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FISCAL IMPACT REPORT

SPONSOR <u>HJC</u>	LAST UPDATED _____ ORIGINAL DATE <u>3/7/23</u>
SHORT TITLE <u>Water Right Lease Effective Date</u>	BILL NUMBER <u>CS/House Bill 121/HJCs</u>
ANALYST <u>Sanchez</u>	

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMDOT	No fiscal impact	No fiscal impact	Indeterminate but substantial	Indeterminate but substantial	Recurring	General Fund
Total	No fiscal impact	No fiscal impact	Indeterminate but substantial	Indeterminate but substantial	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses to Original Bill Received From
 Office of the State Engineer (OSE)
 Department of Transportation (DOT)
 New Mexico Acequia Association (ACE)

SUMMARY

Synopsis of HJC Substitute for House Bill 121

The House Judiciary Committee Substitute for House Bill 121 (HB121) Amends Section 72-6 NMSA 1978 (The Water-Use Leasing Act) to provide that a water-use lease shall not take effect until after an application for an expedited temporary lease has been approved by the Office of the State Engineer and after notice and hearing opportunities have taken place.

HB121 also attempts to clarify the interpretation of the phrase in Subsection B that a “lease may be effective for immediate use,” which has been the basis of a disagreement surrounding the ability of the State Engineer to issue what has been called “preliminary” approvals of applications for leases subject to review under the Water-Use Lease Act. The bill attempts to clarify that exceptions allowing for the use of water under a preliminary approval apply only to “emergency” situations “where crop loss or other serious economic loss” is a possibility.

HB121 exempts water served by an acequia or community ditch from eligibility for expedited temporary leases.

The effective date of this bill is July 1, 2025.

FISCAL IMPLICATIONS

The Office of the State Engineer said there were no fiscal implications for the agency. However, the Department of Transportation (NMDOT) expressed concerns about the potential fiscal and operational complications that would arise if preliminary approval of water leases was no longer available during construction projects. The agency explained:

A lengthy delay in a contractor's ability to use leased water on NMDOT highway improvement projects resulting from the OSE's application and hearing process could result in project delays, increases in project costs related to NMDOT contractors having to pay more for alternative sources of water, or even the loss of federal highway funding if projects cannot be built as scheduled.

SIGNIFICANT ISSUES

House Bill 121 would put an end to the Office of the State Engineer's practice of granting preliminary approval of a water lease, conditioned on an obligation to repay the water if, after notice and a full hearing, the proposed final lease is denied. In its analysis of the original bill, the OSE stated:

This distinction between preliminary approval of a lease application in a non-emergency situation under Section 72-6-5 NMSA 1978 and subsequent "granting" of the application under Section 72-6-6 NMSA 1978 is consistent with the section of the Water Code that allows emergency applications. That provision, Section 72-5-25 NMSA 1978, also distinguishes between the preliminary "approval" of an emergency application by the State Engineer and the subsequent "final decision" on the application by the State Engineer after hearing.

OSE has previously utilized the "preliminary approval" process to meet the temporary, non-emergency demands of the oil and gas industry and major construction projects and to meet stream flow requirements for the federal Endangered Species Act.

OSE explained that preliminary approval of water leases had been used as a tool by individual farmers when inadvertent over-diversion required them to lease water rights from neighbors and others to complete their growing season. OSE's analysis expressed concerns about ending these provisions, stating:

HB121 would eliminate the only tool available to the State Engineer to meet a wide variety of temporary non-emergency water demands through an expedited process while also protecting the due process rights of other water rights owners to file protests, have a hearing, and obtain a final decision from the State Engineer. If HB121 were enacted there would no longer be any mechanism in the water code to allow for the expedited change in place/purpose of use of a groundwater right. Additionally, there would no longer exist a mechanism in the surface water code to allow for an expedited process for non-emergency surface water leases.

The New Mexico Acequia Association’s (ACE) analysis of the bill expressed doubt about the State Engineer’s past and current use of granting preliminary authorization of water rights prior to a hearing and final decision. ACE stated:

The current statutory language allows the State Engineer to approve a water lease application only *after* a hearing if there are objections filed. Yet, the OSE has allowed water lease applications on a preliminary basis, allowing for the immediate use of water at issue while a hearing on protests filed is pending...A major problem with granting “preliminary approval” of a water lease application before the protestants are granted a hearing is that the use of water commences immediately. If eventually the protestants prevail in their protest, then the water that was used by the applicant can never be repaid. There is no viable remedy for the protestants whose water rights were impaired during the time that the use of the water was permitted by the OSE while the protest was pending.

Analysis from the Office of the Attorney General does not offer an opinion in favor of or in opposition to the bill, but the analysis does seem to indicate that the bill, as written would go a long way toward clarifying what has been a contentious issue for both the Office of the State Engineer and various courts. Although statute and precedent are clear that there are few, limited exceptions to the Water-Use Leasing Act that allow for temporary approval of a water lease, agency practice under multiple State Engineers shows that adherence to the strict letter of the law is not always enforced. By clarifying the exceptions and adding clear references to the notice and hearing procedures, the effect of these changes would be to eliminate confusion surrounding statutory interpretation.

ALTERNATIVES

NMDOT requested that legislators consider exempting the agency and its contractors from the requirement to obtain final approval of a water lease before use for projects. The agency proposed the following language be included in Section 1, under a new paragraph F:

F. Subsection B of this section shall not apply to leases made for the construction, reconstruction, maintenance or repair of the State’s public transportation infrastructure: public roads, streets, highways and airports to the extent that an application for a water lease for such purpose may be effective for immediate use of water or may be effective for future use of the water covered by the lease subject to a preliminary finding of no impairment.

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