F I S C A L I M P A C T R E P O R T

SPONSOR HENRC **ORIGINAL DATE** 03/10/11 **LAST UPDATED** **HB** 422/HENRCS

SHORT TITLE Cultural Property Registration and Acquisition **SB**

ANALYST Soderquist and Hughes

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	Indeterminate	Indeterminate	Indeterminate			

(Parenthesis ( ) Indicate Expenditure Decreases)

Original HB 422 is a duplicate of SB 421

SOURCES OF INFORMATION
LFC Files

Responses Received From
Department of Cultural Affairs (DCA)
Economic Development Department (EDD)
Indian Affairs Department (IAD)

Other Responses
Old Santa Fe Association
Timberwick Road Coalition
The Williams Group
Ann Berkley Rodgers, Chestnut Law Offices

SUMMARY

Synopsis of Bill

The House Energy and Natural Resources Committee Substitute for House Bill 422 (HB 422/HENRCS) requires a nomination of a cultural property to the official Register have the consent in writing of: 1) a majority of **surface owners** for land within a municipal boundary or within developed districts of unincorporated towns; or 2) a majority of the number of individual **surface and mineral interest owners** who own any part of a nominated property located outside of municipal boundaries or outside developed districts of unincorporated towns. "Mineral interest owners" are those interests that may be ascertained from publicly accessible land records maintained by the county or the US Bureau of Land Management.

The legislation changes language referencing the Office to the Department of Cultural Affairs (DCA). HB 422/HENRCS requires the Cultural Properties Review Committee (CPRC) to issue regulations by December 31, 2012 pertaining to:

- The process for nominating or removing cultural properties for placement on or removal from the Official Register, including requirements for notice;
- The decision process for placement of the properties on the Official Register; and
- The identification, preservation and maintenance of registered cultural properties in order to maintain the integrity of those properties.

The bill states that DCA may provide comment to and consultation with a state agency within ninety days on how a modification to a registered cultural property might be preserved and to minimize adverse effects on the cultural property. The current language in the statute directs the Department to "participate in the planning" of a modification of a cultural property. HB 422/HENRCS provides that nothing in the Act shall have any effect on the use or permitting of any property not on the official Register or noncontributing property explicitly excluded from the nomination application. Noncontributing property is defined in HB 422/HENRCS at NMSA 1978, §18-6-8.1 as property that "does not contribute to the historic, archaeological, scientific, architectural or other cultural significance of a registered cultural property."

HB 422/HENRCS keeps language encouraging property owners to report archaeological sites on their property, but changes to whom it is reported - the Archaeological Records Management Section of the Laboratory of Anthropology instead of the Cultural Properties Review Committee.

The Committee Substitute eliminates the power of eminent domain or condemnation for the Department and strikes the Department's authority to advise local government with regard to cultural property on use agreements, purchases or the right of eminent domain. For emergency designation, the Committee Substitute requires an owner's consent as required in Section 18-6-5 NMSA 1978. It also adds a new section to clarify that nothing in the 2011 amendments shall modify the State-Tribal Collaboration Act.

FISCAL IMPLICATIONS

There is no appropriation associated with this legislation. Substantially new resources would not be required of DCA in implementation of HB 422/HENRCS. The Economic Development Department response states that there would be some increased costs associated with the due diligence related to ascertaining private property ownership required by the legislation.

SIGNIFICANT ISSUES

For nominations of cultural properties, HB 422/HENRCS requires persons nominating to obtain the consent of a majority of all owners. This stands in contrast to the federal National Historic Preservation Act, which requires a majority of the owners of the properties within the district in the case of an historic district to be given the **opportunity** to concur in, or object to, the nomination of the property or district for such inclusion or designation. In other words, federal law only requires notice to the majority of the owners, not the actual written concurrence of the majority of the owners.

This legislation requires persons nominating cultural properties outside of municipal boundaries to obtain a majority of all surface and mineral interest owners. Owners of mineral interests must be ascertained from county land records or the US Bureau of Land Management (BLM). Requiring the public to access BLM records may make inclusion or designation problematic if BLM's records are not available or easily searchable.

The Energy Minerals and Natural Resources Department points out that the original HB 422 used the term "mineral estate owner" and the CS uses "mineral interest owner," which could be viewed narrowly as describing only a perpetual fee interest in the mineral estate. Alternatively, "mineral interest owner" could also be viewed broader to include "the right to explore (usually owned by a lessee), receive royalties, execute future leases in the event an existing lease expires, receive bonuses paid for new leases, and receive rentals paid by a lessee for deferring development, etc. These interests can be owned, wholly or in part, by different persons. Courts have recognized all of these interests as interests in real estate." EMNRD states that the reference to the BLM indicates that it is intended to include in the category of mineral interest owners claimants to federal minerals or federal lessees or owners of overriding royalties, since the BLM "maintains records only for federal leases and claims, and no other category of private interests can exist in federal lands."

The majority of owners requirement is applied to the number of owners without regard to the percentage of interest those owners have. Thus, a single owner of 98% of a property proposed for listing could be outvoted by two other owners of only 2% of the property. This would likely favor the mineral estate, because the mineral estate is more likely to be held in fractional interests.

In HB 422/HENRCS, Section 18-6-5.C, the Cultural Properties Review Committee shall not include properties for nomination of a cultural property explicitly excluded by the legal description. This bill language is confusing, because it includes a double negative. It would be clearer to state that a legal description is needed for properties explicitly excluded from the nomination application. Additionally, this amendment to §18-6-5 may require a survey of the property, potentially adding time and expense to the cultural property nomination process. DCA suggests this language be changed to "a description of the properties as provided by rule" in order to utilize the type of data descriptions currently used by professionals in the field.

The legislation reflects an ongoing legal debate in New Mexico, other states in the United States, and countries across the international community concerning private property rights and the public good, in particular the appropriate balance between the rights of an individual property owner, the obligations of an owner to protect archaeological and other "heritage" sites, and the capacity of government to ensure that archaeological, historical, ethnological, and other culturally-significant heritage sites are protected for current and future generations. The question of "eminent domain" – or an action pursued by government to acquire an owner's private property or rights to that private property – is of specific concern.

Laws related to eminent domain in New Mexico can be found in Sections 42A-1-1 through 42A-1-33 NMSA 1978, cited as the "Eminent Domain Code." The Eminent Domain Code defines a "condemnor" as "a person empowered by law to condemn." Section 42A-1-2.C NMSA 1978. Only a condemnor may file a petition for condemnation. Section 42A-1-17(A) NMSA 1978. Without the specific authority for eminent domain in Section 18-6-10(C)(5), DCA does not have authority to force private property designation as a cultural property. Eminent domain has never been used by DCA to compel a private property owner to assume this designation.

HB 422/HENRCS eliminates the authority of the Committee to recommend consultation procedures with local government on cultural property and the use of agreements, purchases or the right of the local government's eminent domain. It is important for local government actions to be advised by the DCA on the Historic District Act and the Cultural Properties Act.

One concern raised by a commenter was that New Mexico may be subject to decertification under the National Historic Preservation Act, because of the differences between the state and federal acts, which may result in a significant loss of federal funds. Also, because the Cultural Properties Act requires the Cultural Properties Review Committee to be in compliance with federal statutes and regulations, several of the proposed amendments would cause the Cultural Properties Act to be internally inconsistent.

The response from the Economic Development Department (EDD) emphasizes the importance of state historic registered district designation as "a major step forward for many of our MainStreet and Arts and Cultural Districts, especially in rural communities, to access financial incentives for eligible properties to rehabilitate, renovate, and bring properties into compliance with contemporary building and zoning codes. In many cases adaptive reuse of vacant and under-utilized properties creates a physical, built environment conducive to new business development supporting new entrepreneurs and the creation of jobs. Additional benefits to the community are the subsequent increase in gross receipts taxes with restored properties brought back to higher business uses." The response goes on to say that "State historic district designation for buildings or districts does not limit the ability of private property owners to exercise their rights for use or development of their property or of their decision on how they wish dispose of, renovate, and/or enjoy their personal property unless they use public funds in the renovation of that property."

The proposed amendments to the Cultural Properties Act affected by the legislation raise several questions and issues:

1. As the identification of mineral estate ownership is maintained by counties in different formats and is not easily linked to surface ownership, the time and cost of deed searches to determine surface and mineral estate ownership for properties and to obtain owner consent and signatures could be substantial. The subsurface mineral owner may not live within the state.

2. If there is a dispute over ownership of mineral rights related to a property proposed for listing to the State Register, what is the process for determining mineral ownership? Does the approval of all the parties to the dispute need to be obtained? Also, if title is held by several individuals as tenants in common or joint tenants, will each individual be counted?

3. Should an owner be encouraged in the statute to inform the Archaeological Records Management Section of the Laboratory of Anthropology instead of the Cultural Properties Review Commission that a potential cultural site is present on their private property, and what are the owner's subsequent obligations to exercise appropriate care for those sites?

4. To what extent does the deletion of the condemnation clause in §18-6-6(D) prohibit DCA from exercising its statutory responsibility to preserve and protect cultural properties?

5. To what extent does the deletion of the eminent domain clause in §18-6-10(C)(5) restrict DCA from exercising its statutory responsibility to preserve and protect cultural properties?

6. The scoring in an application for designation as an Arts and Cultural District may include the presence of a historic district and culturally significant properties. To what extent will communities be at a competitive disadvantage if they must obtain a majority of the owner's consent?

7. To what extent will the requirement to obtain a majority of owner's consent impact an emergency designation of a cultural significant property?

8. Visits to New Mexico historic and archaeological sites and districts are a key element of cultural heritage tourism strategies. Tourism is one of the top revenue-generating industries in New Mexico. Studies have shown that heritage tourists stay longer and spend more money during their visits. To what extent will the limitations on the registration, protection, and preservation of new cultural properties proposed by HB 422/HENRCS impact a community's ability to create conditions for economic growth and self-sufficiency?

PERFORMANCE IMPLICATIONS

The legislation could have the following performance implications:

1. The changes to Section 18-6-5(B) have the potential to inhibit the ability of the DCA and the Cultural Properties Review Committee to conduct the State Register program in a timely manner and this could have an impact on the responsibility of DCA and CPRC to preserve and protect cultural properties. The response from the EDD emphasizes that because the responsibility for nominating a local historic MainStreet or Arts and Cultural District falls on volunteers from those organizations overseeing the economic development of those districts, requiring the consent to an historic district nomination is a high threshold for rural communities to meet, especially since such historic district designation does not carry negative impact for those property owners who do not wish to participate in historic district benefits. However, once the consent of all the owners is obtained, the process for listing could be more efficient.

2. HB 422/HENRCS's changes to Section 18-6-5(G) would require promulgation of rules that detail the process for nominating cultural properties and for the decision making process. This revision could improve the registration process and make it easier for the public to participate effectively in designations of cultural properties.

3. HB 422/HENRCS requires owner consent in writing prior to an emergency listing of properties in the State Register. The purpose of emergency listings is to provide a quick, but temporary listing in the State Register to protect properties under threat of demolition or destruction by natural forces or neglect. An emergency listing typically is proposed by the property owner but may be proposed by a group of people in a community. Emergency listings provide time for DCA and CPRC to reach out to the property owners and to promote cooperation and a broader understanding of the historic and cultural significance of the property and determine the feasibility of listing. The temporary listing provides sufficient time to conduct appropriate studies (often structural engineering reports) to determine the merit of the listing, the integrity of the property and the feasibility of long-term protection. The owner-consent requirement in HB 422/HENRCS may inhibit timely emergency listings. This method of listing is seldom utilized, four times in the past 15 years. One example, in recent years it was used for listing properties owned by the state or a municipality when the community sought protection from demolition and wanted a new use for those properties.

ADMINISTRATIVE IMPLICATIONS

Existing statutes, rules, and regulations would require revision.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Property owners of the surface rights will continue to apply for designation to the State Register. The State Historic Preservation Officer will continue to work with other state agencies and departments early in planning to help preserve, protect and minimize adverse effects to registered cultural properties affected by state undertakings. Emergency listings by the CPRC will continue as a seldom used process for quick designation.

AMENDMENTS

Page 5, line 7-8: The reference to the "museum resources division" should be struck, as recommendations are made to the Department of Cultural Affairs only.

Page 7, line 10: The reference to the "director of the museum resources division" should be struck to reference the Department of Cultural Affairs only.

Page 9, line 15, "within 90 days" needs a start time. Suggestion: "within 90 days of receipt by the State Historic Preservation Officer of appropriate documentation of the undertaking, as required by rule".

On Page 11, lines 19 -23, insert "(4) advising the county or municipality within which the cultural property is located on the use of agreements or purchases to obtain control of the cultural property in accordance with the Historic District Act."

RJS/bym:mew:svb