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November 17, 2021

Jennifer L. Scott
Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
supjls@nmcourts.gov (Via electronic mail)

RE: *State ex rel. Candelaria, et al v. Grisham: Tim Eichenberg - Real Party in Interest -*
New Mexico Supreme Court No. S-1-SC-38996

Dear Ms. Scott:

In accordance with Rule 12-318(D)(2), State Treasurer Tim Eichenberg, Real Party in Interest, submits the attached LFC Hearing Brief from the New Mexico Legislative Finance Committee, dated November 17, 2021, and titled "Tracking Federal Stimulus Funds," as supplemental authority.

The Hearing Brief pertains to the argument at pages 14-15 of the Treasurer's November 1, 2021 Reply Brief.

Very truly yours,



L. Helen Bennett
Attorney at Law

Enclosure as noted

LHB/fa

Tracking Federal Stimulus Funds

Calculations by LFC economists confirm that all \$1.06 billion of remaining state fiscal recovery funds from the American Rescue Plan Act (ARPA) can be accounted for as lost revenue to the general fund. As such, the state could, at any time, transfer the funds into the general fund for that purpose. Doing so would ensure that the money is appropriately earned by the state and make the funding available for appropriations by the Legislature. In addition, this brief covers initial details surrounding the estimated \$3.7 billion in infrastructure funding New Mexico will receive as part of the recently passed federal Infrastructure Investment and Jobs Act.

All remaining ARPA state fiscal recovery funding should be deposited into the general fund and counted as lost revenue.

ARPA stipulated that the \$1.75 billion New Mexico received in general state fiscal recovery funds could be used to replace lost revenue that the state was projected to have brought in before the pandemic. The U.S. Treasury released an interim final rule on May 10, 2021, detailing how to calculate that lost revenue (see Figure 1.)

DATE: November 17, 2021

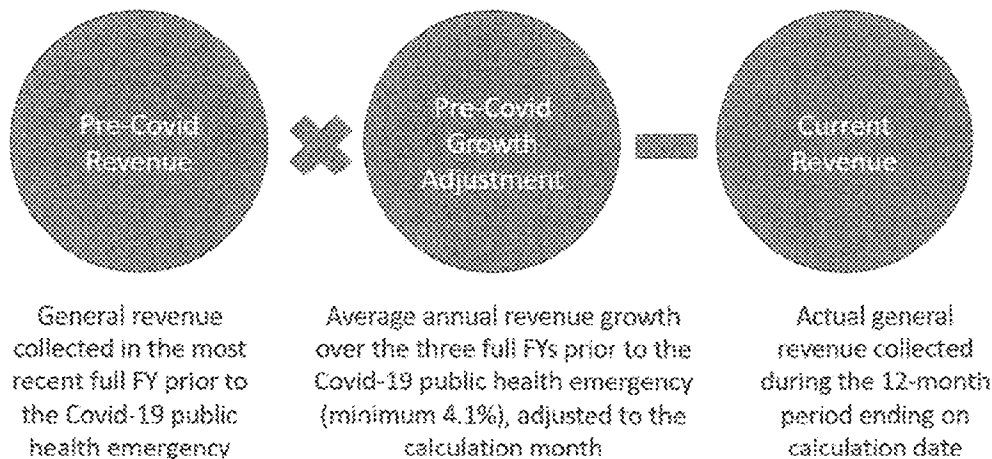
PURPOSE OF HEARING:
Update on budgeting and use of federal stimulus funds

WITNESS: LFC staff

PREPARED BY: Micaela Fischer, Program Evaluation Manager, Catherine Dry, Program Evaluator

EXPECTED OUTCOME:
Informational

Figure 1. Illustration of How Lost Revenue is Calculated for the Purposes of the ARPA State Fiscal Recovery Fund



Source: Adapted from the National Association of Counties

In summer 2021, the Government Finance Officers Association (GFOA) released an Excel formula to assist states and local governments in calculating revenue replacement as required by ARPA. Using this formula, LFC economists calculated a \$1.48 billion revenue loss to the state as a result of the pandemic, which is more than the remaining \$1.06 billion left unspent from New Mexico's state fiscal recovery fund. See Appendix A for a copy of the GFOA calculator with New Mexico revenue calculations.

The executive placed state ARPA funds in a suspense account, asserting they have not been “earned” by the state and that the Legislature cannot appropriate them.

LFC staff have consistently contended that the broad general funding that came to the state through the CARES Act coronavirus relief fund and the ARPA state fiscal recovery fund was the Legislature’s to appropriate. State law (Section 6-4-2 NMSA 1978) that requires the State Treasurer credit all revenues not otherwise allocated by law to the general fund and Article IV, §30, of the State Constitution that requires money to be paid out of the State Treasury only upon appropriations made by the Legislature.

However, the Governor vetoed the Legislature’s appropriations of the \$1.75 billion of ARPA state fiscal recovery funds in the General Appropriation Act of 2021 (HB 2). In her veto message, the Governor stated that the appropriations were an impermissible attempt by the Legislature to appropriate or control the allocation of federal funds to a New Mexico governmental entity.

The Supreme Court will hear oral arguments in the case on Wednesday, November 17 at 9:30 am.

On May 12, 2021, in response to an LFC inquiry, the State Treasurer’s Office affirmed these laws and stated that “consistent with past practices, upon receipt, the State Treasurer’s Office will deposit ARPA proceeds into the State General Fund Investment Pool.” The State General Fund Investment Pool (SGFIP) is a pool of many state agency funds that are centrally managed by the New Mexico State Treasurer’s Office. According to the office’s most recent financial audit, “claims on the SGFIP are reported as financial assets by the various agencies investing in the SGFIP.”

In September 2021, two Legislators petitioned the state Supreme Court to stop the Governor from spending the ARPA funds without Legislative appropriation. The Supreme Court denied the motion to halt the spending but agreed to entertain the case to determine if the Legislature or the Governor had ultimate appropriations authority over those funds. The State Treasurer’s Office subsequently submitted a brief claiming that it was the Legislature that should have appropriations authority over the ARPA funds.

The Governor’s office replied to the Supreme Court on October 15, asserting

- 1) That the ARPA state fiscal recovery funds were “properly held in a suspense account pursuant to NMSA 1978, Section 6-10-3(C) (2003), and NMSA 1978, § 6-10-41 (1977), because they “[ha] ve] not yet been earned so as to become the absolute property of the state.”
- 2) Based on Attorney General opinions from 1930 and 1967, that suspense accounts were outside the state treasury, even though they are controlled by the State Treasurer’s Office.
- 3) Even if the funds were not in a suspense account—thus placing them “in the treasury,” they would not be subject to appropriation because the state is merely holding them as a custodian for the federal government.

The Governor’s Office also requested that if the court did decide that the Legislature has the authority to appropriate the ARPA funds, that they adopt an ad hoc approach to determining whether federal funds more broadly are subject to Legislative appropriation similar to that of recent jurisprudence from Colorado.

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New Mexico has earned the ARPA state fiscal recovery funding.

First, as noted in the first section of this brief, the state has clearly earned all remaining ARPA funding as a replacement for lost revenue. As such, the general fund has a claim on the entire balance to replace lost revenue as expressly allowed purpose for the funding. Further, the federal government has already awarded the state of New Mexico its share of ARPA funding to be used for broad purposes and the executive has already spent a portion of it. Thus, the state has earned the revenue and it is not necessary to keep the ARPA funding in a suspense account. Section 6-10-41 NMSA 1978 states that all funding in suspense accounts shall be transferred out of the suspense account as soon as the funds become the absolute property of the state.

Second, the Governor's Office filing states that New Mexico "is subject to repaying the funds to the federal government if they are used improperly." However, language in the American Rescue Plan Act is clear that in the case the state mispends that state fiscal recovery fund, that the state needs to pay back "an amount equal to the amount of funds used in violation of such subsection" (emphasis LFC), not the actual funds (page 227, PL 117-2, the American Rescue Plan Act).

Third, Colorado was referenced in the Governor's Office filing as a preferred example of how appropriation authority determination might be delineated. In Colorado, the executive retains the authority of federal funds that are "custodial," and the Legislature has appropriations authority over "noncustodial" funds. The difference being, according to the Colorado Attorney General, that when federal statutes "specify the purposes the state is directed to accomplish with the money, the manner in which the purposes are to be accomplished and the restrictions placed on use of the funds by the federal government," such grants are custodial and not subject to the General Assembly's appropriation power. Colorado determined that the ARPA state fiscal recovery funds were indeed noncustodial and the Legislature appropriated the funding, allocating \$300 million for the Governor's discretionary spending.

The new infrastructure legislation will send an estimated \$3.7 billion to New Mexico over approximately five years.

On November 5, 2021 the House of Representatives passed a more than \$1 trillion Infrastructure Investment and Jobs Act (IIJA). Traditional "hard infrastructure" projects such as improvements to roads and transit are the major focus of the bill. However, investments in broadband, the electric grid, cybersecurity and water infrastructure are also included in the bill. New Mexico is due to receive an estimated \$3.7 billion over five years through noncompetitive awards based on predetermined formulas (i.e., formula grants). As more information becomes available, these estimates are subject to change (See Appendix B for more detailed projections of New Mexico apportionments for select programs within the IIJA). The bill also provides for additional funding through numerous competitive grant opportunities.

The Infrastructure Investment and Jobs Act can be found [here](#).

To learn more about key spending areas, visit these sections of the Bill:

Spending Area	IIJA Section
Federal-Aid Highways	11101 - 11530
Public Transit	30001 - 30019
Electric Vehicle	40112; 40411 - 40438
Broadband	60102 - 60105
Water Infrastructure	50102 - 50222
Wildfire	40801 - 40806; 70201 - 70303
Cybersecurity	70601 - 70612

Table 1. Estimated New Mexico Allocations for Key Spending Areas in the Infrastructure Investment and Jobs Act
(\$ in millions)

Spending Area	Estimated NM Allocations for Select Programs (over ~5 years)
Roads, bridges, and major projects	\$2,725
Passenger and freight rail	
Public transit	\$372
Airports	\$90
Ports and waterways	
Electric vehicles	\$38
Road safety	
Reconnecting communities	
Power infrastructure	\$38
Broadband	\$100
Water infrastructure	\$355
Wildfires	\$39
Cybersecurity	\$13
Environmental remediation	
Estimated Total, Spending Provisions	\$3,731
Other Estimated Funding*	
Eastern New Mexico Rural Water Project	\$300
Fire Risk Mapping	\$38

Source: Bipartisan Infrastructure Investment and Jobs Act summary from the U.S. Chamber of Commerce, White House, FFIS, * Office of Senator Martin Heinrich.

The House of Representatives has yet to decide on the larger \$1.85 trillion “human infrastructure” package to address social policy, climate and tax issues.

Roads, bridges and major projects (\$2.7 billion). The largest sum of money coming to New Mexico through the IIA will be for federal aid for highways, roughly \$2.7 billion over five years. This represents an approximate 25 percent increase in federal funds for highways or approximately \$100 million per year for five years. There are nine major formula grant programs (two of which are new). The programs have different matching requirements, but federal funds will cover the majority of program costs, ranging from 80% to 100%.

Public Transit (\$372 million). New Mexico will receive up to \$372 million in formula grants for planning, urbanized areas, enhanced mobility, rural needs, state of good repair needs, and buses and bus facilities.

Broadband (minimum \$100 million). There are two major broadband formula grants: (1.) Broadband equity, access and deployment, and (2.) State Digital Equity Capacity Grant Programs. The White House estimates New Mexico would receive a minimum of \$100 million for broadband coverage. Additionally, 785,000 New Mexicans will be eligible for a new Affordability Connectivity Benefit to help low-income households afford internet connections.

Power Infrastructure (\$38 million). New Mexico will receive an estimated \$38 million total to address energy efficiency. The Energy Efficiency Revolving Loan Fund awards capitalization grants to states to fund and operate revolving loan funds. These funds are sent to states that then distribute them as loans to eligible businesses and homeowners. A portion of the funds can also be direct grants for small businesses and low-income homeowners. The Weatherization Assistance Program would see an over 1,000 percent increase in funding with nearly \$30 million to help low-income New Mexicans reduce their energy bills by increasing the energy efficiency in their homes.

Appendix A



ARPA Revenue Replacement Calculator

Background Information

1) Fiscal Year End	<input type="text" value="June"/>	Notes:
Base Year Revenue Period	<input type="text" value="6/30/2019"/>	FY used for base year calculation
2) Calculation Date	<input type="text" value="12/31/2020"/>	
Number of Months	<input type="text" value="18"/>	Months between Base Year and Calculation Date

Estimate Revenue

3) Base Year Revenue	<input type="text" value="\$ 7,979"/>	
4) Growth Rate	<input type="text" value="13.0%"/>	
Counterfactual Revenue	<input type="text" value="\$ 9,530"/>	Estimated Revenue Without Pandemic
5) Actual Revenue	<input type="text" value="\$ 8,049"/>	Use Worksheet to Calculate

Reduction in Revenue

		<i>Fiscal Year Ended</i>	<i>12/31/2020</i>
Revenue Reduction	<input type="text" value="\$ 1,481"/>		
Revenue Reduction %	<input type="text" value="15.5%"/>		

Base Year Revenue Worksheet



Fiscal Year Ended

6/30/2019

Revenue Source	Base Revenue (Y/N)	Amount
Taxes		
Amount of tax collections for all taxes imposed by the government.		
Property Tax		
Property Tax	Y	\$ -
Sales and Gross Receipts Tax		
General Sales and Use Tax	Y	\$ 2,738
Selective Sales Tax		
Alcoholic Beverage	Y	\$ 48
Amusements Sales Tax	Y	\$ 65
Motor Fuels Sales Tax	Y	\$ 283
Parimutuels Tax	Y	\$ -
Public Utilities Sales Tax	Y	\$ -
Tobacco Products Tax	Y	\$ 88
Other Sales Tax	Y	\$ 225
Licensing and Permit Taxes		
Alcoholic Beverage Licensing and Permits	Y	
Building/Construction Permits	Y	
Amusements Licensing and Permits	Y	
Motor Vehicles Licensing and Permits	Y	
Public Utilities Licensing and Permits	Y	
Occupation and Business Licensing and Permits	Y	
Other Licensing and Permits	Y	\$ 55
Income Tax		
Individual Income Tax	Y	\$ 1,672
Corporate Income Tax	Y	\$ 123
License and Permit Tax		
Alcoholic Beverage	Y	\$ -
Amusements	Y	\$ -
Motor Vehicles	Y	\$ 159
Public Utilities	Y	\$ -
Occupational and Business Licenses	Y	\$ -
Other Selective Sales	Y	\$ -
Other Taxes		
Death and Gift Tax	Y	\$ -
Documentary and Stock Transfer Tax	Y	\$ -
Severance Tax	Y	\$ 1,239
Other	Y	\$ -
Intergovernmental Revenue		
Amount of revenue in form of grants, share of taxes imposed by others, PILOTs, or reimbursement for		
Intergovernmental Revenue		
From Other Local Governments	Y	\$ 78
From the State	Y	\$ -

From the Federal Government	N	\$	1,147
From the State and Financed from Federal Grants	N	\$	-

Other Revenue

Amount of other revenue excluding any refunds or transfers between funds

Utility Sales Revenue

Water Supply System	N	\$	-
Electric Power System	N	\$	-
Gas Supply System	N	\$	15
Transit or Bus System	N	\$	-

User Charges and Fees

Sewerage Charges	Y	\$	-
Refuse Collection, Disposal, and Recycling Charges	Y	\$	-
Parks and Recreation Charges	Y	\$	-
Airports	Y	\$	-
Hospital Charges	Y	\$	-
Parking Facilities	Y	\$	-
Housing Project Rentals	Y	\$	-
Highways and Other Roads	Y	\$	-
Sea and Inland Port Facilities	Y	\$	-
Miscellaneous Commercial Activities Operated	Y	\$	-
Other	Y	\$	-

Other Revenue

Special Assessments	Y	\$	-
Receipts from Sale of Property and Other Capital Assets	Y	\$	-
Proceeds from Issuance of Debt	N	\$	-
Interest Earnings	Y	\$	87
Fines and Forfeitures	Y	\$	-
Rents	Y	\$	132
Royalties	Y	\$	883
Private Donations	Y	\$	-
Sale of Retail or Wholesale Liquor	N	\$	-
Trust Revenue	N	\$	-
Refunds and Other Correcting Transactions	N	\$	-
Miscellaneous Other Revenue	Y	\$	54

Total \$ 9,091

Total Included in Base Revenue \$ 7,829

Growth Rate Calculation

NOTE: This form is only required if annual revenue growth prior to the pandemic exceeds 4.1%. If not, 4.1% rate of growth is assumed.

Revenue Source	Base Revenue (Y/N)	FY Ended 6/30/2016	FY Ended 6/30/2017	FY Ended 6/30/2018
Taxes Amount of tax collections for all taxes imposed by the government:				
Property Tax				
Property Tax	Y	\$ -	\$ -	\$ -
Sales and Gross Receipts Tax				
General Sales and Use Tax	Y	\$ 2,022	\$ 2,062	\$ 2,102
Selective Sales Tax				
Alcoholic Beverage	Y	\$ 46	\$ 48	\$ 50
Amusements Sales Tax	Y	\$ 63	\$ 60	\$ 57
Motor Fuels Sales Tax	Y	\$ 258	\$ 263	\$ 268
Parimutuels Tax	Y			
Public Utilities Sales Tax	Y			
Tobacco Products Tax	Y	\$ 93	\$ 91	\$ 89
Other Sales Tax	Y	\$ 208	\$ 227	\$ 246
Licensing and Permit Taxes				
Alcoholic Beverage Licensing and Permits	Y			
Building/Construction Permits	Y			
Amusements Licensing and Permits	Y			
Motor Vehicles Licensing and Permits	Y			
Public Utilities Licensing and Permits	Y			
Occupation and Business Licensing and Permits	Y			
Other Licensing and Permits	Y	\$ 55	\$ 53	\$ 51
Income Tax				
Individual Income Tax	Y	\$ 1,327	\$ 1,381	\$ 1,435
Corporate Income Tax	Y	\$ 119	\$ 70	\$ 21
License and Permit Tax				

Alcoholic Beverage	Y				
Amusements	Y				
Motor Vehicles	Y	\$	150	\$	145
Public Utilities	Y				
Occupational and Business Licenses	Y				
Other Selective Sales	Y				

Other Taxes

Death and Gift Tax	Y				
Documentary and Stock Transfer Tax	Y				
Severance Tax	Y	\$	588	\$	663
Other	Y				

Intergovernmental Revenue

Amount of revenue in form of grants, share of taxes imposed by other governments, or reimbursement for services

Intergovernmental Revenue

From Other Local Governments	Y	\$	64	\$	63
From the State	Y				
From the Federal Government	N	\$	390	\$	436
From the State and Financed from Federal Grants	N				

Other Revenue

Amount of other revenue excluding any refunds or transfers between governments

Utility Sales Revenue

Water Supply System	N				
Electric Power System	N				
Gas Supply System	N	\$	20	\$	10
Transit or Bus System	N				

User Charges and Fees

Sewerage Charges	Y				
Refuse Collection, Disposal, and Recycling Charges	Y				
Parks and Recreation Charges	Y				
Airports	Y				
Hospital Charges	Y				
Parking Facilities	Y				
Housing Project Rentals	Y				
Highways and Other Roads	Y				

Sea and Inland Port Facilities	Y				
Miscellaneous Commercial Activities Operated	Y				
Other	Y				
Other Revenue					
Special Assessments	Y				
Receipts from Sale of Property and Other Capital Assets	Y				
Proceeds from Issuance of Debt	N				
Interest Earnings	Y	\$	22	\$	(3)
Fines and Forfeitures	Y				
Rents	Y	\$	48	\$	71
Royalties	Y	\$	414	\$	444
Private Donations	Y				
Sale of Retail or Wholesale Liquor	N				
Trust Revenue	N				
Refunds and Other Correcting Transactions	N				
Miscellaneous Other Revenue	Y	\$	48	\$	49
Total		\$	5,934	\$	6,133
Total Included in Base Revenue		\$	5,523	\$	5,687

Growth Rate					3.0%	13
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Average Growth Rate **13.0%**

Growth Rate Used for Calculation **13.0%**

Actual Revenue Worksheet



12 Months Period Prior to 12/31/2020

Revenue Source	Base Revenue (Y/N)	Amount
Taxes		
Amount of tax collections for all taxes imposed by the government.		
Property Tax		
Property Tax	Y	\$ -
Sales and Gross Receipts Tax		
General Sales and Use Tax	Y	\$ 2,875
Selective Sales Tax		
Alcoholic Beverage	Y	\$ 49
Amusements Sales Tax	Y	\$ 14
Motor Fuels Sales Tax	Y	\$ 282
Parimutuels Tax	Y	\$ -
Public Utilities Sales Tax	Y	\$ -
Tobacco Products Tax	Y	\$ 102
Other Sales Tax	Y	\$ 311
Licensing and Permit Taxes		
Alcoholic Beverage Licensing and Permits	Y	\$ -
Building/Construction Permits	Y	\$ -
Amusements Licensing and Permits	Y	\$ -
Motor Vehicles Licensing and Permits	Y	\$ -
Public Utilities Licensing and Permits	Y	\$ -
Occupation and Business Licensing and Permits	Y	\$ -
Other Licensing and Permits	Y	\$ 24
Income Tax		
Individual Income Tax	Y	\$ 1,864
Corporate Income Tax	Y	\$ 150
License and Permit Tax		
Alcoholic Beverage	Y	\$ -
Amusements	Y	\$ -
Motor Vehicles	Y	\$ 199
Public Utilities	Y	\$ -
Occupational and Business Licenses	Y	\$ -
Other Selective Sales	Y	\$ -
Other Taxes		
Death and Gift Tax	Y	\$ -
Documentary and Stock Transfer Tax	Y	\$ -
Severance Tax	Y	\$ 1,057
Other	Y	\$ -
Intergovernmental Revenue		
Amount of revenue in form of grants, share of taxes imposed by others, CILDTs, or reimbursement for		
Intergovernmental Revenue		
From Other Local Governments	Y	\$ 40
From the State	Y	\$ -
From the Federal Government	N	\$ 660
From the State and Financed from Federal Grants	N	\$ -
Other Revenue		
Amount of other revenue excluding any refunds or transfers between funds		
Utility Sales Revenue		
Water Supply System	N	\$ -

Electric Power System	N	\$	-
Gas Supply System	N	\$	12
Transit or Bus System	N	\$	-
User Charges and Fees			
Sewerage Charges	Y	\$	-
Refuse Collection, Disposal, and Recycling Charges	Y	\$	-
Parks and Recreation Charges	Y	\$	-
Airports	Y	\$	-
Hospital Charges	Y	\$	-
Parking Facilities	Y	\$	-
Housing Project Rentals	Y	\$	-
Highways and Other Roads	Y	\$	-
Sea and Inland Port Facilities	Y	\$	-
Miscellaneous Commercial Activities Operated	Y	\$	-
Other	Y	\$	-
Other Revenue			
Special Assessments	Y	\$	-
Receipts from Sale of Property and Other Capital Assets	Y	\$	-
Proceeds from Issuance of Debt	N	\$	-
Interest Earnings	Y	\$	68
Fines and Forfeitures	Y	\$	-
Rents	Y	\$	50
Royalties	Y	\$	917
Private Donations	Y	\$	-
Sale of Retail or Wholesale Liquor	N	\$	-
Trust Revenue	N	\$	-
Refunds and Other Correcting Transactions	N	\$	-
Miscellaneous Other Revenue	Y	\$	45
Total		\$	8,777
Total Actual Base Revenue		\$	8,049

Appendix B. Estimated New Mexico Allocations from Select Formula Grant Programs from the Infrastructure Investment and Jobs Act

New Mexico Apportionments for Highways from the IIJA
(\$ in millions)

	FY2021	FY2022	FY2023	FY2024	FY2025	FY2026	New Program	Fed Share
National Highway Performance Program	\$232	\$271	\$276	\$282	\$280	\$293		80% generally
Surface Transportation Block Grant	\$122	\$132	\$135	\$137	\$140	\$143		80% generally
Highway Safety Improvement Program 1/	\$24	\$29	\$30	\$30	\$31	\$31		90%
Railway-Highway Crossings (HSIP set-aside)	\$2	\$2	\$2	\$2	\$2	\$2		100%
Congestion Mitigation and Air Quality	\$12	\$12	\$13	\$13	\$13	\$13		80% generally
Metropolitan Planning Program	\$2	\$2	\$2	\$2	\$2	\$2		80% generally
National Highway Freight Program	\$14	\$13	\$13	\$13	\$14	\$14		80% generally
Carbon Reduction Program	\$0	\$12	\$12	\$12	\$12	\$13	X	80% generally
Promoting Resilient Operations for Transformative, Efficient, and Cost-saving Transportation (PROTECT) Program	\$0	\$13	\$14	\$14	\$14	\$14		80% generally
Total	\$408	\$484	\$495	\$503	\$514	\$523	X	

Source: FFIS

New Mexico Apportionments for Transit from IIJA
(\$ in thousands)

Public Transit	FY2021	FY2022	FY2023	FY2024	FY2025	FY2026	Fed Share
New Mexico Apportionment for Transit Formula Grants	\$65,206	\$71,159	\$72,581	\$74,504	\$76,063	\$78,023	80%-100% max

Source: FFIS

New Mexico Apportionments for Energy Programs from IIJA
(\$ in thousands)

	FY2021	IIJA Funding	IIJA Energy Efficiency Revolving Loan Fund Formula Allocations
New Mexico Energy Program and Energy Efficiency	\$538	\$4,803	\$661
Weatherization Assistance Program	\$2,380	\$28,387	

Source: FFIS

New Mexico Apportionments for Cybersecurity from IIJA
(\$ in thousands)

Cybersecurity	FY2021	FY2022	FY2023	FY2024	FY2025	Total
New Mexico Allocation		\$2,580	\$5,120	\$3,840	\$1,280	12,800

Source: FFIS