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FISCAL IMPACT REPORT

ORIGINAL DATE 3/12/09
 SPONSOR Begaye LAST UPDATED 3/13/09 HJM 69
 SHORT TITLE Shiprock Pinnacle Park Collaboration SB _____
 ANALYST Burns

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$30.0	Up to \$543.3	Up to \$573.3	Recurring	General Fund
			Up to \$3,500.0*	Up to \$3,500.0	Non- Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

- * If State were to enter into agreement
- **One time Capital Expense if state was to enter into agreement

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Indian Affairs Department (IAD)
- Department of Finance and Administration (DFA)
- Department of Cultural Affairs (DCA)
- Energy Minerals and Natural Resources Department (EMNRD)

SUMMARY

Synopsis of Bill

House Joint Memorial 69 is in regards state and tribal collaboration to establish a park at the Shiprock Pinnacle within the Navajo Nation.

FISCAL IMPLICATIONS

A feasibility study conducted to determine the possibility of state park at the Shiprock Pinnacle indicated that no less than \$3 million in capital needs would be required to establish the park.

According to EMNRD, State Parks Division (SPD) is currently in the middle of starting operations at a new state park (Cerrillos Hills/Galisteo Basin State Park in Santa Fe County) and is also on the verge of being tasked by the Legislature with the responsibility to start up another new state park- Pecos Canyon State Park- if HJM 16 or SJM 16 passes the Legislature this session. Both projects already present considerable demands on SPD staff time and resources.

HJM 69 could add a substantial additional burden to SPD at a time when budgets are being cut and hiring freezes are still in place. SPD does not have money to operate an additional park because of the demands for Galisteo and Pecos and cuts in funding. It is not responsible to negotiate with the Navajo Nation for the creation of an additional park when SPD does not have funds, or the likely possibility of funds to operate the park and construct necessary capital improvements.

HJM 69 directs SPD to undertake a complex negotiation with the Navajo Nation that will cost approximately \$30,000 in personnel and other costs (salary, travel, per diem, etc.). This project would have to involve several personnel from SPD as well as other EMNRD staff (e.g. legal counsel). SPD does not have available budget in FY09 and FY10 specifically for this project, costs for which would have to be taken out of existing personnel and operating budgets that have already been significantly reduced in FY09 and FY10 due to the state's budget situation.

HJM 69 requests that a JPA or other legal agreement with the Navajo Nation be drafted. If the JPA or other agreement was signed, however, there could be substantial fiscal implications, depending on terms of an agreement, including what contributions the state might make to a state-tribal partnership park at Shiprock. A feasibility study by SPD examined several options. The alternative that would entail a significant SPD operational role in a fully-developed state-tribal park at Shiprock could involve recurring costs between \$197.0 and \$250.0 per year plus an unknown percentage of approximately \$3.3 million in non-recurring park development costs (depending on how capital costs for a partnership park might be shared by the Navajo Nation and the state). Total operating costs for the entire Park would be \$543,300 in recurring operational funds per year which would drop to \$480,000 per year after the first two to three years. Approximately \$3.5 million in capital funds would be needed for upgrades to the area. How this might be shared with the Navajo Nation is not determined.

SIGNIFICANT ISSUES

A feasibility study was prepared by the New Mexico State Parks Division in response to House Joint Memorial 11, passed in the 2008 legislative session. HJM 11 requested State Parks to complete a feasibility study to consider the designation of the Shiprock pinnacle as a state park.

The feasibility study determined actions which could be taken by the legislature regarding a state park at the Shiprock pinnacle. There is question whether the state should draft an agreement without moving on one of the recommendations made in the feasibility study. If the legislature chose to carry out one of the recommendations included in the study, that action could include drafting of an agreement.

The feasibility study was developed based on the understanding that the following objectives which were embodied in HJM 11 and are behind the request from the Shiprock Chapter:

1. Protection of the site;
2. increased economic benefits to the community;
3. education opportunities for local schoolchildren on the cultural significance of Shiprock;
4. providing information and facilities for tourists; and
5. desire for assistance to the Navajo Nation through State Parks' expertise and resources.

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Based on the above mentioned objectives the feasibility recommended three alternatives to fulfill those objectives. The alternatives are as follows:

- Alternative 1 – No Action

- Alternative 2 – Navajo Nation tribal park with a State Park partnership
 - 2a - State Parks provides design and development assistance
 - 2b - State Parks provides design and development assistance and operational support

- Alternative 3 – Establish a New Mexico state park

Alternative 2 closely relates HJM 69 and carries significant legal issues which need to be addressed prior to carrying out the provision contained in HJM 69.

The major legal implications of alternative 2a and 2b are as follows:

Alternative 2a

- Procurement Issues - Services performed by State Parks on lands of the Navajo Nation may be subject to tribal laws governing procurement.

- Legislative Authority - would be required to authorize State Parks to provide planning, design, and construction oversight services. Presumably, such legislative authorization may also need to provide for extension of risk management coverage for State Parks employees providing services both on and off Navajo Nation lands.

Alternative 2b

- Shiprock. The Navajo Nation labor laws conflict with the State Personnel Act and the New Mexico Human Rights Act. The extension of risk management coverage to these employees is significant and necessary. Likewise, application of tribal laws and jurisdiction to those individual's action is likewise significant and an agreement should be developed with the Navajo Nation regarding those issues.

- Procurement Issues - Services performed by State Parks on lands of the Navajo Nation may be subject to tribal laws governing procurement. Participation in management plans, assistance with major renovations and facility development, volunteer coordination likewise trigger the need for agreement to be reached with the Navajo Nation on the application of procurement and tax laws.

- Legislative Authority - Required to authorize State Parks to engage in the activities contemplated by this alternative. Presumably, such legislative authorization would also need to provide for extension of risk management coverage for State Parks employees providing services both on and off Navajo Nation lands.

There are serious issues contained with the proposed requests within HJM 69 and it questionable whether the agencies involved have the expertise to overcome the issues in order form an agreement. In order to contract the appropriate experts to form an agreement could carry substantial costs to the agencies involved.

The Shiprock Pinnacle was designated a National Natural Landmark in 1975 by the United States National Park Service.

PERFORMANCE IMPLICATIONS

The administrative implications mentioned below could lead to performance implications for SPD.

ADMINISTRATIVE

SPD does not have available resources to complete the work requested in the timeframe allowed. The negotiation of the JPA requested by HJM 69 will require a significant investment of staff time that will detract from other priorities and efforts at SPD and EMNRD.

HJM 69 may create some administrative implications for IAD through providing staff and office resources to work with EMNRD and the Navajo Nation to negotiate and draft an agreement.

TECHNICAL ISSUES

A status report is to be given to by October 1, 2009, which may not allow enough time for mobilization of entities to begin the measures contained in HJM 69.

DCA believes that the Historic Preservation Division should be consulted in the process of design and construction of park facilities, including trails, picnic shelters and camping facilities, as well as development of the operational aspects of the park.

OTHER SUBSTANTIVE ISSUES

According to EMNRD and also contained in the feasibility study, Shiprock is suitable for park development and management by some entity, and would benefit from the protections afforded by a park designation and management. A visitor center, trails, signage, and other facilities would provide excellent opportunities for education, interpretation, recreation, and protection. A Shiprock park would likely be successful from a tourism and economic development standpoint based on its presence within the “Grand Circle” tourist region and the visitation that already exists to other parks and attractions in the region.

Because Shiprock is within the Navajo Nation, the involvement of SPD in the development of a park and in a possible management role for a park presents extremely significant legal and management challenges. These complexities would increase if SPD has a direct role in park management and would also depend on how various issues were addressed by the Navajo Nation and SPD in any JPA, as well as how certain issues were addressed by the Legislature or the Navajo Nation. It is not clear at this point whether the legal issues involved can be reconciled to the satisfaction of the interests of the Navajo Nation and its chapters, and the State of New Mexico. SPD providing staff on-site presents significant obstacles because of conflicts between Navajo Nation employment laws, which provides preference for hiring Navajos and the New Mexico Human Rights Act, which prohibits discrimination based on race and ethnicity.

NMSA 1978, Section 16-2-11 requires that any new state park project be specifically authorized by the Legislature. HJM 69 does not appear to formally authorize a SPD project at Shiprock, but requests that SPD expend effort toward that end.

The overall legal hurdles which could result as a part of HJM 69 include:

The Joint Powers Agreement Act (NMSA 1978, Section 11-1-1 *et seq.*) specifically defines public agencies entitled to enter into such agreements as including “an Indian nation, tribe or pueblo”. Using the JPA route offers the prospect of EMNRD and the Navajo Nation sharing responsibility for operating a park at Shiprock. Sharing responsibility for daily operation and management of a park at Shiprock might help address, though not necessarily overcome, many of the jurisdictional and legal issues that will be discussed later in this study.

Typically, leases contain one or more clauses regarding breach by a party which, ultimately, are addressable in a court of law in the event of such a breach. In the instance, though, of a lease with the Navajo Nation, the Navajo Nation may wish to retain its sovereign immunity from suit.

A tribe is subject to suit only where Congress has “unequivocally” authorized the suit or the tribe has “clearly” waived its sovereign immunity. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 757 (1998). Tribes retain immunity from suit when conducting business both on and off the reservation. As a general proposition, a tribe can only be sued in contract if the parties expressly negotiate a sovereign immunity waiver into the four corners of the contract.

There are three potential ways for approaching this issue. The first would be to request a limited waiver of immunity from the Navajo Nation; i.e., only for certain purposes and certain types of claims.

The second would be to propose using language that has been previously used and approved by the New Mexico Attorney General’s Office in connection with contracts involving other tribes that serve as contractors to the Youth Conservation Corps and which acknowledges a tribe will comply with state and federal laws and the terms of the contract, but avoids needing to obtain a statement from a tribe waiving its sovereign immunity. Such language provides as follows: Sovereign Immunity: The Contractor's agreement to abide by the federal, state, local laws, and ordinances and to comply with any other terms or conditions of this Agreement shall not be deemed in any way to constitute a waiver of the Contractor's sovereign immunity. Before using such language, however, SPD would need to consult with the New Mexico Attorney General’s Office to determine whether such language would be acceptable in this particular instance.

Finally, third, some tribes have created state-chartered corporations or subordinate entities, with the express understanding that the assets of such institutions are not immune from suit, levy, or execution. This vehicle was used by the Mescalero Apache Tribe many years ago to develop the Inn of the Mountain Gods within the Mescalero Indian Reservation. Other tribes have specifically waived immunity for tribal businesses incorporated under the Indian Reorganization Act of 1934, 25 U.S.C. § 461.

State Parks Law Enforcement Authority

In every instance where a lease for a state park exists, State Parks holds full authority to control all matters within the park and to exercise full law enforcement power within the park. NMSA 1978, Section 16-2-30. For State Parks to exercise law enforcement authority on lands controlled by the Navajo Nation, though, the Navajo Nation would need to recognize or acknowledge SPDs’ law enforcement authority within the park. If not, a jurisdictional challenge to an arrest or citation made by a State Parks officer could be raised by a defendant or a cited individual on the basis SPD has no law enforcement authority within the Navajo Nation.

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 arises as to whether the procurement of materials and services for such infrastructure development should be governed by the laws of the state of New Mexico or those of the Navajo Nation? All state procurement of goods, services and construction is currently governed by the Procurement Code; NMSA 1978, Sections 13-1-28 through 13-1-199.

In the instance of Shiprock, certain services related to infrastructure development may occur off the Navajo Reservation such as design and architectural services and could be governed by the Procurement Code. Other activities, such as construction, would need to occur on the reservation where the Procurement Code does not strictly apply. Segregating and identifying which laws apply to which activities could become a jurisdictional challenge if not resolved by agreement with the Navajo Nation ahead of time.

SPD is not familiar or experienced with procurement requirements involving construction projects within the Navajo Nation. It is not clear what types of performance and contractor's bond are required for such construction projects. In the event of a dispute between SPD and a contractor, it may not be clear whether state, federal, or tribal court would be the appropriate forum. Additionally, state gross receipts taxes are generally not collected within the Navajo Nation, but it is unknown what types of taxes might apply under the laws of the Navajo Nation. In short, before the first bid package can be released, SPD would need to carefully review and become familiar with all aspects and requirements that apply to procurement for projects within the Navajo Nation as they will likely have an impact on infrastructure development.

SPD needs to be prepared to deal with the possibility that either its lease to Shiprock or its activities within the Navajo Nation could result in litigation arising in tribal court. Since a tribal court has authority to decide its jurisdiction and can proceed to a determination on the merits if it determines it has jurisdiction over the defendant, SPD must be prepared to effectively litigate dispute in tribal courts.

Tort Claims Act

The New Mexico 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 that a state employee performing work within the jurisdiction of a sovereign nation is acting within the scope of his duties.

State Personnel Act and Rules and Human Rights Act

If SPD personnel are stationed at Shiprock, there is a significant issue of whether the State of New Mexico personnel laws and its Human Rights Act or Navajo Nation laws, such as the Navajo Preference in Employment Act, would apply. New Mexico laws prohibit discrimination based upon race or ancestry while Navajo Nation laws provide for Navajo preference in employment. 15 N.N.C. §604 requires that employers doing business within the territorial jurisdiction of the Navajo Nation or engaged in any contract with the Navajo Nation give preference in employment to Navajos. Regardless of a non-Navajo applicant's qualifications, the employer shall hire, promote, transfer, upgrade, or recall any Navajo applicant who demonstrates the necessary qualifications for the employment position. It also requires that the Navajo Nation when contracting with a state government include provisions for Navajo preference.

The State Personnel Act and its implementing rules apply to all positions in the executive branch, which are not exempt by law. Most positions within SPD are within the classified service. NMSA 1978, Section 10-9-2 provides that selection of an applicant shall be based solely on qualification and ability. 1.7.5.9 NMAC provides that “any qualified application shall have the opportunity to compete for vacant positions open for recruitment without regard to race, color, religion, national origin, ancestry . . . While Title VII of the Civil Rights Act of 1964 provides an exception to certain employers located “on or near” Indian reservation from charges of discrimination if those employers extend publicly announced employer preferences to Indians who also live “on or near” a reservation, the New Mexico Human Rights Act, NMSA 1978, Section 28-1-1 *et seq.* does not provide a similar exception. NMSA 1978, Section 28-1-7 prohibits:

“an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Resolving issues associated with developing a state-tribal park at Shiprock will be delayed.

POSSIBLE QUESTIONS

1. Should proposals like those presented in HJM 69 be presented in a Joint Memorial or should the measures be proposed in statute?
2. Should the state be drafting measures to enter into an agreement without the guarantee of legislative action?

KJB/mt