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FISCAL IMPACT REPORT

ORIGINAL DATE 02/23/19
LAST UPDATED _____ **HB** 576 _____

SPONSOR Schmedes

SHORT TITLE Underground Water End User Identification **SB** _____

ANALYST Hanika-Ortiz

REVENUE (dollars in thousands)

| Estimated Revenue | | | Recurring or Nonrecurring | Fund Affected |
|-------------------|--------------------------------------|------|---------------------------------|-----------------------------------|
| FY19 | FY20 | FY21 | | |
| | Unknown – see fiscal implications | | | State Land Maintenance Fund |

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY19 | FY20 | FY21 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|---|------|----------------------|------------------------------|--------------------|
| Total | | Unknown – see fiscal implications | | | | OSE Trust Funds |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)

Energy, Minerals and Natural Resources Department (EMNRD)

State Land Office (SLO)

SUMMARY

Synopsis of Bill

House Bill 374 seeks to amend Section 72-12-3 NMSA 1978 of the Water Code as it relates to applications filed with the Office of the State Engineer to use underground water.

The bill adds a new Subsection B that if the end user of all or part of the water applied for is not the applicant itself, then the applicant would be required to identify all actual end users,

including an entity subject to Section 72-1-9 NMSA 1978 (which refers to municipalities, counties, member-owned community water systems, school districts, state universities, special water users' association, and public utilities supplying water to municipalities or counties) or another entity that provides water service such as a subdivision, and provide evidence showing the end user is contractually obligated to use all of the water applied for within a reasonable time, and that there is a substantial probability that the applicant can and will complete the appropriation with diligence within a reasonable time. Furthermore, if there will be multiple end users, the bill requires the applicant to identify the amount each end user would use. Subsection B concludes with a provision that these requirements do not apply to Section 72-1-9 entities.

The bill adds a Subsection E to make prior state engineer decisions binding legal precedent unless distinguishable on the basis of law or fact. This subsection requires when the state engineer "reverses or is otherwise inconsistent" with a prior decision, he/she shall make specific findings of fact and conclusions of law explaining why it was incorrect or distinguishable.

Finally, the bill adds a new Subsection G requiring the state engineer to reject an application if the intention is to sell any permit the applicant may obtain without appropriating the water.

FISCAL IMPLICATIONS

SLO reported any associated revenue impact on the Land Office related to additional constraints on water appropriations cannot be determined at this time.

OSE would likely expend additional staff time and resources to process applications to appropriate groundwater under the additional requirements in the bill.

SIGNIFICANT ISSUES

The bill seeks to amend the Water Code as it relates to applications to OSE to use underground water. Currently, applicants to appropriate groundwater must designate in the application the particular source of water, its proposed beneficial use, its proposed point of diversion, the owner of the land on which the proposed well will be located, the amount of water proposed to be diverted, the proposed place of use, and, for irrigation, the parcel proposed to be irrigated.

Agencies commented about the bill's use of the term "end user". In addition to entities under Section 72-1-9 NMSA 1978, it could also include customers of those entities, lessees of water rights, and customers of water providers making bulk sales of water for commercial purposes. Furthermore, OSE wrote, a significant part of Active Water Resource Management is to encourage leasing arrangements, water banking, shortage-sharing, and other administration. These practices may involve applications where the applicant is not necessarily the "end user," and where the applicant may not always be able to identify all potential "end users" involved.

The bill provides that final decisions of the state engineer on underground water appropriations are binding legal precedent, unless incorrect or distinguishable on the basis of law or fact. OSE noted under Section 72-12-3 NMSA 1978, the state engineer applies existing law and technical expertise to the specific facts of each application to appropriate groundwater and does not determine or create new law in his or her decisions that can be cited later as legal precedent. The water code and the State Constitution provide that state engineer decisions are subject to *de novo* judicial review by the district courts. Legal precedent regarding the appropriation of

groundwater is established by the courts in the course of their review of state engineer decisions.

ADMINISTRATIVE ISSUES

OSE stated that the Subsection B requirement that the applicant submit evidence there is a substantial probability that the applicant will complete the appropriation within a reasonable period of time could be problematic, and might be better addressed in a hearing before the state engineer. Also problematic, is the bill's requirement that OSE make a new and more difficult determination regarding the applicant's intent to sell a permit without appropriating the water.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 576 duplicates SB 435.

HB 576 is also a near duplicate of HB 374 but HB 374 would exclude three categories of applicants from having to identify end users, HB 576 only excludes one category. HB 576 also adds language requiring evidence that there is a substantial probability that the applicant can and will complete the appropriation with diligence within a reasonable time. HB 576 also clarifies that only final decisions of the state engineer would constitute legal precedent, as well as adding final court decisions arising from decisions of the state engineer as constituting legal precedent.

SUBSTANTIVE ISSUES

SLO commented that HB 576 could have the effect of discouraging efforts to re-use and recycle water, as the ultimate "end user" could be unknown at the time an application is made.

AMENDMENTS

SLO suggested clarifying the end user does not need to be defined for applications where the beneficial use is not entirely consumptive, or where the applicant intends to make the consumptive portion of the appropriation available to other unidentified users through recycling.

AHO/gb