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FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/11

SPONSOR Neville LAST UPDATED _____ HB _____

SHORT TITLE Legislative Overturn of Agency Rule, CA SB SJR 3

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	NFI	\$104.0	\$104.0	Non- Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with HJR 3.
Relates to HB 22, HB 69, HB 459, SB 91 and SB 190.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
Secretary of State's Office (SOS)
Regulation & Licensing Department (RLD)
Public Regulation Commission (PRC)
Energy, Minerals & Natural Resources Department (EMNRD)
Department of Health (DOH)
New Mexico Environment Department (NMED)
Public Education Department (PED)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 3 is a proposed constitutional amendment which, if approved by the voters, will allow the Legislature to overturn a rule adopted and promulgated by a state agency by a joint resolution passed by a 2/3 vote of the New Mexico Senate and House of Representatives.

FISCAL IMPLICATIONS

The Secretary of State reports that in accordance with Section 1-16-4 NMSA 1978, upon receipt of the certified proposed constitutional amendment or other question from the Secretary of State,

Senate Joint Resolution 3 – Page 2

the county clerk shall include it in the proclamation to be issued and shall publish the full text of each proposed Constitutional amendment or other question in accordance with the constitution of New Mexico.

Although the county clerk includes the proposed amendments in the clerk's proclamation, it is the responsibility of the State to pay for the costs associated with the publication per Section 1-16-13 NMSA 1978. The approximate cost per constitutional amendment is \$104,000.

As to rule-making agencies, since the legislature has existing authority to adopt new laws or amend existing law to overturn rules it disagrees with, the fiscal impact of legislative action under this bill (the costs incurred by the agency needing to enact a new rule, or amend an existing rule in light of a legislative overturn) would be the same as that under existing law if the legislature amended the substantive law in a manner that required additional rule-making. It would appear that those costs could be covered by the rulemaker's existing budget.

SIGNIFICANT ISSUES

As is true for other bills and resolutions introduced in this session, there have been differing legal analyses concerning the separation of powers issue presented when the legislative branch seeks to overturn rules promulgated by executive branch agencies under statutory authority it originally conferred on the rulemaking agency. Set forth here are those analyses.

The EMNRD advises that SJR 3 represents a fundamental change in the New Mexico Constitution by allowing the Legislature to overturn rules proposed by the executive branch. It argues:

Under Article III, section 1 of the Constitution, New Mexico has always recognized and enforced a strict separation of powers among the 3 branches of government:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.

This provision "generally bars one branch of government from performing a function reserved for another branch of government". *Old Abe Co. v. N.M. Mining Comm'n*, 121 N.M. 83, 94 (Ct. App. 1995). The power to adopt rules is housed in the executive branch. An executive branch agency or official is granted powers to adopt specific rules by the Legislature. After a public process and based on a record, the agency adopts the rules which are then subject to review by the judicial branch. The courts may overturn a rule if it conflicts with legislative laws, if the agency failed to follow the laws for adopting the rule or if the agency's action is arbitrary, capricious or not supported by the agency record.

If the amendment that is proposed by SJR 3 is adopted and the Legislature has the power to overturn a rule, the roles of the other branches are diminished. If the Legislature can overturn a rule at anytime for whatever reason, then the process by which the agency obtains public comment on a rule and reaches a decision based on a record may become

less important. Likewise, the role of the judicial branch is diminished if the Legislature rejects a rule. The courts will have no record and no standard against which to judge the Legislature's decision on the rule.

SJR 3 does not establish any standards for the legislative review. SJR 3 also does not establish a timeframe for when a rule may be overturned. In other words, any rule can be subject to being repealed at anytime for any reason.

The PED expresses concern that this amendment would:

result in the executive branch acting only with the permission of the legislative branch, such an amendment would implicate Article III, Section 1 of the New Mexico Constitution relative to the separation of powers between the executive, judicial and legislative branches of government. *Compare, I.N.S. v. Chadha*, 462 U.S. 919, 954 (1983) (providing that executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of the Houses of Congress and the President).

On this same topic, the AGO advises:

Attempts in other states to enact statutes providing for a "legislative veto" of rules and regulations adopted by administrative agencies have been subject to challenge under those states' constitutions. A challenge usually alleges that a statute authorizing the state's legislature to repeal or nullify an administrative rule amounts to a legislative intrusion into the executive rulemaking function in violation of separation of powers principles or to an impermissible attempt by the legislature to make laws contrary to the procedures governing the enactment of statutes in the state's constitution.

By authorizing the legislature to nullify agency rules and regulations in the New Mexico constitution rather than in a law, SJR 3 undercuts the potential for a successful challenge on state constitutional grounds.

In addition to separation of powers concerns, the EMNRD and the RLD also raise potential due process violations and fairness concerns. EMNRD provides this summary:

Controversial rulemaking proceedings often involve two or more competing interest groups seeking to have their concerns reflected in the final rule. These groups participate in the administrative rulemaking and submit evidence and testimony which becomes part of the record. Under SJR 3, the groups with greater support in the Legislature will get chance to undo a decision they disagree with, or some groups may decide to bypass the administrative process and go directly to the Legislature.

Similarly, the DOH notes:

Rule-making often includes substantial stakeholder involvement in the rule writing process and typically during the public hearing prior to promulgation. DOH is responsible for ensuring subject matter expertise in the process of rule writing, which usually involves medical and public health science. Many of the rules written by state agency health experts include federal guidance from such agencies as the Centers for

Senate Joint Resolution 3 – Page 4

Disease Control and Prevention, the Department of Health and Human Services, and the U.S. Dept. of Agriculture. Independent medical associations and boards publish guidance documents as a result of extensive research in areas of healthcare and public health that inform the rule-writing process.

In addition, the DOH warns:

The inability to enact rules adopted or promulgated to implement state/federal programs co-funded by the US Department of Education or the Health and Human Services Department Centers for Medicare and Medicaid could jeopardize federal funding. Such programs as the Family Infant Toddler, the Medically Fragile Waiver, the Mi Via Waiver or the Developmental Disabilities Waiver could be affected if legislative action alters rules for these programs.

SJR3 also has the potential to impact disengagement from the Jackson litigation as certain rules are promulgated to support court-ordered actions related to the Joint Stipulation on Disengagement.

Finally, the PRC reports that, unlike past bills attempting to permit the legislature to overturn executive agency regulations, this one clearly applies to the PRC as a “state agency.” The PRC asks whether the PRC might be expressly exempted from it in order to preserve the Commission’s constitutional and statutory independence, including its existing statutory rulemaking authority and procedures. It also notes that although this amendment as drafted would apply to PRC rulemaking, it does not apply to PRC adjudications.

CONFLICT, RELATIONSHIP

This resolution (SJR 3) conflicts with HJR 3, which would require a majority vote in each chamber to nullify an agency rule. SJR 3 relates to HB 22, HB 69, HB 459, SB 91 and SB190, which all address rules or rule-making.

TECHNICAL ISSUES

The AGO notes that SJR 3 allows the legislature to overturn rules after they have been adopted and promulgated. In some cases, a rule may have gone into effect before the legislature meets and overturns the rule. This may confuse members of the public who are subject to the rule and may result in wasted time, effort and resources for agencies who go through the entire rulemaking and promulgation process before the rule goes before the legislature and is possibly overturned.

The EMNRD points out the ambiguity of the term “rule”, and asks whether that limits legislative action to a rule as a whole, or could this power be exercised as to any of its chapters, parts or sections? Additionally, since rules are often amended, could the Legislature overturn a single amendment, or must it overturn the entire rule?

OTHER SUBSTANTIVE ISSUES

The AGO advises that, although SJR 3 avoids the common state constitutional issues raised by legislative veto statutes, its practical effect on agencies may lead to other legal challenges. By

overturning a rule, the Legislature, in effect, will be overriding the statutory authority it originally conferred on the agency. This potential for a legislative veto may create uncertainty within the agency and among members of the public about an agency's authority and limit the agency's effectiveness. SJR 3 also may make the rulemaking process more cumbersome and inhibit agencies from promulgating rules even when they are consistent with the agency's statutory authority.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Rules will continue to be adopted, amended and repealed by executive branch agencies, subject to review by the judicial branch.

AMENDMENTS

The AGO suggests these possible amendments:

- (1) require legislative review and approval of proposed rules rather than after rules have been adopted and promulgated;
- (2) make clear that an agency rule is not effective until the Legislature has had the opportunity to review the rule and, if appropriate, overturn it. This may delay the rulemaking process but would avoid confusion among members of the public about the applicability of agency rules. If amended to make a rule's effectiveness contingent on legislative approval, SJR 3 should allow for emergency rules that must go into effect immediately to avoid threats to public health or safety and similar emergency situations or to comply with federal requirements; and
- (3) instead of making SJR 3 self-executing, make it subject to the adoption of rules governing the process the Legislature will use to review and overturn agency rules.

MD/bym