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FISCAL IMPACT REPORT

ORIGINAL DATE 1-22-07

SPONSOR Neville LAST UPDATED _____ HB _____

SHORT TITLE Irrigation District Water Banks SB 61

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

Responses Received From

Office of the State Engineer (OSE)

New Mexico Department of Agriculture (NMDA)

SUMMARY

Synopsis of Bill

Senate Bill 61 will enact a new section of Chapter 73, Article 9 NMSA authorizing an irrigation district created and operating pursuant to Chapter 73, Article 9 to establish a water bank for the purpose of temporarily reallocating water within the district without changing the purpose of use or point of diversion. A district water bank established pursuant to the bill would not be subject to recognition or approval by the interstate stream commission or the state engineer, and such a water bank would have authority to make temporary reallocations of water to new places of use within the district without formal proceedings before the state engineer. Water rights placed in the district's water bank would not be subject to loss for nonuse during the period when the rights are placed in the water bank.

SIGNIFICANT ISSUES

The New Mexico Department of Agriculture (NMDA) notes that this legislation will enable an irrigation district to establish a water bank to temporarily reallocate water without a change in purpose of use or point of diversion in an effort to supplement water supplies available for the places of use served by an irrigation district. This may be accomplished without making

application to the state engineer and water rights in the irrigation district's water bank shall not be subject to loss for nonuse while those water rights are in the water bank. The establishment of a water bank by an irrigation district is not subject to approval or recognition by the interstate stream commission or the state engineer.

The Office of the State Engineer (OSE) suggests that this bill is unnecessary because under existing law irrigation districts operating pursuant to Chapter 73, Article 9 already have authority to establish administrative mechanisms that function like water banks. Specifically, under section 73-9-14 NMSA 1978 irrigation districts have the power to set up administrative systems to facilitate the temporary reallocation of surface water used for irrigation to the irrigation of other lands within the district through rental or lease arrangements. For example, pursuant to the nearly identical authority granted by section 73-10-16 NMSA 1978 to irrigation districts cooperating with the United States under reclamation laws, the board of the Elephant Butte Irrigation District (EBID) has established a "conservation pool" into which water right owners may place their unused surface water allotment for a given year for temporary reallocation to other irrigators within the district. As long as the surface water temporarily reallocated through such an administrative system remains within the district and is reallocated to other irrigation uses, the state engineer is not required to approve the reallocation. Under existing law, OSE opines, when surface water allotments are temporarily reallocated to and used by other water right owners within a district, the underlying water rights are protected from loss through nonuse under the forfeiture statute (section 72-5-28 NMSA 1978) or under the common law doctrine of abandonment. This is because the use of the water allotment by the lessee constitutes beneficial use as required by the constitution. (New Mexico Attorney General Opinion 64-1: 1964).

OSE adds that EBID and the Carlsbad Irrigation District (CID) each have established under existing law (under section 73-10-16, which provides water banking authority nearly identical to that provided in section 73-9-14) administrative mechanisms that function like water banks to allow the temporary reallocation of surface water allotments to other irrigators within those two districts. Those districts have worked with the state engineer and have been able to demonstrate the continued beneficial use of water rights placed in their administrative mechanisms. As a result, those water rights have been protected from loss through nonuse.

OSE concludes by noting that Irrigation districts operating pursuant to Chapter 73, Article 9 have the authority under existing law (section 73-9-14) and the necessary resources to do precisely the same thing. There thus is no need to provide additional authority to Article 9 irrigation districts. The enactment of this bill would create new problems by treating Article 9 irrigation districts disparately from article 10 irrigation districts.

TECHNICAL ISSUES

OSE indicates that it is not clear that this bill, if passed, could achieve the results intended. When a lawsuit is pending at the time of enactment of a law, the state constitution prohibits the application of that law to the parties in that suit if to do so would affect the substantive rights of those parties. N.M. Const. art. IV, § 34. The water rights of the members of at least three irrigation districts created and operating pursuant to Chapter 73, Article 9 are at issue in the ongoing case to adjudicate the water rights in the San Juan River stream system, State of New Mexico ex rel. State Engineer v. United States, et al., Eleventh Judicial Dist. No. D-1116-CV-7500184. To the extent this bill is intended to affect or change the substantive rights of those water right claimants in that pending case, the constitution would bar that result.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

NMDA suggests that irrigation districts might not be able to establish water banks for temporary reallocation of water supplies if SB61 is not enacted. Some irrigation districts have, however, established special water users' districts which allow for different allocations of water under rules established by the special water users' district act.

BW/mt