

Water Leasing Procedures

Presentation to the Water and Natural Resources Legislative Interim Committee

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Background: Due Process in Water Leasing Procedures

- Water leases are an important water management tool in New Mexico. Because leases allow the temporary transfer of a water right from one place or use to another and they can have impacts on existing water rights, their approval is an important public policy decision by the State Engineer. Because of the potential impact to existing water rights, the procedures for water leasing in New Mexico statutes include provisions to ensure fairness in due process in water lease applications.
- New Mexico water law provides procedures for changes in point of diversion, place of use, or purpose of use of water rights (i.e. water transfers and water leases). Those same procedures include protections that are intended to ensure that the State Engineer considers impairment of existing water rights, conservation of water, and public welfare when considering an application for a water transfer or water lease.
- Any application for a water transfer or water lease is subject to public notice and opportunity for protest. If an application is protested on any of the three above criteria (impairment, conservation, public welfare), then the State Engineer is required to hold a public hearing on the application. These are well established procedures that provide due process to those who may be affected by the application.

Granting Immediate Use of Protested Applications without a Hearing is Not Allowed by Statute

- Water leasing procedures have been under scrutiny in recent years. In some water lease applications, the State Engineer granted water leasing permits for “immediate use” even though those applications were protested and the required public hearing had not been held. The use of water was granted by the State Engineer to the applicant while the protest was pending.
- Section 72-6-6 Section C states, “If a protest is filed, the state engineer shall hold a hearing on the granting of the application...” and Section D states, “If no objections are filed, the state engineer may grant the application without a hearing.”
- In the context of article 6, the term “immediate use” is used in the same sentence with the phrase “future use” which should be interpreted to mean that an application for a lease can be granted (upon proper approval by the state engineer) in such a way to specify the timing of the commencement of the use, i.e. now or later. It should not be interpreted to mean that “immediate use” can be granted by circumventing due process protections that are clearly specified in the law.

Policy Implications

- SB 493 (Wirth/Nuñez) added additional clarification to the law that a water use lease becomes effective only after the application has been approved by the state engineer in accordance with laws that require a public hearing. The bill was intended to ensure that the State Engineer would adhere to due process protections in the water leasing statute. The bill was supported by a wide range of groups who represent agricultural and senior water right owners, including the NMAA.
- SB 665 (Griggs) was a wide-ranging bill with multiple sections making significant and substantive changes to state law. In one section, SB 665 sought to codify the practice of the State Engineer of granting “immediate use” to applicants without a hearing. The language would have placed some limits on time and amount of water but it would have removed necessary, existing due process protections for those who could be impaired.

- Policymakers should consider the broad policy implications of making changes to the procedures for water leases before any decisions are made. It is important to note that the administrative hearing process is designed to determine whether impairment could occur and the extent of that impairment. Consider a scenario in which the State Engineer skips the administrative hearing process and an application is granted while the protest is pending. The applicant is allowed to divert surface water for several months or years before a public hearing before a hearing examiner is held. Through the hearing process, it is discovered that impairment is occurring. There is no way to provide a remedy to the surface water right owner for the impairment that occurred while the administrative hearing process was underway. The broad implication is that a property right was impaired for what may be an extended period of time and there is no clear mechanism for the state or the applicant to provide a remedy to that property owner by giving that water back.