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FISCAL IMPACT REPORT

ORIGINAL DATE 1-22-07

SPONSOR Stewart LAST UPDATED _____ HB 42

SHORT TITLE Gila Settlement Fund Disbursement SB _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
none	none		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY07	FY08	FY09		
		66,000.0*	Non-recurring	Federal Settlement

* If approved by the Congress the funds will distributed between four counties in Southwest New Mexico.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)
Office of the Attorney General (OAG)
Department of Finance and Administration (DFA)

SUMMARY

Synopsis of Bill

House Bill 42 – Gila Settlement Money to be Expended Pursuant to the Arizona Water Settlements Act – seeks to have the \$66,000,000 guaranteed to the state of New Mexico by the

federal government pursuant to the Gila Settlement under the Arizona Water Settlements Act be divided equally between the four counties of southwestern New Mexico, Grant, Luna, Hidalgo and Catron counties, and expended for any water supply demand as defined in the Gila Settlement in accordance with Section 212(i) of the Arizona Water Settlements Act.

FISCAL IMPLICATIONS

The Office of the State Engineer (OSE) indicates that no major fiscal implications are presented relating to state operating funds. The 2004 Arizona Water Settlements Act grants New Mexico up to \$128 million should New Mexico choose to develop the additional 14,000 acre-feet of Gila Basin water also apportioned to New Mexico in the 2004 Act. This act proposes to not develop all or part of the 14,000 acre-feet and limit New Mexico's maximum entitlement to only \$66 million of the \$128 million available to New Mexico.

By immediately dividing the original \$66 million between the four counties, New Mexico would effectively be abandoning any claim to either the additional \$62 million, or the additional 14,000 acre-feet of water.

The latest sale of Gila surface waters was for approximately \$10,000 per acre-foot. This bill would then result in a loss to the state of \$62 million in non-reimbursable federal funding plus an additional water supply worth approximately \$140 million, or a total of approximately \$200 million. The value of the water to local communities in southwest New Mexico would multiply by a factor of at least two, meaning a total loss to the state of at least \$340 million in funding and economic value, and perhaps up to \$500 million, depending on the economic benefits realized through development of the water.

SIGNIFICANT ISSUES

As background, the Office of the Attorney General (AGO) notes that the Arizona Water Settlements Act was enacted by Congress on November 17, 2004 as P.L. 108-451 and signed by President Bush on December 10, 2004. According to the New Mexico Interstate Stream Commission (ISC), the Act provides up to 14,000 acre feet of water to New Mexico and between \$66m and \$128m in federal funding to this state.

The Act settles major Indian water rights issues in Arizona. However, it also contains provisions which impact New Mexico and which have been referred to as the "Gila Settlement". Those provisions ended years of dispute between Arizona and New Mexico regarding Gila River water. The provisions include:

1. Sections 107 and 212 of Title II of the act provide funding to New Mexico beginning in 2012 and totaling \$66 million in ten annual deposits to the "New Mexico Unit Fund" which is administered by the New Mexico Interstate Stream Commission. Expenditures must be made with the approval of the ISC and the Southwest New Mexico Water Planning Group, which represents local governments. Expenditures must meet a water supply demand.
2. Congress also ratified the "Consumptive Use and Forbearance Agreement" which allows New Mexico to develop an additional average 14,000 acre-feet of Gila Basin water without objection from Arizona.

3. Provides for an agreement between New Mexico water users and the Secretary of the Interior, approved by the ISC, for the use of the additional water.
4. If New Mexico does not develop that additional water, it will be allocated to Arizona.

AGO additionally notes that, although not directed at the ISC, the bill attempts to direct that agency with regard to expenditures of funds provided New Mexico under the federal Act. Further, the AGO raises a number discussion points that, although, bearing a restrictive caveat, are included below in their entirety:¹

“This bill may be an attempt to restrict the use of those federal funds, which may not be in accordance with the terms of the Act or the procedures for their expenditure implemented by the Interstate Stream Commission. Further, there is no “guarantee” that those funds will be received by New Mexico. Certain conditions regarding the development of Gila River Water must be met and approved by the ISC and Planning Group. It is possible that additional agreements between the Secretary of Interior and local water users must also be signed before the funds may be disbursed to New Mexico. The New Mexico State Engineer should clarify this point.

“The bill also attempts to restrict expenditures by county governments of federal funds they might receive. Normally the Local Government Division of the Department of Finance and Administration has authority over county budgets and expenditures. However, that agency is not mentioned in the bill.

“Further, the bill does not specifically mention the ISC or the Planning Group. It is unclear whether the bill is an attempt to prohibit those agencies from expending the anticipated federal funds for other purposes.

“Further, the bill might be construed as an attempt by the State Legislature to appropriate federal funds, which has been prohibited by the New Mexico Supreme Court’s holding in *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359 (1974). The Court stated: *As to the authority of the Legislature to appropriate non-state funds available to the institutions of higher learning, we are of the opinion that the Legislature lacks authority to appropriate these funds or to control the use thereof through the power of appropriation.*

“After the holding in that case, the Executive Branch has been responsible for spending and accounting for federal funds granted New Mexico, unless the federal act appropriating those funds specifically requires state legislative appropriation.”

OSE notes that, following state statutes, the 2004 Arizona Water Settlements Act identified the New Mexico Interstate Stream Commission (ISC), in consultation with the Southwest Water Planning Group, as the entity who must administer and disburse any funds under the Act. The act also requires that no funds may be spent except to meet a “water supply demand.” From the OSE perspective, it then appears that this bill would prevent the ISC from ensuring that all expenditures comply with the directives in the federal law, and would place at risk the 14,000

¹ The caveat: “This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion letter. This is a staff analysis in response to the agency’s, committee’s or legislator’s request.”

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acre-feet of additional water and the entire \$128 million of funding, including the \$66 million mentioned in HB 42.

OSE further observes that should New Mexico decline or forfeit its benefits under the 2004 Act, the state of Arizona will receive these moneys and the water. It should be expected that Arizona would argue that under this bill New Mexico has not complied with the Act and thus forfeited both the money and water.

OSE advises that to meet its federal and state statutory responsibilities, the ISC and the Office of the Governor have begun a comprehensive study of environmental, economic, and technical issues surrounding the benefits received in the 2004 Act. Until these studies are complete, it is not possible for the ISC to ensure that any funds disbursed will meet a water supply demand as required by the Act. Nor is it possible that the citizens, elected officials, or other interests in the region will have the information they need to make an informed, considered decision.

In addition to ISC certification that all disbursements under the Act meet a water supply demand, the Act requires full federal environmental assessments of any activities or projects. This bill would not meet that requirement and the Secretary of the Interior could not permit use of any water or funds. The water and funds would then be available for use by Arizona.

OSE concludes that though the split proposed in HB02 may be the final decision, such a supposition at this time is clearly premature and will place the enormous benefits received by New Mexico in the 2004 Arizona Water Settlements Act at great risk.

TECHNICAL ISSUES

AGO indicates that the bill does not direct its mandate to any specific state agency. This flaw could result in the provisions of the bill not being implemented.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

OSE suggests that this bill will conflict with the Gila Planning Bill proposed by the Interim Water and Natural Resources Committee.

BW/mt