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FISCAL IMPACT REPORT

SPONSOR Wirth/Chandler/
Jaramillo ORIGINAL DATE 02/25/21 LAST UPDATED _____ HB _____
SHORT TITLE Water Leasing Approval SB 16
ANALYST Wan

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	See Fiscal Implications					

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the State Engineer (OSE)
Department of Transportation (NMDOT)

Other Responses

New Mexico Acequia Association

SUMMARY

Synopsis of Bill

Senate Bill 16 would amend Section 72-6-3 NMSA 1978 to specify that a lease of water by a person who owns a water right is not effective until after the lessee files an application with the Office of the State Engineer (OSE). OSE provides public notice of the application and opportunity for a hearing on any protest filed in a timely manner, and the application is approved.

The effective date of this bill is July 1, 2023.

FISCAL IMPLICATIONS

The Department of Transportation (NMDOT) reports enactment of SB16 could cause delays in contractors' ability to use leased water on highway improvement projects, potentially resulting in project delays, increased project costs, or even a loss of federal funding if project timelines are significantly affected. The agency did not provide an estimate for the potential operating budget

impact. OSE does not anticipate any fiscal impact from SB16.

SIGNIFICANT ISSUES

Currently, OSE exercises the authority provided by existing law to issue “preliminary approvals” of applications to temporarily divert and use water under a water use lease prior to public notice of the application, opportunity to file protests, and final decision by the State Engineer. Despite the requirements under Section 72-6-6 NMSA 1978 for OSE to provide public notice of lease applications and a period of 70 days during which protests may be filed and to hold a hearing on any protested application, OSE argues that Section 72-6-5 NMSA 1978 authorizes the State Engineer to approve water use lease applications before those steps are complete if the applicant has shown the proposed use: (1) is beneficial, (2) will not impair an existing water right to a greater degree than current use would cause, and (3) will not be contrary to the conservation of water within the state or detrimental to the public welfare of the state.

OSE states the ability to issue preliminary application approvals in this manner provides “a flexible and effective mechanism for the State Engineer to regulate temporary changes in the diversion and use of water in non-emergency situations.” Examples of such situations the agency says it would be unable to address under the provisions of SB16 include:

- The frequently changing water needs of the oil and gas industry;
- Temporary water needs of major construction projects;
- Highway construction projects;
- Leases that allow irrigators to pay back over-diversions or balance out accounting periods, which are used for quick resolution of OSE enforcement actions in systems that are fully appropriated; and
- Temporary needs for environmental projects, such as stream flow targets related to the federal Endangered Species Act.

Section 72-6-7 NMSA 1978 allows the State Engineer’s final ruling on hearings to be appealed. NMDOT raised the question of whether the hearing appeal process, which SB16 does not address, would also need to be complete before a lease becomes effective. NMDOT has concerns about this bill resulting in highway construction project delays.

The New Mexico Acequia Association (NMAA) submitted an analysis in support of SB16’s duplicate, HB30, stating the bill will ensure fairness and due process in the way OSE grants approval of water lease applications. NMAA argues that OSE’s practice of preliminary approvals conflicts with Section 76-6-6 NMSA 1978, discussed above, and therefore the language added by this bill is needed for further clarification of OSE’s authority. NMAA further states the protest and hearing process is crucial for stakeholders who have concerns about water lease applications and want those concerns considered before a lessee begins using water.

OSE, however, maintains that if an application that had been granted preliminary approval is eventually rejected after a hearing, the applicant is required to pay back all water diverted under the preliminary approval. OSE also reports that a portion of the agency’s permit application backlog are applications that have been granted preliminary approval. If SB16 is enacted, applicants for non-emergency, temporary water use leases would need to wait until OSE issues a final decision to approve the application before using water, which may take years.

ADMINISTRATIVE IMPLICATIONS

According to OSE, the delay in the bill’s effective date proposed by the HAWC amendment is likely to generate a surge in applications for water use lease permits in the period leading up to July 1, 2023. This could put an administrative strain on OSE as staff attempt to process additional permit applications, potentially increasing the agency’s backlog of pending applications.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

As amended, HB30/aHAWC duplicates Senate Bill 16.

CW/rl