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FISCAL IMPACT REPORT

SPONSOR Neville DATE TYPED 3/8/2005 HB _____

SHORT TITLE Irrigation District Water Banks SB 793

ANALYST Aguilar

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)

New Mexico Environment Department (NMED)

SUMMARY

Synopsis of Bill

Senate Bill 793 authorizes an irrigation district created and operating pursuant to Section 73-9 NMSA 1978 to establish a water bank for the purpose of temporarily reallocating water within the district without changing the purpose of use or point of diversion.

A district water bank established pursuant to the bill would not be subject to recognition or approval by the interstate stream commission or the state engineer, and such a water bank would have authority to make temporary reallocations of water to new places of use within the district without formal proceedings before the state engineer.

Water rights placed in the district's water bank would not be subject to loss for nonuse during the period when the rights are placed in the water bank.

Significant Issues

The State Engineer notes under existing statute irrigation districts already have authority to establish administrative mechanisms that function like water banks. Section 73-9-14 NMSA 1978

provides for irrigation districts to set up administrative systems to facilitate the temporary reallocation of surface water used for irrigation to the irrigation of other lands within the district through rental or lease arrangements. For example, pursuant to the nearly identical authority granted by section 73-10-16 NMSA 1978 to irrigation districts cooperating with the United States under reclamation laws, the board of the Elephant Butte Irrigation District ("EBID") has established a "conservation pool" into which water right owners may place their unused surface water allotment for a given year for temporary reallocation to other irrigators within the district. As long as the surface water temporarily reallocated through such an administrative system remains within the district and is reallocated to other irrigation uses, the state engineer is not required to approve the reallocation.

The state engineer further notes under existing law, when surface water allotments are temporarily reallocated to and used by other water right owners within a district, the underlying water rights are protected from loss through nonuse under the forfeiture statute (section 72-5-28 NMSA 1978) or under the common law doctrine of abandonment. This is because the use of the water allotment by the lessee constitutes beneficial use as required by the constitution. N.M. Att'y Gen. Op. 64-1 (1964).

EBID and the Carlsbad Irrigation District ("CID") each have established under Section 73-10-16 NMSA 1978, which provides water banking authority nearly identical to that provided in Section 73-9-14 NMSA 1978 administrative mechanisms that function like water banks to allow the temporary reallocation of surface water allotments to other irrigators within those two districts. Those districts have worked with the state engineer and have been able to demonstrate the continued beneficial use of water rights placed in their administrative mechanisms. As a result, those water rights have been protected from loss through nonuse.

TECHNICAL ISSUES

The state engineer provides the following comment as a technical issue for consideration by the legislature:

When a lawsuit is pending at the time of enactment of a law, the state constitution prohibits the application of that law to the parties in that suit if to do so would affect the substantive rights of those parties. N.M. Const. art. IV, § 34. The water rights of the members of at least three irrigation districts created and operating pursuant to Chapter 73, Article 9 are at issue in the ongoing case to adjudicate the water rights in the San Juan River stream system, *State of New Mexico ex rel. State Engineer v. United States, et al.*, Eleventh Judicial Dist. No. D-1116-CV-7500184. To the extent this bill is intended to affect or change the substantive rights of those water right claimants in that pending case, the constitution would bar that result.

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