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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/9/16

SPONSOR Morales LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Fund Grant County Water Supply From NM Unit SB 248

ANALYST Armstrong

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
	(\$13,000.0)	Nonrecurring	NM Unit Fund
	\$13,000.0	Nonrecurring	Grant County Regional Water Supply Project

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office

Office of the State Engineer

### SUMMARY

#### Synopsis of Bill

Senate Bill 248 mandates that the New Mexico Interstate Stream Commission (ISC) allocate \$13 million from the New Mexico Unit Fund to the Grant County regional water supply project to meet water supply demands in Silver City and mining district communities in Grant County.

### FISCAL IMPLICATIONS

Senate Bill 248 effectively appropriates \$13 million from the New Mexico Unit Fund to implement the Grant County regional water supply project to meet water supply demands in Silver City and mining district communities in Grant County.

In accordance with the federal law, ISC designated the New Mexico Central Arizona Project Entity, representing 13 political subdivisions, to negotiate and finalize the New Mexico unit agreement with BOR. Estimates on the cost of the project range up to \$1 billion. With the state not committed to funding the project and the federal funds insufficient to cover this cost, BOR

required the CAP Entity to agree to secure funding commitments for any excess costs before construction can start. With additional agreements still to be negotiated and required federal studies yet to begin, potential construction is years away.

On November 24, 2014, ISC voted to further study a diversion and storage project, also known as a New Mexico Unit of the Central Arizona Project (CAP) and allocated federal funding from the New Mexico Unit Fund to a number of local non-diversion projects, including a water supply project proposed by Grant County. What federal funding ISC did not allocate to non-diversion projects it reserved for the possible construction of a New Mexico Unit of the CAP, which is currently under consideration by the New Mexico CAP Entity. SB 248 would take \$13 million away from the funds ISC reserved for a New Mexico Unit of the CAP.

## **SIGNIFICANT ISSUES**

Under the federal Arizona Water Rights Settlement Act (AWSA), enacted by Congress in 2004 to resolve water use disputes among Arizona, New Mexico, and Native American communities, New Mexico has the option to use \$66 million (in 2004 dollars) in federal funds to meet water supply demands in Catron, Luna, Hidalgo, and Grant counties. The law also 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 federal Department of the Interior approved moving forward with feasibility studies in November 2015. While New Mexico is eligible to receive between \$34 million and \$62 million in additional funding for a diversion project, BOR has expressed uncertainty about the full availability of this funding.

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).

SB248 presents separation of powers problems. The bill may be read as an attempt to exert legislative control over the New Mexico CAP Entity. In particular, SB248, could be interpreted as an attempt by the Legislature to displace the Entity by dictating a decision on a regional water supply project, thereby potentially depriving the Entity of both its discretion over an ultimate project and the federal funding required for a project selected by the Entity. Consequently, a court could find that SB248 violates the separation of powers doctrine of the New Mexico Constitution.

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 New Mexico 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. In FY15, the ISC expended \$400 thousand from the fund for agency operations related to the AWSA and \$1.3 million for contracts to study potential projects. For FY16, the agency’s operating budget includes \$425 thousand from the fund and the House Appropriations and Finance Committee Substitute for House Bills 2 and 4 includes the same amount for FY17. The fund’s current balance is approximately \$40 million.

## **OTHER SUBSTANTIVE ISSUES**

Under the New Mexico Central Arizona Project Entity’s Joint Powers Agreement (JPA), the Entity is to submit a budget for the “current fiscal year” when the agreement is executed by the parties and DFA. The entity was not formed until after ISC’s FY17 budget request was submitted, and ISC staff plan to request a budget adjustment during FY16 for the Entity’s FY16 budget after the 2016 legislative session and for the entity’s FY17 budget during FY17. Uncertainties about the Entity’s structure and activities and the timing of the entity’s formation not aligning with the state budget request and appropriation cycle makes requesting use of the New Mexico Unit Fund for the Entity’s budget as part of ISC’s budget difficult for FY16 and FY17.

However, the JPA should be improved for FY18 and subsequent fiscal years. The JPA calls for the entity to submit a budget request for the subsequent fiscal year to ISC by May 1, just two months before the fiscal year begins and after any regular legislative session adjourns, preventing the Entity's operating costs from being included in ISC's budget request which is due 10 months before the fiscal year begins. To limit the use of budget adjustment requests and allow the Legislature to include appropriations from the New Mexico Unit Fund to ISC in future appropriations acts to support the Entity's budget the JPA should be revised to require an earlier budget submission by the Entity for FY18 and subsequent fiscal years.

ISC analysis of the bill states:

Because SB 248 mandates that \$13,000,000 must be used exclusively for a project that will serve a few communities in Grant County, and will not serve any communities or needs in Catron, Luna, or Hidalgo Counties that comprise the remainder of the Southwest Planning Region, SB 248 neither comports with the federal law, nor supports a regional project designed to best meet the needs of citizens in Southwest New Mexico.

The funding mandates in the bill would make development of a regional New Mexico Unit capable of meeting regional demands significantly less likely. Consequently, SB 248 would obviate the proposals of region stakeholders to develop a New Mexico Unit of the CAP. Those proposals are supported by resolutions of support by eighteen of the region's nineteen local governments, including municipalities, counties, soil and water conservation districts, acequias, and irrigation districts. The bill would also invalidate the ISC and the New Mexico CAP Entity's decisions to date by attempting to otherwise allocate the money available to the state under the Act to a few local communities.

Finally, in 2014 the Grant County Water Commission submitted a proposal for funding of a local water project (a non-diversion and storage project). In February 2015, the ISC awarded Grant County \$2.1 million from the New Mexico Unit Fund for its proposal, but required that the County obtain matching funds (approximately \$15,000,000, or 50% of the original cost estimate) from other, non-New Mexico Unit funds. The ISC has already allocated \$9.1 million for non-diversion projects and required local matches for all projects funded from the New Mexico Unit Fund. If the "Grant County regional water supply project" contemplated under SB 248 is in fact the non-diversion project already partially funded by the ISC, the bill would fully fund it, without any local match, contrary to the ISC's February 2015 decision.

## **ALTERNATIVES**

The Legislature could decline to make appropriations from the New Mexico Unit Fund if the projects selected by ISC and the New Mexico CAP Entity are not aligned with legislative priorities.

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