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FISCAL IMPACT REPORT

ORIGINAL DATE 2-20-07

SPONSOR Carraro LAST UPDATED _____ HB _____

SHORT TITLE Declaration of Water from Deep Aquifers SB 1169

ANALYST Woods

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY07	FY08		
Indeterminate*	Indeterminate*		

(Parenthesis () Indicate Expenditure Decreases)

* Pending Responses from the Office of the State Engineer and the Office of the Attorney General

Potential conflict with HB1122

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Energy, Minerals and Natural Resources Department (EMNRD)

No Responses Received From

Office of the Attorney General (OAG)

Office of the State Engineer (OSE)

SUMMARY

Synopsis of Bill

Senate Bill 1169 seeks to repeal sections of the Water Code enacted in 1967 [Sections 72-12-25, 72-12-26 and 72-12-28, NMSA 1978] that exclude from the jurisdiction of the State Engineer (OSE) aquifers the top of which is at a depth of 2,500 feet or more below the surface, and which contains non-potable water.

While there is no appropriation attached to this legislation, the bill does carry emergency language.

SIGNIFICANT ISSUES

AOC notes that, at present, the deep aquifers of the state that contain nonpotable water do not fall under the jurisdiction of the state engineer. More specifically, a party planning to drill a well into an aquifer whose surface occurs at a depth of 2500 feet or greater, and whose water is unsafe or undesirable to drink because it contains pollutants, contaminants, or minerals, does not have to submit an application to the state engineer for evaluation. As a result, deep aquifers containing nonpotable water serve as an exception to the general rule that the state engineer acquires jurisdiction over a basin after declaring the basin (finding that the basin has reasonable ascertainable boundaries). This bill proposes to repeal the provision of the water code that exempts these deep aquifers from the general rule, and to repeal two other related provisions. As a result, the state engineer could declare these deep aquifers, and exercise authority over the use of the water from deep aquifers. The three provisions at issue include:

- Section 72-12-25 – state engineer cannot declare a basin whose surface occurs at a depth of 2500 feet or more, and contains nonpotable water
- Section 72-12-26 – A party planning to drill a well into such a deep aquifer must file a notice of intention with the state engineer
- Section 72-12-28 - if a party believes that their water rights have been impaired by well drilled into a deep aquifer, they may bring an action in the district court

EMNRD raises issues with this legislation, suggesting that that, adoption of this bill would add confusion to the law governing "produced water" (water produced in connection with oil and gas operations).¹ Most produced water is produced from aquifers below 2,500 feet and is non-potable. EMNRD indicates that water produced from these deep aquifers is generally so high in both mineral and hydrocarbon content that it cannot be economically treated for beneficial use, even when the water is already at the surface due to production from oil and gas wells. The oil and gas operators must dispose of these waters by injection or evaporation to prevent environmental damage. Improving technology will likely render some produced water available for beneficial use in the not too distant future. However, there is no immediate prospect that the water in these deep water aquifers will become sufficiently valuable that people will want to sustain the substantial cost of drilling wells to such depths in order to appropriate the waters for use.

EMNRD adds that the Oil Conservation Division (OCD) of EMNRD has statutory responsibility under the Oil and Gas Act [Section 70-2-12.B (15)] to supervise the disposition of produced water. In 2003, the Legislature amended this provision of the Oil and Gas Act, and enacted Section 70-2-12.1, to clarify that OCD jurisdiction over the disposition of produced water is exclusive of OSE jurisdiction, and extends to disposition of such waters that constitutes beneficial use. The bill would not affect these provisions. Thus the bill would give OSE jurisdiction of withdrawals of water from these aquifers other than withdrawals incidental to oil and gas operations, while OCD would retain jurisdiction over water production connected with oil and gas operations. This would involve hazards of agency conflict. Furthermore, it is

¹ Although requested on 2-17-07, it is noted that agency responses from the Office of the State Engineer and the Office of the Attorney General have not be received. Upon receipt, this FIR will be updated to reflect the both the Attorney General and State Engineer comments.

difficult to see how OSE could effectively exert supervision over these aquifers when most, if not all, potential withdrawals there from would remain outside its jurisdiction.

EMNRD concludes that, although Section 70-2-12.1 would preclude OSE jurisdiction over disposition and use of produced water, the bill, by allowing OSE to assume jurisdiction over the aquifers from which most produced water is found, would raise questions, which the bill does not resolve, about whether OSE would have any authority or duty to supervise the withdrawal of water from these aquifers in connection with oil and gas operations, and how that authority would interface with OCD's authority under the Oil and Gas Act. Furthermore, OCD's statutory duty to regulate the disposition of produced water involves the authority to authorize re-injection of such water into the same or another aquifer. At the present time, and for the immediate future, the preferred method of disposition of produced water is injection. The authority of OCD to authorize injection into deep aquifers could interfere with OSE supervision of such aquifers, and OSE jurisdiction over such aquifers could impair the ability of OCD to provide for disposition of produced water by injection.

PERFORMANCE IMPLICATIONS

EMNRD suggests that the bill would blur the lines between the respective responsibilities of OSE and OCD, which could impair the effectiveness of both agencies in performing their respective functions.

ADMINISTRATIVE IMPLICATIONS:

OAC indicates that, depending upon how, or if, the deep aquifers are developed, the judiciary may be involved in the judicial adjudication of the associated water rights.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

EMNRD opines that this bill conflicts with HB1122 which provides tax credits for delivery of treated produced water to the Pecos River. That bill limits the water eligible for the credit to water produced from below 2,500 feet, reflecting the understanding that withdrawal of water from those depths would not require an OSE permit.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

EMNRD anticipates that aquifers the tops of which are at or below 2,500 feet beneath the surface, and in which the water is non-potable, will continue to be excluded from OSE jurisdiction. Since most, if not all, withdrawals from these deep aquifers are incidental to oil and gas operations, they will continue to be regulated by OCD pursuant to its authority under the Oil and Gas Act to regulate the disposition of produced water.

AMENDMENTS

None suggested by respondent agencies.

BFW/mt