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FISCAL IMPACT REPORT

SPONSOR Harper/Diamond/Cervantes LAST UPDATED _____
ORIGINAL DATE 02/23/2023
BILL _____
SHORT TITLE Water Rights De Novo Review NUMBER House Bill 498
ANALYST Sanchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	No fiscal impact	No fiscal impact			

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Conflicts with House Bill 499

Sources of Information

LFC Files

Responses Received From

Office of the State Engineer (OSE)

Administrative Officer of the Courts (AOC)

Office of the Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 498

House Bill 498 proposes multiple amendments to the New Mexico Water Code (Section 72-2, NMSA 1978) to clarify the standard of review for appeals as well as the appeal process for rules, regulations, and decisions made by the Office of the State Engineer (OSE).

House Bill 498 adds language regarding notice and hearing procedures for newly promulgated rules and regulations issued under OSE authority and adds language regarding the venue and timeline for appeals of OSE decisions. Additionally, the bill adds language specifying that appeals are to be made in district court.

House Bill 498 also repeals authority granted to the State Engineer to adopt Active Water Resource Management regulations to administer the allocation of water in accordance with the principles of priority administration, as granted under Section 72-2-9.1, NMSA 1978.

Finally, House Bill 498 changes references to the state engineer from “his” to “state engineer” throughout all amended sections to make the language gender-neutral.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023 (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

None of the analyses received by agencies responding to this bill indicated that it would have any fiscal impact.

SIGNIFICANT ISSUES

House Bill 498 would eliminate the ability of the State Engineer to administer priorities until after water rights adjudications are complete. This would significantly impact senior water rights holders, who would be without protection until adjudications are concluded. While the bill would leave intact the portion of the statute that allows for expedited leasing and marketing in areas affected by priority administration, it would essentially eliminate the State Engineer’s ability to conduct active water resource management (AWRM), which has been an important tool for the agency to manage water resources in times of decreased supply. Additionally, according to the Office of the Attorney General, the bill’s removal of language from Section 72-2-16 requiring the State Engineer to have made a decision or to have refused to act before an appeal can be taken to district court may create uncertainty as to whether the administrative hearing process is ever required.

House Bill 498 also proposes amending Sections 72-5-5 and 72-12-3 NMSA 1978 to state that any individual who believes their water right could be impaired by a proposed new or different use of water or believes the application would be contrary to the public welfare or to the conservation of water may protest the application. The current statute requires that a protestor must proceed through the State Engineer’s administrative hearing process, and once a decision is made, the applicant or protestor may appeal the decision to the district court. While this process can take over a year, the proposed amendment to Section 72-7-1(A) would, according to the Office of the Attorney General (NMAG), “create uncertainty [as to] whether protestors or applicants can seek relief in other forums if the State Engineer has not made a decision within a year...” NMAG further states:

If this bill does not intend to apply to protested application hearing proceedings, or if the bill is only intended to apply to certain orders from the state engineer, such as a decision determining if over-diversion has occurred and repayment is required, further clarity would be helpful.

Analysis from the Administrative Officer of the Courts expresses concerns the repeal of Sections 72-2-9.1 (A) and (B) may impact the authority of the State Engineer to promulgate Active Water Resource Management and additionally and the proposed amendments to Section 72-7-1(A) will likely result in an increase in administrative appeals in the district court.

The Office of the State Engineer provides the following analysis of the amendments contained in Section 4 of House Bill 498:

The final significant issue is the removal of the remedy of “double payback” of water for

willful overdiversions of water in Section 4. If this remedy were removed, it would deprive the State Engineer of the most effective deterrent against overdiversions. Somewhat ambiguously, however, the bill also states that “the rights, remedies and procedures set forth in this section are not exclusive and shall not preclude the exercise of any other rights, remedies and procedures that may be available to...the state engineer.” This provision would seem to allow the State Engineer to still pursue non-enumerated remedies like double payback of water – raising a question of whether the deletion of that remedy is necessary or effective.

ADMINISTRATIVE IMPLICATIONS

Analysis from the Office of the State Engineer explains, while the provisions allowing for appeal to district court during the agency’s decision-making process would lighten the caseload for its hearing unit, the bill would “effectively prevent the agency from administering water rights by priority in basins where adjudication is not complete.”

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 498 conflicts with House Bill 499:

- House Bill 499 amends Section 72-2-9.1, NMSA 1978 but leaves the majority of subsections (A) and (B) intact.
- House Bill 498 removes subsections (A) and (B) completely

ALTERNATIVES

Analysis from the Administrative Office of the Courts states:

The proposed amendment to 72-7-1(A) allows an applicant a year from the filing of a notice with the state engineer to file an appeal in the district court. A 30-day period to file an appeal with the district court will better serve the interests of efficiency and finality. This suggestion also applies to 72-7-1(B).

Suggest rewording new paragraph 72-7-1 (G) to state, “Appeals from the district court shall be as of right and may be pursued in the same manner as any other civil appeal as provided by the Supreme Court.”