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FISCAL IMPACT REPORT

ORIGINAL DATE 02/21/13

SPONSOR Bandy LAST UPDATED _____ HB 558

SHORT TITLE Water Prior Appropriation Administration SB _____

ANALYST McCoy

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	NFI	N/A	N/A

(Parenthesis () Indicate Expenditure Decreases)

Duplicates, Relates to, Conflicts with, Companion to SB 529

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer/Interstate Stream Commission (OSE/ISC)

Attorney General's Office (AGO)

Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

House Bill 558 (HB 558) proposes to amend Section 72-2-1 to by adding a new paragraph B that restricts the state engineer's regulatory authority by:

1. Permitting the state engineer to administer only permitted, licensed, or judicially adjudicated rights;
2. Requiring the state engineer to administer according to priority;
3. Prohibiting the state engineer from determining the elements of a water right; and
4. Limiting the state engineer's participation in adjudication or water rights disputes to providing only technical support.

HB 558 also proposes to amend Section 72-2-9.1 to restrict the state engineer's administrative activities by:

1. Permitting the state engineer to administer only judicially adjudicated permitted, licensed, declared, "or as otherwise may be made available" to the state engineer;

2. Requiring the state engineer to avoid any diminishment of water rights and ensure water delivery in accordance with priority administration; and
3. Requiring that administrative rules developed to promote marketing and leasing of water rights comply with priority administration and continued adjudication of rights.

FISCAL IMPLICATIONS

No Fiscal Impact.

SIGNIFICANT ISSUES

According to the Attorney General's Office (AGO):

In 2003 the State of Texas was actively threatening to sue the State of New Mexico over the Rio Grande compact. In response to that threat, to allow the state to respond to that threat in a timely and effective manner, the Legislature enacted Section 72-2-9.1 recognizing "that the adjudication process is slow, the need for water administration is urgent, [and] compliance with interstate compacts is imperative....." The Legislature then went on to give the state engineer the authority and tools to meet the urgent need for water right administration in that statute. In 2013, Texas is in the process of suing New Mexico in the US Supreme Court. At the precise moment foreseen by the Legislature 10 years ago when "the need for water administration is urgent [and] compliance with interstate compacts is imperative" this bill seeks to take away the state engineer's urgently needed authority to modernize and expedite water rights administration to defend against litigation from Texas and would force him to rely on an adjudication process that the Legislature recognizes is too slow to meet these urgent needs. Enacting this bill will have a serious, negative impact on New Mexico's ability to defend itself effectively. Moreover, when the state's legal resources should be focused on a defense against Texas, the state will be forced to engage in an unnecessary repeat of years of intra-state litigation regarding the state engineer's authority. All of this would put New Mexico at a serious disadvantage.

The Administrative Office of the Courts (AOC) notes the following:

Section 72-2-9.1 was enacted in 2003 for the purpose of directing the state engineer to develop regulations for "interim administration" of water rights, prior to completion of the judicial adjudication of all water rights in a particular basin. In response the state engineer developed active water resources management regulations (AWRM). AWRM, among other things, authorizes the state engineer to determine the elements of "administrable water rights" using a hierarchy of the best available evidence, as listed below starting with the best evidence:

- (A) a final decree from an adjudication
- (B) a subfile order from an adjudication
- (C) an offer of judgment from an adjudication
- (D) a hydrographic survey
- (E) a license issued by the State Engineer
- (F) a permit issued by the State Engineer
- (G) a determination by the State Engineer using "the best available evidence" of historic, beneficial use.

The elements of a water right typically include the place of use, point of diversion, purpose of use, priority date, ownership, and quantity. The constitutionality of Section 72-2-9.1 and the AWRM regulations were challenged, and the New Mexico Supreme Court determined that the state engineer has the constitutional authority to promulgate AWRM and to determine and enforce priorities using the hierarchy stated above, prior to completion of an adjudication. *Tri-State Gen. & Trans. Ass'n., Inc. v. D'Antonio*, 2012-NMSC-039.

According to the Office of the State Engineer/Interstate Stream Commission (OSE/ISC):

HB 558 conflates water rights and water throughout. This lack of precision obscures the intent of much of this bill, which is likely to lead to conflict and litigation over its interpretation.

On page 2, regarding amendments to Section 72-2-1: The new section (lines 5-17) begins with the phrase “The state engineer shall only have the authority to administer water...” However, other statutes grant the state engineer other authority: to issue permits and licenses, to undertake hydrographic surveys, to inspect dams, to appoint hearing examiners, to request adjudication suits, etc. This first sentence limits the state engineer’s administrative authority to water rights that are defined by permits, licenses or adjudication decrees. This authority would be significantly narrower than the state engineer’s current authority to administer any water rights according to the best information available. (See Amendments to 72-2-9.1 below)

The statement that state engineer may exercise authority only “in a manner consistent with the doctrine of prior appropriation under the constitution of New Mexico” merely restates existing law and is superfluous. The statement that the state engineer has “no adjudicatory authority to determine or alter” water rights restates existing law and is superfluous.

The statement that the “state engineer shall not use the state engineer’s authority to extinguish a water right...” except through appropriate legal procedures implies that the state engineer has such authority to extinguish water rights without a legal proceeding. This is the current state of the law and is superfluous.

Because the state engineer’s authority is limited by statute to matters concerning water, the statement that the state engineer and state engineer employees “shall only provide technical support in disputes concerning” water could be interpreted as a restatement of existing law, or it could be interpreted to remove the state engineer’s authority to be proactive in the absence of a dispute, such as actions taken under his statutory authority to initiate legal proceedings and take enforcement actions for illegal use of water. It could be interpreted to remove the state engineer authority to employ attorneys and a human resources department.

On page 3, regarding amendments to Section 72-2-9.1: The state engineer’s authority under this law, enacted in 2003, was promptly challenged in court and has been under challenge until the New Mexico Supreme Court issued its decision on this law in November, 2012. As interpreted by the New Mexico Supreme Court, this law granted the state engineer new authority to administer water rights based on the best information available, including adjudication decrees, licenses, permits, declarations, hydrographic surveys, and other information. HB 558 amends this section such that it is unclear whether or how the state engineer’s authority is changed.

Amendments to subsection A change what “The legislature recognizes...,” but do not clearly change the state engineer’s authority under this section.

Amendments to subsection B change the directive to the state engineer from creating “no impairment of water rights” to creating “no diminishment of water rights.” “Impairment” is a term of art in water law that is well defined and well understood. “Diminishment” is not. It is not clear how any water right could be diminished by an state engineer rule. Subsection B is also substitutes the phrase “deliver according to priority” for the existing phrase “enforce priorities.” The new phrase appears to be a less precise way of saying the same thing: that under the state engineer’s new rules, priority shall remain the element that determines which water rights are curtailed so that others may be fully exercised. However, the state engineer does not deliver water. The state engineer does enforce priorities. The effect of adding the modifier “net” to the word “depletions” (line 20) is uncertain without a definition of “gross depletions.” In either case, the meaning and purpose of subsection B (3) has never been clear or meaningful.

The amendment to subsection C changes its meaning entirely. The existing language directed the state engineer, in adopting rules for leasing water, to focus on geographical areas that have been subject to priority administration. The amendment removes the focus on those areas and changes the directive to adopting rules for leasing “in accordance with priority administration and adjudication.” Any state engineer rules not “in accordance” with adjudication and priority administration would be unconstitutional anyway.

PERFORMANCE IMPLICATIONS

According to the OSE/ISC, HB 558 could bring adjudications to a halt, could make allocation of water impossible, and could create years of new litigation after the nine plus years of litigation it took to clarify the statute as originally enacted in 2003.

ADMINISTRATIVE IMPLICATIONS

According to the AGO, the attorney general will be forced to engage in unnecessary litigation which will take away from the legal resources that need to be focused on litigation from Texas.

The OSE/ISC notes, this bill might place many water rights outside the state engineer’s administrative authority, increasing the likelihood of the unregulated taking of water.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 558 is a duplicate of SB 529.

OTHER SUBSTANTIVE ISSUES

The AOC notes, litigation concerning the constitutionality of Section 72-2-9.1, and of the AWRM regulations developed pursuant to Section 72-2-9.1, lasted for nearly eight years prior to the November, 2012 opinion issued by the New Mexico Supreme Court. Due to the potential ambiguities described above, enactment of the bill as drafted may result in further litigation to clarify the authority and duties of the state engineer.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to the AGO, not enacting this bill will maintain New Mexico’s ability to defend itself against legal threats from Texas.

AMENDMENTS

The AOC recommends the following amendments to Section 72-2-1:

1. “The state engineer shall only have the authority to administer water that is either the subject of permits and licenses issued by the Office of the State Engineer or adjudicated by a court in a manner consistent with the doctrine of prior appropriation under the constitution of New Mexico.” Potential issues:
 - This statement, which restricts the state engineer to administer only pursuant to adjudicated rights, permitted rights, and licensed rights conflicts with the proposed amendment in Section 72-2-9.1(A), which allows the state engineer to administer adjudicated rights, licensed rights, permitted rights, declared rights, and rights “as otherwise may be made available to the state engineer.” The scope of administrable rights under Section 72-2-9.1(A), as it is currently enacted and in the amendment, is significantly more broad.
 - The term "adjudicated" should be more specifically defined. In many adjudications, rights are first partially adjudicated during a "subfile" phase as between the State of New Mexico and the individual claimant, and then finally adjudicated following the inter se phase, where all claimants have the opportunity to object to other rights. Only after all objections are resolved is a final decree issued and the rights are considered finally adjudicated.
 - This amendment appears to foreclose interim administration in areas where no permits, licenses, or adjudicated rights exist.
2. “The state engineer shall have no adjudicatory authority to determine or alter the legal elements of a water right.” Potential issue:
 - The state engineer determines and conditions the elements of a water right regularly in the course of the state engineer’s statutory duties. As stated in *Tri-State Generation v. D’Antonio*, 2011-NMCA-015, ¶¶ 11-13 (overruled on other grounds by *Tri-State Gen. & Trans. Ass’n, Inc. v. D’Antonio*, 2012-NMSC-039):

“To be sure, this statutory authority enables the State Engineer to determine certain elements of water rights as part of this supervision. See, e.g., 19.26.2.7(EE) NMAC (1/31/2005) (defining in the rules and regulations governing the appropriation and use of surface waters “[w]ater right” as the “legal right to appropriate water for a specific beneficial use” and stating that the “elements of a water right generally include owner, point of diversion, place of use, purpose of use, priority date, amount of water, periods of use, and any other element necessary to describe the right”).

Additionally, permits and licenses by necessity identify usage elements. See, e.g., NMSA 1978, §§ 72-5-18 (1969) (amended 2007), 72-12-3(E) (2001); 72-5-1, -6, -7, -13. They also incorporate a priority date. See NMSA 1978, § 72-5-3 (1941). The licensing, permitting, transfer, and forfeiture statutes also, as we have stated, require the State Engineer to evaluate factors such as beneficial use, availability of unappropriated water, and impairment of existing rights.

In order to evaluate beneficial use, the State Engineer must assess the quantity, place of use, and purpose to which water has actually been applied. See *State ex rel. Martinez v. McDermott*, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct. App. 1995) (“Beneficial use has been defined as the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken. The concept requires actual use for some purpose that is socially accepted as beneficial.” (internal quotation marks and citation omitted)).”

3. “The state engineer and the employees of the Office of the State Engineer shall only provide technical support in disputes concerning or adjudicating the waters of the state.” Potential issues:
 - The amendment is ambiguous, possibly meaning either (a) that the state engineer’s technical support is available only in the case of an adjudication or water dispute, or (b) in the case of an adjudication or dispute, the state engineer’s participation is limited to providing technical information.
 - The State of New Mexico is the plaintiff in state and federal court water rights adjudications. Currently, assistant attorneys general represent the State of New Mexico in the adjudications, and litigate disputed factual and legal issues before the courts. The assistant AG’s work out of the state engineer offices and coordinate closely with state engineer technical staff. If interpreted to affect the assistant attorneys general representation of the state in the adjudications, this amendment will effectively halt the current progress of adjudications.
 - The amendment should clarify what constitutes a dispute, including defining the parties involved.
 - The amendment should also clarify who the state engineer’s technical support is intended for, and whether the state engineer’s hydrographic survey work is included in “technical support”.
 - This amendment may be interpreted to remove the state engineer from its legal role during the administrative hearings process.

The AOC recommends the following amendments to Section 72-2-9.1:

1. “...the state engineer shall administer water rights in accordance with the water right priorities adjudicated, licensed, permitted, declared or as otherwise may be made available to the state engineer.” Potential issues:
 - The scope of administrable rights under Section 72-2-9.1(A) is significantly more broad than under Section 72-2-1 above, which restricts the state engineer to administer only pursuant adjudicated rights, permitted rights, and licensed rights.

- The amended language does not appear to substantively change the evidence that the state engineer can rely upon to determine administrable rights, and appears consistent with the interpretation in *Tri-State Gen. & Trans. Ass’n, Inc. v. D’Antonio*.
2. “The state engineer shall adopt rules for priority administration to ensure that authority is exercised...so as to create no diminishment of water rights, other than what is required to deliver according to priority date.” Potential issue:
 - Replacing “impairment” with “diminishment” will likely create a less flexible, “bright line” rule that any degree of depletion is impermissible. “Impairment” in contrast, is considered a more flexible metric determined by the state engineer on a case-by-case basis. See *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶¶ 21-25 (“We are of the view that the question of impairment of existing rights is a matter which must generally depend upon each application, and to attempt to define the same would lead to severe complications.” (internal citations omitted))
 3. “The state engineer shall adopt rules based on the appropriate hydrologic models to promote expedited marketing and leasing of water in accordance with priority administration and adjudication.” Potential issues:
 - The proposed amendment appears to restrict the state engineer’s flexibility in developing site-specific rules encouraging and expediting marketing and leasing of water with the requirement that leasing activities occur in accordance with priority administration. The current language allows the state engineer to effect a shortage sharing agreement that might not be in accordance with priority administration. Under the proposed amendment, the alternatives that the state engineer can promote to avoid priority administration are constrained.
 - If no existing hydrologic model yet exists for an area, the requirement that a hydrologic model serve as the basis for the state engineer’s rules will delay administration. This will present a problem in areas where administration is urgently needed.