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## FISCAL IMPACT REPORT

SPONSOR Feldman DATE TYPED 02/18/04 HB \_\_\_\_\_

SHORT TITLE Natural Resource Trustee Fund Appropriations SB 125/aHENRC

ANALYST Koplik

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
	(\$203.6)			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Appropriation in the General Appropriation Act

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY04	FY05			
		Variable See Narrative	Recurring	Natural Resources Trustee Fund
		(Indeterminate)	Recurring	Game Protection Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of Natural Resources Trustee (ONRT)

Department of Finance and Administration

Attorney General's Office

### SUMMARY

#### Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee amendment adds the following paragraph to Section 75-7-3 NMSA 1978, Natural Resources Trustee Powers and Duties:

“A person may appeal a decision of the natural resources trustee to the district court in the judicial district in which the damages or violations occurred.”

This amendment may not correctly represent the role of the Office of Natural Resources Trustee. The agency was created as a part of the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, enabling New Mexico to receive monetary damages as a result of enforcement deriving from this Act. Additionally, the Office of Natural Resources Trustee is able to sue in instances when a resource owned by the state (like water) has been polluted.

Unlike the State Engineer, the Office of Natural Resources Trustee does not act in a quasi-judicial manner. Its functions are *not* regulatory. Rather, its role is ministerial, determining damages, approving a settlement or a clean up plan. These actions are not able to be appealed. If a responsible party wishes to settle, then a clean up plan is created. If, on the other hand, the responsible party disagrees with the Office of Natural Resources Trustee, then it can appeal in federal court. One of the agency’s principal functions is to determine the amount of money that the state should receive for natural resource damage.

The Attorney General’s Office expresses concern that if this amendment becomes law, the ministerial decisions of the Office of Natural Resources Trustee could be appealed, extending even into the realm of personnel matters.

#### Synopsis of Original Bill

Senate Bill 125 appropriates interest from the Natural Resource Trust Fund to the Office of Natural Resources Trustee for the purpose of restoring damaged natural resources. Further, this bill amends Section 75-7-5, the Natural Resources Trustee Fund. The Fund is non-reverting, and is used by the agency for restoration and remediation activities. The proposed legislation enables direct expenditure by the Office of Natural Resources Trustee for restoration activities, while maintaining legislative authority over the agency’s operating costs.

#### Significant Issues

The Office of Natural Resources Trustee’s sole function is to restore natural resources injured by a hazardous substance or oil to their baseline or condition before contamination. As opposed to remediation (where contaminants are removed or their risk neutralized), restoration projects cannot access Superfund monies. Hence, a viable, financially responsible party must be found first to pay for site assessment and restoration. Restoration at some sites can take years, and during this time period, responsible parties may also pay for compensation projects, where the injured resource (most often ground water) is improved in an area near the site.

In 11 years, since the establishment of the Office of Natural Resources Trustee, the agency has not been able to reimburse the general fund or the Attorney General any funds, due to the particular structure of settlement awards. During the settlement process, cost recovery monies are negotiated with the responsible party to compensate for the time and expense that the state has incurred while investigating, assessing, and collecting damages. Cost recovery monies are generally low, as they only cover *actual* operating costs for a small agency with 3.7 employees. Consequently, the agency is not expected to be able to reimburse the general fund in the foreseeable future.

In the past two years, the Legislature appropriated interest from the Natural Resources Trust Fund for the agency's operating costs. However, it has always been disputed whether this appropriation is legal. This bill would clarify the issue and legalize the use of the interest for operating expenses. Consequently, the General Fund recommendation would be reduced.

The Office of Natural Resources Trustee states that currently it does not have an adequate mechanism to appropriate restoration funds to implement statutorily and judicially mandated restoration actions. Consequently, it is unable to carry out its program of natural resource restoration. It is necessary for the agency to implement restoration in a timely fashion to comply with court-mandated settlements. The agency's restoration project delays have impacted cost-effective opportunities to work with federal co-trustees. Last year, the agency had to budget interest from the Natural Resources Trustee Fund for operating expenses, forcing the agency to operate in an imprecise legal framework.

### **PERFORMANCE IMPLICATIONS**

The agency lacks statutory authority enabling the implementation of court mandated, natural resource restoration projects. This year the agency has experienced delays in implementing \$1.3 million of the following restoration projects:

- Restoration of the fire damaged Bosque in conjunction with the Energy Minerals and Natural Resources Department, the Bureau of Reclamation, the Army Corps of Engineers and the City of Albuquerque;
- Reduction of water use through clearing of invasive plant species in conjunction with the Hispanic Cultural Center;
- Conservation of water use through funding of water conservation ordinances in the Middle Rio Grande in collaboration with the Mid-Region Council of Governments.

The agency was unable to include the cost of these projects in its FY 2004 budget, as the settlement process was not complete. With this legislation, the agency will have the ability to proceed with the above (and any future) obligations.

### **FISCAL IMPLICATIONS**

The proposed legislation should partially lessen general fund needs since the interest from the Natural Resources Trust Fund could be used for the agency's operating costs. Indeed, the FY 2005 reduction in general fund amounted to \$203.6, or 38 percent.

Currently, there is \$33.7 thousand in interest from the fund and this amount is being recommended in the Office of Natural Resources Trustee's FY 2005 operational budget in lieu of general fund. If this bill does not pass, then the agency will be short \$33.7 thousand in operational expenses and will need general fund to supplement this shortage. Additionally, there is \$169.9 thousand from cost recovery revenue that can be used, and was recommended for administrative purposes in lieu of general fund by both the Legislative Finance Committee and the Department of Finance and Administration.

This bill dissolves the necessity of reimbursing the general fund \$258 thousand, and the Attorney General's Office \$74.2 thousand for the agency's start-up costs. Furthermore, the statutorily delineated \$258 thousand due to the general fund as reimbursement have never been "booked."

Consequently, there is no liability to the general fund, and this has never been included or counted as a general fund reversion

The interest earned in the Trustee Fund depends on the cost recovery revenue deposited into the Fund.

The proposed legislation also deletes language which would deposit all remaining interest and earnings into the Game Protection Fund for preserving or improving non-game wildlife.

#### **ADMINISTRATIVE IMPLICATIONS**

The proposed legislation should ease administrative concerns and enable the agency to fulfill its purpose.

#### **OTHER SUBSTANTIVE ISSUES**

This bill is not effective until May 19, 2004; however, the agency needs to conduct restoration projects as soon as possible. An emergency clause should be considered.

**SK/prr:yr:dm**