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FISCAL IMPACT REPORT

ORIGINAL DATE 03/09/09
 SPONSOR HJC LAST UPDATED 03/11/09 HB CS/185/HJCS
 SHORT TITLE Lower Rio Grande Public Works Authority SB _____
 ANALYST Woods

APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Non-Rec | Fund Affected |
|---------------|------|-------------------------|------------------|
| FY09 | FY10 | | |
| NFI | NFI | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
 New Mexico Attorney General (AGO)¹
 Office of the State Engineer (OSE)
 New Mexico Environment Department (NMED)

Other Input Received From

Lower Rio Grande Mutual Domestic Water Association

SUMMARY

Synopsis of HJC Substitute Bill

House Judiciary Committee substitute to HB 185 would enact a new section of Chapter 73 NMSA 1978 to create the Lower Rio Grande Public Works Authority (“authority”) composed of five mutual domestic water consumer associations in Don Ana County. Under the bill, the authority would be a political subdivision of the State and an independent public body. All functions and property of the five founding MDWCAs, including water rights, would be transferred to the authority. The bill would allow the authority to provide for water and wastewater services, road improvements or renewable energy projects that are integral to the operation and maintenance of its facilities.

¹ The AGO response carries the caveat, *This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Opinion letter. This is a staff analysis in response to the agency’s, committee’s or legislator’s request.*

The House Judiciary Committee substitute bill provides that the authority “shall” exercise “all powers allowed pursuant to law,” including the power to acquire, from a willing seller, and hold water rights in an amount necessary to meet its reasonable needs within forty years pursuant to Section 72-1-9 NMSA 1978, and the power and to condemn property. The HJC substitute bill states that the authority is a member-owned community water system and specifically provides that it would not be subject to the jurisdiction of the Public Regulation Commission or the provisions of the Public Utility Act.

Like the HAGC substitute bill, in addition to providing that the authority is to be governed by a board of directors which may authorize the issuance of utility system revenue bonds, the HJC substitute bill provides that the voting community membership of the five founding entities have approved by resolution the development of the authority.

The HJC substitute bill no longer seeks to amend Section 3-53-1.1 NMSA 1978 to provide that, in addition to a municipality, a “public works authority” may, by ordinance, restrict the drilling of new domestic water wells within the boundaries of the authority. The HJC substitute also does not contain the provision found in earlier versions of the bill that proposed to amend Section 72-12-1.1 NMSA 1978 to provide that permits for domestic water use within the jurisdiction of “a public works authority” shall be conditioned to require the permittee to comply with all policies adopted by the public works authority.²

FISCAL IMPLICATIONS

None noted by respondents.

SIGNIFICANT ISSUES

AGO states that this committee substitute would establish a new political subdivision within the state known as the “Local Rio Grande Public Water Works Authority. The associations forming the new authority presumably are organized pursuant to the Sanitary Projects Act, NMSA Sections 3-29-1 et seq. The new authority would be a unique political subdivision, as there are no current statutes allowing for the formation of such entities. However, NMSA Section 3-29-20.1 of the Sanitary Projects Act currently allows the merger of mutual domestic water consumer associations. This bill would effectively cause a merger of five of those associations by operation of law. AGO further notes that:

The Public Regulation Commission currently has jurisdictional authority to settle disputes between those associations and other utilities. NMSA Section 62-9-1. See also *Dona Ana Mutual Domestic Water Consumers Assn. v. New Mexico Public Regulation Commission*, 140 N.M. 6, 139 P.2d 166 (2006). This committee substitute clearly provides that the new authority will not be subject to the jurisdiction of the Public Regulation Commission. It will therefore be left to the courts to decide disputes between the Authority and other utilities.

The committee substitute also provides that the new authority would not be subject to the provisions of the Public Utility Act. That Act currently excludes Class A and Class B counties and municipalities (unless they elect to come within its terms) from its provisions. NMSA Section 62-3-3E.

² Excerpted from OSE response dated 3-9-09.

OSE indicates that the HJC substitute bill addresses the State Engineer’s previous concerns that the bill provided that the authority may acquire, hold and use water rights pursuant to Section 72-1-9 NMSA 1978, but did not contain a provision for the authority to comply with the limitations of Section 72-1-9 NMSA 1978 or with the provisions of the Water Code, Chapter 72 NMSA 1978, generally. In addition to the reference to Section 72-1-9 NMSA 1978 in subsection F(4), the HJC substitute bill now contains specific provisions (page 6, lines 8-10) that the authority, as a political subdivision of the state and “a member-owned community water system,” shall be subject to Chapter 72, NMSA and to applicable rules and regulations of the State Engineer. OSE further notes:

The HJC substitute bill also addresses the previous ambiguity regarding the authority’s eligibility as an entity that is allowed a forty-year water use planning period under the provisions of Section 72-1-9(B), NMSA 1978, by specifically providing that the authority is a member-owned community water system. The bill does not, however, contain any explicit provision that the authority shall be owned by its members.

The HJC substitute bill also addresses some of the State Engineer’s concerns regarding subsection D. The HJC substitute bill now provides that an application must be filed and approved by the State Engineer in order to combine and commingle the water rights and service areas of five founding MDWCAs. Although the bill is not completely clear, it appears to contemplate (page 2, line 23 through page 3, line 3) that any merger of another entity into the authority would also require an application to the State Engineer to combine and commingle the water rights of the merging entity with those of the authority, and to combine service areas.

Section F still appears to grant the authority the ability to exercise all powers allowed pursuant to law, and has been strengthened by the substitution of “shall” for “may” in the exercise of those powers.

OSE concludes by noting that. “The HJC substitute bill, like the HAGC substitute bill, also addresses the State Engineer’s previous concerns regarding the original bill’s proposed amendments to Section 3-53-1.1 NMSA 1978 and Section 72-12-1.1 NMSA 1978, by eliminating those proposed amendments.”

NMED advises that:

1. CS HB 185 would remove the Authority from the Sanitary Projects Act (SPA). Currently, the five mutual domestic water consumers’ associations that would compose the Lower Rio Grande public works authority are regulated by the SPA; and
2. CS HB 185 provides a mechanism for some governmental oversight over the proposed authority. Section 1.G(1) of CS HB 185 allows the Environment Department the ability to conduct reviews of the operation of the Authority, conduct investigations to determine if the authority is in compliance and require information from the Authority. Additionally, this bill allows the Environment Department, after a hearing, to set rates and use the same for the proper operation and management of the authority. CS HB 185 would remove some other protections citizens are currently afforded under the SPA.

EMNRD notes that the substitute bill defines a service area for the utility and requires that service area to be filed in the public records of Dona Ana County (plat). Additionally, the substitute also defines a means for addition of new service areas (Section 1.D), including the addition of other entities into the WUA, and requires a specific application to be filed with the state engineer to combine and commingle water rights and to combine the existing entities' place of use into the authority's service area. EMNRD further advises that:

The powers of the WUA are more clearly defined (Section 1.F), including the establishment of member rates (Section 1.F(2)), charges for connection to the WUA, acquisition of water rights and/or real property for the purposes of constructing and operating the WUA (Section 1.F(4, 8, 9)), funding of infrastructure improvements (Section 1.I), and contracting with other entities (both governmental and non-governmental) (Section 1.F(6, 7)). The substitute bill also identifies in Section 1.G, laws, certain rules and regulations that the WUA will be subject to, adding in five specific oversight actions that the department of the environment may take with respect to the authority.

PERFORMANCE IMPLICATIONS

None noted by respondents.

ADMINISTRATIVE IMPLICATIONS

NMED suggests that the legislation, "...would take away the mechanism to address consumer complaints, including issues such as water service outages that could pose a public health threat."

ALTERNATIVES

NMED indicates that the mutual domestic water consumers' associations that would comprise the Authority could form into one mutual domestic water consumers' association under the SPA without any additional legislation.

OTHER COMMENTS

The Lower Rio Grande Mutual Domestic Water Association notes that, "The memberships of the founding entities have all adopted resolutions authorizing the creating of this Authority, and authorizing the merger. If this bill is not enacted, the five mutual domestics will merge into the Lower Rio Grande Mutual Domestic Water Association. Mutual domestics have no ability to declare service areas, but are protected under federal statute 1926(b) if they are federally indebted, and this has already resulted in several extremely expensive and contentious federal lawsuits in Dona Ana County. Mutual domestics also have no ability to issue revenue bonds, so this potential source of infrastructure funding would not be available."

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AGO indicates that the new political subdivision provided in this committee substitute will not be formed. Mutual domestic water consumer associations would be still allowed to merge under the provisions of NMSA Section 3-29-20.1

AMENDMENTS

OSE suggests, “Amend Subsection D to require that in the event that another entity elects to merge into the authority, an application shall be filed with the state engineer to combine and commingle the merging entity’s water rights with those of the authority, and to add the merging entity’s place of use to the authority’s service area.”

EMNRD suggests that the Sanitary Projects Act NMSA 1978 Section 3-29-1 etc. seq. be added to the list of laws, rules and regulations the WUA will be subject to (Section 1.G).

BW/mt