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FISCAL IMPACT REPORT

ORIGINAL DATE 2-8-07
 SPONSOR Ezzell LAST UPDATED 3-11-07 HB 812/aHVEC
 SHORT TITLE Artesian Conservancy District Water Transfers SB _____
 ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

No Responses Received From (on HVEC Amendment)

Office of the State Engineer (OSE)

Attorney General's Office (OAG)

SUMMARY

Synopsis of HVEC Amendment

House Voters and Elections amendment to House Bill 812 reflects the following language:

1. On page 1, line 14, strike "A CHANGE" and insert in lieu thereof "CERTAIN CHANGES".
2. On page 1, line 23, strike "change, including an emergency change" and insert in lieu thereof "permanent change, or a temporary change in duration of five years or longer".
3. On page 2, line 8, after "the" strike the remainder of the line, strike lines 9 and 10 in their entirety and insert in lieu thereof "district's approval of the change.".
4. On page 2, lines 11 through 14, strike Subsection C in its entirety.

¹ This amendment was received 3-11-07, and agency comments were solicited this same date.

5. Reletter the succeeding subsections accordingly.
6. On page 2, line 17, after "approval" insert "submitted" and strike the second occurrence of "an" and insert in lieu thereof "the".
7. On page 2, line 19, after "the" strike the remainder of the line, strike line 20 in its entirety and insert in lieu thereof "applicant shall submit with the application to the state engineer a statement of compliance".
8. On page 2, line 21, strike "any" and insert in lieu thereof "the".
9. On page 2, between lines 21 and 22, insert the following new subsection:

"D. If an artesian conservancy district has not adopted an applicable requirement, the applicant shall submit to the state engineer along with the application a statement to this effect."
10. Reletter the succeeding subsection accordingly.
11. On page 3, line 6, strike "change" and insert in lieu thereof "permanent change, or a temporary change in duration of five years or longer,".
12. On page 4, between lines 5 and 6, insert the following new subsection:

"C. This section shall not affect the right of a district to protest any application for a change in point of diversion or place of use not governed by this section."
13. Reletter the succeeding subsection accordingly.

House Voters and Elections amendment to House Bill 812 carries no appropriation.

Is noted that agency comments have been solicited from both the Office of the State Engineer and the Attorney General's Office; however, as this amendment was received 3-11-07, and although the agency comments were solicited this same date, the responses have not yet been received.

Synopsis of Original Bill

House Bill 812 seeks to enact a new section of Chapter 72, Article 12 NMSA 1978 to read "ARTESIAN CONSERVANCY DISTRICTS—CHANGES IN POINT OF DIVERSION OR PLACE OF USE." The act provides additional duties for directors of artesian conservancy districts regarding inter-basin transfers; providing for compliance with an artesian conservancy district requirement for a change in point of diversion or place or purpose of use of a water right.

The act states that the state engineer shall not approve an application for a change in point of diversion or place of use of a ground water right from within an artesian conservancy district organized pursuant to Chapter 73, Article 1 NMSA 1978 to a point of diversion or place of use outside the boundaries of the district, including an emergency change, if an applicant has not complied with applicable requirements adopted by the district. An applicant shall submit documentation from the artesian conservancy district that the applicant has complied with

applicable requirements for the change adopted by the artesian conservancy district pursuant to law. If the artesian conservancy district has not adopted an applicable requirement, the applicant shall provide an affidavit from the district stating this fact. The artesian conservancy district has one hundred twenty days to make a decision in response to an applicant's request and if the district fails to make a decision in that time frame, the district shall be deemed to have approved the applicant's request for approval and the state engineer shall proceed with the application.

Water rights purchased and transferred by the interstate stream commission are not subject to these requirements.

An artesian conservancy district board will have additional duties regarding the approval of changes in point of diversion or place of use of ground water rights. These additional duties include adoption of bylaws which may subject said change to approval by an artesian conservancy district board. The board of directors may deny a request for a change only if the board determines the change would be a detriment to the district or its members. The board of directors may require the approval for a change carry a condition to assess the water right owner as though the water right remains appurtenant to the land.

The act allows for an appeal of the decision by the board of directors of the district in the district court of the county within in which the district is located.

There is no appropriation attached to this legislation.

SIGNIFICANT ISSUES

NMDA notes that this bill allows for the board of directors of an artesian conservancy district to make certain requirements of an applicant for changes to a point of diversion or place of use of a water right outside of the boundaries of the district; however, it is not clear whether the act provides for these requirements for changes to a point of diversion or a place of use will apply to both surface water and ground water rights. NMDA indicates that if the legislation is not enacted, current laws will apply to the application process for a change in a point of diversion or place of use within artesian conservancy districts and district boards will not have additional duties governing said changes.

OSE suggests that HB812 presents a 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) from inside to outside of artesian conservancy districts. As a result, the bill could place unconstitutional limits on water rights owners' ability to market their rights as well as limit the availability of water rights for acquisition between willing buyers and sellers. This could have impacts on economic development. Under existing law, artesian conservancy districts are authorized to protest or object to any application made to the state engineer to change the location of any well or the use of water for any purpose other than that originally granted where it is determined by resolution of the board of directors that granting of the application would interfere with any existing water rights or program of the district for the conservation of the waters sought to be appropriated. Districts may appeal to the district court from decisions of the state engineer concerning such applications NMSA 1978 § 73-1-26 (1941).

OSE indicates that the legislation 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 groundwater right from an artesian conservancy district. Under existing law, the State Engineer evaluates proposed changes in point of diversion or place or purpose of use of groundwater rights to determine whether the proposed changes a) will not impair existing water rights, b) will not be contrary to conservation of water within the state, and c) will not be detrimental to the public welfare of the state. NMSA 1978, § 72-12-7 (1985). HB 812 would allow an artesian conservancy district to deny changes in point of diversion or place of use from inside the district to points outside of the district if it determined that the proposed change would be detrimental to the district or its members. When compared to the standard with respect to impairment of existing rights in the current law, this new requirement would allow the artesian conservancy district to consider the concerns of the district itself, including non-hydrologic concerns such as the financial and organizational viability of the district. 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 artesian conservancy district 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.

In addition, OSE suggests that if a proposed change were approved, HB812 would allow the artesian conservancy district to continue to assess the owner of the water right after it was transferred to outside of the district, where the district does not provide services, as though the water right remained appurtenant to the previously assessed land within the district. This too could have the effect of discouraging transfers of water rights from artesian conservancy districts.

ADMINISTRATIVE IMPLICATIONS

OSE predicts that it would need to augment the review process for groundwater right transfer applications to include a step to ensure that applicants seeking to transfer water rights out of an artesian conservancy district submit documentary evidence of compliance with the district's requirements or, if the district had not adopted an applicable requirement, an affidavit provided by the district stating this fact.

TECHNICAL ISSUES

OSE raises the following technical issues:

In Section 1:

This bill is nearly identical to NMSA1978, § 72-5-24.1 enacted in 2003; however, several technical problems are identified in this bill.

P.2 (B): This subsection requires only evidence of compliance with the requirements of a district to be submitted when making application to the State Engineer but to be clear it should also require that the district's evidence include its approval. (See proposed amendments).

P.2 (C): This subsection requires an affidavit from a district that it has no requirement that it approve changes, which seems unnecessarily burden some on both the district and water right owner. This subsection more logically should follow the subsections related to districts requiring their approval. (See proposed amendments).

P.2 (D): Because this subsection relates to subsection (B) it more logically should follow subsection (B). Also, this subsection should track language of subsection (B) to provide for application to the State Engineer where there is compliance but no district action. (See proposed amendments).

In Section 2 [Compared with NMSA 1978, § 73-2-1 (E) & § 73-3-4.1]:

P.3 (A): This subsection is vague with respect to denial of a request on the grounds that it is “detrimental to the district or its members.” It is not unusual, however for the legislature to intend that such terms, when not used as a “term of art”, be defined by the courts.

P.3 (A): While this section provides for a statutory right of appeal, it does not provide the procedure so it is assumed that NMRA 1-74 applies.

P.3-4 (A): Statutory review is not consistent with rule 1-74, therefore, this Subsection must be amended either to provide for the same standard of review as set forth at rule 1-74 or set forth the means by which an appeal may be taken to district court.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

OSE indicates that the process for applications to the state engineer for changes in point of diversion or place of use of groundwater rights from within an artesian conservancy district to a point of diversion or place of use outside the boundaries of the district would continue as provided for by an existing law.

AMENDMENTS

To address the items addressed in TECHNICAL ISSUES, OSE suggests the following amendments:

1. P.2, L.9: after “with” insert “and district approval pursuant to”.
2. P.2, LL, 13-14: on line 13 after “application” strike the rest of the sentence and insert in lieu therefore “a statement to this effect.”
3. P.2, L.17: after “approval” inserts “submitted”.
4. P.2, LL. 19-20: after “the” strike the rest of line 19 and on line 20 strike that line through the second occurrence of “the”.
5. P.2, L 20; strike “had complied” and insert in lieu thereof, “for a changed described in Subsection A of this section shall submit with the application to the state engineer a statement of compliance”.

6. P.2, LL 15-21: move Subsection (D) to line 11 so it appears as Subsection (C) and renumber succeeding sections accordingly.

BFW/nt