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FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/11

SPONSOR King LAST UPDATED _____ HB 374

SHORT TITLE Interstate River Compacts Litigation Appropriation SB _____

ANALYST Aubel

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	\$3,000.0	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		See fiscal impact	See fiscal impact	See fiscal impact	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (OAG)

Office of the State Engineer/Interstate Stream Commission (OSE/ISC)

New Mexico Environment Department (NMED)

SUMMARY

Synopsis of Bill

House Bill 374 appropriates \$3 million from the general fund to the Office of Attorney General for litigation involving New Mexico's interstate rivers, including the Rio Grande and the Colorado River and their tributaries. For example, the San Juan and the La Plata rivers are tributaries to the Colorado River. The litigation may be against the United States of America, the state of Texas, the state of Colorado and such other states or entities and officials within those states as the attorney general deems necessary and proper. The attorney general may enter into agreements with other state agencies to provide funds to those agencies for necessary litigation support.

FISCAL IMPLICATIONS

Appropriation

The appropriation of \$3 million contained in this bill is a non-recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2012 shall not revert to the general fund but remain available in subsequent years for the purpose of litigation over interstate rivers.

Operating Budget Impact

In the past, a joint powers agreement (JPA) among the AG, NMED and OSE/ISC allowed the three agencies to address issues related to potential litigation on interstate rivers, focused primarily on the Lower Rio Grande to provide baseline salinity and other data. Thus, the expenditures were more pro-active in nature as detailed by NMED in its response below in the significant issues section. However, the AG response provided in the significant issues section suggests that litigation may be eminent based on more recent factors. If the AG brings lawsuits as described, it is reasonable to assume that the expenditure would be recurring, and future appropriations will be needed to cover all litigation costs. Insufficient detail is provided to estimate the operating expenditures over the next few years for the related agencies, but they could be significant. It is unlikely \$3 million would cover all litigation as described over the long term.

During the House Appropriations and Finance Committee budget hearing for the OGA, the question was asked whether funding for this litigation is available from the water projects fund (Section 72-4A-9). The answer is no, as explained by the AG:

The water project fund is created to fund water projects (bricks and mortar type projects) and water right adjudications. Under New Mexico law, water right adjudications are a specific type of statutory lawsuit to determine the water rights if individuals and entities within a stream system. All claims to the right to use water are determined by the court as to the amount, priority, place and purpose of use of each claimed water right. *See generally* NMSA 1978 Sections 72-4-17 through -19. “Water rights adjudication” does not include the type of litigation over interstate streams against other states and the United States such as is contemplated by this appropriation.

SIGNIFICANT ISSUES

The AG provides the following background:

Working in conjunction with the Office of the State Engineer and the Interstate Stream Commission and the expert hydrologists, engineers and other experts in those agencies, the Attorney General has identified significant legal threats and actual ongoing harm to New Mexico’s lawful share of water in its interstate streams. This harm and threats fall into two broad categories: (1) Instances where New Mexico must sue to recover water that is already being wrongfully denied to New Mexico and its water users; and (2) Instances where it is likely that the Attorney General must defend New Mexico against litigation brought by other states.

In the first category, for example, the United States Bureau of Reclamation has undertaken to operate the Rio Grande Project under a new scheme called the “2008 operating agreement”. In each of the last three years, the Elephant Butte Irrigation District’s (EBID’s) allocation of water has been reduced by at least 150,000 acre feet. For example, in the year 2000, EBID was allocated 495,000 acre feet. In 2008, EBID was allocated only 320,000 acre feet under the 2008 operating agreement. The difference between the two years is EBID’s farmers were allocated 175,000 acre feet less in 2008 than in 2000 because of the 2008 operating agreement. These are very large annual volumes of water, on the order of 15 times the annual amount in dispute that resulted in the interstate litigation on the Pecos River. The situation is so harmful to New Mexico that this year, 2011, the initial allocation to farmers in the two states is 224,000 acre feet to the Texas farmers and only 20,000 acre feet to the New Mexico farmers. This means that roughly 90% of the initial allocation will go to the farmers in Texas and only 10% to New Mexico’s farmers in EBID. In other words, lots of water will be flowing down the Rio Grande in the Las Cruces area this spring bound solely for use by Texas farms. Attempts to negotiate with the United States Bureau of Reclamation have been unproductive and it appears the only way New Mexico can protect its farmers and their water is to sue.

Also included in this first category is the La Plata River Compact in northwestern New Mexico. The state of Colorado has repeatedly violated and is expected to continue to violate the Compact and not meet its delivery obligations to New Mexico.

In the second category there are serious disagreements between the 7 Colorado River Basin states (California, Arizona, Nevada, Colorado, Utah, Wyoming and New Mexico) that have been exacerbated by drought and potential shortage in the basin. While New Mexico hopes for and is working on resolution of these issues, the Attorney General recognizes that, the chance of resolution is not certain and if resolution is not found and the situation continues to deteriorate, there is a significant likelihood that New Mexico and other states will be sued and New Mexico must defend its water users and its water. Included in this category are:

1. Shortages in the Lower Basin. The storage levels at Lake Meade are close to the levels where the Lower Basin (California, Arizona and Nevada) must take shortages pursuant to the 2007 Basin States Agreement. If water levels at Lake Meade continue to decline, it is likely the 2007 Basin States Agreement will be litigated. This litigation would involve all 7 Basin States, including New Mexico.
2. Various disagreements over the interpretation of the Upper Colorado River Basin Compact have developed between the states since New Mexico reached the settlement with the Navajo Nation and developed its plan for the Navajo Gallup Water Supply Project. If these disagreements cannot be recognized, litigation will likely occur.

NMED provides its viewpoint and role on the issue of salinity in the Lower Rio Grande:

NMED’s Lower Rio Grande Program: Water issues in the Lower Rio Grande Basin in New Mexico have, and continue to be, an area of contention with the State of Texas. Rapid population growth in the region, particularly in Texas and Mexico, has put ever-increasing demand on the area’s limited water resources; a problem that has been exacerbated by several years of drought. Since 2001, Texas has threatened New Mexico with litigation over the quality and quantities of its Rio Grande water deliveries, claiming

it is not receiving its share of Rio Grande Project water and that the quality of delivered water is unacceptable under the terms of the Rio Grande Compact. In response, the AGO, NMED and ISC have worked cooperatively to develop solutions to concerns regarding the quantity and quality of the water delivered to Texas. Technical work conducted to date has been successful in avoiding costly litigation.

Utilization of water resources in the Rio Grande Project area is restricted where highly saline water results in reduced potable water supplies, smaller crop yields, and soil and groundwater deterioration. The cities of El Paso and Ciudad Juarez currently cannot use the Rio Grande for municipal water supply in winter months due to increases in salinity when irrigation releases are not occurring. In future, the City of Las Cruces and Village of Hatch may augment their existing municipal supply with treated Rio Grande surface water.

Recent university and government research has identified natural sources such as the upwelling of deep circulating groundwater and geothermal waters as the principal salinity contributors in the region. Additionally, these natural salinity inputs appear to be localized suggesting that source control and treatment may be feasible. In response to these findings, the multi-state Río Grande Salinity Management Coalition was formed to improve water quality in the New Mexico-Texas border region. The Coalition is composed of Texas, New Mexico, and Colorado state water agencies; irrigation districts; El Paso and Las Cruces water utilities; and university researchers. The overall objective of the Río Grande Project Salinity Management Coalition is to reduce salinity concentrations and impacts in the Río Grande Project area in order to increase usable water supplies for agricultural, urban, and environmental purposes in the critical Texas-New Mexico border region.

In 2009 NMED, ISC, and the US Army Corps of Engineers, on behalf of the Coalition, completed the first phase of a Water Resources Development Act Section 729 Río Grande Salinity Management Program which included a geospatial salinity database; a USGS Río Grande Salinity Assessment Study; and Río Grande Economic Impact Assessment study. Future phases of work would bring together existing information and develop a recommended strategy for moving forward with a salinity management program. However, funding for NMED's participation in these efforts ended in FY11.

NMED has also designed and implemented a salinity monitoring network in the Lower Rio Grande (LRG) from 2005 to present. NMED is also responsible for compiling historical and new water quality data in the Lower Rio Grande from multiple programs and agencies. The monitoring network is designed to improve understanding of salinity sources and the processes influencing salinity changes in the Río Grande from San Acacia, downstream to Courchesne Bridge near El Paso, Texas. The LRG Program conducts water quality investigations to identify sources of salinity; targets salinity control solutions; and provides the technical basis for an effective salinity control program. The monitoring program is currently unfunded.

ADMINISTRATIVE IMPLICATIONS

OSE/ISC: While the Attorney General is charged with representing the state in interstate stream compact litigation, ISC attorneys and ISC technical staff would closely cooperate

with the AGO in any interstate stream litigation, resulting in dedicated staff time to a litigation effort. However, at current staffing and funding levels, ISC attorneys and technical staff could not contribute to litigation in a meaningful way. This appropriation would provide resources to the AGO to adequately staff interstate litigation efforts.

NMED suggests the same need for funding to provide a coordinated effort to protect New Mexico's water interests.

TECHNICAL ISSUES

The Ago provided a specific technical issue that appears significant:

The title of the bill should be amended to strike the word "Compacts" and to make the word "River" plural "Rivers". So the title should read "AN ACT MAKING AN APPROPRIATION TO THE OFFICE OF THE ATTORNEY GENERAL FOR LITIGATION OVER INTERSTATE RIVERS". The reason for this correction is that the text of the bill does not limit the causes of action the Attorney General may bring to those involving "compacts" and the error in the title implies that limitation which could hinder the Attorney General's ability to effectively defend the state and its water in court.

OTHER SUBSTANTIVE ISSUES

The OSE/ISC provided additional background information on the likelihood of litigation:

1. Colorado River

Disputes over Colorado River allocations may have serious implications for water supplies for a variety of New Mexico water users, especially those who contract for San Juan-Chama water. These contractors include the cities of Albuquerque, Santa Fe and Espanola, the Pueblo of Ohkay Owingeh, the Jicarilla Apache Nation and the Middle Rio Grande Conservancy District (supplying water to both Pueblo and non-Pueblo irrigators). Major issues confronting the Colorado River that may result in litigation include:

a. Upper Colorado River Basin Compact: Differences over the interpretation of the Upper Colorado River Basin Compact have developed since New Mexico formalized its plan to develop the majority of its Upper Colorado River apportionment for the Navajo Gallup Water Supply Project. While New Mexico, along with the Upper Colorado River Basin states, have resolved to develop policies to address varying interpretations of the Compact, litigation likely will ensue if those differences cannot be reconciled.

b. Lake Mead: The storage levels at Lake Mead are close to the levels at which the Lower Basin States of the Colorado River, pursuant to the 2007 Basin States Agreement, must begin to take shortages (reduced allocation of Colorado River water). In an effort to mitigate the impact of such shortages, the 7 Colorado River Basin states have initiated discussions with the Republic of Mexico (pursuant to a 1944 Treaty) to determine its willingness to share shortages. If the discussions with Mexico are not fruitful and levels at Lake Mead continue to decline, there is a possibility that the 2007 Basin States Agreement will be litigated. All 7 Basin States, including New Mexico, are parties to the agreement and would be named in litigation.

c. La Plata River Compact: The state of Colorado has repeatedly violated the terms of the Compact with respect to its delivery obligations to New Mexico. Most recently, during the summer of 2010, Colorado dried-up the river channel and diverted all flow in the river so that Colorado was unable to make its required deliveries to New Mexico. The ISC and OSE have communicated these violations to the Colorado State Engineer but Colorado continues to breach its obligations under the Compact. While New Mexico remains hopeful about an amicable settlement with Colorado, it will consider litigation in the near future, if necessary.

2. Rio Grande

Rio Grande Compact. In 2008, the United States, the Elephant Butte Irrigation District and the El Paso County Water Improvement District entered into an Operating Agreement and developed an accompanying Operating Manual. The state is not a party to the Operating Agreement and was not involved in negotiating it. However, both the ISC and the OSE are concerned that, under the Agreement and Manual, New Mexico farmers in the Lower Rio Grande are receiving substantially less water than in previous years and therefore are disproportionately suffering the impacts of Texas groundwater pumping. The ISC also is concerned about the possible implications of the Operating Agreement for the Compact. While the AGO, ISC and OSE have repeatedly engaged the United States, through the Bureau of Reclamation, to resolve issues regarding the Operating Agreement and its impact on the Compact, state water users and the adjudication of the Lower Rio Grande, these negotiations have been unproductive and litigation appears to be inevitable in order to protect New Mexico's interests.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the OGA, “the Attorney General’s ability to effectively protect New Mexico’s water and farmers will be compromised.”

As prioritized by NMED, “New Mexico’s ability to participate in development of salinity management strategies for the Rio Grande and to complete other tasks associated with water management and Rio Grande Compact issues will be limited.”

POSSIBLE QUESTIONS

- 1. Have all sources of possible funding been explored?**
- 2. What is the economic impact to New Mexico, particularly the farming industry, if New Mexico doesn’t pursue the lawsuits?**
- 3. What is the AG’s long term projection for funding water litigation under the “worse case” scenario of bringing lawsuits under both categories identified?**
 - (1) Instances where New Mexico must sue to recover water that is already being wrongfully denied to New Mexico and its water users; and
 - (2) Instances where it is likely that the Attorney General must defend New Mexico against litigation brought by other states.
- 4. Does the state need to identify and “ earmark” a revenue stream to protect the state’s water interests for this and future generations?**

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