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FISCAL IMPACT REPORT

SPONSOR SCONC
ORIGINAL DATE 03/02/09
LAST UPDATED 03/18/09
HB _____
SHORT TITLE Ownership of Pore Space Under Surface Land
SB CS/208/aSJC/aSfI#1
ANALYST Hoffmann/Haug

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicate to HENRC Committee Substitute for House Bill 790.

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	Indeterminate	Indeterminate	*See Narrative	Various Surface Owners

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

Energy, Minerals and Natural Resources Department (ENMRD)

State Land Office (SLO)

Office of the State Engineer (OSE)

SUMMARY

Synopsis of SFI#1 Amendment

Senate Floor Amendment #1 removes one of the incompatible amendments affecting Section 1 Paragraph K. The SJC amendment removed would, without approval of all owners, prohibit injection of gases for sequestration into any portion of a reservoir that is producing, under development or leased for exploration or development of hydrocarbons or other minerals.

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment broadens the means of providing access to the surface by the owner of a severed right or title beyond the instrument of severance by including “or by other written agreement”.

The amendment strikes language dealing with instruments affecting title to pore space executed prior to the effective date of the bill.

The amendment adds an exception for requiring notice to a surface owner or a mineral estate owner when the owner of a pore space has placed of record the instrument establishing their ownership interest. Ownership of pore space and any easement, license or lease related to ownership would be subject to Chapter 14, Articles 8 through 10 NMSA 1978.

The amendment relieves the person injecting gas into a pore space of responsibility if the gas is released by another person.

Two incompatible amendments affect Section 1 Paragraph K. Without approval of all owners, one would prohibit injection of gases for sequestration into any portion of a reservoir that is producing, under development or leased for exploration or development of hydrocarbons or other minerals. The other would prohibit injection of gases for sequestration into any portion of a reservoir as of the date of commencement of injection pursuant to the Oil and Gas Act and its regulations.

The amendment permits the right to drill through a reservoir by restricting drilling to rights that can be exercised “without interference with the integrity of the reservoir or the geologic sequestration” of gases in the pore space.

The amendment adds “lease” to granting of easement or license as a method the owner of pore space may use to make pore space available to a storage operator.

Synopsis of SCONC Substitute for Senate Bill 208

Senate Conservation Committee Substitute for Senate Bill 208 bill defines ownership rights in subsurface pore space that can be used for storage of carbon dioxide and other gases (such as compressed air from wind farms). 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 recognizes, however, 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. The bill expressly preserves those rights. It also expressly preserves existing law regarding underground water.

This bill is designed to facilitate acquisition of underground storage rights for geologic sequestration of carbon dioxide (CO₂) and other gases. Accordingly, it allows a surface owner to separately convey underground storage rights, but provides that the person to whom storage rights are conveyed does not have a right to enter or use the surface unless specifically agreed. It also protects surface owners who sell or license the right to use pore space for gas sequestration

or storage, but do not otherwise participate in the storage activity, from liability resulting from that activity.

FISCAL IMPLICATIONS

Senate Conservation Committee Substitute for Senate Bill 208 makes no appropriations.

None of the responding agencies noted any fiscal implications.

SIGNIFICANT ISSUES

The SLO observes that as a result of laws and SLO rules that prohibit the sale of mineral estates in state trust lands, the SLO has sold approximately 4 million acres of surface estate and manages approximately 4 million acres of severed mineral estate. The SLO also manages an undivided interest in an additional 9 million acres. While the bill provides that a mineral estate owner may use the pore space to the extent necessary to explore for and produce minerals, it would prohibit any mineral exploration or production that impairs the integrity of a reservoir of stored gas. Therefore, the bill could have a serious adverse effect on the ability to exploit the SLO's mineral estate, and thus a serious adverse effect on SLO revenues.

Future salt, sulfur, potash, and uranium mining on state trust land could be jeopardized. Current potash solution mining requires injection of fluids into mine workings which could qualify as "pore space" under the current definition. Salt production for oil and gas drilling fluids requires injection into pore space in salt zones. Future uranium mining and sulfur production can also rely on injection into pore space for mobilization of the ores.

ADMINISTRATIVE IMPLICATIONS

The SLO contributed the following concerns.

Because the SLO's position regarding existing split estates is that SLO's mineral estate includes pore space rights, the legislation may result in litigation regarding rights associated with existing split estates.

While the SLO can reserve pore space rights when it conveys trust lands in the future, the bill would add complexity to transactions where the SLO is selling trust lands or exchanging trust lands for other lands, and similarly would add complexity to SLO mineral lease transactions involving split estates.

By creating an estate that is distinct from the surface estate and the mineral estate, the legislation could add to the complexity and expense of recording and tracking ownership rights and noting possible restrictions on the ability to issue leases to explore for and produce oil, gas and other minerals. The additional expense is unknown at this time. The ONGARD system used by SLO for tracking trust land ownership and leasing and by TRD for tracking tax credits cannot at this time track ownership of a severed pore space estate. It is estimated that it would take 2-3 full-time employees working 9 months to reprogram ONGARD to accommodate that need. In addition, county clerks would be required to reprogram their systems for maintaining ownership and tax records.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The ENMRD reports that the Senate Bill 208 contains provisions similar to, and in some instances, conflict with, House Bill 790.

TECHNICAL ISSUES

The ENMRD reports that in defining pore space ownership, the bill is carefully drawn to protect any rights to pore space in State lands that the courts might hold that the State has effectively reserved in prior conveyances. Had the bill not been written in this way, it might have been held unconstitutional as a donation of property belonging to the State land trusts.

In addition, the bill contains a “severability provision;” so that if any of its provisions is held unconstitutional, other provisions will continue in effect.

OTHER SUBSTANTIVE ISSUES

The SLO suggests that the bill might discourage the development and use of new technologies for exploiting various state trust mineral resources where there is a split estate. There might also be a technical issue related to injection of carbon dioxide into coal seams where adsorption of the carbon dioxide may be the mechanism for storage rather than use of the pore space.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the ENMRD, ownership of underground pore space in New Mexico will remain confused and controversial, hindering acquisition of rights to use that pore space for sequestration of CO₂, storage of other gases, or other useful purposes.

The SLO states that CO₂ sequestration can occur and be encouraged without this legislation.

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