F I S C A L I M P A C T R E P O R T

SPONSOR Cisneros **ORIGINAL DATE** 1/28/08 **LAST UPDATED** 1/30/08 **HB**

SHORT TITLE Engineer Authority Over Underground Water **SB** 262

ANALYST Wilson

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		$0.1	$0.1	$0.1	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY08	FY09	FY10		
	(unknown)	(unknown)	Recurring	Land Grant Permanent Fund

(Parenthesis ( ) Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Attorney General's Office (AGO)
Department of Agriculture (DA)
Energy, Minerals & Natural Resources Department (EMNRD)
Environment Department (ED)
Office of the State Engineer (OSE
State Land Office (SLO)

SUMMARY

Synopsis of Bill

Senate Bill 262 amends Section 72-12-25 NMSA 1978 to authorize the State Engineer to declare as an underground water basin any aquifer containing non-potable water in which the top of the aquifer is 2,500 feet or more below the ground surface. Following the State Engineer's declaration of such basins, all appropriations of water from the basins will be subject to

requirements of the general groundwater code, in Sections 72-12-1 through 72-12-24 NMSA 1978, except that proposed appropriations for purposes of oil and gas exploration and production or for geothermal use will continue to be subject to the provisions of Sections 72-12-26 through 72-12-28 NMSA 1978.

SB 262 also specifies that it shall not affect the disposal of produced water pursuant to Paragraph (15) of Subsection B of Section 70-2-12 NMSA 1978 and Section 70-2-12.1 NMSA 1978.

FISCAL IMPLICATIONS

SLO states that it is not possible to determine the fiscal implications of the bill without in-depth economic studies of the New Mexico oil and gas industry. SB262 could have significant impact on that industry, which is a major source of jobs and tax revenue in New Mexico. In addition, oil and gas revenues in the form of lease bonuses and royalties make up 90% of the annual revenue generated by state trust land. Royalties are the source of nearly all of the funds directed to the Land Grant Permanent Fund for investment; lease bonuses have been an important source of annual revenues to a number of institutions that receive income from state trust lands. Loss of these revenues will have to be offset with other general fund revenues such as taxes. Although not as significant to New Mexico, the bill could have adverse effects on the development of geothermal resources.

SIGNIFICANT ISSUES

The AGO notes under existing law, Sections 72-12-25 through 72-12-28 NMSA 1978, the State Engineer is limited in his ability to require permits to appropriate groundwater from deep saline aquifers. Removing these limitations will provide the State Engineer with more uniform administrative and regulatory authority over all of the State's groundwater. This is necessary because of the growing interest in the use of deep saline aquifers as new sources of supply spurred by increasing demand for potable water and recent improvements in desalination technology.

This bill will leave 72-12-26 through 72-12-28 NMSA 1978 unchanged. Those statutes will continue to govern only the appropriation of water for purposes of oil and gas exploration and production or for geothermal use.

This bill also will make clear that it will not affect the disposal of produced water from the exploration for or production of oil and gas, which pursuant to Paragraph (15) of Subsection B of Section 70-2-12 NMSA 1978 and Section 70-2-12.1 NMSA 1978 is under the jurisdiction of the Oil Conservation Division of EMNRD and not under the State Engineer.

This bill will bring non-potable water in aquifers deeper than 2,500 feet under the administrative jurisdiction of the OSE. It will make appropriations of deep saline water subject to the same existing statutes, rules and regulations that apply to all other appropriations of water, regardless of the physical characteristics (depth and quality) of the source of the water. Because applications to appropriate water in these deeper aquifers will be evaluated and administered using the same statutes, rules and regulations as apply to all other water appropriations, the result should be a more consistent, efficient and effective administration of all groundwater across the state.

ED notes there is increased interest among growing communities in the state in the use of non-potable groundwater as potential source of drinking water. At one time, such waters were not valued as potential water sources because higher quality groundwater was available. As New Mexico's higher quality groundwater becomes depleted or fully allocated, public perceptions are changing about the use of non-potable ground water for domestic supply and the economics for treatment of those waters. State law does not allow the State Engineer to control the use of non-potable groundwater. If the state fails to regulate the use of non-potable groundwater, it could lead to the exploitation of that resource and could result in adverse impacts to higher quality groundwater.

SLO claims that attempting to clarify regulatory authority over non-potable water lying 2,500 feet or more below the ground, SB262 will delay well drilling by imposing notice requirements that did not previously exist. In addition, it opens the door to litigation that could delay if not actually prevent such wells from being drilled and greatly increase costs. Because of the complexity and extended duration of litigation over the impairment of water rights, SB262 opens the door to abuse of the litigation as a means for a plaintiff to obtain concessions from oil and gas operators by alleging impairment of water rights. The oil and gas operator has an incentive to grant concessions regardless of the merits of the suit to avoid project delays.

ADMINISTRATIVE IMPLICATIONS

The OSE states this bill will benefit the people of the state, by allowing the State Engineer to fully supervise and administer the State of New Mexico's declared underground water basins in a consistent manner using the same set of existing statutes, rules and regulations that apply to other appropriations of water, regardless of the physical characteristics (depth and quality) of the source of the water. Administration of Notices of Intent under § 72-12-25 will be limited to relatively minor appropriations for oil and gas exploration and production and geothermal use.

The small increase in the number of applications to the OSE for permits to appropriate groundwater will result in some additional administrative duties related to increased record keeping and processing of permit applications.

The SLO states that as the manager of the state trust land, the Commissioner of Public Lands might require additional staff to protect his ability to generate income from oil and gas leases and to protect the State's claim to non-potable water underlying state trust so that it might be used to generate income from those lands.

TECHNICAL ISSUES

EMNRD provided the following:

> The reference in Subsection C (page 2, lines 12 through 16) to "appropriations of water from such an aquifer for oil and gas exploration and development" raises the question whether it is the intent of the bill to provide that the drilling of an oil or gas well that incidentally produces water constitutes an appropriation of water. There is no authority in New Mexico holding that this is an "appropriation of water." However, this language in the bill could be read as making it an appropriation of water by statute.

The reference in Subsection D (page 2, line 20) to "disposal of produced water" raises the question whether this phrase is identical to, or in some way different from, the phrase "disposition of produced water" employed in the Oil and Gas Act [NMSA 1978 Sections 70-2-12.B (15) and 72-2-12.1, as amended]. Probably the intent is that "disposal" in the amendment mean the same thing as "disposition" in the Oil and Gas Act. However, interpreters of statutes sometimes infer that the use of a different word imports a different intent. In this case, Oil Conservation Division (OCD) specifically recommended the use of "disposition" rather than "disposal" at the time the referenced provisions of the Oil and Gas Act were adopted because the definition of "disposal" includes the meaning of "an act of throwing out or away" (Webster's II New Rev. University Dictionary 1994). Since the intent was to give OCD power over treatment and use of produced water as well as waste disposition, OCD recommended, and the Legislature adopted, provisions using the arguably broader term "disposition."

OTHER SUBSTANTIVE ISSUES

ED further notes increased development of non-potable ground water resources will result in large volumes of groundwater with high dissolved solids being pulled to the surface for treatment as a public water supply. Those waters must be contained and disposed of in a manner that protects higher quality groundwater near drilling projects, the environment, biota and wildlife. Suitable, cost-effective disposal options for the treatment wastes that result from non-potable groundwater are uncertain at this time. In order to make use of non-potable waters, treatment is required to reduce the dissolved solids content to potable levels. Such treatment typically results in a highly concentrated reject water waste stream (i.e., wastewater with very high dissolved solids or salt concentrations). Disposal of those waste streams may pose challenges. Injection of such wastes into deep wells tapping non-potable aquifers has been a common approach, yet the future viability of deep injection may be questionable given the changing perspectives regarding the value of non-potable groundwater for domestic supply purposes. Surface evaporation of waste streams with high dissolved solids may be a viable option but may require a large area of land for evaporation processes and the resulting salt minerals also require appropriate disposal.

DW/mt