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FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/12

SPONSOR Munoz LAST UPDATED _____ HB _____

SHORT TITLE Protection of Right to Hunt & Fish, CA SJR 11

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Secretary of State		\$104.0				General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Department of Game & Fish (DGF)

Energy, Minerals & Natural Resources Department (EMNRD)

State Land Office (SLO)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 11 proposes an amendment to Article 2 of the constitution of New Mexico by adding a new section to protect the right to hunt and fish.

The resolution gives the residents of New Mexico the right to hunt, fish and harvest wildlife lawfully. Wildlife belongs to New Mexico and is held in trust for the benefit of the residents of this state.

The resolution also reads that the exclusive authority to enact laws to regulate the manner, methods or seasons for hunting, fishing and harvesting wildlife is vested in the legislature, which may delegate rulemaking authority to the State Game Commission (SGC).

According to the resolution, no law shall be enacted and no rule shall be adopted that unreasonably restricts hunting, fishing and harvesting wildlife or the use of traditional means and methods. Laws and rules authorized under this section shall have the purpose of wildlife conservation and management and preserving the future of hunting and fishing.

Senate Joint Resolution 11 – Page 2

Lawful public wildlife harvest and fishing shall be the preferred means of managing and controlling wildlife.

The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date that may be called for that purpose.

FISCAL IMPLICATIONS

The SOS reports that in accordance with Section 1-16-4 NMSA 1978, upon receipt of the certified proposed constitutional amendment or other question from the Secretary of State, the county clerk shall include it in the proclamation to be issued and shall publish the full text of each proposed Constitutional amendment or other question in accordance with the constitution of New Mexico.

Although the county clerk includes the proposed amendments in the clerk's proclamation, it is the responsibility of the State to pay for the costs associated with the publication per Section 1-16-13 NMSA 1978, including printing samples of the text of each constitutional amendment in both Spanish and English in an amount equal to ten percent of the registered voters of the state. There are currently 1.7 million registered voters in the state. Voters whose election mail is returned as undeliverable will be sent the proper notice under federal law in 2012, and if they do not vote in the next two federal elections, may be purged in 2015. Under these timelines, the voter roll is expected to increase until the purge in 2015.

The SOS reports that in 2010, the publication cost was \$520,000 for 5 constitutional amendments, or approximately \$104,000 per amendment. Although the SOS is continually seeking ways to reduce publication costs, it believes the 2010 figure is a reasonable projection for 2012 costs, given the increasing number of voter registrations.

SIGNIFICANT ISSUES

The AOC notes specific issues could arise if hunting and fishing were raised to constitutionally protected status. For instance, crop depredation by game species is a substantial concern for the agricultural community. NMSA 1978, Section 17-3-13.4(B), requires the establishment of a program to protect against depredation, but provides no guidance for balancing hunter versus landowner interests. As with any broad constitutional right, existing statutes and regulations would have to be tested through litigation to determine whether they are consistent with the new right.

The DGF provided the following:

This resolution establishes that wildlife belongs to the state. There is no definition established for wildlife and this creates the likelihood for conflicts between the State and the federal government as ownership of wildlife can vary by species. Some migratory birds are managed solely by the United States and have no protected status in New Mexico and the State currently does not claim ownership.

Birds like ravens have not been established in New Mexico Statutes for protection and are under the protection and sole jurisdiction of the federal government. Other common birds like ducks and geese have a shared jurisdiction between the State and federal

government, with the United States having the controlling interest. Past legal interpretation of waterfowl ownership lies with the federal government and not with the state. Likewise, some threatened and endangered species may have joint jurisdiction or sole jurisdiction depending on their designation by the federal government or the State.

This resolution establishes that no law shall unreasonably restrict hunting, fishing or harvesting of wildlife or the use of traditional means and methods. Future conflicts could arise if a person or group takes issue with any legislation or rules that restrict harvesting wildlife by a certain method, especially since no definition of unreasonably restricts will be established in the constitution. Also, many methods that could be viewed as traditional means or methods are outlawed today. For example in the past bears were caught with huge jaw-toothed traps, game was herded off cliffs and ledges, waterfowl was taken with cannon guns and fish were netted by early natives and later dynamited by settlers. There is no distinction of a traditional means by aboriginal ancestors or early European settlers in this resolution so it makes restrictions to harvesting methods and means subject to court interpretation.

EMNRD comments were as follows:

The resolution establishes within the New Mexico Constitution the role of the SGC in managing hunting and fishing in New Mexico. The State Parks Division (SPD) of EMNRD partners with the DGF to identify, provide, and promote hunting and fishing within state parks across the state. Some state parks are destinations for quality hunting and fishing opportunities.

SJR 11 will presumably limit any state regulation of hunting, fishing, trapping, etc to the SGC. Other state agencies, such as the SPD and the SLO may also regulate these activities on land they own or manage. Such regulation may be prohibited by this amendment.

SJR 11 provides that any regulation of these activities must have the purpose of wildlife conservation and management. State agencies that manage public lands may also limit these activities on public lands for other purposes, such as public safety and to avoid conflicts with other permitted uses including recreation and commercial development. Regulation for such purposes may be prohibited by this amendment.

The SLO has the following concerns:

The federal Enabling Act, the New Mexico constitution and state statutes all charge the Commissioner of Public Lands with exclusive management authority of state trust land, not to mention the fiduciary responsibility for anything of value derived from that land. Wildlife, of course, exists on state trust land, and is, or may be, of monetary value. Thus, the amendment would set up a conflict between the Commissioner's existing discretion with respect to management and the legislature's new, proposed discretion – at least with respect to any matter relating to wildlife on state trust land.

More generally, it is unclear what wildlife belonging to the state actually means or what a trust composed of wildlife would constitute – particularly given that the wording states it would not modify existing property rights.

In addition, the following important terms are undefined: lawfully, harvesting and traditional means and methods.

To give but one example, SLO currently allows hunting and fishing on many parcels of state trust land pursuant to a Game and Fish easement, but not on all parcels. An oil and gas lease or a rural store on a commercial lease, for example, might not be the most appropriate sites for elk hunting. The Commissioner needs the discretion to control such uses, ensure safety and promote conditions compatible with lessees' reasonable needs. This amendment would call that discretion into question.

To give another example, SLO field staff currently concern themselves with habitat conservation and or restoration, sometimes through specific projects designed for such conservation. This amendment could call that authority into question, particularly as concerns the use of habitat manipulation as a tool for wildlife management.

OTHER SUBSTANTIVE ISSUES

The AGO identified the following legal issues:

SJR 11 creates a right to hunt and fish in the citizens of the state of New Mexico. In addition, it allows authority to enact laws to regulate the manner, methods or seasons for hunting fishing and harvesting wildlife in the legislature, which may or may not delegate rule-making authority in the SGC. SFR 11 expressly prohibits the enactment of any rule that unreasonably restricts hunting, fishing or harvesting wildlife, or the means and manner of accomplishing such. The purpose of any such laws shall have the purpose of wildlife conservation and management and preserving the future of hunting and fishing.

There are several notable issues with this bill. First, the absolute right to hunt and fish, as stated in Section A, could be in contravention with current state statutes like the Endangered Species statute, NMSA 17-2-41, and the depredation laws, NMSA 17-2-7.2. Further, there is also possible inconsistency with the federal Endangered Species Act. All of these consistencies would need to be resolved. Additionally, the fact that SJR 11 rests responsibility for implementation of laws and rule making with the legislature, albeit allowing for delegation to the SGC, may also be problematic based on separation of powers constructs. Generally the legislature makes the laws, but the executive branch implements the laws including rule-making. As current state law gives general management of game and fish to the SGC, SJR 11 could make the SGC superfluous.

There appears to be some internal inconsistency with SJR 11, in that page 2, lines 3 to 6, states that the purpose of laws and rules is wildlife conservation and management and preserving the future of hunting and fishing. However, Section C, page 2, lines 7 through 9 states that lawful public wildlife harvest and fishing shall be a preferred means of managing and controlling wildlife." These two sections should be reconciled.

Finally, the inclusion of the wording resident might and nonresident hunters have challenged state restrictions on nonresident hunters. These challenges have been based on the Privileges and Immunities Clause, the Dormant Commerce Clause, the Equal Protection Clause, and the Supremacy Clause of the Constitution. Historically, courts have held that states may enact discriminatory nonresident hunting regulations if the type of hunting being regulated is typically a recreational activity, such as elk, deer, or bird hunting; but in some instances, courts have held that a state cannot discriminate when the hunting is typically a commercial activity, such as catching shrimp. Since 2005, Congress enacted the Public Law Number 109-13, section 6036 which affirms a state's

right to regulate hunting and generally. Generally under section 6036 such challenges will likely fail, however, they merit mention.

ALTERNATIVES

DGF respectfully recommends the following:

A. The residents of New Mexico have a right to lawfully hunt, fish and harvest wildlife [~~lawfully~~]. Wildlife is a trust resource held by the state [~~belongs to this state and is held in trust~~] for the benefit of the residents [~~of this state~~].

B. Exclusive authority to enact laws to regulate the manner, methods or seasons for hunting, fishing and harvesting wildlife is vested in the legislature, which may delegate rulemaking authority to the state game commission. [~~No law shall be enacted and rule shall be adopted that unreasonably restricts hunting, fishing and harvesting wildlife or the use of traditional means and methods.~~] Laws and rules authorized under this section shall have the purpose of wildlife conservation and management and preserving the heritage and traditions [~~future~~] of hunting and fishing for future generations.

C. Lawful public wildlife harvest and fishing shall be a preferred means of managing and controlling wildlife.

D. This section shall not be construed to modify any provision of common law or statutes relating to trespass or property rights.

The SLO requests an exception for state trust land be added to the bill.

POSSIBLE QUESTIONS

Why is there a need for this constitutional amendment?

DW/svb