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FISCAL IMPACT REPORT

ORIGINAL DATE 3/4/15
 SPONSOR SFC LAST UPDATED 3/9/15 HB _____
 SHORT TITLE County IRB Projects & Complaint Process SB 319/SFCS/a HWMC
 ANALYST Graeser

REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17	FY18	FY19		
	(*)	(*)	(*)	(*)	Recurring	General Fund and OSF comp tax
	(*)	(*)	(*)	(*)	Recurring	Gen Fund GRT
	(*)	(*)	(*)	(*)	Recurring	Local Gov't GRT

(Parenthesis () indicate revenue decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration/Board of Finance

SUMMARY

Synopsis of Amendment

The House Ways and Means Committee amendment allows the State Board of Finance 90 days from when it receives a request for determination of competition to when it must decide the issue. This will give the SBoF sufficient time to notify the public that the issue will be heard, gather evidence, hear testimony and otherwise conduct due diligence.

Another HWMC amendment clarifies that for a refinery, treatment plant or processing plant for energy products allowed by the substitute bill, all necessary state permits must be in place before the county can approve an IRB.

Synopsis of Bill

Senate Finance Committee Substitute for Senate Bill 319 would amend the County Industrial Bond (IRB) Act by expanding the list of suitable industries to include an EMNRD-permitted mine and an EMNRD-permitted refinery, treatment plant or processing plant for energy products.

The bill also amends Section 4-59-15 NMSA, which establishes a process for existing businesses that believe a County IRB project will compete with their existing business to file a complaint with the county and have the State Board of Finance (SBoF) make a determination. Under current law, such a complaint must be filed at the meeting at which the county ordinance authorizing the IRBs is authorized. The bill would allow a complaint to be filed within 15 days of the county meeting.

If a complaint is filed with the county, the IRBs in question cannot be issued until the SBOF determines that the proposed IRB project would not directly or substantially compete with the existing business. The bill adds the caveat that the SBOF shall conduct a hearing and make its determination within 60 days after the complaint is filed (see Proposed Changes).

The effective date of the act is July 1, 2015.

FISCAL IMPLICATIONS

The HWMC amendments do not change the fiscal impacts of this bill. LFC staff continue to note that the approval by a county of an IRB for a mine or refinery can impose a loss of gross receipts or compensating tax revenue on the state. However, if the project would not occur without the IRB, then the loss to the state is not of base revenues but of growth in state revenues.

The fiscal implications of this bill are complex. The conditions are quite narrow and may involve only a single project in each category. In any event, the impacts will not be realized until FY 2017 or FY 2018.

This bill would allow two new industries -- an EMNRD-permitted mine and an EMNRD-permitted refinery, treatment plant or processing plant for energy products – to negotiate with a County Commission for an Industrial Revenue Bond. While a few IRB projects actually use the negotiated bonds for financing of the projects, the major reason for soliciting an IRB is to gain a tax subsidy – primarily long-term property tax relief. On paper, the sponsoring government “owns” the project’s assets, including buildings, pits, shafts, lifts and conveyors, and leases these assets to the operating company. The lease payments are calculated to service the IRB debt from the bonds sold at the inauguration of the project (and usually bought by the operating company’s holding company). Since the project’s assets are “owned” by a government entity, the property is property tax-exempt for the period that the IRB is valid. In addition to property tax exemption, operating equipment purchased by the sponsoring government using the proceeds of the IRB is leased to the operating company. However, this is tangible personal property owned by a government. This equipment is then gross receipts and compensating tax deductible

	Mining Project	Refinery, etc. Project
Construction GRT	Taxable	Taxable
Equipment GRT	Deductible	Deductible
Equipment Comp	Deductible	Deductible
Property Tax	Exempt for period of bonds	Exempt for period of bonds

For the mining project, “construction” is taxable to the government entity. It may be quite technical for a mining project to distinguish between “construction” and “equipment.” The construction will be taxable; the equipment will be GRT and comp tax deductible. For property tax pur-

poses, mining projects are valued using a special valuation method at 7-36-23 NMSA 1978. This method looks at the project as a whole and attempts to value the resource. The special method is simply to value the project based on the annual production value. This project can be considered for the local government as no fiscal impact, since the project would probably not happen without the significant tax relief. To the extent that the project is at least partly equipment, the sponsoring county is imposing a revenue loss on the State general fund. The magnitude of this depends on the quantity and value of the equipment.

The tax consequences of the IRB for the refinery project are similar to those of the mine. The tanks, piping, cracking towers, etc. would probably be considered as equipment and not real property. The fiscal impact of bringing these projects on board with IRB tax advantages could be large. However, this project could also be put into the category that the project will not go forward without the tax relief.

This bill may be counter to the LFC tax policy principles of adequacy, efficiency, accountability and equity. Due to the increasing cost of tax expenditures revenues may be insufficient to cover growing recurring appropriations.

SIGNIFICANT ISSUES

The premise of the IRB mechanism is simple. A useful paper, written by Alan Hall of the Rodey law firm,¹ is available:

“IRBs are, fundamentally, tax subsidies. Depending on the type of IRB project, the holder of the bonds and other factors, the subsidies may be one or more of (i) a property tax exemption, (ii) a gross receipts tax deduction (and/or compensating tax exemption), (iii) an exemption of bond interest from New Mexico income taxation, and (iv) an exemption of bond interest from federal income taxation.² IRBs may also be the actual mechanism for financing the IRB project, although ... this is not mandatory.”

The Board of Finance provides the background and perspective on the protest portions of this bill:

“Section 4-59-15 NMSA 1978, which would be amended by this bill, has been in place since the entire County IRB Act was enacted in 1975. To the SBOF's knowledge, no complaints that would invoke this section of statute were filed prior to 2014.”

“On June 10, 2014, a complaint was filed with Dona Ana County by copper wire manufacturer International Wire Group Holdings, Inc., which claimed that Dona Ana County's proposed issuance of IRBs to defray the costs of land, buildings, and equipment for copper wire manufacturer CN Wire Corporation would directly or substantially compete with International Wire's existing business located within one mile of the proposed CN Wire site. On June 16, 2014, Dona Ana County requested that the SBOF make a determination whether the proposed CN Wire IRB project would directly or substantially complete with the existing International Wire Group business. SBOF staff believes this was the first and only instance of such a request for determination from the SBOF.”

¹ http://www.rodey.com/downloads/rodey_industrial_revenue_bond_basics.pdf

² It is unlikely that either a conventional housing project or a mining or energy development project would qualify for a piece of the state's private activity bond allocation. See the mining and energy development section for a list of the requirements to qualify a project for federal and state personal or corporate income tax exemption.

“At the SBOF's July 15, 2014 meeting, the SBOF approved publication of notice of a public comment period related to the issue, appointed a member of the SBOF to serve as hearing officer on future hearings related to the issue and to respond to procedural questions on the issue, and adopted procedures that it would use to make its determination. The procedures called for a two-part written public comment period, whereby interested persons could review the first round of public comments and rebut those public comments in the second round. Following the conclusion of the public comment period, the SBOF would schedule a meeting to hold a hearing on the issue, after which a determination would be made.”

“The SBOF was scheduled to hold a hearing on the issue on October 22, 2014. However, on October 8, 2014 Dona Ana County withdrew its request for a determination from the SBOF because it had received notice from CN Wire that the City of Anthony had issued IRBs on behalf of the CN Wire project under the Municipal IRB Act, and the county IRBs were no longer required. The SBOF cancelled its October 22, 2014 meeting and the matter is considered closed from the SBOF's perspective.”

“The Municipal IRB Act, under which the City of Anthony issued IRBs to fund the CN Wire project, does not contain a provision that allows an existing business to file a complaint and prevent issuance of IRBs on behalf of a competing business. In a suit filed on September 15, 2015 by International Wire Group against the City of Anthony and CN Wire, International Wire argued that the City of Anthony's issuance of IRBs for CN Wire was unlawful and invalid arguing that the Municipal IRB Act contains an implied requirement that IRBs may not be issued for the benefit of a proposed project that would directly or substantially complete with an existing business within the same county or within five miles. International Wire argued that protection from IRB subsidized competition is implied in the Municipal IRB act because the New Mexico Supreme Court has recognized that two statutes covering the same subject matter should be harmonized and construed together when possible, in a way that facilitates their operation and the achievement of their goals. This suit is currently pending in the 3rd Judicial District Court.”

“Under current law, the SBOF's role under 4-59-15 NMSA is unclear and untested. The section does not offer guidance to the SBOF as to what is meant by the term "directly or substantially compete." The SBOF's basis for determination is therefore open to interpretation by the SBOF. Section 4-59-16 NMSA, directly following the section that this bill would repeal, states that the county IRB act shall be "liberally construed to carry out its purposes." Section 4-59-3 NMSA 1978 states that the legislative intent of the county IRB act is to promote various forms of industry in the State. Read together, these sections might suggest that when there is a question of competition, the SBOF ought to favor a determination that there is no competition, thereby liberally construing its authority to allow the legislative intent of promoting industry to occur through issuance of county IRBs. In so doing, the SBOF would also be allowing the county's action to authorize issuance of IRBs to prevail.”

“In its notice of public comment period on the copper wire IRB issue, the SBOF requested public comment on a wide range of topics, including data related to business inputs (such as raw materials, capital and labor), business outputs, manufacturing technology, required workforce training, local labor market characteristics, estimated impacts of the

planned project on prices of business inputs or outputs, business input supply constraints, specific business models employed by the two businesses, transportation infrastructure, geographical market factors, and any other information that could assist the SBOF in making its determination.”

“A key difference between the County IRB Act and the Municipal IRB act is that the County IRB Act allows IRBs to be issued by counties for retail businesses, whereas retail is not an allowable use of municipal IRBs. One could infer that perhaps the 1975 Legislature enacted Section 4-59-15 to protect existing retail businesses from IRB-subsidized competition, since retail businesses could be argued to be more likely to compete for a share of a finite local market. Manufacturers may have been seen as competing in a statewide, national, or international marketplace.”

PERFORMANCE IMPLICATIONS

The LFC tax policy of accountability is not met since neither TRD nor any other agency is required in the bill to report annually to an interim legislative committee regarding the data compiled from the reports from taxpayers taking the deduction and other information to determine whether the deduction is meeting its purpose.

This IRB provision would possibly allow a county to control to a significant extent the amounts of compensating and gross receipts taxes received by the State general fund. This is clearly not accountable.

CONFLICT

The Attorney General’s Office points out the following:

SB 111 – Repeal County IRB Complaint Process (Sen. Leavell)

SB 111 repeals Section 4-59-15, NMSA 1978, a section of the IRB Act which allows nearby businesses to file a complaint with the county governing body that the proposed IRB project would “directly or substantially compete” with the existing business. The IRB funds are withheld until the State Board of Finance can review the complaint and determine that the proposed project does not directly or substantially compete with the existing business.

SB 131 – Local Gov’t IRB Notices & Impacts (Sen. Stewart)

SB 131 would require municipalities and counties to notify other local property tax levying entities before taking any action on issuing IRBs. The bill also provides a mechanism for local school districts to negotiate and receive payment in lieu of taxes.

The State Board of Finance notes that this bill might provide an opportunity to provide guidance in Section 4-59-15 NMSA 1978 concerning the definition of "directly or substantially compete." Lacking this clarification, the SBOF will continue to grapple with interpreting the basis on which it should make any future requested determinations. If the basis for a SBOF determination remains unclear, the SBOF could be vulnerable to legal appeal of a determination being arbitrary and capricious.

One of the HWMC amendments provides that the SBoF has 90 days from receiving the request for determination until it must act. This additional time adequately addresses the following concern.

~~The State Board of Finance also notes that, “ requiring the SBOF to make a determination within 60 days of a complaint being filed with a County may not provide counties, existing businesses, and new businesses adequate due process under the law. If the SBOF makes a determination without demonstrating adequate due process to the interested parties, the determination could be subject to appeal in district court, which would slow closing of the affected IRBs much more than allowing the SBOF adequate time to make a sound determination.”~~

~~“The SBOF meets once per month and traditionally does not meet in the month of August. The procedures adopted by the SBOF in 2014 to make a determination pursuant to Section 4-59-15 NMSA may be difficult to follow in only 60 days. It is recommended that the bill be amended to either restore Section 4-59-15 to current law, or amend it to leave the SBOF a minimum of 120 days to make its determination.”~~

~~“Under the SBOF's 2014 IRB determination procedures, after receiving notification of a complaint being filed by with a county, the SBOF must meet once to approve publication of notice of a public comment period. Then, the public comment period would be open for about 30 days. Then, at a second SBOF meeting, the SBOF would hear presentations by the county, the existing business, and the new business that would benefit from the proposed IRBs. If the SBOF is not yet prepared to make its determination, the determination may follow at a third SBOF meeting.”~~

Because the IRB mechanism can result in fiscal impacts and tax shifting beyond the general fund or bond funds of the sponsoring county, the Legislature could consider for these two additions to the allowed IRB projects, requiring the sponsoring government to consult and hold the collateral jurisdictions harmless to the IRB by requiring annual PILOTs equal to the foregone revenue that these collateral jurisdictions will experience. This PILOT is required by 4-59-4 NMSA 1978 for an electrical generation facility.

OTHER SUBSTANTIVE ISSUES

The New Mexico Association of Counties supported the original version of this bill, but the comments are equally applicable to this substitute bill:

“SB 319 would allow New Mexico counties to promote economic development and create jobs by expanding the list of projects that are eligible for county industrial revenue bonds, including value-added natural resource projects.

“On the issue of the State Board of Finance review (section2), the review is only required of counties, not municipalities. Additionally, one of the major challenges of economic development is timing, and it is crucial for businesses contemplating locating in New Mexico, to find timely responses to their issues.”

Section 3-32-xx NMSA 1978 constitutes the Municipal Industrial Revenue Bond Act. This section is not amended in the bill. This may or may not mean that cities cannot issue Industrial Revenue Bonds under the authority of the County Industrial Revenue Bonds.

This bill compromises revenue adequacy, efficiency and equity. Accountability also suffers because the tax abatements can last up to 30 years and there is no way of detailing the impacts on individual property tax bills or even requiring reports to the Legislature. The administration,

however, is quite simple. The project's real and tangible personal property are assessed as government property and are tax exempt. Any PILOTs are simply routine payments to the affected government body. The construction gross receipts tax consequences are unchanged. Equipment can be purchased with an NTTC. Of note, a PILOT is not considered a local tax, hence, the local school board could spend this money outside of the State Equalization Guarantee.

SUGGESTED CHANGES

The SBOF meets once per month and traditionally does not meet in the month of August. The procedures adopted by the SBOF in 2014 to make a determination pursuant to Section 4-59-15 NMSA may be difficult to follow in only 60 days, but were designed specifically to ensure the SBOF would afford all interested persons adequate due process. It is recommended that the bill be amended to either restore Section 4-59-15 to current law, or amend it to leave the SBOF a minimum of 120 days to make its determination.

The State Board of Finance notes the following suggestion:

- “If, as posited in the "Significant Issues" section, the non-competition protection offered by Section 4-59-15 NMSA was enacted because the County IRB Act allows IRB to be issued for retail, consider limiting the complaint and SBOF determination process to those IRBs issued to fund retail enterprises. Consider amending Section 4-59-15 NMSA to preclude an existing business that itself benefitted from the issuance of county or municipal IRBs from being eligible to file a complaint.

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