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FISCAL IMPACT REPORT

ORIGINAL DATE 2/11/09

SPONSOR Varela LAST UPDATED _____ HB 521

SHORT TITLE State Engineer Domestic Well Authority SB _____

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	See Narrative	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB19.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$500.0	\$500.0	\$1,000.0		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

Energy, Mineral, and Natural Resources Department (ENMRD)

Office of the State Engineer (OSE)

SUMMARY

Synopsis of Bill

House Bill 521 would amend Sections 72-2-8 and 72-12-1.1 NMSA 1978. Section 1 of the bill would provide the State Engineer additional authority in Section 72-2-8 to issue special orders designating "management areas." Unlike his existing authority to issue special orders prior to holding a hearing, the bill would require the State Engineer to hold a hearing prior to issuing a special order designating a management area.

Section 2 of House Bill 521 would make the following extensive changes to Section 72-12-1.1 NMSA 1978, the domestic well statute:

- Change the purpose of use allowed for water diverted from a well permitted under 72-12-1.1 by deleting the language in the existing statute allowing for the irrigation of not to exceed one acre of noncommercial trees, lawn or garden (p. 5, lines 3-4);
- Change the requirement in 72-12-1.1 that the State Engineer shall issue domestic well permits to all applicants. Instead, the bill would provide that the State Engineer may issue a domestic well permit under the conditions set out in the bill (p. 5, lines 8-10);
- Insert a new Subsection C providing that the State Engineer shall issue a domestic well permit for up to 0.25 acre-foot per year (af/yr) for domestic wells proposed to be drilled outside of special management areas at least ¼ mile from the nearest existing well and five miles from a river or stream (p. 5, lines 15-22);
- Insert a new Subsection D authorizing the State Engineer to declare by special order a “low impact management area” (LIMA) where water resources have not been fully appropriated and the issuance of permits for small amounts of water will not impair existing water rights or reduce flows in streams subject to interstate compacts. Within a LIMA, the bill would provide that the State Engineer shall issue a domestic well permit for an amount not to exceed 0.5 af/yr (pp. 5-7);
- Insert a new Subsection E providing that, for areas other than declared LIMAs or for wells not meeting the criteria set out in Subsection A, the State Engineer shall issue a domestic well permit only if the applicant transfers into the new well an existing water right for up to 1.0 af/yr, or if the applicant obtains a permit from the State Engineer for a new appropriation for up to 1.0 af/yr. The required application for a water right transfer or new appropriation would be required to follow the public notice and hearing procedures required for non-domestic permit applications, except that protests would be allowed only on the grounds of impairment. The State Engineer would be required to approve the application unless the proposed use will impair existing users or reduce flows in streams subject to interstate compacts (pp. 7-8);
- Insert a new Subsection F providing that in a closed underground water basin for which the State Engineer has established management criteria and allowable withdrawal amounts, the State Engineer shall issue a domestic well permit for up to ¼ af/yr, provided that the use is consistent with the management criteria for the basin. (p. 8, lines 12-17)

FISCAL IMPLICATIONS

The Office of the State Engineer estimates that 10 additional FTEs would likely be required for the evaluation of domestic well applications; the cost estimate is in the above table of estimated additional operating budget impact. Without additional staff the Office of the State Engineer would not be able to maintain the current levels of service in regards to existing administrative duties.

The ENMRD notes that implementation of this legislation may have an impact on the development costs for new state parks or expansion of state parks into new developed recreation areas. Many of the state parks currently operate using domestic wells with three acre-feet permits. This level of a permit is generally sufficient to support usage at a campground or recreation area for a park and is a minimal expense to apply for. For example, Eagle Nest Lake State Park is operated using a domestic well permit, as well as the South Monticello Recreation Area at Elephant Butte. As many of the state parks and recreation areas are located within five miles of rivers and streams, the proposed statute would require the State Parks Division to purchase water rights and relocate them to the new park/recreation area, and even this is limited

to one acre-foot per year. For example, Pecos Canyon State Park will require domestic water at several of the proposed recreation sites. As the sites are disconnected from each other, a new well will be needed at each of the recreation sites where water will be provided. The costs for acquiring water rights to supply each of these recreation areas will increase the costs of water rights acquisition as well as delay (until the water rights issue is resolved) the process of developing sites at the park.

SIGNIFICANT ISSUES

The State Engineer, recognizing the need for regulation of domestic wells, especially in and around New Mexico's river corridors, promulgated Domestic Well Rules and Regulations on August 15, 2006 (19.27.5 NMAC), which place a 1.0 af/yr limitation on diversions from domestic wells and allow the State Engineer to declare Domestic Well Management Areas (DWMA).

The Domestic Well Rules and Regulations outline the procedure the State Engineer will follow in declaring DWMA's – areas where domestic wells may negatively impact senior water rights and flows of surface water sources. The declaration of a DWMA further restricts the amount of water that can be diverted for domestic use – down to 0.25 acre-foot per annum or less. These regulations are currently being challenged in the First Judicial District Court.

Both the constitutionality of 72-12-1.1 and the State Engineer's issuance of Domestic Well permits have been challenged in a separate lawsuit in Grant County. The district court ruled that 72-12-1.1 is unconstitutional. The case is currently before the Court of Appeals. The decisions in these cases will provide direction both to the State Engineer and the Legislature regarding the need to amend either the domestic well statute or the regulations. It is recommended that the Legislature let these cases be decided so they can guide the Legislature's decision as to the appropriate action to be taken, if any is required.

For the vast majority of the state, domestic wells have minimal impact of aquifer water level declines. However, numerous domestic wells on small lot parcels may interfere with the production of other wells in localized mountainous areas. These situations are relatively rare and several options are presently available to address this concern. The provisions of the New Mexico Subdivision Act allow the counties an effective avenue to limit the number of domestics and their withdrawals. In addition, in some circumstances the courts have imposed limitations on domestic well diversions, and the State Engineer has limited domestic well diversions under his existing authority.

The State Engineer currently designates critical management areas (CMAs) as the basis for adopting basin administrative guidelines for water right application processing. Impacts from municipal and irrigation wells were the primary factors in requiring these designations. House Bill 521's provisions relating to management areas are likely to cause confusion with existing CMAs.

The process to designate CMAs is technically based and has been in place for decades. CMA boundaries are established on technical criteria that are consistently applied throughout the state. Groundwater flow models are used to estimate future water level declines. If the projected declines inhibit well production, the State Engineer will impose strict limitations. If water supply conditions are variable within a basin, multiple layers of restriction may be required. The

areas requiring the greatest level of restriction are referred to as a CMA. Areas that are not classified as CMA are also regulated to ensure rights are not impaired. A relatively small portion of the state has been classified as a CMA. All declared basins receive a high degree of protection regardless of CMA classification.

Finally, the structure and requirements of the amendments to Section 72-12-1.1 is complex and would not be easily understood by the average domestic well consumer who wants to apply for a domestic well permit or easy to administer. The bill gives the prospective applicant many confusing options.

An example would be a person who wants to drill a domestic well and determines that she could place the proposed well 1/4 mile from the nearest existing well and 5 miles from a river or stream (although "river" and "stream" are not defined in the bill). Under Subsection C, she would automatically be issued a permit for up to 1/4 acre-foot per year of water. However, if the prospective applicant lived in an area declared a "low impact management area" by the state engineer under Subsection D, she could automatically obtain a permit for a domestic well for 1/2 acre-foot per year of water whether or not her new well would be very near an existing well or a river, contrary to the provisions of Subsection C. Finally, the applicant in this example might be able to obtain 1 acre-foot per year of water for domestic uses if she applied under Subsection E, but only if she did not live in a "low impact management area," or within 1/4 mile of an existing and within 5 miles of a "river" or "stream". Applicants whose prospective wells meet the criteria in Subsection C and/or D are limited, it seems, to 1/4 or 1/2 acre-foot per year of water with no option of applying for more domestic-use water through an application, with publication and notice, to transfer a water right or seek a new appropriation to their new well location. These options are confusing, seemingly contradictory and don't make sense in terms of quantity of water that can or cannot be obtained under each Subsection.

ADMINISTRATIVE IMPLICATIONS

The Office of the State Engineer states that it processes on the average of 6,000 to 7,000 domestic, stock and temporary well applications per year. Requiring the Water Rights Division of the OSE to evaluate all domestic well applications would require the addition of at least 50 FTEs. The notice and hearing requirements for "low impact management area" would also have a significant administrative impact. In addition, the OSE Administrative Litigation Unit and the Hearings Unit would be impacted by the inevitable addition of aggrieved and protested domestic well applications to the current caseload of all other types of aggrieved and protested applications. No funding is provided in the bill to offset these increased administrative costs.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 521 is related to House Bill 19 which proposes to give the jurisdiction of deep aquifers to the OSE.

TECHNICAL ISSUES

On page 1, line 23, the deletion of "his" and "him" would have unintended substantive effect. The decisions referred to on line 23 are the decisions of the State Engineer, but deletion of "his" could suggest otherwise. Similarly, "him" is needed to make clear that orders are to aid the State Engineer, in the accomplishment of his duties.

On page 2, line 21, the deletion of “his” and insertion of “the state engineer’s” improperly changes the meaning of the sentence. The legal review is to be performed by legal counsel, but this change would have the legal review performed by the State Engineer. The reference to the State Engineer should be deleted, and “the counsel’s” should be inserted in lieu thereof.

The reason for the reference to "Subsection A" in Subsection E, page 7, line 6, is unclear. Is it to refer to wells proposed for the irrigation of up to one acre of non-commercial trees, lawn, or garden?

OTHER SUBSTANTIVE ISSUES

Domestic wells are a concern because most will have a septic system and there is a growing groundwater contamination from too many septic tanks in many areas of the state. The drilling of domestics also provides the potential for contamination of deep aquifers if the well is not properly drilled or properly abandoned. Requiring community water supply and wastewater treatment systems, as county subdivision regulations may do, is an alternative to addressing the problems associated with domestic wells.

The new Subsection E(1) of proposed by House Bill 521 for Section 72-12-1.1 specifies that applications for the small amounts of water under the section "shall be deemed consistent with the ...public welfare of the state." The proposed Subsection E(2) would provide that the State Engineer shall not approve an application under this section if the proposed use will reduce flows in streams subject to interstate stream compacts. One of the issues analyzed currently in legal proceedings under the umbrella of public welfare concerns is an application's impact on interstate stream compacts. The language in Subsection E, which takes compact-effect analysis out from under the umbrella of public welfare concerns, could create confusion in and have a negative impact on recent and pending cases in state engineer administrative proceedings and state district court or appellate proceedings involving water rights transactions.

New Subsection E, it is unclear whether a party aggrieved by the State Engineer’s denial decision is entitled to a hearing pursuant to NMSA 1978, §72-2-16 (which would require notice by certified mail of the final decision) and, if so, then the Notice of that decision must be sent certified mail to allow for appeal pursuant to NMSA 1978, §72-7-1.

ALTERNATIVES

Leave existing law in place until the courts provide guidance as to whether any change in the law is needed and, if so, the legislature can focus on the specific change required.

In the alternative, repeal Section 72-12-1.1 so that all domestic wells would be permitted under Section 72-12-3 along with all other applications to appropriate groundwater.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The OSE currently is and will continue to be guided concerning domestic wells by the language of Sections 72-12-1 and 72-12-1.1

