

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

**ORIGINAL DATE** 01/23/14

**SPONSOR** Keller & Egolf      **LAST UPDATED** \_\_\_\_\_      **HB** \_\_\_\_\_

**SHORT TITLE** Inter-Basin Water Rights Transfer      **SB** 77

**ANALYST** Weber

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate		Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)  
 Attorney General Office (AGO)  
 Office of the State Engineer (OSE)

### SUMMARY

#### Synopsis of Bill

Senate Bill 77 provides additional permitting requirements for applicants seeking a water permit for an appropriation for an out of basin transfer for more than one thousand acre feet of water. It also requires the State Engineer to make additional findings and study additional factors before granting such a permit. The bill further requires legislative consent for such diversions in excess of seven thousand acre feet per year.

Section 1(A) requires the applicant to make an additional application for an out of basin transfer for either surface or groundwater.

Section 1(B) requires the State Engineer to do a comprehensive review of the information and application.

Section 1(C)(1)-(11) sets forth additional considerations the State Engineer must study before granting an out of basin transfer permit, including: When acting upon an application submitted pursuant to the provisions of Subsection A of this section, the state engineer shall consider, but not be limited to, the following factors: (1) the amount of water in the basin of origin available for future appropriation; (2) present and reasonably foreseeable projected future needs for water

in the basin of origin and the receiving basin (3) benefits presently and prospectively derived from the return flow of water used within the basin of origin that will be eliminated by the proposed out-of-basin use; (4) the correlation between surface water and ground water in the basin of origin, and whether the proposed use will be harmful to the supply of either; (5) interference with planned uses or developments within the basin of origin for which a permit has been issued or for which an application is pending; (6) whether the proposed use will adversely affect the quantity or quality of water available for domestic, agricultural, environmental, public recreational or municipal uses within either the basin of origin or the receiving basin; (7) whether the proposed transfer will unduly limit the future growth and development in the basin from which the water is exported; (8) the practicable availability of alternative sources of water for the proposed use that would not rely on transfer of water out of its basin of origin; (9) whether the entity in the receiving basin has prepared and implemented a drought contingency plan and an approved water conservation plan; (10) whether all funding necessary for the withdrawal and transportation of water to the receiving basin has been secured and guaranteed by the applicant; and (11) whether the source of supply can reliably sustain the diversion's anticipated firm yield considering the predicted effects of climate change on precipitation patterns and temperature in the basin of origin.

Section 1(D) provides that the law does not apply to any applications filed before July 1, 2014.

Section 1(E) contains an exemption for applications less than one thousand acre feet a year.

Section 1(F) provides that legislative consent is necessary for any applications for diversions in excess of seven thousand acre feet per year, and provides additional considerations the legislature may take into account in adding additional terms and conditions to protect the public welfare.

Section 1(G) exempts certain appropriations by municipalities who have historically relied on transfers between the basins in the application, and projects approved and begun on or before January 1, 2014.

## **FISCAL IMPLICATIONS**

There would be some cost for OSE but it is indeterminate without information related to the estimated frequency of the application.

## **SIGNIFICANT ISSUES**

OSE offers the following:

In New Mexico, water rights are established by the amount of water placed to beneficial use and they are property rights that may be sold and bought by willing sellers and buyers. Surface and ground water can be diverted and physically transported from one basin to another by permit issued by the state engineer. Pursuant to state statutes, the state engineer regulates the use of water in the state – the place and purpose of use, etc. – through the permit process. State Engineer Permits may be issued upon State Engineer approved applications for new appropriations. To change any element of a water right, including place of use (such as from one basin to another), requires application to the state engineer and public notice in accordance with Articles 5 and 12 of Chapter 72 NMSA 1978. The state engineer shall approve a transfer

application if he finds that issuing the permit will not impair existing valid water rights, is not contrary to conservation of water within the state, and is not detrimental to the public welfare of the state.

The bill adds an additional review process to determine “impairment”, “public welfare” and “conservation of water” in the evaluation of water rights applications with respect to the receiving basin (move-to). This new process will be at the expense of the applicant. Also, it is not clear whether this is a separate “new” application process and whether it applies to both new appropriations and existing water right transfers. Because of this lack of clarity on the bill, it is not possible to determine how to mesh existing statutes with the new proposed statute.

AGO adds that requiring legislative consent for a private water permit application is extremely rare and presents the applicant with significant obstacles to acquiring a permit involving an inter-basin transfer of more than seven thousand acre feet. The New Mexico legislature is not in session year-round and in even numbered years meets only to consider budget issues and those the Governor puts on the call. Because the legislature has wide authority to regulate and permit new uses of water, as applied to intra-state transfers, the additional considerations of this Bill seem reasonable. Restrictions on out of state transfer, however, are subject to Interstate Commerce Clause scrutiny, *Sporhase v. Nebraska*, 102 S.Ct. 3456 (1982). Therefore, any application for an out of basin transfer that also sought to transport the water out of state would be subject to that analysis and potential challenge on that ground.

The AGO continues that inter-basin transfers play an important part in state and federal projects, and should be specifically exempted from this Bill to assure there is no confusion. Those projects are typically approved through other project specific federal or state law, so the legislature has the ability to make its policy known through those bills. A specific exemption in SB 77 would assure the Bill creates no conflict with proposed or foreseeable developments of large public regional water supply projects within New Mexico. New Mexico already has numerous important large inter-basin transfers and such projects are likely to play an increasing role in water supply of the future.

MW/ds