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FISCAL IMPACT REPORT

SPONSOR Lujan DATE TYPED 3/8/05 HB 917/aHAGC/aHJC

SHORT TITLE Prosecution For Various Misuses Of Water SB _____

ANALYST Aguilar

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY05	FY06			
	Minimal	Indeterminate	Recurring	Varies

(Parenthesis () Indicate Revenue Decreases)

Relates to SB-102/SCONCS

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Office of the State Engineer (OSE)
 New Mexico Environment Department (NMED)
 Public Defender Department (PDD)
 Corrections Department (CD)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment House Bill 917 provides for application for injunctive relief to be made in the county where a violation has occurred and removes language exempting the applicant from posting a bond.

The amendment makes technical corrections to language and keeps monetary fines for failure to prosecute by mayordomo's at existing levels.

Synopsis of HAGC Amendment

The House Agriculture and Water Resources Committee amendment to House Bill 917 provides that the easement created by this bill shall be adequate to allow for reasonable maintenance, use

and improvements of the ditch.

This amendment changes the provision requiring a magistrate court to issue a warrant for an individual upon whom a complaint has been made, making the warrant issue optional.

HB 917/a HAGC also provides that in addition to criminal prosecution, the district attorney, mayordomo, or commission of the ditch or acequia may file a civil complaint for a civil penalty not to exceed \$5,000 dollars and/or may also file for injunctive relief.

The amendment provides for criminal complaints for violation be made in the county where the violation occurred.

Synopsis of Original Bill

Section 73-2-5 NMSA 1978 provides that if there has been continuous use of a ditch for the purposes of irrigation for a period of five years it will be presumed that an easement has been created by such.

House Bill 917 makes it unlawful to interfere with the easement noted or to prevent access to the ditch and states such action is a misdemeanor crime punishable by a fine of not less than \$300 dollars and not more than \$1,000 dollars and/or ninety (90) day imprisonment in the county jail.

HB 917 also provides that in lieu of criminal prosecution, the district attorney, mayordomo, or commission of the ditch or acequia may file a civil complaint for a civil penalty not to exceed \$5,000 dollars and/or may also file for injunctive relief.

HB 917 provides for a misdemeanor offense and establishes penalties for any person who violates an order of the mayordomo in charge of a ditch; or to interfere with any community ditch or dam; or to take or use water without having a water right.

HB 917 also provides that in lieu of criminal prosecution, the district attorney, mayordomo, or commission of the ditch or acequia may file a civil complaint for a civil penalty not to exceed \$5000.00 and/or may also file for injunctive relief. The bill further clarifies that the filing of either a criminal complaint or civil complaint will not prevent the complaining party from seeking restitution.

This bill also provides if the district attorney chooses to prosecute for violations; the mayordomo will not be required to do so.

Significant Issues

Under current statute, only the acequia mayordomo may prosecute violations. HB 917 would authorize the district attorney or acequia commission to prosecute violations as well.

FISCAL IMPLICATIONS

The provisions contained in this bill may generate small revenues to the various courts and acequias.

TECHNICAL ISSUES

The attorney general's office notes Section 30-1-14 NMSA 1978 provides all trials of crimes shall be held in the county in which the crime was committed. HB 917 may be contrary to current venue requirements in that the bill contains language that the criminal complaint for violations "may be filed in the magistrate court in a county were the ditch or acequia is completely or partially located" rather than in the county were the alleged violation occurs. This may be a problem only if the ditch is located in more than one county.

The attorney general's office also points out, HB 917 provides that in lieu of criminal prosecution for violations the district attorney may choose to file a civil complaint seeking a civil fine. The AGO notes that allowing the district attorney to forego criminal penalties in exchange for a civil monetary award could be problematic if there is sufficient evidence to proceed with a criminal matter. Additionally, there appears to be a potential internal conflict with the mandate all mayordomos or other persons in charge of any ditch to prosecute in the name of the state any violations of the statute. Language allowing a mayordomo to forego criminal prosecution for a civil monetary award may also be problematic

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