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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/25/15

SPONSOR Rue LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE NM Unit Fund & Stream Commission Actions SB 542

ANALYST Armstrong

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See fiscal implications		See fiscal implications	Nonrecurring	TBD

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 455, SB 461

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)

Office of the State Engineer (OSE)

### SUMMARY

#### Synopsis of Bill

Senate Bill 542 repeals ISC’s existing general rulemaking authority and creates new subsections within Section 72-14-45 NMSA 1978, specifying a more limited authority requiring ISC to meet certain conditions before taking an action to spend \$5 million or more from the New Mexico Unit Fund (“Fund”). These conditions include recognizing any successor to the southwest New Mexico water study group and adopting rules establishing minimum requirements for consultation with the group’s successor under the federal Arizona Water Settlements Act (AWSA). The bill also requires ISC to promulgate rules regarding actions to approve or disapprove spending in accordance with the Open Meetings Act and actions to approve or disapprove any proposed encumbrance of \$50 thousand or less, with additional requirements for larger commitments including advance recommendations from the ISC secretary, i.e. the state engineer.

Additionally, the bill enacts a new section within the statutes governing ISC’s duties and powers to establishes additional conditions for the ISC to meet before acting as the State under the

AWSA, including:

- all ISC substantive deliberations be conducted under the Open Meetings Act;
- approving a written assessment of the ability to fulfill the New Mexico Central Arizona Project (CAP) entity's obligations under a joint powers agreement; and
- authorizing the New Mexico CAP entity to assume responsibilities of a New Mexico unit of the AWSA including ISC's definitions and findings of feasibility and project design, costs and funding.

Finally, SB 542 requires the state engineer to determine the probability of receiving funds up to \$28 million prior to the ISC assessment of financial feasibility, to obtain and respond to public comment prior to approving any end user contracts, and to encourage the federal secretary of interior to provide for public observation of contract negotiations.

### **FISCAL IMPLICATIONS**

SB 542 requires ISC to promulgate rules and have a hearing officer conduct the public meetings related to these rulemaking actions. The agency estimated the cost of funding the public meetings and hiring a hearing officer as a \$100 thousand recurring cost. However, these costs do not appear to be recurring and ISC could come to an agreement with OSE's hearing officer unit to fulfill the bill's requirement that a hearing officer conduct the public meetings.

### **SIGNIFICANT ISSUES**

SB 542 imposes numerous conditions precedent to spending any money from the Fund, which ISC contends would prevent the full execution of the New Mexico Unit Agreement ("Agreement") by November 24, 2015, as required by the AWSA. ISC notes this would result in forfeiture of additional federal funding up to \$62 million, and effectively make it impossible for New Mexico to develop the additional annual average of up to 14 thousand acre-feet of water provided to the state under the AWSA.

The agency also raises many legal concerns with SB 542, including:

- possible preemption due to a conflict with federal law that could result from changes – due to the public comment process required by the bill – to the essential terms of the Agreement which were negotiated and ratified by the AWSA;
- possible unconstitutional interference with existing contractual obligations like the essential terms of the Agreement that are already in place;
- separation of powers issues as the bill "attempts to legislatively circumvent a decision made by an executive commission..." (ISC's November 2014 decision to notify the federal government of the state's intent to construct a diversion project) "...by constraining implementation of that decision such that federal deadlines will be missed."; and
- exposing the state engineer to challenge for possible prejudgment due to the bill's

requirement that the state engineer make recommendations and provide a determination that expenditures of money will yield certain results, which are decisions the state engineer would likely have to later approve water rights applications relating to AWSA and other water infrastructure projects funded by ISC.

In addition to these legal issues, ISC noted SB 542 may cause misinterpretation, duplication of efforts, and delay by requiring consultation with the southwest New Mexico water study group or its successor which ISC already does. Moreover, the requirements of public hearings, recommendations of a hearing officer and approval of such recommendations by ISC's director and the state engineer would create delays that put the state's ability to execute the Agreement before the November 2015 deadline.

## **RELATIONSHIP**

Senate Bill 455 prohibits the New Mexico Central Arizona Project entity from entering into any agreement with the federal secretary of the interior to construct or develop a New Mexico unit of the Central Arizona Project on the Gila River until ISC has presented a written report signed by the state engineer to the legislative finance committee and the committee has notified the New Mexico CAP entity that the report adequately addresses ten separate detailed requirements.

Senate Bill 461 requires ISC to use the New Mexico Unit Fund to cover costs of implementing water utilization alternatives to meet water supply demands in the southwest water planning region of New Mexico that are categorized as non-diversion alternatives to the development or construction of a New Mexico unit and also requires ISC to spend no less than \$77 million, indexed to 2014 dollars, on such non-diversion alternatives.

JA/je