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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/06

SPONSOR Martinez LAST UPDATED \_\_\_\_\_ HB 662

NAVAJO NATION CAPITAL PROJECT

SHORT TITLE CONDITIONS SB \_\_\_\_\_

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ANALYST Weber

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
	None		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General Office (AGO)  
 Department of Finance and Administration (DFA)  
 Indian Affairs Department (IAD)

### SUMMARY

#### Synopsis of Bill

House Bill 662 in Section 1 notes a variety of conditions that will be addressed. Among the problems that need recognition are the following:

- The legislature finds that many residents of this state living within Indian country are impoverished and are involuntarily living without electric service, indoor plumbing, adequate potable water, telecommunications or related infrastructure due to federal government policies over the decades. Living under such adverse circumstances has a negative impact on the education of children at the elementary and secondary school levels and on the health and welfare of Native Americans in general.
- Since statehood New Mexico has had a responsibility for its Native American residents.
- The New Mexico policy is to improve the basic quality of life of residents within Indian country through the use of any means available.
- The purpose of this act is in part to enable the state, in compliance with the provisions of the constitution of New Mexico, to provide financial assistance to residents within Indian country to improve infrastructure.
- After development of government-to-government relationships many state agencies have designated divisions or liaisons to work with the nations, tribes and pueblos.

- The state has worked with Indian nations, tribes and pueblos, of which the Navajo Nation is the largest tribal government, and recognizes that the Navajo Nation is divided into political subdivisions designated as chapters.
- Due to federal, state and tribal policies related to the implementation of capital outlay and other projects, delays in implementation due to bureaucratic red tape have resulted in the reversion of millions of dollars in capital outlay funds designated for projects in Indian country.
- Tribal governments and their subdivisions have, through the years, organized nonprofit entities to assist in the provision of education and other basic services.

Section 2 notes the state recognizes the chapters of the Navajo Nation as local tribal entities having the capability and capacity to apply for and implement capital improvement projects. The state also recognizes as local tribal entities those nonprofit entities organized under the supervision of tribal governments whose mission or objective is to provide education and other basic services and who may apply for and implement capital improvement projects. Therefore, the state may contract through a fiscal agent other than the Navajo Nation for the expenditure of state funds on behalf of local tribal entities of the Navajo Nation. Unless otherwise negotiated, an administrative fee of no more than five percent of a project's cost may be charged by the entity that serves as fiscal agent.

Section 3 states local tribal entities may be considered as vendors when they utilize their own resources to implement capital improvement projects.

Section 4 addresses the issue of direct payments.

- In the case of capital outlay projects located within Indian country and authorized through the Indian Affairs Department or other state agencies working through the Indian Affairs Department the state may make payments directly to third-party contractors for services rendered or goods supplied. Upon approval by the Indian Affairs Department of a billing statement submitted on behalf of a vendor by a tribal government or a local tribal entity, the department may arrange for payment of that statement directly to the vendor. Capital outlay projects may be invoiced and paid in phases.
- The department of finance and administration is authorized to make payments directly to third-party contractors for services rendered or goods supplied regarding capital outlay projects located within Indian country and authorized to the Indian Affairs Department.

Section 5 focuses on Navajo Nation state general fund projects. Money appropriated from the general fund to several chapters of the Navajo Nation located in New Mexico for the same or similar purposes may be pooled by those chapters to create a regional or centralized project upon review of the Indian affairs department and approval by the state board of finance.

Section 6 provides that provisions of this act also may be used to implement the provisions of the Tribal Infrastructure Act.

Section 7 indicates that for the purposes of capital outlay projects located within Indian country and authorized to the Indian Affairs Department, pursuant to Subsection A of Section 14 of Article 9 of the constitution of New Mexico, persons who reside in Indian country who are not served by electric service, water service, indoor plumbing, sewers, telecommunications or related

infrastructure are presumed to be indigent. State agencies may contract with and make payment to local tribal entities to assist the indigent in local tribal entities.

Section 8 instructs the Department of Finance and Administration or the Indian Affairs Department to promulgate rules necessary to implement the provisions of this act.

Section 9 is an emergency clause making the act effective immediately.

### **SIGNIFICANT ISSUES**

The Attorney General contributes the following but with the understanding that the analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's, or legislator's request.

HB 662 may violate principles of sovereignty by authorizing the state to recognize and conduct business with local chapters of the Navajo Nation, in the absence of any recognition or authorization from the Navajo Nation itself.

This bill, by authorizing appropriations for certain capital outlay projects to local chapters of the Navajo Nation and nonprofit entities organized under tribal supervision, may violate Article IV, sec. 31 of the New Mexico Constitution, which prohibits "appropriations for charitable, educational or other benevolent purposes to any person, corporation, association, institution or community not under the absolute control of the state . . . ." (emphasis added).

This bill, by authorizing appropriations for certain capital outlay projects to nonprofit entities organized under tribal supervision, may also violate Article IX, sec. 14 of the New Mexico Constitution (the "Anti-donation Clause"), although the bill does provide a statutory presumption of indigence for certain purposes that may address a proper anti-donation clause exception

Section 7 of HB 662 creates the statutory presumption of indigence for persons residing in Indian Country who do not have electric service, water service, indoor plumbing, sewers, telecommunications or related infrastructure "pursuant to Subsection A of Section 14 of Article 9 of the constitution of New Mexico." This may, however, violate the Anti-donation Clause in that the constitutional provision does not make exceptions for statutory presumptions.

The Department of Finance and Administration offers the following analysis.

In the past, if the State wanted to provide funding to residents of Indian nations, to improve the basic quality of life or support capital outlay projects (electric, indoor plumbing, sewer, potable water, tele-communications), the Indian Affairs Department would receive the appropriations. Then IAD entered into Joint Powers Agreements with the Indian entity. The entity would then hire third party contractors to perform the work. The problem has been that due to federal, state and tribal policies related to the implementation of capital outlay and other projects, delays in implementation due to bureaucratic red tape have resulted in the reversion of millions of dollars in capital outlay funds designated for projects in Indian country. HB 662 streamlines the flow of money

in 2 ways--1) it permits the State to contract with the Chapters of the Navajo Nation (not just the Navajo Nation itself) and permits the state to contract with other fiscal agents (nonprofit entities organized under the supervision of tribal governments whose mission or objective is to provide education and other basic services and who may apply for and implement capital improvement projects); 2) it permits the State to make payments directly to third party contractors for services rendered or goods supplied regarding such projects.

Also, by defining persons who live in Indian country (who lack water and electricity and indoor plumbing) as "indigent" for purposes of the anti-donation clause (Art.IX, Sec.14, NM Constitution) it clears up a current problem when the State desires to upgrade these persons homes for the above mentioned basic services. The homes are most often leased by the person residing in Indian country for 99 years-- but owned by the federal government.

Another issue remains. Is it legal for the State to directly pay third party contractors procured by the Pueblo and with whom the State has no legal obligation to pay (other than an agreement with the Pueblo)? This could be a problem if the State makes a payment and then the Pueblo states the work should not have been paid for. Also, the State can not directly pay a contractor hired by a nonprofit corporation. HB 662 needs to be made clearer on this point.

The Department of Indian Affairs offers the following:

There appears to be several inconsistencies throughout the document. For example, though the intent of the legislation may be to provide Navajo Nation local chapters with capital expenditures, Navajo Nation local chapters are not designated as fiscal agents with which the state may contract. Additionally, though certain non-profit entities may provide various services to the local chapters and/or the Navajo Nation government, they nonetheless are usually bound by terms and conditions stipulated in an agreement with the Navajo Nation government; this may still bring the proposed funding mechanisms in HB 662 under the control of the Navajo Nation government. Finally, without any definitive language that would identify the qualifications and characteristics of a fiscal agent, the bill is rather vague in determining who or what entity would be a qualified fiscal agent for the Navajo Nation local chapters.

Additionally, under the current terms of the bill, vendors would be required to provide services to Navajo Nation local chapters and be reimbursed for services upon the submission of a billing statement provided by the Navajo Nation local chapter. This does not address a central issue mentioned in the bill - tribal bureaucratic "red tape." In submitting various billing statements for payment to third party vendors, Navajo Nation local chapters may still be required to work with the Navajo Nation government by Navajo Nation law/code/regulations. This brings up a last consideration: for funding that may require a tribal match, the Navajo Nation government will necessarily be involved in providing matching funding and oversight to ensure that such funds are spent according to Navajo Nation government law/code/regulations.

Also, in Section 4, Subsection A, the Indian Affairs Department (IAD) or other state agencies working through IAD are authorized to make payments directly to third-party contractors for capital outlay projects. Because some state agencies work directly with the Navajo Nation Chapters and other non-profit entities, it may be appropriate to allow

other state agencies to implement a direct pay process as well and not have to work through IAD.

There is a great need for the direct pay process as it will help facilitate completion of projects for tribes with limited resources. IAD attributes much of its current back log of capital outlay projects to this issue. Currently, the Department of Finance and Administration (DFA) and IAD are developing a direct pay process proposal for all Indian capital outlay projects.

Direct pay to third-parties would streamline the capital outlay process and allow these projects to be completed and closed out more efficiently. Through a direct pay program, the IAD would assist the tribal entity in completing the project in a timely manner. The tribal entity would provide documentation to IAD certifying that the tribe's procurement process had been followed. The tribe would also provide an invoice from the vendor to IAD for the exact cost of the goods or services provided for the capital outlay project. The IAD would then wire the funds to the vendor through the New Mexico State Treasurer's office (similar to the process already utilized by the IAD for projects financed with STB proceeds).

#### **TECHNICAL ISSUES**

The term "fiscal agent" needs clarification.

MW/mt