LFC Requester:	Scott Sanchez

AGENCY BILL ANALYSIS
2023 REGULAR SESSION

SECTION I: GENERAL INFORMATION
{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:
Original x **Amendment** ___
Correction ___ **Substitute** ___

Date 1/30/2023
Bill No: HB121

Sponsor: Reps. C. Chandler, S. Herrera, and P. Wirth
Short Title: Water Right Lease Effective Date

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY23	**FY24**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY23	**FY24**	**FY25**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General Opinion nor an Attorney General Advisory Letter. This is a staff analysis in response to a committee or legislator's request. The analysis does not represent any official policy or legal position of the Office of the Attorney General.

BILL SUMMARY

Synopsis: House Bill 121 amends the state's Water-Use Lease Act, expressly clarifying that an application requesting approval from the State Engineer related to water right leases under the Act must follow a process that includes notice and opportunity for a hearing before any approval may be given.

HB 121 addresses a question of interpretation of the phrase in Subsection B that a "lease may be effective for immediate use." This phrase has been the basis of a disagreement surrounding the ability for the State Engineer to issue what has been called "preliminary" approvals of applications for leases subject to review under the Water-Use Lease Act.

FISCAL IMPLICATIONS

N/A

SIGNIFICANT ISSUES

Approval Process Under the Water-Use Leasing Act

The Water-Use Leasing Act, last amended in 2019, is instructive on the requirements and procedures for water use leases. Section 3 of the WULA, titled "Owner may lease use of water," provides authority for owners to lease their water right to a lessee, and places a number of conditions on such lease. Section 4, titled "Lessee's application," provides that prior to using any leased water, "the lessee shall apply to the state engineer requesting approval for the use and location of use to which such water will be put." NMSA 1978, § 72-6-4. Section 5, titled "Approval," includes standards the State Engineer must follow when considering the approval of any lease. Section 6, titled "Application; notice; protest; hearing," provides a step-by-step process of the administrative procedures that an application is subject to, including the incorporation of procedural requirements of Section 72-2-20, which was adopted by the legislature to add more robust public notice and specific timelines to the State Engineer's review of applications. See 2019 N.M. ch. 88, § 1 (S.B. 12). This section of the WULA specifically, and explicitly, addresses when a hearing on an application to temporarily change the use of a water right:

> C. If a protest is timely filed, the state engineer shall hold a hearing on the granting of the application, and the applicant and protestants shall be notified by the state engineer as to the date and place of the hearing.
>
> D. If no objections are filed, the state engineer may grant the application without hearing. If no objections are filed and the state engineer denies the application, the state engineer shall hold a hearing if requested to do so by the applicant. [. . .]

Section 72-6-6.

Although the State Engineer has approved temporary changes in water use leases on a "preliminary" basis prior to or without a hearing, there is no process to follow in the WULA, no use of the word "preliminary" in the applicable law, and no express authority for the State Engineer to circumvent the hearings that are explicitly required by Section 72-6-6.

While the Legislature amended the water code to include an "emergency" section to allow changes to water rights without following the standard notice and hearing process, the section only applies to the limited situation where a "crop loss or other serious economic loss to the appropriator" would occur, and further provides a short time period in which the normal application process is stayed. Section 72-5-25. Section 25 only appears to apply to appropriators of water and not to leases, but, even if the section did apply, given the plain meaning of "emergency," this section would certainly not apply to the use of "preliminary approvals" or "preliminary authorizations" being examined here. See State v. Jonathan M., 1990-NMSC-046, ¶ 4, 791 P.2d 64, 65 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation"). Our courts recognize public officials usurp their delegated powers, noting "[w]here authority is given to do a particular thing and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded. This is a part of the so–called doctrine of expressio unius est exclusio alterius." Robinson v. Board of Comm'rs, 2015-NMSC-035, ¶ 21, 360 P.3d 1186, 1191 (citing Fancher v. Board of Comm'rs, 1921-NMSC-039, ¶ 11, 210 P. 237, 241 (Finding that when the legislature "prescribes the mode of procedure the rule is exclusive of all others and must be followed")). It is clear that no statutory authority exists to authorize the State Engineer's use of preliminary approvals and any action otherwise would be considered ultra vires and void.

A Preliminary Approval is Not an Exception to Statutory Procedure

If the clear language of the WULA was not sufficient to conclude that "preliminary" approvals are not permissible under statute or rule, further examination of legislative intent leads us to the same determination. Absent reference to any type of "preliminary" approval in statute, we turn to a single instance of the phrase "immediate use" in Section 72-6-3 of the WULA to determine if an implied authority or alternative process could exist. The subsection states, in part:

> The lease may be effective for immediate use of water or may be effective for future use of the water covered by the lease…

NMSA 1978, § 72-6-3(B) (emphasis added). It is understood in our review that "immediate use" has been interpreted as following the preliminary review of the hydrologic impacts of the proposed lease on other nearby water uses by the State Engineer, and is the basis for the State Engineer to authorize "preliminary" approval of temporary changes in water use applications without first holding a hearing required by Section 72-6-6. This interpretation fails under the rules of statutory construction, legislative intent, and due process scrutiny.

While our analysis concludes that the plain meaning of the statute is unambiguous and does not provide for preliminary approvals of a change in water use application before an opportunity to protest and to be heard at an evidentiary hearing has been provided, to further support our conclusion we will continue the analysis of statutory construction and legislative intent as if there were lingering ambiguity of the WULA. When the plain meaning of a statute is ambiguous or doubtful, courts will examine the statute as a whole and "construe the law according to its obvious spirit or reason." State v. Willie, 2009-NMSC-037, ¶ 9.

Individual statutory provisions should be read in context with the rest of the act or related sections, and must be interpreted "as a whole so that each provision may be considered in relation to every other part." N.M. Pharm. Ass'n v. State, 1987-NMSC-054, ¶ 9, 738 P.2d 1318, 1321. Importantly, it is instructive that procedural requirements are located in Section 6 of the WULA, whereas the "immediate use" phrase is found in Section 3, which provides the authority and conditions – substantive not procedural conditions – of leasing water under the Act. Where the phrase "immediate use" is located in the WULA is significant, as it provides context and distinguishes the intents and purposes of each section. See Giant Cab, Inc. v. CT Towing, Inc., 2019-NMCA-072, ¶7 ("We read provisions in their entirety and construe them in relation with all others so as to produce a harmonious whole."). Otherwise, if read in a vacuum without other sections, the language in Section 3, which states that a "lease may be effective for immediate use of water," would just as easily be interpreted as to not require approval from anyone prior to use. But such interpretation would clearly violate procedures for applications provided in Section 6 and run contrary to the intent of the Act to protect water rights by requiring a process that includes the right to a hearing.

Due Process Requires Opportunity of Hearing Prior to Approval

Precedent in New Mexico recognizes the significant interest of water users, and our law requires the State Engineer to thoroughly examine the interests of existing water users before approving temporary changes to use and location of water rights. See Brown, 1958-NMSC-113 (holding that to allow changes to water rights without regard to whether the change would impair the existing rights of other appropriators would be eminently unreasonable); see also Heine v. Reynolds, 1962-NMSC-002, 367 P.2d 708 (recognizing that the State Engineer has the positive duty to determine whether existing rights would be impaired). The Legislature must be interpreted as having acted intentionally when it prescribed various procedural requirements and, notably, did not provide explicit power for the State Engineer to promulgate regulations or policies[1] to expand or limit the procedures or rights to a hearing that are provided in the WULA. The numerous and explicit requirements, procedures, and protections created by the Legislature in the WULA demonstrate a clear policy interest to protect substantive and procedural rights and prevent the State Engineer from developing processes not expressly authorized by statute. See McCasland v. Miskell, 1994-NMCA-163, ¶ 22, 890 P.2d 1322, 1327 (recognizing that "the legislature created a statutory procedure governing the manner by which appropriators may change the place of use of water rights"); see also Eldorado at Santa Fe, Inc. v. Cook, 1991-NMCA-117, 822 P.2d 672 (abrogated on other grounds as recognized by Storm Ditch v. D'Antonio, 2011-NMCA-104, 263 P.2d 932) (due process requires that holders of water rights are entitled to notice and opportunity to be heard). See generally George A. Gould, Transfer of Water Rights, 29 Nat. Resources J. 457 (1989).

An owner of water rights holds a property interest and has authority to use the water for its approved purpose, but the process to temporarily alter existing rights must follow procedures of the WULA, regardless of inconvenience or impact on prospective business opportunities.[2] Our courts have held that reasonable limitations on water rights imposed by procedures and

[1] Policies adopted by state agencies may be subject to the same rulemaking requirements under the State Rules Act, NMSA 1978, Sections 14-4-1 to -11.

[2] As discussed above, the legislature amended the water code to add a specific emergency provision to temporarily bypass certain procedural requirements, but the provision is only applicable when the emergency "would result in crop loss or other serious economic loss to the appropriator," does not include missed economic opportunities that might result in a delay of the lease approval, and may not apply to lessees. Section 72-5-25(A).

requirements of the water code do not infringe on existing water rights, as a vested right is not affected while an application is pending. See State ex rel. Reynolds v. Mitchell, 1959-NMSC-073, 345 P.2d 744. A water owner may continue to use water rights under their approved beneficial use but cannot change the "vested right without following the statutory procedure." Id. at ¶ 15. "The principle underlying the statutory requirement of application, notice and hearing is to insure that the change proposed in the application will not impair the rights of other appropriators." City of Roswell v. Berry, 1969-NMSC-033, ¶ 5, 452 P.2d 179, 181 (internal references omitted).

Even if the inclusion of the phrase "immediate use" had been harmonious with the explicit procedural requirements of the WULA, the property interests of other water users would be jeopardized if no clear procedural protections exist. Administrative proceedings require a framework of procedures to ensure due process that provide a "plain, adequate, and complete means of resolution through the administrative process to the courts." U.S. Xpress, Inc. v. N.M. Taxation & Revenue Dep't, 2006–NMSC–017, ¶ 12, 136 P.3d 999 (quoting Chavez v. City of Albuquerque, 1998–NMCA–004, ¶ 14, 952 P.2d 474). Although there are examples in the state of various provisional, temporary, and emergency permits, these are issued either only after notice and opportunity for a hearing or with procedures that provide guaranteed access to a hearing within a short and specific time after issuance. See City of Albuquerque v. Reynolds, 1962-NMSC-173, 71 N.M. 428. Since the State Engineer's current practice of issuing "preliminary" approvals has no explicit authority in law with no procedural protections to expedite the access to a hearing, it is clearly distinguished from the emergency procedures found in Section 72-5-25 and fails to offer the basic fundamental requirements of due process.

PERFORMANCE IMPLICATIONS
None

ADMINISTRATIVE IMPLICATIONS
None

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP
None

TECHNICAL ISSUES
N/A.

OTHER SUBSTANTIVE ISSUES
See analysis in attached document.

ALTERNATIVES
N/A.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL
The possibility of continued litigation and competing arguments as to whether the term "immediate use" in Section 72-6-3 allows the State Engineer to issue preliminary approvals or authorizations of changes to lease agreements pending the outcome of the administrative hearing process under the Water-Use Lease Act and the state's Water Code.

AMENDMENTS
N/A