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FISCAL IMPACT REPORT

SPONSOR: Tsosie DATE TYPED: 02/26/01 HB _____
 SHORT TITLE: Navajo Nation Right-of-Way Agreements SB 810
 ANALYST: Valdes

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
			Indeterminate		Road Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates HB217

SOURCES OF INFORMATION

State Highway and Transportation Department

SUMMARY

Synopsis of Bill

Senate Bill 810 specifies terms and conditions upon which the State Highway and Transportation Department (SHTD) shall accept right of way grants from the Interior Department Secretary pursuant to Navajo Nation approval. The bill would also require SHTD to amend all existing right of way agreements to the terms and conditions delineated in the bill. These terms include:

- The term of the agreement is for the life of the right of way use for constructing, maintaining and administering the highway.
- The bill includes the right of SHTD to design, build maintain, manage access, issue driveway permits; accommodate utilities in the right of way through a separate utility right of way agreement (with additional provisions identified in the bill); allow utility service line agreements; install and maintain traffic control devices; post speed limits, require tolls for use of the highway; close the highway and issue permits for temporary use of the highway; enjoy all rights within the right of way without interruption of the Navajo Nation.
- The bill expressly reserves the jurisdictional law enforcement rights of the Navajo Nation within the right of way area.
- The bill clarifies that the right of way shall forever remain Navajo Nation country for the purposes of Navajo Nation jurisdiction.

Significant Issues

This bill requires the department to renegotiate all existing right of way agreements with the Navajo Nation in compliance with the terms and conditions specified in the bill. That could be an expensive and time-consuming process for the department.

The length of the right of way agreement specified in the bill is for the full time frame the right of way is used for highway purposes. This is a change from recent negotiations with the Navajo Nation where Navajo officials refused to grant perpetual easements, opting instead for term easements. This bill more closely reflects the needs of SHTD relating to length of right of way agreement needed.

This bill would be binding on SHTD and the State of New Mexico while the Navajo Nation is not committed to or bound by its terms. Language could be added to the bill requiring the Navajo Nation to enact a similar law prior to SHTD being subject to the terms and conditions of this legislation.

The bill lists the rights of SHTD to conduct various activities within right of way boundaries. However, the exercise of these rights may be subject to restrictions and prohibitions by the Navajo Nation.

PERFORMANCE IMPLICATIONS

This bill could positively impact the department's ability to initiate Navajo Nation projects identified in the Statewide Transportation Improvement Program if the Navajo Nation agreed to the terms and conditions in this bill.

Efficiency of the Right of Way Bureau within the construction program may be reduced if this bill passes due to the requirement that the department must renegotiate all existing right of way agreements with the Navajo Nation.

If this bill is signed into law, it may eventually streamline the negotiation process between SHTD and the Navajo Nation. For this to occur, the Navajo Nation must agree to follow provisions of the bill and SHTD must first complete the renegotiation process. Subsequently, future negotiations could follow the process in the bill and be accomplished more efficiently.

FISCAL IMPLICATIONS

The requirement of this bill to renegotiate existing rights of way with the Navajo Nation would have an impact on the department budget, although these additional costs are indeterminate.

ADMINISTRATIVE IMPLICATIONS

This bill would require the department to re-open negotiations with the Navajo Nation concerning all rights of way involving Navajo Nation lands. The amount of right of way involved is substantial requiring a significant commitment of resources to accomplish these negotiations.

DUPLICATION

Duplicates House Bill 217.

TECHNICAL ISSUES

Senate Bill 810 – Page 3

The department provided the following information as consideration for amendments:

The New Mexico State Highway and Transportation Department in its most recent easement agreements is using the following language rather than the language proposed in SB 810 sections A. (2) and A. (3). The following language is designed to avoid or mitigate the issues with sections A. (2) and A. (3) as discussed above at the section on substantive issues.

“The safety and protection of visitors passing through the (insert Nation, Tribe or Pueblo) is paramount. To that end, the (insert Nation, Tribe or Pueblo) expressly retains its civil jurisdiction over the right-of-way, except, for due consideration, the (insert Nation, Tribe or Pueblo) expressly grants to the Department the exclusive right to regulate the following in this right-of-way: 1) highway design, 2) highway construction, 3) highway maintenance, 4) management of access and driveway permits, 5) accommodation of utilities, 6) installation of traffic control devices, traffic safety measures, and posting of speed limits, 7) motor vehicle regulation, including size, weight and licensing, 8) setting of speed limits, 9) toll roads subject to federal law, 10) road closures, subject to federal law and 11) other permits to use the right-of-way. The parties agree that nothing in this Agreement constitutes a consent by the (insert Nation, Tribe or Pueblo) to be sued in state court or a consent by the Department to be sued in the (insert Nation’s, Tribe’s or Pueblo’s) courts.

The Department recognizes the (insert Nation, Tribe’s or Pueblo’s) right to temporarily and partially close, roads for religious and tribal ceremonies. The (insert Nation, Tribe or Pueblo) may temporarily or partially close the highway to be constructed on the easement to be granted by this Agreement for religious and tribal ceremonies by applying to the Department for a permit to use the right of way for non-highway purposes. The Department shall not unreasonably withhold such permission provided the (insert Nation, Tribe or Pueblo) meets the requirements of such procedures and the closure presents no public safety problems.

Nothing contained herein shall be interpreted as constituting a waiver, express or implied, of the sovereign immunity of the (insert Nation, Tribe or Pueblo) or of the Department. The Department is liable for claims arising under this Agreement for the acts or omissions of its officials, agents and employees to the extent provided by the applicable waivers of sovereign immunity under New Mexico law. The (insert Nation, Tribe or Pueblo) is liable for claims arising under this Agreement for the acts or omissions of its officials, agents and employees to the extent provided by the applicable waivers of sovereign immunity under (insert Nation, Tribe or Pueblo) law.

The State Highway and Transportation Department's agreement to the (insert Nation’s, Tribe’s or Pueblo’s) reservation of civil jurisdiction is binding only to the extent that the Department has legal authority, as an Executive branch agency, to make such an agreement.”

OTHER SUBSTANTIVE ISSUES

The SHTD Office of General Counsel prepared significant, detailed information on this bill which is listed in part, below:

Initially, it is noteworthy that this Bill would require the New Mexico State Highway and Transportation Department to re-negotiate all rights-of-way with the Navajo Nation with the provisions of this Bill binding on the Department, while nothing in this Bill binds the Navajo Nation.

Section A.: This section of the Bill requires the New Mexico State Highway and Transportation Department to accept otherwise satisfactory right-of-way agreements with the Navajo Nation which include the substantive provisions of sections A (1) – (3).

Section A. (1): This section provides the rights of way shall last for as long as the right of way is used for highway purposes. This is a change from the Navajo Nation’s previous position in recent negotiations of only agreeing to term easements: a position uniformly rejected by the New Mexico State Highway and Transportation Department.

Section A. (2): Section A. (2) lists rights of the New Mexico State Highway and Transportation Department to conduct various activities within the right-of-way. However, given the other jurisdiction language, the exercise of these rights may be subject to restrictions or prohibitions by the Navajo Nation. See the discussion of the jurisdiction language at section A. (3) *supra*. When similar language has been subject to negotiation between the New Mexico State Highway and Transportation Department and tribal governments, the parties have agreed that the Department’s authority in these areas is exclusive. The Department considers exclusive jurisdiction in these areas necessary to discharge its legal mandates established by both State law and under federal law as a recipient of federal funds. The text of the negotiated agreements addressing this issue is included in the text under the section on amendments *supra*.

Similarly, section 2 (h) reserves concurrent authority to the Navajo Nation to “close the highway and issue permits for the temporary use of the highway.” Closing a highway is a serious matter, one which the Department considers must be its exclusive decision to perform its duties under the law. Also, the negotiated agreements have addressed temporary closure for religious or ceremonial purposes by requiring application for a permit from the Department for this purpose. Application for a permit from the Department is considered necessary to address both potential liability issues associated with a temporary closure and to provide the opportunity to accommodate the traveling public during the period of closure. The text of the negotiated agreements addressing this issue is included in the text under the section on amendments *supra*.

Section A. (3): Provision for reservation of jurisdiction to tribal governments in right-of-way agreements has been the subject of extensive negotiations between the New Mexico State Highway and Transportation Department and tribal governments located within New Mexico during the past three years. However, the jurisdictional reservation to the Navajo Nation at sec. A.(3) is substantially broader than the negotiated language and poses several issues under the applicable law.

The language of this section may be construed as acknowledging the Navajo Nation’s jurisdiction over the rights-of-way as plenary and possibly exclusive of state jurisdiction; e.g., “full territorial, legislative, executive and judicial jurisdiction” over “**without limitation, all persons**, including the traveling public . . . **all activities** . . . enforcement of speed limits . . . enforcement of Navajo Nation laws . . . adjudication of disputes arising from motor vehicle accidents or **other conduct** . . .” However, applicable law includes a number of limitations on a tribal government’s exercise of its “full” jurisdiction, e.g.:

Senate Bill 810 – Page 5

- the prohibition of exercise of tribal criminal jurisdiction over non-Indians (*Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978));
- circumscription of tribal jurisdiction over non-members (*Montana v. United States*, 450 U.S. 544 (1981));
- recognition of state jurisdiction over activities of non-Indians on-reservation (*Compare McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164 (1973)[no state jurisdiction to impose income tax on Navajo tribal member residing and working on-reservation] with *Kahn v. Arizona Tax Comm'n*, 490 P.2d 846 (Az. 1972)[state has jurisdiction to impose income tax on non-Indian residing and working on-reservation]);
- recognition of state jurisdiction over transactions involving both on and off reservation factual contacts (*See e.g. DeCoteau v. District Court*, 420 U.S. 425 (1975) and *Crawford v. Roy*, 557 P.2d 352 (Mont. 1978)).

The outer parameters of tribal jurisdiction are defined by federal common law. *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). As limitations on tribal jurisdiction exist as a matter of federal common law, rather than as impediments of state law, such limitations are susceptible to re-definition by federal, rather than state statute.

If acknowledgment of the Navajo Nation's "full" jurisdiction is to be understood as jurisdiction to the exclusion of the State of New Mexico over "without limitation all persons, including the traveling public" this could result in the delegation of State jurisdiction over areas where the State has traditionally exercised jurisdiction. The language of this Bill could be construed as delegating to the Navajo Nation the State of New Mexico's authority to enforce state speed limits and other safety laws over non-Indians on State Highways located within the Navajo Nation. Also, the language of this Bill could be construed as delegating, to the Navajo Nation, the jurisdiction of New Mexico courts to adjudicate disputes arising on State Highways between non-Indians, e.g. auto accidents.

Acknowledgment of the Navajo Nation's "full" jurisdiction over "without limitation, all persons" and "all activities conducted or otherwise occurring within the right of way" in an agreement that sets out the relationship between the Navajo Nation and the New Mexico State Highway and Transportation Department could potentially be construed as a consent to the jurisdiction of the Navajo Nation courts over the State of New Mexico via the New Mexico State Highway and Transportation Department. On this point the U.S. Court of Appeals for the Ninth Circuit (which does not include New Mexico) has ruled tribal courts do not have jurisdiction over states. *State v. Gilham*, 127 F.3d 897 (9th Cir. 1997). The U.S. Supreme Court has agreed to decide another case from the Ninth Circuit which may decide whether tribal courts have jurisdiction over states. *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 2000). This decision should be issued by July 1, 2001.

Under the terms of this Bill the Navajo Nation would have "full jurisdiction" over "without limitation all persons including the traveling public" over "enforcement of speed limits set . . . by the department" and "enforcement of Navajo Nation laws applicable to the operation of motor vehicles." As this jurisdiction impacts law enforcement interests, perhaps the Department of Public Safety should be consulted to determine what such impacts may be.

The New Mexico State Highway and Transportation Department has addressed the issue of appropriate recognition of tribal jurisdiction, while avoiding the problems discussed above, in its negotiations with tribal governments during the past three years. Rather than recognizing “full” jurisdiction, the negotiated language has recognized “its” jurisdiction. The use of “its” recognizes the jurisdiction the tribal government in fact has under current law, while hopefully avoiding problems such as those described above. The text of the negotiated agreements addressing this issue is included in the text under the section on amendments *supra*.

Section A. (4): This section states the lands subject to the rights of way “are and **forever remain** Navajo Indian country for purposes of Navajo Nation jurisdiction.” The status of Indian lands as to their “Indian Country” status for jurisdiction purposes is subject to designation or termination by Congress as a matter of federal law. The future status of these lands is a federal law issue under Congress’ jurisdiction.

Section A. (5): This section requires right-of-way agreements between the Navajo Nation and the New Mexico State Highway and Transportation Department meet other requirements of law and as “otherwise agreed upon,” requiring such agreements be otherwise mutually acceptable, as to the other covenants of such agreements.

Section B: This section requires the New Mexico State Highway and Transportation Department to amend its existing right of way agreements with the Navajo Nation to conform to the jurisdictional provisions set forth at sections A (1) through A (5) of the Bill. This would require the New Mexico State Highway and Transportation Department to re-open negotiations for all of its right-of-ways involving Navajo Nation land: a substantial process which could also result in an endeavor by the Navajo Nation to re-negotiate the price for such rights-of-way.

MFV/njw