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FISCAL IMPACT REPORT

SPONSOR: Marquardt DATE TYPED: 02/17/03 HB 600

SHORT TITLE: Municipal Water Rights SB _____

ANALYST: Chabot

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Department of Game and Fish (DGF)
- Energy, Minerals and Natural Resources Department (EMNRD)
- New Mexico Environment Department (OSE)
- Office of the State Engineer (OSE)
- State Land Office (SLO)

SUMMARY

Synopsis of Bill

House Bill 600 amends Section 72-5-23 NMSA 1978 to include a change of water use to municipal use as provided in Section 72-5-24 NMSA 1978. That statute is amended to allow a municipality to change the place or purpose of use under five conditions:

1. The change in use is submitted to the State Engineer for a determination of whether the change will not impair existing water rights, be contrary to conservation or be detrimental to the public welfare;
2. Publish the request in the newspaper once a week for three consecutive weeks;
3. Protesters to the change in use have to file a protest within 10 days following the last advertisement in the newspaper;
4. If the protester proves that the change in use impairs existing water rights, is contrary to conservation or detrimental to public welfare, the State Engineer shall modify the

- permit to address the objections; and
5. The municipality shall comply with the conditions of the permit before it puts the water to beneficial use.

Section 72-12-7 NMSA 1978 is amended to allow a municipality to change the location and purpose of use by meeting the requirements of the amended Section 72-5-24 NMSA 1978.

A new section of Chapter 72 NMSA is proposed that allows municipalities, within or without their boundary to acquire, contract or condemn additional sources of water from springs, wells, water rights, other water supplies and/or right of ways. They may also change the place of diversion and acquire water rights from persons with vested water rights or through condemnation at full compensation or satisfaction for all damages.

Significant Issues

This is a very significant change to water priorities; it allows municipalities to acquire water for their use and if there are no willing sellers, obtain the rights through condemnation. Currently, the only method of obtaining the water rights is through transfer of ownership authorized by the State Engineer.

OSE states the bill requires the State Engineer to review a municipality's permit request only if he intends to approve it. This bill does not address or provide a review process if the application is denied. As drafted, this bill would assure State Engineer approval of every application for the transfer of water rights to a municipality without either an opportunity for an administrative hearing or judicial review.

NMED is concerned that the proposed Section 4.B page 7, line 2 could be interpreted to allow dewatering of an entire system causing concern for water quality and associated habitat.

EMNRD is concerned that the proposed statute will shift the adjudicatory process of water right transfers in favor of municipalities. This could impact state parks by jeopardizing their water supply. The agency states this statute will interfere with the adjudication process and cause re-adjudications by giving municipalities undue preference.

SLO states some municipal wells are located on substantial water resources on and under state trust lands, and this proposed statute may affect SLO in the development and administration of these lands.

ADMINISTRATIVE IMPLICATIONS

OSE states the proposed statute provides for publication after the State Engineer has approved the permit; however, it is not clear whether the application or the permit needs to be published.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

There is a possible constitutional conflict with Article XVI, Section 2 that provides for priority administration of water rights.

TECHNICAL ISSUES

OSE states the proposed Section 4 is unnecessary as it is virtual identical to Section 3-27-2 NMSA 1978. Striking the section will prevent conflicting statutory interpretations.

EMNRD states “this bill amends not only the procedure for protests in connection with changes in place, purpose of use and point of diversion of surface rights contained in Chapter 72, Article 5, but also amends requirements in connection with ground water contained in Chapter 72, Article 12. The latter change is made by HB600 by adopting by reference for the ground water article the changes to be contained in the surface water article. Generally, adopting legislation by reference presents legal issues.”

SLO points out that this proposed statute conflicts with Section 3-18-10 NMSA 1978 which limit’s a municipality’s power of eminent domain to its municipal boundary or, at most, to its platting and planning jurisdiction.

OTHER SUBSTANTIVE ISSUES

OSE is concerned that objections can be made after the permit is issued and then OSE must amend the permit. This bill will likely create greater difficulties for the State Engineer as he tries to modify the approval to address numerous protests. Without a hearing or judicial review, the State Engineer’s required action are “likely to engender disregard for the application process.”

POSSIBLE QUESTION

1. Is there a constitutional conflict in requiring the State Engineer to approve an application without public notice or due process for any water right owner to protest the loss of the water right?

GAC/prr