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FISCAL IMPACT REPORT

SPONSOR: Gubbels DATE TYPED: 02/11/02 HB 421/aHAGC/aHGUAC/aHF1#1



REPORT TITLE: Pecos River Basin Water Bank SB _____

ANALYST: Chabot

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY02	FY03	FY02	FY03		
	NFI				

Duplicates SB 427 and is related to HB 140, HB 225, HB 267, HB 417, HB 418, SB 271, SB 291, SB 341, SB 343, SB 393 which all pertain to Pecos River water issues.

SOURCES OF INFORMATION

LFC Files
 New Mexico Acequia Association (NMAA)
 New Mexico Environment Department (NMED)
 Office of the State Engineer (OSE)

SUMMARY

Synopsis of HF1#1 Amendment

Amends Section 1.B. to read: The interstate stream commission shall propose and recommend to the state engineer for adoption rules for recognition of a water bank that include:

The State Engineer has the authority to regulate water banks, not the Interstate Stream Commission.

Synopsis of HGUAC Amendment

1. Amends the title to read: AN ACT RELATING TO WATER; PROVIDING FOR A PECOS RIVER BASIN WATER BANK TO FACILITATE COMPLIANCE WITH THE INTERSTATE COMPACT; PROVIDING FOR ACEQUIA AND COMMUNITY DITCH WATER BANKS.

2. Amends the title of Section 1 to read: (NEW MATERIAL) PECOS RIVER BASIN WATER BANK--ACEQUIA AND COMMUNITY DITCH WATER BANKS--INTERSTATE STREAM COMMISSION.--

3. Amends Section 1.B.(5) to read: procedures for the water bank to temporarily transfer deposited water to new purposes and places of use and points of diversion without formal proceedings before the state engineer.

This amendment allows the bank to temporarily transfer to new uses and different points of diversion without the State Engineer needing to process a permit application. The water would need to be used with the same stream system or underground water source.

4. Adds new paragraph 1.C. that provides acequias and community ditches the authority to establish water banks and allowing temporary changes in use and points of diversion without formal proceedings before the State Engineer. These temporary changes shall not be subject to loss of the water right for non-use for the period the water rights are in the water bank. Acequia and community ditches water banks are not subject to recognition or approval by the Interstate Stream Commission or State Engineer and are not subject to any rules pertaining to the Lower Pecos River Basin below Sumner Lake Water Banks.

This amendment authorizes acequias and community ditches to create water banks and operate them by their own rules and regulations without approval or oversight by the Interstate Stream Commission or State Engineer. The State Engineer would not support the limits imposed on the authority to regulate water. The New Mexico Acequia Association would support the amendment because it allows the governing body of acequias and community ditches to control their own water bank.

5. Reletters the succeeding subsections.

6. Amends 72-5-28H. to read: Water deposited in a Pecos river basin water bank approved by the interstate stream commission or an acequia or community ditch water bank shall not be computed as part of the four-year forfeiture period.

This amendment implements the new paragraph Section 1.C. including acequias and community ditches from forfeiture provisions for non-use while a water right is deposited in the water bank.

7. Amends 72-12-8I. to read the same as 72-5-28H.

Synopsis of HAGC Amendment

All references to the “Pecos River Basin” are changed to the “lower Pecos river basin below Sumner lake”. This limits the applicability of the proposed statute to the Pecos river below Sumner lake to the state line.

On page 2, lines 5 and 6 were deleted which removes the authority of the Interstate Stream Commission to establish procedures and criteria for pricing water transactions and fees of the water bank.

Added is a provision to terminate all authorities provided by the proposed statute on December 31, 2005.

Synopsis of Original Bill

House Bill 421 enacts new statutes authorizing the irrigation districts, conservancy districts, artesian conservancy districts, community ditches, acequias and water user's associations in the Pecos River Basin to establish a water bank. The water bank is to be established under rules adopted by the Interstate Stream Commission (ISC) to include the following:

1. criteria, terms and conditions for deposit of a water right in the bank;
2. terms and conditions for the accrual, pooling, exchange, assignment and conditions of the deposit of a water right;
3. procedures and criteria for pricing water transactions and fees of the bank;
4. procedures for recording and annual reporting of all transactions to the ISC and OSE;
5. procedures for temporarily transferring deposited water to new places of use without a formal hearing before OSE.

The operation of the water bank shall:

1. not impair other water rights;
2. not deplete water greater than would have occurred without a water bank transaction;
3. comply with state law;
4. be within the same stream system or underground source.

Water deposited in the Pecos River Basin Water Bank shall not be subject to forfeiture of the water right for not being put to beneficial use under the Water Right Forfeiture Statute.

Significant Issues

The state is obligated to meet compact water delivery requirements to Texas and is under a United States Supreme Court (USSC) decree to do so since 1988. The state has been able to meet these requirements; however, it has been barely able to do. The USSC River Master will issue an accounting by May 2002 for calendar year 2001. The state expects that they will meet the requirement but will have used all reserves in doing so. OSE states that water depletions in the Pecos river basin must be reduced or water flow increased in order to meet the compact requirements. If the state defaults in its compact delivery requirements, OSE will be obligated to manage the river through priority administration causing a major economic impact on southeastern New Mexico. A 1993 study estimated that impact to be approximately \$236 million. A more in-depth discussion of Pecos River Compact issues is found at attachment 1.

Water banking is one of the proposals to reduce water use by allowing water rights holders to deposit the water in a bank for a period of time during which the right would not be subject to forfeiture for non-use. The water bank will also be used to transfer use from one location to another most likely through a leasing agreement. OSE states "Water banks are an efficient mechanism for providing transfers of wet water on a short-term basis but must be adequately regulated to avoid ... increases in overall depletions and impairment of other water rights."

Dr. F. Lee Brown, UNM Professor Emeritus, under contract to ISC reported that water banking would “mitigate economic injury in the event of priority administration” and would “maintain sufficient basin-wide physical reserves and compact credits to permanently meet compact delivery obligations without disruption.” Water banking should be considered as part of a total solution to reducing water use in the Pecos River from below Fort Sumner to the state line so that the state can meet its interstate compact delivery requirements to Texas.

NMAA is concerned that water banking will lead to the break up of acequia districts because the commissioners and/or mayordomo of the acequias would not have any say in the actions of individual members of the acequia that decide to participate in the water bank. They fear this would weaken the historic structure and strength of community found in acequia districts.

FISCAL IMPLICATIONS

This bill does not include an appropriation but there will be costs both for OSE and to the water users of the Pecos River in establishing a water bank.

ADMINISTRATIVE IMPLICATIONS

Operation of the water bank will incur administrative costs and require FTEs that are not provided in the bill. OSE would have to determine these costs and decide whether they should be charged to the water bank or requested as an operating budget increase. Because of the critical situation on the Pecos, OSE plans to prepare rules and regulations with his existing staff; however, personnel will be taken from to essential tasks to administer water banking.

TECHNICAL ISSUES

OSE states that water banking is the responsibility of the State Engineer and not ISC. They propose the following changes:

Page 1, line 17, strike “interstate stream commission” and insert in its place “state engineer”.

Page 1, line 17, strike “interstate stream commission” and insert in its place “state engineer”.

For clarification purposes, recommend that Sections 72-5-28.H. and 72-12-8.I. be rewritten as follows:

“Water deposited in a Pecos river basin water bank approved by the state engineer is not subject to water right forfeiture for non-use.”

POSSIBLE QUESTIONS

1. Do you anticipate that there will be enough interested parties to make the water bank worthwhile ?
2. How long will it take to develop administrative rules and regulations for the operation of the water bank ? Will these be accomplished in sufficient time to be of benefit in calendar year 2002 ?

3. How will you resolve the concerns of the New Mexico Acequia Association ?

Attachment

Pecos River Compact

GAC/njw

Pecos River Compact. The Pecos River compact was created in 1948 between New Mexico and Texas and approved by Congress in 1949. As such, it has the status of federal law and state law in each of the states. It cannot be changed without the consent of Congress. The ISC is responsible for all New Mexico actions under the compact which requires that New Mexico “not deplete by man’s activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give Texas a quantity of water equivalent to that available to Texas under the 1947 condition.” The compact does not contain an explicit water delivery amount and it is calculated by the river master using a complicated formula. New Mexico’s annual delivery obligations are approximately one-half of Sumner Dam releases and approximately one-half of flood inflows from Sumner Dam to the state line.

In 1956, adjudication of the Pecos River stream system began with the filing of State of New Mexico ex re. State Engineer v. Lewis. The objective at that time was to adjudicate all groundwater rights in the Roswell Artesian Basin. Over time, the adjudication was expanded to include the Hondo Basin, Carlsbad Irrigation District, Carlsbad Underground Basin, Black River and Gallinas Basin. By 1976, the adjudication encompassed the entire Pecos River stream system. The adjudication is still on-going and SEO estimates that it could take up to 20 years or more to complete. Adjudications would legally determine application date, ownership, point of use and amount of water that can be put to beneficial use.

In 1974, Texas sued New Mexico in the United States Supreme Court (USSC) for under-deliveries of water required by the compact. The USSC has exclusive authority under the United States Constitution for resolving conflicts between states. The issue was over the interpretation of the “1947 condition.” In 1988, USSC found that New Mexico had under-delivered annually an average of 10,000 acre-feet for the previous 34 years. As a result, USSC ordered New Mexico to pay to Texas \$14 million for economic loss caused by the under-deliveries. In addition, New Mexico was ordered to meet its future water delivery obligations using a water accounting system proposed by Texas. Deliveries to Texas are to be considered the senior water right on the river. New Mexico can accumulate delivery credits but cannot maintain a deficit delivery position.

As a result of the USSC decree, the Legislature approved and began funding a program to acquire and retire enough water rights to increase the state line flow by 15,000 acre-feet per year at an estimated cost of \$60 million. Funding was primarily from the Irrigation Works Construction Fund and Severance Tax Bonds. In addition, water rights were leased, primarily from the Carlsbad Irrigation District (CID), to increase state line flows. To date, approximately \$30 million has been expended. These efforts resulted in reversing the deficit position as depicted in the chart below taken from a report to the Legislative Council Service by John E. Thorson.

Accumulated Shortfall or Overage As of June 25, 2001		
Pecos River Compact		
Water Year Jan 1-Dec 31	Annual Overage or Shortfall (acre-feet)	Accumulated Overage or Shortfall (acre-feet)
1987	15,400	15,400
1988	23,600	39,000
1989	2,700	41,700
1990	(14,100)	27,600
1991	(16,500)	11,100
1992	10,900	22,000
1993	6,600	28,600
1994	5,900	34,500
1995	(14,100)	20,400
1996	(6,700)	13,700
1997	6,100	19,800
1998	1,700	21,500
1999	1,400	22,900
2000	(12,300)	10,600

However, last year, New Mexico under-delivered to Texas and the accumulated credit was reduced to approximately 10,600 acre-feet. In testimony before the interim legislative Water and Natural Resource Committee, the director of the ISC stated that the deficit in CY2001 would be approximately 3,000 acre-feet unless there is a large rainfall in the Carlsbad area before the end of the year. He estimated that 9,000 additional acre-feet would be needed to avoid the deficit because the annual calculation is based upon a three-year average. To restore a reasonable credit, ISC is attempting to increase flows by 15,000 acre-feet which is three percent of the uses along the river.

To forestall a deficit, ISC has commissioned an ad hoc Pecos River Basin Committee to investigate voluntary measures to reduce use and increase river flows. The committee consists of members representing critical interests of the river system. There are 16 members on the committee, two are SEO employees. The members have agreed that a consensus plan must include sufficient elements of priority administration and beneficial use limitation such that state funding will not be required continuously to buy the water necessary for compliance. SE has advised the ad hoc committee that if it develops an acceptable plan to ensure deliveries to Texas, the plan will become the basis for the state response if a deficit occurs. SEO is developing a separate plan based upon prior appropriation if consensus is not reached by the ad hoc committee. The ad hoc committee will present its recommendations to ISC at the December 11, 2001 meeting.

If the deliveries go into a deficit for CY2001, the river master will issue a preliminary report by May 15, 2002 stating the cumulative delivery status. Both New Mexico and Texas have the opportunity to review and comment. A final report is due from the river master by July 1, 2002. If there is a deficit, New Mexico must submit a proposed plan by August 1, 2002 “for verifiable action” that will increase water deliveries to Texas. After Texas has had a chance to comment, the river master will issue an approved plan directing New Mexico’s actions to meet delivery requirements.