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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/11
LAST UPDATED 02/27/11 **HB** _____

SPONSOR Adair

SHORT TITLE Cultural Property Registration and Acquisition **SB** 421

ANALYST Soderquist

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)

Duplicates HB 422

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Cultural Affairs (DCA)
 Economic Development Department (EDD)
 Indian Affairs Department (IAD)
 Old Santa Fe Association
 Timberwick Road Coalition
 The Williams Group

SUMMARY

Synopsis of Bill

Senate Bill 421 requires surface and mineral estate owners' consent and signature to nominate a property to the New Mexico Register of Cultural Properties. The legislation defines ownership of a property nominated to the State Register to include the owners of both the surface and mineral estate in situations in which mineral rights have been severed. The legislation removes the power of eminent domain and condemnation as a means of acquiring cultural properties by the Cultural Affairs Department, requires promulgation of rules, revises state agency collaboration with the State Historic Preservation Officer on projects that impact properties listed in the Register, and only allows emergency classifications with the consent of all private property owners. The legislation changes language referencing the Office (vs. the Department) of Cultural Affairs and removes language in the Act that encourages communication between owners and the Department of Cultural Affairs and the Cultural Property Review Committee to protect significant archaeological sites and historic properties on private land.

FISCAL IMPLICATIONS

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

SIGNIFICANT ISSUES

SB 421 will require the written consent of all owners of a property, including mineral estate owners if the estate is split, to be included on the State Register of Cultural Properties. There are currently 1,922 sites on the State Registry.

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.

Every state in the United States has statutes of some form related to appropriate procedures to be followed in the exercise of eminent domain, usually with reference to the Fifth Amendment of the U.S. Constitution, which states in part that private property shall not be taken for public use without just compensation. As a result, the majority of legal debate has revolved around the procedural protections required for what is and is not “just” compensation as it applies to compulsory purchase. Equitable estimations of “market value” have not always proven to be easy to ascertain or administer.

There has been a movement to place more restrictions on the potential for government-driven acquisitions of private property. This approach is based on the argument that government has overstepped its boundaries in its efforts to obtain property, even when the property is not necessary for public use. Private property owners have expressed concern that title to their property – and their capacity to either use or sell the property – could be affected by the potential for condemnation as a result of designation as a cultural property. Given the fact that New Mexico has a substantial number of heritage sites, both identified and unidentified, the issue is especially relevant.

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) NMSA 1978, 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.

There have been a number of legislative attempts to place restrictions on the use of eminent domain in New Mexico, the most visible example being the veto by then-Governor Richardson of legislation introduced by Representative Richard Cheney in 2006. The legislation received strong bi-partisan support in the Legislature.

In June of 2009, the Cultural Properties Review Commission listed 680 square miles of Mount Taylor as a Traditional Cultural Property. Fifteen parties appealed this decision to district court. In 2010, the district court reversed the Traditional Cultural Property designation for Mount Taylor. The case is currently on appeal in the Court of Appeals.

The bill amends Section 18-6-5 NMSA 1978 by determining that a cultural property would not be included in the New Mexico Register of Cultural Properties unless a nomination for the inclusion, signed by all owners of the land comprising the cultural property or upon which the cultural property is located, has been submitted to the Cultural Properties Review Committee. The Cultural Properties Review Committee is required to promulgate regulations pertaining to:

- The process for nominating cultural properties for placement on the official register;
- 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.

Section 18-6-8.1(B) adds new criteria for applicability of the Cultural Properties Act. This section states that nothing in the Cultural Properties Act shall have any effect on the use of property “that does not contribute to the historic, archaeological, scientific, architectural or other cultural significance of a registered cultural property.” To list property on the State Register, the Cultural Properties Review Committee must identify the property as having historical or other cultural significance and integrity, being suitable for preservation and having educational significance. (Section 18-6-5 NMSA 1978.) Section 18-6-8.1(B) introduces new criteria that must be met for the Cultural Properties Act to be applicable and the Act must be applicable for property to be listed.

The response from the Old Santa Fe Association states that SB 421 will affect the creation of state historic districts and reduce the number of individual requests to list private historic properties. According to this response, the “majority of historic districts are typically in downtown areas and are created as a result of civic pride, tourism marketing, or downtown revitalization. The rehabilitation, repair and maintenance of historic structures results in jobs, local sales, and tax revenues. The tourism associated with historic properties generates income for property owners and tax revenues. The additional requirement for mineral rights owners to agree to a cultural property listing is another hurdle that may add costs in forming historic districts”. On this point, the response from the Indian Affairs Department states that the legislation “could inhibit property owners from receiving financial preservation incentives for registered historic properties due to one owner objecting to the nomination”.

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 “(s)tate 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 (NMSA 1978, 18-6-1 et seq.) 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. Should timelines be established so action on specific properties is not significantly delayed to the detriment of the owner, other entities, and the community?
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?
3. Under SB 421, the objection of one property owner within a downtown commercial historic district could prohibit designation of historically significant properties to the State Register. Under current law, an individual has the choice to opt out of a district designation and the district can still be created. To what extent should objections of one owner affect the majority of property owners and the community from utilizing financial incentives for historic preservation?
4. Revisions proposed to Section 18-6-8.1 NMSA 1978 (Review of Proposed State Undertakings) will reduce the role of the State Historic Preservation Officer in participating in undertakings with other state agencies and departments to minimize adverse effects to registered cultural properties. To what extent will this change impact the Historic Preservation Division in its effort to transmit knowledge obtained from public agencies, businesses and property owners and ensure efficient use of project funds and preserve and protect cultural properties?
5. Should an owner should be encouraged in statute to inform the government 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?
6. To what extent does the deletion of the condemnation clause in Section 18-6-6(D) prohibit the Department of Cultural Affairs from exercising its statutory responsibility to preserve and protect cultural properties?
7. 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?
8. The scoring in an application for designation as an Arts and Cultural District, which 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 100 percent owner consent?

9. To what extent will the requirement of 100 percent owner consent impact an emergency designation of a cultural significant property?

10. 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 SB 421 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. SB 421's changes to Section 18-6-2(F) would require promulgation of rules that detail the process for nominating cultural properties and for the decision making process. The response from The Williams Group states this revision could improve the registration process and make it easier for the public to participate effectively in designations of cultural properties.

2. The changes to Section 18-6-5(B) have the potential to inhibit the ability of the Historic Preservation Division and the CPRC to conduct the State Register program in a timely manner and this could have an impact on the responsibility of DCA and the 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, "to add the burden to private owners and volunteers to track down mineral rights under a traditional village or town commercial center that has operated as such for decades and in some cases hundreds of years, would increase greatly the time required to research and the potential costs associated with verification and notification". However, once the consent of all the owners is obtained, the response from The Williams Group states that the process for listing should be more efficient.

3. SB 421 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 HPD and the 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 SB 421 may inhibit timely emergency listings. This method of listing is seldom utilized. In recent years it has been 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.

TECHNICAL ISSUES

The requirement for 100 percent owner consent and signature as a condition of listing would place the rights of a single owner objecting to a State Register listing over the rights of all other owners that support registering a cultural property (site, building, structure, place or object of scientific, historic or cultural significance). The response from the EDD states that “the burden of collecting 100% of property owners’ support to nominate a district would leave the majority of property owners without recourse if they wished to take advantage of district designation benefits. MainStreet and Arts and Cultural Districts already encounter a myriad of problems with commercial property absentee ownership, property management companies unwilling or unable to represent the business owners of properties, and properties handed down from generation to generation, where multiple families now own a percentage of the property. Municipalities face these issues when they seek to address nuisance and derelict properties when addressing public safety and health issues”.

In 1980 the federal National Historic Preservation Act (NHPA) was amended to recognize private property owner rights in listings in the National Register. The 1980 amendment required consent of 51 percent of the owners of a property or district in order to be listed in the National Register of Historic Places. The technical issue that should be addressed is whether private property rights can be recognized and protected in a manner that respects the rights of a percentage of the majority as it relates to the preservation and protection of cultural properties – much as is done in other states.

DUPLICATION

HB 422

ALTERNATIVES

CPRC could adopt by rule the 51 percent owner consent standard set by the National Historic Preservation Act (<http://www.achp.gov/nhpa.html>).

The EDD response states: Guidelines to consultants assisting communities with National Register nominations, which could be a next step for some state registered historic districts and cultural properties uses as its criteria of at least a majority and when there is dissent, a 2/3 majority of property owners consenting, within a proposed district for the nomination to move forward.

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

According to the Department of Cultural Affairs, the following technical amendments should be considered:

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Pages 4, line 25 and page 5, line 1: The reference to the “museum resources division” should be struck, as recommendations are made to the Department of Cultural Affairs only.

Pages 7, line 1: The reference to the “director of the museum resources division” should be struck to reference the Department of Cultural Affairs only.

On page 9, lines 12-14, perhaps the standard in this section should match the criteria for listing, i.e.: having historical or other cultural significance and integrity, being suitable for preservation and having educational significance. Section 18-6-5 NMSA 1978.

Page 11, lines 4 and 5: insert a new paragraph 5: “(5) advising the secretary of the cultural affairs department on the use of the right of eminent domain.”

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