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## FISCAL IMPACT REPORT

	<b>ORIGINAL DATE</b> 1/26/06		
<b>SPONSOR</b>	<b>LAST UPDATED</b> 2/06/06	<b>HB</b>	HJM 1/aHGUAC
	DEVELOP PROTOCOL FOR CONSULTATION WITH		
<b>SHORT TITLE</b>	TRIBES	<b>SB</b>	
		<b>ANALYST</b>	Weber

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Indian Affairs Department (IAD)

Department of Finance and Administration (DFA)

Department of Health (DOH)

Energy Minerals and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of HGUAC amendment

The House Government and Urban Affairs Committee amendment makes the following changes:

1. On page 1, line 11, after "TO" strike the remainder of the line, strike line 12 and insert in lieu thereof "CONVENE A TASK FORCE TO STUDY THE MANY FACETS OF CONSULTATION AMONG TRIBAL, STATE, FEDERAL AND LOCAL GOVERNMENT ENTITIES IN NEW MEXICO."

2. On page 2, line 20, after "to" strike the remainder of the line, strike lines 21 through 25 and insert in lieu thereof:

"convene a task force to study the many facets of consultation among tribal, state, federal and local government entities in New Mexico and provide recommendations to improve meaningful consultation with tribes; and

## House Joint Memorial 1/aHGUAC - Page 2

BE IT FURTHER RESOLVED that the task force be composed of one representative each from the public regulation commission; the New Mexico association of counties; the New Mexico municipal league; the office of the state engineer; the interstate stream commission; the children, youth and families department; the economic development department; the human services department; the energy, minerals and natural resources department; the department of environment; the aging and long-term services department; the taxation and revenue department; the public education department; the department of health; the labor department; the tourism department; the New Mexico department of agriculture; the department of transportation; the cultural affairs department; and the veterans' services department; and

BE IT FURTHER RESOLVED that the recommendation be made to invite government-to-government and interagency agreement through communications among members of the task force; and

BE IT FURTHER RESOLVED that the task force present its recommendations on strategies and protocols to establish meaningful tribal consultation in New Mexico to the interim legislative Indian affairs committee by its October 2006 meeting; and".

3. On page 3, line 2, after the first occurrence of "the" insert "leaders of each New Mexico tribe, pueblo and nation, the".

4. On page 3, line 3, after "committee" strike the remainder of the line, strike line 4 up to the period and insert in lieu thereof ", affected state agencies and state and local governments with significant tribal involvement".

The changes better define what entities need to be part of the consultation in development of protocol practices, offer a specific timeline for completion of the project and designate the Indian Affairs Committee to receive the final report.

### Synopsis of Original Bill

House Joint Memorial 1 (HJM1) requests the Indian Affairs Department draft a protocol for meaningful tribal consultation between federal, state, and local governments and tribal entities, and to promulgate appropriate rules for tribal consultation.

### **SIGNIFICANT ISSUES**

The Indian Affairs Department notes:

In 2003, Governor Richardson and 21 of New Mexico's Tribal leaders (out of 22 Tribes) signed a Statement of Policy and Process. The Statement of Policy and Process "recognizes and respects the sovereignty of each nation," while recognizing the "importance of full and open communication and cooperation on issues of shared interest and concern .... And requires an open-door policy for [Indian Nations, Tribes] and Pueblos to voice concerns and discuss issues and to have the [Indian Nations, Tribes] and Pueblos' views seriously considered with respect to the formulation and execution of State policy."

The Statement of Policy and Process states the Governor and Indian Nations, "agree to establish procedures setting forth the framework to coordinate a cooperative and joint effort to address

issues identified by the Governor and [Indian Nations, Tribes] and Pueblos, to seek mutually beneficial solutions and outcomes, and to avoid litigation.” IAD and all other state agencies are charged to ensure that the Statement of Policy and Process will be honored to the fullest extent.

Building on the principles set forth in the Statement of Policy and Process, Governor Richardson issued Executive Order 2005-004 (“EO”) Statewide Adoption of Pilot Tribal Consultation Plans on February 1, 2005. The EO directed 17 executive agencies to adopt a pilot tribal consultation plan to address a specific area of the agency’s operations that involve interaction with tribal governments, communities, and/or tribal members within New Mexico. The intent of the EO is to review different models for tribal consultation and to determine the most effective ways to communicate, confer, and consult with tribal governments and communities.

All 17 departments submitted their proposals to the Governor’s office on July 1, 2005 and progress reports were submitted on October 1, 2005. The state departments are in various stages in the refinement or implementation of their respective tribal consultation pilot plans. Some of these pilot plans include annual tribal summits, quarterly state-tribal institutes, and development of internal department protocols. Such plans were drafted after consultation with the New Mexico Tribes.

Examples of recent government-to-government initiatives, as a result of such consultation include:

- State Health and Human Services Tribal Consultation Meeting
- State Indian Education Summit
- State-Tribal Water Institute
- Tribal Economic Development Summit

Additionally, Governor Richardson also signed the State of New Mexico Executive Department Policy Regarding Tribal Consultation on the Protection of Sacred Places and Repatriation (“Policy”) on March 3, 2005. The Policy sets forth a tribal consultation process for a Major State Action at issue to be followed in order to assure that tribal governments have a sufficient, ongoing, and meaningful opportunity for productive participation in the State’s planning and decision-making process.

In order to draft a tribal consultation protocol, the Indian Affairs Department would have to coordinate with all twenty-two Indian Tribes, Nations and Pueblos of New Mexico, all state agencies, federal, and local governments. This effort will require at least a year to develop a draft protocol.

HJM1 fails to outline a timeline for the completion of this project. Moreover, there is no mandate that the Indian Affairs Department actually consult with the New Mexico Tribes in the establishment of such consultation protocol. Finally, no direction is given to the Department as to which agency or body the finalized protocol should be presented.

As a result of the work completed in previous years, several NM Departments, including Human Services and the Department of Health, have already established their own Tribal Consultation

protocols. If the IAD establishes one tribal consultation protocol for all state agencies, such other agency protocols will need be amended or revised.

HJM 1 directs the IAD to establish protocol, in part, for federal interaction with tribes. The State of New Mexico does not have the authority to mandate that any federal agency follow a protocol established by a state agency or rules promulgated by the same.

ENMERD offers the following regarding the tribal consultation policies:

The second, Executive Order No. 2005-003, requires state agencies to adopt a framework for effective tribal consultation regarding the protection of Tribal sacred places and repatriation to assure that tribal governments have a sufficient, ongoing and meaningful opportunity for productive participation in the State's planning and decision-making processes. This Executive Order was the result of lengthy study and analysis by many state and Tribal participants through the Tribal-State Working Group and is directed to the following state agencies: EMNRD, NMED, Dept. of Cultural Affairs, Department of Game and Fish, GSD, Interstate Stream Commission, State Engineer Office, DOT and adjunct and administratively attached agencies. EMNRD has implemented this Executive Order as directed by the Governor, but has received no comments from IAD, or any affected Tribal entity that EMNRD has not offered meaningful consultation under it. In fact, although not required by the Executive Order, EMNRD extended an invitation to the Mescalero Apache Tribe to meet with it involving an exploratory mining permit application by Great Western Exploration for the Sullivan Ranch site, which is in the "Monticello Box," a native area that is north of the town of Winston, New Mexico. The Tribe did not pursue the invitation.

HJM 1 recites that the Interim Indian Affairs Committee heard testimony that consultation between federal, state and local governments have not been meaningful, yet does not identify if that alleged failure occurred at the state, federal or local level. As discussed above, EMNRD's attempts at consultation have received positive feedback.

HJM 1 notes that, in recent cases, proponents of projects before the Cultural Properties Review Committee of the Department of Cultural Affairs were required to engage in consultation with tribal entities regarding those projects. Although not cited, consultation over the impacts on Tribes from construction of underground parking at the proposed location of the new Santa Fe Convention Center resulted in a resolution of issues of concern to certain Northern Pueblos (avoidance of Native American burials) ruins in the excavation of the underground parking structure. This suggests the current process may, in fact, be working and not require institution of a regulatory framework, but, instead, improved methods for communication.

IAD does not have statutory authority to bind the federal government or local governments by its regulations with respect to laws it is not charged with enforcing. Further, IAD does not have statutory authority to enact rules to place additional regulatory requirements on state agencies absent specific statutory authority to impose such requirements. Many state agencies are required to follow a fixed set of statutory criteria in approving and issuing permits and licenses and must do so within a fixed period of time. The Executive Orders require state agencies to address Tribal concerns, but not at the expense of following state law and were prepared in recognition of these limitations. Each state agency has unique statutory and regulatory authority and unique missions and it is not feasible for one set of regulations to apply across many different statutory and regulatory authorities throughout state government.

Furthermore, Executive Order No. 2005-003 applies only in the instance of projects partially or wholly financed with state funds or involving state lands (excluding State Trust Lands), federal

lands or Tribal lands. This is significant because if private lands are involved, the state could be exposed to takings claims for imposing requirements without authority under state law. Again, this was an important consideration when the Executive Orders were prepared and again, points to the need to address any issues on an agency-by-agency basis, rather than through a uniform set of regulations.

IAD would need to consult with state agencies before promulgating any rules and, preferably, in lieu of a House Joint Memorial directing promulgation of such rules, IAD should be directed to convene a working group to analyze and make recommendations on improving consultations under the current Executive Orders.

### **ALTERNATIVES**

IAD notes an alternative is to have the department continue working with all appropriate state agencies in the implementation of their already drafted and approved tribal consultation pilot plans. A final review of the pilot plans and implementation may yield sound recommendations to further strengthen the government-to-government relationship.

MW/mt