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FISCAL IMPACT REPORT

ORIGINAL DATE 02/12/14

SPONSOR Wirth LAST UPDATED _____ HB _____

SHORT TITLE Unit Fund for Certain Water Supply Needs SB 89

ANALYST McCoy

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0.0	\$0.0	\$0.0			

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 90

SOURCES OF INFORMATION

LFC Files

Responses Received From

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

Attorney General's Office (AGO)

Audubon New Mexico, Gila Conservation Coalition, and the Rio Grande Restoration

SUMMARY

Synopsis of Bill

Senate Bill 89 requires that the Interstate Stream Commission (ISC) pay from the New Mexico Unit Fund the costs of implementing water utilization alternatives to meet water supply demands in the southwest water planning region of New Mexico categorized as nondiversion alternatives to the development or construction of a New Mexico Unit, including projects for forest and watershed restoration and improvement; municipal conservation; agricultural conservation; infrastructure improvements; effluent reuse; and sustainable ground water use.

SB 89 requires no less than eighty-two million dollars (\$82,000,000), indexed to 2012 dollars, of the total amount distributed to the state pursuant to Paragraph (2)(D)(i) of Section 403(f) of the federal Colorado River Basin Project Act, as amended by Section 107(a) of the federal Arizona Water Settlements Act, Public Law 108-451, December 10, 2004, shall be allocated to implement nondiversion alternatives to meet water supply demands in the southwest water planning region of New Mexico.

FISCAL IMPLICATIONS

SB 89 requires no less than \$82 million, indexed to 2012 dollars, be allocated to implement nondiversion alternatives to meet water supply demands in the southwest water planning of New Mexico.

SIGNIFICANT ISSUES

The federal Arizona Water Settlements Act (AWSA) of 2004 provides New Mexico with up to \$128 million in non-reimbursable funding. The funds are deposited by the Bureau of Reclamation (BOR) into the New Mexico Unit Fund, created in the state treasury in Laws 2011, Chapter 99 (House Bill 301). The ISC administers the nonreverting fund, and federal law restricts use of the funds to southwestern New Mexico and to the implementation of AWSA.

The state will receive \$66 million, guaranteed and adjusted to reflect changes in the construction cost indices since 2004, in federal funds to construct the New Mexico Unit of the Central Arizona Project (CAP) or a water utilization alternative to meet water supply demands in Catron, Grant, Hidalgo and Luna counties. The project(s) will be determined by the ISC 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. The funds may be used to cover costs of an actual water supply project, planning, environmental mitigation, or restoration activities associated with or necessary for the project. The water supply project can be something other than a dam or diversion from a stream system as long as it develops water to meet a water supply demand. BOR reports, three of the ten required payments totaling over \$27 million (indexed for inflation) have been deposited in the New Mexico Unit Fund. According to the BOR, these payments will continue under the AWSA through 2021, with the total amount likely in the \$90 million range. (See attachment 1)

In addition to the guaranteed amount stated above, if the state elects to construct a New Mexico Unit of the CAP, the Act makes up to \$62 million in additional funding available for that purpose. Per the AWSA, New Mexico is only eligible for the additional \$62 million if it elects to build a project that would use any of the additional 14,000 acre-feet of Gila River water, and that would result in downstream users exchanging their Gila River water for CAP water. The BOR also notes \$28 million of the \$62 million is tied to return investments of the Lower Colorado River Basin Development Fund. The BOR reports the following:

The investment return on the Development Fund must average over 4 percent between December 10, 2004, and date of start of construction of a New Mexico Unit. To date, the earnings in the fund have been far less than 4 percent annually. At this point in time, it is highly unlikely that any of these funds would be available unless a dramatic and sustained turnaround in the interest rates occurs.

In that scenario, only \$34 million, indexed for inflation, of the additional \$62 million would be made available for construction of the New Mexico Unit.

The ISC plans to select project(s) by November 2014, as the Act requires the ISC to notify the Secretary of the Department of the Interior if New Mexico will use any of the 14,000 acre-feet of additional water by December 31, 2014. The ISC reports, the agency is currently, evaluating proposals for the use of the funding and water available to New Mexico under the AWSA.

Differing estimates were provided for the cost of both non-diversion proposals and diversion proposals. The list submitted by local project proponents in February 2012 projected initial cost estimates of non-diversion water supply proposals to be \$82.4 million. (See attachment 2) Whereas the projections of the total cost of all non-diversion water supply proposals under ISC consideration range from \$110 million to \$124 million. (See attachment 3) According to the ISC, the initial estimated cost of the diversion/storage proposal at \$330 million to \$400 million. A draft engineering report on the AWSA Diversion and Storage, conducted by the Bohannon Huston, Inc. in January 2014 (<http://nmawsa.org/ongoing-work/diversion-and-storage-proposals/bhi-diversion-and-storage-evaluation/bhi-draft-engineering-report-awsa-diversion-and-storage/view>) cited the capital costs for diversion alternatives range from approximately \$300 million to \$500 million. The study notes, in addition to the capital costs, diversion alternatives will have annual operations and maintenance costs.

The Audubon New Mexico, Gila Conservation Coalition, and the Rio Grande Restoration report:

Low-interest federal loans for a water development project are likely unavailable due to a history of cost overruns and near defaults. Additionally, new Council of Environmental Quality principles and guidelines for water development projects portend new environmental criteria tied to loan guarantees, something a Gila River diversion project is unlikely to satisfy given the number of federally endangered species that occur there. Therefore, the federal subsidy will not cover the full cost of a project, leaving a gap of \$200 to \$350 million for taxpayers, farmers and/or water utility ratepayers to cover.

The proposed diversion project is estimated to yield on average 10,000 acre-feet on the Gila River, leaving 4,000 acre-feet for a San Francisco River diversion, for an estimated cost of \$300-\$500 million dollars and that is just the cost of the Gila River diversion. The ISC has stated that upwards of 30% of the 10,000 acre-feet Gila River diversion will be lost to reservoir evaporation. Another portion could be lost to reservoir seepage.

Non-diversion alternatives provide three times more water for a third of the cost. The non-diversion projects are estimated to provide an average yield of 22,000 acre-feet of water per year at a cost of \$82 million dollars.

According to the OSE/ISC:

SB 89 would mandate the expenditure of slightly over one-half of all available funding to non-diversion projects, effectively preventing any realistic consideration of the development of the additional annual average of up to 14,000 acre-feet of water allocated to New Mexico under the AWSA. It would also preempt the ISC's evaluation process by forcing it to fund specific non-diversion projects whether or not they were technically or ecologically valid; whether they best met the water needs of New Mexico citizens and the environment; or, whether they were permissible. The AWSA both expressly contemplates use of these funds for either a New Mexico Unit or a water utilization alternative, and does not dictate specific water utilization alternatives for funding.

Moreover, SB 89 mandates that \$82 million, indexed to 2012 dollars, "distributed to the state [by the United States pursuant to the AWSA]" must be used exclusively for water utilization alternatives enumerated in the bill. On the contrary, the AWSA clearly states that New Mexico can receive no more than \$66 million indexed for any non-diversion

alternative. Also, SB 89 dictates the outcome of the ISC's ongoing AWSA evaluation process by impermissibly attempting to allocate the money available to the state under the Act.

TECHNICAL ISSUES

The Attorney General's Office (AGO) noted, SB 89 may present separation of powers issues arising from the Supremacy Clause of the U. S. Constitution (Article VI, § 2) and the doctrine of federal preemption in its specification of a particular dollar amount and its restriction on ISC's discretion. The AGO reports, the Colorado River Basin Project Act, as amended by the AWSA at 43 USC § 1543(f)(D)(i) directs the Secretary of the Interior to make deposits into the New Mexico Unit Fund, totaling \$66,000,000, adjusted to reflect changes since January 1, 2004, in the construction cost indices applicable to the types of construction involved in construction of the New Mexico Unit as provided by section 212(i) of the Arizona Water Settlements Act. This is the total amount that may be used for the type of projects that would be classified as "nondiversion alternatives" to construction of a New Mexico unit. Thus, the federal legislation provides the means by which the dollar amount for such projects will be determined. The AGO also notes, New Mexico may not legislate a different amount, at least not an amount that may exceed the amount stated in the federal legislation. Regarding how the \$66,000,000 as adjusted may be spent, § 212(i) of the Arizona Water Settlements Act provides:

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.

(Italics added by the AGO). Thus, the relevant federal legislation mandates that the ISC is to determine how the funds are to be spent and that it shall do so in consultation with a specific group. According to the AGO, in the face of such specificity, there is no room for the legislature to direct the ISC regarding types of projects to be selected.

According to the Audubon New Mexico, Gila Conservation Coalition, and the Rio Grande Restoration, SB 89 does not conflict with the AWSA and therefore, does not violate the Supremacy Clause. From their perspective, the AWSA does not require New Mexico to accept the funding and leaves to the state's discretion how AWSA funds are spent. SB 89 establishes the policy of the state with respect to the expenditure of funds; an appropriate role for the state Legislature. Because federal law contemplates this decision by the State of New Mexico, there is no conflict with federal law. Further, SB 89 does not stand in the way of the Congressional objective of resolving water rights.

According to the OSE/ISC,

SB 89, which requires, in pertinent part, that "no less than eighty two million dollars (\$82,000,000) ...of the total amount distributed to the state pursuant to [the AWSA] shall be allocated to implement nondiversion alternatives to meet water supply demands in the southwest water planning of New Mexico..." is preempted by the AWSA and is therefore unconstitutional.

Additionally, the OSE/ISC notes the AWSA provides that the ISC consult with the Gila San Francisco Water Commission in the determination of funding priorities. SB 89 would prevent any meaningful and thorough consultation with the Gila San Francisco Water Commission.

OTHER SUBSTANTIVE ISSUES

The AGO notes, neither SB 89 nor the related federal legislation provides a definition of the term, nondiversion alternatives, although SB 89 provides examples of projects that would be classified as such.

According to a 2012 report commissioned by business coalition Protect the Flows, which includes more than 200 New Mexico owned businesses, the Colorado River and its tributaries support a \$26 billion river-related economy across six states, drawing revenue from more than 5 million adults who use the Colorado River system for recreational activities each year. From this, New Mexico enjoys \$1.2 billion in direct spending on river recreation and fills 17,000 jobs. Seemingly simple outdoor activities like picnicking, trail activities, wildlife watching, camping, fishing, water sports, bicycling, snow sports, and hunting are major economic drivers that pour millions of dollars into New Mexico's local businesses and state treasury. Southern New Mexico visitor spending is growing faster than in other parts of the state according to 2011 figures, with southwestern counties including Grant County generating from \$34 to \$61 million each.

According to the Audubon New Mexico, Gila Conservation Coalition, and the Rio Grande Restoration:

Contrary to ISC claims that a diversion would only skim flood flows and put water in the river during low flows, the majority of the water would come from lower flow pulses that carry nutrients over the river banks and that are critical to recharging groundwater, harming wildlife and their habitat. Furthermore, a diversion will permanently fragment aquatic habitat. There are far cheaper alternatives to reduce seasonal river drying than a costly diversion: OSE could perform its duties of monitoring and enforcing diversion rights and responsibilities; Freeport McMoRan (largest land holder in the Gila Valley) and other farmers could voluntarily lease a portion of their water for compensation to increase base flows; and irrigation infrastructure could be improved to increase reliability of diversions and leave some water in stream.

According to a recent analysis titled *Assessment of Water Use And Supply, Mimbres Basin, New Mexico*, depletions in the Mimbres Basin Aquifer that supplies Silver City and Deming have decreased significantly since the 1970's due to agricultural conservation and a decrease in irrigated acreage. However, the rate of groundwater level declines has been reduced, and in some areas partially recovered, largely due to reduction in overall basin pumping rates.

According to a recent analysis, depletions in the Mimbres Basin Aquifer that supplies Silver City and Deming stabilized between 2000 and 2008 due to agricultural conservation." And also states, "Additionally, local water plans demonstrate that with ongoing sustainable groundwater use and conservation the Mimbres Basin Aquifer contains enough water to supply Silver City, Deming and adjacent communities far into the future."

RELATIONSHIP

SB 89 is related to SB 90 in that both bills relate to provisions of the federal Colorado River Basin Project Act, as amended by the federal AWSA.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the OSE/ISC, the consequence of not enacting this bill is that:

1) New Mexico would continue thorough evaluation of all AWSA proposals, including those that propose a New Mexico Unit, in order to select one or more that best satisfy water and environmental needs, 2) it will preserve the possibility that New Mexico will be able to develop some or all of the additional annual average of 14,000 acre-feet of water provided to New Mexico in the 2004 AWSA, 3) New Mexico would not be precluded from selecting a New Mexico Unit, therefore preserving \$34,000,000 to \$62,000,000 of federal funding authorized by the 2004 AWSA, 4) the additional water would be utilized in New Mexico rather than in Arizona, and 5) New Mexico would avoid a potential legal challenge based upon the constitutionality of this bill.

QUESTIONS

If the State of New Mexico invests in non-diversion alternatives now, can we still use the water in the future if needed?

Has the ISC identified who the beneficiaries of the diversion project will be? Have any entities signed contracts for the water or agreed to assume financial responsibility for the non-federal remainder of construction costs for the diversion project?

Please explain differing estimates for the cost of non-diversion proposals? Please explain differing estimates for the cost of diversion proposals?

MTM/svb



United States Department of the Interior

BUREAU OF RECLAMATION
Lower Colorado Region
Phoenix Area Office
6150 West Thunderbird Road
Glendale, AZ 85306-4001

FEB 11 2014

IN REPLY REFER TO:
PXAO-7000
PRJ-28.00

Honorable Peter Wirth
New Mexico Senate
Santa Fe, NM 87501-1923

Dear Senator Wirth:

Thank you for your February 5, 2014, inquiry to Commissioner Connor regarding the amount of funding available under the Arizona Water Settlements Act (AWSA) for construction of a New Mexico Unit. Commissioner Connor has asked me to respond on his behalf due to the short response time requested.

You are correct that the AWSA provides New Mexico the potential for three separate funding components depending on whether or not New Mexico chooses to build the New Mexico Unit. A New Mexico Unit for this purpose consists of infrastructure diverting waters from the Gila River, its tributaries or underground water sources in New Mexico, in exchange for the delivery of Colorado River water to downstream Gila River users in Arizona.

The first funding component authorized in Section 107 of the AWSA consists of \$66 million to be paid in 10 equal annual amounts into the State of New Mexico's New Mexico Unit Fund beginning in 2012. This total amount is to be adjusted to reflect changes since January 1, 2004, in the construction cost indices applicable to the types of construction involved in construction of the New Mexico Unit. The difficulty of making 10 equal payments without a known project to index was overcome through discussions with the New Mexico Interstate Stream Commission and the Bureau of Reclamation where it was agreed that payments would be at \$9.04 million per year, but would be subject to further adjustments when a project was identified or not. You are correct that these funds can be used for 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.

The second funding component consists of \$34 million and is only available if New Mexico chooses to build a New Mexico Unit, which also is subject to indexing for the type of construction involved. In this case, the funds would be paid as needed for construction and indexed based on the construction project selected.

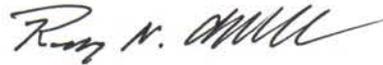
The third and final funding component authorized in Section 212 of the AWSA provides the potential opportunity for an additional amount up to \$28 million if New Mexico chooses to build a New Mexico Unit, which again is subject to indexing. This potential funding component is tied to return investments of the Lower Colorado River Basin Development Fund (Development Fund).

The investment return on the Development Fund must average over 4 percent between December 10, 2004, and date of start of construction of a New Mexico Unit. You are correct that to date, the earnings in the Development Fund have been far less than 4 percent annually. At this point in time, it is highly unlikely that any of these funds would be available unless a dramatic and sustained turnaround in interest rates occurs.

In summary, Reclamation has made 3 of the 10 required payments for a total of just over \$27 million. We plan to continue making these payments as required under the AWSA through 2021. The total amount will most likely be in the \$90 million range. The additional \$34 million indexed would be made available if and when actually needed for construction purposes. Any additional funds are unlikely at this time, but will be evaluated under the criteria of the AWSA prior to the beginning of construction.

We hope this information is helpful in clarifying the funding requirements language of the AWSA with respect to New Mexico. If you have any additional questions or concerns, please contact me at 623-773-6215.

Sincerely,

A handwritten signature in black ink, appearing to read "Randy N. Chandler". The signature is fluid and cursive, with a long horizontal stroke at the end.

Randy N. Chandler
Area Manager

FINAL TIER 2 PROJECTS

Approved by NMISC February 2012 (In assessment phase 2012 – 2014)

Project Category	Project / Volume water produced/stored	Project Proponent / Cost
Non-Diversion \$66 million (2004\$)(\$90 million 2013\$) available in non-reimbursable AWSA funds		
Municipal Conservation	Municipal Conservation 4,269 acre-feet/year	Gila Conservation Coalition (GCC) \$7,742,000
	Deming Conservation Fund 3,900 – 5,340 acre-feet/year	City of Deming \$1,400,000
	Water Harvesting 1,250 acre-feet/year	Stream Dynamics, Inc. \$15,775,000
Agricultural Conservation	Pleasanton Ditch Improvements 1,480 – 1,670 acre-feet/year	Pleasanton East-side Ditch Company \$900,000
	Luna Ditch Improvements 419 acre-feet/year	Luna Irrigation Ditch Association \$1,363,000
	Sunset and New Model Ditch Improvements 2,950 acre-feet/year	Sunset/New Model Canals \$18,000,000
Effluent Reuse	Deming Effluent Reuse 820 acre-feet/year	City of Deming \$4,484,000
	Bayard Effluent Reuse	City of Bayard withdrawn
Sustainable Groundwater Use	Grant County Regional Water Supply 943 acre-feet/year	Grant County Water Commission \$15,000,000
Watershed Restoration	Catron County Watershed Improvement As amended – 4,000 acre-feet/year	Catron County \$12,090,000
	NMSU Watershed Improvement 21 acre-feet/year	New Mexico State University \$2,170,000
	GSWCD Watershed Project 8,600 acre-feet/year	Grant Soil and Water Conservation District \$1,210,000
	New Mexico Forest Industries Association Watershed Improvement 173 acre-feet/year	New Mexico Forest Industries Association \$2,270,000
Total Costs	Non-diversion Alternatives	\$82,404,000
Diversion - Additional \$34 - \$62 million (2004\$) (\$46 - \$83 million 2013\$) available to construct project. Note: \$62 million unlikely to be available given insufficient interest earnings by Lower Colorado Basin Development Fund.		
	GBIC Diversion and Storage 2,600 acre-feet/year	Gila Basin Irrigation Commission \$10,233,000
	Deming Diversion Project 14,000 acre-feet/year As amended 10,000 acre-feet/year	City of Deming \$323,000,000 \$190,000,000
	Hidalgo County Diversion and Storage 14,000 acre-feet/year As amended additional 1,000 acre-feet/year storage	Hidalgo County \$115,000,000 \$115M + ?
	Grant County Reservoir 500 acre-feet/year storage	Grant County \$10,700,000

**Arizona Water Settlements Act
Stakeholder Proposals
Provided by Interstate Stream Commission**

Project Category	Proponent and Project	Water Produced/Stored Per Year	Initial Cost Estimate
Diversion/ Storage	Hidalgo County, Gila Basin Irrigation Commission, and City of Deming. Proponents asked to combine their three proposals into a single diversion/storage project to develop the AWSA water.	10,000 acre-feet to 14,000 acre-feet ¹	First phase: \$210 M ² Complete project: \$330M to \$400M ²
Effluent reuse/diversion/ storage	Grant County Recharge and Reservoir. Would pipe Gila River water via proposed Southwest New Mexico Regional Water Supply pipeline (the integrated diversion and storage proposal) to a recreational reservoir near Silver City	3,000 acre-feet ¹	\$18M ²
Effluent reuse	Grant County Water Commission Infrastructure and Reuse. Would pump Mimbres Basin groundwater from a new well field to four communities via 16-mile pipeline. Pumping proposed to be offset by an effluent return-flow credit.	200 to 980 acre-feet ⁴	\$30M ³ \$18M ²
	Deming Wastewater Reuse	462 acre-feet ¹	\$4.5M ²
Municipal Conservation	Gila Conservation Coalition	Pilot project ongoing to estimate water savings	\$12M ³
Ditch Improvement	Luna Ditch	419 acre-feet ³	\$1.3M ²
	Pleasanton Ditch	1,600 acre-feet ³ 70 acre-feet ²	\$2.2M ²
	Sunset/New Model Ditches	0 acre-feet ⁵ 2,040 acre-feet ³	\$13 - \$15M ²
	10 Catron County Ditches (Included with the Catron watershed proposal)	2,000 to 3,000 acre-feet ³	\$10M ³
Watershed Restoration	NMSU. Paired basin water salvage study.	296 acre-feet ³	\$2.2M ³
	Catron County. Reseeding and tree thinning.	Unknown at this time	\$7M ³
	New Mexico Forest Industries. Paired basin water salvage study.	121 acre-feet ³	\$2.3M ³
	Grant SWCD. Paired basin water salvage study.	42 acre-feet ³	\$12M ³
	Gila National Forest. Tree thinning.	Unknown at this time	\$8.4M ³

- 1 — Based on latest engineering evaluations.
- 2 — Staff estimate based on latest studies.
- 3 — Proponent's estimate.
- 4 — Actual amount will depend on final permit.
- 5 — Saved water would flow to Arizona.