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## FISCAL IMPACT REPORT

SPONSOR	<u>Sanchez</u>	LAST UPDATED	<u>03/06/2023</u>
		ORIGINAL DATE	<u>02/24/2023</u>
SHORT TITLE	<u>Endangered Species Water Use</u>	BILL NUMBER	<u>Senate Bill 470/aSCONC</u>
		ANALYST	<u>Sanchez</u>

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT\* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	No fiscal impact	No fiscal impact			

Parentheses ( ) indicate expenditure decreases.

\*Amounts reflect most recent analysis of this legislation.

### Sources of Information

LFC Files

#### Responses Received From

Department of Homeland Security and Emergency Management (DHSEM)

Office of the State Engineer (OSE)

Department of Environment (NMED)

## SUMMARY

### Synopsis of SCONC Amendment

The Senate Conservation Committee Amendment to Senate Bill 470 adds language requiring the director of the Department of Game and Fish and the State Forester to the list of individuals who need to be notified of a determination by a fire response official that water needs to be used pursuant to the rules laid out in the bill.

### Synopsis of Senate Bill 470

Senate Bill 470 proposes to add a new section to Section 72 NMSA 1978 (Water Law) which would suspend restrictions on water use pursuant to the Federal Endangered Species Act of 1973 (ESA) upon the determination by a fire response official that a fire poses an imminent risk to human health or property. The bill would require the fire response official to immediately notify the Secretary of the Environment and the State Engineer and transmit written documentation of the determination within 10 days.

Senate Bill 470 defines a “fire response official” as “the state fire marshal, the fire chief of a

county fire department, the fire chief of a municipal fire department, or the fire chief of a volunteer fire department.”

The effective date of this bill is July 1, 2023.

## **FISCAL IMPLICATIONS**

None of the analyses received by agencies responding to this bill indicated that it would have any fiscal impact.

## **SIGNIFICANT ISSUES**

A common concern shared by analysis from both the Department of Homeland Security and Emergency Management and the Office of the State Engineer regarded the statement in the text of the bill that “...the restrictions on water use within fifteen miles of [a] fire pursuant to the federal Endangered Species Act of 1973 shall be suspended for the duration of the fire...” Both agencies indicated this might pose a conflict with the supremacy clause of the Constitution of the United States (Article VI) which states”

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This clause is interpreted by the Supreme Court of the United States as giving federal laws preemption over state laws where conflicts exist. As there is no provision in the Endangered Species Act of 1973 permitting the type of actions proposed in Senate Bill 470, legal challenges would likely result in a determination that it is unconstitutional and, therefore, void.

## **ALTERNATIVES**

The Department of Environment’s analysis pointed out that the Department of Game and Fish needs to be included in the list of agencies receiving notification of the use of water, as that department has jurisdiction and responsibility for protecting endangered species. The agency proposed the following language be included as an alternative for Section 1(B):

A fire response official shall immediately notify the secretary of environment, the state engineer, and the secretary of department of game and fish upon making a determination of imminent risk pursuant to Subsection A of this section and shall transmit written documentation of the determination to the secretary of environment, the state engineer, and the secretary of department of game and fish within ten days.