



Support HB 121 - Due Process in Expedited Water Leases

The bill creates a new lawful “expedited temporary lease” process that allows certain lease applications to be fast tracked while also retaining due process protections for communities potentially impacted by water right leases.

This legislation addresses a need for a legal process for expedited temporary water leases. The State Engineer has been engaging in an administrative practice of granting “preliminary approval” for water leases, a process which circumvented due process protections. This practice has been deemed unlawful by a District Court ruling and a recent Attorney General Opinion.

HB 121 ensures due process is protected by defining an expedited hearing process that retains existing requirements for public notice, opportunity for protest, and a mandatory public hearing on protested applications. It is vital to protect due process and transparency in any applications that could affect existing and senior water rights, as well as our rivers and aquifers.

HB 121 seeks to balance economic development and water sustainability. The process allows for a legal route for industries to access water rights for projects while protecting due process, which is vital for protecting existing and senior water rights. The expedited lease process reduces the risk of adverse impacts to local water supplies by placing a cap and time constraint on the fast-tracked leases. The bill limits leases of surface water to 50 acre feet for one year and groundwater to 125 acre feet for two years.

This legislation protects existing and senior water rights. The water rights of every farmer and water right owner in the state depend on the right to raise concerns about any new uses of water via water leases. Owners of water rights and the public also depend on this process to protect water sources and aquifers before any potential harm can occur. The bill does not affect farm-to-farm leases and reallocations (e.g. irrigation districts and acequias) or transfers for emergency situations such as crops loss that are already allowable under existing law

Without this bill.... the OSE practice of “preliminary approval” is uncertain because such approvals are vulnerable to legal challenge and industries will lack a legal process for expedited water leases. Preliminary approvals without due process also put communities at risk of impairment as well as detriment to conservation of water and the public welfare. HB 121 provides a compromise to address the needs of both industry and potentially impacted communities.

The 5th Judicial District held in 2020 that “preliminary approval/authorization” is unlawful. In *Carlsbad Irrigation District and Otis Mutual Domestic Water Consumers & Sewage Works Association v. John D’Antonio, State Engineer* (April 1, 2020), the court held that, “The State Engineer has no authority under the Water-Use Leasing Act to grant the applicants ‘preliminary authorization’ to change the use and location of leased water.” Initially, the OSE appealed the decision and then withdrew the appeal. That makes this decision a final judgement and binding on the State Engineer.

The Attorney General Opinion No. 23-01 (January 30,, 2023) states that “preliminary approval/authorization” is unlawful. The opinion states 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 the Water Use Lease Act, and that issuing a preliminary approval circumvents clear procedural requirements and may violate due process enshrined in our state constitution.

The following organizations urge the State Legislature to support HB 121, a compromise to create an expedited lease process that also protects due process. This is a delicate balance to protect the water that sustains our communities as well as our rivers and our aquifers.

EL AGUA ES VIDA! WATER IS LIFE!

