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FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/12

SPONSOR SCORC LAST UPDATED _____ HB _____

SHORT TITLE Status of Water Rights Under Lease SB 349/SCORCS

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY12	FY13		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Related to HB402

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		N/A	N/A			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

SUMMARY

Synopsis of Bill

Senate Bill 349 was originally introduced with a short title of PUBLIC PEACE, HEALTH, SAFETY & WELFARE.

The Senate Corporations and Transportation Committee substitute for Senate Bill 349 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.”

The permittee would also be allowed to lease the water right prior to the date for filing proof of beneficial use as required by the permit or approved extension of time.

FISCAL IMPLICATIONS

Senate Bill 236/SCORCS 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. SB349/SCORCS 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. SB349/SCORCS 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.

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.

CH/lj