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FISCAL IMPACT REPORT

SPONSOR McCamley ORIGINAL DATE 03/06/15
LAST UPDATED _____ HB HJR 8
SHORT TITLE No Prior Appropriation For Water Admin, CA SB _____
ANALYST Cerny

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total			\$ 15.2	\$ 15.2	Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HB 265 and SB 313, which are duplicates of one another.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Office of the Attorney General (AGO)
Office of the State Engineer (OSE)
NM Department of Agriculture (NMDA)

SUMMARY

Synopsis of Bill

House Joint Resolution 8 proposes an amendment to Article 16, Section 2 of the Constitution of New Mexico by removing the requirement that priority of appropriation of water shall give the better right.

The proposed amendment also would create a new sub-section B to Art. XVI, Section 2, requiring that the amount of water available for beneficial use in each stream system of the state be estimated annually prior to the beginning of the irrigation season, and the amount of water available for current agricultural beneficial uses based upon that estimate be allocated on a pro rata per acre basis to each owner of a water right used for agricultural purposes as provided by law.

HJR 8 would be submitted to a public vote during the next general election in November 2016.

FISCAL IMPLICATIONS

HJR 8 contains no appropriation but a constitutional amendment carries the following requirements:

Under Section 1-16-13 NMSA 1978 and the NM constitution, the SOS is required to print samples of the text of each constitutional amendment, in both Spanish and English, in an amount equal to ten percent of the registered voters in the state. The SOS is also required to publish them once a week for four weeks preceding the election in newspapers in every county in the state. In 2014, the SOS estimated the cost per constitutional amendment to be \$15,217. However, if the ballot size is greater than one page, front and back, it would increase the cost of conducting the general election. In addition to the cost of the ballot, there will be added time for processing voters to vote and would mean additional ballot printing systems would be required to avoid having lines at voting convenience centers.

However, fiscal implications of this bill if approved by voters and enacted into law would have very significant, fiscal implications for the state.

AGO analysis states:

The proposed amendment is quite short, but fundamentally alters a constitutional property right protection for priority of right and repeals the long standing doctrine of prior appropriation. Its brevity, silence on means of implementation, and the fundamental changes it apparently seek create significant uncertainty, and could result in thousands of lawsuits against the State. The Attorney General's Office cannot estimate the number of suits or the resources necessary to defend the State, but the Office likely does not have adequate resources to handle such litigation.

OSE analysis states:

The proposed amendment would eliminate longstanding principles governing allocation of water in times of shortage of supply. This would greatly affect the role of the State Engineer in "the general supervision of the waters of the state and of the measurement, appropriation, distribution thereof" (Section 72-2-1 NMSA 1978). The fiscal implications resulting from this re-defined role are not known but could have a significant effect on the budget requirements for the OSE/ISC.

SIGNIFICANT ISSUES

Like the other 17 arid western states, New Mexico follows the doctrine of prior appropriation in water law and has since inception. The doctrine of prior appropriation has been the law in New Mexico since the territorial period (*Snow v. Abalos*, 1914-NMSC-022, section 9). Repeal of this doctrine would repeal the doctrine on which water rights have been developed, financed and relied upon for protection. New Mexico has spent billions of dollars in defining water property rights.

AGO analysis suggests that the impact of HJR 8 would be substantive (major points have been highlighted in italics):

HJR 8 proposes to repeal the prior appropriations doctrine for water rights and to establish a new system for allocation of water rights for agricultural purposes. *It does not appear to distinguish between surface and groundwater rights.*

If such an amendment to the constitution were approved by the electorate, further clarification would be needed to ascertain whether retroactive application is intended, and if so, constitutional.

Retroactive implementation would result in: (a) the loss of priority rights for all water rights holders and, (b) a reallocation by the state of water rights for agricultural purposes. Water rights holders with senior rights would have rights taken away and junior right holders would receive water they had no right to receive. The allocation for holders of agricultural rights would be based on how much property a person/entity owns, i.e., on a “pro rata per acre basis.” All of these issues would have to be sorted out after passage.

If retroactive application is intended, the taking and reallocation of water rights would be considered a taking under the state and federal constitutions for which compensation would be required. *The reallocation could require therefore, massive and incalculable payments to persons whose water rights were taken. If the State did not compensate for the taking, the State would be subject to tens of thousands of lawsuits from holders of senior water rights whose rights were lost.*

HJR 8 repeals the prior appropriations doctrine *in toto*, and therefore apparently repeals the doctrine as it applies to all water rights: non-agricultural water rights included. *HJR 8 does not replace that priority system with any other system for non-agricultural rights, including domestic, municipal, hydropower, etc.* This would leave a great deal of uncertainty as to the rights of holders of rights for non-agricultural use.

HJR 8 is silent as to which state agency would be responsible for estimating all water rights annually and for distributing the taken agricultural water rights. This administrative responsibility would represent an enormous expenditure of administrative resources with serious and far reaching implications administrative and fiscal implications for the State.

HJR conflicts with current legislative direction to the State Engineer and with ongoing administrative and judicial adjudications. For example, the State Engineer is preparing to administer water in priority in the lower Pecos, San Juan and lower Rio Grande river basins. *The current state adjudications are adjudicating water by priority. Approval of HJR 8 would disrupt those ongoing adjudications.*

NMDA analysis agrees, stating:

The effect of removing prior appropriation may require that all settled cases be re-litigated.

The doctrine of prior appropriation applies equally to surface and underground waters and controls all beneficial uses of water in the state. HJR 8 only addresses surface waters and agricultural beneficial uses. It is unclear how underground water and beneficial uses

other than agricultural would be addressed with the proposed amendment.

Individuals whose adjudicated water rights are “senior” and include early dates of appropriation could stand to suffer substantial reduction in asset value, as these rights would no longer confer any additional protection from the encroachment of “junior” water users.

AOC analysis states:

In New Mexico, water rights are “separate protected property right[s] that can be sold, leased, or transferred” (Tri-State Generation & Transmission Ass’n, Inc. v. D’Antonio, 2012-NMSC-039, para.40).

Priority date increases the “security of delivery” as perceived by the owners of water rights, and therefore affects the price of water rights. Surface water rights in existence at the time of the 1907 state water code have the highest security of delivery and may be considered immune from priority calls. (See David Brookshire et al., Water Policy in New Mexico: Addressing the Challenge of an Uncertain Future, 2011, p. 103).

The change contemplated by HJR 8 would strip water rights of what is arguably their most valuable element, particularly if the priority is relatively senior to other water rights in the stream system. Such a change could impact the value of senior water rights and implicate the takings clause of Amendment V of the United States Constitution, and raise the specter of just compensation for water rights claimants. Compensation in this context is an expensive proposition. Repealing the prior appropriation doctrine may also implicate the procedural due process rights of claimants protected by Amendment XIV of the United States Constitution.

Even though rarely enforced in its strictest form, priority of appropriation provides the structure and underlying rationale for alternative approaches to water management in New Mexico, such as local shortage sharing agreements that are currently in place, some of which have been approved by adjudication courts, and the Active Water Resources Management tools currently being developed by the OSE.

PERFORMANCE IMPLICATIONS

AGO analysis states that it “ does not have the resources to handle the litigation that could result from approval of HJR 8 and, as such, could affect the work of the entire office.”

ADMINISTRATIVE IMPLICATIONS

Assuming that under HJR 8 the OSE/ISC would be tasked with the duty to perform an annual estimate of the amount of water available for beneficial uses on all the stream systems of the State, HJR 8 would impose a significant new administrative burden on the agency. The proposed amendment’s abolition of the prior appropriation doctrine would entail a re-structuring of the agency’s rules, procedures and policies that would impose a significant additional administrative burden on the OSE/ISC

CONFLICT

SB 313 Water Right Reviews, Hearings, and Court Venue, and its duplicate in the House, HB 265 (with the same title) refer to the prior appropriation doctrine in the state constitution. HJR 8 conflicts with provisions in those bills by eliminating the referenced protection.

OTHER SUBSTANTIVE ISSUES

NMDA analysis suggests HJR 8 may have a deleterious effect on agricultural water users, especially those who currently have senior rights:

Agriculturalists without robust upstream reservoirs rely on the doctrine of prior appropriation for certainty, since users with the earliest dates can rely on flow. Under prior appropriation, the most junior of users are subject to loss of water in dry years. By contrast, the imposition of pro rata shortage sharing would subject all water users to vast fluctuations in yearly water allocation, depending on severity of weather condition, which would result in uncertainty.

OSE analysis states:

While abolishing the doctrine of prior appropriation in New Mexico, HJR 8 provides no guidance as to how water for non-agricultural purposes would be allocated during times of insufficient supply.

It also is not clear how the proposed amendment would affect water rights in New Mexico created and acquired outside of the parameters of state law, such as federal reserved water rights and tribally-owned water rights, and how water for such rights would be allocated during times of insufficient supply.

In addition, HJR 8 would render multiple provisions of the State water code void or ineffective. See, e.g., NMSA 1978:

Sections 72-1-2 “Priority in time shall give the better right.”

Section 72-2-9 “The state engineer shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudication of the courts.”

Section 72-2-9.1 “the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer” and “The state engineer shall adopt rules for priority administrations to ensure that authority is exercised.”

Section 72-4-19 Adjudication decrees shall declare “the priority, amount, purpose, periods and place of use . . .”

Section 72-5-1 “priority of application shall date from the time of filing such notice of intention.”

Section 72-5-23 “water appurtenant to land may be severed, transferred and become appurtenant to other land “without losing priority of right thereto.”

Section 72-9-1 “Nothing contained in this article shall be construed to impair existing vested rights or the rights and priority of any person . . .”