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FISCAL IMPACT REPORT

SPONSOR: Aragon DATE TYPED: 02/16/01 HB _____
 SHORT TITLE: Endangered Species Act Litigation SB 507
 ANALYST: Chabot

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
	\$ 2,065.2			Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files
 Department of Game and Fish (DGF)
 Energy, Minerals and Natural Resources Department (EMNRD)
 Office of the State Engineer (SEO)

SUMMARY

Synopsis of Bill

This bill appropriates \$2,065.2 from the general fund to SEO for the purpose of funding Endangered Species Act (ESA) of 1973 litigation and associated solutions.

Significant Issues

According to SEO, three existing lawsuits filed in federal court regarding the use of water from the Pecos River and the Rio Grande are of critical importance. These lawsuits could reallocate New Mexico's water supplies and interfere with the state's ability to meet Pecos River and Rio Grande interstate stream compact obligations. SEO would use the appropriation to assemble and maintain a 9-member in-house multi-disciplinary team to defend against these and other anticipated lawsuits filed under the ESA. SEO's summarization of these lawsuits is attached.

Both DGF and EMNRD expressed interest in working with SEO on environmental litigation issues.

PERFORMANCE IMPLICATIONS

To establish baseline data, the following performance measures are recommended:

- Output Percent of cases where the State of New Mexico sustains its position either in the trial or on appeal:
- Output Number of acre feet of water taken without fair compensation to beneficial users in New Mexico as the result of environmental litigation:
- Output Number of acre feet of incremental depletion of New Mexico's allocation of water under the Pecos River Compact and the Rio Grande Compact that is not offset by the federal government through willing seller water rights transactions under state law:

FISCAL IMPLICATIONS

The appropriation of \$2,065.2 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2005 shall revert to the general fund. Another appropriation to continue the effort on environmental litigation maybe needed for fiscal year 2006.

TECHNICAL ISSUES

The bill should be amended to authorize SEO to hire 9.0 term positions.

GAC/njw
Attachment

SEO Analysis of Environmental Litigation

SEO Analysis of Environmental Litigation

Summary. Litigation initiated under the federal Endangered Species Act of 1973, as amended ("ESA") is a rapidly growing threat to New Mexico's water supplies, to its citizens' water use rights, to New Mexico's continued compliance with its interstate stream compacts, and to its sovereign administrative authority over the waters of the State. Even on rivers where lawsuits have not yet been filed, the existence of listed species (either "endangered" or "threatened") results in the investment of enormous sums of money and dedication of technical resources to the creation and implementation of

long-term projects designed to recover the species. Three existing lawsuits filed in federal court regarding the use of water from the Pecos River and the Rio Grande are of critical importance to the State of New Mexico. The New Mexico Interstate Stream Commission (ISC) is a party to all three of these lawsuits. The Interstate Stream Commission needs additional legal, technical, and support resources in order to provide vigorous and thorough representation of the State's interests in these lawsuits. The appropriation contained in SB507 is that amount necessary to allow the ISC to assemble and maintain a 9-member in-house multi-disciplinary team for four fiscal years, FY 2002 through FY 2005. These term positions would consist of: 1 Attorney Master; 1 Attorney Supervisor; 2 Legal Assistant II; 2 Water Resources Master II; 1 Water Resource Master I; 1 IS Techmaster I; and 1 Administrative Secretary. The appropriation would also allow for initial capital outlay for computers and related support equipment, as well as for reasonable operating costs, including necessary office space.

Detail. The State of New Mexico is presently vigorously defending ESA litigation which threatens to (1) reallocate New Mexico's limited water supplies, preventing New Mexicans from enjoying the benefits of using the water allocated to New Mexico under its interstate stream compacts and (2) interfere with New Mexico's ability to meet its Pecos River and Rio Grande interstate stream compact obligations. On the Rio Grande, the case known as Minnow v. Martinez was filed by several environmental groups against the Bureau of Reclamation and the Corps of Engineers. The State of New Mexico (through the Interstate Stream Commission, the State Engineer, and the Attorney General) is a defendant-intervenor. The plaintiffs have made clear that they seek the federal court to order a continuously wet Rio Grande from Cochiti Dam to Elephant Butte Reservoir in order to comply with the Endangered Species Act and protect the endangered Rio Grande silvery minnow. This is being accomplished in 2000, a dry year, by releasing large amounts of water from storage reservoirs in Northern New Mexico in a manner that cannot be sustained. The plaintiffs seek the abandonment of federal water salvage and conveyance facilities and associated benefits in the Middle Rio Grande that are essential to New Mexico's compliance with its Rio Grande Compact obligations to deliver most of the water entering the Middle Rio Grande downstream to Elephant Butte Reservoir. The manner in which the plaintiffs seek to provide this water on a permanent basis would cause reallocation of San Juan-Chama Project water in a manner inconsistent with the authorizing legislation and the Upper Colorado River Basin Compact. It would also cause large increases in depletions of water in the Middle Rio Grande and could therefore cause New Mexico to fail to meet its delivery obligations to Elephant Butte Reservoir under the Rio Grande Compact. Severe economic consequences would result from any impairment of New Mexico users' ability to beneficially use their San Juan-Chama Project water or from any failure by New Mexico to meet its Rio Grande Compact delivery obligations. The result would go likely far beyond halting economic development and would include substantial reduction in economic activity.

In another ESA lawsuit on the Rio Grande, the Interstate Stream Commission and the State Engineer sued the U. S. Fish and Wildlife Service regarding its designation of critical habitat for the Rio Grande silvery minnow in a manner that wholly failed to consider the economic consequences to New Mexicans of that designation. The federal district court has ruled in favor of the State, finding that the actions of the Fish and Wildlife Service were the "essence of arbitrary and capricious." That decision may be appealed by the United States.

Additional attorney, technical, and support resources are requested to support the State of New Mexico's participation in this litigation. Several term positions are needed to assure that New Mexico is fully prepared to argue and support its technical and legal positions in this litigation, in the closely associated collaborative, problem-solving initiative, and in the appeals that may follow. Additional legal term positions include an

Attorney Master position and a Legal Assistant. Technical positions include a geographical information systems IS Techmaster I that is currently filled by a contract employee at substantial incremental cost, a Water Resources Master II position that will be filled with an experienced aquatic biologist (which will be the only biologist in the employment of the State of New Mexico in water resources management agency), a Water Resources Master I position that will be filled with a water resources engineer or a hydrologist to assist with surface water systems data management and analyses, and an Administrative Secretary for the Interstate Stream Commission's Rio Grande office in Albuquerque, which currently has no clerical support staff. The aquatic biologist position will also deal with the status of the Pecos bluntnose shiner and the associated water requirements on the Pecos River.

On the Pecos, plaintiffs have sued the Bureau of Reclamation and the Corps of Engineers seeking excessive and unnecessary minimum flows in the Pecos River for the benefit of the Pecos bluntnose shiner. The Interstate Stream Commission and the Attorney General have intervened. If plaintiffs are successful in obtaining management of reservoir releases from Fort Sumner and Santa Rosa Dams to provide their requested flows for the bluntnose shiner, the additional depletions may reach 13,000 acre feet in a dry year. Such an additional depletion would exhaust New Mexico's Pecos River Compact credit, which has been slowly accumulated over the last 14 years by the expenditure of \$35 million to purchase and retire water rights and to lease water for delivery to the state line. That credit was necessary to New Mexico's economic well-being, because to underdeliver to Texas will violate the United States Supreme Court's injunction mandating New Mexico's annual delivery of water to Texas and would trigger the severe economic consequences that would result from consequent, required priority call on junior uses of water in the Pecos River basin. The Interstate Stream Commission in 1994 estimated that approximately \$240 million in economic damages would be caused by a priority call that would result from a Pecos River Compact delivery shortfall. The Interstate Stream Commission requests two additional term positions to deal with this litigation, including an Attorney Supervisor and a Legal Assistant II. The senior aquatic biologist term position requested above and existing water resources staff, augmented by a new term position created in FY2001 by action of the 2000 legislature, will handle the technical matters with the assistance of contractors.

On the San Juan River, Endangered Species Act problems are being addressed by the San Juan River Basin Recovery Implementation Program and are not yet in litigation. For the last decade, Endangered Species Act problems have halted water development from the San Juan River and tributaries. Water management decisions are being made based on a computer simulation model of the San Juan River developed by a contractor to the Bureau of Indian Affairs and supported by the Bureau of Reclamation. This model was developed using RiverWare software, a complex river simulation package that the Bureau of Reclamation also has applied to the Rio Grande and Pecos Rivers. This San Juan River Basin hydrology model is now operated only by the Bureau of Indian Affairs consultant. As of now, the RiverWare model is being used by the San Juan River Basin Recovery Implementation Program despite objections by the states and water users to portions of the model. The model is the key hydrology analysis tool being used by these two agencies and the Fish and Wildlife Service for making decisions and determinations in NEPA Environmental Impact Statements and ESA Section 7 consultations on water development projects in the basin, including the forthcoming consultations on the completion of the Navajo Indian Irrigation Project, the San Juan-Chama Project, and the Gallup-Navajo Pipeline. It is important that the model be reliable for assessing project impacts on flow recommendations for endangered fish and for assessing water supplies available for project development, including fulfilling Indian water rights and trust obligations. Due to the importance of New Mexico being allowed to fully develop its compact apportionment out of the San Juan River, it is necessary that New Mexico

evaluate the model. Full evaluations cannot be performed without operating the model. Through its review of model documentation, New Mexico already is aware of some problems with the model that may materially affect the conclusions. New Mexico needs to correct problems with model input data and model operations rules so that the state can perform its own analyses with the RiverWare model. The Interstate Stream Commission has acquired, through previous appropriations of the Legislature, the UNIX workstations and model licenses required to operate RiverWare applications. Two existing ISC Water Resources Master I staff are operating the Pecos River and Rio Grande applications of this model in conjunction with the water management and joint lead environmental impact statement responsibilities of the Interstate Stream Commission on those rivers. The ISC's efforts have identified material problems in the Pecos River model developed by Reclamation's contractor. Severe economic consequences will result from not completing development of New Mexico's allocation of San Juan River water. For example, the Navajo Nation has plainly asserted that failure to complete the Navajo Indian Irrigation Project would result in its priority call on the San Juan-Chama Project water that the Middle Rio Grande region depends on for water supply. Another example is that Gallup must have a water supply source to replace its current sources and is relying on the Gallup-Navajo pipeline project to replace its depleted deep ground water. One Water Resources Master I term position is requested to operate and evaluate the San Juan River model under the guidance of ISC senior staff in order to independently check this model and its applications which are of crucial importance to the secure water future of a large area of New Mexico. Cost Benefit Analysis: The Interstate Stream Commission has been very successful in hiring well qualified staff and contractors to perform its essential work. Continued contractor involvement will be necessary but costs will be substantially less if the positions to be funded by this appropriation are filled.