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FISCAL IMPACT REPORT

SPONSOR Bandy/Neville ORIGINAL DATE 02/18/19
 LAST UPDATED _____ HB 450

SHORT TITLE Water Right Hearings & Appeals SB _____

ANALYST Hanika-Ortiz

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY19 | FY20 | FY21 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|---------------|------|----------------------|------------------------------|------------------|
| Total | | Indeterminate | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)
 Administrative Office of the Courts (AOC)
 New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of Bill

HB 450 amends several sections of Chapter 72, relating to water law.

Section 1 would make several changes to Section 72-2-8, which provides OSE the authority to issue regulations, codes, orders, and special orders. These changes include:

- Qualifying the declaration currently in Subsection A of Section 72-2-8 that the legislature’s grant of rulemaking authority in Section 72-2-8 is to be liberally construed with the following statement: “to protect the constitutional rights of prior appropriation and beneficial use ... [and] de novo review by the district court and to minimize the cost and delay to water rights owners.” (p. 2, lines 3-6)
- Requiring State Engineer rulemaking hearings to be held in the “district” that is most convenient to the persons most affected by the proposed regulation. (p. 3, lines 19-20)
- Adding a new requirement that all rulemaking by the State Engineer shall be subject to full de novo review by the district court. (p. 4, lines 18-20)

Section 2 would delete the following two subsections of Section 72-2-9.1:

- Subsection A, which grants to the State Engineer authority to administer water allocations based on water right priorities on file with or otherwise available to the

State Engineer. (p. 5, lines 4-10)

- Subsection B, which directs the State Engineer to adopt rules for priority administration. (p. 5, lines 11-17)

Section 3 would amend Section 72-2-16 as follows:

- To eliminate the requirement that a party dissatisfied with a decision or action by the State Engineer must request an administrative hearing before taking an appeal to the district court. (p. 6, lines 22-24)

Section 4 would amend Section 72-2-18, the State Engineer’s compliance order statute, as follows:

- To eliminate the State Engineer’s authority to require double repayment of water for over diversion or illegal diversion. (p. 8, lines 16-22)
- To eliminate the State Engineer’s authority to impose civil penalties after a compliance order has become final. (p. 9, line 6)

Section 5 would make several changes to Section 72-7-1, including:

- Permitting an applicant the option to file a direct appeal to district court if a “matter” has been pending before the Office of the State Engineer for a period of one year. (p. 9, line 20 through p. 10, line 5)
- Eliminating the current provision for the appellant to post a bond for costs upon appeal. (p. 11, lines 1-2)
- Eliminating the authority of the district court on appeal to submit questions of fact to a referee. (p. 11, line 11)
- Expanding the district court’s jurisdiction upon appeal from its current appellate jurisdiction to the district court’s original jurisdiction under Article 6 of the NM constitution. (p. 11, lines 12-14)
- Eliminating the requirement of exhaustion of administrative remedies in certain circumstances. (p. 11, line 15-22)

SIGNIFICANT ISSUES

According to the NMAG, the bill takes some rulemaking authority away from the State Engineer, which may affect that which was disallowed prior; allows for appeals to be made before the State Engineer has heard the matter and issued an order, modifying the common law doctrine of exhaustion; and states that exhaustion is not required when it is futile or the State Engineer lacks authority to grant the relief sought. Additionally, according to the NMAG, the bill removes civil penalty powers from the State Engineer and places it in the district court.

According to OSE: the bill would significantly undermine the State Engineer’s ability to issue regulations, codes, and orders to implement the water code and manage the State’s waters; expose to renewed legal challenge the State Engineer’s authority to protect senior water rights and ensure New Mexico’s continued compliance with interstate obligations; result in increased litigation and costs for parties and slow or delay the administrative process; reduce the risk for illegal diverters and water right owners’ overdiversions by eliminating the State Engineer’s authority to require double repayment of water over diverted or illegally diverted; and erode the State Engineer’s authority to control the distribution of water in accordance with the law of prior appropriation.

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IMPLICATIONS

OSE noted the bill would eliminate the provision for the appellant to post a bond for costs upon appeal. This provision applies only to those who appeal a State Engineer decision to district court, since the State Engineer cannot appeal from his own decision. Deletion of the cost bond provision could expose the State Engineer to liability for litigation costs on appeals to district court.

Further, AOC noted, Section 72-7-1(A) allowing an applicant to file an appeal with the district court if a matter has been pending before the state engineer for a year or more may result in an increase in administrative appeals to the district courts from decisions of the state engineer. If the state engineer has not developed the administrative record in an appeal, which is often technical, the district court would be required to undertake this work resulting in longer proceedings. Without an administrative hearing and record from OSE, more resources would likely be expended in district court developing a complete record of the issues and relevant technical background.

PERFORMANCE IMPLICATIONS

AOC provided the following:

Repeal of Sections 72-2-9.1 (A) and (B) may impact the authority of the state engineer to promulgate AWRM: As determined by the state supreme court in *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, Section 72-2-9.1 provides the state engineer with new regulatory authority to adopt Active Water Resources Management regulations (AWRM) for the purpose of administering the allocation of water, in accordance with priority. The court also determined that AWRM does not violate due process. *Id.* at ¶ 50. The state engineer has been actively engaged in developing district specific rules for various basins, pursuant to AWRM. If enacted, this repeal may undermine the state engineer's authority to pursue AWRM, and nullify the agency's efforts to date to develop rules and regulations for priority administration.

Proposed amendments to Section 72-7-1(A) will likely result in an increase in administrative appeals in the district court: Section 72-7-1(A) applies to decisions of the state engineer involving appropriations and applications for permits. *Id.* at ¶ 16. Allowing an applicant to file an appeal with the district court if the state engineer has not issued a final decision in one year's time may result in a significant increase in cases filed with the district courts, depending upon the average period to a final decision at the office of the state engineer. At present, the administrative hearing process will generally define the issues that will be heard by the district court (see discussion below). Also, decisions of the State Engineer often rely on technical analyses, and the scientific basis for particular decisions will therefore become part of the administrative record. Without an administrative hearing and record, more time and resources will likely be expended in the district court developing a complete record of the issues and relevant technical background.

Expanded scope of de novo review of administrative appeals before the district court: HB 450 amends 72-7-1 (E) to provide for de novo review by the district court of "all matters within its original jurisdiction under Article 6" of the constitution. At present, as determined by the

state supreme court in *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 29, the district court's review on appeal is limited to the issues originally before the state engineer: "[a] harmonious reading of the water code with Article XVI, Section 5 limits the district court's scope of appellate review to a de novo consideration of issues within the State Engineer's statutorily-defined jurisdiction. 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 their 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, Section 72-7-1, or our precedent. Lion's Gate's approach would defeat the administrative process for water rights applications designed and articulated by the Legislature."

The court concluded that upon appeal, although the district court is limited to reviewing the issues that were before the state engineer, "...the district court can hear new and additional evidence and form its own conclusions based upon that evidence. In addition, its review of a State Engineer's decision is neither limited to questions of law nor restricted to determining whether the State Engineer acted arbitrarily or capriciously." *Id.* at ¶ 30. Further, the district court "...is free to find facts, make conclusions of law, and enter such judgments, orders, and decrees that it determines are necessary to dispose of the issue(s) decided by the State Engineer." *Id.* at ¶ 35.

ADMINISTRATIVE IMPLICATIONS

AOC noted the New Mexico's district court system consists of a water judge in every district. An administrative impact on these water judges and staff resulting from an increased caseload is likely.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

OSE would continue to exercise his current statutory authorities to actively manage real-time distribution of water, implement priority administration of water rights in times of shortage, ensure New Mexico's compliance with interstate obligations, and implement and enforce the water code.

AHO/gb