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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/16/11

SPONSOR SJC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Status of Water Rights Under Lease SB CS/236/aSCC

ANALYST Hoffmann

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
NFI	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

Related to HB402

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

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		N/A	N/A			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the State Engineer (OSE)

### SUMMARY

#### Synopsis of SCC Amendment

The Senate Conservation Committee amendment would restrict the use of the leased water right to its permitted use rather than allowing, in addition, “municipal or instream flow.”

According to the OSE, the amendment addresses the significant issues identified below.

#### Synopsis of Original Bill

The Senate Judiciary Committee substitute for Senate Conservation Committee substitute for Senate Bill 236 proposes to amend § 72-6-3(A) NMSA 1978 to explicitly set forth the existing law that the beneficial use of water pursuant to a state engineer approved lease of valid existing

water rights constitutes the continued exercise of the leased water rights and protects those water rights from partial loss through forfeiture or abandonment to the extent the rights have been leased.

The bill also proposes to amend § 72-6-3 to allow perfection of a right to place water to beneficial use pursuant to a permit through leasing of that right, when such right was originally adjudicated at a previous location and then transferred to a new location. This means of perfecting a water right through leasing would only be available on a fully appropriated system, and only if it had become “infeasible to place the water to the permitted beneficial use because of a change in the circumstances beyond the permittee’s control.”

## **FISCAL IMPLICATIONS**

CS/236/SJCS does not make any appropriations.

## **SIGNIFICANT ISSUES**

The OSE identified the following “interesting and difficult 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. CS/236 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. Second, 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. CS/236 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.

### **PERFORMANCE IMPLICATIONS**

The OSE forecasts a slight increase in the number of applications for permits to lease the right to place water to beneficial use in this limited circumstance.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Before the Senate Conservation Committee amendment, this bill was a duplicate of House Bill 402.

### **TECHNICAL ISSUES**

The OSE observes the following issues with the bill as currently drafted.

a. The reference to a “finally” adjudicated ground water right in proposed new § 72-6-3(C) NMSA 1978 is unclear. There is no precedent in New Mexico’s Water Code for describing and adjudicated ground water right in this manner.

b. Proposed new § 72-6-3(C) NMSA 1978 does not propose any term under which the unperfected right could be leased. As drafted, the change in circumstance beyond the permittee’s control could occur at some unspecified point in the future. As a possible guide to an appropriate term, current State Engineer Policy W-04-2007 allows an unperfected water right to be re-permitted within 5 years due to “unforeseen circumstances” that prevents use of a new location.

c. In section 1 of the bill (p.2, 1. 13), the proposed amendment of § 72-6-3(B) NMSA 1978 to change “nonuser” to “nonuse” would create a conflict with the use of “nonuser” in the two cited statutes (§§ 72-5-28 and 72-12-8 NMSA 1978). There is a legal basis for the water code’s use of “nonuser” rather than “nonuse.” “Nonuse” means the failure to exercise right, whereas “nonuser” means “nonuse” that may result in the loss of the right. The difference goes to notice – a state engineer declaration of “nonuser” informs the holder of the water right that the right is a risk of being lost for “nonuse.” While this distinction may seem nuanced, the use of “nonuser” is purposeful and should remain as part of the New Mexico’s water code as it has existed and been relied upon for over half a century.

d. Page 3 (lines 8-9): No beneficial use of water for “instream flow” is specifically defined in New Mexico by statute as proposed here. This would call for actively pumping water into a stream to increase surface flows and would require extra measuring and metering to protect the water from unauthorized diversion.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Beneficial use of water at the permitted place of use will continue to be a requirement of all State Engineer permits, including those authorizing the change in place or purpose of use of an adjudicated water right, to establish a valid existing water right that may be transferred or changed thereafter.

JCH/bym