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FISCAL IMPACT REPORT

ORIGINAL DATE 02/09/13

SPONSOR Griego LAST UPDATED _____ HB _____

SHORT TITLE Status of Water Rights Under Lease SB 188

ANALYST McCoy

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to HB 19

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

Senate Bill 188 (SB 188) proposes to amend the Water-Use Leasing Act to emphasize and clarify the existing law that beneficial use of water by a lessee, pursuant to a state engineer-approved lease, constitutes beneficial use attributable to the owner of the water right. SB 188 also proposes a new section to allow a water rights claimant to perfect a water right by leasing the right, under the following circumstances: the water right occurs in a fully appropriated system; the water right is a “finally adjudicated ground water right”; the state engineer has issued a permit authorizing a change in place or purpose of use; and circumstances beyond the permittee’s control prevent the permittee from applying the water to beneficial use in the manner authorized by the permit. If these conditions are met, the permittee may lease the water right for a term of 10 years, subject to a renewal of one additional 10-year term. Currently, the holder of a water right who has obtained a permit from the state engineer to change the place or purpose of use may only perfect the water right by placing the water to beneficial use in conformity with the conditions of the permit. In allowing the claimant to perfect the right through a lease, the proposed new section establishes greater flexibility in the manner in which a water right can be perfected.

FISCAL IMPLICATIONS

No Fiscal Impact.

SIGNIFICANT ISSUES

According to the Office of the State Engineer the intended purpose of the bill raises the following water policy issues:

a. On one hand, it appears that the bill addresses the instance where the owner of an adjudicated water right has obtained a state engineer permit authorizing a change in the place of use of the water right but for some legitimate reason has not been able to place water to beneficial use at the new place of use authorized by the permit. Under the law as it currently exists, the owner's only option in this situation is to find a way to put water to beneficial use at the permitted place of use, even if the owner now would like to transfer the water right to another, different place of use. Without beneficial use at the permitted place of use the owner does not have a water right to transfer, and the right to establish a water right under the permit can be lost with the expiration of time.

b. On the other hand, allowing a new water right to be established by the beneficial use of water pursuant to a lease, even if limited only to adjudicated water rights changed in place of use by permit, could be seen as statutorily allowing speculation in water rights. This is because such a procedure would make it easier to acquire and hold a water right for the primary purpose of benefitting from an increase in the value of the water right. Current statutory and case law specifies that a water right may be established pursuant to a state engineer change of location of use permit only at the place of use specified in the permit. This bill proposes to relax that requirement. The policy behind the prior appropriation doctrine is to maximize the beneficial use of water and impede speculation in water rights by requiring that water rights be continuously used or lost. To the extent that this bill encourages speculation, serious consideration should be given to what may be a well intentioned law that might have significant unintended consequences, since irrigation water rights are the main source of water rights available in New Mexico for acquisition and transfer to new uses.

c. There are arguments against the contention that this bill would allow speculation in water rights. First, true speculation in water occurs where a speculator can "tie up" unappropriated water by making a new appropriation without putting water to beneficial use. This bill would not allow that. This bill does not involve the new appropriation of previously unappropriated water and does not eliminate the requirement of beneficial use. SB 188 only addresses the narrow specific circumstance where, in a fully appropriated system, the owner of a previously adjudicated groundwater right has been granted a state engineer permit authorizing a change in place or purpose of use of the right but is unable to place water to beneficial use at the permitted place of use. The bill would allow water to be leased for use at a place of use different than that specified in the permit, but would still require that water be placed to beneficial use.

d. This bill minimizes the vexing problem in fully appropriated systems of speculation in water "on the back end." If holders of permits to change the location of existing valid water rights are unable to put water to beneficial use at the new, permitted place of use, over time they may lose the right to establish a new water right under the permit. If water rights are lost in this manner in a fully appropriated system, speculators may assert that unappropriated water is newly

available for appropriation and file applications for new appropriations in order to sell water rights for a profit. SB 188 would reduce the risk of water rights being lost in this fashion by providing to holders of change location of use permits some flexibility in how they are allowed to put water to beneficial use under their permits.

MTM/svb