



HB 121 (Chandler, Herrera, Wirth) Water Use Lease Effective Dates

New Mexico Acequia Association
January 23, 2023

Purpose of HB 121 – Water Use Lease Effective Dates

- The purpose of this bill is to ensure fairness and due process in water lease applications to the State Engineer. Water leases are an important water management tool in New Mexico and this legislation does not remove the ability of entities such as cities, industry, farmers, or community water systems to lease water.
- HB 121 expressly clarifies that the State Engineer can approve a permit for a water use lease **only after** he has adhered to requirements for public notice, opportunity to protest, and mandatory public hearings on protested applications. It is vital to protect due process and transparency in any proposed changes to water rights that could affect existing and senior water rights as well as our rivers and aquifers.

Public Notice and Opportunity for Public Hearings are Required in Water Use Lease Applications

- State law clearly requires that if a water lease application is protested, the OSE cannot grant a permit until the protest is completed and the application is approved. This bill clarifies that a water use lease is effective only after the State Engineer has approved the application after following requirements for public notice, opportunity for protest, and a mandatory public hearing on protested applications.
- New Mexico water law requires that changes in point of diversion, place of use or purpose of use for water rights must be approved by the State Engineer only after consideration of impairment of existing water rights, conservation of water, and public welfare. Any application before the State Engineer is subject to protest on these issues, a public hearing, and appeal. These existing due process protections also apply to water transfers (Sections 72-5-23 and -24 NMSA 1978) and temporary water leases (Sections 72-6-2 through 72-6-6 NMSA 1978).
- HB 121 helps to ensure that the State Engineer operates within existing legal requirements and provides clarity to entities seeking to lease water about the statutory requirements protecting existing water rights. HB 121 also incentivizes entities to engage in water planning to meet their water needs.

Communities Have Been Adversely Affected by “Preliminary Approval” of Water Leases:

- The State Engineer in 2015 granted preliminary approval to a water lease in the Upper Hondo of Lincoln County. The permit allowed immediate use of water despite the fact that hundreds of acequia irrigators filed a protest. The municipality was allowed to unlawfully pump from the river upstream from acequias for years. The protests were resolved via a settlement agreement SIX YEARS AFTER UNLAWFUL USE of water began, after several water rights were likely impaired, and after substantial legal costs for the protestants.

- In another egregious example, the State Engineer granted preliminary approval and unlawful use of water to Intrepid Potash, Inc. and its Lessees. The water lease was for over 5,000 ACRE FEET of water on the Lower Pecos River despite potential negative impacts to downstream water right owners. Carlsbad Irrigation District challenged the decision of the OSE as unlawful in the 5th Judicial District Court. In a 2020 decision, Judge Edward Romero ruled that the State Engineer did not have the statutory authority to grant “preliminary approval” or “preliminary authorization.”

Acequias and Senior Water Right Owners are Vulnerable to Impacts from Water Leases

- The legislature amended the Water Use Leasing Act in 2019 to add Subsection D which affirmed existing authorization by acequias to approve or deny applications for water leases into or out of an individual acequia that has adopted language in their bylaws pursuant to statute.
- The amendment is helpful and gives acequias a level of protection from a subset of leases that may affect them, specifically into or out of a specific acequia. However, water lease applications can have broader impacts than to just the one acequia that is the subject of the lease. A new use of water, such as a surface water diversion, could affect river flows and connected aquifers. Such a water lease could affect multiple acequias that share a stream system or an aquifer. The impact of an upstream surface water diversion on multiple acequias was exemplified in the Upper Hondo situation from 2015-2021.