F I S C A L I M P A C T R E P O R T

SPONSOR: Stell DATE TYPED: 03/12/01 HB 834/aHAGC/a/aHJC

SHORT TITLE: Point of Diversion for Water Appropriations SB

ANALYST: Chabot

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
			See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION

Office of the State Engineer
Legislative Counsel Service

SUMMARY

Synopsis of the HJC Amendment

This amendment strikes the House Agriculture and Water Resources Committee (HAWRC) Amendment and substitutes a new section C. This is similar to the HAWRC amendment except that it specifies that the water used at the new point of diversion must be from the same source as the applicant's surface diversion.

Synopsis of the HAGC Amendment

This amendment replaces Subsection C of the bill and requires that SEO approve an application for a well permit equal in amount to an existing surface water right under three conditions:

1. The right has a priority date prior to 1907;
2. The natural flow of the stream and the underground water supply are hydrologically connected as demonstrated by the applicant; and
3. A public hearing is held.

Synopsis of Orginal Bill

HB 834 instructs the State Engineer to approve an application for a well permit as a change in the point of diversion of an existing surface consumptive water right, not to exceed three and one-half acre feet per acre of water rights, if the natural flow of the stream includes the underground supply of the well.

Significant Issues

This legislation may not be necessary. *Templeton v. Pecos Valley Artesian Conservancy District, 65 NM 59 (1958),* has spoken on this issue, "that drilling of such wells and use of water therefrom would not impair existing rights or be detrimental to the rights of others". However, according to the State Engineer, significant impact on downstream water rights and the Pecos river compact could occur.

According to the Office of the State Engineer, if the ground and surface water are not hydrologically interrelated at the new point of diversion, then the Legislature, through this enactment, will be allowing, in effect, new appropriations under the auspices of calling them changes in points of diversion.

Water rights could be determined by a persons ability to economically pump water, as water tables decrease due to upstream "mining" downstream water rights could only be exercised with pumps and wells.

Determination if the natural flow of a stream include the underground water supply could be a significant undertaking.

FISCAL IMPLICATIONS

HB 834 contains no appropriations. However, determining if the natural flow of a stream includes the underground water supply would require a hydrographic survey. If the survey does not exist, the Office of the State Engineer or the applicant would have to provide this documentation. HB 834 does not address this potentially significant expense.

The State Engineer approving application of well permits could decrease the number of lawsuits associated with denial of these applications.

ADMINISTRATIVE IMPLICATIONS

Water rights of downstream users could be affected. Upstream "mining" of water could affect the flow of the Pecos and the compact with Texas.

TECHNICAL ISSUES

According to the State Engineer, the term "central channel" is not defined and, to the knowledge of this agency, it is not a term of art having a specific meaning in the prior appropriation system of water rights administration.

According to the State Engineer, this finding sets forth an erroneous description of a "watershed" that includes hydrologically connected watershed and aquifer systems. The Legislature's finding is limited to the fluvial connections of water within the watershed and the alluvial aquifer. It ignores the true connection of any other aquifer that may be present in the watershed and whether it is truly

connected to the surface source. More simply stated, not all aquifers and streams interact as declared in this bill, even though they may be in proximity to one another. Not all aquifers are connected to streams as subsumed by the this declaration.

According to the State Engineer, the term "watershed" appears to have a different meaning than that commonly used by the State Engineer. This term ought to be defined so that the term is given the meaning intended by the legislature.

According to the State Engineer, there might be a less technical and more appropriate term available for use in lieu of "centripetal", which is defined as "directed or moving toward a center or axis".

OTHER SUBSTANTIVE ISSUES

According to the State Engineer, the legislative determination that all ground and surface water within a watershed is hydrologically connected makes scientific/engineering evidence to the contrary irrelevant. In making this determination, the Legislature ignores scientific evidence, and will be directing the Engineer to allow an appropriation from the Rio Grande below the city of Socorro to change his point of diversion to a well located within a stream or arroyo watercourse within the Rio Grande stream system, without regard to impairment of existing water rights.

According to the State Engineer, during the last 43 years the NM Supreme Court and Court of Appeals have reviewed, analyzed, and discussed, at length, the requirements that must be present for an appropriation to avail itself of the right to change a point of diversion from surface water to groundwater, which may be summarized as fundamentally requiring that the two sources must be hydrologically connected. *See Templeton v. Pecos Valley Artesian Conservancy District, 65 NM 59 (1958), State ex rel. Reynolds v. Allman, 78 NM 1 (1967), State ex rel. Reynolds v. Pecos Valley /Artesian Conservancy District, 99 NM 699 (1983), State ex rel. Martinez v. City of Roswell, 114 NM 581 (Ct. App. 1992), and , State ex rel. Martinez v. LT Lewis, 118 NM 446 (Ct. App. 1994).* Each of these cases arose from the Pecos River adjudication and each time the courts reviewed the factual requirements that must be present before an appropriation can go from surface to groundwater.

According to the State Engineer, there may be a constitutional problem because the Legislature directs the State Engineer to grant the application without regard for impairment to uses relying solely on the groundwater source below the appropriators' surface point of diversion.

POSSIBLE QUESTIONS

If the State is over allocated and everybody exercises their water rights by pumping water, what eventually happens?

PD/prr:sb:njw