

1 SENATE BILL 426

2 **53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**

3 INTRODUCED BY

4 Carlos R. Cisneros

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10 AN ACT

11 RELATING TO TOURISM; ENACTING THE PUBLIC-PRIVATE PARTNERSHIPS
12 ACT; ALLOWING THE STATE AND LOCAL GOVERNMENTS TO ENTER INTO
13 LONG-TERM PARTNERSHIPS WITH PRIVATE SECTOR PARTNERS TO
14 FACILITATE TOURISM PROJECTS; PROVIDING POWERS AND DUTIES.

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
18 cited as the "Public-Private Partnerships Act".

19 SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
20 Public-Private Partnerships Act:

21 A. "department" means the tourism department;

22 B. "force majeure" means an uncontrollable force or
23 natural disaster not within the power of the public or private
24 partner;

25 C. "local government" means a municipality; a

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1 county; or a regional entity created by a joint powers
2 agreement between one or more public agencies;

3 D. "material default" means a failure of a private
4 partner to perform any duties under a public-private
5 partnership, which failure jeopardizes delivery of adequate
6 service to the public and remains unsatisfied after a
7 reasonable time and after the private partner has received
8 written notice from the public partner of the failure;

9 E. "private partner" means one or more persons who
10 have entered into a public-private partnership with a public
11 partner and who are not the federal government or any agency or
12 instrumentality of the federal government; another state or
13 territory of the United States; a sovereign or foreign
14 government; or the state or an agency, branch, institution,
15 instrumentality or political subdivision of the state;

16 F. "public partner" means a local government, state
17 agency, state institution or instrumentality of the state;

18 G. "public-private partnership" means an agreement
19 between one or more public partners and one or more private
20 partners for the design, development, financing, construction,
21 operation or maintenance of a tourism project;

22 H. "tourism" means the practice of traveling for
23 recreation, leisure or pleasure and the business of attracting,
24 guiding, managing, transporting, accommodating and entertaining
25 persons engaged in tourism, including activities related to

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1 recreation and exercise, sporting events, cultural enrichment
2 and religious fulfillment;

3 I. "tourism project" means:

4 (1) a building or other facility, together
5 with equipment, for providing tourism services, including
6 renovations and improvements to an existing building or
7 facility; or

8 (2) a program and equipment for providing
9 tourism services at an existing building or facility; and

10 J. "user fee" means a rate, fee or other charge
11 imposed by a partner for use of all or part of a tourism
12 project.

13 SECTION 3. [NEW MATERIAL] PROJECT DELIVERY METHODS--
14 PROPOSALS.--A public partner may provide for the development of
15 a tourism project using a variety of project delivery methods,
16 which methods shall be documented in written agreements. The
17 methods may include:

18 A. predevelopment agreements leading to other
19 implementing agreements;

20 B. design-build agreements;

21 C. design-bid-build agreements;

22 D. design-build-finance agreements;

23 E. construction manager at risk;

24 F. agreements that provide for the private partner
25 to design, build, manage, maintain, operate or lease a tourism

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1 project; or

2 G. other project delivery methods or agreements or
3 combination of methods or agreements that the public partner
4 determines is most advantageous to the public interest.

5 SECTION 4. [NEW MATERIAL] PROJECT DEVELOPMENT--
6 PROCUREMENT.--

7 A. A public partner may:

8 (1) procure a tourism project using any of the
9 following:

10 (a) requests for proposals in which the
11 public partner describes a class of tourism project or a
12 geographic area in which a person is invited to submit
13 proposals to develop a tourism project;

14 (b) solicitations using requests for
15 qualifications, short-listing of qualified proposers, requests
16 for proposals, negotiations or other procurement procedures;

17 (c) procurements seeking development and
18 finance plans that are most advantageous to the public partner
19 and suitable for the tourism project;

20 (d) best-value selection procurements
21 based on price or financial proposals, or both, or other
22 factors; and

23 (e) other procedures that the public
24 partner determines may further the implementation of the
25 Public-Private Partnerships Act; and

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1 (2) consider an unsolicited proposal if the
2 public partner determines that there is sufficient merit to
3 pursue the unsolicited proposal and a reasonable opportunity
4 for other persons to submit competing proposals for
5 consideration to ensure maximum competition among proposals
6 submitted and the best value for the public partner.

7 B. For a procurement in which the public partner
8 issues a request for qualifications or similar solicitation
9 document or following a public partner's decision to consider
10 an unsolicited proposal, the public partner shall issue a
11 request that sets forth the factors that will be evaluated and
12 the manner in which responses will be evaluated.

13 C. In evaluating proposals, the public partner, and
14 the department if required, shall:

15 (1) consider a range of factors they deem
16 appropriate to obtain the best value for the state or local
17 government; and

18 (2) require specific justification and support
19 for a proposal that may affect:

20 (a) public employees' employment; or

21 (b) the cost of public service delivery.

22 D. The public partner may charge and retain a
23 reasonable administrative fee for the evaluation of an
24 unsolicited tourism project proposal and for the cost of
25 experts that are consulted pursuant to Subsection E of this

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1 section; provided that the administrative fee shall not exceed
2 the reasonable cost of evaluating the proposal.

3 E. The public partner shall consult with in-house
4 or contracted financial, legal, architectural or other experts
5 and advisors to assist in the design, evaluation, negotiation,
6 construction administration and development of public-private
7 partnership agreements for a tourism project.

8 F. If contractor insurance is required for services
9 procured pursuant to this section, the insurance shall be
10 placed with an insurer authorized to transact insurance in New
11 Mexico or with a surplus lines insurer approved by the office
12 of superintendent of insurance or its successor agency.

13 G. In addition to making proposals available to the
14 public pursuant to Subsection H of this section and providing
15 the opportunity for written comments from the public, the
16 public partner shall hold at least one public hearing and may
17 hold additional public hearings prior to entering into a
18 public-private partnership, all of which shall be preceded by
19 at least thirty days' notice. The meetings shall be subject to
20 the Open Meetings Act.

21 H. Each request for proposals issued pursuant to
22 the Public-Private Partnerships Act shall require the proposer
23 to include with its proposal an executive summary covering the
24 major elements of its proposal that do not address the
25 proposer's price, financing plan or other confidential or

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1 proprietary information or trade secrets that the proposer
2 intends to be exempt from disclosure. Any unsolicited proposal
3 shall also include a similar executive summary. After the
4 public-private partnership is awarded and the conclusion of any
5 protest or other challenge to the award, the Inspection of
6 Public Records Act applies to any release of any part of the
7 proposals.

8 I. A solicited or unsolicited proposer shall
9 identify those portions of a proposal or other submission that
10 the proposer, with the public partner's concurrence, considers
11 to be a trade secret or confidential commercial, financial or
12 proprietary information. For trade secrets and confidential
13 and proprietary information to be exempt from disclosure, the
14 proposer must do all of the following:

15 (1) invoke exclusion on submission of the
16 information or other materials for which protection is sought;

17 (2) identify with conspicuous labeling the
18 data or other materials for which protection is sought;

19 (3) state the reasons why protection is
20 necessary; and

21 (4) fully comply with any applicable state law
22 with respect to information that the proposer contends should
23 be exempt from disclosure.

24 J. A public partner shall consider a proposer's
25 request to withhold certain information in a proposal from

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1 disclosure and shall issue a written determination either
2 accepting or rejecting the proposer's request. Following the
3 public partner's determination, any portions of the proposal
4 not withheld from disclosure shall be made available to the
5 public by request and the public partner shall maximize public
6 access to the disclosed portions of the proposal through
7 reasonable means available to the public partner.

8 SECTION 5. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

9 A. The resident preferences provided in Sections
10 13-1-21 and 13-1-22 NMSA 1978 apply to procurements pursuant to
11 the Public-Private Partnerships Act. The construction of a
12 facility for a tourism project is a public works for the
13 purposes of the Public Works Minimum Wage Act, the
14 Subcontractors Fair Practices Act, any other provisions of
15 Chapter 13, Article 4 NMSA 1978 and the Public Works Apprentice
16 and Training Act.

17 B. Before it may be awarded, every public-private
18 partnership shall include an operating agreement that defines
19 the roles and responsibilities of the partners. The operating
20 agreement shall require that a tourism project be operated and
21 maintained to the operating and maintenance standards and
22 specifications as set out in the agreement.

23 C. Should a tourism project include building
24 maintenance, as to the maintenance activities, the public
25 partner or department shall not approve a project that

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1 displaces an existing government employee unless the employee
2 is offered alternate equivalent employment.

3 SECTION 6. [NEW MATERIAL] DEPARTMENT--POWERS AND DUTIES--
4 ASSISTANCE WITH DUTIES.--

5 A. The department shall:

6 (1) in consultation with the state purchasing
7 agent, the department of finance and administration and any
8 other person that the department deems necessary, develop a
9 minimum set of guidelines to implement the provisions of the
10 Public-Private Partnerships Act, including the process that the
11 department shall follow with respect to the public-private
12 partnership agreements that the department is required to
13 review and approve and the information that is required to be
14 included in a requested or unsolicited proposal;

15 (2) before a public-private partnership may be
16 established, review and approve all public-private partnership
17 agreements that include:

18 (a) a total tourism project cost that is
19 greater than one million dollars (\$1,000,000); or

20 (b) a public-private partnership term
21 that is longer than five years;

22 (3) establish an evaluation process to
23 determine whether projects should be developed as public-
24 private partnerships or using traditional procurement and
25 funding methods prior to the initiation of contract

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1 negotiations with a private partner;

2 (4) manage public communication and education,
3 including public hearings, regarding the scope, cost and
4 impacts of proposed public-private partnerships in order to
5 maximize the opportunity for public input on proposals;

6 (5) encourage maximum competition among
7 private entities to pursue the development and operation of
8 public-private projects in the state;

9 (6) serve as a resource for the legislature
10 and its staff regarding the policy and financial impacts of
11 proposals and the implications of proposed or pending tourism
12 project agreements on the credit or other obligations of the
13 state;

14 (7) provide technical assistance to local
15 governments and regional entities on the use of public-private
16 partnerships to meet their needs; and

17 (8) on or before December 1 of each year,
18 submit a report to the legislature on any pending, proposed or
19 completed public-private partnership agreements that the
20 department is required to review and approve. The report shall
21 specifically name the public-private project, its proposed
22 scope, the proposed finance plan, the status of permitting and
23 land acquisition, if necessary, and a summary of any tourism
24 project agreements pending at the time of the report.

25 B. The department or a local government may:

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1 (1) in accordance with Subsection D of Section
2 4 of the Public-Private Partnerships Act, retain, as necessary,
3 financial, legal and other experts to assist it in carrying out
4 its duties pursuant to the Public-Private Partnerships Act,
5 including assistance with the review of public-private
6 partnership agreements;

7 (2) solicit the expertise of state agencies,
8 state institutions, state instrumentalities and local
9 governments to assist the department or local government in
10 carrying out its duties pursuant to the Public-Private
11 Partnerships Act, including reviewing public-private
12 partnership proposals; and

13 (3) receive appropriations and money from any
14 other source, including other state agencies or local
15 governments, regional organizations or the federal government,
16 to carry out its duties pursuant to the Public-Private
17 Partnerships Act.

18 C. All state agencies, state institutions, state
19 instrumentalities and local governments, as appropriate, shall
20 cooperate with the department or a local government and assist
21 it in carrying out its duties by providing technical
22 assistance, analysis and other services as requested by the
23 department or a local government.

24 SECTION 7. [NEW MATERIAL] DEPARTMENT--ADVICE AND
25 ASSISTANCE--REVIEW AND APPROVAL OF AGREEMENTS.--With respect to

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1 public-private partnership agreements that the department is
2 required to review and approve, and before approving a public-
3 private partnership, the department shall:

4 A. assist the public partner in negotiating
5 agreements;

6 B. assist the public partner in preparing any
7 documents related to a specific agreement;

8 C. identify, and advise the public partner
9 regarding, any relevant federal securities or other laws and
10 related disclosure requirements; and

11 D. identify, and advise the public partner
12 regarding, accounting, investment and tax requirements
13 applicable to specific tourism projects.

14 SECTION 8. [NEW MATERIAL] EVALUATION CRITERIA.--Before
15 entering into a public-private partnership, the public partner,
16 and the department if required, shall consider:

17 A. the ability of the tourism project to meet the
18 needs of the community in which it is to be located, including
19 improving and streamlining services to the public; providing or
20 enhancing tourism services; or otherwise serving a public
21 purpose;

22 B. the proposed cost and financial plan for the
23 tourism project;

24 C. the performance benchmarks contained in the
25 proposal;

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- 1 D. the estimated operating costs of the tourism
2 project;
- 3 E. the financial commitment of the private partner;
- 4 F. the risk of the proposed financing;
- 5 G. the general reputation, qualifications, industry
6 experience and financial capacity of the proposer;
- 7 H. the compatibility of the tourism project with
8 local and regional plans or other infrastructure plans;
- 9 I. the feasibility and proposed design and
10 management of the tourism project;
- 11 J. the degree of innovation; efficiency; and
12 technical, scientific, technological and socioeconomic merit of
13 the proposal;
- 14 K. comments from potential users, local citizens,
15 affected jurisdictions and other interested persons;
- 16 L. benefits to the public, including improvements
17 in tourism, public safety and quality of life;
- 18 M. the safety record of the proposer;
- 19 N. efforts to be made through the public-private
20 partnership to retain and train New Mexico residents in
21 occupations and professions related to planning, design,
22 construction, project management, general management,
23 administration, legal, accounting and other areas of the
24 tourism project over the life of the public-private
25 partnership;

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1 O. the commitment to use New Mexico building
2 materials and manufactured goods and local services to the
3 extent possible;

4 P. green building design and construction
5 certification by a nationally recognized organization;

6 Q. innovations in energy efficiency or generation;
7 and

8 R. other criteria that the public partner and the
9 department deem appropriate for consideration.

10 SECTION 9. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
11 AGREEMENTS--REQUIREMENTS.--

12 A. In a public-private partnership, the public
13 partner, and the department with respect to public-private
14 partnership proposals that it reviews, shall require an
15 agreement to include provisions, as applicable, that:

16 (1) authorize the public partner or the
17 private partner to establish and collect user fees, rents,
18 advertising and sponsorship charges, service charges or other
19 charges allowed in the agreement, including provisions that:

20 (a) specify how revenue will be
21 collected, accounted for and audited;

22 (b) establish circumstances under which
23 the public partner may receive all or a share of revenue from
24 such charges; and

25 (c) govern enforcement of user fees,

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1 including provisions for mechanisms to ensure that users are
2 identified and notified of fees owed and provisions that allow
3 the private partner access to information from relevant public
4 databases for enforcement purposes. Negligent use of the data
5 contained in the databases, including unauthorized disclosure
6 of the data, shall result in a civil penalty of ten thousand
7 dollars (\$10,000) for each violation;

8 (2) provide for a maximum negotiated rate of
9 return on the private partner's investment, including:

10 (a) fees and charges that may be
11 collected directly by the private partner or a third party
12 engaged by the private partner for that purpose;

13 (b) a formula for the adjustment of user
14 fees and other charges during the term of the public-private
15 partnership;

16 (c) for an agreement that does not
17 include a formula described in Subparagraph (b) of this
18 paragraph, provisions regulating the private partner's return
19 on investment; or

20 (d) other strategies that the public
21 partner or the department deems appropriate;

22 (3) allow for payments to be made by the
23 public partner to the private partner, including availability
24 payments or performance-based payments;

25 (4) allow the public partner to accept

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1 payments and share revenue with the private partner;

2 (5) address how the public and private
3 partners will share management of the risks of the tourism
4 project;

5 (6) specify how the public and private
6 partners will share the costs of development of the tourism
7 project;

8 (7) allocate financial responsibility for cost
9 overruns to the partner or partners that were responsible for
10 the cost overruns;

11 (8) establish the damages to be assessed for
12 nonperformance;

13 (9) establish performance criteria or
14 incentives, or both;

15 (10) address the acquisition of property
16 interests that may be required, including provisions that allow
17 the public or private partner to acquire real property,
18 including acquisition by exchange of other real property that
19 is owned by the state, a local government or the federal
20 government;

21 (11) establish recordkeeping, accounting and
22 auditing standards to be used for the tourism project;

23 (12) for a tourism project with a term that is
24 longer than twenty-five years, address responsibility for
25 reconstruction or renovations that are required so that the

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1 tourism project meets all applicable government standards
2 before the tourism project reverts to the public partner;

3 (13) provide for responsibilities for law
4 enforcement on tourism projects;

5 (14) identify public partner specifications
6 that must be satisfied, including provisions allowing the
7 private partner to request and receive authorization to deviate
8 from the specifications on a showing satisfactory to the public
9 partner that the deviation is necessary;

10 (15) require a private partner to provide,
11 either directly or through the principal contractor who is in
12 charge of the project, performance and payment bonds as
13 required by Section 13-4-18 NMSA 1978 for those components of a
14 tourism project that involve construction. For components that
15 do not involve construction, require parent company guarantees,
16 letters of credit or other acceptable forms of security or a
17 combination of any of these, the penal sum or amount of which
18 may be less than one hundred percent of the value of the
19 contract involved based on the public partner's or the
20 department's determination of what is required to adequately
21 protect the public partner, made on a project-by-project basis;

22 (16) provide clawback or recapture provisions
23 that protect the public investment; and

24 (17) specify remedies available to the parties
25 and dispute resolution procedures to be followed.

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1 B. The public-private partnership agreement shall
2 include a clear statement of which partner will own any real
3 property pertaining to the tourism project when the project
4 reverts to the public partner based on the terms of the
5 agreement.

6 C. The term of initial agreements entered into
7 pursuant to the Public-Private Partnerships Act may be for a
8 term not to exceed fifty years, and such agreements may be
9 extended for additional terms; provided that an extension shall
10 be subject to the same review and negotiation process as the
11 original agreement.

12 D. The public-private partnership agreement shall
13 contain a provision by which the private partner expressly
14 agrees that it is prohibited from seeking injunctive or other
15 equitable relief to delay, prevent or otherwise hinder the
16 public partner or any other jurisdiction from developing,
17 constructing or maintaining a tourism project that was planned
18 and that would or might affect the revenue that the private
19 partner would or might derive from the tourism project
20 developed pursuant to the Public-Private Partnerships Act,
21 except that the agreement may provide for reasonable
22 compensation to the private partner for the adverse effect
23 resulting from development, construction and maintenance of an
24 unplanned facility that affects the tourism project's revenue.

25 E. The state board of finance shall approve the

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1 assignment, transfer or sale of assets or investment in a
2 tourism project that creates debt obligation of the public
3 partner.

4 SECTION 10. [NEW MATERIAL] FUNDING AND FINANCING.--

5 A. Any lawful source of funding may be used for the
6 development or management of a tourism project pursuant to the
7 Public-Private Partnerships Act, including:

8 (1) proceeds of grant anticipation revenue
9 bonds, private activity bonds, revenue bonds or other bonds
10 allowed by federal or state law;

11 (2) grants, loans, loan guarantees, lines of
12 credit, revolving lines of credit or other arrangements as
13 allowed by federal or state law;

14 (3) other federal, state or local revenues;

15 (4) user fees, lease payments, availability
16 payments, gross or net receipts from sales, proceeds from the
17 sale of development rights, franchise charges, permit charges,
18 advertising and sponsorship charges, service charges or any
19 other lawful form of consideration; and

20 (5) other forms of public and private capital
21 that are available.

22 B. As security for the payment of financing
23 described in this section, the revenues from the tourism
24 project may be pledged, but no pledge of revenues or property
25 constitutes in any manner or to any extent a general obligation

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1 of the state or local government, unless explicitly agreed to
2 by the state or local government. Financing may be structured
3 on a senior, parity or subordinate basis to any other
4 financing.

5 C. The public partner may accept money from the
6 United States or any of its agencies to carry out the
7 provisions of the Public-Private Partnerships Act, whether the
8 money is made available by grant, loan or other financing
9 arrangement. The public partner assents to any federal
10 requirements, conditions or terms of any federal funding
11 accepted by the public partner pursuant to this subsection.
12 The public partner may enter into agreements or other
13 arrangements with the United States or any of its agencies as
14 may be necessary to carry out the provisions of that act.

15 D. The public partner may accept from any source
16 any grant, donation, gift, conveyance of land, other real or
17 personal property or other thing of value made to the public
18 partner for the purposes of a tourism project.

19 E. A tourism project may be funded in whole or in
20 part by contributions of money or property made by a private
21 person, a private entity or the state or any agency,
22 institution, instrumentality or political subdivision of the
23 state.

24 F. Federal, state and local money may be combined
25 with private sector money for tourism project purposes as

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1 allowed by law or by the grant, gift or donation provisions.

2 G. Any revenue bonds issued as a result of the
3 Public-Private Partnerships Act are not general obligations of
4 this state or any local government and are not secured by or
5 payable from any money or assets of the state or any local
6 government other than the money and revenues specifically
7 pledged to the repayment of the revenue bonds.

8 SECTION 11. [NEW MATERIAL] USER FEES AT END OF AGREEMENT
9 PERIOD.--The public partner may continue or cease collection of
10 user fees after the end of the term of the public-private
11 partnership agreement, based on a determination of the tourism
12 project's future operations.

13 SECTION 12. [NEW MATERIAL] REVERSION OF TOURISM PROJECT
14 TO PUBLIC PARTNER.--If the public-private partnership is
15 terminated, the powers and duties of the private partner cease,
16 except for any duties and obligations that extend beyond the
17 termination as provided in the public-private partnership
18 agreement, and the tourism project reverts to the public
19 partner and shall be dedicated for public use.

20 SECTION 13. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

21 A. Upon the occurrence and during the continuation
22 of material default by the private partner, not related to an
23 event of force majeure, the public partner may:

24 (1) elect to take over the tourism project,
25 including the succession of all right, title and interest in

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1 the tourism project, subject to any liens on revenue previously
2 granted by the private partner; and

3 (2) terminate the public-private partnership
4 and exercise any other rights and remedies that may be
5 available.

6 B. If the public partner elects to take over a
7 tourism project pursuant to Subsection A of this section, the
8 public partner:

9 (1) shall collect and pay any revenue that is
10 subject to lien to satisfy an obligation;

11 (2) may develop and operate the tourism
12 project, impose user fees for the use of the tourism project
13 and comply with any service contracts; and

14 (3) may solicit proposals for the maintenance
15 and operation of the tourism project as provided in the Public-
16 Private Partnerships Act for original proposals.

17 SECTION 14. [NEW MATERIAL] POLICE POWERS--VIOLATIONS OF
18 LAW.--All law enforcement officers of the state or local
19 government have the same powers and jurisdiction within the
20 limits of the tourism project as they have in their respective
21 areas of jurisdiction and access to the tourism project at any
22 time to exercise such powers and jurisdictions.

23 SECTION 15. [NEW MATERIAL] UTILITY CROSSINGS.--Subject to
24 the requirements of federal and state laws, contractual
25 agreements and land conveyance documents, a public or private

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1 partner and any utility whose facility is to be crossed or
2 relocated shall cooperate fully in planning and arranging the
3 manner of the crossing or relocation of the utility facility.

4 SECTION 16. EFFECTIVE DATE.--The effective date of the
5 provisions of this act is July 1, 2017.

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