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FISCAL IMPACT REPORT

SPONSOR Aragon DATE TYPED 2/9/2004 HB _____

SHORT TITLE Albuquerque-Bernalillo Water Utility Act SB 438

ANALYST Garcia

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY04	FY05	FY04	FY05		
			See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

Companion to SB 422

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Finance Authority (NMFA)
 State Engineer
 Department of Finance and Administration (DFA)
 Public Regulation Commission (PRC)
 Attorney General's Office

Responses Not Received From

City of Albuquerque
 County of Bernalillo
 Middle Rio Grande Council of Governments
 Municipal League
 Association of Counties

SUMMARY

Synopsis of Bill

The bill would re-create the Albuquerque-Bernalillo County Water Utility Authority, a political subdivision of the state, which would act to own, operate and maintain water and wastewater facilities serving the City of Albuquerque and Bernalillo County. The Authority's powers to raise

and set rates, float revenue bonds and obtain funding from a variety of sources are clarified and expanded from its inception in 2003. The bill determines the Authority shall have a board of directors composed of the mayor of Albuquerque, three city councilors and three county commissioners; who serve for a period of one year and serve ex officio.

The bill would provide for the utility's powers and duties; the setting of utility rates; the issuance of revenue and refunding bonds; and for the assessment of fees. It would exempt the authority from the Procurement Code, the Public Utility Act, and regulation by the Public Regulation Commission. It would provide for retirement benefits for authority employees. The bill also adds certain related and unrelated exemptions to the Procurement Code.

In addition, Senate Bill 438 is a companion bill to SB 422. The only difference is that SB 438 expands the purview of the Albuquerque-Bernalillo County Water Utility Authority to include the Albuquerque Metropolitan Arroyo Flood Control Authority. The bill provides that the Board of Directors of the Albuquerque-Bernalillo County Water Utility Authority shall serve as the Board of Directors of the Albuquerque Metropolitan Arroyo Flood Control Authority. Furthermore, the bill provides that the Board of Commissioners for Bernalillo County may levy taxes pursuant to the Arroyo Flood Control Act. The bill also amends and repeals certain related sections of the Albuquerque Metropolitan Arroyo Flood Control Act, Sections 72-16-1 NMSA 1978, which add certain related and unrelated exemptions to the Procurement Code.

Significant Issues

- 1) The Act gives the Authority power to purchase, construct or condemn real assets for the water and wastewater system located within or around Bernalillo County. The bill also provides that the Authority has jurisdiction of all territory occupied by its water facilities, over all reservoirs, streams and other sources supplying those reservoirs and streams and up to five miles above the point from which the water is taken both within and outside Bernalillo County. The Authority may also acquire or condemn springs, wells, water rights, rights of way, privately owned systems and may change the point of diversion to any place selected by the Authority to make water available.
- 2) According to the Attorney General's Office analysis, allowing the Authority to change place of diversion of any water to any place selected by the Authority in order to make the water available to the Authority is in direct conflict with existing water law as set forth under the Water Code at Chapter 72 NMSA 1997. Section 72-2-1 provides that the State Engineer has general supervision of the waters of the state and of the measurement, appropriation, and distribution thereof. Further Sections 72-5-24 and 72-12-7 provides that an application and approval be obtained from the state engineer if there is to be a change of purpose of use of a water right, a change of point of diversion of water or change of location of a water well. The bill exempts the Authority from making such application and from obtaining such approval.
- 3) Passage and enactment in 2003 of a law to establish the Albuquerque-Bernalillo County Water Utility Authority drew four members of the authority from the city council, four from the county commission, and the mayor. Questions and disagreements on the authority purposes, powers and directions impeded its progress. According to DFA, the bill reflects a negotiated agreement between city and county representatives on the authority on how it sets policy, administers the water utility, raises revenue, and imposes rates for services.

4) According to the Attorney General's Office analysis, because the bill exempts the new Authority from PRC regulation, the Public Utility Act, and may be in conflict with Water Code, the bill, while providing benefits to Albuquerque and Bernalillo County residents, may have adverse consequences on residents in other parts of the state.

FISCAL IMPLICATIONS

The bill allows the Authority to impose development (impact) and franchise fees for operations. Furthermore, the bill allows the Authority to set utility rates and issue revenue and refunding bonds for its water and waste water systems. The bill gives the Bernalillo County Commission the authority to levy taxes pursuant to the Arroyo Flood Control Act.

The bill presents no direct impact to the state's finances.

ADMINISTRATIVE IMPLICATIONS

The bill divorces the Authority from the jurisdiction of the Public Regulation Commission, similar to other municipal utilities. Also, the bill moves the administration of Albuquerque Metropolitan Arroyo Flood Control Authority to the purview of the newly created Albuquerque-Bernalillo County Water Utility Authority.

CONFLICT AND COMPANIONSHIP

1) According to the PRC, there may be a conflict between Sections 9 and 16 vis a vis Section 26. Section 9(A) of this bill provides that the authority is exempt from the Public Utility Act (PUA) and regulation by the NMPRC. Section 16(B) exempts issuance of revenue bonds by the authority from NMPRC approval. However, Section 26 (D) of the bill provides that the authority is a "municipality" as defined under the PUA and Section 26 (E) provides that the authority is a "person" under the PUA if the municipality "elects" to come within the terms of the PUA as provided in Section 62-6-5, NMSA 1978. In order to avoid conflict in these sections of the bill it might be appropriate to include exception language in Sections 9 and 16 as follows: "except as provided in Section 26 of this Act".

In addition, 62-6-5 (B), NMSA 1978, pertaining to an election to come within the authority of the PUA provides that the "legal voters" of any municipality may petition the municipal clerk to hold an election to determine whether the municipality shall come under the provisions of the PUA. The petition must consist of at least 25% of the municipality's legal votes for Governor in the last general election. Since this bill creates the authority as a political subdivision of the state and provides that the board of the authority shall not be elected, but shall consist of the mayor of Albuquerque, three Albuquerque city councilors and three Bernalillo County commissioners, it is not clear how the authority could come under the PUA pursuant to Section 62-6-5. If it is the desire to provide such an option to the voting public, it might be useful to include language in Section 26 (E) of the bill as follows: "For purposes of this section the election to come under the Public Utility Act shall be by petition and vote of the registered voters of Bernalillo County".

2) Companion bill is SB 422, which is a duplicate of SB 438 except for the provision pertaining to the Albuquerque Metropolitan Arroyo Flood Control Authority.

TECHNICAL ISSUES

1) The analysis of the Attorney General's Office is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. The analysis is a staff analysis in response to the legislature's request.

According to the Attorney General's Office analysis, if any statutory sections amended by this bill are also amended by another bill or bills, the bill last signed by the Governor may be the only one that will be considered a valid law. See State v. Smith, Ct.App. No.s 24,253, 24,254 and 24,258 (filed 1/12/04), pet. for cert. pending.

2) The State Engineer suggests the legislature should consider an amendment explicitly stating that the authority must comply with Chapter 72, known as the New Mexico Water Code, to change the point of diversion, or place or purpose of use of a water right. Section 7(C), page 8, lines 13 through 25, and page 9, lines 1 and 2, could be amended as follows to accomplish this:

- C. The Authority, within and without the Bernalillo county boundary, may:
- (1) acquire, contract for or condemn:
 - (a) springs;
 - (b) wells;
 - (c) water rights;
 - (d) other water supplies;
 - (e) right of way or other necessary ownership for the acquisition of water facilities;
 - (2) acquire, maintain, contract for or condemn for use privately owned water facilities used or to be used for the furnishing and supply of water; and
 - (3) change the ~~place~~ point of diversion, or the place or purpose of use of any water right to any place selected by the authority in order to make the water available to the authority. Such changes shall comply with all applicable provisions of the state's Water Code, set forth in Chapter 72, including but not limited to sections 72-5-1, 72-5-22, 72-5-23, 72-5-24, 72-12-3 and 72-12-7 NMSA 1978.

OTHER SUBSTANTIVE ISSUES

The DFA analysis notes it may be important to require the Albuquerque-Bernalillo County Water Utility Authority adhere to the growth and land use policies set forth in the Albuquerque-Bernalillo County Comprehensive Plan, Focus 2050 Plan, and the Planned Growth Strategy.

Regional delivery of services has become a more accepted method of responding to problems that transcend jurisdictional lines. Tackling regional problems such as the use of land and infrastructure financing are best addressed in a coordinated and consistent manner. According to DFA, the bill fails to address the effects the new Authority will have on the location of new water infrastructure on the facilitation of growth and development, especially on Albuquerque's western edge. Nor does the bill address state obligations for delivery of water to Texas, which may be made even problematic should the Middle Rio Grande area not be covered by the state's general laws.