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FISCAL IMPACT REPORT

ORIGINAL DATE 1/25/10

SPONSOR Nunez LAST UPDATED _____ HJR 4

SHORT TITLE Nullification Of Executive Rules, CA SB _____

ANALYST Haug

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	\$0.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SJM 7, SB 98

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	\$104.0*			\$104.0	Non- Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications below

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AGO)

Energy, Minerals and Natural Resources Department (EMNRD)

New Mexico Environment Department (NMED)

Secretary of State (SOS)

Commission of Public Records (CPR)

SUMMARY

Synopsis of Bill

House Joint Resolution 4 proposes to amend Article IV of the New Mexico Constitution to allow the State Legislature to nullify administrative regulations.

FISCAL IMPLICATIONS

The SOS notes that Constitutional Amendments placed on the ballot are very costly. The previous 2008 General Election had 5 Constitutional Amendments that cost the State of New

Mexico over \$520,000. Each amendment cost approximately \$104,000. These amendments have to be published in English and Spanish in a major recognized newspaper in every county statewide.

SIGNIFICANT ISSUES

The AGO states:

Although the State Legislature may delegate some authority to Executive Branch agencies to enact rules, this joint resolution would have the effect of allowing the Legislature to nullify regulations. The joint resolution would allow the enactment of a form of “legislative veto.” See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983) for a discussion of the “legislative veto” as interpreted under federal law.

Although this joint resolution would amend the State Constitution, its provisions raise federal constitutional issues. For example, its possible usurpation by the Legislature of Executive Branch authority to enact rules and administer laws, along with an unlawful delegation of that authority to a legislative committee, could be considered a violation of Article IV of the United States Constitution which guarantees each state a “republican form of government”.

Further, the concepts of “separation of powers” and the “non-delegation” doctrine are fundamental concepts in the United States Constitution, implemented to keep the different branches of government distinct in order to prevent abuse of power. See Articles I, II, and III U.S.Const. Those concepts were included in the New Mexico Constitution when it was submitted for congressional and presidential approval pursuant to Sections 3 and 4 of the “Enabling Act for New Mexico”, 36 Statutes at Large 557, Chapter 310(1910). Article VI of the United States Constitution requires members of state legislatures to be “bound by Oath or Affirmation to support this [Federal] Constitution”. The provisions of the joint resolution may also violate that provision, if construed as an unlawful usurpation and delegation of Executive Branch authority by the State Legislature.

At best, the provisions of the joint resolution would be construed along with the “separation of powers” doctrine set forth in Article III, Section 1 of the New Mexico Constitution, and the “non-delegation” doctrine arising from that section. See *State ex rel. Schwartz v. Johnson*, 120 N.M. 820, 907 P.2d 1001 (1995). See also *Cobb v. State Canvassing Bd. of New Mexico* 140 NM 77, 140 P.3d 498 (2006) where the New Mexico Supreme Court stated: “It is this principle of separation of powers and the limitations on the Legislature's ability to transfer its power to other departments that is the basis of the nondelegation doctrine.” The joint resolution does not amend Article III, Section 1. It is unclear how its constitutional amendments would be reconciled with that section.

State agencies are generally required to comply with statutory procedures when enacting, amending, or repealing rules. Those procedures allow for public notice, publication, filing, etc. See the State Rules Act, NMSA 14-4-1 et seq. for example. It is unclear as to the legal effect of the “annulment” by legislative committee of a rule adopted by a state agency. See *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 686 P.2d 934, (1984). It is possible that the designated legislative committee will be required to publish notice, hold hearings, etc. before invalidating a state agency rule.

Aside from those legal issues, requiring legislative committees to review and approve state agency rules and regulations will have the likely effect of lengthening the process of rule enactment. It may delay or prohibit the enactment of rules required by other state laws.

The CPR notes:

There may be conflicts with the separation of powers provision in Article III of the New Mexico Constitution. If rules are seen as an outgrowth of an executive agency's administration of a statute, legislative prohibition or annulment of rules could be considered an encroachment on the executive authority to execute laws. If rules are seen as a quasi-delegation of the legislature's law-making authority, then legislative prohibition or annulment of rules could be considered an encroachment on the judiciary's authority to review laws. This action could be questioned especially where the legislature determines whether an executive agency acted within its authority. In New Mexico, that kind of determination has generally been limited to the judiciary.

It appears that some of the text of the resolution comes from the states of Idaho and Iowa. It should be noted that the definition of rule in both of those states differs from that in New Mexico. The definition of rule in New Mexico includes the requirements of one executive branch agency to another; the definitions in Idaho and Iowa do not. Currently in New Mexico, there are a number of rules promulgated by one executive agency that affect only other state agencies. These rules include record retention schedules, state building requirements, governmental information technology standards, and rule formatting requirements, to name a few. There could be a separation of powers concern if the legislature were to annul a rule that was strictly internal to the executive branch.

ENMRD and NMED both add comments on separation of powers issues associated with the proposed amendment.

RELATIONSHIP

House Joint Resolution 4 is related to Senate Joint Memorial 7 which proposes to study rule making processes and to Senate Bill 58 which would delay any rule negatively affecting educational funding greater than five million dollars.

ALTERNATIVES

The CPR notes that the Uniform Law Commission (ULC) has spent the last six years working on a revised Model State Administrative Procedure Act that should be finished before the end of 2010. Article 7 of the current draft version of the Model Act deals specifically with legislative review of rules. The members of the drafting committee working on the revision have studied many states and examined the issues associated with this subject. Some consideration might be given to waiting until the Model State Administrative Procedure Act is finished to see what best practices are suggested.

GH/mt