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## FISCAL IMPACT REPORT

ORIGINAL DATE 2-14-07

SPONSOR King LAST UPDATED \_\_\_\_\_ HB 884

SHORT TITLE Domestic Well Regulation SB \_\_\_\_\_

ANALYST Woods

### APPROPRIATION (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB726 and SB755

### SOURCES OF INFORMATION

LFC Files

### Responses Received From

Office of the State Engineer (OSE)  
Energy, Minerals and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of Bill

House Bill 884 seeks to define “critical management area” (CMA) for groundwater appropriation purposes and the criteria for establishing a CMA. This bill also amends 72-12-1.1, setting limits on water rights associated with new domestic well permits issued under this section. The bill also provides a mechanism for the transfer of water rights into domestic wells (up to 1 acre-foot). There is no appropriation attached to this legislation.

### FISCAL IMPLICATIONS

EMNRD suggests that the bill may require more capital outlay funding for State Parks Division (SDP) projects or programs that would require the drilling of a new well, if the demands were projected to be more than ½ acre-foot. In that event, the agency would have to acquire water rights and transfer them to the new domestic well.

If this transfer was in excess of 1 acre-foot, timelines could be delayed due to public notice requirements.

OSE indicates that approximately 50 additional FTE would be required for the evaluation of water right transfers for domestic well permits. The required staff will allow the Office of the State Engineer to maintain the current levels of service in regards to existing administrative duties. While processing the significantly increased volume of water rights applications requiring state engineer review that this bill would produce. However, it is noted that OSE supplied no detailed information as to how it arrived at the “50 additional FTE” number included in its response.

## **SIGNIFICANT ISSUES**

EMNRD notes that, under the definition of critical management areas in the legislation, this bill would assist the State Engineer in meeting the requirements of the interstate compacts. If groundwater use declined, and depending on the conjunctive relationships between groundwater and surface water in a particular basin, benefits to surface flows might mean additional water inputs to the State’s reservoirs. If this occurred, it might create better recreational opportunities at these reservoirs. This, in turn, would allow for economic opportunity in the communities near reservoirs. However, EMNRD also advises that the need for more capital start-up money to secure water rights necessary for the expansion of programs by state agencies requiring water in CMAs would be negatively impacted.

OSE raises a number of issues with this legislation, stating that, the State Engineer, recognizing the need for regulation of domestic wells, especially in and around the state’s river corridors, promulgated Domestic Well Rules and Regulations on August 15, 2006, which placed a 1.0 acre-foot per annum limitation on domestic wells for household use and allowed for the creation of Domestic Well Management Areas (DWMA) as well as other restrictions / requirements. Further that, that the term “critical management areas” as used in HB 884 is not consistent with the historic and long accepted use of this term by the state engineer and will likely cause unnecessary confusion. As defined in HB 884 a “critical management area” is the equivalent of a DMWA.

OSE adds that the 2006 Domestic Well Rules and Regulations outline the procedure the state engineer will follow in declaring DWMA’s, areas where domestic wells may negatively impact senior water rights and flows of surface water sources. The declaration of a DWMA further restricts the amount of water that can be appropriated for domestic use, down to 0.25 acre-foot per annum or less. This rule set is currently being challenged in District Court. Also, the Office of the State Engineer has been challenged in Grant County on the Constitutionality of his issuance of Domestic Well permits. Further, there are two cases currently in the Supreme Court on this issue. The decisions of the courts on these cases will establish the direction the state engineer should take regarding domestic wells in NM. It is recommended that the legislature allow the courts to resolve these cases and either uphold or overturn and the state engineer’s position before enacting this bill or other legislation regulating domestic wells. OSE additionally raises the following considerations:

- This bill restricts the authority of the state engineer (Section 3.C.) to limit the amount of water appropriated from each domestic well to "no less than ½ acre-foot per year per household" unless the applicant transfers an existing water right to the well. In

certain areas of the state, wells may have to be restricted to amounts less than the proposed ½ acre-foot per year - depending on aquifer or stream shortages. The existing domestic well rules provide for this in DWMA's.

- Also, the bill should be amended to require that any water rights transferred into new domestic wells must come from within that same specially designed area. Otherwise, the bill will not be an effective tool for controlling declines in the aquifer's water level, because allowing the transfer (change in point of diversion) of an existing water right into a new domestic well does not physically bring additional water into the affected aquifer.
- Transfers of existing water rights into domestic wells are presently allowed - even within the areas or districts presently declared by the state engineer. Under existing law, such transfers of existing water rights retain the "move-from" priority dates and may be subsequently transferred from the well subject to the provisions of Chapter 72 NMSA 1978.
- New proposed Section 3(F)(2) provides that applications to transfer a water right of 1.0 acre-foot or less may be exempted from the public notice requirement under certain conditions. Such an exception is consistent with his present statutory authority.
- Subsection 2(E) provides for "critical management areas" having a narrower applicability than CMAs established by the state engineer. To avoid confusion, the bill should be amended to use a different term than "critical management area."
- Subsection 1(D) would allow any owner of land or water rights within a CMA to petition for reconsideration of the declaration of the CMA. This section would require the state engineer to consider the petition pursuant to the procedures for the promulgation of special orders under section 72-2-8 NMSA 1978. These procedures require the state engineer to publish notice in at least five newspapers of general circulation before a hearing can be held. Requiring that the state engineer satisfy such a publication requirement for every petition to reconsider the designation of a CMA could be significantly burdensome on the office of the state engineer. The bill should be revised to require the petitioner to publish notice of the petition, or to remove the provision for reconsideration petitions entirely, since subsection 1(E) requires a review of the CMA designation every five years.
- If a water rights application is scheduled for hearing the agency needs to provide the most realistic assessment. Rigid rules may not make sense for every application but HB 884 would require their use and certainly will increase staff workload to unacceptable levels preventing the state engineer from acting in a meaningful time frame.

#### **PERFORMANCE IMPLICATIONS:**

OSE indicates that CMAs in the manner specified and requiring the transfer of water rights may have a significant impact on the agency's workload. An existing court decree in southwestern New Mexico requires the transfer of water rights for domestic wells. Further, "Staff advises that

they devote considerable effort processing these small transfers to ensure the water rights are valid.”

However, EMNRD anticipates that any benefits to surface water flows into the State’s reservoirs could potentially create improved recreation conditions that could potentially increase state park visitation and revenue, which are performance measures.

**ADMINISTRATIVE IMPLICATIONS:**

OSE notes it processes on the average 6,000 to 7,000 domestic well applications per year. Requiring the transfer of water rights for domestic wells will require additional FTEs, the level of which will depend on the degree to which the state engineer will exercise the provisions of the bill and available funding. The notice and hearing requirements for CMA designation and for petitions to reconsider CMA designation will have a significant administrative impact. OSE offers the following examples:

- Page 1, lines 22 through 24: The proposed language would require the Office of the State Engineer to meet the public notification and hearing requirements established in §72-2-8 for the state engineer to establish a CMA. These new CMA’s would differ from existing CMAs’ established by the state engineer.
- Page 4, lines 8 through 25: The bill requires the Office of the State Engineer to hold a hearing before a special order declaring a critical management area becomes effective. This requirement would prevent the state engineer’s ability to establish a Critical Management Area in an emergency. Also, requiring a hearing before the special order becomes effective will create a rush of applications to be filed with the Office of the State Engineer before the effective date of the special order.
- Page 7, lines 9-10: The state engineer would be responsible for evaluating applications for transfer of water rights to domestic wells. This requirement will add significant administrative review to many domestic well permit applications.

**CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Both OSE and EMNRD indicate conflicts with HB726 and SB755.

**AMENDMENTS:**

OSE proposes the following amendments:

- Subsection 1(B) (2), pg. 2, lines 8-9: strike entire provision and insert in lieu thereof: "(2) additional depletions negatively impact upon the flows of interstate streams."
- Subsection 1(C), pg. 2, lines 10-12: strike entire subsection because each management area has its own unique problems and characteristics. Domestic well permits may have to be handled differently within each management area depending on the situation and aquifer/basin characteristics.
- Subsection 1(D), pg. 2, lines 13-21: strike entire subsection because it would allow any

person to petition at any time for reconsideration of the designation of a CMA and require the matter to go to hearing. The public notice requirements for such petitions could be significantly burdensome on the office of the state engineer. Providing for such petitions is unnecessary, since section 1.E. already requires a review of the CMA designation every five years.

- Subsection 2(G), pg. 5, lines 22-24: strike lines 22 through 24 in their entirety and insert in lieu thereof "notify persons on the list when new, revised or proposed regulations are available and may be requested from the state engineer. Such charges as will defray the expense incurred in preparation of copies and mailing shall be paid by the requestor."
- Subsection 3.C: strike pg. 6, line 25 through pg. 7, line 6: in their entirety and insert in lieu thereof: "The state engineer may limit a domestic well diversion within a domestic well management area to an amount one-quarter acre-feet or less per annum per household. If multiple households are served by a domestic well the total diversion from the well shall not exceed three acre-feet per year. Greater well diversions may be allowed by the transfer of existing water right(s) subject to the provisions of Chapter 72 NMSA 1978."
- Subsection 3.D, pg 7, line 7: strike "approve a domestic well" and insert in lieu thereof "issue a domestic well permit".
- Subsection 3.D. (2), pg. 7, line 15: after "been" insert "properly".
- Subsection 3.E, p. 7, lines 16-19: the reference to "water rights obtained" is unclear. Strike entire section and insert in lieu thereof: "Water rights transferred pursuant to this section shall retain the priority date of the transferred water right and are transferable to a new location or purpose of use subject to the provisions of Chapter 72 NMSA 1978."
- Subsection 3.F.2.(a), pg. 8, lines 4-7: strike this entire provision because existing statute already requires the state engineer to perform such review.
- Amend the bill to provide an additional \$5,000,000 per year appropriation to the state engineer to implement the provisions of the bill. (It is noted that OSE supplied no detailed information as to how it arrived at the "\$5,000,000 per year" projection included in its response.)

BFW/nt