STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL

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OPINION
OF
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Opinion No. 23-01

By: Joseph M. Dworak
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To: Honorable Miguel P. Garcia
State Representative
New Mexico State Capitol 205B
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In Re: Opinion Request – Preliminary Approvals Under the Water Use Leasing Act

Questions:

1. Is the State Engineer's practice of "preliminary approval" or "preliminary authorization" of proposed leases of water rights lawful under state law?

2. Is the State Engineer's practice of "preliminary approval" or "preliminary authorization" of proposed leases of water rights permitted under State Engineer regulations, and, if so, are such regulations lawful?

Conclusions:

1. No. There is no explicit or clearly implicit authority for the State Engineer to issue a preliminary approval or authorization of an application to lease water under New Mexico's Water-Use Leasing Act or related statutes.

2. No. There is no authority or process to issue a "preliminary approval" or "preliminary authorization" of an application to lease water under the State Engineer's regulations.

Introduction

The issue raised directs our focus to a narrow question of statutory interpretation and legislative intent behind a provision of New Mexico's Water-Use Leasing Act (referred to herein as "WULA" or the "Act"), NMSA 1978, Sections 72-6-1 to -7, and whether the State Engineer has lawful authority to issue what is referred to as a "preliminary approval" of a change in water use application under the WULA before the State Engineer's Office has provided an opportunity to protest and be heard at an evidentiary hearing. Given that neither the WULA nor related regulations include any explicit authorization of a "preliminary approval" or any type of similar process following only an initial review by the State Engineer, the question of implied authority relies on the effect of the phrase "immediate use" in a single section of the WULA. Section 72-6-3(B). Based on the examination of relevant New Mexico statutes, case law authorities, and on the information available at this time, we conclude that no explicit or implied legal authority exists for the State Engineer to issue a "preliminary approval" or "preliminary authorization" of an application to temporarily change the place or purpose of use or the point of diversion of a water right leased under state law, and that issuing such approval circumvents clear procedural requirements of the WULA and may violate due process.

Water in New Mexico has, as a limited and vital natural resource, long been appropriated through laws which recognize the competing interests of existing water right holders and prospective users. The New Mexico Constitution emphasizes a central tenant that water in the state is "to be subject to appropriation for beneficial use, in accordance with the laws of the state." N.M. Const. art. XVI, § 2. State law is unambiguous in acknowledging constraints on water in our region and has declared that all natural waters flowing in the state "belong to the public and are subject to appropriation for beneficial use." NMSA 1978, § 72-1-1. Our laws demonstrate the significance of stewardship for this resource, providing that "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water . . . " Section 72-1-2.

The difficult and complicated task of appropriating and managing the "beneficial use" of water resources in our state has been delegated by the Legislature to the State Engineer. Our courts have recognized the expertise of the State Engineer and that the position "needs a reasonable degree of flexibility and opportunity for the exercise of sound discretion in the performance of his duties." Barnett v. Brown (In re Application of Brown), 1958-NMSC-113, ¶ 26, 332 P.2d 475, 477; see Lion's Gate Water v. D'Antonio, 2009-NMSC-057, ¶ 24, 226 P.3d 622, 631 ("The general purpose of the water code's grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process that maximizes resources through its efficiency, while seeking to protect the rights and interests of water rights applicants."). However, the authority of the State Engineer is not without limit, and "is no more than the Legislature has granted, either expressly or by necessary implication." Brown, 1958-NMSC-113, ¶ 16. To answer what procedures the State Engineer must follow when allocating water, and what flexibility the State Engineer might have, we are guided by state statute.

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 Authorized under the State Engineer's Regulations

While we find that the WULA does not authorize the "preliminary" approval of changes in water use leases, the State Engineer's regulations further prohibit such action as well. Not only does the word "preliminary" – or any other similar term – not appear, the regulations explicitly prohibit changes to point of diversion, place of use, or purpose of use prior to use by a lessee without the opportunity for objections to be considered in a hearing first.

> "Prior to the use of water pursuant to a lease, if the proposed [use differs] in any respect, a permit must be obtained[.]"

19.26.2.18 NMAC; see 19.26.2.11(A), (B) NMAC. The State Engineer's own regulations are instructive on this issue and should be provided deference given their conformance with the administrative process proscribed in law, discussed above, which do not authorize any form of preliminary approvals. See City of Albuquerque v. N.M. Pub. Regulation Comm'n, 2003-NMSC-028, ¶ 16. 79 P.3d 297 ("The Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law") (internal citations omitted).

The regulations provide rights to individuals objecting to an application and the requirement to hold a hearing which unequivocally prohibits the State Engineer from approving a contested application until after a hearing.

> The state engineer may approve a protested application after holding a hearing and may impose reasonable conditions of approval.

19.26.2.12(F)(2) NMAC (emphasis added). The language of the State Engineer's own regulations certainly resolve any lingering ambiguity of legal authority to follow a process of issuing "preliminary" approvals that are not contemplated anywhere in applicable law.

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

[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.

WULA.[2] Our courts have held that reasonable limitations on water rights imposed by procedures and 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.

Conclusion

Our determination that the State Engineer cannot lawfully grant "preliminary" approval of changes in use or location of water rights is based on the plain language of the Water Use Lease Act and supported by statutory interpretation and considerations of due process. The law does not allow for the State Engineer to circumvent procedures and protections clearly defined in statute, even if temporary in nature.

You have requested an opinion on this question raised to our office. The request and the opinion provided herein are public documents, and will be published to our website and may available to the general public. If you have any questions regarding this matter, or if we may be of further assistance, please let us know.

[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).

Respectfully,

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