

LFC Requester:	Jonas Armstrong
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

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:

Date January 29, 2015

Original **Amendment**
Correction **Substitute**

Bill No: SB313

Sponsor: Sen. Steven P. Neville

Agency Code: AGO

Short Water Right Reviews, Hearings

Person Writing Sarah Bond, AAG

Title: & Court Venue

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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		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates: [HB 265](#); Conflicts with [SB 276](#).

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: The bill makes numerous changes to several sections of Chapter 72, NMSA 1978.

Section 1 amends §72-2-8(A), making some grammatical changes, and adding several additional specific purposes, i.e., “to protect the constitutional rights of prior appropriation and beneficial use, to protect the constitutional right to de novo review by the district court and to minimize the cost and delay to water rights owners” to the provision instructing a liberal construction for the statute for those purposes. Section 1 continues its gender neutral grammatical changes in other subsections of the statute.

Section 1 amends subsection D by requiring the hearings on state engineer’s proposed regulations or codes to be held in Santa Fe only if the matter is one of state wide application, and in the district most convenient to the persons most affected.

Section 1 amends subsection E to include those venue requirements for after the fact hearings on special orders.

Subsection H is amended to add that proposed regulations, codes or orders are presumed to be proper but are subject to full de novo district court review.

Section 2 repeals §72-2-9.1A. and B. (A provides legislative findings that adjudications are slow and the need for water administration is urgent, compliance with interstate compacts imperative, and that the state engineer has the authority to administer water rights in priority prior to final adjudications. B includes legislative direction the state engineer must follow in adopting rules for priority administration prior to final adjudications, specifically requiring that the rules cannot interfere with future or pending adjudications, create any impairment of existing rights beyond that required to enforce priorities, or create any new depletions.

Section 3 amends §72-2-16 by repealing the provision that no appeal may be taken until the state engineer has held a hearing and made a decision, and specifies that hearings be held in Santa Fe for matters of state wide application or the district where the matter is located.

Section 4 amends §72-2-18 to repeal subsection E. which allows a state engineer compliance order to include a requirement that repayment of improperly over diverted water may be up to double the amount of improper diversion, and directs the state engineer to take into consideration the seriousness of the violation, good faith efforts to comply, and other relevant factors.

Section 4 amends subsection G by repealing the state engineer’s authority to include a civil penalty for a final compliance order and gives that authority to the district court.

Section 5 makes numerous amendments to the appeal procedure for appeals from state engineer decisions. It amends §72-7-1A to provide that if the state engineer has not issued a

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decision on a matter that has been pending for a year or longer, the applicant may treat it as a refusal to act by filing a written notice to that effect with the state engineer and then has one year to file an appeal with the district court. The applicant and state engineer may by written agreement extend the time for appeal.

Section 5 also extends the time for appeal from a state engineer decision or refusal to act from 30 days to one year. (Amending subsection B.)

Section 5 amends subsection D by removing the discretion to require an appellant to file a bond for costs.

Section 5 amends subsection E removes the provision allowing a district court to allow amendments necessary in the furtherance of justice but adds a provision that additional evidence and arguments may be offered, and also that a district court shall consider all matters within its original jurisdiction under Article 6 of the New Mexico constitution.

New subsections F and G are added. F provides that administrative exhaustion of remedies is not required when they would “probably” be futile or when the state engineer lacks the authority to grant the right the applicant is seeking, and that the rights, remedies. G provides that appeals from the district court may be pursued as any other civil appeal and that no application for writ of certiorari is required from the court of appeals “or any other writ”.

FISCAL IMPLICATIONS

The bill enacts significant revisions of the provisions governing appeals from state engineer decisions and repeals significant portions of prior legislative enactments describing the state engineer’s authority. It also includes in Section 5, F. and G. New provisions regarding appellate procedure may conflict with existing appellate procedure court rules and merit further review. The provision indicating exhaustion of administrative remedies is unnecessary when they would “probably” be futile is entirely subjective and likely could be challenged as void for vagueness absent some additional legislative language clarifying what is meant by that.

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

There are numerous difficulties with many sections of the bill, but its complexity prevents detailed analyses in the time frame necessary for legislative review. The AGO is thus focusing on only the most egregious sections of the bill that pose clear and immediate legal dangers to protecting New Mexico from legal action from other states and holders of very senior prior water rights.

Section 2, by repealing §72-2-9.1 A. and B., is a significant impediment to New Mexico’s ability to protect the constitutionally protected prior rights of New Mexican’s to their beneficial water use rights. This section repeals a provision upheld in 2011 by the State Supreme Court which ruled that the state engineer has the authority to implement priority administration when needed. *Tri-State Generation and Transmission Assoc. Inc. v. D’Antonio*, 2012-NMSC-039. It thus creates a void in New Mexico law and significant uncertainty in the state engineer’s authority to do the work he has been delegated to do since statehood.

To assure that New Mexico has the infrastructure and legal ability to comply with its obligations under its water compacts with neighboring states, in 2003 the legislature enacted NMSA 1978, Section 72-2-9.1 recognizing “that the adjudication process is slow, the need for water administration is urgent, [and] compliance with interstate compacts is imperative....” (Emphasis added). The Legislature then went on to give the state engineer the authority and tools to meet the urgent need for water right administration in that statute.

In 2013, Texas brought a compact enforcement action against New Mexico alleging New Mexico had violated the Rio Grande Compact. Although New Mexico in fact is not in violation of that Compact, it is important to show the United States Supreme Court that it 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.

Section 4’s provision repealing the state engineer’s authority to require, in certain circumstances, double payback for over diversions further weakens New Mexico’s ability to prove we are serious about ensuring the constitutional right to protection of priorities are protected 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.

PERFORMANCE IMPLICATIONS

The attorney general will be forced to engage in unnecessary litigation which will take away from the legal resources that need to be focused on litigation with Texas and the United States.

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB 313 duplicates HB 265, introduced by Representative Bandy.
SB 313 in Section 3 amends NMSA 1978, Section 72-2-16, conflicting with SB 276.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Not enacting this bill will protect the Legislature’s long standing delegations of authority to the state engineer and bolster New Mexico’s ability to defend itself in any interstate compact litigation.

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AMENDMENTS

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