

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** Feb. 24, 2015
Original **Amendment** _____ **Bill No:** SB648
Correction **Substitute** _____

Sponsor: Sen. Joseph Cervantes **Agency Code:** Attorney General's Office
Short State Engineer Power and **Person Writing** Sarah Bond, AAG
Title: Duties **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		

(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)

Conflicts with SB 647

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:

Section 1 restricts the authority of the state engineer to only administering water that has been permitted, licensed, or adjudicated by a court. It appears to restrict the state engineer’s employees to providing only technical support in adjudication disputes.

Section 2 makes minor amendments to the wording of 72-2-9.1; allowing the state engineer to administer water rights in accordance with priorities ‘adjudicated, licensed, permitted, declared or as otherwise may be made available to the state engineer.’ It deletes the well defined term “impairment” and replaces it with “diminishment.”

FISCAL IMPLICATIONS

N/A

SIGNIFICANT ISSUES

Section 1 would significantly limit the role the state engineer has served since territorial days as the delegated agency to carry out territorial and legislative direction in water administration, permitting, and in prosecuting and representing the interests of the state in water right adjudications. Currently, in court adjudications, attorneys who are employees of the state engineer and commissioned by the attorney general, carry out the legislative mandate to prosecute the water rights adjudications on behalf of the state. See, Title 72, Article 4 of the water code. Since those employees act under commission from the attorney general but are state engineer employees, it is not clear how this bill would affect required work in adjudications, but it would likely disrupt long established practice and slow the adjudications. Simply put, it severely limits the state engineer’s existing ability to administer water rights in accordance with New Mexico’s statutes, constitution, and well established case law.

Section 1 still further directs that the state engineer and the employees of that office shall only provide technical support in disputes concerning or adjudicating the waters of the state. This provision appears to conflict with other provisions that have been in the state water code for many years. It may be interpreted to prevent the state engineer from shutting off illegal uses of water including outright waste of water through an administrative or court proceeding, as he has always been authorized to do. See *Erickson v. Mc Lean*, 62 N.M. 264, 308 P.2d 983 (1957).

Section 1 conflicts with section 2 in its description of what the state engineer may rely on in administering water: in Section 1 only permits, licenses, and adjudications to be relied on, but in section 2, any other information on priorities that is made available to the state engineer may also be relied on. The New Mexico State Supreme Court recently upheld the state engineer's existing broad authority to administer water rights prior to final adjudications in *Tri-State Generation v. D'Antonio*, 2012-NMSC-039; 289 P.3d 1232. These changes and internal inconsistencies will throw the scope of that authority back into uncertainty, and likely engender significant litigation. Tri State was the culmination of almost ten years of litigation, and the AGO will again be tasked with the burden of sorting out legislative intent from the changes made in this bill.

This will likely result in years of litigation not only because of the internal inconsistencies in this bill but because of the inconsistencies of this bill with the water code as a whole. A small but illustrative example of this inconsistency is that Section 2 strikes the word "impairment" which is a well-defined term of art used in New Mexico water law and substitutes the word "diminishment" which has no established meaning in water law.

PERFORMANCE IMPLICATIONS

As drafted, the bill will likely impact the AGO by requiring it to participate in long and complex litigation but provides no additional appropriation.

The state engineer now has an entire division dedicated to performing its statutorily delegated responsibilities in adjudications. If these tasks can no longer be performed by those AGO commissioned attorneys, significant additional hiring would be required of the AGO, but the bill provides no additional appropriation for this work

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

N/A

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS

N/A