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FISCAL IMPACT REPORT

ORIGINAL DATE 2-21-07
 LAST UPDATED 3-08-07 HB 1278/aHAGC/aHENRC

SPONSOR Ezzell

SHORT TITLE Pecos River Settlement Water Rights SB _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

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

Relates to: HB 274 and SB 485, both of which appropriate money for additional acquisitions under NMSA 1978, §72-1-2.4 (Pecos land and water-right acquisitions statute).

SOURCES OF INFORMATION

LFC Files

Response Received From (On HENRC Amendment)

New Mexico Attorney General¹
 Office of the State Engineer

REVENUE (dollars in thousands)*

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY07	FY08	FY09		
	Unknown	Unknown	Non-Rec	

(Parenthesis () Indicate Expenditure Decreases)

* OSE Estimates

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)*

	FY07	FY08	FY09	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		(360.0)	(360.0)	(720.0)	Recurring	

(Parenthesis () Indicate Expenditure Decreases)

* OSE Estimates

¹ Attorney General comments bear 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."

SUMMARY

Synopsis of HENRC Amendment

House Energy and Natural Resources Committee amendment to House Bill 1278 (as amended) reflects the following:

1. Strike House Agriculture and Water Resources Committee Amendment 7.
2. On page 2, between lines 24 and 25, insert the following new paragraph to read:
"(3) the purchase of water rights or rights to the delivery of water authorized by this section and the subsequent use of the land to which the rights are appurtenant comply with the provisions of Section 5D(1) and (2) of the settlement agreement dated March 25, 2003 entered in *State v. Lewis*; provided that the commission shall not be responsible for the establishment of cover vegetation or the ongoing maintenance of the land."
3. On page 3, line 10, strike "shall" and insert in lieu thereof "may".

House Energy and Natural Resources Committee amendment to House Bill 1278 (as amended) adds no appropriation to the legislation. In commenting on the HENRC amendment, the Attorney General's Office (AGO) notes the following:

The Energy and Natural Resources Committee amendments to HB 1278 relate to the amendments adopted earlier by the House Agriculture and Water Resources Committee. In Amendment 1, the Energy and Natural Resources Committee struck the House Agriculture and Water Resources Committee Amendment 7, and in Amendment 2, inserted its own language in place of Amendment 7. However, the only textual change between the two versions is that the Energy and Natural Resources Committee version adds the following clause: “. . . provided that the [Interstate Stream] commission shall not be responsible for the establishment of cover vegetation or the ongoing maintenance of the land.”

AGO adds:

In short, Amendment 2 makes clear that when the ISC acquires water rights in the Pecos river basin without acquiring the ancillary surface land, the ISC is not responsible for establishing cover vegetation on the surface acreage and is not responsible for the ongoing maintenance of the land. Further, that Amendment 2 is consistent with the common law. When water rights are severed from surface land, the purchaser of the water rights has no legal obligation for maintaining the surface acreage.

AGO concludes that the legislation relates to HB 274 and SB 485, both of which appropriate money for additional acquisitions under NMSA 1978, §72-1-2.4 (Pecos land and water-right acquisitions statute).

As updated on 3-8-07, the Office of the State Engineer (OSE) offers a number of observations on the legislation, which are included in their entirety:

1. The existing statute 72-1-2.4 NMSA 1978, requires the Interstate Stream Commission to purchase land to which the water rights are appurtenant or the land which has the right to the delivery of water when purchasing water rights to satisfy the Pecos Settlement. This bill allows the Interstate Stream Commission to purchase water rights without purchasing the land to which the water rights is appurtenant or the land which has the right to the delivery of water. This is consistent with the Settlement Agreement and is acceptable to the other settlement parties (the PVACD, CID and the US).

2. This bill will also allow the Interstate Stream Commission to sell back the lands it has so far acquired if the Interstate Stream Commission determines that all or any part of the land is not necessary or desirable for permanent compliance with the Pecos Compact or the Supreme Court's amended decree, first to its original owner and if the original owner is not interested, then to a third party at the current market price for the land.

3. In addition, this bill amends 72-1-2.5, which established the Pecos River Basin Land Management Fund to allow for income from the sale of land per 72-1-2.4 NMSA 1978 to go to this fund in addition to other sources of income already designated to this fund.

OSE notes that the amendments:

1. Provide for an emergency clause so that the law takes effect immediately.

2. Will require the Interstate Stream Commission to also enter into contract with Carlsbad irrigation district in addition to the Pecos valley artesian conservancy district and the Fort Sumner irrigation district as provided in the original bill. The purpose of these contracts being to specify the actions the parties agree will be taken or avoided to ensure that the expenditures will be effective toward permanent compliance with New Mexico's obligations under the Pecos River Compact.

3. Allows the Interstate Stream Commission to acquire water rights or rights to the delivery of water without acquiring the appurtenant lands within the Carlsbad irrigation district and in areas between the Acme gage and the Fort Sumner irrigation district in addition to other areas mentioned in the original bill.

4. Requires that the purchase of water rights or rights to the delivery of water and subsequent use of the land to which the rights are appurtenant comply with the provisions of Section 5D(1) and (2) of the settlement agreement dated March 25, 2003 entered in State v. Lewis. This will assure that when water rights or the rights to delivery of water are purchased without also acquiring the land, additional water development, including from domestic wells, will be prevented on those lands unless another valid water rights is transferred onto that land. The amendment also clarifies that the ISC shall not be responsible for the establishment of a cover crop or ongoing maintenance of the land when the land is not acquired.

OSE suggests that, "This bill benefits the Interstate Stream Commission because the commission is required to pay the ongoing costs associated with land maintenance without having specific

appropriations to do so. The bill reduces the amount of land the commission must purchase and also increases the amount of funding the Pecos River Basin Land Management Fund may receive.” The cost of land management and maintenance will vary from parcel to parcel depending on the original condition of the land and also based on rainfall conditions from year to year. If the original condition is poor enough that it requires seeding and irrigation, the costs will be higher. The annual land maintenance costs will be high if it is a wet year with frequent and large rainfall that results in heavy weed growth. A rough estimate of the current costs is that it will take about \$20 per acre per year to maintain the land the commission is required to purchase. If the Interstate Stream Commission acquires all of the 18,000 acres needed to fully implement the Pecos Settlement, the annual land management costs will be about \$360,000 per year. With this bill, that obligation will decrease because the commission will not have to buy as much land and can sell land it determines it does not need.

OSE adds that it is estimated that one full time employee will be needed to manage the lands acquired by the interstate stream commission. Therefore, by not having to own the lands, the Interstate Stream Commission will not only save a significant amount of money but also save valuable staff time. On the other hand, if the Interstate Stream Commission does not own the land from which it has acquired water rights, annual inspections may be needed to assure that these lands remain fallowed and that the water rights sold to the Interstate Stream Commission are no longer being diverted.

Additionally, OSE mentions the following considerations:

1. Because the settlement agreement provides that water cannot be applied to “dried up acreage” unless allowed by law by subsequent transfer to the lands, and no wells pursuant to 72-12-1 can be drilled, overall water depletions in the Pecos River Basin will not be increased. The Interstate Stream Commission will ensure that the contracts it enters into will prohibit drilling domestic wells on those properties in the future and compliance with the other settlement requirements regarding water use.
2. The settlement provides that the Interstate Stream Commission shall withhold from the transfer of water rights or shall obtain from another source, a quantity of water sufficient for irrigation, not to exceed one irrigation season, in the minimum amount necessary to establish such cover vegetation, to prevent erosion, thus minimizing the possibility that a weed or dust problem would develop on the property that the water rights are transferred away from.
3. Because the water rights that the Interstate Stream Commission may purchase in the future may not have been appurtenant to land for some time, a stricter evaluation of historical use will be needed to assure that the acquisition of water rights would benefit compact compliance.

OSE concludes that, “This bill will result in significant savings in ongoing costs to the Interstate Stream Commission related to land management. Because the ISC is no longer required to own or maintain lands from which it has acquired water rights, the net savings to the Interstate Stream Commission could be in the order of \$360,000 per year.” Moreover, the amendments allow the bill to also benefit the Carlsbad irrigation district farmers as they can retain the land and only sell the water rights to the interstate stream commission. The Interstate Stream Commission will continue to pay the irrigation district assessments and stack its water rights on a small portion of

the land that it will continue to own.

Synopsis of HAGC Amendment

House Agriculture and Water Resources Committee amendment to House Bill 1278 reflects the following:

1. Provides for an emergency clause so that the law takes effect immediately, upon signing by the Governor.
2. Will require the Interstate Stream Commission to also enter into contract with Carlsbad irrigation district in addition to the Pecos valley artesian conservancy district and the Fort Sumner irrigation district as provided in the original bill. The purpose of these contracts being specifying the actions the parties agree will be taken or avoided to ensure that the expenditures will be effective toward permanent compliance with New Mexico's obligations under the Pecos River Compact.
3. Allows the Interstate Stream Commission to acquire water rights or rights to the delivery of water without acquiring the appurtenant lands within the Carlsbad irrigation district and in areas between the Acme gage and the Fort Sumner irrigation district in addition to other areas mentioned in the original bill.
4. Requires that the purchase of water rights or rights to the delivery of water and subsequent use of the land to which the rights are appurtenant comply with the provisions of Section 5D(1) and (2) of the settlement agreement dated March 25, 2003 entered in *State v. Lewis*.

OSE notes that the amendment requiring compliance with Section 5D(1) of the settlement agreement will make the Interstate Stream Commission responsible for maintaining vegetation cover on the lands from which it acquires water rights on a long-term basis even if it does not acquire or own the land. OSE states, "The Interstate Stream Commission may be able to pass on this responsibility contractually to the owner of the land. If that happens, the Interstate Stream Commission will still have to inspect these lands at least annually to assure compliance."

OSE additionally suggests the following language be added on page 3, line 20, "The offer shall also include a notice that if the land is sold pursuant to this section, the Interstate Stream Commission is not required to offer the water rights for sale at the original point of diversion and for the original place and purpose of use." after "parties"

The amendment contains no appropriation language and OSE notes no fiscal impact.

Synopsis of Original Bill

House Bill 1278 seeks to enact a new section of Chapter 72, Article 1 NMSA 1978 to address the following:

- The existing statute 72-1-2.4 NMSA 1978, requires the Interstate Stream Commission to purchase land to which the water rights is appurtenant or the land which has the right to the delivery of water when purchasing water rights to satisfy

the Pecos Settlement. This bill allows the Interstate Stream Commission to purchase water rights without purchasing the land to which the water rights is appurtenant or the land which has the right to the delivery of water. This is consistent with the Settlement Agreement and is acceptable to the other settlement parties.

- This bill will also allow the Interstate Stream Commission to sell back the lands it has so far acquired if the Interstate Stream Commission determines that all or any part of the land is not necessary or desirable for permanent compliance with the Pecos Compact or the Supreme Court's amended decree, first to its original owner and if the original owner is not interested, then to a third party at the current market price for the land.
- In addition, this bill amends 72-1-2.5, establishing the Pecos River Basin Land Management Fund to allow for income from the sale of land per 72-1-2.4 NMSA 1978 to go to this fund in addition to other sources of income already designated to this fund.

There is no appropriation attached to this legislation.

FISCAL IMPLICATIONS

The Office of the State Engineer (OSE) indicates that this benefits the Interstate Stream Commission because the commission is required to pay the ongoing costs associated with land maintenance without having specific appropriations to do so. The bill reduces the amount of land the commission must purchase and also increases the amount of funding the Pecos River Basin Land Management Fund may receive. The cost of land management and maintenance will vary from parcel to parcel depending on the original condition of the land and also based on rainfall conditions from year to year. If the original condition is poor enough that it requires seeding and irrigation, the costs will be higher. The annual land maintenance costs will be high if it is a wet year with frequent and large rainfall that results in heavy weed growth. A rough estimate of the current costs is that will take about \$20 per acre per year to maintain the land the commission is required to purchase. If the Interstate Stream Commission acquires all of the 18,000 acres needed to fully implement the Pecos Settlement, the annual land management costs will be about \$360,000 per year. With this bill, that obligation will decrease because the commission will not have to buy as much land and can sell land it determines it does not need.

OSE additionally indicates that it is estimated that one full time employee will be needed to manage the lands acquired by the interstate stream commission. Therefore, by not having to own the lands, the Interstate Stream Commission will not only save a significant amount of money but also save valuable staff time. On the other hand, if the Interstate Stream Commission does not own the land from which it has acquired water rights, annual inspections may be needed to assure that these lands remain fallowed and that the water rights sold to the Interstate Stream Commission are no longer being diverted.

SIGNIFICANT ISSUES

OSE raises a number of discussion points:

1. Because the settlement agreement provides that water cannot be applied to “dried up acreage” unless allowed by law by subsequent transfer to the lands, and no wells pursuant to 72-12-1 can be drilled, overall water depletions in the Pecos River Basin will not be increased. The Interstate Stream Commission will ensure that the contracts it enters into will prohibit drilling domestic wells on those properties in the future and compliance with the other settlement requirements regarding water use.
2. The settlement provides that the Interstate Stream Commission shall withhold from the transfer of water rights or shall obtain from another source, a quantity of water sufficient for irrigation, not to exceed one irrigation season, in the minimum amount necessary to establish such cover vegetation, to prevent erosion, thus preventing the possibility that a weed or dust problem would develop on the property that the water rights are transferred from.
3. Because 72-1-2.4 requires the commission to offer the land and water rights it has purchased to the original use at the original point of diversion and for the original use, this bill should be amended to accommodate the prior statute and to allow the commission to sell existing land with the approval of the original owner the commission purchase the land and water rights from. An amendment is proposed to address this issue.
4. Because the water rights that the Interstate Stream Commission may purchase in the future may not have been appurtenant to land for some time, a stricter evaluation of historical use will be needed to assure that the acquisition of water rights would benefit compact compliance.
5. The bill should be amended to specify that the commission does not have to purchase land within the Carlsbad Irrigation District and to expand the Fort Sumner area to make it consistent with the requirements of the settlement agreement.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

OSE suggests that the Interstate Stream Commission will continue to own and manage the lands purchased as required by 72-1-2.4.

AMENDMENTS

OSE suggests the following amendments:

1. Page 2, line 15, add “the Carlsbad Irrigation District, the” after “Basin,”
2. Page 2, line 16, add “between the Acme gage to and including” after “or”
3. Page 2, line 25, add a new section “(3) The commission shall ensure further water use at the land from which water rights are purchased, including water use associated with § 72-12-1 through § 72-12-1.3, shall not occur without the

subsequent transfer of a duly-adjudicated water right; provided that the commission shall ensure that sufficient water is available to establish cover vegetation on that land.”

4. Page 3, line 10, change the first “shall” to “may”
5. Page 3, line 20, add “The offer shall also include a notice that if the land is sold pursuant to this section, the Interstate Stream Commission is not required to offer the water rights for sale at the original point of diversion and for the original place and purpose of use.” after “parties”

BFW/mt:csd