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## FISCAL IMPACT REPORT

SPONSOR Morales/Rue ORIGINAL DATE 2/22/17  
 LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Legislative Authorization for NM Unit SB 340

ANALYST Armstrong

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See narrative				

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB101  
 Relates to Appropriation in the General Appropriation Act

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the State Engineer/Interstate Stream Commission (OSE/ISC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 340 (SB340) clarifies that the New Mexico unit fund is subject to legislative appropriation. Additionally, the bill prohibits unit fund expenditures for a New Mexico unit (a Gila River diversion project) unless:

- The Interstate Stream Commission
  - determines a specific configuration of is technically feasible,
  - approves a technical projection of the quantity of new water the project is expected to produce and the intended uses, and
  - approves an engineering estimate of the costs to implement and operate the project, and
- the University of New Mexico’s Bureau of Business and Economic Research issues a report concluding the financial implementation plan for the project is feasible.

The bill also clarifies that ISC’s annual report on the status of the unit fund must include cumulative encumbrances and expenditures, the previous fiscal year’s itemized encumbrances and expenditures, and the approved or planned uses and itemized projections of expenses in the current fiscal year and each fiscal year “through exhaustion of the fund.”

## FISCAL IMPLICATIONS

Under the federal Arizona Water Rights Settlement Act (AWSA), New Mexico has the option to use \$66 million (in 2004 dollars) in federal funds to meet water supply demands in the state's "southwestern water planning region" (Catron, Luna, Hidalgo, and Grant counties). The federal Department of the Interior approved moving forward with feasibility studies in November 2015. New Mexico is eligible to receive \$34 million (also indexed to 2004 dollars) in additional funding for a diversion project if the required National Environmental Policy Act (NEPA) review is complete and a "record of decision" is issued by December 2019.

While the 2019 deadline may be extended to 2030 if it is missed at no fault of New Mexico, ISC analysis raises concern that SB340 could delay the process, prevent NEPA reviews from being completed timely, and preclude the state from receiving the additional funding. Further, ISC notes the bill's required technical and financial analyses would result in duplicated efforts and increased costs because such studies are required by NEPA, and, under SB340, would be financed twice; once before the NEPA review begins and again during the NEPA review. However, proponents of the bill claim ISC has spent significant amounts of time and money researching the technical and financial feasibility of a diversion project, and should be able to rely on those past efforts to comply with the requirements of SB340 and still be able to meet the 2019 deadline.

## SIGNIFICANT ISSUES

In November 2014, ISC elected to pursue a New Mexico unit of the Central Arizona Project. Environmental review and permitting under NEPA must occur before construction may begin, including technical and financial feasibility studies. The NEPA process will be funded from the unit fund, and ISC and the federal Bureau of Reclamation (BOR) are acting as joint-leads on the review which is scheduled to begin before the end of FY17.

The AWSA allows up to 14 thousand additional acre-feet of water from the Gila and San Francisco rivers to be used in New Mexico but requires compensation to downstream users across the state line for the delivery costs of an equal amount of Central Arizona Project water. The AWSA states that the New Mexico Unit Fund is a state of New Mexico fund to be established and administered by ISC and further:

Withdrawals from the New Mexico Unit Fund shall be for the purpose of paying costs of the New Mexico Unit or other water utilization alternatives to meet water supply demands in the Southwest Water Planning Region of New Mexico, *as determined by the New Mexico Interstate Stream Commission* in consultation with the Southwest New Mexico Water Study Group or its successor, including costs associated with planning and environmental compliance activities and environmental mitigation and restoration. (emphasis added).

While federal and state law are clear that the determination of which projects are selected is up to ISC, the Legislature's power of appropriation still extends over state funds such as the New Mexico unit fund. Although the fund statute states that "money in the fund ... is appropriated to the interstate stream commission," similar continuing appropriation language is used a total of 119 times in statute regarding various funds which are appropriated annually through the legislative process.

Regarding the New Mexico unit fund, Section 72-14-45 NMSA 1978, provides:

Money in the fund shall be administered by the interstate stream commission and is appropriated to the interstate stream commission for expenditure in fiscal year 2012 and subsequent fiscal years to comply with the provisions of the federal laws cited in Subsection A of this section. Those provisions of federal law establish that the purpose of money in the fund is to pay the costs of the New Mexico unit or other water utilization alternatives to meet water supply demands in the southwest water planning region of New Mexico, as determined by the interstate stream commission in consultation with the southwest New Mexico water study group or its successor, including costs associated with planning and environmental compliance activities and environmental mitigation and restoration. Money in the fund shall not be expended for any purpose other than the purpose provided in this section. The interstate stream commission may adopt rules it deems necessary to carry out the purpose of this section. (emphasis added).

The New Mexico Supreme Court’s opinion in *State of New Mexico ex rel. Smith v. Martinez*, 2011-NMSA-043, states:

The New Mexico Constitution vests the power to appropriate money exclusively with the Legislature. Our Constitution further requires that a law making an appropriation must “distinctly specify the sum appropriated and the object to which it is to be applied,” with money being “paid out of the treasury only upon appropriations made by the legislature.” (citations omitted).

Because the New Mexico Unit Fund statute does not distinctly specify an appropriated sum, it may not meet the constitutional requirement of an appropriation. Although the purpose of the unit fund and the authority to determine which projects are selected are restricted by federal and state law, the power to appropriate the fund resides with the Legislature. This is further shown by ISC’s inclusion of the fund as “other state funds” revenue in its annual budget request each year since fiscal year 2013 and submission of budget adjustment requests to increase use of the fund which also classify it as “other state funds” revenue. Finally, LFC, DFA, and ISC staff reached consensus in the summer of 2016 that the unit fund should be classified as “other state funds.”

## RELATIONSHIP

The House Appropriations and Finance Committee Substitute for House Bill 2 includes nearly \$1.7 million from the unit fund in ISC’s FY18 operating budget, including funding to support 3 FTE within ISC and the New Mexico Central Arizona Project Entity’s (NMCAPE) operating budget of \$1.35 million. NMCAPE is the local body overseeing Arizona Water Settlement Act (AWSA) implementation.

Senate Bill 101 includes \$15.2 million from the unit fund for capital projects related to AWSA implementation, including New Mexico unit NEPA reviews and non-diversion project design and construction.

## TECHNICAL ISSUES

On page 3, lines 2 and 3, the bill provides the New Mexico unit fund is “subject to legislatively authorized capital and operating budgets.” Other fund statutes state that “subject to legislative appropriation” a fund may be used to a certain entity or for a certain purpose.

The terms “permitting” and “implementation,” used on page 3, line 16, are not defined.

**OTHER SUBSTANTIVE ISSUES**

Legal concerns raised by ISC analysis include preemption, separation of powers, and interference with contracts issues. However, all of these concerns are based on assumptions that either the New Mexico unit fund is considered as federal funds rather than state funds or the unit fund statute qualifies as an appropriation of the full amount currently in or to be deposited in the fund. As noted above, LFC, DFA, and ISC staff reached consensus in the summer of 2016 that the unit fund should be classified as “other state funds” rather than federal funds. Further, it is unclear whether the New Mexico unit fund statute meets the constitutional requirement for appropriations.

**ALTERNATIVES**

The Legislature could decline to make appropriations from the New Mexico unit fund if the projects selected by ISC and NMCAPE are not aligned with legislative priorities.

JA/jle