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FISCAL IMPACT REPORT

ORIGINAL DATE 2/28/19

SPONSOR SJC LAST UPDATED _____ HB _____

SHORT TITLE Water Rights Notifications Online SB CS/CS/12/SCONC/SJC

ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	Various

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

SUMMARY

Synopsis of Bill

The Senate Judiciary Committee Substitute for Senate Conservation Committee Substitute for Senate Bill 12 enacts a new section of Chapter 2, Article 2 NMSA 1978 and amends other sections of state laws to provide when notice of certain water permit applications are required.

If the state engineer determines that notice of an application shall be published:

- the State Engineer shall post on its website the facts of the application, the newspaper required to provide notice, its contact information and date objections may be filed, which is 70 days after the date of posting on its website;
- within five days of posting, the State Engineer shall instruct applicant to publish notice in a form and newspaper prescribed once a week for three weeks, with the last date of publication no less than ten days prior to the date objections may be filed;
- the applicant shall file with the State Engineer proof of publication as required within twenty days after the last date of publication; and
- if publication does not occur within sixty days of posting, the applicant shall request new publication instructions and deadlines from the State Engineer.

The posting, publication and timeline instructions are repeated in each of five sections of the bill for five types of permit applications; Sections 72-5-4 (appropriation of surface water), Section 72-5A-5 (groundwater storage and recovery), Section 72-6-6 (water use leasing), Section 72-12-3 (appropriation of groundwater), and Section 72-12B-1 (export of water outside the State).

FISCAL IMPLICATIONS

The State Engineer would absorb administrative costs to put in place the requirements of the bill.

SIGNIFICANT ISSUES

Using a consistent approach for public notice increases accessibility of information related to permit applications. This may help disputes of water rights be realized earlier in the development of a project and issues be resolved sooner rather than add to a burdensome adjudication process.

In its original analysis, the State Engineer noted it currently posts permit notices on its website and the process includes the applicant publishing a notice in a newspaper of local circulation for three consecutive weeks. If objections or protests have been filed by other water right owners, it is determined whether those were filed timely - within ten days of the last day of publication.

In its original analysis, the New Mexico Acequia Association (NMAA) noted the intent of the original bill was to improve due process in relation to water right applications. Many rural communities do not have regular access to newspapers and there is often uncertainty about which newspapers are distributed in rural areas. Rural residents should have a single source of information, such as the State Engineer website, rather than searching newspapers for legal notices. Although the State Engineer posts an informal notice about applications on its website, it has not been a consistent source of information for purposes of filing timely objections.

OTHER SUBSTANTIVE ISSUES

The New Mexico Acequia Association noted that notice of OSE water right applications is a matter of constitutional due process. (*Eldorado v. Cook*, 1991-NMCA-117, 113 N.M. 33 (holding that "[d]ue to the error [in the notice] . . . petitioners failed to receive notice" and this "violated the due process rights" of the potential protestants, and rendered the SEO "without jurisdiction to grant [the application]". *Id.* at 113 N.M. 36-38.). The New Mexico Supreme Court, following long-established U.S. Supreme Court decisions, has held that notice by newspaper publication alone is not constitutionally sufficient when the identities and whereabouts of persons whose property is potentially affected are reasonable ascertainable. *Uhden v. N.M. Oil Conservation Comm'n*, 1991-NMSC-089, ¶ 9-13, 112 N.M. 528, 817 P.2d 721, citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306. For these reasons, the nature of the legal notice the OSE is required to give should be expanded, the Association further noted, beyond newspaper publication, in a manner that is more thorough and legally enforceable.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Public notices of certain permit applications may not always be a reliable source of information.

AHO/cw/sb/al