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## FISCAL IMPACT REPORT

ORIGINAL DATE 2-5-07

SPONSOR Foley LAST UPDATED \_\_\_\_\_ HB 662

SHORT TITLE Repeal Water Law Forfeiture SB \_\_\_\_\_

ANALYST Woods

### APPROPRIATION (dollars in thousands)

| Appropriation |      | Recurring<br>or Non-Rec | Fund<br>Affected |
|---------------|------|-------------------------|------------------|
| FY07          | FY08 |                         |                  |
| NFI           | NFI  |                         |                  |
|               |      |                         |                  |

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General's Office (AGO)  
Office of the State Engineer (OSE)

### SUMMARY

#### Synopsis of Bill

House Bill 662 seeks to repeal NMSA 1978, § 72-5-28 (1907), providing for the forfeiture of surface water rights for the failure to beneficially use water for a period of four years plus an additional year after the State Engineer has provided notice and a declaration of nonuse. In addition to providing for forfeiture, Section 72-5-28 authorizes applications to the state engineer for extensions of time in which to place water to beneficial use and specifies the conditions of nonuse that will not result in forfeiture.

### SIGNIFICANT ISSUES

AGO indicates that the Constitution of 1911, New Mexico adopted a prior appropriation system for its waters, requiring that water be placed to beneficial use.<sup>1</sup> Article XVI, section 2 of the

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<sup>1</sup> AGO comments carry the following caveat: "This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request."

Constitution provides that “[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.” (emphasis added) Article XVI, Section 3 states that beneficial use is the “basis, the measure and the limit” of the right to appropriate water in New Mexico. The requirement that water be put to beneficial use is fundamental to the doctrine of prior appropriation because it insures the equitable allocation of a scarce public resource. Forfeiture is a legal penalty that applies by operation of law under circumstances in which water has not been applied to beneficial use for four years or more. Forfeiture or abandonment statutes exist in some form in every state that adheres to the doctrine of prior appropriation. Repealing the forfeiture statute would fundamentally alter the doctrine of prior appropriation in New Mexico and would remove the legal mechanisms that promote the socially beneficial use of a limited natural resource.

AGO adds that, under existing law, when water can no longer be applied to beneficial use, the owner must transfer that water right or place it in a water conservation program or water bank in order to maintain the right. If the forfeiture statute is repealed, then the incentive for these programs or for the marketing of water rights is eliminated or frustrated. In short, it would allow the hoarding of “paper” water rights, without a concomitant obligation to apply the water under those rights to beneficial use. The repeal of Section 72-5-28 raises obvious constitutional issues. Does a repeal of Section 72-5-28 contravene the provisions of the New Mexico Constitution cited above, particularly Article XVI, Section 3, which states that beneficial use is the “basis, the measure and the limit” of a water right? Can the legislature repeal the forfeiture clause in the surface water code but leave a nearly identical forfeiture clause in place under the groundwater code? In that case, groundwater owners could have their water rights forfeited, but surface water owners would not face forfeiture. This disparate treatment of surface and groundwater owners would almost certainly lead to equal protection challenges under both the United States Constitution and the New Mexico Constitution.

OSE voices similar concerns, also noting that the requirement that water be placed to beneficial use is established by the New Mexico Constitution. Section 3 of article XVI provides that “beneficial use shall be the basis, the measure and the limit of the right to the use of water.” The forfeiture statute is an essential component of the Water Code and has been part of the Water Code since 1907. The requirement that water must be beneficially used in order to maintain a right to use water is a fundamental element of the prior appropriation doctrine, to ensure the equitable allocation of a scarce public resource. The New Mexico Constitution, article XVI, section 2 of provides that “[t]he unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state.” The prior appropriation doctrine, based on the requirement of beneficial use, is designed to promote the socially beneficial use of a limited natural resource. While there is no fee for using public water pursuant to a state water right, there is a requirement that water must be put to beneficial use, or returned to the public for appropriation. This ensures that a limited resource will be used where it will benefit society, not wasted or hoarded. If water is no longer being put to beneficial use, then it is to be reallocated where it can be put to beneficial use. This ensures that water is not wasted or hoarded, but is optimized to provide the maximum benefit to society.

OSE indicates that forfeiture or abandonment statutes exist in some form in every state that follows the prior appropriation doctrine. The elimination of this requirement by the repeal of this statute would remove a necessary element of the state engineer’s ability to administer and

determine water rights. While the state engineer has used this ability sparingly, it serves nevertheless to deter the hoarding of water under water rights that are not or can no longer be exercised. Where water can no longer be put to beneficial use under an existing water right, the owner currently must transfer that water right or place it in a water conservation program or water bank in order to maintain it. If this statute is repealed, then the incentive for these programs or for the marketing of water rights is also eliminated or undermined.

OSE further suggests that, "...the repeal of the statute would serve to block the ability of the state engineer to allocate the public resource that he is statutorily charged to supervise and administer. Water rights could no longer be stacked §72-5-8(F)."

### **OTHER SUBSTANTIVE ISSUES**

OSE anticipates that, making valid every water right ever established in New Mexico would lead to a gross over-appropriation of all streams and aquifers there by rendering paper administrations meaningless. On the other hand, everyone has a water right whether used recently or 100 or more years ago there would be a real need for administration because priority calls would become a part of daily life since the resulting demand would far exceed existing supply.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

OSE states that, "The constitutional requirement of beneficial use will be retained."

BFW/mt