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## FISCAL IMPACT REPORT

ORIGINAL DATE 3/3/15

SPONSOR Cervantes LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE State Engineer Powers & Duties SB 648

ANALYST Armstrong

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See fiscal implications				

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to SB 647

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the State Engineer (OSE)

Attorney General's Office (AGO)

Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

Senate Bill 648 amends Section 72-2-1 NMSA 1978, by adding a new paragraph restricting OSE's regulatory authority by:

- Permitting OSE to administer only permitted, licensed, or adjudicated rights consistent with the doctrine of prior appropriation and the state constitution;
- Prohibiting OSE from determining or altering the legal elements of a water right; and
- Limiting OSE's participation in adjudication or water rights disputes to providing only technical support.

SB 648 also amends Section 72-2-9.1 to restrict OSE's administrative activities by:

- Limiting OSE to administering only judicially adjudicated permitted, licensed, declared, "or as otherwise may be made available";
- Requiring OSE to avoid any diminishment of water rights and ensure water delivery in accordance with priority administration in rulemaking actions; and

- Requiring that administrative rules developed to promote marketing and leasing of water rights comply with priority administration and continued adjudication of rights.

## **FISCAL IMPLICATIONS**

The bill does not include an appropriation, but AOC analysis noted that potential ambiguities within the bill may result in litigation to clarify the authority and duties of the state engineer, implicating judicial resources. AGO analysis also stated that SB 648 would “likely result in years of litigation not only because of the internal inconsistencies in this bill but because of the inconsistencies of this bill with the water code as a whole.” Additionally, OSE’s Litigation and Adjudication Program is dedicated to fulfilling the agency’s statutory responsibilities in adjudications. If these tasks can no longer be performed by OSE, significant additional hiring would be required of the AGO but the bill provides no additional appropriation for this work.

## **SIGNIFICANT ISSUES**

This bill significantly limits the state engineer’s historical role as the agency charged with carrying out water administration and permitting as well as prosecuting and representing the interests of the state in water right adjudications. Currently, OSE attorneys are commissioned by the attorney general to prosecute water rights adjudications on behalf of the state. AGO analysis notes it is unclear how SB 648 would affect required work in adjudications, but asserts it would likely disrupt long established practice and slow the process.

Limiting OSE to only providing “technical support in disputes concerning or adjudicating the waters of the state” (page 2, lines 15-18) could be interpreted to the agency from applying its technical expertise in the absence of a dispute. This could be interpreted as restricting the agency’s ability to exercise technical expertise in promulgating rules and regulations, declaring groundwater basins, issuing orders, evaluating and granting water rights applications, and conducting hydrographic surveys. This provision also could be interpreted to limit OSE to only providing technical support in water rights matters, and removing the agency’s authority to employ attorneys or other staff to participate in legal proceedings and take enforcement actions for illegal use of water.

According to OSE analysis, the bill invites a new round of litigation challenging the Active Water Resource Management (AWRM) rules. These rules address priority administration as directed by the Legislature in Section 72-2-9.1, which was enacted in 2003. The rules were challenged in court and, after eight years of litigation, the Supreme Court resolved this challenge in 2012 and held that statute granted the agency the authority necessary to implement priority administration of water rights based on the best information available, including adjudication decrees and orders, licenses, permits, declarations, hydrographic surveys, and other information. By amending the statutory basis for the AWRM rules, SB 648 would expose OSE to another legal challenge and litigation which would delay the implementation of priority administration in areas across the state where it is needed to protect senior water rights or ensure continued compliance with interstate compacts.

Analyses from OSE, AOC, and AGO identified many issues with the bill as drafted, but did not offer amendments or alternative suggestions. It is unclear if the agencies believe the status quo is ideal or what changes these agencies would suggest to improve both adjudications and administration.

**RELATIONSHIP**

Senate Bill 647 amends Section 72-2-9.1 – by substituting language in one subsection, and adding language in another subsection, clarifying that priority administration rules adopted by the State Engineer shall be enforced and be consistent with Article 16 of the New Mexico constitution and the doctrine of prior appropriation.

**OTHER SUBSTANTIVE ISSUES**

The bill’s amendments to Section 72-2-1 limiting OSE’s authority to administer water rights to only those rights set out in a permit or license or that have been adjudicated by a court conflict with the agency’s authority – set out on page 3, lines 12-13 – to administer water rights according to the best information available.

Similarly, the bill’s provision that OSE “shall have no adjudicatory authority to determine or alter” the elements of a water right (page 2, lines 11-12) conflicts with existing statutes granting broad authority to the state engineer to determine the validity and define the elements of a water right in the permitting and hearing processes.

JA/je