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FISCAL IMPACT REPORT

SPONSOR <u>Harper/Diamond/Cervantes</u>	LAST UPDATED _____
	ORIGINAL DATE <u>02/23/2023</u>
SHORT TITLE <u>Ensure Prior Administration of Water</u>	BILL NUMBER <u>House Bill 499</u>
	ANALYST <u>Sanchez</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	No fiscal impact	No fiscal impact			
Total	No fiscal impact	No fiscal impact	No fiscal impact			

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Conflicts with House Bill 498 and Senate Bill 458

Sources of Information

LFC Files

Responses Received From

Office of the State Engineer (OSE)
 Office of the Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 499

House Bill 499 proposes to amend state statute concerning the State Engineer (Section 72-2-1 NMSA 1978) by making grammatical changes and adding language limiting the authority of the State Engineer to the administration of water rights that have been permitted, licensed, or adjudicated in a manner consistent with the doctrine of prior appropriation.

House Bill 499 would restrict the State Engineer’s authority to determine or alter the legal elements of a water right and the authority to extinguish a water right through abandonment or forfeiture proceedings. The State Engineer would only be able to provide technical support in disputes over the waters of the state.

House Bill 499 proposes additional amendments that would require the State Engineer to

- Administer water rights in accordance with the doctrine of prior appropriation;
- Ensure water is delivered in accordance with the prior appropriation doctrine without additional diminishment of water rights;
- Adopt rules based on hydrologic models to expedite the sale and lease of water in accordance with prior appropriation and adjudication.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023

(90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

Analysis from the Office of the State Engineer indicates that enactment of House Bill 489 would have no fiscal implications for the agency.

SIGNIFICANT ISSUES

Analysis from the Office of the Attorney General expressed concerns relating to the potential conflict the proposed amendments might create with other sections of NMSA 1978, stating:

HB499's amendment to Section 72-2-1 may create conflict with existing statute Section 72-2-9.1 NMSA 1978. HB499 would restrict the OSE's authority to administer only water rights that have been permitted, licensed, or adjudicated. However, NMSA 72-2-9.1 still provides the OSE with the authority to administer declared water rights or water rights "otherwise made available" to the state engineer. These declared rights or rights "otherwise made available" to the state engineer fall outside of permitted, declared, or adjudicated rights that HB499's amendments to 72-2-1 would allow the OSE to administer.

Analysis from the Office of the State Engineer includes a detailed explanation of the potential conflicts, redundancies, and programmatic changes that would result from this bill's enactment. These comments are included below in their entirety, so attempts to summarize do not misrepresent their substance:

House Bill 499's changes to section 72-2-9 would bring that statute into conflict with Section 72-2-9.1 (Priority Administration), which gives the state engineer broad authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer, due to the New Mexico legislature's recognition that the adjudication process is slow, the need for water administration is urgent and compliance with interstate compacts is imperative. House Bill 499 would amend 72-2-9 to restrict the state engineer's ability to administer water to only what is either the subject of permits or licenses or adjudicated by the court. But the amendments to 72-2-9.1 would retain the state engineer's ability administer water rights according to priorities established in declarations or "as otherwise made available" to the state engineer – which are, by definition, priorities established outside of permits or adjudications. The state engineer's ability to administer water rights that are declared or unrecorded or otherwise available to the state engineer is a critical tool in ensuring that all water rights are properly protected during times of shortage.

House Bill 499 would prevent the office of the state engineer from exercising "adjudicatory authority to determine or alter the legal elements of a water right." If the intent behind this provision is to prevent the State Engineer from unilaterally adjudicating water rights, it is redundant; 72-4-17 already vests exclusive jurisdiction in adjudication courts to adjudicate the elements of water rights. However, if the intent behind this provision is to prevent the state engineer from evaluating the validity of water rights in the course of performing administrative duties, that would mark a sea change to existing practices. It would prevent the State Engineer from confirming whether the information proffered in a declaration or permit application shows that a subject water right is valid. That practice has been upheld in, *inter alia*, *Headen v. D'Antonio*, 2011-NMCA-058.

Sometimes, a declarant or an applicant will overstate the extent of the water right in their declaration or application. The state engineer conducts field surveys and other investigations to confirm that the information submitted by the declarant or applicant is accurate. Sometimes the information is not accurate. Under a broad reading of this bill, the state engineer would have to accept the proffered information as valid on its face even if the declarant or applicant has not established the water right as provided by law.

In addition, the state engineer is required by law to review water rights listed on the RLD Cannabis Producer applications to make water right validity determination with regards to the need for a valid water right to be a cannabis producer. Likewise, the OSE is required to provide a water rights validity check on any entity requesting funding from the Water Trust Board. A broad reading of this bill would create a conflict with those duties.

House Bill 499 would provide that “The state engineer and the employees of the office of the state engineer shall only provide technical support in disputes concerning or adjudicating the waters of the state.” This language is ambiguous. If read to mean that the staff of the Office of the State Engineer could not provide legal support in adjudications and disputes concerning the waters of the state, it would effectively prevent the Attorney General from deputizing attorneys at the Office of the State Engineer from working on water cases and adjudications. For a number of years, the Litigation and Adjudication Program has employed attorneys to conduct adjudications, under commissions from the Attorney General. It would seem to be an unjustified intrusion into the ability of the Attorney General to select the most appropriate, knowledgeable attorneys to conduct adjudications and water rights litigation.

If, on the other hand, this language is read to prevent the Office of the State Engineer from providing technical support to anyone *except* in adjudications or water disputes, it would effectively nullify a great number of programs that the Office of the State Engineer performs to provide technical support to the State of New Mexico, including providing support to acequias for acequia projects, assisting local governments with conservation efforts, supporting the Water Data Act, or generally doing anything not related to a water dispute.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Analysis from the Office of the Attorney General includes the following breakdown of conflicts presented by HB499:

Conflict with HB498:

- HB499 makes several amendments to Section 72-2-9.1 NMSA 1978 but leaves the majority of Subsections (A) and (B) intact.
- HB498 removes Subsections (A) and (B) all together.

Conflict with SB458:

- SB458 repeals sections of New Mexico code (Sections 72-5-28 and 72-12-8 NMSA 1978) providing the OSE with the authority to extinguish water rights due to non-use through a specific forfeiture process.
- HB499 states the OSE may only extinguish water rights through the appropriate abandonment or forfeiture proceedings.

SS/al/hg