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FISCAL IMPACT REPORT

ORIGINAL DATE 02/17/09

SPONSOR Stewart LAST UPDATED _____ HB 762

SHORT TITLE State Engineer Aquifer Authority SB _____

ANALYST Woods

APPROPRIATION (dollars in thousands)

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

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB19

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
Environment Department (NMED)

No Response Received From

Office of the State Engineer (OSE)¹

SUMMARY

Synopsis of Bill

This bill is similar to HB19, as amended. However, it contains a provision not included in HB19 to the effect that a person completing a well in a deep aquifer on or after March 21, 2009 does not thereby acquire any element of a water right to use those waters for uses other than oil and gas, mining, road construction, industrial or agricultural purposes, except for a priority date.²

This legislation carries emergency language.

¹ Comments from OSE were requested on 2-14-09; however, none were received by LFC prior to the 2-17-09 scheduled HAGC hearing. FIR will be updated to incorporate OSE comments upon receipt.

² EMNRD 2-16-09

FISCAL IMPACT

Both NMED and EMNRD indicate no fiscal impact to their respective agencies.

SIGNIFICANT ISSUES

EMNRD indicates that, under existing law, if a water appropriator completes a well in a deep aquifer that contains non-potable water; then, provided that the appropriation has complied with the notice requirements of NMSA 1978, Section 70-2-26, the appropriator acquires a vested right to produce and use water from that well to the extent that the appropriator applies the water to any beneficial use, including residential, municipal or subdivision use. No permit from the Office of the State Engineer (OSE) is required. Under the bill, the OSE would be authorized to assume jurisdiction of water in deep aquifers by declaring or extending a basin to include such waters. After declaration or extension of a basin, if the OSE declares a basin consisting only of the non-potable aquifer, an appropriator could acquire a right to use such waters for any use other than oil and gas production, mining, road construction, agriculture or industrial use (the specified uses) only by application to the OSE. If the OSE declares or extends a basin that also includes potable water, an appropriator could acquire any use right only by application to the OSE.

EMNRD further notes that if an appropriator completed a well tapping a non-potable, deep aquifer on or after March 21, 2009, but before the OSE declares or extends a basin to include the aquifer, that appropriator would not thereby acquire any right to use the water for other than the specified uses, but would acquire only a priority date that would apply to a water right that might be subsequently granted by the OSE. Presumably such an appropriator could commence residential, municipal or subdivision or other non-specified use immediately, but, if and when the OSE declares or extends a basin, the use would have to cease such uses unless and until the OSE grants a permit, which the OSE could deny for any reason which would warrant denial of any application for a new water right. If the OSE granted the water right, the priority of that water right would relate back to the original commencement of use, provided that the use had commenced prior to declaration of a basin.

NMED adds that the legislation maintains authority over appropriations of water from aquifers that are at a depth of 2,500 feet or more below ground surface for oil and gas exploration and production, prospecting, mining, road construction, agriculture, generation of electricity, use in an industrial process or geothermal pursuant to NMSA 1978, Sections 72-12-25 through 72-12-28. Those uses remain exempt from the requirements of NMSA 1978, Sections 72-12-1 through 72-12-24, which apply to all other uses of water. The New Mexico Water Quality Act and its regulations require the control of discharges to any groundwater aquifer that has a dissolved solids concentration of 10,000 parts per million or less, with no restriction on depth of the aquifer. However, deep aquifers often have a higher mineral concentration than 10,000 parts per million dissolved solids. As water supplies in New Mexico become more scarce, it may be prudent to provide authority under the Water Quality Act to control discharges to aquifers that contain a higher dissolved solids concentration than 10,000 parts per million in order to maximize the potential for these water resources to be treated and put to use.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

EMNRD suggests that both HB 19 and this bill extend OSE jurisdiction to deep aquifers containing non-potable water over which existing Section 72-12-25 excludes such jurisdiction. Under both bills, OSE jurisdiction would apply only to uses other than the specified uses if the OSE assumed jurisdiction by declaring a basin consisting only of an aquifer whose water are uniformly non-potable, but would apply to all uses if the OSE assumed jurisdiction by declaring or extending a basin that also contained potable water. EMNRD concludes:

The difference between the two bills lies in the effect upon an attempted appropriation of water in a deep water aquifer by any well completed on or after March 21, 2009, but before the OSE declares or extends an applicable basin. Under HB 19, a person who completed such a well could, by application of the water to any beneficial use (including a use that is not a specified use) prior to OSE's declaration or extension of a basin, acquire a vested water right to apply water from the well to that use. That right would continue after declaration or extension of a basin. Under this bill, that would not be the case. Rather an appropriation in that situation would acquire only a priority date that would apply to a water right that the OSE might, or might not, subsequently grant.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

EMNRD states, "If neither this bill nor HB 19 is passed, deep aquifers containing non-potable water will not be subject to OSE jurisdiction. If HB 19 is passed, but this bill is not, such aquifers will be potentially subject to OSE jurisdiction, but appropriators who complete wells after March 20, 2009 and commence beneficial use of the water prior to declaration of a basin, will be able to acquire permanent water rights in those aquifers without regard to subsequent OSE action."

AMENDMENTS

None recommended by respondents.

BW/svb