

<b>LFC Requester:</b>	Jonas Armstrong
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**AGENCY BILL ANALYSIS  
2015 REGULAR SESSION**

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**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**     **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_ **Substitute**    \_\_\_\_\_

**Date** Feb. 9, 2015  
**Bill No:** HJR-8

**Sponsor:** Rep. Bill McCamley

**Agency Code:** Attorney General's Office

**Person Writing** Sarah Bond, AAG

**Short Title:** NO PRIOR APPROPRIATION FOR WATER ADMIN, CA

**Phone:** 827-7481    **Email** sbond@nmag.gov

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

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(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with/ HB 265, SB 313

**SECTION III: NARRATIVE**

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

**BILL SUMMARY**

Synopsis:

HJR 8 proposes to amend Article 16, Section 2 of the New Mexico Constitution by repealing the prior appropriation doctrine for all water rights, and by enacting a new system for allocating water used for agricultural purposes. HJR 8 requires the amount of water “available for beneficial use” in each stream system to be estimated annually, prior to the beginning of the irrigation season, and provides that the amount of water available for current agricultural beneficial uses shall be allocated “on a pro rata per acre basis” to each owner of an agricultural water right.

**FISCAL IMPLICATIONS**

The proposed amendment is quite short, but fundamentally alters a constitutional property right protection for priority of right and repeals the long standing doctrine of prior appropriation. It is not clear whether a retroactive application is intended, and if so, how it would be implemented. Water rights have been perfected and administered under the prior appropriation doctrine since territorial days. If the amendment is intended only to apply prospectively, that is, only to rights to be obtained after passage, it is not clear whether any new rights are available because most if not all the water currently known to be capable of beneficial use (that is, not brackish) is already appropriated. If it is intended to apply retroactively, that is, to eliminate existing private property rights to free up water for the annual distribution, those rights will presumably have to be paid for, but the amendment does not indicate how that would be accomplished. It also is not clear whether it is intended to apply to both surface and groundwater. Its brevity, silence on means of implementation, and the fundamental changes it apparently seek create significant uncertainty,

and could result in thousands of lawsuits against the State. The Attorney General's Office cannot estimate the number of suits or the resources necessary to defend the State, but the Office likely does not have adequate resources to handle such litigation.

## SIGNIFICANT ISSUES

1. HJR 8 proposes to repeal the prior appropriations doctrine for water rights and to establish a new system for allocation of water rights for agricultural purposes. It does not appear to distinguish between surface and groundwater rights. If such an amendment to the constitution were approved by the electorate, NM Const., art. XIX, § 1, further clarification would be needed to ascertain whether retroactive application is intended, and if so, constitutional. Retroactive implementation would result in: (a) the loss of priority rights for all water rights holders and, (b) a reallocation by the state of water rights for agricultural purposes. Water rights holders with senior rights would have rights taken away and junior right holders would receive water they had no right to receive. The allocation for holders of agricultural rights would be based on how much property a person/entity owns, i.e., on a "pro rata per acre basis." All of these issues would have to be sorted out after passage.

Water rights are property rights. Once a water right has vested, the owner has a property right, though a usufructory right, protected by law. *Tri State Generation and Transmission Ass. v. D'Antonio*, 2012-NMSC-039, ¶¶ 11-14.

If retroactive application is intended, the taking and reallocation of water rights would be considered a taking under the state and federal constitutions for which compensation would be required. The reallocation could require therefore, massive and incalculable payments to persons whose water rights were taken.

If the State did not compensate for the taking, the State would be subject to tens of thousands of lawsuits from holders of senior water rights whose rights were lost.

2. HRJ 8 repeals the prior appropriations doctrine *in toto*, and therefore apparently repeals the doctrine as it applies to all water rights: non-agricultural water rights included. HJR 8 does not replace that priority system with any other system for non-agricultural rights, including domestic, municipal, hydropower, etc. This would leave a great deal of uncertainty as to the rights of holders of rights for non-agricultural use.

3. HJR 8 is silent as to which state agency would be responsible for estimating all water rights annually and for distributing the taken agricultural water rights. This administrative responsibility would represent an enormous expenditure of administrative resources with serious and far reaching implications administrative and fiscal implications for the State.

4. HJR conflicts with current legislative direction to the State Engineer and with ongoing administrative and judicial adjudications. For example, the State Engineer is preparing to administer water in priority in the lower Pecos, San Juan and lower Rio Grande river basins. The current state adjudications are adjudicating water by priority. Approval of HJR 8 would disrupt those ongoing adjudications.

5. HJR 8 conflicts with multiple provisions of the State water code. *See, e.g.*, NMSA 1978, § 72-1-2 (“Priority in time shall give the better right.”); § 72-2-9 (“The state engineer shall have the supervision of the apportionment of water in this state according to the licenses issues by him and his predecessors and the adjudication of the courts.”); § 72-2-9.1 (“the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer” and the “state engineer shall adopt rules for priority administrations to ensure that authority is exercised.”); § 72-4-19 (adjudication decrees shall declare “the priority, amount, purpose, periods and place of use . . . .”); § 72-5-1 (“priority of application shall date from the time of filing such notice of intention.”); § 72-5-23 (water appurtenant to land may be severed, transferred and become appurtenant to other land “without losing priority of right thereto.”); § 72-9-1 (“Nothing contained in this article shall be construed to impair existing vested rights or the rights and priority of any person . . .”).

### **PERFORMANCE IMPLICATIONS**

The Attorney General’s Office, as stated above, does not have the resources to handle the litigation that could result from approval of HJR 8 and, as such, could affect the work of the entire office.

### **ADMINISTRATIVE IMPLICATIONS**

*See* Fiscal and Performance Implications above.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

SB 313 and HB 265 refer to the prior appropriation doctrine in the state constitution. HJR 8 conflicts with provisions in those bills by eliminating the referenced protection.

### **TECHNICAL ISSUES**

N/A

### **OTHER SUBSTANTIVE ISSUES**

The doctrine of prior appropriation has been the law in New Mexico since the territorial period. *Snow v. Abalos*, 1914-NMSC-022, ¶ 9. Repeal of this doctrine would repeal the doctrine on which water rights have been developed, financed and relied upon for protection.

### **ALTERNATIVES**

N/A

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

New Mexico will continue to protect water rights based on priority of use.

### **AMENDMENTS**

N/A