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F I S C A L   I M P A C T   R E P O R T

SPONSOR Bandy
ORIGINAL DATE 2/5/15
LAST UPDATED
HB 265

SHORT TITLE Water Right Reviews, Hearings, and Court Venue
SB

ANALYST Armstrong

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	**FY16**		
	See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB 313
Relates to SB 276

SOURCES OF INFORMATION
LFC Files

Responses Received From
Administrative Office of the Courts (AOC)
Office of the State Engineer (OSE)
Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

While the state constitution mandates priority administration of water rights by users' seniority, New Mexico's water managers are not prepared to enforce this rule. Adjudications that are underway continue at a glacial pace, with projections for completing the Lower Rio Grande adjudication reaching up to 30 years. Moreover, adjudication of the most populous basin, the Middle Rio Grande, has not begun. In addition to the long and costly process taking a toll on individual water rights claimants, the resulting delay and uncertainty over is a drag on economic development.

Intending to improve OSE's processes in determining water rights ownership, House Bill 265 amends several sections of New Mexico's statutes on water administration. These changes include:

- Specifying that the state engineer's authority to promulgate regulations and issue orders should be construed to protect the constitutional guarantees of prior appropriation, beneficial use, de novo review of administrative decisions in district court, and to minimize cost and delay to water rights owners.
- Providing that a hearing shall be held either in the district most convenient to the affected parties or in Santa Fe on matters that affect the entire state.
- Providing for de novo review of any regulation, code, or order issued by the state engineer in district court.
- Removing provisions granting the state engineer authority to administer water rights in accordance with priorities either recorded or otherwise available to the state engineer and direct the state engineer to adopt rules for priority administration that do not interfere with a future or pending adjudication.
- Requiring hearings to take place in the district where the matter arises, or in Santa Fe if the matter affects the entire state.
- Deleting a provision authorizing the state engineer to require double repayment of illegally diverted water.
- Transferring authority for assessing a civil penalty for violating a state engineer compliance order from the state engineer to the district court.
- Permitting an applicant whose matter has been pending for one year or longer to treat the absence of a final decision as a refusal act, and file a written notice to that effect with the state engineer. The bill also lengthens the time to file an appeal in the district from 30 days to one year.
- Removing the provision allowing a bond for costs to be required upon proper application for appeal.
- Clarifying language to provide that upon de novo appeal to the district court the court will allow additional evidence and arguments and consider all matters within its original jurisdiction.
- Providing that exhaustion of administrative remedies is not required when futile or when the state engineer lacks the authority to grant the right sought by the applicant.
- Adding a provision to address appeals from the district court and providing for an appeal of right from the district court to the court of appeals.

FISCAL IMPLICATIONS

This bill does not appropriate funds, but AOC analysis notes the provision allowing an applicant to file an appeal with the district court if a matter has been pending before OSE for a year or more is likely to result in increased costs associated with hearing these appeals. However, the number of OSE matters that have been pending for a year or more is currently unavailable.

According to AOC:

> 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.

According to OSE, the bill's requirement that administrative hearings be held "in the district where the matter is located" unless the hearing concerns matters that affect the entire state would impose additional operating expenses on the agency. While OSE's analysis of HB 265 did not project a cost for the change in hearing locations, agency analysis of Senate Bill 276 – which requires *all* hearings to be held in the county where the water right at issue is located – states that such a change could increase travel costs by $40 thousand to $50 thousand.

SIGNIFICANT ISSUES

HB265 specifies that OSE's rulemaking and order authority be construed 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." OSE notes this amendment and a provision allowing full de novo review of OSE actions by district courts could be interpreted as restricting the Legislature's traditional deference to the agency in rulemaking and issuing orders, which could constrain OSE's ability to manage the state's waters. However, this concern may be overstated as HB265 does not amend or remove language stating OSE regulations, codes, or orders are "presumed to be in proper implementation of the provisions of the water laws administered" by the state engineer.

Both AGO and OSE noted issues with the bill's removal of some of the provisions that serve as the basis of the Active Water Resource Management regulations. After nearly a decade of litigation, these provisions and the rules promulgated thereunder were upheld by New Mexico's Supreme Court in 2011. Agency analyses take the position that removing these clauses creates a void in New Mexico law and significant uncertainty in terms of OSE's ability to manage the state's water resources. According to OSE:

> In 2003, Texas was actively threatening to sue New Mexico under the Rio Grande Compact. To allow the state to respond to that threat in a timely and effective manner, the Legislature declared in Subsection A of Section 72-2-9.1 that "the adjudication process is slow, the need for water administration is urgent, [and] compliance with interstate compacts is imperative.…" The legislature then granted the State Engineer the specific authority and tools to expedite water rights administration. Texas has now sued New Mexico in the U.S. Supreme Court. After approximately eight years of litigation over this legislative directive, the State Engineer is now in the process of promulgating rules for priority administration in the Lower Rio Grande Basin, which will support the State's defense in the Supreme Court case. At this critical juncture, HB 265 would expose the State Engineer's authority to expedite water rights administration to further legal challenge, authority which is critically needed to defend against Texas's claims.

AGO adds:

> Although New Mexico is not in violation of [the Rio Grande] Compact, it is important to show the U.S. Supreme Court that New Mexico is ready, willing, and able to enforce its water laws and priorities if that should ever become necessary in the future. At the precise moment foreseen by the Legislature 10 years ago when "the need for water

> administration is urgent [and] compliance with interstate compacts is imperative" this bill takes away the state engineer's authority to modernize and expedite water rights administration, forcing him to rely on an adjudication process that the Legislature recognizes is too slow to meet the need. Moreover, when the state's legal resources should be focused on a defense against Texas, the state will be forced to engage in an unnecessary repeat of ten years of intra-state litigation regarding the state engineer's authority.

AGO and OSE also agree that HB 265's provisions allowing appeals of an OSE action or failure to act to district court would allow multiple piecemeal appeals to be taken to district court from a single administrative case, on any decision by the hearing officer. The agencies assert this would result in increased litigation and costs to water rights applicants and protestants, and would significantly slow or delay the administrative process. OSE states these changes would "dramatically reduce the utility and effectiveness of the State Engineer's administrative hearing process … [and] create chaos by allowing parties to argue one issue in front of the State Engineer and then raise entirely new issues and arguments before the district court."

The New Mexico Supreme Court has interpreted the existing statute, specifically Section 72-2-16, to bar parties from taking appeals to the district court until the entire administrative hearing has been conducted and a decision is issued by the State Engineer. According to OSE analysis, this approach prevents parties from disrupting the administrative hearing process by seeking relief from the courts on discrete issues or determinations before the hearing is complete. In its most recent restatement of this principle in 2013, the Supreme Court ordered that "piecemeal appeals to the district court are not permitted." Allowing multiple opportunities to take interlocutory appeals could provide parties – applicants and protestants – with means to intentionally delay State Engineer administrative proceedings.

Moreover, HB 265 provides the district courts' review of OSE actions shall be de novo. At present, as determined by the New Mexico Supreme Court's 2009 opinion in *Lion's Gate Water v. D'Antonio*, 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." 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." This precedent provides district courts broad discretion in terms of what issues may be heard on appeal.

The bill reduces OSE's authority to impose up to double repayment of water that was over- or illegally diverted, and limits repayment to the amount over- or illegally diverted. This change could encourage the behavior of illegal diverters or overdiverters who ignore orders to stop their diversions, choosing instead to litigate for years while continuing to overdivert or illegally divert. This is unfair to other water rights owners and contrary to prior appropriation. According to OSE analysis places great importance on the agency's authority to require up to double repayment to address serious and significant illegal diversions or overdiversions and to protect the water supply for other water right owners. Removing the possibility that double repayment might be required would reduce the risk for illegal diverters and would reduce the incentive for water right owners to avoid overdiversions. AGO also fears this change further weakens New Mexico's ability to prove its seriousness about ensuring priorities are protected and that Compact compliance is a true priority. It also reduces an incentive for water users to avoid over diverting. Existing law provides discretion to the state engineer to consider good faith efforts and there is no existing evidence that this provision has been implemented in an onerous manner.

DUPLICATION

Senate Bill 313 duplicates HB 265. Additionally, Senate Bill 276 limits the location where OSE hearings may be held to the county in which the water right at issue is adjudicated, licensed or permitted, unless the parties and the state engineer agree to another site for the hearing.

OTHER SUBSTANTIVE ISSUES

According to OSE analysis:

> Section 1 of HB 265 would require hearings on proposed OSE regulations be held in Santa Fe only if the matters have statewide impact, and requiring all other hearings to be conducted in the "district" that is most convenient to persons most affected. The need for such a change is unclear. Currently, if a regulation is being promulgated for a specific area of the state, OSE holds numerous public meetings in the affected area and conducts a hearing in that area if warranted.
>
> Section 5 would eliminate the current provision requiring the appellant to post a bond for costs upon appeal. The existing provision for a cost bond upon appeal applies only to applicants or protestants 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 from Section 72-7-1 (D) could have the unintended effect of exposing the State Engineer for the first time to potential liability for litigation costs on appeals to district court.

JA/bb/je