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FISCAL IMPACT REPORT

ORIGINAL DATE 03/10/09
LAST UPDATED 03/17/09 **HB** CS/CS/902/HFIS

SPONSOR HFI

SHORT TITLE Public Peace, Health, Safety & Welfare **SB** _____

ANALYST Kehoe

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI	N/A	See Fiscal Impact Report

(Parenthesis () Indicate Expenditure Decreases)

Senate Indian Affairs Committee Substitute for Senate Bill 723, as amended and Senate Bill 405 relate to this bill.

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)

New Mexico Finance Authority (NMFA)

Indian Affairs Department (IAD)

SUMMARY

Synopsis of Bill

The House Floor Substitute for House Bill 902 proposes to transfer a \$5.4 million grant approved by the New Mexico Finance Authority from the water project fund to the New Mexico Environment Department for the Navajo Nation Division of Natural Resources Department of Water Resources Management Branch for a regional water project in the counties of San Juan, McKinley, Rio Arriba, Sandoval and Cibola.

The bill contains an emergency clause.

FISCAL IMPLICATIONS

Laws 2003 (Chapter 134) requires the Board of Finance to authorize and issue bonds for 10 percent of the severance tax bonding capacity each year for deposit in the water project fund. The 10 percent set-aside of severance tax bond capacity for FY07 provided approximately \$31.7 million to the water project fund for eligible water projects. Laws 2005 (Chapter 293) certifies 10 percent of all funds in the water project fund may be allocated to the Office of State Engineer (OSE) to be used for adjudication. Of the OSE 10 percent, 20 percent (approximately is

transferred to the Administrative Office of the Courts for adjudication purposes. Section 72-4A-8 of the Water Finance Act provides that on July 1 of each fiscal year, an annual distribution will be made from the water trust fund to the water project fund in the amount of \$4 million until the amount is less than an amount equal to 4.7 percent of the average of the year-end market values of the water trust fund for the immediate preceding five calendar years.

The water project fund and water trust board were created by the Water Finance Act. According to the Act, projects funded from the water project fund must be authorized by the Legislature. The water trust board reviews all projects and determines qualifying entities and projects for consideration of loans or grants from the water project fund.

The bill indicates an appropriation of \$5.4 million was made in a prior year, specifically, in Laws 2007, Chapter 139 (Section 1). However, the referenced statute did not appropriate funds for specific projects but only authorized the New Mexico Finance Authority (NMFA) to make loans or grants from the water project fund to qualified entities. Chapter 139, Section 1, subsection 25 authorized NMFA to “consider” a loan or grant from the water project fund to the Navajo Nation Division of Natural Resources Department of Water Resources Water Management (NNNRD) Branch for a regional water project in Rio Arriba, Sandoval, McKinley, San Juan and Cibola counties.

The Water Trust Board in 2007 approved a “grant” totaling \$5.4 million to the aforementioned entity contingent on the Navajo Nation agreeing to a “limited sovereign immunity waiver”, in accordance with NMFA court of jurisdiction. To date, the waiver has not been approved by the Navajo Nation.

Money from the severance tax bond capacity may not be used to pay indirect project costs, and any unexpended balance from proceeds of severance tax bonds issued for a water project shall revert to the severance tax bonding fund within six months of completion of the water project.

SIGNIFICANT ISSUES

According to the Indian Affairs Department (IAD), the “Cutter Project”, is a part of the Navajo-Gallup Water Supply Project (“NGWSP”). The Cutter Latter pipeline will bring potable drinking water to numerous homes in the Eastern Navajo Agency, where many still travel long distances for drinking and utility water for animals and farming.¹ The lack of water also limits economic development and prevents permanent housing and medical and public safety services from being located in these communities.²

The IAD further states the NNNRD Water Resources Management Department has found it difficult to access these funds due to NMFA statutory “sue or be sued” agreement clause and venue statute which requires a tribe to agree to a limited sovereignty waiver.³ The Navajo Nation had previously agreed to a partial sovereignty waiver where the Nation would be a plaintiff in state court but would defend in Navajo district court.⁴ This was proposed in an effort to preserve a fundamental aspect of sovereignty.⁵ The Water Trust Board, fiscally administrated by NMFA, was unwilling to agree to a partial waiver, citing that such a waiver could have a potential negative impact on its bond rating.⁶ A limited sovereignty waiver would also require a 2/3

¹ The Navajo Nation Office of the President and Vice President. “Navajo President Joe Shirley, Jr., says Navajo-Gallup Pipeline will provide, secure, permanent homeland to Eastern Navajo.” June 2007. Retrieved March 10, 2009, <http://opvp.org/cms/kunde/rt/opvporg/docs/718572039-06-11-2007-12-07-24.pdf>.

² Ibid.

³ New Mexico Water Trust Board Update Meeting, March 4, 2009 minutes.

⁴ New Mexico Water Trust Board, *Update on Eastern Navajo Water Pipeline Project*, March 4, 2009, 1.

⁵ Ibid.

⁶ *New Mexico Water Trust Board*, 1.

majority vote of the Navajo Nation Council, and due to the complexity of the Navajo Nation legislative process, this may further delay the project and decrease the value of the appropriation as the cost of labor and materials increases. House Floor Substitute for HB 902 would direct NMFA to transfer funds to ED where the NNNRD will be able to access and utilize the funds for the Cutter Project. Other funds for the Cutter Project are currently administered by the ED.”

OTHER SUBSTANTIVE ISSUES

Eligible water projects pursuant to the Water Finance Act are defined as those involving: 1) the storage, conveyance or delivery of water to end-users; 2) the implementation of federal Endangered Species Act collaborative programs; 3) the restoration of watersheds; 4) flood prevention; 5) conservation; or 6) for recycling, treatment or reuse of water.

According to the Water Finance Act, grants and loans from the water project fund shall be made only to state agencies or to political subdivisions that:

- (1) “Agree to operate and maintain the water project so that it will function properly over the structural and material design life, which shall not be less than twenty years;
- (2) Require the contractor of the construction project to post a performance and payment bond in accordance with the requirements of Section 13-4-18 NMSA 1978;
- (3) Provide written assurance signed by an attorney or provide a title insurance policy that the political subdivision has proper title, easements and rights of way to the property upon or through which the water project proposed for funding is to be constructed or extended;
- (4) Meet the requirements of the financial capability set by the board to ensure sufficient revenues to operate and maintain the water project for its useful life and to repay the loan;
- (5) Agree to properly maintain financial records and to conduct an audit of the project's financial records; and
- (6) Agree to pay costs of originating grants and loans as determined by rules adopted by the board. “

In addition, “plans and specifications for a water project shall be approved by the authority before grant or loan disbursements to pay for construction costs are made to a state agency or political subdivision. Plans and specifications for a water project shall incorporate available technologies and operational design for water use efficiency. Grants and loans shall be made only for eligible items, which include:

- (1) To match federal and local cost shares;
- (2) Engineering feasibility reports;
- (3) Contracted engineering design;
- (4) Inspection of construction;
- (5) Special engineering services;
- (6) Environmental or archaeological surveys;
- (7) Construction;
- (8) Land acquisition;
- (9) Easements and rights of way; and
- (10) Legal costs and fiscal agent fees.”

ADMINISTRATIVE

According to the Water Finance Act, the NMFA is responsible for administering the water

project fund, including monitoring and ensuring proper reversions.

RELATIONSHIP, DUPLICATION, CONFLICT

Senate Indian and Cultural Affairs Committee Substitute for Senate Bill 723 appropriates \$5.4 million from the water project fund to the New Mexico Environment Department for the Navajo Nation Division of Natural Resources Department of Water Resources Management Branch for a regional water project in the counties of San Juan, McKinley, Rio Arriba, Sandoval and Cibola.

Senate Bill 405 authorizes the New Mexico Finance Authority (NMFA) to make loans or grants to 58 qualifying projects from the water project fund and to make grants to 19 qualifying acequia water projects pursuant to the Water Project Finance Act on terms and conditions established by the Water Trust Board (WTB) and NMFA.

In 2008, the Water Trust Board received 62 applications for funding from the water project fund. The Board evaluated and recommended 60 projects for legislative authorization contained in Senate Bill 405 totaling approximately \$120 million.

NMFA reports the New Mexico interstate Stream Commission has submitted 22 projects to the Water Trust Board for their review and consideration for funding. The Board evaluated the projects and recommends 22 acequia projects totaling \$245,000 for legislative authority contained in House Bill 405.

This bill appears to conflict with the intention of the Water Finance Act (Article 4A, Section 72-4A-1).

LMK/svb:mc