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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: June 26, 2023

4 **No. A-1-CA-40113**

5 **TED JOSE GARCIA and CINDY GARCIA,**

6           Plaintiffs-Appellants/Cross-Appellees,

7 v.

8 **NEW MEXICO DEPARTMENT OF**  
9 **TRANSPORTATION,**

10           Defendant-Appellee/Cross-Appellant.

11 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**  
12 **Bryan Biedscheid, District Court Judge**

13 Keller & Keller, LLC  
14 Michael G. Duran  
15 Samantha L. Drum  
16 Albuquerque, NM

17 Grayson Law Office, LLC  
18 Brian G. Grayson  
19 Albuquerque, NM

20 for Appellants

21 Park & Associates, L.L.C.  
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23 Lawrence M. Marcus  
24 Albuquerque, NM

25 for Appellee

1 **OPINION**

2 **BUSTAMANTE, Judge, retired, sitting by designation.**

3 {1} The direct appeal in this case involves a federal statutory evidentiary privilege  
4 created by 23 U.S.C. § 407 (hereinafter § 407).<sup>1</sup> The cross-appeal challenges the  
5 district court’s denial of a bill of costs. Plaintiffs Ted Jose Garcia and Cindy Garcia  
6 appeal the district court’s exclusion of the Final Project Prioritization Plan for the  
7 NM 599 Corridor (the Plan) pursuant to the privilege. Plaintiffs contend that  
8 Defendant New Mexico Department of Transportation (DOT) waived its right to  
9 assert the privilege. Alternatively, Plaintiffs contend that the district court  
10 improperly applied too broad an interpretation of the privilege. DOT cross-appeals  
11 the district court’s subsequent bill of costs denial, arguing that the district court erred  
12 by failing to include in its order the required “good cause” for the denial. We affirm  
13 the district court’s exclusion of the Plan, reverse the bill of costs denial, and remand  
14 with instructions that the district court file an amended order in which it specifies  
15 the reasons for its decision to deny costs for reconsideration.

16 **BACKGROUND**

17 {2} This case arises from a vehicle collision on New Mexico Highway 599 (NM  
18 599) in Santa Fe County, New Mexico that resulted in one death and severe injuries

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<sup>1</sup>Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 784 (2021) (codified as amended at § 407). Because the provision was not substantively amended, this opinion cites the current designation.

1 to Plaintiffs. Decedent Arsenio Sanchez failed to yield at the intersection of NM 599  
2 and Via Veteranos Road, colliding with Plaintiffs' vehicle as it was traveling south  
3 on NM 599. Plaintiffs sued DOT for personal injuries and loss of consortium,  
4 alleging that DOT's inadequate traffic controls and warnings caused the collision.  
5 DOT produced the Plan during discovery.

6 {3} The Plan was prepared for DOT in April 2010 as an aid in prioritizing  
7 construction improvements along NM 599. According to the Plan, "[i]mproved  
8 access to or across NM 599 is needed for . . . all modes of travel as the area continues  
9 to develop. There is public perception that improvements are needed to address  
10 safety concerns, particularly at existing at-grade intersections." The Plan provides  
11 detailed evaluations of alternative construction projects along NM 599, with the  
12 purpose of prioritizing "public funding that addresses the access issues and supports  
13 economic development, regional transportation and long range planning goals." The  
14 Plan prioritizes projects "based on their ability to satisfy the purpose and need, public  
15 input, and cost." In addition to the original purpose and need, the Plan considers  
16 multiple factors, including safety, as the basis for the need of transportation  
17 improvement. The Plan recommends constructing an interchange at the intersection  
18 where the accident took place. The Plan observes that this recommendation "would  
19 improve the safety at the intersection of C[ounty] R[oad] 70 (Via Veteranos) and  
20 NM 599."

1 {4} Plaintiffs sought to introduce the Plan during trial to demonstrate that DOT  
2 was aware of the intersection’s dangerous conditions for over five years. DOT  
3 responded by filing a motion in limine to exclude admission of the Plan pursuant to  
4 § 407. After a hearing on the motion, the district court ruled in favor of DOT and  
5 ordered Plaintiffs not to introduce the Plan into evidence or allude to the Plan during  
6 trial. A three-day jury trial ensued, and the jury rendered its verdict in favor of DOT.  
7 Following entry of the verdict, DOT filed a bill of costs requesting \$23,058.84  
8 pursuant to Rule 1-054(D) NMRA. The district court denied the request.

9 {5} Plaintiffs appeal the exclusion of the Plan, and DOT cross-appeals the denial  
10 of their bill of costs.

## 11 **DISCUSSION**

### 12 **I. The District Court Did Not Err in Excluding the Plan**

13 {6} We generally “review discovery orders and initial determinations regarding  
14 the applicability of privileges for an abuse of discretion.” *Albuquerque J. v. Bd. of*  
15 *Educ. of Albuquerque Pub. Schs.*, 2019-NMCA-012, ¶ 15, 436 P.3d 1. The district  
16 court’s construction of a privilege, however, is reviewed de novo. *Id.* In reviewing  
17 the application of a federal privilege, our duty is to give effect to the intent of  
18 Congress; we may find guidance to do so in federal case law interpreting the  
19 privilege. *See State v. Branham*, 2004-NMCA-131, ¶ 11, 136 N.M. 579, 102 P.3d  
20 646 (“Our duty, when interpreting federal statutes, is to give effect to the intent of

1 the legislative body. In this instance, we endeavor to give effect to the intent of  
2 Congress. When doing so, we may find guidance in federal case law interpreting  
3 federal statutes.” (citations omitted)).

4 {7} We first address Plaintiffs’ arguments that DOT waived the privilege by  
5 producing the Plan during the discovery process and by not producing a privilege  
6 log. Plaintiffs argue that DOT produced the Plan “without any claim that the  
7 document was privileged . . . fail[ing] to preserve any claim to privilege,” and thus  
8 “the . . . Plan should have been admissible at trial.” DOT responds that the Plan was  
9 “available to the public, so no harm was done in producing it in discovery.” We  
10 agree with DOT because § 407 provides that protected documents “shall not be  
11 subject to discovery *or* admitted into evidence” (emphasis added), indicating the  
12 privilege is not lost solely because the evidence has been produced in discovery. In  
13 addition, § 407 does not impose a confidentiality component for the privilege to  
14 apply. *Compare* § 407, *and Zimmerman v. Norfolk S. Corp.*, 706 F.3d 170, 180, 183  
15 (3d Cir. 2013) (holding that a report was privileged under § 407 even though it was  
16 publicly available through the National Crossing Inventory, a database of highway-  
17 railroad crossing in the United States), *with* Rule 11-511 NMRA (“A person who  
18 possesses a privilege against disclosure of a confidential matter or communication  
19 waives the privilege if the person voluntarily discloses or consents to disclosure of  
20 any significant part of the matter or communication.”).

1 {8} Furthermore, DOT need not produce a privilege log to assert the § 407  
2 privilege. *See Albuquerque J.*, 2019-NMCA-012, ¶ 21 (explaining that a party  
3 asserting a privilege may provide support therefor “through a variety of mechanisms,  
4 including submission of a privilege log or an affidavit, in camera interview, or other  
5 means as required by the circumstances of a particular case” (internal quotation  
6 marks and citation omitted)). One purpose of producing a privilege log is to provide  
7 the district court sufficient details to make an independent judicial determination  
8 regarding the applicability of the privilege. *See Pina v. Espinoza*, 2001-NMCA-055,  
9 ¶ 24, 130 N.M. 661, 29 P.3d 1062 (asserting that failure to prepare a sufficiently  
10 detailed privilege log thwarts meaningful independent judicial review). The Plan’s  
11 availability allowed the district court to determine whether § 407 applied based on  
12 the Plan itself, obviating the need for a privilege log describing the Plan’s content.  
13 *See Albuquerque J.*, 2019-NMCA-012, ¶ 21 (noting that the circumstances of a  
14 particular case may determine the means through which a party supports its assertion  
15 of privilege). Accordingly, DOT did not waive its assertion of the § 407 privilege by  
16 producing the Plan during discovery or by failing to produce a privilege log.

17 {9} Next, we turn to whether the district court erred in its application of § 407,  
18 which provides that

19 [n]otwithstanding any other provision of law, reports, surveys,  
20 schedules, lists, or data compiled or collected for the purpose of  
21 identifying, evaluating, or planning the safety enhancement of potential  
22 accident sites, hazardous roadway conditions, or railway-highway

1 crossings, pursuant to [§§] 130, 144, and 148 of this title or for the  
2 purpose of developing any highway safety construction improvement  
3 project which may be implemented utilizing [f]ederal-aid highway  
4 funds shall not be subject to discovery or admitted into evidence in a  
5 Federal or State court proceeding or considered for other purposes in  
6 any action for damages arising from any occurrence at a location  
7 mentioned or addressed in such reports, surveys, schedules, lists, or  
8 data.

9 In *Pierce County, Washington v. Guillen*, 537 U.S. 129, 133-36 (2003), the United  
10 States Supreme Court explored the background and purpose of § 407, though it did  
11 not apply the relevant part of the privilege. The Court explained that, beginning in  
12 the late 1960s, “Congress . . . endeavored to improve the safety of our Nation’s  
13 highways by encouraging closer federal and state cooperation with respect to road  
14 improvement projects.” *Pierce*, 537 U.S. at 133. Thus, Congress established several  
15 federal programs to assist the states in identifying and evaluating roads and highways  
16 in need of safety improvements and to provide funding for those projects. *Id.* (citing  
17 §§ 130 (Railway-Highway Crossings), 144 (National Bridge and Tunnel Inventory  
18 and Inspection Standards), and 148<sup>2</sup> (Highway Safety Improvement Program)).

19 {10} The Court explained that one of those programs, the Highway Safety  
20 Improvement Program, required any state that wanted federal funds for safety  
21 improvement projects to “undertake a thorough evaluation of its public roads.”

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<sup>2</sup>When *Pierce* was decided, § 407 contained internal references to §§ 130, 144, and 152. *See Pierce*, 537 U.S. at 135-36 (construing a former version of § 407). § 152 was later amended and is now codified at § 148. § 407 reflects this change and references the amended statute. We refer to the current § 148 in our analysis.

1 *Pierce*, 537 U.S. at 133. Shortly after the program was adopted, the states objected  
2 to the lack of confidentiality regarding their compliance measures because they  
3 “feared that diligent efforts to identify roads eligible for aid under the [p]rogram  
4 would increase the risk of liability for accidents that took place at hazardous  
5 locations before improvements could be made.” *Id.* at 134. Thus, the United States  
6 Department of Transportation recommended the adoption of legislation preventing  
7 the disclosure of information compiled in connection with the program. *Id.*

8 {11} Congress responded by enacting § 407. *Pierce*, 537 U.S. at 134. The statutory  
9 language is expansive, precluding the admission of specified documents into  
10 evidence “in [f]ederal or [s]tate court or considered for other purposes in any action  
11 for damages.” *Id.* The statutory privilege “clearly has two parts.” *Zimmerman*, 706  
12 F.3d at 181. The first part encompasses “reports, surveys, schedules, lists, or data  
13 compiled or collected for the purpose of identifying, evaluating, or planning the  
14 safety enhancement of potential accident sites, hazardous roadway conditions, or  
15 railway-highway crossings, pursuant to [§§] 130, 144, and 148.” § 407; *see*  
16 *Zimmerman*, 706 F.3d at 180-81. The second part of the statute includes documents  
17 that an agency compiles or collects “for the purpose of developing any highway  
18 safety construction improvement project which may be implemented utilizing  
19 [f]ederal-aid highway funds.” § 407; *Zimmerman*, 706 F.3d at 181, 184 (internal



1 quotation marks and citation omitted). This case involves the second part of the  
2 statute.<sup>3</sup>

3 {12} Following the Supreme Court’s example, the Third Circuit Court adopted a  
4 narrow interpretation of the second part of § 407. *Zimmerman*, 706 F.3d at 184. In  
5 *Zimmerman*, the Third Circuit Court was tasked with determining whether § 407  
6 privileged railroad crossing reports obtained from the Department of  
7 Transportation’s National Crossing Inventory. *Zimmerman*, 706 F.3d at 180, 184. In  
8 its analysis, the court explained that “[t]here are two plausible interpretations of the  
9 relevant language in § 40[7].” *Zimmerman*, 706 F.3d at 184. The broad interpretation  
10 privileges all “reports, surveys, schedules, lists, or data” that are collected for the  
11 purpose of developing highway safety construction “with the understanding that  
12 someone might use [them] to improve highway safety in a later construction

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<sup>3</sup>Plaintiffs dedicate a section in their brief in chief to the argument that the first part of the statute does not privilege the Plan. Plaintiffs’ argument, however, is misguided for multiple reasons. First, the district court did not rely on the first part of the statute to determine that the Plan was privileged. Second, Plaintiffs rely on an outdated version of the statute that references to § 152, instead of the current version which references §§ 130, 144, and 148. Finally, DOT did not argue to the district court or on appeal that the first part of § 407 privileges the Plan. Accordingly, this Court requested supplemental briefing regarding the interpretation of the second part of § 407, relies on the second part of § 407 for its decision, and declines to further address the first part of § 407. *See Sandoval v. Baker Hughes Oilfield Operations, Inc.*, 2009-NMCA-095, ¶ 56, 146 N.M. 853, 215 P.3d 791 (“In order to preserve an issue for appeal, [an appellant] must have made a timely and specific objection that apprised the district court of the nature of the claimed error and that allows the district court to make an intelligent ruling thereon.”).

1 project.” *Id.* at 180, 184 (internal quotation marks and citation omitted). “The narrow  
2 interpretation is that a report was collected for the statutory purpose if the agency  
3 collected it with the intent to use it for a particular construction project.” *Id.* at 184.  
4 {13} The Third Circuit Court adopted the narrow interpretation for two reasons.  
5 First, the recognized principle that “statutes establishing evidentiary privileges must  
6 be construed narrowly because privileges impede the search for the truth.” *Id.*  
7 (internal quotation marks and citation omitted); *see Pierce*, 537 U.S. at 144  
8 (adopting a narrow interpretation of the first part of § 407). Second, the court  
9 expressed that “the narrow interpretation is more faithful to the text.” *Zimmerman*,  
10 706 F.3d at 184. The Third Circuit Court explained that the broad interpretation  
11 would render much of § 407 language unnecessary because “if the second part  
12 privileges any document that might be used to improve highway safety in a later  
13 construction project, there would be no need for the first part to privilege  
14 documents.” *Zimmerman*, 706 F.3d at 184. Therefore, the broad interpretation would  
15 privilege all information that might be used to improve safety in a later project,  
16 including information which is “compiled or collected . . . pursuant to [§§] 130, 144,  
17 and 148,” rendering the first part of the statute superfluous. *See* § 407. Moreover,  
18 the court highlighted the difference between the verbs used in the first and second  
19 parts of § 407, “‘identifying, evaluating, or planning’ in the first and ‘developing’ in  
20 the second.” *Zimmerman*, 706 F.3d at 185. According to the court, “[t]he first part

1 seems to privilege documents that deal with both potential and actual projects, while  
2 the second part appears to privilege only those documents that deal with actual  
3 projects.” *Id.*

4 {14} We are persuaded by the reasoning of the Third Circuit Court and adopt the  
5 narrow interpretation. The second part of § 407 only privileges documents prepared  
6 “when the agency already has a construction project in mind—and not simply  
7 documents that might be used to plan later projects.” *Zimmerman*, 706 F.3d at 185.  
8 Therefore, to determine whether the Plan is privileged under the second part of  
9 § 407, we must consider whether the Plan was prepared with the intention to be used  
10 in a particular highway safety construction improvement project “which may be  
11 implemented utilizing [f]ederal [] aid highway funds.” § 407. We conclude that the  
12 Plan meets the requirements to be protected under the second part of § 407.

13 {15} Plaintiffs present two arguments against privileging the Plan under the second  
14 part of § 407. First, Plaintiffs contend that “there is no indication that the Plan and  
15 the information contained therein was for a particular project.” Second, Plaintiffs  
16 argue that the Plan does not contemplate a safety construction project because its  
17 stated purpose is to prioritize projects along NM 599 and “addressing the safety  
18 concerns is a secondary need for the project.”<sup>4</sup> We address each argument in turn.

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<sup>4</sup>Plaintiffs do not dispute that federal aid highway funds were used; a DOT engineer stated that additional improvement to NM 599, as recommended in the Plan, utilized federal aid highway funds.

1 {16} DOT responds to Plaintiffs’ first argument by explaining that “the Plan was  
2 used to prioritize improvements along [NM] 599, which constitutes a particular  
3 project and not an abstract theoretical possibility.” We agree. The Plan was prepared  
4 for a particular project because it reevaluated and prioritized improvements to NM  
5 599 that DOT had already planned and it resulted in the completion of a specific  
6 construction project. In contrast, the *Zimmerman* court held that the privilege did not  
7 apply to a report that collected data on railroad crossings because the agency did not  
8 collect the report “for a particular project—instead, they were collected to establish  
9 a national database that might be used in future projects.” *Zimmerman*, 706 F.3d at  
10 185. Similarly, *Zimmerman* held that the second part of § 407 did not privilege  
11 accident reports because they are “collected for a variety of reasons” but “[i]n most  
12 cases, . . . accident reports are not collected for a particular highway [] safety  
13 construction project.” *Zimmerman*, 706 F.3d at 186.

14 {17} In this case, the Plan contains specific information regarding NM 599 safety  
15 improvement alternatives, including traffic analysis, and estimated construction  
16 cost. The level of detail of the information contained in the Plan indicates that DOT  
17 intended to construct the improvement projects along NM 599; the Plan simply  
18 reevaluated and prioritized the options. The Plan asserts, “[i]mprovements to the NM  
19 599 intersections that were planned but not constructed are being reevaluated.” The  
20 Plan did not gather general data that might theoretically be used in future projects.

1 Rather, the Plan contains the type of specialized analysis that is collected for a  
2 particular project that the agency had already planned. Further, DOT presented the  
3 affidavit of a DOT engineer highlighting that an interchange on NM 599 was  
4 constructed based on the Plan. *See Zimmerman*, 706 F.3d at 185 (“[T]he second part  
5 [of § 407] privileges documents prepared when the agency already has a  
6 construction project in mind.”).

7 {18} We are unpersuaded by Plaintiffs’ argument that “[t]he Plan is not a particular  
8 project” because it “discusses a wide array of potential and alternative projects.” The  
9 mere fact that the Plan includes analysis pertaining to multiple projects does not  
10 categorically preempt the application of § 407. As explained above, the purpose of  
11 the plan was to prioritize among alternatives to improve NM 599. Prioritizing  
12 alternatives inherently entails the collection of multiple projects’ detailed  
13 information to compare alternatives. Prioritization can be a crucial step in the  
14 planning and development of highway construction improvement. Privileging the  
15 Plan, which contains highway improvement details, gives effect to the intent of  
16 Congress to prevent Plaintiffs from receiving an “effort-free tool in litigation” that  
17 may discourage DOT from its “diligent efforts to collect the relevant information  
18 necessary, more candid discussions of hazardous locations, better informed  
19 decision[-]making, and, ultimately, greater safety on our [n]ation’s roads.” *Pierce*,  
20 537 U.S. at 146-47.

1 {19} Plaintiffs’ second substantive argument is that this Court cannot “base its  
2 decision solely on the degree to which safety was considered in the Plan” because  
3 doing so would indirectly “adopt the broad interpretation of § 407 rejected in  
4 *Zimmerman*.” As discussed above, the narrow interpretation articulated in  
5 *Zimmerman* does not address the degree to which safety must be considered when  
6 applying the second part of § 407. Rather, the narrow interpretation clarifies that  
7 DOT must collect the privileged document in relation to a planned highway safety  
8 construction project. *See Zimmerman*, 706 F.3d at 184. In this case, the Plan lists  
9 safety as one of the factors that can be the basis for the need of a transportation  
10 improvement. Therefore, completed projects based on the Plan are highway safety  
11 construction projects.

12 **II. The District Court Erred in Failing to Provide Grounds for Denying**  
13 **DOT’s Bill of Costs**

14 {20} “We review the district court’s decisions regarding costs for an abuse of  
15 discretion.” *Aquifer Sci., LLC v. Verhines*, ¶ 66, 2023-NMCA-020, 527 P.3d 667,  
16 *cert. denied* (S-1-SC-39734, Jan. 30, 2023). DOT contends that the district court  
17 erred by not establishing good cause for the denial of the award. We agree.

18 {21} “In all civil actions or proceedings of any kind, the party prevailing shall  
19 recover his costs against the other party unless the court orders otherwise for good  
20 cause shown.” NMSA 1978, § 39-3-30 (1966). Similarly, our rules state “[u]nless  
21 expressly stated either in a statute or in these rules, costs . . . shall be allowed to the

1 prevailing party unless the court otherwise directs.” Rule 1-054(D)(1). As the  
2 prevailing party, DOT is “entitled to a presumption that it should be awarded costs.”  
3 *Key v. Chrysler Motors Co.*, 2000-NMSC-010, ¶ 6, 128 N.M. 739, 998 P.2d 575.  
4 “The burden is on the losing party to demonstrate that an award of costs would be  
5 unjust or that other circumstances justify a denial or reductions of costs.” *OR&L*  
6 *Constr., L.P. v. Mountain States Mut. Cas. Co.*, 2022-NMCA-035, ¶ 48, 514 P.3d  
7 40. “The most common bases for denying costs to prevailing defendants have been  
8 the indigency of the losing plaintiff, coupled with good faith of the indigent and the  
9 non-frivolous nature of the case.” *Gallegos ex rel. Gallegos v. Sw. Cmty. Health*  
10 *Servs.*, 1994-NMCA-037, ¶ 29, 117 N.M. 481, 872 P.2d 899 (text only) (citation  
11 omitted).

12 {22} If the district court “in the exercise of its discretion does not award costs to  
13 the prevailing party, it should specify the reasons for its denial unless the basis for  
14 denying costs is clear from the record.” *Martinez v. Martinez*, 1997-NMCA-096,  
15 ¶ 20, 123 N.M. 816, 945 P.2d 1034. In this case, however, the district court did not  
16 explain the basis for its decision to deny costs. The district court, thus, abused its  
17 discretion. *See* § 39-3-30; *see also* Rule 1-054(D)(1). We reverse and remand with  
18 instructions that the district court file an amended order in which it specifies the  
19 reasons for its decision to deny costs.

1 **CONCLUSION**

2 {23} For the foregoing reasons, we affirm in part, reverse in part, and remand to  
3 the district court for further proceedings consistent with this opinion.

4 {24} **IT IS SO ORDERED.**

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**MICHAEL D. BUSTAMANTE, Judge,**  
7 **retired, sitting by designation.**

8 **WE CONCUR:**

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**KRISTINA BOGARDUS, Judge**

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**JACQUELINE R. MEDINA, Judge**