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FISCAL IMPACT REPORT

ORIGINAL DATE 01/20/11

SPONSOR Harden LAST UPDATED _____ HB _____

SHORT TITLE Ownership of Pore Space SB 59

ANALYST Haug

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
Attorney General (AGO)

SUMMARY

Synopsis of Bill

Senate Bill 59 defines ownership rights in subsurface pore space that can be used for storage of gasses or liquids. Generally, it provides that pore space belongs to the owner of the overlying surface unless ownership thereof has been separated from surface ownership by express agreement. The bill expressly authorizes severance of pore space ownership from the surface estate, but provides that, in the event of such severance, the pore space owner has no implied right of entry upon or use of the surface.

The bill recognizes that mineral owners and lessees have the right to use pore space as necessary to produce native oil, gas or other minerals, including rights to inject fluids for enhanced recovery or disposal, and expressly preserves those rights. It also expressly preserves existing law regarding underground waters.

FISCAL IMPLICATIONS

Senate Bill 59 contains no appropriation and has no fiscal impact.

SIGNIFICANT ISSUES

The AGO notes Senate Bill 59 clarifies that the pore space generally belongs to the surface owner, but an already severed mineral estate cannot be interfered with by a later severance of the pore space estate. The bill also clarifies that severance of the pore space estate does not create any secondary easement to use the surface unless the documents specifically provides for this.

The EMNRD states:

New Mexico courts have not addressed whether pore space underlying land where the surface and mineral estates have been severed belongs to the surface owner or the mineral owner. Most states that have addressed this issue have held that the surface owner owns these rights. The bill would seem to align New Mexico with those states, although, of course, this legislative declaration concerning the presumption of pore space ownership by the surface owner would not be binding on a court construing a mineral severance by patent or deed executed prior to the bill's enactment.

The bill is apparently intended to take a neutral position on the developing law of subsurface trespass (*i.e.*, whether a surface owner is entitled to compensation for migration of substances into the pore space beneath the surface owner's land resulting from injection operations on other land). If any compensation is allowed for such intrusions into the subsurface, the bill would seem to direct that compensation to the surface owner or severed pore space owner, but the bill does not take a position on whether such intrusion is compensable.

New Mexico courts also have not specifically held that a landowner is entitled to compensation for migration into the pore space underneath the owner's land of substances injected into the subsurface on other lands. In *Snyder Ranches, Inc. v. Oil Conservation Com'n*, 110 N.M. 637, 640, 798 P.2d 587, 590 (Sup. Ct. 1990), the New Mexico Supreme Court stated that:

“The issuance of a license by the State [in that case an Oil Conservation Division (OCD) injection permit] does not authorize trespass or other tortious conduct by the licensee, nor does such license immunize the licensee from liability for negligence or nuisance which flows from the licensed activity.”

Liability for subsurface trespass was not, however, at issue in that case, which involved the validity of OCD's permit. Recent Texas cases have indicated that a landowner may not be entitled to compensation for subsurface intrusion of fluids absent actual damages to the surface. See *FPL Farming Ltd. v. Environmental Processing Systems, L.C.*, 305 S.W.3d 739 (Tex. App. – Beaumont 2009) (injection for salt water disposal authorized by Texas Railroad Com'n) and [*Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1 \(Tex.2008\)](#) (fracture treatment of gas well). The bill states that it “shall not be construed to affect . . . the right to inject any substance into the pore space as approved by the oil conservation division . . .” Presumably this means that the question of liability or non-liability for subsurface trespass in such cases is left to the courts.

TECHNICAL ISSUES

The ENMRD suggests:

Subparagraph G(3) of Section 1 of the bill states that the bill does not affect:

the right to inject any substance into the pore space as approved by the oil conservation division . . . *or pursuant to rules adopted pursuant to this section by or governing the oil conservation division.* [emphasis added]

No provision of the bill confers any rulemaking authority. Therefore it is unclear what is meant by this reference to rules adopted “pursuant to this section”. Because this reference is preceded by the disjunctive “or”, it presumably does not detract from, or limit, the provision of Subparagraph G(3) that the bill does not affect injection approved by OCD. However, it is confusing.

GH/mew