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## FISCAL IMPACT REPORT

ORIGINAL DATE 1-28-2008

SPONSOR Begaye LAST UPDATED 1-31-2008 HB 321/aHHGAC

SHORT TITLE Ship Rock as State Monument Feasibility Study SB \_\_\_\_\_

ANALYST Woods

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
\$15.0	Continuing	Non-Recurring	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HJM11

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of HHGAC Amendment

As amended by the House Health and Government Affairs Committee, House Bill 321 requests a feasibility study by the EMNRD/State Parks Division (SPD) for establishing the Ship Rock pinnacle, located on the Navajo Reservation, *as a state park*. As originally proposed, HB 321 requested SPD conduct a feasibility study of the Ship Rock pinnacle *as a state monument*. The amendment appropriates \$15,000 to the Energy, Minerals, and Natural Resources Department/State Parks Division (SPD) in FY08 and FY09 to conduct the study. Any unexpended or unencumbered balance remaining at the end of fiscal year 2009 would revert to the general fund. The legislation carries emergency language.

### FISCAL IMPLICATIONS

EMNRD indicates that the type of study HB321a directs SPD to undertake typically costs SPD around \$25,000 in personnel and other costs (salary, travel, per diem, printing, etc.); therefore, SPD does not have available budget in FY08 to complete the study. The balance of funds needed to complete the study – \$10 thousand – would need to come out of the FY08 and FY09 operating budgets for SPD or not be performed.

## SIGNIFICANT ISSUES

EMNRD raises a number of administrative and operational considerations associated with the legislation. They are included in their entirety:

The amendment that was adopted clarified an ambiguity in the original HB 321 that requested SPD conduct a feasibility study regarding designation of the Ship Rock pinnacle as a “state monument.” State monuments are managed by the Department of Cultural Affairs. SPD does not prepare feasibility studies for proposed state monuments, nor does it operate state monuments. The Health and Government Affairs Committee amendment changed references to “monument” to “park” in HB 321a.

The location of the Ship Rock pinnacle on lands of the Navajo Nation presents significant and difficult jurisdictional issues with respect to establishing a state park within the Navajo Nation.

First, all 34 existing state parks are currently located on lands either owned by the state through the Energy, Minerals and Natural Resources Department (EMNRD), lands leased from another state or local state entity (State Land Office, Department of Game and Fish, City of Albuquerque, Interstate Stream Commission, Storrie Water Users Association) or lands leased from a federal agency (U.S. Bureau of Reclamation, U.S. Forest Service, International Boundary and Water Commission, Corps of Engineers). In fact, NMSA 1978, Section 16-2-11(H), specifically provides for written agreements with agencies of the U.S. to be entered into for the operation of state parks on federally owned lands. There is no statutory authority for entering into leases with sovereign Indian tribes, pueblos or Nations to establish and operate state parks. Moreover, leases typically include terms with respect to breach by a party and provide for redress in a court of law in the event of such a breach. The Nation could need to agree to be sued in the event of a dispute over the lease for the park. The Nation might, therefore, have to agree to waive its sovereign immunity from suit in order for SPD to have an enforceable lease with the State of New Mexico, through EMNRD, for the park. Waiver of sovereign immunity could present an insurmountable obstacle to a lease for a park on the Navajo Nation.

Second, in every instance where a lease for a state park exists, SPD has, as in the instance of parks operated on lands owned outright by the State of New Mexico, full authority to control all matters within the park and to exercise full law enforcement power within the park. For SPD to exercise law enforcement authority on lands controlled by the Navajo Nation, the Nation would need to recognize SPD’s law enforcement authority within the park. If not, a jurisdictional challenge to an arrest or citation made by a SPD officer could be raised by a defendant or a cited individual on the basis SPD has no law enforcement within the Navajo Nation. Up to now, Indian Tribes have not been willing to recognize state jurisdiction over all criminal matters occurring within reservations, particularly where tribal members are involved.

Third, to operate a state park within the Navajo Nation, SPD would likely have to invest in significant infrastructure development in developing a visitor center, campgrounds, comfort stations, etc. A question would arise as to whether the procurement of such infrastructure development would be governed by the laws of the state of New Mexico or

those of the Navajo Nation? What happens in the event of a dispute between a contractor and EMNRD; is it enforced in state court or tribal court? Do the gross receipts taxes of New Mexico apply or the taxing power of the Nation? What wage guidelines govern? Would the state be subject to preference requirements for Navajos in constructing and operating a visitor's center and, if so, how would conflicts be resolved between state labor and personnel requirements and those of the Nation?

Fourth, the Tort Claims Act (NMSA 1978, Sections 41-4-1 *et seq.*) waives state tort immunity in connection with operating public parks (Section 41-4-6), but grants tort claim insurance coverage to state employees acting within the scope of their duties. Absent clarification in the law, it is not clear whether a state employee performing work within the jurisdiction of a sovereign nation would be considered acting within the scope of his duties. Therefore, a determination on this point would be needed from the Risk Management Division of the General Services Department. SPD has already submitted a request for such clarification.

In summary, the State of New Mexico, through EMNRD/SPD, would need to enter into a series of agreements with the Navajo Nation to identify and resolve all jurisdictional issues implicated in taking the unprecedented step of establishing a state park within another sovereign nation; namely, the Navajo Nation.

#### **ADMINISTRATIVE IMPLICATIONS**

EMNRD states that, "SPD does not have available resources to complete the study."

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

EMNRD notes that no feasibility study will be prepared.

#### Synopsis of Original Bill

House Bill 321 seeks to appropriate \$15,000 from the general fund to the Energy, Minerals and Natural Resources Department for expenditure in fiscal years 2008 and 2009 for the State Parks Division to conduct a feasibility study regarding the designation of the Ship Rock pinnacle as a state monument. Any unexpended or unencumbered balance remaining at the end of fiscal year 2009 shall revert to the general fund.

This legislation carries emergency language.

#### **SIGNIFICANT ISSUES:**

DCA advises that, while the legislation requests that EMNRD undertake a feasibility study of the Ship Rock Pinnacle as a possible state monument, the State Parks Division is not the appropriate entity to conduct a feasibility study on the possibility of a site becoming a State Monument. Rather, the appropriate entity is the State Monuments Division of the Department of Cultural Affairs. EMNRD appears to support the DCA opinion, stating that:

"State monuments are managed by the Department of Cultural Affairs and SPD has no statutory authority over state monuments. Further, SPD does not undertake

feasibility studies for proposed state monuments and does not manage monuments.”

DCA concludes that, as written, the bill is somewhat unclear about whether the intention of the study is to determine whether the Ship Rock Pinnacle should be designated a state monument or a state park. Further, the Department of Cultural Affairs *Policy On Cultural Properties* (4.51.26 NMAC) outlines the procedures through which a cultural property may be acquired by the State Monuments Division and designated a state monument. This policy states that should there be sufficient interest in prehistoric or historic sites of statewide or regional significance to warrant their inclusion within the state monument system, a feasibility study shall be conducted by the *Museum of New Mexico*.<sup>1</sup>

EMNRD notes that an important additional consideration is that Ship Rock is located on Navajo Nation land, which raises significant questions about sovereignty, legal jurisdiction, tort claims liability, cultural sensitivity, and future management: “Would state employees performing duties on the Navajo Nation—which is, arguably, outside state jurisdiction—be acting within the scope of their duties under state law for purposes of the Tort Claims Act? What about law enforcement?” Any feasibility study for a state monument, EMNRD opines, would need to explore these issues and offer a range of alternatives for management/collaboration between the Navajo Nation and the State of New Mexico.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP:**

Relates to HJM11 which requests the SPD undertake a feasibility study of Ship Rock as a state monument.

**TECHNICAL ISSUES:**

EMNRD indicates that, “Because SB 321 directs a study pertaining to a proposed state monument, the State Monuments Division of the Department of Cultural Affairs should perform that study, not SPD.”

**OTHER SUBSTANTIVE ISSUES:**

As background, EMNRD advises that indicates that the Ship Rock Pinnacle is one of the most well-known natural features in New Mexico and is also nationally significant, having been designated as a National Natural Landmark by the U.S. Department of the Interior, National Park Service, in 1975. Ship Roc and the surrounding area are of great religious and historical significance to the Navajo Nation.

**ALTERNATIVES:**

DCA suggests the Department of Cultural Affairs and its State Monuments division could be requested to study the feasibility of Ship Rock Pinnacle as a state monument.

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<sup>1</sup> In an updated FIR (received 1-28-2008) DCA notes that it is DCA’s “...understanding that the Navajo Nation's Shiprock Chapter sent a resolution to the Governor requesting that Shiprock become a State Park.”

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

There may be no evaluation of Ship Rock Pinnacle as possible New Mexico State Monument.

**AMENDMENTS**

EMNRD suggests that on page 1, lines 17 through 19, replace “energy, minerals and natural resources department for expenditure in fiscal years 2008 and 2009 for the state parks division” with “state monuments division of the department of cultural affairs for expenditures in fiscal years 2008 and 2009.”

BFW/nt