F I S C A L I M P A C T R E P O R T

SPONSOR Gentry **ORIGINAL DATE** 02/01/11 **LAST UPDATED** 02/22/11 **HB** 109/aHJC

SHORT TITLE Appeal State Engineer Decisions in Court **SB**

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	**FY12**		
NFI	NFI	n/a	None

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Office of the State Engineer (OSE)

SUMMARY

Synopsis of House Judiciary Committee Amendment

The House Judiciary Committee amendment to House Bill 109 makes two clarifications. It specifies it is the applicant who must be aggrieved. It also adds that the State Engineer's referral of the matter to mediation or alternative dispute resolution does not constitute an decision or action under the amended subsection.

Synopsis of Original Bill

House Bill 109 proposes to amend Section 72-2-16 NMSA 1978 to give applicants for water permits who are aggrieved by an initial decision on their applications, made without a hearing, the option of either asking for a hearing from the State Engineer (SE) or by appealing the SE's initial determination directly to district court without ever going through the SE administrative process.

It would also add the requirement that a protestant to an application is entitled to a hearing if the protestant is aggrieved by a SE decision, but that the protestant must request a hearing from the SE within 30 days after receipt of the SE's decision.

FISCAL IMPLICATIONS

House Bill 109 makes no appropriations.

The OSE notes that House Bill 109 may require the SE to increase litigation and water rights administration staff to accommodate the added responsibilities of increased numbers of appeals in district court.

SIGNIFICANT ISSUES

The Office of the State Engineer presented the following concerns about potential legal challenges to the changes proposed by House Bill 109.

Under current law, an aggrieved applicant must first exhaust her administrative remedies before the SE prior to appealing a SE decision to district court. This allows for the expertise of the SE to be addressed to the application and for a thorough administrative record to be developed for *de novo* review in a district court appeal of a final SE decision. The courts have long recognized that the SE "has far greater expertise in the resolution of issues of fact arising in connection with the administration of our water laws that do most, if not all, of our judges...." *Fort Sumner Irrig. Dist. v. Carlsbad Irrig. Dist.*, 87 N.M. 149, 152, 530 P.2d 943, 946 (1974).

Without this record, district courts would not only be at a disadvantage in understanding the technically complex factual issues that arise during administrative hearings on aggrieved applications, but would also be unable to determine whether the court even had jurisdiction over the issues in the appeal. As recently held by the New Mexico Supreme Court in *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶¶ 2, 17, the district court's appellate jurisdiction is limited to those issues heard by the SE. Without an administrative record, it would be very difficult for a court to identify the issues considered by the water rights division in initially acting upon an application. As the *Lion's Gate* court went on to say about the limitation on the appellate jurisdiction of a district court:

> This avoids the "absurd" and "unreasonable" result that would ensue if water rights applicants, seeking a more favorable outcome, could transform district courts into general administrators of water rights applications by forcing district courts, rather than the State Engineer, to consider on appeal the merits of applications. We do not find that such usurpation of the State Engineer's authority and jurisdiction under the Water Code was the intent of Article XVI, Section 5 [of the New Mexico Constitution], Section 72-7-1, or our precedent.

House Bill 109 might be seen to skirt the limitations outlined by the Supreme Court above, which in turn could form the basis of legal challenges to the bill.

It also is possible that House Bill 109 could be found to be unconstitutional. A similar amendment to the water code to allow aggrieved applicants for State Engineer permits to go directly to district court for a hearing on the State Engineer's denial of their application was found to violate of the separation of powers doctrine in *Fellows v. Shultz*, 81 N.M. 496, 500 (1970) on the basis that it attempted to delegate a duty imposed on the executive branch to the

judicial branch. House Bill 109 appears to be vulnerable to a similar constitutional challenge.

In addition to developing an administrative record of oftentimes technical issues such as hydrologic modeling raised in administrative hearings on aggrieved applications, the SE is also afforded the opportunity of modifying the initial action on the application carried out by the water rights division of the Office of the State Engineer, which is the decision to be appealed directly to district court under House Bill 109. It is often the case that the initial action of the water rights division in processing applications to either grant a permit with conditions or to deny an application is changed by the SE as a result of his administrative review. It also is often the case that aggrievances are resolved through informal or formal negotiations during the administrative hearing process. For instance, in the last calendar year 18 aggrieved applications were set for hearing. Of those, 10 were settled before hearing, 2 were withdrawn and 2 were dismissed on procedural grounds. Thus, only 4 aggrieved applications are pending hearings. Without the administrative process providing opportunities for resolving cases, 14 cases might unnecessarily be on appeal in district court.

PERFORMANCE IMPLICATIONS

The Office of the State Engineer is concerned that their administrative litigation unit and water rights division, as well as experts from other divisions of the office of the state engineer, would likely be required to defend more appeals simultaneously in district court, which would negatively impact these divisions' performances of already existing duties. They also suggest that the district courts, their resources already overtaxed, would have to absorb the numerous new appeals that could result from House Bill 109.

TECHNICAL ISSUES

The Office of the State Engineer identified certain potential conflicts with existing statutes.

House Bill 109 creates a conflict with other existing statutory procedures set out in the Water Code. The bill adds to Section 72-2-16 the provision that, "on an application that has been protested", any person aggrieved by the SE's entry of a decision, act or refusal to act is entitled to a hearing if she requests one. Section 72-5-5 (A), however, states that if a person timely protests an application the SE **shall** hold a hearing on the application, even before any preliminary decision is made and without a request for a hearing by the protestant by the protestant.

House Bill 109 creates the option for applicants in unprotested cases to bypass the administrative process and appeal directly to district court. The same option is not extended to protestants in permit application proceedings or to persons who are challenging the issuance of a SE compliance order under Section 72-2-18. Both of these categories of aggrieved persons must exhaust their administrative remedies before appealing to district court. The division created by House Bill 109 might seem arbitrary and unreasonable and lead to legal challenges.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Current law will remain in place which requires an aggrieved applicant to request a hearing and exhaust administrative remedies with the SE before taking an appeal to district court of a decision, act or refusal to act of the SE.

JCH/bym