



## SIGNIFICANT ISSUES

According to OSE analysis, this bill attempts to clarify that conditions or restrictions imposed by USFS and BLM cannot create administrative requirements for the state engineer. The bill would solidify the state engineer’s current practice of exercising exclusive authority over water rights in the state, independent of federal land management policies.

However, OAG analysis raised the following concern:

Changes in the substitute raise a significant constitutional issue. At page 1, lines 21-23, the Substitute provides that “The state engineer shall not enforce or administer efforts by the United States forest service or bureau of land management that [contain certain requirements or restrictions relating to water rights].” The language of the original bill was not specific to federal agencies, stating: “The state engineer shall not enforce or administer a condition placed on permitted land that [contain the same requirements or restrictions].” The substitute bill thus singles out federal agencies for disparate treatment. This may violate the Supremacy Clause of the U.S. Constitution. The U.S. Supreme Court has explained that: “State law may run afoul of the Supremacy Clause in two distinct ways: The law may regulate the Government directly or discriminate against it. *North Dakota v. United States*, 495 U.S. 423, 434 (1990). The test of whether a state law discriminates against the Federal Government is whether “it treats someone else better than it treats” the Government. *Id.* at 438. To the extent HB472 would deny federal agencies the rights and protections under New Mexico water law that are available to other persons, it may be unconstitutional. In addition, the word “efforts” (in the phrase “efforts by the United States forest service or bureau of land management”) is ambiguous, because an “effort” is not a particular instrument that can be enforced or administered.

JA/jle