

HOUSE ENERGY, ENVIRONMENT AND NATURAL  
RESOURCES COMMITTEE SUBSTITUTE FOR  
HOUSE BILL 95

**55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021**

AN ACT

RELATING TO WATER; PROVIDING FACTORS FOR THE STATE ENGINEER TO  
CONSIDER IN ASSESSING WHETHER A WATER USE WILL BE CONTRARY TO  
THE CONSERVATION OF WATER OR DETRIMENTAL TO THE PUBLIC WELFARE  
OF THE STATE; REQUIRING THE STATE ENGINEER TO PUBLISH FINDINGS  
IN SUPPORT OF APPROVING OR DENYING AN APPLICATION; DIRECTING  
THE STATE ENGINEER TO ADOPT RULES TO ADDRESS THE IMPACTS OF  
DROUGHT AND CLIMATE CHANGE ON THE ADMINISTRATION OF THE STATE'S  
WATERS; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 72-5-6 NMSA 1978 (being Laws 1907,  
Chapter 49, Section 27, as amended) is amended to read:

"72-5-6. HEARING--APPROVAL--PERMIT.--

A. Upon the receipt of the proofs of publication,  
accompanied by any statutory fees required at this time, the

1 state engineer shall determine, from the evidence presented by  
2 the parties interested, from such surveys of the water supply  
3 as may be available and from the records, whether there is  
4 unappropriated water available for the benefit of the  
5 applicant. [~~If so~~]

6 B. If there is unappropriated water available for  
7 the benefit of the applicant and if the proposed appropriation  
8 is not contrary to the conservation of water within the state  
9 and is not detrimental to the public welfare of the state, the  
10 state engineer shall endorse [~~his~~] approval on the application,  
11 which shall become a permit to appropriate water, and shall  
12 state in [~~such~~] the approval the time within which the  
13 construction shall be completed and the time within which water  
14 shall be applied to a beneficial use; provided that the state  
15 engineer may, in [~~his~~] the state engineer's discretion, approve  
16 [~~any~~] an application for a less amount of water or may vary the  
17 periods of annual use, and the permit to appropriate water  
18 shall be regarded as limited accordingly. The time allowed by  
19 the state engineer for completion of works or application of  
20 water to beneficial use shall be governed by the size and  
21 complexity of the project, but in no case shall exceed five  
22 years from the date of approval within which to complete  
23 construction, and four years in addition thereto within which  
24 to apply water to a beneficial use; provided that the state  
25 engineer shall have the power to grant extensions of time for

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1 completion of works or application of water to beneficial use  
2 as provided in Section 72-5-14 NMSA 1978.

3 C. The state engineer shall publish specific  
4 findings to support the state engineer's approval or denial of  
5 an application, which shall include the factual and legal  
6 rationale for the state engineer's decision."

7 **SECTION 2.** Section 72-5-7 NMSA 1978 (being Laws 1907,  
8 Chapter 49, Section 28, as amended) is amended to read:

9 "72-5-7. APPLICATION--REJECTION--NONCOMPLIANCE WITH  
10 RULES--CONSERVATION AND PUBLIC WELFARE.--

11 A. If, in the opinion of the state engineer, there  
12 is no unappropriated water available, [~~he~~] the state engineer  
13 shall reject [~~such~~] an application. [~~He~~]

14 B. The state engineer shall decline to order the  
15 publication of notice of [~~any~~] an application [~~which~~] that does  
16 not comply with the requirements of the law and rules. [~~and~~  
17 ~~regulations.~~—~~He~~]

18 C. The state engineer may also refuse to consider  
19 or approve [~~any~~] an application or notice of intention to make  
20 application or to order the publication of notice of [~~any~~] an  
21 application if, in [~~his~~] the state engineer's opinion, approval  
22 would be contrary to the conservation of water within the state  
23 or detrimental to the public welfare of the state. In making  
24 the determination as to whether approval would be contrary to  
25 the conservation of water within the state, the state engineer

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1 shall consider the impacts of drought and climate change, and  
2 in making the determination as to whether approval would be  
3 detrimental to the public welfare of the state, the state  
4 engineer shall consider the impacts on health, safety,  
5 recreational, cultural and environmental interests."

6 SECTION 3. Section 72-5-23 NMSA 1978 (being Laws 1907,  
7 Chapter 49, Section 44, as amended) is amended to read:

8 "72-5-23. WATER APPURTENANT TO LAND--CHANGE OF PLACE OF  
9 USE.--

10 A. All water used in this state for irrigation  
11 purposes, except as otherwise provided in [~~this~~] Chapter 72,  
12 Article 5 NMSA 1978, shall be considered appurtenant to the  
13 land upon which it is used, and the right to use it upon the  
14 land shall never be severed from the land without the consent  
15 of the owner of the land, but, by and with the consent of the  
16 owner of the land, all or any part of the right may be severed  
17 from the land, simultaneously transferred and become  
18 appurtenant to other land, or may be transferred for other  
19 purposes, without losing priority of right theretofore  
20 established, if such changes can be made without detriment to  
21 existing water rights and are not contrary to conservation of  
22 water within the state and not detrimental to the public  
23 welfare of the state, on the approval of an application of the  
24 owner by the state engineer.

25 B. Publication of notice of application,

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1 opportunity for the filing of objections or protests and a  
2 hearing on the application shall be provided as required by  
3 Sections 72-5-4 and 72-5-5 NMSA 1978.

4 C. In making the determination as to whether  
5 approval would be contrary to the conservation of water within  
6 the state, the state engineer shall consider the impacts of  
7 drought and climate change, and in making the determination as  
8 to whether approval would be detrimental to the public welfare  
9 of the state, the state engineer shall consider the impacts on  
10 health, safety, recreational, cultural and environmental  
11 interests.

12 D. The state engineer shall publish specific  
13 findings to support the state engineer's approval or denial of  
14 an application, which shall include the factual and legal  
15 rationale for the state engineer's decision."

16 SECTION 4. Section 72-5A-6 NMSA 1978 (being Laws 1999,  
17 Chapter 285, Section 6) is amended to read:

18 "72-5A-6. STATE ENGINEER--POWERS AND DUTIES--PERMIT--  
19 MONITORING REQUIREMENTS.--

20 A. The state engineer shall issue a permit to  
21 construct and operate a project if the applicant has provided a  
22 reasonable demonstration that:

23 (1) the applicant has the technical and  
24 financial capability to construct and operate the project;

25 (2) the project is hydrologically feasible;

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1 (3) the project will not impair existing water  
2 rights or the state's interstate obligations;

3 (4) the project will not be contrary to the  
4 conservation of water within the state;

5 (5) the project will not be detrimental to the  
6 public welfare of the state;

7 (6) the applicant has completed applications  
8 for all permits required by state and federal law;

9 (7) the applicant has a valid water right  
10 quantified by one of the following legal processes:

11 (a) a water rights adjudication;

12 (b) a consent decree;

13 (c) an act of congress, including a  
14 negotiated settlement ratified by congress;

15 (d) a contract pursuant to 43 USC 620 et  
16 seq.; or

17 (e) an agreement with an owner who has a  
18 valid water right subject to an application for a change in  
19 purpose, place of use or point of diversion; and

20 (8) ~~[that]~~ the project will not cause harm to  
21 users of land and water within the area of hydrologic effect.

22 B. A permit for a project shall include:

23 (1) the name and mailing address of the person  
24 to whom the permit is issued;

25 (2) the name of the declared underground water

1 basin in which the project will be located;

2 (3) the capacity and plan of operation of the  
3 project;

4 (4) any monitoring program required;

5 (5) all conditions required by or  
6 [~~regulations~~] rules adopted pursuant to the Ground Water  
7 Storage and Recovery Act; and

8 (6) other information the state engineer  
9 determines to be necessary.

10 C. The permit shall not become effective until the  
11 applicant obtains all other required state and federal permits.

12 D. The state engineer shall adopt [~~regulations~~]  
13 rules to carry out the provisions of the Ground Water Storage  
14 and Recovery Act, including monitoring the operation of  
15 projects and their effects on other water users in the area of  
16 hydrologic effect, including an Indian nation, tribe or pueblo.  
17 In determining monitoring requirements, the state engineer  
18 shall cooperate with all government entities that regulate and  
19 monitor the quality of water, including the department of  
20 environment.

21 E. In making the determination as to whether  
22 approval would be contrary to the conservation of water within  
23 the state, the state engineer shall consider the impacts of  
24 drought and climate change, and in making the determination as  
25 to whether approval would be detrimental to the public welfare

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1 of the state, the state engineer shall consider the impacts on  
2 health, safety, recreational, cultural and environmental  
3 interests.

4 F. The state engineer shall publish specific  
5 findings to support the state engineer's approval or denial of  
6 an application, which shall include the factual and legal  
7 rationale for the state engineer's decision."

8 SECTION 5. Section 72-6-5 NMSA 1978 (being Laws 1967,  
9 Chapter 100, Section 5, as amended) is amended to read:

10 "72-6-5. APPROVAL.--

11 A. The state engineer shall approve the application  
12 if the applicant has reasonably shown that [~~his~~] the  
13 applicant's proposed use and location of use is a beneficial  
14 use and:

15 (1) will not impair any existing right to a  
16 greater degree than [~~such~~] the right is, or would be, impaired  
17 by the continued use and location of use by the owner; and

18 (2) will not be contrary to the conservation  
19 of water within the state or detrimental to the public welfare  
20 of the state.

21 B. In the case of annual allotments of project  
22 water leased to a special water users' association from an  
23 irrigation district organized pursuant to Chapter 73, Article  
24 10 NMSA 1978, if the state engineer determines that the  
25 proposed changes in place and purpose of use and point of

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1 diversion comply with the rules established pursuant to  
2 Subsection G of Section 73-10-48 NMSA 1978, the board of  
3 directors of the irrigation district may approve the  
4 application in accordance with the provisions of Section  
5 73-10-48 NMSA 1978.

6 C. In making the determination as to whether  
7 approval would be contrary to the conservation of water within  
8 the state, the state engineer shall consider the impacts of  
9 drought and climate change, and in making the determination as  
10 to whether approval would be detrimental to the public welfare  
11 of the state, the state engineer shall consider the impacts on  
12 health, safety, recreational, cultural and environmental  
13 interests.

14 D. The state engineer shall publish specific  
15 findings to support the state engineer's approval or denial of  
16 an application, which shall include the factual and legal  
17 rationale for the state engineer's decision."

18 SECTION 6. Section 72-12-3 NMSA 1978 (being Laws 1931,  
19 Chapter 131, Section 3, as amended) is amended to read:

20 "72-12-3. APPLICATION FOR USE OF UNDERGROUND WATER--  
21 PUBLICATION OF NOTICE--PERMIT.--

22 A. ~~Any~~ A person, firm or corporation or any other  
23 entity desiring to appropriate for beneficial use any of the  
24 waters described in Chapter 72, Article 12 NMSA 1978 shall  
25 apply to the state engineer in a form prescribed by the state

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1 engineer. In the application, the applicant shall designate:

2 (1) the particular underground stream,  
3 channel, artesian basin, reservoir or lake from which water  
4 will be appropriated;

5 (2) the beneficial use to which the water will  
6 be applied;

7 (3) the location of the proposed well;

8 (4) the name of the owner of the land on which  
9 the well will be located;

10 (5) the amount of water applied for;

11 (6) the place of the use for which the water  
12 is desired; and

13 (7) if the use is for irrigation, the  
14 description of the land to be irrigated and the name of the  
15 owner of the land.

16 B. If the well will be located on privately owned  
17 land and the applicant is not the owner of the land or the  
18 owner or the lessee of the mineral or oil and gas rights under  
19 the land, the application shall be accompanied by an  
20 acknowledged statement executed by the owner of the land that  
21 the applicant is granted access across the owner's land to the  
22 drilling site and has permission to occupy such portion of the  
23 owner's land as is necessary to drill and operate the well.

24 This subsection does not apply to the state or any of its  
25 political subdivisions. If the application is approved, the

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1 applicant shall have the permit and statement, executed by the  
2 owner of the land, recorded in the office of the county clerk  
3 of the county in which the land is located.

4 C. No application shall be accepted by the state  
5 engineer unless it is accompanied by all the information  
6 required by Subsections A and B of this section.

7 D. Upon the filing of an application, the state  
8 engineer shall proceed in accordance with the provisions of  
9 Section [~~1 of this 2019 act~~] 72-2-20 NMSA 1978 regarding notice  
10 of the application. [~~Any~~] A person, firm or corporation or  
11 other entity objecting that the granting of the application  
12 will impair the objector's water right shall have standing to  
13 file objections or protests. [~~Any~~] A person, firm or  
14 corporation or other entity objecting that the granting of the  
15 application will be contrary to the conservation of water  
16 within the state or detrimental to the public welfare of the  
17 state and showing that the objector will be substantially and  
18 specifically affected by the granting of the application shall  
19 have standing to file objections or protests. [~~provided,~~  
20 ~~however, that~~] The state or any of its branches, agencies,  
21 departments, boards, instrumentalities or institutions, and all  
22 political subdivisions of the state and their agencies,  
23 instrumentalities and institutions, shall have standing to file  
24 objections or protests.

25 E. After the expiration of the time for filing

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1 objections, if no objections have been filed, the state  
2 engineer shall, if the state engineer finds that there are in  
3 the underground stream, channel, artesian basin, reservoir or  
4 lake unappropriated waters and that the proposed appropriation  
5 would not impair existing water rights from the source, is not  
6 contrary to conservation of water within the state and is not  
7 detrimental to the public welfare of the state, grant the  
8 application and issue a permit to the applicant to appropriate  
9 all or a part of the waters applied for, subject to the rights  
10 of all prior appropriators from the source.

11 F. If objections or protests have been filed within  
12 the time prescribed in the notice or if the state engineer is  
13 of the opinion that the permit should not be issued, the state  
14 engineer may deny the application without a hearing or, before  
15 the state engineer acts on the application, may order that a  
16 hearing be held. The state engineer shall notify the applicant  
17 of the action by certified mail sent to the address shown in  
18 the application.

19 G. In making the determination as to whether  
20 approval would be contrary to the conservation of water within  
21 the state, the state engineer shall consider the impacts of  
22 drought and climate change, and in making the determination as  
23 to whether approval would be detrimental to the public welfare  
24 of the state, the state engineer shall consider the impacts on  
25 health, safety, recreational, cultural and environmental

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1 interests.

2 H. The state engineer shall publish specific  
3 findings to support the state engineer's approval or denial of  
4 an application, which shall include the factual and legal  
5 rationale for the state engineer's decision."

6 SECTION 7. Section 72-12-7 NMSA 1978 (being Laws 1931,  
7 Chapter 131, Section 7, as amended) is amended to read:

8 "72-12-7. CHANGE OF LOCATION OF WELL--CHANGE IN USE ON  
9 APPLICATION--TEMPORARY CHANGE.--

10 A. The owner of a water right may change the  
11 location of [~~his~~] the owner's well or change the use of the  
12 water, but only upon application to the state engineer and upon  
13 showing that the change will not impair existing rights and  
14 will not be contrary to the conservation of water within the  
15 state and will not be detrimental to the public welfare of the  
16 state. The application may be granted only after such  
17 advertisement and hearing as are prescribed in the case of  
18 original applications.

19 B. When the owner of a water right applies for a  
20 temporary change [~~of~~] not to exceed one year for not more than  
21 three acre-feet of water to a different location or to a  
22 different use, or both, the state engineer shall make an  
23 investigation and, if the change does not permanently impair  
24 any vested rights of others, [~~he~~] the state engineer shall  
25 enter an order authorizing the change. If [~~he~~] the state

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1 engineer finds that the change sought might impair vested  
2 rights, [~~he~~] the state engineer shall order advertisement and  
3 hearing as in other cases.

4 C. If objections or protests have been filed within  
5 the time prescribed in the notice or if the state engineer is  
6 of the opinion that the permit should not be issued, the state  
7 engineer may deny the application or, before [~~he acts~~] acting  
8 on the application, may order that a hearing be held. [~~He~~] The  
9 state engineer shall notify the applicant of [~~his~~] the action  
10 by certified mail sent to the address shown in the application.

11 D. In making the determination as to whether  
12 approval would be contrary to the conservation of water within  
13 the state, the state engineer shall consider the impacts of  
14 drought and climate change, and in making the determination as  
15 to whether approval would be detrimental to the public welfare  
16 of the state, the state engineer shall consider the impacts on  
17 health, safety, recreational, cultural and environmental  
18 interests.

19 E. The state engineer shall publish specific  
20 findings to support the state engineer's approval or denial of  
21 an application, which shall include the factual and legal  
22 rationale for the state engineer's decision."

23 SECTION 8. Section 72-12B-1 NMSA 1978 (being Laws 1983,  
24 Chapter 2, Section 1, as amended) is amended to read:

25 "72-12B-1. APPLICATIONS FOR THE TRANSPORTATION AND USE OF  
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underscored material = new  
[bracketed material] = delete

1 PUBLIC WATERS OUTSIDE THE STATE.--

2 A. The state of New Mexico has long recognized the  
3 importance of the conservation of its public waters and the  
4 necessity to maintain adequate water supplies for the state's  
5 water requirements. The state of New Mexico also recognizes  
6 that under appropriate conditions, the out-of-state  
7 transportation and use of its public waters is not in conflict  
8 with the public welfare of its citizens or the conservation of  
9 its waters.

10 B. ~~[Any]~~ A person, firm or corporation or any other  
11 entity intending to withdraw water from any surface or  
12 underground water source in the state of New Mexico and  
13 transport it for use outside the state or to change the place  
14 or purpose of use of a water right from a place in New Mexico  
15 to a place out of that state shall apply to the state engineer  
16 for a permit to do so. Upon the filing of an application, the  
17 state engineer shall proceed in accordance with the provisions  
18 of Section [~~1 of this 2019 act~~] 72-2-20 NMSA 1978 regarding  
19 notice of the application. Any person, firm or corporation or  
20 other entity objecting that the granting of the application  
21 would impair or be detrimental to the objector's water right  
22 shall have standing to file objections or protests. ~~[Any]~~ A  
23 person, firm or corporation or other entity objecting that the  
24 granting of the application will be contrary to the  
25 conservation of water within the state or detrimental to the

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1 public welfare of the state and showing that the objector will  
2 be substantially and specifically affected by the granting of  
3 the application shall have standing to file objections or  
4 protests. [~~Provided, however, that~~] The state [~~of New Mexico~~]  
5 or any of its branches, agencies, departments, boards,  
6 instrumentalities or institutions and all political  
7 subdivisions of the state and their agencies, instrumentalities  
8 and institutions shall have standing to file objections or  
9 protests. The state engineer shall accept for filing and act  
10 upon all applications filed under this section in accordance  
11 with the provisions of this section. The state engineer shall  
12 require notice of the application and shall thereafter proceed  
13 to consider the application in accordance with existing  
14 administrative law and procedure governing the appropriation of  
15 surface or ground water.

16 C. In order to approve an application under this  
17 [~~act~~] section, the state engineer must find that the  
18 applicant's withdrawal and transportation of water for use  
19 outside the state would not impair existing water rights, is  
20 not contrary to the conservation of water within the state and  
21 is not otherwise detrimental to the public welfare of the  
22 citizens of New Mexico.

23 D. In acting upon an application under this [~~act~~]  
24 section, the state engineer shall consider [~~but not be limited~~  
25 ~~to~~] the following factors:

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1 (1) the supply of water available to the state  
2 of New Mexico;

3 (2) water demands of the state of New Mexico;

4 (3) whether there are water shortages within  
5 the state of New Mexico;

6 (4) whether the water that is the subject of  
7 the application could feasibly be transported to alleviate  
8 water shortages in the state of New Mexico;

9 (5) the supply and sources of water available  
10 to the applicant in the state where the applicant intends to  
11 use the water; ~~and~~

12 (6) the demands placed on the applicant's  
13 supply in the state where the applicant intends to use the  
14 water; and

15 (7) the impacts of drought and climate change.

16 E. By filing an application to withdraw and  
17 transport waters for use outside the state, the applicant shall  
18 submit to and comply with the laws of the state of New Mexico  
19 governing the appropriation and use of water.

20 F. The state engineer is empowered to condition the  
21 permit to insure that the use of water in another state is  
22 subject to the same regulations and restrictions that may be  
23 imposed upon water use in the state of New Mexico.

24 G. Upon approval of the application, the applicant  
25 shall designate an agent in New Mexico for reception of service

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1 of process and other legal notices.

2 H. The state engineer shall publish specific  
3 findings to support the state engineer's approval or denial of  
4 an application, which shall include the factual and legal  
5 rationale for the state engineer's decision."

6 SECTION 9. A new section of Chapter 72 NMSA 1978 is  
7 enacted to read:

8 "[NEW MATERIAL] RULEMAKING--CLIMATE CHANGE IMPACTS.--No  
9 later than July 1, 2023, the state engineer shall adopt rules  
10 to identify and assess the impacts of drought and climate  
11 change in the administration of the surface and ground waters  
12 of New Mexico. The rules shall be based on reliable scientific  
13 projections and data."

14 SECTION 10. EFFECTIVE DATE.--The effective date of the  
15 provisions of this act is July 1, 2021.