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HOUSE BILL 452

43RD LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 1998

INTRODUCED BY

PAULINE K. GUBBELS

AN ACT

RELATING TO WATER RIGHTS; ENACTING THE NEW MEXICO WATER BANKING ACT AND AMENDING SECTIONS OF THE NMSA 1978 TO CREATE AN AUTHORITY AND BOARD TO REGULATE WATER BANKING OF CONSERVED AND SURPLUS WATER AND TO ESTABLISH A FUND; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. [ NEW MATERIAL ] SHORT TITLE. -- Sections 1 through 16 of this act may be cited as the "New Mexico Water Banking Act".

Section 2. [ NEW MATERIAL ] LEGISLATIVE PURPOSE. -- The purposes of the New Mexico Water Banking Act are to:

- A. make better and more extensive use of water resources in the state;
- B. encourage the conservation of water and ensure

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1 that conserved and surplus water is available for other uses  
2 and users through transfers administered by the New Mexico  
3 water bank authority;

4 C. permit greater access to known resources of  
5 available water to water users who need additional supply;

6 D. amend water forfeiture statutes to delay their  
7 application to water rights deposited in the water bank for  
8 use by others who have current needs for water resources;

9 E. permit public uses of unused, conserved or  
10 surplus water rights for the benefit of the public interest;

11 F. provide a market conduit for unused, conserved  
12 or surplus water rights and resources;

13 G. provide an alternative to forfeiture for  
14 unused, unneeded or conserved water rights by permitting  
15 transfers administered by the New Mexico water bank board; and

16 H. promote economic development in the state by  
17 providing alternative water availability solutions for  
18 agricultural, environmental, municipal, industrial,  
19 commercial, recreational and residential interests in the  
20 state.

21 Section 3. [NEW MATERIAL] DEFINITIONS. --As used in the  
22 New Mexico Water Banking Act:

23 A. "authority" means the New Mexico water bank  
24 authority;

25 B. "board" means the New Mexico water bank board;

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1 C. "deposit" means the placement of a water right  
2 or portion of a water right in the New Mexico water bank for  
3 transfer;

4 D. "depositor" means the owner of a water right  
5 who deposits the water right or a portion of the water right  
6 in the New Mexico water bank;

7 E. "transfer" means the conveyance of a water  
8 right or a portion of a water right by sale or lease;

9 F. "water bank" or "bank" means the New Mexico  
10 water bank;

11 G. "water right" means a right acquired or  
12 authorized pursuant to the laws of this state to impound,  
13 divert or use surface water or ground water to the extent  
14 authorized by law; and

15 H. "withdrawal" means the removal of a deposit in  
16 the water bank by the depositor.

17 Section 4. [NEW MATERIAL] NEW MEXICO WATER BANK BOARD--  
18 CREATION-- APPOINTMENT-- QUALIFICATIONS-- TERMS-- EX-OFFICIO  
19 MEMBERS. --

20 A. The "New Mexico water bank board" is  
21 established to administer the New Mexico Water Banking Act  
22 through the New Mexico water bank authority.

23 B. The board shall be composed of seven public  
24 members appointed by the governor for four-year terms whose  
25 service on the board shall be without compensation except for

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1 expense reimbursement made in accordance with the Per Diem and  
2 Mileage Act. For initial terms, two members of the board  
3 shall be appointed for four-year terms, two members shall be  
4 appointed for three-year terms and three members shall be  
5 appointed for two-year terms. Thereafter, all appointments  
6 shall be for four-year terms. Members shall be chosen for  
7 their expertise and experience in water rights and water  
8 resources fields. Each member shall reside in a geographic  
9 area of the state different from each other member. No more  
10 than four of the members shall be of the same political party.  
11 Members may serve two terms and shall remain in office until  
12 their respective successors have been appointed and have  
13 agreed to serve. The members shall annually elect a member to  
14 serve as chairman of the board.

15 C. The state engineer, chairman of the interstate  
16 stream commission, secretary of environment, speaker of the  
17 house of representatives and president pro tempore of the  
18 senate, or each of their respective designees, shall be ex-  
19 officio members of the board, without vote.

20 Section 5. [NEW MATERIAL] NEW MEXICO WATER BANK  
21 AUTHORITY ESTABLISHED-- EMPLOYMENT AND DISCHARGE OF DIRECTOR--  
22 EMPLOYEES. --

23 A. The "New Mexico water bank authority" is  
24 established under the direction of the board.

25 B. The board shall appoint and fix the salary of a

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1 full-time director who shall serve at the pleasure of the  
2 board and, pursuant to the direction of the board, the  
3 director shall employ such employees of the authority as are  
4 proper and necessary and prescribe their duties and  
5 compensation.

6 Section 6. [NEW MATERIAL] NEW MEXICO WATER BANK BOARD  
7 AND AUTHORITY--POWERS AND DUTIES.--The authority, acting at  
8 the direction of the board, shall:

- 9 A. administer, implement and enforce the New  
10 Mexico Water Banking Act;
- 11 B. administer, operate and regulate the water  
12 bank;
- 13 C. encourage water rights owners to implement  
14 water conservation practices;
- 15 D. educate the public, including political  
16 subdivisions of the state, about the water bank and the  
17 benefits of depositing conserved or surplus water in the bank;
- 18 E. establish requirements for a deposit of a water  
19 right or portion of a water right into the water bank,  
20 including:
  - 21 (1) terms and conditions for deposit and  
22 withdrawal, including the procedure and penalties for early  
23 withdrawal;
  - 24 (2) the procedure for determining eligibility  
25 of water rights for deposit;

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1 (3) the procedure and formula to quantify  
2 water rights to be deposited;

3 (4) the eligibility of water rights for  
4 deposit considering legal entitlement, ownership, validity,  
5 recent historical use and absence of legal restrictions;

6 (5) the priority order, if any, of water  
7 rights to be sold by the bank; and

8 (6) monitoring to determine and penalties for  
9 improper use of deposited or transferred water;

10 F. facilitate the transfers of water rights from  
11 the water bank for future beneficial use, including:

12 (1) making annual determinations of available  
13 deposited water to be transferred;

14 (2) making annual determinations of the fees  
15 for transfer of deposited water;

16 (3) establishing the formula to calculate the  
17 annual pro rata interest of each depositor in transfers made  
18 during the previous year and computing each depositor's  
19 entitlement of proceeds;

20 (4) negotiating the terms of a transfer;

21 (5) maintaining a registry of deposits and  
22 persons who have registered with the bank and identifying a  
23 beneficial use for additional water supplies; and

24 (6) informing persons listed on its registry  
25 about water rights available from the bank;

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1           G. purchase, hold and sell water rights in its own  
2 name;

3           H. negotiate and contract for or acquire the use  
4 of existing surface facilities or reservoirs to store  
5 deposited water not transferred during any year of its term of  
6 deposit;

7           I. determine compliance with the necessary  
8 standards for stored water considering the obligations of the  
9 board and authority pursuant to surface storage reservoir  
10 contracts, if any;

11          J. establish injection standards, in conjunction  
12 with other state agencies having authority regarding water  
13 injection schemes or water quality, for deposited water to be  
14 injected, through direct surface or direct subsurface methods,  
15 into underground aquifers;

16          K. subject to Sections 13 and 14 of the New Mexico  
17 Water Banking Act, establish fees to be paid to the water bank  
18 fund for transfers and the administrative and operational  
19 costs of the bank, board and authority;

20          L. establish procedures for making, transferring  
21 or withdrawing a deposit; determining the priority of  
22 transfers, the reports and records of a transfer and the fees  
23 associated with transfers; and other actions;

24          M report annually to the legislature regarding  
25 deposits, withdrawals and transfers made, identifying the

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1 number of persons and water rights involved in all deposits,  
2 withdrawals and transfers; existing and anticipated future  
3 storage needs of the water bank; and other operations of the  
4 bank, board and authority;

5 N. promulgate rules to implement the New Mexico  
6 Water Banking Act and to administer, operate and regulate the  
7 water bank;

8 O. contract with any person to achieve or further  
9 the purposes of the New Mexico Water Banking Act;

10 P. file suit in its own name and be sued; and

11 Q. take all other actions necessary or advisable  
12 to facilitate deposits and transfers and to achieve or further  
13 the purposes of the New Mexico Water Banking Act.

14 Section 7. [NEW MATERIAL] NEW MEXICO WATER BANKING ACT  
15 EXCLUSIVE. -- Water rights shall not be banked or eligible for  
16 storage in either surface facilities or reservoirs or  
17 underground aquifers in this state, except in accordance with  
18 the New Mexico Water Banking Act and authorizations of law,  
19 compacts or contracts of the state valid on the effective date  
20 of the New Mexico Water Banking Act; provided that the water  
21 bank may accept water rights of Indian nations, tribes or  
22 pueblos for banking and storage in accordance with the terms  
23 of that act.

24 Section 8. [NEW MATERIAL] DEPOSITED WATER RIGHTS--USES--  
25 REVERSION TO PUBLIC WATER--PUBLIC INTEREST USE. --



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1           A. In accordance with rules promulgated by the  
2 board, a water right or portion of a water right deposited in  
3 the water bank during the term of the deposit may:

4                   (1) not be used by the depositor, his heirs,  
5 successors or assignees;

6                   (2) be transferred, stored or used for public  
7 interest uses by the bank in accordance with the New Mexico  
8 Water Banking Act and rules of the board; or

9                   (3) be withdrawn by the depositor in  
10 accordance with the New Mexico Water Banking Act, the rules of  
11 the board and the terms of the deposit.

12           B. In any event, unless sold by the bank on behalf  
13 of the depositor or withdrawn by the depositor in accordance  
14 with the New Mexico Water Banking Act, the rules of the board  
15 and the terms of the deposit, a deposited water right reverts  
16 to the status of unappropriated public water subject to state  
17 administration over public waters and subsequent appropriation  
18 for beneficial use at the expiration of the term of the water  
19 right deposit.

20           C. During the term of the deposit, water that is  
21 neither transferred nor stored during any year may be used for  
22 in-stream releases, environmental, recreational, flushing or  
23 other public interest uses, as determined by the board;  
24 provided that the public interest use shall not interfere with  
25 any obligation, compact or other interest of the state.

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1           Section 9.   [NEW MATERIAL] STORAGE IN SURFACE FACILITIES  
2   AND RESERVOIRS AND RECOVERY OF DEPOSITED WATER. --The board,  
3   through the authority, may store deposited water in existing  
4   surface facilities or reservoirs in the state during the term  
5   of the deposit. The board shall promulgate rules to implement  
6   storage and recovery of deposited water in and from surface  
7   facilities and reservoirs for transfers, alternative surface  
8   storage, public interest uses, ground water storage and  
9   conversion to bank ownership, withdrawal or reversion to public  
10   water.

11           Section 10.   [NEW MATERIAL] STORAGE AND RECOVERY OF  
12   DEPOSITED WATER IN UNDERGROUND AQUIFERS--BANK- OWNED WATER. --In  
13   any year of a deposit term, the bank may store available  
14   deposited water, unneeded during that year for transfers or  
15   public interest uses, in underground aquifers. Upon being  
16   stored in an underground aquifer, through direct or indirect  
17   surface or direct subsurface methods, the water is deemed  
18   abandoned by the depositor and converted to bank ownership for  
19   subsequent recovery by the bank for sale, lease, public  
20   interest or other use by the bank, without compensation, credit  
21   or proceeds paid to or for the depositor. The water bank shall  
22   not use water converted to bank ownership under the provisions  
23   of this section in competition with or in any manner  
24   detrimental to its obligations or responsibilities to  
25   depositors and deposited water rights.

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1           Section 11.   [NEW MATERIAL] PRESUMPTION OF NON-  
2 IMPAIRMENT. --A transfer of a deposited water right for any  
3 year, during the term of the deposit, by the board through the  
4 authority, shall create a rebuttable presumption that the  
5 transfer does not impair existing water rights and is neither  
6 contrary to the conservation of water within the state nor  
7 detrimental to the public welfare of the state. Unless the  
8 state engineer objects to the transfer within ten days of  
9 written notice of the intended transfer by the board to the  
10 state engineer, the transfer is deemed approved by the state  
11 engineer, and the transfer may occur, subject only to objection  
12 by an objector substantially and specifically affected by the  
13 one-year transfer of the deposited water right. Upon any  
14 objection, the transfer shall be reviewed by the state  
15 engineer, who shall provide his findings to the board about the  
16 transfer and the objection. If the state engineer objects to  
17 the transfer or determines that the transfer may adversely  
18 affect the objector, the board shall rescind or modify the  
19 transfer to avoid any adverse effect on the objector's water  
20 right.

21           Section 12.   [NEW MATERIAL] DEPOSITS--EXEMPT FROM  
22 FORFEITURE. --A water right, eligible for deposit as determined  
23 by board rule, may be deposited in the water bank for a term of  
24 up to ten years and may be transferred annually during the  
25 deposit term, pursuant to the terms of the New Mexico Water

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1 Banking Act and rules promulgated thereunder. During the  
2 deposit term, a deposited water right is exempt from forfeiture  
3 pursuant to Sections 72-5-28, 72-6-3 and 72-12-8 NMSA 1978.

4 Section 13. [NEW MATERIAL] FEES AND REPORTS. --

5 A. Fees shall be imposed on each transfer of water  
6 rights on deposit with the water bank for:

7 (1) administration and operation of the water  
8 bank; and

9 (2) each transfer of deposited water rights.

10 B. By rule, the board shall set:

11 (1) the administration and operation fees to  
12 be charged to and paid by the transferee of each deposited  
13 water right to the bank;

14 (2) annually, the transfer fees to be paid by  
15 the transferee to the bank, considering the type and duration  
16 of the transfer and the amount, quality and intended use of the  
17 deposited water rights to be transferred; and

18 (3) the percentage of the transfer fee to be  
19 paid over to the depositor for the transfer made and the  
20 percentage of the transfer fee retained by the bank for making  
21 the transfer.

22 C. By rule, the board shall establish the procedures  
23 for setting the fees imposed by this section and procedures for  
24 the calculation and payment of the percentage of the transfer  
25 fee to be paid over to the depositor.

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1                   D. Fees shall not be imposed or paid for public  
2 interest uses of deposited water rights made pursuant to  
3 Subsection B of Section 8 of the New Mexico Water Banking Act.

4                   Section 14. [ NEW MATERIAL ] WATER BANK FUND CREATED--  
5 FUNDING.--There is created in the state treasury the "water  
6 bank fund" to be used solely for the administration and  
7 operation of the water bank by the board and the authority.  
8 The water bank fund is to be financed by appropriations from  
9 the general fund to the board, fees assessed and collected by  
10 the board in administering the New Mexico Water Banking Act  
11 and such other financing as is permitted by law. Income or  
12 interest earned on the investment of the fund shall remain in  
13 the fund. Money shall be expended pursuant to warrant issued  
14 by the department of finance and administration pursuant to  
15 vouchers signed by the director of the authority. Any  
16 unexpended or unencumbered balance of the water bank fund shall  
17 not revert to the general fund, but shall remain on deposit in  
18 the fund for administrative and operating costs of the water  
19 bank.

20                   Section 15. [ NEW MATERIAL ] OTHER TRANSFERS.--Nothing in  
21 the New Mexico Water Banking Act shall prevent the sale or  
22 purchase of water or water rights by or through persons other  
23 than the board or authority to the extent permitted by and in  
24 accordance with law.

25                   Section 16. [ NEW MATERIAL ] CONSERVATION OF WATER RIGHTS.--

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1 Subject to Section 7 of the New Mexico Water Banking Act, the  
2 amount of water rights conserved by a water right owner may be  
3 deposited in the water bank in the amount conserved, subject  
4 further to board rule establishing eligibility terms for the  
5 conserved water deposit and the calculation of the water  
6 conserved.

7 Section 17. Section 72-5-28 NMSA 1978 (being Laws 1907,  
8 Chapter 49, Section 42, as amended) is amended to read:

9 "72-5-28. FAILURE TO USE WATER--FORFEITURE. --

10 A. When the party entitled to the use of water fails  
11 to beneficially use all or any part of the water claimed by him,  
12 for which a right of use has vested for the purpose for which it  
13 was appropriated or adjudicated, except the waters for storage  
14 reservoirs, for a period of four years, such unused water shall,  
15 if the failure to beneficially use the water persists one year  
16 after notice and declaration of nonuser given by the state  
17 engineer, revert to the public and shall be regarded as  
18 unappropriated public water; provided, however, that forfeiture  
19 shall not necessarily occur if circumstances beyond the control  
20 of the owner have caused nonuse, such that the water could not  
21 be placed to beneficial use by diligent efforts of the owner;  
22 and provided that periods of nonuse when irrigated farm lands  
23 are placed under the acreage reserve program or conservation  
24 reserve program provided by the Food Security Act of 1985, P.L.  
25 99-198 shall not be computed as part of the four-year forfeiture

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1 period; and provided, further, that the condition of notice and  
2 declaration of nonuser shall not apply to water [ ~~which~~ ] that has  
3 reverted to the public by operation of law prior to June 1,  
4 1965.

5 B. Upon application to the state engineer at any time  
6 and a proper showing of reasonable cause for delay or for nonuse  
7 or upon the state engineer finding that it is in the public  
8 interest, the state engineer may grant extensions of time, for a  
9 period not to exceed three years for each extension, in which to  
10 apply to beneficial use the water for which a permit to  
11 appropriate has been issued or a water right has vested, was  
12 appropriated or has been adjudicated.

13 C. Periods of nonuse when water rights are acquired  
14 by incorporated municipalities or counties for implementation of  
15 their water development plans or for preservation of municipal  
16 or county water supplies shall not be computed as part of the  
17 four-year forfeiture statute.

18 D. A lawful exemption from the requirements of  
19 beneficial use, either by an extension of time or other  
20 statutory exemption, stops the running of the four-year period  
21 for the period of the exemption, and the period of exemption  
22 shall not be included in computing the four-year period.

23 E. Periods of nonuse when the nonuser of acquired  
24 water rights is on active duty as a member of the armed forces  
25 of this country shall not be included in computing the four-year

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1 period.

2 F. The owner or holder of a valid water right or  
3 permit to appropriate waters for agricultural purposes  
4 appurtenant to designated or specified lands may apply the full  
5 amount of water covered by or included in the water right or  
6 permit to any part of [~~sueh~~] the designated or specified tract  
7 without penalty or forfeiture.

8 G. Periods of nonuse when water rights are acquired  
9 and placed in a state engineer-approved water conservation  
10 program by a conservancy district organized pursuant to Chapter  
11 73, Articles 14 through 19 NMSA 1978, an acequia or community  
12 ditch association organized pursuant to Chapter 73, Article 2 or  
13 3 NMSA 1978, an irrigation district organized pursuant to  
14 Chapter 73, Articles 9 through 13 NMSA 1978 or the interstate  
15 stream commission shall not be computed as part of the four-year  
16 forfeiture period.

17 H. Periods when water rights are deposited in the New  
18 Mexico water bank pursuant to the New Mexico Water Banking Act  
19 shall not be computed as part of the four-year forfeiture  
20 period. "

21 Section 18. Section 72-12-8 NMSA 1978 (being Laws 1931,  
22 Chapter 131, Section 8, as amended) is amended to read:

23 "72-12-8. WATER RIGHT FORFEITURE. --

24 A. When for a period of four years the owner of a  
25 water right in any of the waters described in Sections 72-12-1



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1 through 72-12-28 NMSA 1978 or the holder of a permit from the  
2 state engineer to appropriate any such waters has failed to  
3 apply them to the use for which the permit was granted or the  
4 right has vested, was appropriated or has been adjudicated, the  
5 water rights shall be, if the failure to beneficially use the  
6 water persists one year after notice and declaration of nonuser  
7 given by the state engineer, forfeited and the water so unused  
8 shall revert to the public and be subject to further  
9 appropriation; provided that the condition of notice and  
10 declaration of nonuser shall not apply to water [~~which~~] that has  
11 reverted to the public by operation of law prior to June 1,  
12 1965.

13 B. Upon application to the state engineer at any time  
14 and a proper showing of reasonable cause for delay or for nonuse  
15 or upon the state engineer finding that it is in the public  
16 interest, the state engineer may grant extensions of time, for a  
17 period not to exceed three years for each extension, in which to  
18 apply to beneficial use the water for which a permit to  
19 appropriate has been issued or a water right has vested, was  
20 appropriated or has been adjudicated.

21 C. Periods of nonuse when irrigated farm lands are  
22 placed under the acreage reserve program or conservation reserve  
23 program provided by the Food Security Act of 1985, P.L. 99-198  
24 shall not be computed as part of the four-year forfeiture  
25 period.

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1           D. Periods of nonuse when water rights are acquired  
2 and placed in a state engineer-approved water conservation  
3 program by an artesian conservancy district, a conservancy  
4 district, an acequia or ~~community~~ ditch association organized  
5 pursuant to Chapter 73, Article 2 or 3 NMSA 1978, an irrigation  
6 district organized pursuant to Chapter 73, Articles 9 through 13  
7 NMSA 1978 or the interstate stream ~~commission~~ shall not be  
8 computed as part of the four-year forfeiture statute.

9           E. A lawful exemption from the requirements of  
10 beneficial use, either by an extension of time or other  
11 statutory exemption, stops the running of the four-year period  
12 for the period of the exemption, and the period of exemption  
13 shall not be included in computing the four-year period.

14           F. Periods of nonuse when water rights are acquired  
15 by incorporated municipalities or counties for implementation of  
16 their water development plans or for preservation of municipal  
17 or county water supplies shall not be computed as part of the  
18 four-year forfeiture statute.

19           G. Periods of nonuse when the nonuser of acquired  
20 water rights is on active duty as a ~~member~~ of the armed forces  
21 of this country shall not be included in computing the four-year  
22 period.

23           H. The owner or holder of a valid water right or  
24 permit to appropriate waters for agricultural purposes  
25 appurtenant to designated or specified lands may apply the full

1 amount of water covered by or included in that water right or  
2 permit to any part of the designated or specified tract without  
3 penalty or forfeiture.

4 I. Periods when water rights are deposited in the New  
5 Mexico water bank pursuant to the New Mexico Water Banking Act  
6 shall not be computed as part of the four-year forfeiture  
7 period. "

8 Section 19. APPROPRIATION. --Two hundred fifty thousand  
9 dollars (\$250,000) is appropriated from the general fund to the  
10 water bank fund for expenditure in fiscal year 1999 and  
11 subsequent fiscal years by the New Mexico water bank board for  
12 the purpose of carrying out the provisions of the New Mexico  
13 Water Banking Act. Any unexpended or unencumbered balance  
14 remaining at the end of any fiscal year shall not revert to the  
15 general fund.

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