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FISCAL IMPACT REPORT

ORIGINAL DATE 1-27-09

SPONSOR Neville LAST UPDATED _____ HB _____

SHORT TITLE Establish Water Banks SB 113

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to N/A

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)
New Mexico Department of Agriculture (NMDA)

SUMMARY

Synopsis of Bill

Senate Bill 113 seeks to enact a new section of Chapter 73, Article 9 NMSA authorizing an irrigation district created and operating pursuant to Chapter 73, Article 9 to establish a water bank for the purpose of temporarily reallocating water within the district without changing the purpose of use or point of diversion. A district water bank established pursuant to the bill would not be subject to recognition or approval by the interstate stream commission or the state engineer, and such a water bank would have authority to make temporary reallocations of water to new places of use within the district without formal proceedings before the state engineer. Water rights placed in the district's water bank would not be subject to loss for nonuse during the period when the rights are placed in the water bank. There is no appropriation attached to this legislation.

SIGNIFICANT ISSUES

OSE indicates that this bill is unnecessary because under existing law irrigation districts operating pursuant to Chapter 73, Article 9 already have authority to establish administrative mechanisms that function like water banks. Specifically, under section 73-9-14 NMSA 1978

irrigation districts have the power to set up administrative systems to facilitate the temporary reallocation of surface water used for irrigation to the irrigation of other lands within the district through rental or lease arrangements. For example, pursuant to the nearly identical authority granted by section 73-10-16 NMSA 1978 to irrigation districts cooperating with the United States under reclamation laws, the board of the Elephant Butte Irrigation District (“EBID”) has established a “conservation pool” into which water right owners may place their unused surface water allotment for a given year for temporary reallocation to other irrigators within the district. As long as the surface water temporarily reallocated through such an administrative system remains within the district and is reallocated to other irrigation uses, the state engineer is not required to approve the reallocation.

Further, OSE advises that, under existing law, when surface water allotments are temporarily reallocated to and used by other water right owners within a district, the underlying water rights are protected from loss through nonuse under the forfeiture statute (section 72-5-28 NMSA 1978) or under the common law doctrine of abandonment. This is because the use of the water allotment by the lessee constitutes beneficial use as required by the constitution. [N.M. Att’y Gen. Op. 64-1 (1964).] EBID and the Carlsbad Irrigation District (“CID”) each have established under existing law (under section 73-10-16, which provides water banking authority nearly identical to that provided in section 73-9-14) administrative mechanisms that function like water banks to allow the temporary reallocation of surface water allotments to other irrigators within those two districts. Those districts have worked with the state engineer and have been able to demonstrate the continued beneficial use of water rights placed in their administrative mechanisms. As a result, those water rights have been protected from loss through nonuse. Irrigation districts operating pursuant to Chapter 73, Article 9 have the authority under existing law (section 73-9-14) and the necessary resources to do precisely the same thing. There thus is no need to provide additional authority to Article 9 irrigation districts. Irrigation districts operating pursuant to Chapter 73, Article 9 have the authority under existing law (section 73-9-14) and the necessary resources to do precisely the same thing. There thus is no need to provide additional authority to Article 9 irrigation districts. The enactment of this bill would create new problems by treating article 9 irrigation districts disparately from article 10 irrigation districts.

TECHNICAL ISSUES

OSE suggests that it is not clear that this bill, if passed, could achieve the results intended. When a lawsuit is pending at the time of enactment of a law, the state constitution prohibits the application of that law to the parties in that suit if to do so would affect the substantive rights of those parties. N.M. Const. art. IV, § 34. The water rights of the members of at least three irrigation districts created and operating pursuant to Chapter 73, Article 9 are at issue in the ongoing case to adjudicate the water rights in the San Juan River stream system, *State of New Mexico ex rel. State Engineer v. United States, et al.*, Eleventh Judicial Dist. No. D-1116-CV-7500184. To the extent this bill is intended to affect or change the substantive rights of those water right claimants in that pending case, the constitution would bar that result.

OTHER SUBSTANTIVE ISSUES

NMDA notes that SB113 would allow for irrigation districts to create a water banking system for the temporary reallocation of water rights within the area of service. The need for this type of market should be demonstrated by a preliminary analysis of the service area to determine the supply and demand of temporary water transfers. Participants of water banking mechanisms

created by irrigation districts would increase financial opportunities to temporarily sell a water right to a buyer who has exclusively expressed an interest in buying it at the given market price. Willing buyers would have an opportunity to find water rights at fair market prices and temporary investments would be beneficial and financially sensible

PED concludes that the temporary transfer of water rights has a potential to affect compact deliveries which are managed by the interstate stream commission depending on the details of the transfer. The change in point of diversion could affect other water users on the system. Transferring water rights from downstream to upstream users may affect 3rd party water right holders, these are potentially senior water right holders such as tribal entities. Further, temporary water right transfers could affect compliance measures associated with water flows for federally protected species and associated habitat. The term ‘temporary’ within SB 113 should be further defined. The potential impacts listed above could be exacerbated if the allowable time for transfer of water rights is for longer than three to five years depending on the characteristics of the system, whether or not water is subject to compact deliveries, or transfers interfere with the biological functions of federally protected species.

AMENDMENTS

None suggested by responding agencies.

BW/mc