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FISCAL IMPACT REPORT

ORIGINAL DATE 1/27/18

SPONSOR Morales **LAST UPDATED** _____ **HB** _____

SHORT TITLE Southwest NM Water Projects **SB** 72

ANALYST Jorgensen

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY18	FY19		
	(\$50,000.0)	Nonrecurring	New Mexico Unit Fund
	\$50,000.0	Nonrecurring	Interstate Stream Commission

(Parenthesis () Indicate Expenditure Decreases)

Duplicates HB127

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General's Office (NMAG)
 New Mexico Finance Authority (NMFA)
 New Mexico Institute of Mining and Technology (NMTech)
 Office of the State Engineer (OSE)

SUMMARY

Synopsis of Bill

Senate Bill 72 appropriates \$50 million from the New Mexico unit fund to the Interstate Stream Commission (ISC) for four identified purposes: 1) \$12 million to fully implement a regional water project; 2) \$34 million to construct Water Trust Board-approved water supply projects in southwest New Mexico that meet a water supply demand and are included in 2017 infrastructure capital improvement plans; 3) \$3.5 million to collect ground water and geologic data to improve the ground water flow model of the Mimbres basin aquifer system; and 4) \$500 thousand for the evaluation and planning of alternatives for a remote well field for the City of Deming in a comparatively stable area of the Mimbres basin aquifer.

SB72 requires that local project sponsors provide a match between 10 percent and 20 percent. SB72 provides for expenditure of the appropriations in fiscal year 2019 through 2023 and unexpended or unencumbered balances remaining at the end of fiscal year 2023 shall revert to the New Mexico Unit Fund.

FISCAL IMPLICATIONS

The OSE raised concerns that enactment of SB72 would disrupt construction of a diversion project and may reduce funding available for 16 water utilization projects which received \$9.1 million from the unit fund. OSE also notes that spending New Mexico unit funds would deprive the state of the income received through investment of these funds and may prevent ISC from paying staff salaries for employees working on the New Mexico unit, or diversion.

Under the federal Arizona Water Rights Settlement Act (AWSA), New Mexico has the option to use \$66 million (in 2004 dollars) in federal funds to meet water supply demands in the state's "southwestern water planning region" (Catron, Luna, Hidalgo, and Grant counties). The federal Department of the Interior approved moving forward with feasibility studies in November 2015. New Mexico is eligible to receive \$34 million (also indexed to 2004 dollars) in additional funding for a diversion project if the required National Environmental Policy Act (NEPA) review is complete and a "record of decision" is issued by December 2019. OSE notes that enactment of SB72 would likely hamper the completion of the NEPA process thus endangering the funding available for construction of a diversion project. While a project has been selected, the NEPA process has yet to begin.

SIGNIFICANT ISSUES

NMAG notes:

Section 212(i) of the Arizona Water Settlements Act (which cross-references the above-cited federal statutes) provides that

Withdrawals from the New Mexico Unit Fund shall be for the purpose of paying costs of the New Mexico Unit or other water utilization alternatives to meet water supply demands in the Southwest Water Planning Region of New Mexico, *as determined by the New Mexico Interstate Stream Commission* in consultation with the Southwest New Mexico Water Study Group or its successor

Because SB72 attempts to appropriate monies from the New Mexico Unit Fund for purposes specified by the legislature, it appears to contradict the federal statutes directive that such spending determinations be made by the ISC. If the bill is enacted and subsequently challenged, a court could hold that it is subject to federal preemption.

While federal and state law are clear that the determination of which projects are selected is up to ISC, the Legislature's power of appropriation still extends over state funds such as the New Mexico unit fund. Although the fund statute states that "money in the fund ... is appropriated to the interstate stream commission," similar continuing appropriation language is used a total of 119 times in statute regarding various funds which are appropriated annually through the legislative process.

The New Mexico Supreme Court’s opinion in *State of New Mexico ex rel. Smith v. Martinez*, 2011-NMSA-043, states:

The New Mexico Constitution vests the power to appropriate money exclusively with the Legislature. Our Constitution further requires that a law making an appropriation must “distinctly specify the sum appropriated and the object to which it is to be applied,” with money being “paid out of the treasury only upon appropriations made by the legislature.” (citations omitted).

Because the New Mexico unit fund statute does not distinctly specify an appropriated sum, it may not meet the constitutional requirement of an appropriation. Although the purpose of the unit fund and the authority to determine which projects are selected are restricted by federal and state law, the power to appropriate the fund resides with the Legislature. This is further shown by ISC’s inclusion of the fund as “other state funds” revenue in its annual budget request each year since fiscal year 2013 and submission of budget adjustment requests to increase use of the fund which also classify it as “other state funds” revenue. Finally, LFC, DFA, and ISC staff reached consensus in the summer of 2016 that the unit fund should be classified as “other state funds.”

According to New Mexico Tech:

From the 1950s to 1990s, some regions (i.e. south of Deming) in southwest NM have seen alarming rates of groundwater level declines, which have slowed some since the 1990s. In other locations, groundwater levels are stable; suggesting groundwater use may be in balance with surface water recharge. Comparisons across the state show that the Mimbres basin in Southwestern New Mexico remains an area of higher concern, due to an overall reduction in the amount of groundwater available in storage. Previous studies of the hydrology of this region have been performed based on limited data from existing wells and mapping. Additionally, there are local groundwater models used for groundwater administration, but these are not comprehensive across the region. Measured trends and predictive analysis suggest a reduction in surface water supplies in the region, limiting potential recharge to groundwater basins. Long term planning and management for the region requires a comprehensive understanding of available groundwater resources across the entire Mimbres basin.

In addition, New Mexico Tech believes the hydrogeologic study portion of this bill would provide an important planning and management tool that would directly benefit state water managers, local municipalities and adjacent communities, and the public.

OTHER SUBSTANTIVE ISSUES

Concerns have been raised about the financial sustainability of the diversion project. In a letter dated November 30, 2017, (Attachment 1) the State Auditor’s Office raised concerns about the viability of future revenue streams necessary to support the operations and maintenance costs of the diversion.

PERFORMANCE IMPLICATIONS

ISC pays approximately \$300 thousand in salaries from the New Mexico unit fund. Should SB72 be enacted, the funding to continue paying these staff salaries may not be available.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB72 is duplicated by HB127.

TECHNICAL ISSUES

SB72 requires the \$34 million of water supply projects be approved by the water trust board rather than the ISC. However, federal and state law are clear that project selection is up to ISC.

CJ/al