, as well as to prevent such issues with the program in the future, the Office of Justice Programs (OJP) and Bureau of Justice Assistance (BJA) have reviewed and rewritten the SWBPI guidelines; a draft of these proposed guidelines was forwarded to Ms. Kelly Kuenstler for review on March 15, 2007. Additionally, OJP and BJA continue to conduct outreach to seek further clarification on New Mexico's policies and practices that might positively impact its SWBPI payments.

As soon as these reviews are completed and guidelines finalized, OJP will respond in writing to the State of New Mexico Department of Public Safety to identify any previously questioned costs that can now be deducted from the remaining balance.

Authorized Designee for the SWBPI Program: While OJP approval is not required to change the designation and administration of SWBPI from the State of New Mexico Department of Public Safety to the Administrative Office of the District Attorney, BJA will contact Mr. Larry Romero, Grant Accountability and Compliance Section, Department of Public Safety, to discuss how the transition can be recorded in the SWBPI online system. BJA is fully committed to working with Mr. Romero and the new staff assigned to successfully administer SWBPI in New Mexico.

Questioned Costs: While a review of the questioned costs is being undertaken, OJP placed a hold on the fourth quarter (July 1 through September 30, 2005) Fiscal Year (FY) 2005 payments due to the State of New Mexico totaling \$1,012,019. This hold allows OJP to recoup questioned

costs, if due, without having to be reimbursed by the State. In addition, on February 23, 2007, OJP released \$959,259.26 in funds as reimbursement to New Mexico for the first quarter of FY 2006 (October 1 through December 31, 2006). Further review of the charges will be made to determine reasonableness and allowability.

If you have additional questions, please contact Larry Hailes, Deputy Comptroller, Grants Financial Management Division, Office of the Comptroller on 202-514-7925.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia K. Paull". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Marcia K. Paull
Chief Financial Officer