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FISCAL IMPACT REPORT

SPONSOR Diamond/Cervantes LAST UPDATED _____
ORIGINAL DATE 02/24/2023
BILL _____
SHORT TITLE Water Rights, Uses, Reserve & Storage NUMBER Senate Bill 458
ANALYST Sanchez

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			

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Conflicts with House Bill 121, House Bill 358

Relates to Senate Bill 167

Sources of Information

LFC Files

Responses Received From

Office of the State Engineer (OSE)

Office of the Attorney General (NMAG)

SUMMARY

Synopsis of Senate Bill 458

Senate Bill 458 proposes to amend multiple sections of Section 72 NMSA 1978 (Water Law) pertaining to water use and forfeiture, the leasing and sale of water rights, and the use, sale, or lease of water from the strategic water reserve. Senate Bill 458 also proposes to repeal Sections 72-5-28 NMSA 1978 (Failure to use water) and Section 72-12-8 NMSA 1978 (Water right forfeiture).

Senate Bill 458 proposes to amend Section 72-5A-8 NMSA 1978 (Stored water not public; stored water not subject to forfeiture; use or exchange of recovered water) by removing an exception to forfeiture of water stored in an aquifer for later use pursuant to a project permit. This would mean water stored in an aquifer for later use would be subject to forfeiture. The bill would also amend Section 72-6-3 NMSA 1978 (Owner may lease use of water) by removing language which clarifies that the act of leasing water rights does not protect those water rights from forfeiture for nonuse. The bill also proposes to amend Section 72-9-1 NMSA 1978 (Vested

and existing rights; protection) by removing language subjecting owners of reservoirs, canals, pipelines or other works to forfeiture for nonuse.

Senate Bill 458 proposes several amendments to Section 72-14-3.3, NMSA 1978 (Interstate Stream Commission; Protection of Interstate Streams) which would remove the exemption from forfeiture for water held in the strategic water reserve (SWR). The amendments proposed to this section would eliminate the Interstate Stream Commission’s ability to sell or lease water rights from the SWR and would prohibit water from the SWR from being used to protect threatened and endangered species.

Finally, Senate Bill 458 would completely repeal Sections 72-5-28 and 72-12-8 NMSA 1978, relating to the forfeiture of surface and groundwater due to nonuse.

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

None of the analyses received by agencies responding to this bill indicated that it would have any fiscal impact.

SIGNIFICANT ISSUES

Analysis from the Office of the Attorney General cited possible conflicts with the Constitution of the State of New Mexico, specifically Article XVI, Section 3 which establishes the concept of beneficial use of water as the framework for managing water rights. NMAG stated:

The concept of beneficial use of water is codified in Article XVI, Section 3 of New Mexico’s constitution. “Beneficial use shall be the basis, the measure and the limit of the right to use water.” Const. Art. 16, § 3, NM CONST Art. 16, § 3. Thus, the right to use water in New Mexico is subject to the requirement that the water actually be placed to beneficial use.

Forfeiture has repeatedly been found by New Mexico courts to be an important tool for ensuring water is placed to beneficial use, as required by the New Mexico Constitution. In 2022, the New Mexico Supreme Court in *State v. Romero*, held that “the beneficial use doctrine, enshrined in Article XVI, Section 3 of the New Mexico Constitution, *mandates* that continuous beneficial use be ‘the basis, the measure and the limit of the right to the use of water’ and that water not subject to beneficial use reverts to the public and is subject to appropriation by the state.” 2022-NMSC-022 at ¶ 23 (emphasis added). See also *State ex rel. Martinez v. City of Las Vegas* 2004-NMSC-009, at ¶ 37 (“Forfeiture ... is an essential punitive tool by which the policy of our constitution and statutes is fostered, and the waters made to do the greatest good to the greatest number. Forfeiture prevent[s] the waste of water—our greatest natural resource.”).

The concerns regarding constitutionality were echoed by the Office of the State Engineer, which stated:

The elimination of the statutory authority for the State Engineer to determine if a water

right holder has lost water rights for failing to put the water to beneficial use without an acceptable excuse would eviscerate the State Engineer's ability to administer water consistent with the Constitution and could result in unconstitutional hoarding of and speculation in water rights.

The current forfeiture statutes and regulations allow the State Engineer to make determinations regarding the validity of an existing water right. This is commonly undertaken as a "validity review" of a water right when there is an application for a change in the purpose or place of use or point of diversion, and is followed by notice and a hearing on the issue of validity. As such, wholesale repeal of the forfeiture statutes will directly affect the proper administration of water rights. These determinations are also a primary focus in ongoing statutory stream system adjudications.

Both agencies also expressed concerns regarding the implications for the strategic water reserve, which has historically been used to help the Interstate Stream Commission comply with interstate stream compacts and to protect endangered species. Compliance with the Federal Endangered Species Act has been a source of contention in past decades, and the ability of the State Engineer to use the supplies contained therein to protect endangered species has been an important tool for restoration and preservation projects.

Finally, the prohibition of the sale or lease of water rights in the strategic water reserve would decrease the State Engineer's ability to maintain the flexibility needed to respond to changing hydrologic conditions.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

The Office of the Attorney General stated:

Conflict with HB121

- HB121 is a bill specifically relating to the lease of water rights. HB121 would amend Section 72-6-3 NMSA 1978 such that water leases must be approved in accordance with law before the water can be used.
- Within subsection (B) of Section 72-6-3, leasing of water rights does not toll any forfeiture of water rights for nonuse. SB458 removes forfeiture all together through the repeal of Sections 72-5-28 and 72-12-8 NMSA 1978.

Conflict with HB358

- HB358 proposes an amendment to Section 72-5-28 NMSA 1978, that would change the time period for the statutory forfeiture of water rights due to non-use from 5 years to 10 years.
- SB458 repeals Sections 72-5-28 and 72-12-8 NMSA 1978 all together.

Relationship to SB167

- SB167 proposes an appropriation to the ISC for the strategic water reserve.
- SB458 amends water sale, purchase, and lease requirements for the strategic water reserve and that may impact how appropriations can be used.