

use of the members. The request may only be denied if it would be detrimental to the acequia or community ditch. The commissioners must provide a written decision which may be appealed to the district court within 30 days. The court may set aside, reverse or remand the decision if it determines that the commissioners acted fraudulently, arbitrarily or capriciously, or not in accordance with law.

A new Section 73-3-4.1 NMSA 1978 is enacted to give acequia and community ditch commissioners the authority to approve or deny requests pursuant to rules or bylaws duly adopted by its members.

The effective date for provisions of the bill is March 1, 2004.

Significant Issues

OSE discusses six issues with the substitute bill:

1. "The substitute bill presents a public policy choice which, if taken, could limit transfers of water rights (i.e., changes in point of diversion or place or purpose of use of a water right), and correspondingly the bill could limit the availability of water rights for acquisition on the open market in voluntary transactions between willing buyers and sellers. The economic development impacts of such limits, while merely speculative, have the potential to be significant, as they will affect the availability of surface water rights needed for new economic enterprises or to replace the ever-increasing effects on stream flows attributable to groundwater diversions. For example, within the Rio Grande Underground Water Basin groundwater management has been predicated on the transfer of surface water rights to "keep the river whole," and the task of doing so will be directly impacted if surface water rights become ever more scarce.
2. The substitute bill removes the ambiguity in the earlier version of the bill as to how a ditch could impose a requirement that the ditch's commissioners must approve any proposed water right transfer. The substitute bill provides that such a requirement may be imposed by a ditch pursuant to rules or bylaws duly adopted by the members of the ditch.
3. The substitute bill now provides for judicial review of a determination by a ditch's commissioners that a proposed water right transfer should be denied. The substitute bill allows either a water right owner proposing a transfer or a member of the ditch to challenge the decision of the ditch's commissioners regarding the proposed transfer by appealing that decision to district court.
4. The substitute bill now provides procedures for an applicant for a proposed water right transfer to communicate to the State Engineer the ditch's approval or denial of the proposed transfer.
5. The substitute bill clarifies the grounds on which a ditch's commissioners may deny a proposed water right transfer.
6. The substitute bill would insert into the State's water code an additional condition precedent that an applicant must fulfill prior to the State Engineer's evaluation of a proposed transfer of a surface water right. Under existing law, the State Engineer evaluates pro-

posed changes in point of diversion or place or purpose of use of a surface water right to determine whether the proposed changes a) can be made without detriment to existing water rights, b) are not contrary to conservation of water within the state, and c) are not detrimental to the public welfare of the state. NMSA 1978, §§72-5-23, 72-5-24 (1985). would allow ditches to require in addition that an applicant demonstrate that a proposed change will not be detrimental to the ditch or its members.

Although similar to the language of the existing statutory standards, this proposed new requirement is different. When compared to the “detriment to existing water rights” standard in the current law, this new requirement would allow the ditch to consider the concerns of a new entity, the ditch itself, including non-hydrologic concerns such as the financial and organizational viability of the ditch. Such concerns would not be considered in the analysis of hydrologic impairment to other existing water rights that is typically performed by the State Engineer. The concerns of the ditch and its members would be considered under current law in the State Engineer’s consideration of the potential impact on public welfare of a proposed water right transfer, but such specific and localized concerns would be a part of the overall public welfare analysis, which considers a host of other factors and evaluates the impact on the public welfare of the State as a whole, not just a specific entity or local community.

ADMINISTRATIVE IMPLICATIONS

The State Engineer would have to augment the review process for water right transfer applications to include a step to determine whether an applicant seeking to transfer a water right into or out of an acequia has complied with any applicable requirements imposed by the acequia for such a transfer.

TECHNICAL ISSUES

Section 1E exempts the section Indian Pueblos. To be consistent with other bills this session, it should be changed to read: “Indian Nation, Tribe or Pueblo.”

POSSIBLE QUESTIONS

1. Why should the effective date be March 1, 2004?

GAC/njw:yr