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## FISCAL IMPACT REPORT

**SPONSOR** Small **ORIGINAL DATE** 1/30/17  
**LAST UPDATED** 2/09/17 **HB** 164/aHJC

**SHORT TITLE** Conservancy District Roadway Liability **SB** \_\_\_\_\_

**ANALYST** Esquibel/Daly

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Minimal	Minimal	Minimal	Recurring	Public Liability Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

House Bill 164 duplicates Senate Bill 178, Conservancy District Roadway Liability

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Department of Transportation (NMDOT)

Administrative Office of the Courts (AOC)

Office of the Attorney General (OAG)

Energy, Minerals and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 164, by changing “or” to “and” in subsections C and D, makes the extension of immunity in subsection C to irrigation and conservancy districts when a state agency or other governmental entity has agreed in writing to operate and maintain a road and the waiver of immunity in subsection D as to that agency or entity subject to both conditions (operating and maintaining), rather than only one, as originally drafted. This change also makes the language of subsections (C)(1) and (2) and subsection D consistent with one another.

#### Synopsis of Original Bill

House Bill 164 (HB164) proposes to amend Section 41-4-11 of the Tort Claims Act (NMSA 1978, §§ 41-4-1 through 41-4-30) to extend immunity from certain types of tort liability to all irrigation and conservancy districts.

The type of liability at issue in Section 41-4-11 arises from bodily injury, wrongful death, or property damage caused by the negligence of public employees acting within the scope of their duty in the construction and maintenance of any bridge, road, culvert, street, alley, sidewalk or parking. Section 41-4-11 also extends immunity from suit to any harm caused by a defect in design or construction, or deviation from standard design practice when such deviation is reasonable under the circumstances.

HB164 would extend this immunity to irrigation and conservancy districts, when the State of New Mexico has entered into an agreement with a district to maintain a road running through a irrigation and conservancy district for public use. HB164 also reaffirms that any state agency that enters into such an agreement with any district is subject to the Tort Claims Act.

### **FISCAL IMPLICATIONS**

The bill does not include an appropriation.

The Department of Transportation (NMDOT) indicates should NMDOT be responsible for maintenance of a roadway that applies under the provisions of the bill, the concern is that a co-defendant irrigation and conservancy district may be absolved of all liability, even that caused by its own actions or inactions pertaining to the maintenance of the roadway. Potentially, with fewer co-defendants, greater damages could be attributed to NMDOT and could impact NMDOT's premiums paid from the public liability fund. However, NMDOT has not typically entered into such agreements with irrigation and conservancy districts, and in the few instances where NMDOT has constructed or assumed control of a roadway to which the bill would be relevant, NMDOT is the entity solely responsible for the operation and maintenance of that roadway. In these instances, the provisions of the bill would not apply to the adjacent irrigation and conservancy district. Instead, insofar as the irrigation and conservancy district's actions or inactions impacted the road and resulted in damages, other applicable sections of the Tort Claims Act could still apply.

### **SIGNIFICANT ISSUES**

Office of the Attorney General (OAG) writes with respect to roads on irrigation and conservancy district lands that are maintained by a state agency or other governmental entity, it is not clear that the bill would result in a substantive change in the law. The waiver of immunity in Subsection A for the negligence of public employees in the construction and operation of roads is not dependent on the ownership status of the land on which the road is located. Therefore, proposed Subsection D (providing for liability as provided in the Tort Claims Act for a state agency or governmental entity operating or maintaining a road on district land pursuant to an agreement with the district) may be superfluous. At the same time, if a district has turned over operation and maintenance of a road to a state agency or governmental entity, presumably the district will not be engaged in maintenance of the road and therefore will not need protection from the waiver of liability for negligence in the course of maintaining the road.

Conversely, in some situations the bill may inadvertently provide immunity for an irrigation and conservancy district for a portion of a road maintained by the district rather than another entity. This is because the district's exclusion from liability is not limited to that portion of road which the state agency or other governmental entity has agreed to maintain. Instead the bill provides for an exclusion from the waiver of immunity if the district authorizes "any part" of its property

for use as a public road, and the state agency or other governmental entity agrees to maintain that portion of the district's property as a public road. Conceivably, if a district authorizes public use of a roadway but enters into a maintenance agreement with the state for only a portion of the road, the district could be immune from liability for other portions of the road which the district maintains.

### **TECHNICAL ISSUES**

Office of the Attorney General reports it is not clear what the written agreement referenced in proposed subsection (C)(1) (between the district and the state or other entity) must encompass. That is, is it contemplated that the agreement will simply be for the state or governmental entity to assume operation and maintenance, or must the agreement explicitly provide that the state or other governmental entity agree to be subject to liability as provided in the Tort Claims Act? If it is the former, subparagraphs (C)(1) and (C)(2) could be combined into one clause at the end of paragraph (C), to read “. . . provided that the irrigation or conservancy district has entered into a written agreement with the state agency or governmental entity under which the state agency or governmental entity agrees to assume the operation and maintenance of that portion of the district's property used for that road..”

On page 3, line 14, insert “irrigation or conservancy” before “district's.”

The Energy, Minerals and Natural Resources Department indicates the bill does not define irrigation districts and conservancy districts.

### **OTHER SUBSTANTIVE ISSUES**

The Attorney General's Office indicates the bill raises the question why, under similar circumstances, other special districts created by law are not specifically excluded from the waiver of immunity in the same manner irrigation and conservancy districts are excluded for damages resulting from bodily injury, wrongful death or property damage caused by the negligence of their employees while acting within the scope of their duties.

RAE/jle/al