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FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/11
 SPONSOR Tripp LAST UPDATED 02/22/11 HB 505/aHAGC
 SHORT TITLE Complaints for Interfering with Acequias SB _____
 ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Duplicates Senate Bill 553

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
0	0	0		

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	n/a	n/a	n/a			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

The AGO provides the following disclaimer on material submitted for analysis of proposed legislation. "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."

Office of the State Engineer (OSE)

SUMMARY

Synopsis of House Agriculture and Water Resources Committee Amendment

The House Agriculture and Water Resources Committee amendment to House Bill 505 removes the language that would allow private persons to pursue criminal complaints against parties unlawfully interfering with the easement of members in a community ditch or acequia. The amendment adds a new subsection that would allow, in the case of a ditch or acequia where there is no mayordomo or commission or irrigation or conservancy district with control of the ditch or acequia, an affected person may file a civil complaint in magistrate or metropolitan court for knowingly, intentionally or willfully violating the provisions protecting the ditch or acequia's easement. The penalty may not exceed \$5,000. Neither party is precluded from exercising any other remedies provided by law.

Synopsis of Original Bill

House Bill 505 seeks to amend NMSA 1978, § 73-2-5(B). Currently, Section 73-2-5(B) provides that a criminal complaint may be filed with a magistrate court by the district attorney or the mayordomo or commission of the ditch or acequia if a person unlawfully interferes with the members of a community ditch or an acequia's easement to the ditch within the community ditch or acequia. HB 505 seeks to add that where there is no mayordomo or commission, irrigation or conservancy district with control of the ditch or acequia, an affected person may file a criminal complaint for unlawfully interfering with an easement to the ditch in magistrate or metropolitan court. In essence HB 505 authorizes a person on a private ditch to file a criminal complaint against a person that unlawfully interferes with his easement to the private ditch.

FISCAL IMPLICATIONS

House Bill 505 makes no appropriation. If enacted, it could possibly have an impact on district courts by increasing their caseloads.

SIGNIFICANT ISSUES

The AGO identified some potentially problematical legal features of the bill as drafted.

The bill appears to be intended to extend to private parties the state prosecutorial authority to bring a criminal complaint for interference with ditch rights on private ditches. It is currently drafted as an amendment in Chapter 73, special districts, Article 2, acequias, but applies only to ditches that are by definition, not acequias. NMSA 1978 § 73-2-27, provides that “these sections shall apply only to such ditches as have been heretofore and are now known and regarded as community ditches, under the laws of this state; and under the provisions of said sections, shall be construed to mean such ditches as are not private,. . .” Thus, it appears that any bill intended to apply to private ditches should be codified elsewhere.

The delegation of the power of the state to commence prosecution of a criminal matter involves significant constitutional issues as well. While the legislature defines the crimes, it is the district attorneys and attorney general that bring prosecutions, and it is

the judicial branch that specifies applicable rules of procedure for criminal prosecutions. See, generally, discussion of separation of powers issues relevant to criminal procedure in *State v. Belanger*, 146 N.M. 357, 369, 2009 NMSC 25. Court rules of procedure are established by the Supreme Court, i.e., the judicial branch, not the legislature. NMSA 1978 § 31-1-3 recognizes that court rules are established by the judicial branch, providing that, “A criminal prosecution shall be commenced, conducted and terminated in accordance with Rules of Criminal Procedure. All pleadings, practice and procedure shall be governed by such rules.” Currently, Magistrate Court criminal provisions do not allow “private citizens” to bring criminal actions. R. Crim. Proc. Magistrate Court § 6-108. The rules used to provide such a prosecutorial right, but the Supreme Court deleted that provision in 2008. Following black letter rules of construction, it must be assumed the Court meant to change the rule when it deleted that provision, and that it is properly construed now as not allowing private prosecutions, except in the circumstances articulated. Although governmental employees may appear and prosecute misdemeanors in certain circumstances, see, R. Crim. Proc. Magistrate Court 6-108 B., a mayordomo is an official of a political subdivision and so would appear to be in this category, but a private party is not.

The OSE offers a similar discussion of the potential issues with House Bill 505.

HB 505 would allow private individuals on private ditches to file a criminal complaint for unlawfully interfering with a private easement to a conveyance ditch. In New Mexico the rights of private ditches and the rights of statutorily recognized acequias and community ditches are often different. Section 73-2 is titled “Special Districts, Ditches or Acequias,” and largely describes and recognizes the unique nature of acequias and community ditches from other water users, and the requirements of being an acequia or community ditch. In order to be recognized as an acequia or community ditch a ditch must be “superintended by three commissioners and one mayordomo as now provided by law.” NMSA 1978, § 73-2-11. HB 505 would apply where there is no mayordomo or commission, or irrigation or conservancy district with control of the ditch or acequia. Therefore, HB 505 would not apply to acequias and community ditches as statutorily defined, but only to private ditches. NMSA 1978, § 73-2-27 states that the “provisions of these sections (Sections 73-2, 3) shall apply only to such ditches as have been heretofore and are now known and regarded as community ditches, under the laws of this state; and under the provisions of said sections, shall be construed to mean such ditches as are *not private*, and such as are not incorporated under the laws of this or of some other state or territory, and are held and owned by more than two owners as tenants in common, or joint tenants.” HB 505 would now recognize the rights of private ditches within the acequia and community ditch statutes in Section 73-2-5.

The statutes addressing the rights and requirements of other water users that are not acequias, community ditches or other recognized special districts are found in Chapter 72. In fact, NMSA 1978, § 72-8-3 addresses the issue of unlawfully interfering with a ditch:

Whenever any appropriator of water has the right-of-way for the storage, diversion or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violations of this section shall be a

misdemeanor.

The significant difference between the existing statute that applies to private ditches and HB 505 is that HB 505 provides that the affected person may file the criminal complaint. Generally, only district attorneys, the attorney general, those attorneys appointed by the attorney general, law enforcement agents such as municipal police or county sheriffs, and attorneys appointed special prosecutors by the district attorneys have the jurisdiction to prosecute misdemeanor criminal complaints. One exception to this practice is shown in Section 73-2-5, the statute that HB 505 would amend, where the mayordomo or commission of the acequia or ditch could file a criminal complaint. It is important to note that acequias and community ditches are political subdivisions of the State, and that mayordomos and commissions are elected officials. Enacting HB 505 would allow private members of private ditches to file a criminal complaint for the unlawful interference with their easement to the ditch like community ditch and acequia mayordomos and commissions could.

The OSE remarks further that HB 505 may conflict with Rule 6-107 NMRA of the Rules of Criminal Procedure for Magistrate Court. Rule 6-107 was amended effective December 31, 2008, specifically deleting the provision that “private citizens” could prosecute criminal misdemeanors in Magistrate Court.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Senate Bill 553 is a duplicate of this bill.

TECHNICAL ISSUES

The AGO states the bill appears to apply only to ditches that are not by definition, acequias, but is written as an amendment to a statute that only applies to acequias and community ditches.

ALTERNATIVES

The AGO suggests that if the goal is to provide more remedies for interference with ditch easements on private ditches, an expedited remedial procedure could be drafted as a civil remedy. This would avoid the constitutional issues that arise only in the criminal process area while serving the goal of more remedial procedures.

JCH/svb:mew