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FISCAL IMPACT REPORT

SPONSOR: Begaye DATE TYPED: 2/14/03 HB 571

SHORT TITLE: Navajo Nation Special Fuels Tax Credit SB _____

ANALYST: Reynolds-Forte

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY03	FY04			
	(978.0-8,900.0)*	**	Recurring	State Road Fund
	(122.0-1,100.0)*	**	Recurring	Local Governments

(Parenthesis () Indicate Revenue Decreases)

(*) – The fiscal impact in FY04 is uncertain. It is unclear whether the tax credit would apply before a cooperative agreement is entered into between the Taxation and Revenue Department and the Navajo Nation, and the timing of such an agreement cannot be predicted. The Department is attempting to gather information regarding diesel fuel sales within the Navajo Nation boundaries, but the Navajo Tax Commission has not yet responded. **Assuming, for purposes of illustration only, a very narrow interpretation of the applicable geographic area, and a loss of state tax on approximately 6 million gallons of diesel fuel, the negative fiscal impact would be approximately \$1,100 thousand [a loss of (\$978) thousand to the State Road Fund, and a loss of (\$122) thousand to the Local Governments Road Fund].**

(**) – The fiscal impact in subsequent years would be similar to FY04, assuming the very limited definition of “exterior boundaries”. However, under a broader interpretation, or in the event some court decision allows the extension of tribal taxing authority into “Indian Country”, the negative fiscal impact could be tens of millions of dollars in lost state revenue. Also, it is highly likely that the Legislature may find it necessary to extend equal treatment to all tribes and pueblos, in which case the negative fiscal impact could be *additional* tens of millions of dollars.

SOURCES OF INFORMATION

Responses Received From
State Highway and Transportation Department

SUMMARY

Synopsis of Bill

HB571 would allow the Taxation & Revenue Department to enter into a cooperative agreement with the Navajo Nation regarding administration and collection of the state Special Fuel Excise Tax and a similar tax imposed by the Navajo Nation. The full amount of the Navajo Nation tax would be credited against the state's tax, effectively eliminating the state's tax within Navajo Nation boundaries. The Navajo Nation tax credit would operate on transactions "*taking place on land owned by or for the benefit of the Navajo Nation and located within the exterior boundaries of the Navajo Nation*".

HB571 has a July 1, 2003 effective date.

FISCAL IMPLICATIONS

As noted in the tables above, the revenue loss for this bill could be from \$1 million to \$10 million or even more dependent upon how the geographic area where the Navajo Nation fuel tax can be imposed is defined. Also, it is highly likely that if HB571 became law, the Legislature may find it necessary to extend equal treatment to all tribes and pueblos, in which case the negative fiscal impact could be **additional** tens of millions of dollars.

The State Highway and Transportation Department notes that HB571 contains several ambiguities which causes questions regarding the geographic application of this bill and could have grave fiscal implications to state revenues.(see legal issues).

It should be noted that the State Highway Department has pledged the special fuel tax for repayment of highway debentures for the next 12 years; HB 571 will divert some this revenue.

LEGAL ISSUES

The State Highway and Transportation Department notes that House Bill 571 contains several ambiguities, which shroud the geographic scope of its application in significant uncertainty.

First, the Bill states it applies to transactions "*taking place on land owned by or for the benefit of the Navajo Nation and located within the exterior boundaries of the Navajo Nation.*" However, which lands of northwestern New Mexico are "*within the exterior boundaries of the Navajo Nation*" and which lands are not is far from clear. It is noteworthy that the language used is "*Navajo Nation*" not "*Navajo Indian Reservation.*" The New Mexico Supreme Court has interpreted Navajo Indian Reservation as including much less area than the area populated largely by Navajo people, included in the areas covered by Navajo government local Chapters and Navajo Nation Council legislative districts, which seemingly may be encompassed in the broader rubric of "*Navajo Nation.*" See *General Motors Acceptance Corp. v. Chischilly*, 96 N.M. 113, 628 P.2d 683 (1981).

It is plausible that the "*exterior boundaries of the Navajo Nation*" language could be interpreted as synonymous with the term "*Indian Country*" which is a legal term of art in the area of federal-tribal-state jurisdiction. See 18 U.S.C. 1151. Transactions occurring within Indian Country are subject to the jurisdiction of the federal government, perhaps subject to the tribe's jurisdiction,

and generally state jurisdiction is barred. The term “Indian Country” has three components

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The first component is essentially the Navajo Indian Reservation, which occupies a relatively small area in northwest New Mexico. However the area arguably subject to the second and third components, Indian dependent communities and allotments, appear to occupy most of the area in New Mexico north of I-40 from the Arizona state line to near Grants, with its eastern boundary approximating the route of US 550 from Cuba to Bloomfield. *See State v. Frank*, 132 N.M. 544, 52 P.3d 404 (2002) (whether US 550 at the community of Naagezi, 74 miles northwest of Cuba, constitutes a dependent Indian community) and *Pittsburgh & Midway Mining Co. v Watchman*, 52 F.3d 1531 (10th Cir. 1995) (whether coal mine located between Gallup, N.M. and Window Rock, Az. is located within a dependent Indian community). Consequently the geographic area impacted by this Bill, hence the number of transactions impacted, is subject to widely varying interpretations.

Much of the land in northwest New Mexico was divided into allotments and conveyed to individual tribal members. Apart from the issue concerning the exterior boundary language, it is unclear whether allotments are considered land “for the benefit of the Navajo Nation” as the federal trust status of this land generally subjects it to tribal jurisdiction. Also, much of the land in northwestern New Mexico has had the mineral estate severed from the surface estate. Is the ownership referred to in the language of the Bill only surface estate ownership or is ownership of the mineral estate sufficient?

Linkage of the tax credit to land ownership decidedly complicates, hence increases the expense of effective enforcement, as enforcement officers would be required to research the property records at the County Clerk and Recorders’ offices and property records for the trust lands which are held by the Bureau of Indian Affairs in order to determine whether a particular transaction is eligible for the tax credit.

TECHNICAL ISSUES

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OTHER SUBSTANTIVE ISSUES

- The State Highway and Transportation Department is concerned about extending differing policies or different treatment to specific Tribes and Pueblos. It is unlikely the Legislature would be able to resist demands from other Tribes and Pueblos for equal treatment. That could result in *very large* revenue losses.

- Tax returns filed by International Fuel Tax Agreement (IFTA) taxpayers and New Mexico Special Fuel Excise Tax users would not be affected by the cooperative agreement. The fuel *distributors* would make use of the tax credit, and retail purchasers would be unaware the fuel was not subject to state tax. Fuel users would still report the gallons for purposes of determining the state taxes paid on gallons of diesel purchased, even though the state received no tax revenue. In some cases, the *uncollected* revenue might still be required to be forwarded to other states under IFTA.
- The state has already granted an exemption from state gasoline excise taxes for gasoline re-tailed within Native American Reservation and Pueblo boundaries. Given the difficulties posed by the IFTA provisions, Native American Tribes and Pueblos might consider receding from their tax on diesel, since the state has receded from its tax on gasoline.

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