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FISCAL IMPACT REPORT

ORIGINAL DATE 03/09/11

SPONSOR HENRC LAST UPDATED _____ HB 543/HENRCS

SHORT TITLE Endangered Species Management Compacts SB _____

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to Senate Bill 565 and House Memorial 46, Conflicts with House Bill 567.

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
0	0	0		

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	n/a	n/a	n/a			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Game and Fish (DGF)

SUMMARY

Synopsis of HENRCS Substitute

The House Energy and Natural Resources Committee Substitute for House Bill 543 proposes to

change the state’s role in the management of threatened and endangered species.

It would amend Section 17-2-42 NMSA 1978 (the Wildlife Conservation Act) to add “Indian nations, tribes or pueblos, other states” to the entities with which the director of the DGF may enter into agreements for the management of endangered species.

The bill would add a new section to the Wildlife Conservation Act to allow the State Game Commission to recommend to the Governor to enter into interstate compacts, to manage threatened or endangered (T&E) species, with one or more states on the recommendation of the State Game Commission (SGC). At least one state party to the compact must border New Mexico. The compacts would seek to achieve viable populations of T&E species in areas compatible with human activity. Some of the provisions of the potential compacts include:

1. recognize and accommodate the unique management needs and challenges of the several distinct populations and subspecies of the various species present among the participating states and Indian nations, tribes and pueblos;
2. provide for the administration of its provisions and public participation and comment in formulating the policies, procedures and programs governed by the compact;
3. include provisions for compiling and sharing data and other information, documents and electronic files among the participating states and Indian nations, tribes and pueblos, the state, federal wildlife management agencies and the public;
4. include measures for addressing issues of human and endangered or threatened species interface, including habitat overlap and depredation; and
5. provide for legislative enactment of uniform civil and criminal penalties for the protection of listed threatened or endangered species.

Before the Governor could sign such a compact the SGC would be required to perform the following actions.

1. Provide copies of the compact to the Legislative Council.
2. Submit a proposed compact to the Legislature for ratification at the next regular session.
3. Notify legislators and boards of county commissioners in locations likely to be affected by the compact, and provide a copy of the compact to these parties on request.
4. Post the text of the compact on the SGC’s and the department’s official websites.

FISCAL IMPLICATIONS

An analysis of the fiscal impact of a proposed compact could only be done after copies are given to the Legislative Council. In advance of this event it is not possible to develop even a broad range estimate of any financial obligation the state might incur by becoming a party to such a compact.

It is unclear how the purposes of the bill would be funded, but it could be expensive. The initial task of establishing geographic boundaries between land “compatible with human activity” and land that is not might be lengthy and expensive. The interstate compacts contemplated by this bill involve activities that are usually under the jurisdiction of state agencies that include DGF, the Energy, Minerals and Natural Resources Department, and the SLO. Engaging in these activities usually requires significant funding through legislative appropriations.

SIGNIFICANT ISSUES

In contrast to the legislative or rulemaking processes, there is no requirement for public hearings or input to the terms of a compact, though it appears that public participation is provided for after the compact is in effect. The proposed process has little transparency. The Governor would have sole discretion to negotiate the terms of a compact though it would be subject to ratification by the Legislature.

The AGO submitted the following discussion of the bill.

[There is] Some question whether this compact can survive a legal challenge. Although federal code and cases have generally supported a states right to enter into compacts with other states, it has been held to do so only when the compact enforces federal law or where there has been some acquiescence by the federal government. Here the federal law, the Endangered Species Act, may be supplanted by this compact, as the language in the compact does not mirror nor follow the complex code, regulations and case law the Endangered Species Act requires and therefore may be in contravention with that act. Under the Endangered Species Act, for instance, all management decision must promote the recovery of the species, whereas the mandate under this bill is to “achieve viable populations of endangered or threatened species in locations compatible with human activity.”

Further, the Game and Fish Department already has the authority to communicate and consult with other states, federal government, private organizations, and others for a broad range of habitat, wilderness, and recreation issues to ensure comprehensive conservation services under Section 17-1-5.1 NMSA.

The SLO comments as follows.

The bill only seeks “to achieve viable populations of endangered or threatened (T&E) species in locations compatible with human activity.” By exclusion, T&E species habitat requirements will not be pursued where their presence is deemed incompatible, without regard to appropriate habitat or historical range.

Additionally, the bill requires the compacts to “recognize and accommodate the unique management needs and challenges of the several distinct populations and subspecies of the various species present among the participating states”. This mandates that T&E species be managed according to the needs of non-threatened species and possibly non-native species, and that accommodation be made for the management of any species present in the area, regardless of the population status of those species.

Overall, this bill could have a negative effect on the management and recovery of T&E

species.

The management of state trust lands with which the Commissioner of Public Lands is charged necessarily includes ecologically sound practices of habitat conservation and, at times, restoration. This, in turn, implicates the sort of wildlife management the bill contemplates. Any compact that might (i) lessen protections and (ii) be binding on state trust lands should be made available for review by the Commissioner.

The DGF expressed similar concerns as follows.

This bill does not specify whether state or federal designations for “threatened” and “endangered” are the subject of the bill. Clearly there are species which are threatened or endangered across a range that includes several states and could qualify under this legislation. State listed species, be they New Mexico, Arizona, Colorado, Oklahoma, Texas, or Utah could have different criteria for designation and the designation could vary between states.

The bill specifies compacts with other states. Presumably this would not apply to Mexican states.

It suggests that viable T&E species populations should only be achieved in locations where they are compatible with human activity. This, in conjunction with the requirement for public participation, leaves significant opportunities for debate on whether areas are compatible or not with human activities. The inverse means that cooperative management thru the compact shall not seek to achieve viable populations in locations incompatible with human activity. Hence, interstate cooperative management would not be an option for some species with limited/localized distribution that coincides with human activity.

The bill would accommodate for differences in management of a species between populations and subspecies presumably between states but potentially within states. If the species is federally listed, there could be limitations that preclude some forms of management that could be envisioned in different states.

The bill specifies that the compact provides for the public to participate in formulating policies, procedures, and programs but it does not specify New Mexico public. This could result in management being influenced by public in other states; some not even bordering New Mexico.

The bill requires proactive sharing of data, documents, and files generated under the compact with the public which may result in significant additional effort to ensure redaction of personal information and other legally protected information.

PERFORMANCE IMPLICATIONS

The DGF observed the following potential performance impacts.

There are several components of this bill that would have performance implications for the department. The mandate to incorporate public participation in the formation of

policies and procedures and the operation of projects under the compact will add additional time requirements to all activities under the compacts. The bill does not specify that the department must yield to public demands but contentious issues will provide numerous opportunities for conflict and dissent.

The provision for sharing data, documents, and files would place an undue burden on the department to make all generated work product available to the public. While the inspection of public records act requires the department to make that information available on request, standard practice posting of all relevant work product would put additional demands on those working under the compact. It could also increase the demand for information processing hardware and potentially the need to prepare and send by mail large volumes of mail to interested parties.

ADMINISTRATIVE IMPLICATIONS

The DGF is concerned that the primary administrative implications are based on the requirement to *“provide for the administration of its provisions and public participation and comment in formulating the policies, procedures and programs governed by the compact.”* Fulfilling this requirement will place additional resource needs on agencies if they are to continue providing for the administration of current programs at current levels. The other notable administrative implication is the requirement to develop *“measures for addressing issues of human and endangered or threatened species interface, including habitat overlap and depredation.”* This could put the department into the position of legally having to do something about a conflict between the public and a federally listed species which may conflict with federal law and potentially jeopardize the department’s ability to comply with obligations pursuant to current agreements between the Department and the USFWS.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 567 would have the state take primary responsibility for the listing, protection and management of threatened and endangered species.

HM 46 would request the state to compensate property owners for their losses as a result of restrictions for the protection of threatened and endangered species.

SB 565 (a duplicate of the original HB 543) seeks to permit the Governor to enter into similar compacts with other states.

TECHNICAL ISSUES

The DGF returned the following notes.

There is no definition of “compact” so it is difficult to fully assess how broadly the proposed statute would impact the department.

The bill does not specify whether the terms “endangered” and “threatened” refer to federal or state listed species.

This bill does not specifically address existing compacts which could lead to two classes of compacts with different requirements.

The SLO comments that the notice-like provisions of § (D) are selective without a discernable basis for selection; they are notification without any provision for comment or disapproval.

OTHER SUBSTANTIVE ISSUES

The DGF had further concerns, and added detail to earlier discussions.

The authority of the governor unilaterally to enter into an interstate compact is problematic. The compacts in which the state is participating are legislatively approved and the role of the Governor is to negotiate such compacts subject either to legislative approval or the fact that the compacts already exist in statute. See, e.g., Wildlife Violator Compact, 11-16-1 to 11-16-12 NMSA; Western Interstate Corrections Compact, 31-5-4 NMSA et seq.; Compact on Mentally Disordered Offenders, 31-5-10 NMSA et seq.; Interstate Water Compacts, Article 15 NMSA (Interstate Water Compacts).

Additionally, the proposed authority of the Governor to enter into such compacts on the recommendation of the State Game Commission may be contrary to legislative intent upon which the Commission on Intergovernmental Cooperation was enacted. In section 11-2-2 NMSA, of that statute one of the functions of that commission is “to endeavor to advance cooperation between this state and other units of government whenever it seems advisable to do so by formulating proposals for, and by facilitating: ...the adoption of compacts.” (11-2-2C(1) NMSA).

If the Fish and Wildlife Service were not to delist the Mexican Gray wolf, or any other species currently federally listed as threatened or endangered, actions by the states under such a suggested compact would involve aspects of federal sovereignty and require the consent of Congress. See, *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981) (Congressional consent is required to maintain ultimate supervisory power over interstate compacts that might otherwise interfere with the full and free exercise of federal authority). Consent of Congress transforms the States’ agreement into federal law under the compact clause. *Id.*

The bill specifically references “interstate compacts” but it is not clear whether this would be interpreted broadly and potentially include interstate USFWS Section 6 grants not requiring a governor’s signature. These grants have a very favorable 9:1 reimbursement ratio that could be jeopardized if the statute were enacted and broadly interpreted.

This legislation could inhibit some states from entering into agreements with New Mexico because of specific requirements imposed by this bill. In cases where other states were open to entering into agreements, it could prove more difficult to come to agreement because of the requirements.