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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/06/13

SPONSOR Gentry LAST UPDATED \_\_\_\_\_ HB 181

SHORT TITLE Lease Of Water Rights For Streamflow SB \_\_\_\_\_

ANALYST McCoy

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB19, SB188 and SB309.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

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

Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

House Bill 181 (HB181) proposes a new section of the Water-Use Leasing Act that would require the state engineer to approve a water lease under the following conditions: the lease of water rights is for the purpose of maintenance or augmentation of streamflow; the use maintains or enhances fish or wildlife resources and the owner agrees to the lease for that purpose; the application describes the location of use; the application describes how the applicant or applicant's designee will measure use or demonstrate the owner's forbearance of the amount of leased water; and the application describes how the use will maintain or enhance fish or wildlife resources. The applicant whose lease the state engineer will be required to approve will also be required to submit annual monitoring reports to the state engineer. The bill expressly exempts leases acquired for the Interstate Stream Commission's strategic water reserve and related leases from the requirements of the new legislation.

### FISCAL IMPLICATIONS

No Fiscal Impact.

## **SIGNIFICANT ISSUES**

The Office of the State Engineer/ Interstate Stream Commission (OSE/ISC) notes, HB181 should be considered within the context of the November 2012 state supreme court opinion in *Tri-State v. D’Antonio*, 2012-NMSC-039 and its affirmation that, “the general purpose of the water code’s grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process that maximizes interests of water rights applicants.” *Id.* at pgh, 34, citing *Lions Gate Water v. D’Antonio*, 2009-NMSC-057.

According to the Administrative Office of the Courts (AOC), HB181, and duplicate SB309, would clarify that dedicated instream flows for fish or wildlife habitat purposes constitute a cognizable beneficial use. Article XVI, Sec. 3 of the New Mexico Constitution states, “[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water.” State case law suggests that a physical diversion of water and distinct application to use, such as irrigation, are necessary to effectuate a beneficial use. “A diversion alone is not beneficial use. There must be an ultimate, actual beneficial use of the water resulting from the diversion.” *State ex rel. Martinez v. McDermott*, 120 N.M. 327, 331, 901 P.2d 745 (Ct. App. 1995). “We hold that man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes.” *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 493 P.2d 409 (S. Ct. 1972). However, Attorney General Opinion No. 98-01 examined whether the state engineer could recognize instream flows for recreational, fish or wildlife, or ecological purposes and concluded that “...there is nothing in the New Mexico constitution, statutes, or case law that would preclude the state engineer from approving an application to change the purpose of use of an existing water right to an instream purpose and conditioning that approval upon the installation of gauging devices to measure the instream flow beneficially used.”

The AOC also points out, the bill requires the lessee to bear the responsibility of either measuring the instream use or documenting the owner’s cessation of diversion, as well as submitting annual monitoring reports to the state engineer.

## **PERFORMANCE IMPLICATIONS**

The OSE/ISC notes, the state engineer may encounter more water lease applications if potential users come to believe that the approval process is a pathway to acquiring new water rights.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP:**

HB19 and SB188 also make changes to the Water-Use Leasing Act. HB181 is a duplicate of SB309.

## **TECHNICAL ISSUES**

The OSE/ISC notes, the bill requires that an applicant merely describe how the applicant measures forbearance in the owner’s use of water and describe how a lease will maintain or enhance fish or wildlife resources. In addition to the requirements currently listed in the bill, the OSE suggests additional requirements such as the application for the proposed lease be for the purpose of maintaining or augmenting streamflow as well as fish and wildlife resources, that the

application detail and document how the owner’s forbearance of the amount of leased water will be measured, that the applicant describe how the leased water will maintain or enhance fish or wildlife resources and that the applicant monitor use and report to the state engineer.

### **OTHER SUBSTANTIVE ISSUES**

According to the OSE/ISC, the state engineer has approved applications to change or transfer water rights for the purpose of use for fish or wildlife “habitat and maintenance” so the bill ought to be consistent with the state engineer’s previous decisions.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

The OSE/ISC points out, the current water-use leasing provisions of state law will remain, which currently do not prohibit the state engineer’s approval of applications for the lease of surface water for fish and wildlife habitat, maintenance, and/or restoration. Water rights owners seeking to lease their water rights for such uses can currently achieve such results by leasing such rights to the ISC for use in the strategic water reserve.

### **AMENDMENTS**

The OSE/ISC included the following amendments:

1. p.1, l. 24: after the word “of” insert “surface” and after the word “rights” insert “or groundwater rights hydro-logically connected to an intermittent or perennial stream and that will result in an accrual to and increase the flows of the stream within one year from the date pumping ceases”
2. p.2, l. 2: after the word “enhance” insert “or restore”
3. p.2, l.3: strike the word “resources” and insert in lieu thereof “habitat”
4. p.2, l.6: before the word “describes” insert “identifies by name the intermittent or perennial stream and specifically”
5. p.2, l. 13: after the word “to” insert “provide the technical hydrological basis in support of the application demonstrating that the amount of leased water rights is equal to their consumptive use or consumptive irrigation requirement and will increase stream flows by that amount within one year and to”
6. Insert new section providing that these provisions shall be in effect for a 5 year period to determine its effectiveness, so that it may be permanent, amended or allowed to sunset upon the expiration of the 5 year period.

MTM/bm