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FISCAL IMPACT REPORT

ORIGINAL DATE 01/28/11

SPONSOR Harden LAST UPDATED _____ HB _____

SHORT TITLE Cigarette Taxes on Tribal Lands SB 264

ANALYST Burrows

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	\$19,080 - \$26,640	\$18,790 - \$26,240	Recurring	General Fund
	\$190 - \$260	\$180 - \$260	Recurring	UNM Cancer Center
	\$280 - \$390	\$280 - \$390	Recurring	NMFA
	\$2,000 - \$2,800	\$1,970 - \$2,750	Recurring	NMFA/ UNMHSC
	\$840 - \$1,180	\$830 - \$1,160	Recurring	NMFA/DOH
	\$140 - \$200	\$140 - \$190	Recurring	Rural County Cancer Treatment Fund

(Parenthesis () Indicate Revenue Decreases)

Relates to SB81, HB79, SB212, SM07

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Health (DOH)

Indian Affairs Department (IAD)

Department of Taxation and Revenue (TRD)

SUMMARY

Synopsis of Bill

Senate Bill 264 would provide for cigarette excise tax to be paid on sales to non-tribal members by cigarette vendors on tribal land. In current law, cigarette vendors receive a tax credit on all

sales on tribal land on the condition that the tribe has imposed a minimum cigarette tax. The bill also removes the requirement that tribes impose their own excise tax, and changes the definition of “units sold” for the purpose of tobacco escrow payments to include cigarettes sold with tax-credit and tax-exempt stamps. Cigarette sales to tribal members remain exempt from tax under Senate Bill 264 as in current law.

The effective date of this bill is July 1, 2011.

FISCAL IMPLICATIONS

The presumed consumption of cigarettes by tribal members, assuming standard national consumption patterns, is estimated to be about 5.4 million packs per year (see Attachment 1). The estimated state tax loss associated with the federal preemption from taxing tribal members on their own tribal land is estimated to amount to about \$4.9 million per year. The estimated revenue impact represents estimated sales of cigarettes that are currently tax-exempt to non-tribal persons.

Cigarette demand is responsive to price changes and it is important to recognize that when prices go up demand will do down, thereby affecting the fiscal impact.

Impacts were calculated based on the effect of the tax increase on price and the correlated decrease in demand for cigarettes. Demand elasticity, the ratio of the change in purchases to the change in price, was assumed to be -0.50. This estimate is a national average based on a review of the economic literature. The revenue ranges presented represent 72 percent to 100 percent of the calculated full revenue impact to allow for possible tax compliance problems (see Technical Issues).

Distributions to the general fund include a distribution of 9.77 percent of the additional revenue to the New Mexico Finance Authority (NMFA) credit enhancement fund, which is later returned to the general fund.

SIGNIFICANT ISSUES

According to TRD, in addition to the revenue impact shown above, tribal governments would probably realize a revenue loss of about \$15.8 million to \$20 million per year, and may find it necessary to repeal the majority of their tribal taxes on cigarette sales.

The Indian Affairs Department (IAD) reports that the “tax credit stamp” language, negotiated between State and tribal representatives during the 2010 Special Session, aligns with sound state-tribal tax policies, similar to those that exist for gasoline sales and gross receipts.

IAD also states:

“[The bill] may be detrimental to those tribes that have implemented tribal cigarette taxes. Non-tribal member customers will be subject to both state and tribal taxes and will actually be paying more for cigarettes purchased on tribal lands.”

And:

“Tribal tobacco sales and tribal taxes collected on those sales by tribal governments, has spurred successful economic development... [, which] has also brought needed revenue to tribal governments for governmental operations, infrastructure development, and civic services and created local jobs for tribal members.

The elimination of the tax exemption may also negatively impact the state’s government-to-government relations with the 22 New Mexico tribes.”

ADMINISTRATIVE IMPLICATIONS

TRD suggests there may be need to monitor tax-credit stamps provided by distributors to individual tribal retailers. It is unclear by what mechanism the Department might address an apparent violation of the use of tax-credit stamps by tribal retailers, but having a tribal agreement in place regarding the allowed number of tax-credit stamps would be a most useful beginning step (see Technical Issues).

TRD states that the bill would require TRD to establish rules regarding how tobacco “units sold” would be determined for purposes of the Master Settlement Agreement.

RELATIONSHIP

SB264 relates to:

- SB81, which would clarify the definition of tobacco products, increase the state tobacco products excise tax from 25% to 57% of product value and impose a minimum excise tax on all tobacco products sold;
- HB79, which would provide for an additional distribution from the Tobacco Settlement Permanent Fund to the Tobacco Settlement Program Fund through Fiscal Year 2013;
- SB212, which proposes to amend sections of the Dee Johnson Clean Indoor Air Act to prohibit smoking in motor vehicles in which a minor is present; and,
- SM07 would require the Department of Health to conduct a study that would examine the feasibility of holding tobacco manufacturers accountable for sale of tobacco to minors.

TECHNICAL ISSUES

According to TRD, the mechanism for providing untaxed cigarettes to tribal members may prove unworkable. Section 4, subsection A (on page 11, lines 18-24) requires cigarette distributors to obtain a number of “tax credit stamps” for sales of cigarettes to tribal members. This would require distributors to maintain a separate inventory of tax exempt stamps for each tribe, and tribal retailers to maintain separate inventories of cigarettes intended for sale to tribal members and non-members. Since all cigarette packages are required to bear some type of tax stamp, and since the tax exempt status (federal preemption) cannot be determined until the pack is sold to a tax exempt entity, administration would be difficult. Moreover, shortages of particular cigarette brands that bear a tax exempt stamp could occur.

TRD also reports that Section 6, subsection G (on page 13, lines 20-24), which is intended to bring the Cigarette Tax Act (Section 7-12-5) into harmony and compliance with the Master Settlement Agreement (MSA) (Section 6-4-12), should be revised to include “tax-credit stamp” in the determination of units sold as in the MSA. Moreover, TRD suggests the definition of “tax-credit stamp” on page 9, lines 19-22 be revised to correspond to language elsewhere in the bill.

OTHER SUBSTANTIVE ISSUES

The availability of untaxed cigarettes from tribal sellers limits the effectiveness of state policy initiatives designed to discourage cigarette consumption. Moreover, cigarette consumption imposes significant costs through second hand smoke and health-related costs that are paid directly or indirectly by non-smokers. Higher cigarette taxes may discourage non-smokers from becoming smokers.

According to DOH, the U.S. Supreme Court ruled in *Oklahoma Tax Commission v. Potawatomi Tribe* (1991), that “under the doctrine of the tribal sovereign immunity” a state is “free to collect taxes on sales to non-tribal members” that occur on tribal land, but may not tax sales to tribal members on tribal land. Moreover, a state cannot enforce any such tax collection laws against tribes through a court lawsuit unless specifically authorized by Congress.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

All sales of cigarettes on tribal land will continue to be exempt from taxation.

LKB/bym

**Illustration of Tax Reimbursement to Native American Smokers Living on Reservations
(calculated at the current \$0.91 per pack tax rate)**

Geographic Area	Total Population (2000 Census)	Native American (1) Population (2000 Census)	Estimated 2010 Total Population	Native American Population age 18 and over	Native American Adult Smokers (2)	Estimated Cigarette Tax that would be paid by Native American Smokers (3)
AMERICAN INDIAN RESERVATION AND OFF-RESERVATION TRUST LAND — FEDERAL All areas	138,839	104,823	114,705	70,764	14,577	\$4,894,940
Acoma Pueblo and Off-Reservation Trust Land, NM	2,802	2,724	2,981	1,932	398	\$133,642
Cochiti Pueblo, NM	1,502	695	761	561	116	\$38,806
Isleta Pueblo, NM	3,166	2,675	2,927	1,985	409	\$137,308
Jemez Pueblo, NM	1,958	1,940	2,123	1,380	284	\$95,458
Jicarilla Apache Reservation, NM	2,755	2,474	2,707	1,635	337	\$113,097
Laguna Pueblo and Off-Reservation Trust Land, NM	3,815	3,670	4,016	2,671	550	\$184,760
Mescalero Reservation, NM	3,156	2,888	3,160	1,849	381	\$127,900
Nambe Pueblo and Off-Reservation Trust Land, NM	1,764	455	498	365	75	\$25,248
Navajo Nation Reservation and Off-Reservation Trust Land, NM (part)	69,524	67,369	73,720	44,011	9,066	\$3,044,361
Picuris Pueblo, NM	1,801	166	182	132	27	\$9,131
Pojoaque Pueblo, NM	2,712	263	288	210	43	\$14,526
Sandia Pueblo, NM	4,414	499	546	370	76	\$25,594
San Felipe Pueblo, NM	3,185	2,465	2,697	1,718	354	\$118,839
San Ildefonso Pueblo, NM	1,524	527	577	405	83	\$28,015
San Juan Pueblo, NM	6,748	1,329	1,454	1,015	209	\$70,210
Santa Ana Pueblo, NM	487	473	518	335	69	\$23,173
Santa Clara Pueblo, NM	10,658	1,332	1,458	1,057	218	\$73,116
Santo Domingo Pueblo, NM	3,166	3,084	3,375	2,079	428	\$143,810
Taos Pueblo and Off-Reservation Trust Land, NM	4,492	1,330	1,455	1,131	233	\$78,234
Tesuque Pueblo and Off-Reservation Trust Land, NM	806	355	388	264	54	\$18,262
Ute Mountain Reservation and Off-Reservation Trust Land, NM (part)	0	n/a	n/a	n/a	n/a	n/a
Zia Pueblo and Off-Reservation Trust Land, NM	646	645	706	460	95	\$31,819
Zuni Reservation and Off-Reservation Trust Land, NM (part)	7,758	7,424	8,124	5,199	1,071	\$359,629
San Felipe/Santa Ana joint use area, NM	0	n/a	n/a	n/a	n/a	n/a
San Felipe/Santo Domingo joint use area, NM	0	n/a	n/a	n/a	n/a	n/a

(1) "Native American" based on Census definition of "American Indian and Alaska Native".

(2) "Smokers" assumed to be 20.6% of adult population.

(3) Estimated Cigarette Tax that would be paid by Native American smokers assumes average consumption of 369 packs per year per smoker.

Source: U.S. Census Bureau, Census 2000 Summary File 1, Matrix P8.

Source: U.S. Census Bureau, Census 2000 Summary File 1, Matrices PCT12 and P13.

Calculations by TRD/TAR&S Office from Census percentages of population for age and race.