

Memorandum

To: File

From: DL Sanders, Chief Counsel
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Re: Comments on the AWRM Rules, and Revisions Made

Date: December 3, 2004

The proposed regulations were made available for public inspection on April 28, 2004. On June 28, 2004, a hearing was held before Paul Saavedra, the State Engineer's Hearing Examiner, to take comments from the public on the proposed Active Water Resource Management regulations. Written comments had been received for some time prior to that and a number of individual meetings to discuss suggestions from the public had also been held. At the hearing, the Examiner extended the period for written comments to July 12, 2004. The comment period was then further extended to July 26, 2004. A public meeting to discuss the changes that were made was held on October 14, 2004. A number of additional meetings with individual representatives of the public to discuss further suggestions were held during the following three weeks.

The following memorandum addresses the comments received, both written and verbal, discusses changes that were made to the regulations in response to those comments, and also provides reasons why certain suggestions were not incorporated.

I. General Comments

- A. Several commentators expressed concern about the length of time provided to comment on these proposed regulations and made various suggestions to cure the concern, including extending the time period for comment, providing workshops to help people understand the proposed regulations, and appointing a blue ribbon commission to start from scratch in developing regulations.

The State Engineer agrees strongly with those commentators who pointed out that public participation in the regulatory process, and in the development of structures of water rights Administration, is crucial. At the same time, the State Engineer believes that the legislature is correct that "the need for water rights Administration is urgent." NMSA 1978, § 72-2-9.1 (A). The State Engineer intends to accommodate this tension by promulgating two tiers of regulations, one general set of regulations, and as many basin-specific sets of regulations as might be required. The general regulations will not be used, barring exceptional circumstances, directly for water rights Administration, and even then, they will not be used without further formal State Engineer action pursuant to NMSA 1978, § 72-2-8.

The general regulations are intended to serve as a framework within which to begin discussion and negotiation of Water Master District-Specific regulations that will be consistent with the legal framework and statewide policy set down in the general regulations. The broad provisions of the general regulations will be adapted through District-Specific regulations to fit the particular circumstances of each District and, to the extent possible, to embody the agreements of local water right owners. With this purpose in mind, the State Engineer intends to put the general regulations in place as quickly as possible, in order to offer a general State Engineer position in discussions concerning District-Specific regulations. Further, the State Engineer will put Water Masters in the field during negotiation of District-Specific regulations, in order to gain the benefit of practical and District-Specific knowledge that will facilitate both development of District-Specific regulations and water rights Administration itself. A new provision entitled “Use of These Rules” has been added to the regulations to clarify this structure, and make clear that District-Specific regulations are the means by which water rights Administration will actually be accomplished.

- B. Many commentators had specific questions about how certain concepts or provisions of the general regulations would work in the particular context of their Districts.

The answer to these questions lies in the above-described two-tiered approach. A large variety of water issues arise in the various stream systems of New Mexico, which typically are at different stages of Adjudication and Administration. Under these circumstances, it is important to develop an overarching statewide framework for Administration that can make consistent sense of the law and policy embodied in these different arrangements, and also to allow sufficient flexibility so that local conditions and circumstances as well as already existing procedures can be accommodated. For this reason, the State Engineer has determined that the general regulations will define the broad policy of water rights Administration. However, issues like treatment of domestic wells, existing shortage sharing agreements, credit or debit accounting, interplay with the duties of existing Water Masters who might be court-appointed, interplay with settlements negotiated in particular basins, interplay with other regulations already applicable in a stream system, the respective administrative powers of the State Engineer and local entities in certain special districts, coordination with those districts, and a number of other issues raised by commentators, are best addressed by the creation of District-Specific regulations within the framework offered by these statewide regulations.

- C. Several commentators stated that they objected to what they perceived as a “top-down” approach to water rights Administration that did not allow for enough local control over how water rights Administration would be implemented.

The State Engineer agrees that local control over the water rights Administration process is preferable to a “top-down” approach. For this reason, the regulations contain provisions that are intended to encourage and facilitate agreement among

local water right owners to achieve that local control. A few commentators, in fact, asserted that these provisions were outside the State Engineer's authority, but the State Engineer disagrees, believing his "general supervision of waters of the state and the measurement, appropriation, distribution thereof and such other duties as [are] required" give him the authority to recognize and administer local agreements. NMSA 1978, § 72-2-1. The State Engineer and the State Engineer's Water Masters will, therefore, under these general regulations, administer water rights in accordance with any local agreement that has been reached, provided the agreement is acceptable to the State Engineer as consistent with his duty to protect non-parties to the agreement. In fact, the State Engineer prefers to administer on the basis of local agreements if these agreements adequately protect non-parties to the agreement and are otherwise consistent with legal requirements such as, for example, interstate stream Compact delivery obligations. If such an agreement is not possible, however, the State Engineer must stand ready to administer in accordance with State law.

It should be noted that the State Engineer expects that, in the majority of cases, water rights Administration will only be initiated in response to requests by water right owners. There are exceptions to this. Certain areas of the State may have to be administered for Compact compliance purposes, for example. It is the State Engineer's policy not to administer priorities for purposes of Compact compliance without a request from the Interstate Stream Commission. It is possible that there may be other emergency situations in which the State Engineer may need to step in for reasons of "public safety or interests of the water right owners." NMSA 1978, § 72-3-2. In these exceptional circumstances, the State Engineer will begin Administration upon further formal State Engineer action pursuant to NMSA 1978, § 72-2-8. In general, however, the State Engineer expects that these regulations will be invoked by request for a Water Master from water right owners.

It is important to note, in this context, that when requested to conduct water rights Administration, the State Engineer will not do so on an ad hoc basis, or solely for the benefit of specific water right owners, but will administer in a manner that is consistent with the framework and requirements set out in these general regulations. He will, therefore, declare a Water Master District and appoint a Water Master and promulgate District-Specific regulations and do all the various other things contemplated by these general regulations.

Finally, it is the State Engineer's experience that Water Masters serve as advocates for local interests, rather than as command and control agents. A Water Master gets to know the situation on the ground in a way not usually possible for State employees, and gains a practical knowledge of, for example, farm delivery requirements, that cannot be calculated from an office in Santa Fe. Thus, in adopting the strategy of appointing Water Masters to effect Priority Administration, the State Engineer intends to honor local customs and experience, and believes this result will be achieved.

- D. Several commentators expressed concern that the proposed regulations give the State Engineer the power to force rural areas to give up their water in favor of cities.

The concept of a Replacement Plan serves as a stop-gap measure to allow cities, who are typically junior water right owners, to lease, for a limited period of time, a senior water right owner's use of water during a period of Priority Administration when the city is Out-of-Priority. These lease arrangements will occur strictly on a voluntary basis. No water right owner can be forced to lease his water to a municipality. Permanent water right sales also will occur on a voluntary basis. The only way water right owners can be forcibly deprived of their water rights is through condemnation proceedings by a public entity such as a city or a county. The State Engineer, however, has no condemnation powers. Therefore, these regulations cannot be used to force anyone to give up his water rights.

- E. Some commentators were concerned that the proposed regulations might be read to establish a preference hierarchy of beneficial uses, or to seek to discriminate among beneficial uses in order to conserve water.

There is no legal basis in New Mexico for establishing a preference hierarchy of beneficial uses, and the State Engineer never intended the language to be read in this way. The problematic language has been clarified. The regulations do not attempt to move water to a "highest and best use," but treat all beneficial uses equally. Whether agricultural water is moved to other uses is the decision of the holder of the water right who may sell or lease the water right. The State Engineer has no power to force sales or leases.

- F. Some commentators perceived too great an emphasis on agricultural uses, and were concerned that the proposed regulations might only apply to such uses, allowing municipal and industrial uses a free rein.

This has never been the intent of the State Engineer, but is the result of imprecise drafting. Language has been added to the regulations to make it clear that water rights Administration is intended to apply to all water uses, and that, for example, the Water Master's duty to prevent Waste goes to municipal and industrial uses as well as agricultural uses. The evidence on which a Water Master might determine Waste may differ among various types of water use, but the principle that the Water Master must prevent Waste remains the same. The principle is articulated in the general regulations, and the State Engineer expects that, in the course of development of District-Specific regulations, more particulars can be developed about how a Water Master might make a determination of Waste with respect to all types of uses.

- G. Many commentators were concerned about whether sufficient due process had been provided with respect to Replacement Plans, determinations made by the Water Master, and the strategies for Expedited Marketing and Leasing. Some commentators argued that the processes outlined in the proposed regulations for

Replacement Plans and Expedited Marketing and Leasing conflict with NMSA 1978, § 72-2-9.1(C), which requires that rules adopted by the State Engineer for the promotion of Expedited Marketing and Leasing “be consistent with the rights, remedies and criteria established by law for proceedings for water use leasing and for changes in point of diversion, place of use and purpose of use of water rights.” One commentator pointed out a related concern that Replacement Plans and Expedited Marketing and Leasing should be consistent with the State Water Plan’s mandate to balance market approaches to water with non-economic cultural and social values, implying that moving the hearing on objections to a time after the provisional granting of the application would cut off consideration of public welfare and conservation standards. One commentator suggested that Replacement Plans were contrary to law for the same reasons that the State Engineer’s dedication practice was found to be contrary to law in NMAG Opinion 94-07.

The State Engineer believes that the narrowness of the set of circumstances under which Replacement Plans may be used, and the need for them as a matter of public safety, makes them acceptable as a part of the balance that must be achieved under the State Water Plan. Replacement Plans and Expedited Marketing and Leasing strategies are intended to provide a “soft landing” to junior water right owners affected by Priority Administration. The State Engineer sees a strong public policy interest in ensuring that water right owners affected by water rights Administration are provided with a vehicle through which they can quickly obtain a replacement source of water to address an emergency situation in which they would otherwise be left without recourse. Some form of “soft landing” is essential to protect, for example, a steady drinking water supply for municipalities, many of which have junior priorities. This is not a market-based value, but a matter of protection of the essential needs of populations. Nevertheless, the State Engineer believes that cultural and other values will be protected. For instance, acequias and community ditches are expressly exempted from Expedited Marketing and Leasing provisions.

The regulations have been edited to make it clear that Replacement Plans should be used only as a temporary bridge to address the immediate effects of Priority Administration while seeking permanent transfers. For that reason, the duration of Replacement Plans has been set at two years, at which point an Out-of-Priority water right owner will have to apply for renewal. It is the State Engineer’s policy to scrutinize applications for renewals of Replacement Plans carefully to determine whether the applicant likely is a water right owner who will be Out-of-Priority much of the time and should, therefore, be required to obtain permanent replacement water, or whether the applicant is likely to be In-Priority much of the time and should, therefore, be allowed to renew his application for Replacement Plan.

The State Engineer has provided for more due process by adding several new provisions to provide explicitly for more opportunity to object, both informally and formally, to determinations made by the State Engineer or by the Water Masters, and

to appeal the State Engineer's decisions. See new Rules 19.25.4.31; 19.25.4.41; and 19.25.4.42.

The regulations also have been edited to make clear that Replacement Plans will be published after they have been approved, so that they can be administratively appealed pursuant to the provisions of NMSA 1978, § 72-7-1. Under these circumstances, the State Engineer disagrees that a Replacement Plan is the same thing as a transfer, as suggested by one commentator, and further disagrees that Replacement Plans suffer from the same legal infirmities as the "dedication" practice discussed in NMAG Opinion 94-07. A Replacement Plan involves only existing, legally valid water rights both as to the junior water right owner seeking Replacement Water and the water of the senior water right owner being used as Replacement Water, as opposed to the dedication practice, which addressed new appropriations. The fact that Replacement Plans concern only already established water rights means that, with respect to all water rights involved in the application, there has either been a previous finding of consistency with statutory standards of public welfare and conservation, or the water rights are old enough to pre-date the requirement for the application of such standards.

In addition, in a Replacement Plan proceeding, the Replacement Water source must be identified at the time of the application—as opposed to the dedication process in which the applicant could identify the offset after the application was granted, so that no one had a chance to object to the adequacy of the offsets identified or their comportment with public welfare and conservation. In the Replacement Plan proceeding, by contrast, all Replacement Water must be identified up front, and the opportunity for objection exists on all applicable State law standards. While it is necessary that the opportunity for objection take place after the provisional approval of the Replacement Plan, in order to accommodate the urgency of the need to replace water under the emergency circumstances that Replacement Plans are intended to address, the opportunity to object does not await for an indefinite time the identification of offset water, as was the case in the dedication process. Instead, the objection to a Replacement Plan will take place immediately. The regulations have been edited to make this clear.

H. Coupled with concern over the legality of Replacement Plans and Expedited Marketing and Leasing was the question of whether Replacement Plans and Expedited Marketing and Leasing would be available statewide regardless of Priority Administration in a District, or whether they were only available in Districts in which a Water District has been declared, a Water Master appointed, and Priority Administration had been initiated.

Replacement Plans fall under the State Engineer's emergency powers to prevent imminent economic harm. They are applicable only when there is a priority call in a specific District, or when the State Engineer has decided to administer by Administration Date. The regulations have been edited to make it clear that

Replacement Plans are only available in areas in which a Water Master District has been declared, a Water Master appointed, and Priority Administration has been initiated. Rules specific to each stream system regarding Replacement Plans and Expedited Marketing and Leasing strategies will be part of the development of District-Specific regulations, a process in which the State Engineer is committed to as much public participation as is consistent with his duty to administer water effectively.

- I. Some commentators were concerned that the proposed regulations should be clarified to make sure that Expedited Marketing and Leasing strategies should not apply to acequias and community ditches.

NMSA 1978, § 72-2-9.1 provides that acequias and community ditches are exempt from Expedited Marketing and transfers and these rules, therefore, do not apply to acequias and community ditches; there is no need to explicitly say so in the rules. However, the State Engineer has added language in Rule 19.25.4.19 that confirms that these rules do not affect the internal management of Projects, including acequias or community ditches, and other water delivery systems, in accordance with NMSA 1978, § 72-9-2.

- J. Some commentators were also concerned about the timing of objections and appeals from Water Master actions or failures to act and State Engineer actions or failures to act. The comments on this were somewhat contradictory, with some commentators wanting more process and some suggesting a more streamlined process that would be accomplished “promptly” under NMSA 1978, § 72-3-3.

The State Engineer has added language to provide for prompt review of objections to Water Master actions. The State Engineer is willing to set up streamlined processes in specific areas, if that is what the local water right owners want, and processes with greater procedural guarantees in other areas, if that is what the local water right owners prefer. The State Engineer has also added language to provide for appeals from State Engineer review of Water Master actions.

- K. Some commentators perceived vagueness in the proposed regulations, sometimes fearing that this perceived vagueness allows the State Engineer too much discretion in making decisions about water rights Administration.

Because the general regulations are intended to provide a consistent statewide framework under which District-Specific regulations can be developed and negotiated with affected water right owners, they are necessarily broadly drawn in order to leave room for a wide array of area-specific possibilities that would still be consistent with the general regulations.

- L. Some commentators were concerned about the circumstances under which active Administration of water for interstate stream Compact compliance purposes might be triggered, arguing that such Administration should not occur unless the

Interstate Stream Commission and/or the Compact Commissioner had certified evidence of Compact violation.

The regulations have been edited to include a provision for the Interstate Stream Commission (“ISC”) to request that the State Engineer begin active water Administration for interstate stream Compact purposes, see Rule 19.25.4.43, and to make it clear that active water Administration for Compact purposes alone will not take place without further formal State Engineer action pursuant to NMSA 1978, § 72-2-8(E). The State Engineer does not consider it advisable to require that the ISC’s request be founded upon a certification of evidence of violation, which might constitute an admission.

M. Some commentators argued that the regulations, as well as the underlying statute, are unconstitutional. The most extensive argument alleged three grounds for unconstitutionality: 1) that due process requires that Administration of water can only be initiated when an Adjudication is complete; 2) on a related note, that the State Engineer’s determinations of the elements of water rights for administrative purposes offend separation of powers principles; and 3) that a certain phrase from NMSA 1978, § 72-2-9.1(A), which recognizes the State Engineer’s authority to administer “in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer,” is void for vagueness.

The State Engineer disagrees that the statute or the regulations are unconstitutional. Constitutional due process does not require a completed Adjudication prior to Administration, as Administration does not deprive any party of a property right. The property right in water is not the water itself, which is what is regulated by Administration, but is the right to use the water, which the State Engineer does not have the power to affect, as the regulations recognize in their deference to the courts’ power to adjudicate. The State Engineer’s determinations of the elements of water rights for purposes of Administration, therefore, are not Adjudications of a water right. Rather, they constitute administrative control over property that has not yet been adjudicated, similar to police protection of land, including land with disputed boundaries. As long as an avenue exists for objection or appeal to the administrator’s interim determination of the right for purposes of Administration, no constitutional principle is offended by interim protection of the property, which protection is founded upon the administrator’s determination of the boundaries of that property. That determination is subject to final Adjudication by a court, which is in no way bound by the administrator’s determination. Upon the final Adjudication, the administrator will adjust to defer to the Adjudication.

In the case of water, the lack of Administration while awaiting Adjudication may be as damaging to surrounding water right owners whose water is being taken invalidly, as the curtailment pursuant to Administration may be damaging to a water right owner invalidly curtailed. Under these circumstances, the legislature, in enacting NMSA 1978, § 72-2-9.1, has chosen to recognize the State Engineer’s authority to protect the surrounding water right owners with interim Administration of water (as opposed to Adjudication of water rights) upon an evidentiary determination that supports such

protection. This choice was within the legislature’s authority. Any other understanding of the law would make it impossible for the State Engineer to perform his statutory duty to supervise the distribution of water within any reasonable time, as the legislature has recognized in finding that “Adjudications are slow.” Id. Such a reading of New Mexico law would plunge property rights into chaos.

Because the State Engineer’s determination of the elements of water rights for the purpose of Administration are not Adjudications of water rights, but are, instead, interim measures needed for Administration and not binding on an Adjudication court, there is no separation of powers issue. New Mexico’s statutory scheme provides that courts adjudicate water rights and the State Engineer administers water. This scheme is honored in these regulations.

The regulations have been edited to address the allegation that NMSA 1978, § 72-2-9.1 is unconstitutionally vague, as any possible vagueness is cured in the application of the law through the specific descriptions in the regulations about what constitutes evidence “otherwise available” to the State Engineer.

II. Specific Comments, and Changes Made to Language of Regulations

In this section, specific suggestions made by commentators are discussed. In addition, the changes made by the State Engineer, if any, to address public comments are noted.

TITLE 19 NATURAL RESOURCES AND WILDLIFE

CHAPTER 25 ADMINISTRATION AND USE OF WATER – GENERAL PROVISIONS

PART 4 ACTIVE WATER RESOURCE MANAGEMENT

One commentator argued that the use of the word “management” might be misconstrued to suggest that the State Engineer was claiming the power to balance water needs in a discretionary way for public policy purposes. The State Engineer is not claiming that power.

19.25.4.1 ISSUING AGENCY: Office of the State Engineer

19.25.4.2 PREFACE: The State Engineer adopts these rules and regulations to undertake the supervision of the physical distribution of water, to prevent Waste, and to administer the available supply of water by Priority Date or by Alternative Administration, as appropriate.

One commentator argues that Priority Administration can only be triggered by a priority call with respect to intrastate matters, and should only be triggered by request from the Interstate Stream Commission in interstate matters. The State Engineer disagrees that his power to administer in accordance with priorities must await a formal priority call

given his general power to supervise the measurement, appropriation and distribution of water, coupled with the New Mexico Constitutional provision that priority of appropriation gives the better right. N.M. Const. art. XVI, Section 2. The case law cited by the commentator does not hold that a priority call is required before Administration in accordance with priorities can be initiated.

A section has been added to the regulations at 19.25.4.43 to provide for the Interstate Stream Commission to request Priority Administration for Compact compliance purposes.

19.25.4.3 SCOPE: These rules apply to all water rights within the State from all sources of water, surface water and hydrologically connected groundwater.

One commentator suggested that certain water rights be excluded from the application of these rules. It is the State Engineer's position that the rules and regulations should apply to all water rights. The added language makes it clear, in response to a question from one commentator, that the regulations apply to both ground and surface water.

Another commentator claimed that acequias and community ditches are exempt from the provisions of NMSA 1978, § 72-2-9.1. Acequias and community ditches are exempt only from Expedited Marketing and Leasing, not from operation of the entire statute.

19.25.4.4 STATUTORY AUTHORITY: These rules and regulations are established pursuant to constitutional authority set forth in Article XVI of the New Mexico Constitution, and statutory authority enumerated in NMSA 1978, Chapter 72, including but not limited to §§ 72-1-2; 72-2-8; 72-2-9; 72-2-9.1; 72-3-1-5; 72-4-20; 72-5-3 through 5; 72-5-18; 72-5-23; 72-5-24; 72-6-1 through 7; 72-8-1; 72-9-2; 72-12-1; 72-12-2; 72-12-8(D); 72-12-24; 72-13-2; 72-13-4.

19.25.4.5 DURATION: Permanent.

19.25.4.6 EFFECTIVE DATE: November 22, 2004

19.25.4.7 OBJECTIVE: The objective of these rules is to establish the framework for the State Engineer to carry out his responsibility to supervise the physical distribution of water to protect senior water right owners, to assure compliance with interstate stream Compacts and to prevent Waste by Administration of water rights. These framework rules employ long-standing statutory mechanisms specified at NMSA 1978, § 72-3-1 through 5, which describe procedures for the creation of Water Master Districts and the appointment of Water Masters with certain defined duties and authorities. In addition, these rules fulfill the mandates of NMSA 1978, § 72-2-9.1, requiring the State Engineer to adopt rules for Priority Administration based on appropriate hydrologic models and Expedited Marketing and Leasing within Water Master Districts subject to Priority Administration.

Several commentators suggested that it was not possible to tell how the present regulations would affect their area specifically. See comment I.C., supra. Some commentators requested a specific reference to the statutory language regarding appropriate hydrologic models. Language has been added to make it clear that these general regulations provide the framework for promulgation of District-Specific regulations applicable to specific areas.

See also the comments under General Comments, Section I.C.

19.25.4.8 CONSTRUCTION: These rules and regulations shall be construed as consistent with, and subject to, the authorities of the State Engineer for the Administration of water in the State of New Mexico. These rules and regulations shall not be construed as imposing any limitation on the authority of the State Engineer to administer water rights, act on water rights applications, permit water rights, or order the curtailment, in whole or in part, of the use of water under any water right. NMSA 1978, §72-2-8(H) provides that these rules and regulations are presumed to be the correct implementation of the law.

One commentator remarked, in connection with this provision, that “[t]he State Engineer’s authority is subject to his statutory authority, to conditions of approval in any Permit or License, and to the orders of an Adjudication court.” It is unclear whether this sentence was intended to suggest that this proposition was somehow contradicted by this Rule. The State Engineer cannot understand how that might be so, and has made no change.

One commentator claimed that the State Engineer does not have the authority to state how these rules should be construed because this is a judicial function and that this rule, therefore, violates the separation of powers doctrine. The State Engineer disagrees.

19.25.4.9 DEFINITIONS: Unless defined below in a specific section of these rules, all words used herein shall be given their customary and accepted meanings. All uses of masculine pronouns or possessives shall be held to include the feminine.

A number of commentators stated that it was impossible to tell how the definitions would affect their specific areas. These rules provide a framework within which rules for specific Districts will be developed. The District-Specific regulations will provide greater detail, based on local circumstances and conditions, as to how the regulations will affect a particular District. No change has been made pursuant to this broad comment, except to the extent that clarifying changes have been made pursuant to other, more specific comments.

- A. Adjudication:** A comprehensive court proceeding to establish the elements of each water right for all water right owners on a stream system with respect to the State of New Mexico and as among each other, including the priority, amount, purpose, periods and place of use and the

specific tracts of land to which the water right is appurtenant, as provided by NMSA 1978, § 72-4-19.

- B. Administrable Water Right:** A water right or right to impound, store or release water, the elements of which have been determined by a court of competent jurisdiction or determined on an interim basis by the State Engineer under these rules and regulations. The State Engineer may make determinations of the elements of a water right for purposes of Administration prior to the commencement or completion of, and during the pendency of, a water rights Adjudication. State Engineer determinations made for purposes of Administration are subject to review by any court of competent jurisdiction and are not binding on that court. Such determinations are subject to the decrees of an Adjudication court of competent jurisdiction, and are not binding on such an Adjudication court.

This provision was changed to clarify that what makes a water right administrable is that its elements have been determined, either finally by a court or on an interim basis by the State Engineer if no court determination has yet been made, or if the court determination is subsequently superseded by a permit. The State Engineer does not adjudicate water rights, but merely makes an interim determination of the elements of water rights for purposes of Administration, pending a final determination by a court of competent jurisdiction.

The second sentence was changed to clarify that Administration under these rules may occur in areas where no Adjudication has been commenced or completed.

The last sentence was added in response to a commentator who pointed out that State Engineer determinations are subject to all courts of competent jurisdiction, an observation particularly apt with respect to areas in which Adjudication has not been commenced.

One commentator asked about the process related to State Engineer determinations. That matter is addressed below under Rules 19.25.4.28 and 19.25.4.29.

- C. Administration:** Distribution by a Water Master of available water supplies within a Water Master District or sub-district, subject to any legal constraints identified by or imposed on the State Engineer, for specific beneficial uses by the owners of Administrable Water Rights that are In-Priority. There are four forms of Administration available to achieve different objectives. These forms are defined below together with subsidiary definitions. A Water Master may, based on the applicable District-Specific regulations, use any of these forms of Administration, depending on the specific legal and physical aspects of the water supplies that are subject to Administration and the existence or absence of agreements for Alternative Administration. Administration may also combine these forms within a Water Master District, as the Water Master

finds appropriate or necessary. The specific form of Administration, or combination of forms of Administration, that will be utilized in each Water Master District will be established through promulgation of District-Specific regulations. Notice of such promulgation will be provided pursuant to NMSA 1978, § 72-2-8 (D).

One commentator requested that Administration should incorporate specifically the protection of In-Priority Administrable water rights acquired and permitted under State law for fish and wildlife habitat from illegal Diversion. The State Engineer believes that these concerns should be addressed as a matter of permit condition.

Several commentators asked how “legal constraints” would be identified. For each area to be administered, the State Engineer will develop legal analyses of what constraints might affect water rights Administration, such as, for example, limitations that might be created by New Mexico’s obligations under interstate stream Compacts. In the course of the development of District-Specific regulations, and through the processes connected to those regulations, interested members of the public may comment upon those analyses.

Several commentators were concerned that it was unclear how it would be decided what forms of Administration would be applied in their areas. These definitions are intended to be used as a broad framework within which those decisions will be made on a area-specific basis. The State Engineer agrees that the process by which those decisions are made should include interested parties from the specific District affected, and result in District-Specific rules. Because that process requires flexibility for definitions to be properly adapted to the needs of specific areas, the broad language of the definitions is acceptable and necessary. Language has been added to make it clear that the specific forms of Administration to be used in each District will be identified in the District-Specific regulations. Extensive opportunity for public input will be provided for during the promulgation of those regulations.

Language was inserted following a comment that it was unclear how the public would learn of the promulgation process of District-Specific regulations.

i. Direct Flow Administration

- a. Direct Flow Water:** All the flow of a stream, including storage reservoir inflows that are legally bypassed through that reservoir, but excluding sources of flow augmentation such as Storage Water releases or Imported Water.
- b. Direct Flow Administration:** Distribution of Direct Flow Water by a Water Master for Diversion and beneficial use, or for Diversion and storage in a reservoir, in accordance with the affected Administrable Water Rights. Direct Flow Administration consists of both protection of available Direct Flow Water for diversion and use by In-Priority Administrable Water Rights, and

protection of Direct Flow Water from Out-of-Priority Diversion. Direct Flow Administration may incorporate changes to the Water Master's determination of which water rights are In-Priority and which are Out-of-Priority on a daily basis, depending on the currently available direct flows.

Changes to these two provisions respond to a request from a commentator to be clearer in their meaning.

ii. Storage Water Administration

- a. Storage Water:** Water stored in a reservoir In-Priority and in accordance with the conditions of an Administrable Water Right and subsequently released from storage. Storage Water does not include Direct Flow Water that is bypassed through a reservoir.
- b. Storage Water Administration:** Administration by a Water Master of the release from reservoirs and subsequent downstream Diversion of Storage Water in accordance with the requirements of the applicable Administrable Water Rights for such release and Diversion. Storage Water Administration includes both the distribution of Storage Water released for the benefit of those having rights to its use, and also the protection of Storage Water releases from Diversion by water right owners having only an Administrable Water Right to Direct Flow Water. Conveyance Losses that occur as a result of the delivery of Storage Water shall be borne by the owner of the applicable Administrable Water Right, and Storage Water Administration shall account for those Conveyance Losses.

For purposes of Administration, Imported Water shall be administered in the same manner as Storage Water; however, Imported Water is subject to 100% depletion. The beneficial use of Imported Water is exclusive in the owner of the right to its use and is not subject to priority call in the basin of use, but its diversion from the basin of origin is subject to Priority Administration in that basin.

These changes respond to requests for clarity and, to requests that Imported Water be separately defined.

One commentator suggested that Imported Water be defined as the property of the importer of the water and not subject to Priority Administration in the basin into which it is exported. If Imported Water were defined as the property of the importer, then, for example, all San Juan/Chama water might be construed to belong to the United States

Bureau of Reclamation, which is incorrect. Further, while Imported Water might not be subject to Priority Administration, it is subject to Administration for the prevention of Waste, and to ensure that no more water is diverted than the right allows, including considerations of Conveyance Loss.

Several commentators noted correctly that the State Engineer, consistent with State water law, considers that owners of water rights to Direct Flow Water may not divert Storage Water from a stream. This is the State Engineer's view of the law, and will remain in the general regulations.

One commentator pointed out that Imported Water should not be subject to Priority Administration. The language was changed to appropriately accommodate that comment.

One commentator pointed out that, in some basins, Direct Flow and Storage Water have never been separately accounted for, nor could they with any precision. These matters will be addressed in District-Specific regulations.

One commentator pointed out that Storage Water released from storage should not get a free ride on Direct Flow Water, but should have to bear appropriate Conveyance Losses. Language has been added to accommodate this suggestion.

iii. Depletion Limit Administration

- a. Depletion Limit:** The amount of surface water that is available for Depletion by both surface water rights and hydrologically connected groundwater rights within a Water Master District or sub-district, taking into account interstate stream Compact compliance requirements. Taking into account the conjunctive nature of surface and groundwater, the Depletion Limit may be greater than, or less than, the physically available surface water supply.

One commentator asked how the Depletion Limit could be greater than the available surface water supply. There are two possible scenarios: 1) the actual established cumulative depletions from the Diversion and beneficial use of surface water and hydrologically connected ground water actually exceed the water flowing in the stream; or 2) New Mexico's cumulative Depletions exceed the maximum Depletions of the surface flow that New Mexico is allowed by interstate stream Compacts.

- b. Administration Date[s]:** A date, or dates, to be determined by the State Engineer, where Administration within a specific Water Master District is to be in effect for a period of time to be determined by the State Engineer for interstate stream Compact compliance purposes, or to address substantial long-term groundwater effects on surface supply, as expressed in a Depletion

Limit. If an Administration Date is determined and published for a District, no water rights with Priority Dates later than the Administration Date shall be exercised in the absence of a Replacement Plan approved by the State Engineer.

A number of commentators appeared to confuse the Administration Date with the Priority Date of a water right. The Administration Date is the date that establishes the water rights that are junior to it, and are, therefore, Out-of-Priority, in a District subject to Depletion Limit Administration. Neither this provision nor any other provision within these regulations shall be interpreted so as to vest the State Engineer with the authority to change the established Priority Date of any water right.

A suggestion has been made that the State Engineer has the ability to adopt several Administration Dates which could be keyed to varying levels of water supply, so that there could be maximum flexibility to provide water to all water right owners when there is adequate supply without having to re-determine the Date. The State Engineer thinks this might be a good idea, but one that should more appropriately be considered during the promulgation of District-Specific regulations, depending on the circumstances and conditions of specific stream systems.

- c. Depletion Limit Administration:** Administration by a Water Master to curtail water rights with Priority Dates junior to an Administration Date. Such Out-of-Priority rights shall not use water in the absence of a Replacement Plan approved by the State Engineer.

Some commentators have suggested that the State Engineer does not have the power to conduct Depletion Limit Administration. NMSA 1978, § 72-2-9.1 contains an explicit recognition of the need to administer water rights for compliance with interstate stream Compacts. The purpose of Depletion Limit Administration is to implement effective Administration for Compact compliance by adoption of an Administration Date that will maintain or re-establish the hydrologic balance within a District.

Some commentators suggested that, if water rights are to be administered to comply with interstate stream Compacts, the use of water rights must be curtailed in accordance with priority. The State Engineer does not contemplate administering water rights other than by priority. This method of Administration is to establish water supply availability for Diversion and beneficial use based upon seniority of Priority Date.

- d. Replacement Water:** Water acquired temporarily by an Out-of-Priority Administrable Water Right from an In-Priority Administrable Water Right pursuant to a Replacement Plan for the purpose of offsetting surface water Depletions attributable to an Out-of-Priority Administrable Water Right and preventing impairment of In-Priority Administrable Water Rights.

- e. **Replacement Plan:** A plan submitted by the owner(s) of Administrable Water Rights, and approved by the State Engineer for no more than two consecutive years, subject to renewal, for the purpose of offsetting Depletions attributable to Out-of-Priority Administrable Water Rights.

- iv. **Alternative Administration:** Administration that is based on water sharing agreement among affected water right owners, and that is acceptable to the State Engineer. Such Administration may include voluntary shortage sharing such as, but not limited to, percentage division or *pro rata* allocation, rotation of water use, and reduced diversions. Where there is an existing shortage sharing agreement between acequias or community ditches confirmed on the first Monday of April of each year in accordance with NMSA 1978, § 73-2-47 or thereafter as necessary, it shall be recognized in the District-Specific regulations, but nothing in this section shall be taken to impair the authority of the State Engineer and Water Master to regulate the distribution of water from the various stream systems of the State to the ditches and irrigation systems entitled to water therefrom under the provisions of this article. Alternative Administration may be substituted for any of the forms of Administration above described.

Several commentators pointed out that the fourth form of Administration had inadvertently been treated as a separate definition. This change corrects that error. The added language addresses the concern of one commentator that only affected water right owners should be eligible to negotiate Alternative Administration

One commentator asserted that the State Engineer did not have the power to enter into private agreements. Neither the definition nor any provisions for Administration in accordance with Alternative Administration below require the State Engineer to do so: he must find the agreement acceptable in his regulatory capacity.

A number of commentators pointed out that acequias and other organizations have traditionally shared shortages or allocated water based on need, and that these local agreements should be honored. The State Engineer would like to point out that the main reason for including Alternative Administration was to provide the opportunity to accommodate such arrangements. The State Engineer encourages these arrangements and prefers to administer on the basis of Alternative Administration arrangements so long as he is certain that all water right priorities in the District are protected. The Water Master is specifically empowered to administer based upon such alternative forms of Administration. Moreover, Rule 19.4.25.19 (No Change in Ditch Management Systems) specifically provides that these rules shall not affect internal management practices of Projects, including acequias. The above rule has been revised to explicitly reference voluntary shortage sharing agreements.

- D. Administration Date[s]:** See definition under 19.25.4.9 (C), Administration above.

Several commentators suggested that the definition of Administration Date should not be located under the definition of Depletion Limit Administration as it is difficult to find, but should be a stand-alone definition. This change should make it easier to find the definition. The use of Administrative Dates is limited to the implementation of Depletion Limit Administration.

- E. Consumptive Irrigation Requirement:** See definition under 19.25.4.9 (S) (i), Irrigation Water Requirements below.

- F. Consumptive Use:** The quantity of water beneficially consumed during the application of water to beneficial use.

Several commentators noted that some of the definitions in these regulations differed from definitions in the proposed surface water regulations under consideration for adoption by the State Engineer. In response to these comments, the State Engineer has, for the most part, conformed these definitions to those in the proposed surface water regulations. In a few cases, such as this one, the surface water regulations provided more narrative detail than is required for these regulations.

- G. Conveyance Loss:** The quantity of water that is effectively removed from a stream system due to seepage or evapotranspiration as calculated between a measurement device used to measure the available water supply and a downstream point of diversion for an Administrable Water Right or a downstream point of delivery.

- H. Depletion:** That consumptively used portion of a Diversion that has been evaporated, transpired, incorporated into crops or products or used by livestock, or man-made consumptive uses such as, but not limited to, municipal, industrial and domestic uses, or otherwise removed from, and not returned to, the available water supply, including all incidental depletions associated with the beneficial use. Depletions shall include, but not be limited to:

- i.** Any increase in Depletions resulting from construction projects for the restoration and maintenance of fish and wildlife habitat that result in increased depletion of water over that amount that would have been depleted had there been no restoration. Such projects are subject to the permitting authority of the State Engineer.
- ii.** Any increase in Depletions resulting from changes in reservoir operations that increase the amount of water depleted over that amount which would have been depleted had there been no change

in the reservoir's operations; such as, but not limited to, changes in historic release patterns. Such changes are subject to the permitting authority of the State Engineer.

Some changes were made in response to a comment that the original definition of depletion might be construed too narrowly.

Additional language was added at the suggestion of the agricultural community that further clarifies that all Depletions are subject to Priority Administration, not just those of agricultural users.

One commentator requested clarification of the regulations to recognize Administration of river flows for fish and wildlife purposes. The changes address this request. The Depletions described in 19.25.4.9(H)(i) and (ii), above, are limited by and subject to the permitting authority of the State Engineer and will be administered in accordance with the State Engineer's surface water regulations and in accordance with the permit and any conditions thereto.

- I. Depletion Limit:** See definition under 19.25.4.9 (C), Administration above.
- J. Depletion Limit Administration:** See definition under 19.25.4.9 (C), Administration above.
- K. Direct Flow Administration:** See definition under 19.25.4.9 (C), Administration above.
- L. Direct Flow Water:** See definition under 19.25.4.9 (C), Administration above.
- M. District:** When used in these regulations, means Water Master District.
- N. Diversion:** The quantity of water taken from a ground or surface water source by a constructed structure or Project to supply a beneficial use.

One commentator requested clarification in the Diversion definition. This change, and associated changes in the definition of Project, clarify the State Engineer's intentions with regard to his regulatory control regarding increases in Depletions.

- O. Expedited Marketing and Leasing:** Any process within a District in which water rights are subject to Priority Administration whereby changes in use or place of use of water may be effected so as to minimize costly and time-consuming administrative procedures. Expedited Marketing and Leasing processes may include, but are not limited to, expedited permit proceedings before the State Engineer through the use of the appropriate hydrologic models adopted by the State Engineer for the District. NMSA

1978, § 72-2-9.1(C) expressly provides that rules and regulations concerning Expedited Marketing and Leasing “shall not apply to acequias or community ditches or to water rights served by an acequia or community ditch.”

One commentator asked how the exemption for acequias would apply in a situation in which part of a water right owner’s supply comes from acequias and part of it does not. This subject is a matter for area-specific negotiation, but an initial answer is that the exemption means that, where water has been obtained from an acequia, neither Replacement Plans nor any other Expedited Marketing and Leasing strategy can be applied to that water.

- P. Farm Delivery Requirement:** See definition under 19.25.4.9 (S) (i), Irrigation Water Requirements, below.
- Q. Imported Water:** Water removed from, and not returned to, its hydrologic basin of origin delivered for use in a different basin or drainage.
- R. In-Priority:** If the currently available Direct Flow Water is sufficient for distribution to a specific use Administrable Water Right, then that right is In-Priority. If a water right has a priority date that is senior to the applicable Administration Date, that water right is In-Priority. In the case of Storage Water, that amount of the total inflow to a reservoir that exceeds the volume of water that must flow through the dam to serve senior Administrable Water Rights to Direct Flow Water is In-Priority for Storage.

One commentator asserted that the amount of water stored in a year must be limited to the amount of water beneficially used in that year by the Storage Water right owners. That is not the case.

- S. Irrigation Water Requirements:** Irrigation Water Requirements can be expressed in several ways, depending on circumstances:
 - i. Consumptive Irrigation Requirement (CIR):** The quantity of irrigation water, expressed as a depth or volume, exclusive of effective rainfall, that is consumptively used by plants or is evaporated from the soil surface during one calendar year. The CIR may be numerically determined by subtracting effective rainfall from the Consumptive Use.
 - ii. Farm Delivery Requirement:** The quantity of water, exclusive of effective rainfall, that is delivered to the farm head gate or is diverted from a source of water that originates on the farm itself, such as a well or spring, to satisfy the Consumptive Irrigation

Requirement of crops grown on a farm during the irrigation accounting year, or as otherwise provided by permit.

- iii. **Project Diversion Requirement:** The annual quantity of water necessary to be diverted from a source of water to satisfy the Farm Delivery Requirement and to account for off-farm ditch conveyance delivery losses during the irrigation accounting year.

Changes were made in response to several commentators' observation that some of the definitions of these regulations differed from definitions in the surface water regulations. Some simplifications of the definitions in the surface water regulations have been introduced for these general regulations.

Some commentators voiced concern that Project Diversion Requirements will be determined based on no on-the-ground knowledge about the practicalities of water management in a localized setting. The State Engineer understands the concern. Determinations about the appropriate Project Delivery Requirement will be District-Specific and will be flexibly addressed by the Water Master in consultation with local interests. Furthermore, the State Engineer anticipates that appointment of a Water Master prior to promulgation of District-Specific regulations will provide practical experience with deliveries and actual Conveyance Losses so that the District-Specific regulations will reflect that experience.

- T. **Measuring Devices:** Gauging or metering devices, installed and operated as required by the State Engineer.
- U. **Out-of-Priority:** If the currently available Direct Flow Water is insufficient to serve all Administrable Water Rights, and therefore an Administration Date is adopted or a priority call placed, then those Administrable Water Rights are Out-of-Priority that have a priority date junior to the applicable Administration Date or are junior to the priority of the water right placing the priority call. In the case of Storage Water, if the inflow to a reservoir is equal to, or less than, the quantity of water necessary to serve downstream senior Administrable Water Rights from the Direct Flow, then such Direct Flow must be bypassed and the right to impound and store water in that reservoir is Out-of-Priority. Water that was stored In-Priority is not available for use except by those with Administrable Water Rights to the use of the Storage Water.

One commentator seemed to be saying that something in this definition prevented a water administrator from taking tributary flows into account. It is not clear what was meant.

- V. **Priority Administration:** all the forms of Administration defined under Administration are methods of Priority Administration. Priority Administration involves any administrative scheme implemented by a Water Master in accordance with the priority dates of Administrable

Water Rights, including Direct Flow, Storage Water and Depletion Limit Administration. See, generally, Administration.

- W. Project:** Any man-made works intended physically to control or to use water for a beneficial purpose of use.
- X. Replacement Water:** See definition under 19.25.4.9 (C), Administration above.
- Y. Replacement Plan:** See definition under 19.25.4.9 (C), Administration above.
- Z. Return Flow:** That amount of diverted water returned to the available water supply.
- AA. State Engineer:** The New Mexico State Engineer, or his designated appointee.
- BB. Storage Water:** See definition under 19.25.4.9 (C), Administration above.
- CC. Storage Water Administration:** See definition under 19.25.4.9 (C), Administration above.
- DD. Waste:** Diversion of water in excess of that amount reasonably necessary to supply a beneficial use in accordance with accepted water use practices that are consistent with considerations of water conservation.

Several commentators suggested that the definition of Waste be made more specific. The language has been revised slightly to incorporate the concept of water conservation. The State Engineer believes that this general definition provides adequate guidance to the Water Master, who must exercise his judgment to determine whether a Diversion is entirely beneficially used or is excessive in that some or all of the water is not reasonably necessary to supply particular beneficial uses and therefore includes Waste.

One commentator expressed concern that the concept of water conservation inserted in the definition of Waste might force water right owners to make do with less water than is feasible for good agricultural practices. Paragraphs C, D, and E of Rule 19.25.4.18 have been inserted precisely to alleviate those concerns.

An additional concern was expressed about the conservation language inserted above that the State Engineer might require the installation of drip irrigation measures. The State Engineer has no power to require drip irrigation.

One commentator suggested that, under this definition of Waste, the water kept in the streambed for endangered species would be Waste. But such water is not diverted and therefore not part of this definition.

- EE. Water Master:** An official duly appointed by, and under the general supervision of, the State Engineer, pursuant to NMSA 1978, § 72-3-2, who shall have immediate charge of the Diversions and distribution of waters in the Water Master District.
- FF. Water Master District:** An area designated as a water district or sub-district by the State Engineer for purposes of Administration, as provided in NMSA 1978, § 72-3-1.
- GG. Water Master District Manager:** The State Engineer District Supervisor is the manager of any Water Master District within his particular State Engineer District and the direct supervisor of the Water Master.

19.25.4.10 USE OF THESE RULES AND REGULATIONS: These rules and regulations provide the framework for the promulgation of specific Water Master District rules and regulations.

New provision, upon State Engineer initiative, to clarify the meaning or operation of these rules.

19.25.4.11 STATE ENGINEER ADOPTION OF DISTRICT-SPECIFIC RULES AND REGULATIONS: For every District in which water rights Administration is requested, or the State Engineer determines in the performance of his duties under NMSA 1978, § 72-2-1 that water rights Administration is required for the economical and satisfactory apportionment of water, the State Engineer shall adopt rules and regulations, pursuant to NMSA 1978, § 72-2-8 (D), specific to the Water Master District, which incorporate and adapt the provisions of these rules and regulations to the needs of the specific District.

New provision, upon State Engineer initiative, to clarify the meaning or operation of these rules.

One commentator suggested that advisory committees composed of major water right owners should be formed during the promulgation of District-Specific regulations. The State Engineer believes that this may be a good idea in some Districts. He will make decisions about this matter on a case-by-case basis depending on the specific circumstances of each District.

19.25.4.12 STATE ENGINEER AUTHORITY TO CREATE WATER MASTER DISTRICTS AND APPOINT WATER MASTERS: The State Engineer may create Water Master Districts and appoint Water Masters in any drainage areas of the State pursuant to NMSA 1978, § 72-3-1 through 5 and these regulations. The Water Master District Manager shall provide the Water Master with guidelines for Administration,

including his determination, for purposes of Administration, of all Administrable Water Rights within the Water Master District. Water Master guidelines shall be in the form of a Water Master manual applicable to each Water Master District or sub-district. Comments from the public shall be taken and considered prior to finalizing the Water Master manuals. Notice shall be provided in accordance with NMSA 1978, § 72-2-8 (D). The State Engineer may administer water rights pursuant to a draft Water Master manual for a specific period of time, which will be determined in the District-Specific regulations, prior to finalizing a manual so that the adopted manual will be based upon actual experience and the collective comments of the water right owners in the District.

The change emphasizes that the Water Master District Manager's determination of the elements of water rights is a measure for Administrative purposes, and is not an Adjudication of the water right.

Some commentators asked about the process for the Water Master guidelines and how appeals from any decisions may be made. Language has been added to provide for public input prior to finalization of Water Master manuals and to provide for trial use of the guidelines contained in a manual after receipt and consideration of comments, but prior to finalizing a specific manual. The purpose of the trial period is to gain experience in the field and to obtain the benefit of input by water right owners in the affected District. All acts or failures to act on the part of the State Engineer are subject to appellate review under NMSA 1978, § 72-7-1.

One commentator expressed concern that the Water Master, while collecting experience in the field that would ultimately benefit the District-Specific regulations, might also be making policy on the fly in advance of the actual promulgation process. The commentator stated that the Water Master had so much power that his powers should be quite limited before District-Specific regulations are actually promulgated. The State Engineer envisions that, in most circumstances, the Water Master will begin his tenure by overseeing installation of measuring devices and learning local conditions for a period of time. However, any policies that will be incorporated into District-Specific regulations as a result of the Water Master's suggestions are subject to review and extensive comment by the public during the formal promulgation process. The addition of a District Manager at paragraph at Rule 19.25.4.9 (GG), above, will provide any checks and balances necessary to prevent such a situation from arising.

In addition, the State Engineer may, as warranted, form an advisory committee composed of major water right owners representing various purposes of use in a given District, which will assist in the review process of the draft Water Master manual to achieve a balanced manual.

19.25.4.13 CREATION OF A WATER MASTER DISTRICT: The State Engineer may create Water Master Districts within the State, provided that:

- A. the State Engineer finds that the creation of such a Water Master District is necessary for the economical and satisfactory Administration of water;

- B.** the boundaries of the Water Master Districts are in conformity with drainage areas as defined by the State Engineer;
- C.** the Water Master Districts are designated by names; and
- D.** as far as possible, the Water Master Districts comprise one or more stream systems or stream reaches, including hydrologically connected groundwater, as defined by the State Engineer.

Several commentators suggested that the statutory provisions governing the funding of the Water Master be included in the regulations. The State Engineer is in discussions with various counties that might be affected by water rights Administration, and prefers to await a clear need to elaborate on the statutory provisions.

19.25.4.14 CHANGING A WATER MASTER DISTRICT: Water Master Districts may be changed from time to time, as may be necessary in the opinion of the State Engineer, for the economical and satisfactory apportionment of water.

One commentator requested that the statutory phrase “economical and satisfactory” be defined in the regulations. It is not clear, however, under what circumstances the phrase might be applied. The State Engineer prefers to wait upon facts.

19.25.4.15 CREATION OF WATER MASTER SUBDISTRICTS: When, in his opinion, it shall be in the best interests of the State and the owners of water rights within any stream system within the State, the State Engineer may divide Water Master Districts further into sub-districts, each of which shall be designated by a distinct name.

One commentator pointed out that sub-districts could not impair each other. This requirement is inherent in the best interests of the State.

19.25.4.16 APPOINTMENT OF A WATER MASTER: Where the State Engineer has created a Water Master District, the State Engineer shall:

- A.** Appoint a Water Master for such District upon the written application of a majority of the water right owners of any Water Master District; or
- B.** Appoint a Water Master to administer the Water Master District and sub-districts where the State Engineer finds that the public safety or interests of the State or water right owners in any Water Master District in the State require the appointment of a Water Master. Where a Water Master has been appointed pursuant to such a finding, he may be appointed on either a temporary or a permanent basis.

One commentator asked about the process for appointing a Water Master. As discussed above, the State Engineer expects that, ordinarily, the appointment of a Water Master

will be pursuant to a request for Administration from a majority of the water right owners in the District. It should be noted that, where the water right owners of a District request Administration, the State Engineer will conduct Administration pursuant to these regulations and the appropriate District-Specific regulations and not in an ad hoc fashion or for the benefit of only one, or a small number of, water right owners. The State Engineer reserves the right to appoint a Water Master on his own initiative where the statutory standards for that appointment are met.

19.25.4.17 GENERAL AUTHORITY OF A WATER MASTER: The Water Master shall have immediate charge of the Administration of waters within a Water Master District as necessary to protect the public safety and the interests of water right owners in a District or for the economic and satisfactory apportionment of water to all Administrable Water Rights from the available water supply, and shall so regulate and control the waters of the District as to prevent Waste. Administration implemented by the Water Master may be Direct Flow Administration, Storage Water Administration, Depletion Limit Administration, Alternative Administration, or any combination thereof, as defined by District-Specific regulations, depending on the physical and legal circumstances affecting the water resources and Administrable Water Rights of the Water Master District. The Water Master may, as necessary, to effect Administration:

- A.** determine the available supply of water from time to time, considering Conveyance Losses, as appropriate and necessary for effective Administration;
- B.** implement Administration of the Storage, Diversion, and use of the waters of the Water Master District in accordance with the Administrable Water Rights;

Several commentators were troubled by language in an earlier draft of the regulations regarding maximizing beneficial use, concerned that it might be misread to allow the Water Master to prefer certain types of beneficial use to other types, or increase efficiencies to the extent of increasing depletions. The language was unnecessary and has been removed.

- C.** administer the Diversion of the waters of the Water Master District in priority or under an Alternative Administration;
- D.** administer Diversions of the waters of the Water Master District in accordance with any Administration Date declared by the State Engineer;
- E.** facilitate the formation and operation of water right owner groups to, among other things, improve the management of water supplies, water conservation, cooperation among water right owners and Administration;

- F.** facilitate the negotiation and implementation of Alternative Administration agreements, including cooperative agreements, for sharing available water supplies;
- G.** adjust headgates and restrict Diversions or pumping as required to administer water in accordance with principles of prior appropriation and beneficial use, to prevent the illegal use of water, and to prevent Waste; and
- H.** exercise all such authority as is required to accomplish effective water rights Administration.

Several commentators were concerned that this language was so broad as to give the Water Master unlimited discretion. The language is a catchall provision that reflects the State Engineer's powers as defined in NMSA 1978, § 72-2-1, making it clear that he must perform all duties as may be required for effective water rights Administration. This authority is not a matter of expansive discretion. Rather, the exercise of this authority is tied to what is required for Administration. All Water Master determinations are, however, subject to objection and State Engineer review pursuant to Rule 19.25.4.24.

One commentator suggested that there was some redundancy in the provisions of this section. There may be overlap, but the State Engineer sees no harm in including all of the provisions.

One commentator suggested that the authority of the Water Master conflicts with State law provisions that give irrigation districts authority over the allocation and delivery of water within a United States Reclamation Project. Such situations will be addressed in District-Specific regulations.

The same commentator stated that the rules need to provide a mechanism whereby some of the Water Master duties can be delegated to other public entities that already perform these or similar functions. The interplay of Water Master duties with those of already existing water managing officials will be addressed in District-Specific regulations.

One commentator claimed that the Water Master statutes only contemplate that the Water Master prevents Waste, and that there is no statutory authority for State Engineer management of water under these rules. The State Engineer disagrees. The State Engineer reads NMSA 1978, §§ 72-3-1 and 72-3-2 to also provide that he is authorized to administer for the economical and satisfactory apportionment of water or when, in his opinion, the public safety or the interests of water right owners in a District require it.

19.15.4.18 SPECIFIC DUTIES OF A WATER MASTER: Taking into account the available water supply in general and considering Conveyance Losses, the Water Master shall implement Administration in the District. The Water Master is authorized to do the following, as may be provided by District-Specific rules and regulations and as necessary to effect Administration:

- A. determine the physical capacity of Diversion and delivery structures for each point of Diversion expressed as a maximum rate of flow in cubic feet per second (cfs);
- B. determine the maximum rate of flow, expressed in cfs, required to meet the total demand for Administrable Water Rights served by that point of diversion;

One commentator raised specific questions regarding the parameters of the determinations listed in the first two provisions of this section. Such matters should be considered during promulgation of District-Specific regulations.

- C. take into account water needed to provide for adequate hydraulic pressure to ensure maximum irrigation efficiency and charge of the system;
- D. take into account water needed for additional uses such as, but not limited to, silt-flushing;
- E. during times of high stream flow, when there are no legal constraints imposed upon the physical Administration of the available water supply, relax limits on the amount of water that may be diverted in order that the delivery system might operate more efficiently, except that under no circumstances may the total CIR of water rights served from the Project increase;

One commenter suggested additional language to allow the use of additional water for hydraulic pressure during high flow periods when doing so would result in greater irrigation system efficiency; and for other beneficial uses such as silt flushing, as warranted in specific situations. Additional language in C. through E. above accommodates these suggestions.

- F. with respect to all agricultural uses, require the designation by the water right owner of land to be irrigated in a particular season and verify the irrigability of that land;

One commentator suggested that the State Engineer, as the holder of the records, provide this information. But the information is not documentary, it requires field inspection.

Another commentator suggested that the Water Master does not have the power to determine the irrigability of land. The State Engineer disagrees. Putting water on land that is not irrigable constitutes Waste.

One commenter took issue with the apparent subjectivity of the Water Master's determination that land is not irrigable. The Water Master is an employee of the Office of the State Engineer with specific expertise in such matters. He must be able to perform

all duties as may be required for effective water rights Administration. All Water Master determinations are, however, subject to objection and State Engineer review pursuant to Rule 19.25.4.24.

- G.** ensure that water Diversions do not exceed the amount needed to serve Administrable Water Rights, except as provided in C through E, above;
- H.** administer Direct Flow Water for delivery to In-Priority Administrable Water Rights, curtail Diversions by Out-of-Priority Administrable Water Rights, ensure the delivery of Storage Water to those having rights to its use, and protect Storage Water releases from Diversion by those without rights to its use;
- I.** establish protocols for communication and exchange of information with water right owners as required for Administration;
- J.** maintain accurate records of all Administration activities, including meter readings, and establish a protocol for the inspection and copying of such records, at the requestor's expense;
- K.** identify Waste and illegal use of water, including re-Diversion and reuse of Return Flows other than as specifically provided for in an Administrable Water Right;

One commentator questioned the handling of Return Flows in this subsection. The State Engineer believes that this language gives flexibility for specifics to be defined in District-Specific regulations.

- L.** upon a determination that a use is illegal or constitutes Waste, cap, lock or otherwise temporarily disable any mechanism for illegal Diversion. No permanent disablement may occur without hearing before the State Engineer;
- M.** where he has determined that a facility must be permanently disabled, issue an order directing that the Diversion be permanently disabled, which order shall be heard by the State Engineer as provided below. Pending review of the Water Master's order, the temporary disablement of the disputed Diversion shall remain in place; and

At the suggestion of one commentator that permanent (as opposed to temporary) disablement without a hearing violated due process, changes to the above two subsections are designed to make it clear that permanent disablement will not happen without hearing before the State Engineer, so that the issue can then be appealed to district court under NMSA 1978, § 72-7-1.

- N.** perform all such duties as are required to accomplish Administration.

19.25.4.19 NO CHANGE IN DITCH SYSTEM MANAGEMENT: Except as required in the performance of the Water Master's duties to regulate the distribution of water from the various stream systems of the State to the points of Diversion of ditches and irrigation systems entitled to water therefrom, these rules and regulations shall not be construed to affect the internal management of Projects, including acequias or community ditches and other water delivery systems, in accordance with NMSA 1978, § 72-9-2, which provides for the distribution of water from the ditches and acequias according to local or community customs, rules and regulations that have been properly adopted. The State Engineer's authority, and that of his Water Master, to regulate the Diversion of water from the source to a ditch or acequia is unaffected by either NMSA 1978, § 72-9-2 or this provision.

Several commentators suggested that the original language was unclear in the extent to which the Water Master might interfere internally with the operations of an acequia or ditch. The added language tracks NMSA 1978, § 72-9-2 in defining the authority of the Water Master with respect to ditches. The State Engineer will not interfere with the internal distribution of surface water in acequias and community ditches. The State Engineer will maintain control over the gross Diversion to these organizations to ensure that they receive the water they are entitled to. In addition, the State Engineer retains responsibility for Administration of all groundwater pumping.

One commentator used the occasion of this provision to express a general concern that the Water Master had too much authority, so much as to be potentially in conflict with the specific authority of other water management officials in the commentator's area. It may be appropriate for the Water Masters to have different powers in different areas, which matter should be discussed in the development of District-Specific regulations.

19.25.4.20 WATER MASTER SUPERVISION OF MEASUREMENT: In all Districts in which Water Masters are appointed, Water Masters shall have the authority to supervise the measurement of water in order to conduct Administration.

19.25.4.21 HEADGATES AND MEASURING DEVICES REQUIRED: The State Engineer shall determine those points of Diversion from, and Return Flow discharge to, the stream system where Measuring Devices are necessary for the efficient Administration of water within the Water Master District. The owners of private ditches, the commissioners of acequias or community ditches, the boards of irrigation and conservancy districts, and all other owners of Administrable Water Rights and operators of Projects that are notified by the Water Master of the need to comply with this Rule shall cause to be installed and maintained headgates and Measuring Devices of types and at locations acceptable to the Water Master, as may be provided by District-Specific rules and regulations, once promulgated and adopted by the State Engineer and ordered by the State Engineer, or as otherwise ordered pursuant to NMSA 1978, § 72-2-8 (B)(3).

Several commentators are concerned about funding for required measuring devices. While the State Engineer cannot, through regulations, promise to assist with funding, the State Engineer will take into account the availability of funding to assist water right or

Project owners to install whatever Measuring Devices are required. In this context, it is important to note, however, that the State Engineer has broad powers to order the installation of Measuring Devices. NMSA 1978, § 72-5-20 requires that every ditch owner shall, when requested to do so by the State Engineer, construct and maintain a substantial headgate at the point where the water is diverted. The State Engineer may refuse to deliver water to any water right owner who has not complied with this requirement and it is a misdemeanor to continue to take water after refusal by the State Engineer to deliver water.

One commentator incorrectly concluded that these regulations require the measurement of all farm deliveries within a Water Master District. That is not the case. As stated in Rule 19.25.4.26, the State Engineer does not intend that the Water Master affect the internal management of Projects, including irrigation and conservancy district and acequias and community ditches. The State Engineer may regulate Diversions from stream systems to serve Projects and may presume that Diversions are uniformly distributed on a per-acre basis to all farms served by a Project in order to administer the conjunctive use limits of groundwater and surface water.

On a related note, some commentators suggested that the State Engineer should supply Measuring Devices. The State Engineer cannot supply meters, he can only specify the type of meter required, and attempt to assist with potential funding sources.

19.25.4.22 WATER TO BE DIVERTED OR DELIVERED THAT WILL BE PLACED TO ACTUAL BENEFICIAL USE; ESTABLISHING BENEFICIAL USE REQUIREMENTS: If a particular water right is In-Priority, the Water Master shall allow the Diversion or delivery of water that will be put to actual beneficial use without Waste. The Water Master shall make such investigations, including inspections of lands, well records, diversion records and municipal records, as are necessary to determine, for purposes of Administration, the current beneficial use needs for all types of water uses under Administrable Water Rights during periods of Priority Administration. Water deliveries for irrigation uses shall not be made unless the land on which water will be used has an Administrable Water Right as determined by the State Engineer. Nothing in this provision shall be construed to allow the Water Master to prefer some beneficial uses to other beneficial uses on any grounds other than priority, unless he is doing so pursuant to local agreements through Alternative Administration. Such determination shall not affect the maximum legal entitlement to water.

In response to several comments, see I.D, above, this provision has been edited to clarify that the Water Master's duty to prevent Waste applies to all types of water rights, not just agricultural water rights, and that the Water Master has no power to set up a preference hierarchy of beneficial uses, or to attempt to enforce, as some commentators expressed it, "best management practices" in water use.

Here, too, several commentators asked about due process, and suggested language addressing that concern. Rule 19.25.4.24 addresses the process for objections from Water Master decisions.

One commentator suggested that the State Engineer must address how fallowed land will be monitored to allow for changes in beneficial use. But there is no question of a loss of a water right because water is not beneficially used in a particular year; rather, the provision holds the water right owner to the real beneficial use requirement of his or her particular use in a given year.

One commentator suggested that the Water Master should not have the power to make a determination whether a tract has an Administrable Water Right. The State Engineer disagrees. The State Engineer must make such threshold determinations for purposes of Administration. These determinations are similar to the threshold determinations the State Engineer must make, in the context of evaluating permit applications to change the place and/or purpose of use of a water right, as to what a court would find regarding the existence and extent of a water right, before allowing the change. These determinations are subject to challenge in court.

19.25.4.23 FARM DELIVERY AND PROJECT DIVERSION REQUIREMENT DETERMINATIONS: In the absence of applicable court orders or Adjudication decrees, the State Engineer shall, prior to Administration, make a determination of Farm Delivery and Project Diversion Requirements in Water Master Districts that are subject to Administration. The Project Diversion Requirement may be expressed as a maximum rate of Diversion, an annual maximum diverted volume of water for a specified use, or both. The State Engineer may modify these determinations based on new information, including field experience of the Water Master. None of the requirements of this provision shall apply if a determination adequate for effective water Administration has been made by a court of competent jurisdiction.

This change responds to several commentators expressing concern about the interplay between State Engineer interim evidentiary determinations and court decrees. A few commentators had questions about the application of this provision in specific areas, which questions should be addressed at the time of the development of District-Specific regulations.

Some commentators expressed concerns that the definition of Project Diversion Requirement should not be so constraining as to tie the Water Master's hands. The State Engineer believes that the definition allows for incorporation of additional concepts into the District-Specific regulations so as to allow for maximum efficiency and flexibility for irrigation, depending on the specific circumstances of each District.

One commentator thought it might be more realistic to arbitrate something among interested parties. That may be so, and can be explored as part of Alternative Administration.

19.25.4.24 OBJECTIONS TO, AND STATE ENGINEER REVIEW OF, WATER MASTER DECISIONS: Objections to any act or failure to act of a Water Master shall be made in the first instance informally, or in writing, to the Water Master who shall take

prompt action on the objection if he determines that any action is warranted. If the Water Master fails to resolve the objection, further objections shall be made to the State Engineer, who shall hear the matter in accordance with NMSA 1978, § 72-3-3.

Streamlined processes for the prompt hearing of appeals from Water Master decisions shall be set up for each Water Master District. Filing of an objection to an act or failure to act by the Water Master will not stay the Water Master's action or failure to act, or his authority to administer the water right, pending resolution of the objection.

This Rule has been substantially revised in response to several comments that 1) State Engineer review should be pursuant to Section 72-3-3, not 72-2-16; 2) that there should be some provision for prompt hearing of such objections as required by the statute; 3) and pursuant to staff comments that these objections could be heard and resolved more efficiently and rapidly in the first instance informally by the Water Master in the field.

19.25.4.25 WATER MASTER ADMINISTRATION OF AN ADMINISTRATION DATE: In the event that the State Engineer determines an Administration Date for a Water Master District, the Water Master shall oversee the curtailment of all Administrable Water Rights junior to the Administration Date. The Water Master shall not allow Out-of-Priority use in the absence of a Replacement Plan approved by the State Engineer.

19.25.4.26 WATER MASTER ENTRY ON PRIVATE OR PUBLIC LAND: Pursuant to NMSA 1978, § 72-8-1, the Water Master shall have the right to enter private or public lands in order to:

- A.** install, inspect, read, and adjust Measuring Devices and require the replacement or repair of such Measuring Devices;
- B.** inspect and adjust headgates or require the repair of such headgates;
- C.** make seepage evaluations;
- D.** conduct inspections of canals, wells, wasteways or sluiceways;
- E.** prevent Waste and prevent illegal water use;
- F.** cap, lock or otherwise temporarily disable any mechanism for illegal Diversion; and
- G.** perform such other duties as are required to accomplish Administration.

One commentator indicated that the Water Master might need to inspect municipal or irrigation district facilities. Therefore, the rule was changed to include public lands as well as private ones.

One commentator opined that NMSA 1978, § 72-8-1 did not provide sufficient authority to support the actions listed in this Rule. The statute provides, in part, that: "The state

engineer, the water masters and their authorized assistants, and agents may enter upon private property for the performance of their respective duties, doing no unnecessary injury thereto.” The State Engineer believes that the listed actions may be called for in the performance of duties connected to water Administration and are specifically authorized by the statute, without exceptions being made for entry on the lands of acequias and community ditches.

One commentator suggested that water right owners should receive prior notification of the Water Master’s entry on their premises. The State Engineer generally makes every possible effort to provide prior notification of entry on lands, but believes that it is important that the Water Master retain the discretion and authority to enter without prior notification on the lands of a water right owner who may be diverting illegally.

One commentator suggested that it would be a constitutional violation for the Water Master to disable an acequia diversion without any prior notice or opportunity to be heard. The State Engineer believes that the action may be called for in the performance of his duties connected to water rights Administration and that he clearly has the power to do so without prior notice if anyone diverts water in violation of the State Engineer’s Administration. Language has been added, however, to make it clear that permanent disabling of diversion structures will not occur without a hearing before the State Engineer.

19.25.4.27 WATER MASTER REPORTS: Annually, the Water Master shall submit a report including a record of total Diversions and deliveries of Direct Flow Water and Storage Water, as applicable, a statement of expenditures, a list of infrastructure and metering improvements needed or performed, problems encountered, and any other pertinent issues or aspects of Administration. The report shall also address the amount of water needed to supply the requirements of the Water Master District, the amount available, the works which are without their proper supply, the supply required during the period preceding the Water Master’s next regular report and such other information as the State Engineer may require. The report shall be submitted to the State Engineer and be publicly available for inspection and copying, at the requestor’s expense.

This language was added at the suggestion of a commentator to track the language of NMSA 1978, § 72-3-5.

19.25.4.28 ADMINISTRABLE WATER RIGHTS: The Water Master District Manager for each Water Master District will define each Administrable Water Right by its elements as set forth in:

- A. A partial final decree or a final decree entered by an Adjudication court of competent jurisdiction, subject to any State Engineer permit issued subsequent to entry of said Adjudication decree; or, if no decree has been entered, then;

- B.** A subfile order entered by an Adjudication court of competent jurisdiction; or, if no subfile order has been entered, then;
- C.** An Offer of Judgment signed by the defendant in a water rights Adjudication; or, if no Offer of Judgment has been signed, then;
- D.** A hydrographic survey conducted and filed in accordance with NMSA 1978, § 72-4-17 or NMSA 1978, § 72-4-16; or, if no hydrographic survey has been filed, then;

At the suggestion of one commentator, the language was revised to assure that only hydrographic surveys acceptable to the State Engineer may serve as a source of information for determining Administrable Water Rights.

- E.** A license issued by the State Engineer; or, if no license has been issued, then;
- F.** A permit issued by the State Engineer, accompanied by proof of actual beneficial use; and
- G.** Determinations made by the State Engineer based on the best available evidence, consisting of, where available, any filings with the Office of the State Engineer, field or documentary evidence of beneficial use associated with the right including historical aerial photography, diversions records of historical diversions, historical studies containing evidence regarding water use, and data regarding irrigation and water delivery system requirements.
- H.** In all instances where the State Engineer makes determinations of priority based on best available evidence as set forth in sections (A) through G) of this Rule, he shall publish a list of his determination of the water rights in the Water Master District for review and provide opportunity to affected water right owners to informally present evidence. The State Engineer shall hear objections to the Water Master District Manager's determination of an Administrable water right in accordance with NMSA 1978, § 72-2-16. Filing of an objection to the Water Master District Manager's determination of an Administrable water right will not stay the State Engineer's Administration based upon that determination, pending resolution of the objection. Appeals from decisions of the State Engineer shall be in accordance with NMSA 1978, § 72-7-1.

A number of comments were received that determination of Administrable Water Rights by the State Engineer amounted to an impermissible Adjudication of water rights by the State Engineer. The State Engineer's determinations under this provision are not Adjudications of a water right, but are interim measures for administrative purposes only.

Several commentators were concerned that the Rule 19.25.4.28 could be misread to imply that the order of precedence, rather than being a listing of the deference due to certain types of available evidence of a right, reflected instead a comment on the strength or importance of the underlying right itself. This misreading could lead to a possible result that a pre-1907 right which had never been recorded with the Office of the State Engineer, or recognized by a court, would be considered a lesser right than a permitted right, even though the pre-1907 right is, as a matter of priority, the better right. Another commentator raised the question of whether there might not be cases in which the order of precedence would not clearly take into account a case where, for administrative purposes, a permit for a change in a right would take precedence over a subfile order for instance.

The rule, as rewritten, should make it clear that the State Engineer does not intend to establish a hierarchy or order of preference of water rights, only a hierarchy of evidence that he looks to in order to determine the elements of a water right.

One commentator's suggestions as to a possible process, including the suggestion that a provision be added that would prevent Priority Administration before final resolution of Priority Date determination—presumably meaning the final decree of a court on appeal from the State Engineer's interim evidentiary determination—was rejected for the general regulations. New language has been added, however, in 19.25.4.28 (H) to provide for publication of a list of all water right priority dates in the District for review by affected water right owners and informal presentation of evidence, and for appeals pursuant to NMSA1978, § 72-2-16 .

One commentator pointed out that, in a completed Adjudication, the State Engineer should not make any determinations, and NMSA 1978, § 72-2-9.1 should not apply. To the extent that the Adjudication is sufficient for Administration, that is correct. The section has been rewritten to include the possibility, however, that some Adjudications might not be sufficiently complete. In addition, language was added to provide for the possibility of permit action subsequent to final Adjudication of a right.

One commentator suggested the addition of offers of judgment to the list, which suggestion was accepted. The State Engineer sees no value, however, in making special mention of declarations among all the other categories of filings with the Office of the State Engineer.

As discussed above, one commentator has argued that this provision, particularly paragraph G, as written, was unconstitutionally vague under New Mexico case law. The provision has been changed to be specific about exactly what types of evidence may be relied upon in making a best interim evidentiary determination. This specificity should also address the allegation that NMSA 1978, § 72-2-9.1 is unconstitutionally vague, as any possible vagueness is cured in the application of the law through these regulations.

One commentator suggested that acequias and other statutory water distribution entities that are determined to have pre-1907 water rights should be permitted to submit evidence of their water use to the State Engineer who should treat it as prima facie evidence for purposes of determining Administrable Water Rights served by those entities. The State Engineer will accept any evidence submitted, but points out that the statutes already provide for declaration of pre-1907 surface water rights, or pre-basin groundwater rights, by filing a declaration form with the State Engineer. Declarations are in the form of an affidavit and water right owners must attest to their truth. There is no reason, however, why acequias and other water distribution entities could not assist their constituents in filling out these declaration forms and filing them with the State Engineer all at once. Declarations are prima facie evidence that can be rebutted; for that reason, the State Engineer will make his own determination based upon independent investigations as to the validity and extent of those water rights.

19.25.4.29 SUPERSESSON BY A COURT: Any determinations made by the State Engineer for Administration purposes within any District subject to Administration in the absence of a completed Adjudication shall be subject to any decrees issued by an Adjudication court of competent jurisdiction or any court of competent jurisdiction.

These changes are made to emphasize that the State Engineer does not adjudicate water rights under these regulations, and to respond to the observation of some commentators that State Engineer determinations are subject to the decrees of all courts, not just the Adjudication court, so that even in areas in which no Adjudication suit has been filed, the State Engineer is subject to the decrees of a court.

19.25.4.30 ADMINISTRATION BY ADMINISTRATION DATE: The State Engineer may adopt an Administration Date, based on his best professional judgment of the water supply available for consumptive use by water right owners in the Water Master District or for depletion within the State of New Mexico as may be appropriate, and the date on which that Administration Date will be effective, by order in accordance with NMSA 1978, § 72-2-8 (B) (3), for any Water Master District. The State Engineer may revise an Administration Date as necessary to achieve the objectives of these rules and regulations. The State Engineer shall publish the adoption or revision of an Administration Date once a week for two consecutive weeks in two newspapers of general circulation within the Water Master District affected by such adoption or revision. Upon the effective date of an Administrative Date, all Out-of-Priority Administrable Water Rights must cease Diversion, except as provided by an approved Replacement Plan. Determination of an Administration Date shall be ordered to implement Depletion Limit Administration and shall be specifically provided for by the provisions of District-Specific regulations to achieve compliance with an interstate stream Compact; or, in the State Engineer's performance of his duties under NMSA 1978, § 72-2-1 upon further formal State Engineer action pursuant to NMSA 1978, § 72-2-8 for reasons of public safety or the interests of the water right owners in the District.

One commentator suggested that the means by which the public learns of the adoption of an Administration Date should be stated in these regulations. The commentator further

suggested that criteria for how the State Engineer adopts an Administration Date should be spelled out. Language has been inserted to accommodate those concerns.

19.25.4.31 OBJECTION TO, AND STATE ENGINEER REVIEW OF, STATE ENGINEER DETERMINATION OF AN ADMINISTRATION DATE: Owners of Administrable Water Rights are encouraged to resolve objections to the State Engineer's determination of an Administration Date informally with the State Engineer's District Office. If such informal negotiations fail, the State Engineer shall hear objections to his determination of an Administration Date in accordance with NMSA 1978, § 72-2-16. Filing of an objection to an Administration Date will not stay the State Engineer's Administration by Administration Date, pending resolution of the objection. Appeals from decisions of the State Engineer shall be in accordance with NMSA 1978, § 72-7-1.

Several commentators requested that the State Engineer lay out processes for the adoption of an Administration Date, and ensure through those processes that the public has an opportunity to comment on any proposed Administration Date. The new provision above was drafted to accommodate that suggestion.

At the suggestion of staff, the statutory reference to § 72-3-3 was changed to § 72-2-16.

One commentator asked whether objections to the State Engineer's determination of an Administration Date was limited to the owners of Administrable Water Rights in the specific District. These rules and regulations so limit objections to the State Engineer's determination of an Administration Date.

19.25.4.32 APPLICATION FOR APPROVAL OF REPLACEMENT PLANS: Replacement Plans are available only during State Engineer priority Administration of the available water supply to prevent serious and imminent economic harm in response to, and only until water rights are permanently transferred, if necessary. The State Engineer may approve Replacement Plans based on the adopted Generalized Hydrologic Analysis that, in his professional judgment, provide sufficient Replacement Water to fully offset Depletions to surface waters caused by Out-of-Priority Diversions in order to prevent impairment of senior water right owners by the junior water right owner that would otherwise be Out-of-Priority. Replacement Plans may be approved temporarily until permanent transfer of water is effected for water right owners who are likely to face permanent curtailment, or for limited periods when a water right owner is not likely to face permanent curtailment. The owner of an Out-of-Priority Administrable Water Right that is subject to Administration in a Water District may submit to the State Engineer an application for approval of a Replacement Plan. The application shall contain the following information:

- A. the name and address of the applicant;
- B. the location, amount and Priority Date of applicant's existing Administrable Water Right;

- C. each source of Replacement Water and the amount of historic Consumptive Use related to the water right that is the source of Replacement Water, to be established by documentation satisfactory to the State Engineer;
- D. an estimate of the amount of water to be diverted by the applicant;
- E. a map acceptable to the State Engineer showing the source and point of diversion of the Replacement Water and the location of the proposed use;
- F. a copy of any agreement between the applicant and the owner of water to be used as Replacement Water, or other documentation demonstrating to the State Engineer's satisfaction that the applicant has a legal entitlement to a source of water to be used as Replacement Water;
- G. the expected duration of the Plan; and

Paragraph G is a new provision that was added at the suggestion that applications for Replacement Plans should specify duration.

- H. any other information the State Engineer deems necessary.

Comments were much divided on Replacement Plans. Some commentators argued that they should be dropped entirely, as a disguised and improper form of transfer for which the State Engineer has no authority. Other commentators liked the concept and praised it as forward thinking because simply cutting off a junior appropriators such as a municipality would be problematic. Some, however, suggested that a fuller description of the process be included in the regulations. Several commentators suggested that Replacement Plans should have a specific duration, and language has been added to implement that suggestion.

After much consideration, the State Engineer has chosen to include Replacement Plans in the regulations. As discussed more extensively in section I.F. above, the general regulations are intended as a framework for discussion of District-Specific regulations, within which issues of process can be fully worked out among local water interests. The State Engineer believes that Replacement Plans, for the reasons discussed above, are not transfers, and are consistent with other provisions of State law. The State Engineer also believes that he has the authority to provide for Replacement Plans under his very broad authority in NMSA 1978, § 72-2-1, coupled with his authority to hear a broad array of applications under NMSA 1978, § 72-5-1. Finally, the State Engineer sees a strong public policy interest in providing a mechanism whose purpose is to attempt to ensure that no water right owner affected by water rights Administration is left without recourse so as to prevent serious economic harm to water right owners.

In order to meet the concerns of those who are troubled by Replacement Plans, the State Engineer has placed a two-year limit on Replacement Plans, has edited the regulations to

be more specific about the conditions of approval, and has added language to make clear that the process outlined here for Replacement Plans is applicable only when a water right owner is affected by Administration. The State Engineer has also removed the standard of proof language that many commentators disfavored.

One commentator suggested that, in order to qualify for approval before notice and hearing, applicants for a Replacement Plan should have to demonstrate that an emergency exists that would result in serious economic loss. In the State Engineer's view, Priority Administration creates an emergency situation by definition. Replacement Plans are only available during periods of Priority Administration to prevent serious economic harm.

One commentator suggested that the regulations should reflect that, under already granted permits with offset requirements, credit should be given for Return Flows to the stream system in excess of the offset requirements, and accounting should occur on a credit and debit basis. Pumping an aquifer in excess of the actual Return Flow requirements still de-waters the aquifer during drought; the resulting excess Return Flows simply flow down the river. The State Engineer concludes that all depletions must be accounted for on an annualized basis. A Return Flow Plan is a benefit to the diverter only during times of full supply.

Under Priority Administration, existing Return Flow Plans will be evaluated on a case-by-case to determine the extent to which groundwater Diversions would have to be reduced to ensure that the resultant Depletion effects remain in priority.

19.25.4.33 GENERALIZED HYDROLOGIC ANALYSIS: The State Engineer will develop a Generalized Hydrologic Analysis for a Water Master District subject to Administration as the basis for the development, review and approval of Replacement Plans within that Water Master District. The Generalized Hydrologic Analysis will be based upon, and obtained from, the best available hydrologic model or models designated by the State Engineer for the Water Master District. The hydrologic models based upon the best available hydrogeologic data will take into account existing surface and groundwater diversions and the combined effect of groundwater and surface water uses on the basin groundwater and surface water system. Adoption of a Generalized Hydrologic Analysis shall be undertaken in conjunction with the public rule-making process for District-Specific regulations pursuant to NMSA 1978, § 72-2-8 (D). The Generalized Hydrologic Analysis shall include guidelines for the approval of applications. If an applicant agrees to the use of the Generalized Hydrologic Analysis in the review of his application, the State Engineer shall expedite his review of the application on that basis. The Generalized Hydrologic Analysis may be adopted as part of basin-specific regulations developed by the State Engineer for a specific Water Master District, or subsequent thereto. A Generalized Hydrologic Analysis shall not be adopted in the absence of proposed District-Specific regulations for Administration.

After consideration of public comment on a proposed Generalized Hydrologic Analysis, the State Engineer may adopt a Generalized Hydrologic Analysis for use to evaluate

Replacement Plans pertinent to Administration within the Water Master District. In order to adopt a Generalized Hydrologic Analysis, the State Engineer shall find that it is sufficiently conservative to assure that any Replacement Plan that is approved:

- A. will not impair In-Priority Administrable Water Rights and by limiting diversions under the Replacement Plan to no more than the average of recent historical beneficial use will be a sufficient basis for such a finding;
- B. will not result in any increase in Depletions within the Water Master District. Accepting an applicant's assurance that no water shall be diverted under that portion of the In-Priority Administrable Water Right that is committed to the Replacement Plan, and finding that foregone average historic Depletions associated with the temporarily transferred In-Priority water right are at least 10 percent greater than the average historic Depletions associated with the Out-of-Priority Administrable Water Right, are together a sufficient basis for such a finding.

The State Engineer reasons that this definition of Generalized Hydrologic Analysis will assure that Depletions will be equal to, or less than, a value that will assure that the continued Depletions associated with the Out-of-Priority Administrable Water Right will not exceed the average historic Depletions.

Several commentators made a difficult to understand comment which seemed to suggest that this provision was in conflict with that section of NMSA 1978, § 72-2-9.1 that required reliance on appropriate hydrologic models. The comment seemed to be that this provision did not contemplate District-Specific analysis. The language has been edited to attempt to resolve that concern.

One commentator suggested that promulgation procedures be identified for the Generalized Hydrologic Analysis. Language was added to address that point.

Many commentators were concerned about the standard of proof established in the original proposed regulations. The State Engineer has removed the problematic language.

A number of commentators were concerned that the term "Generalized Hydrologic Analysis" is difficult to understand, and sufficient information must be provided about such analysis to evaluate the impacts of the proposed change. Rule 19.25.4.33 has been substantially revised and substantive language has been added to limit and constrain its development and application. These changes should make the concept easier to understand.

Because a Generalized Hydrologic Analysis must be adopted through a rule making process, objectors have the opportunity to contest the Generalized Hydrologic Analysis concepts during the rule making process.

Language was inserted at the suggestion of one commentator that the rule making processes for the Generalized Hydrologic Analysis and the District-Specific regulations should occur simultaneously.

Language was added in paragraph a) to address the suggestion that the language should track that of NMSA 1978, 72-6-5 (A)(1).

One commenter asked how the State Engineer would account for the delayed effects of pumping on the river. The applicant for a Replacement Plan would have to show to the State Engineer that he has taken into account the modeled effects on the stream system. If the applicant uses the Generalized Hydrologic Analysis, he will have to offset his Depletion effects on the stream system for the duration of Priority Administration, unless the State Engineer is conducting Depletion Limit Administration.

19.25.4.34 APPROVAL OF REPLACEMENT PLANS: The State Engineer shall determine the adequacy of each source of water proposed for use as Replacement Water based upon the Generalized Hydrologic Analysis adopted by the State Engineer. Replacement Plans shall be approved for a period not to exceed two years but may be renewed upon application. Upon finding that the approval of a Replacement Plan meets the criteria of Rule 19.25.4.33, is necessary to prevent crop loss or other serious economic harm to the owner of an Out-of-Priority Administrable water right, and is not contrary to conservation of water or the public welfare of the State, the State Engineer shall approve the Replacement Plan. The State Engineer may require such terms and conditions for the approval of a Replacement Plan as he deems to be necessary, including time limitations on the duration of the Replacement Plan. State Engineer approvals of Replacement Plans shall be presumed to be in proper implementation of the provisions of the water laws administered by him as provided by NMSA 1978, § 72-2-8(H). Any approved Replacement Plan shall continue in effect during the course of objections and appeals proceedings.

One commentator suggested that it was necessary to ensure that actual wet water be allowed as Replacement Water. This necessity is taken care of in the State Engineer's duty to see that Replacement Water actually fully replaces Depletions.

One commentator suggested that Replacement Plans were contrary to the requirements of due process because they circumvent the statutory notice and protest procedures. The suggestion was made that the only way water could be transferred was to follow the procedures set up in law, and that there was no statutory basis for Replacement Plans. Replacement Plans are not transfers, but are temporary measures designed to be used as a temporary bridge to address the immediate effects of Priority Administration while seeking permanent transfers. Under these circumstances, the State Engineer disagrees that a Replacement Plan is the same thing as a transfer. See also comments above in the General Comments section of this memorandum. The State Engineer reasons that Replacement Plans must be available to prevent serious economic harm to Out-of-Priority water right owners during Priority Administration and that it is in the public interest to provide for their availability in these rules and regulations.

At the suggestion of staff, the State Engineer has decided to place a two-year limitation on Replacement Plans.

19.25.4.35 AMENDMENT AND RENEWAL OF REPLACEMENT PLANS: The holder of a Replacement Plan may submit an application to the State Engineer at any time during the term of the Replacement Plan to amend or renew the Replacement Plan. Upon State Engineer determination that the permanent acquisition of a senior water right to replace the Depletions caused by the exercise of an Out-of-Priority water right is not required, or upon a showing of a good faith effort to permanently acquire a senior water right in the absence of such a determination, the State Engineer may approve the renewal or amendment of a Replacement Plan in the same manner as set forth in Section 35 of this part, after a review of any new information or evidence of changed conditions submitted in support of the application.

At the suggestion of several commentators, language was inserted to accommodate the concern that, without some standard for renewal or amendment of Replacement Plans, some junior appropriators might use them to avoid the need to obtain permanent Replacement Water.

19.25.4.36 ACCURACY OR SUFFICIENCY OF INFORMATION; MODIFICATION: Each applicant for, or holder of, a Replacement Plan is responsible for the accuracy and sufficiency of all material information provided in support of the application to the State Engineer before or after approval of the Replacement Plan. If an approved Replacement Plan proves to be insufficient to replace Depletions, the State Engineer may require the holder of a Replacement Plan to provide additional Replacement Water at any time during the term of the Replacement Plan or within a reasonable period after the term of the Replacement Plan if necessary to offset cumulative impacts.

One commentator suggested that this provision violated an expectation of certainty that an applicant should have from an approved application. The State Engineer points out that the exercise of a water right is always, to some extent, conditional and dependent on contingencies and, in particular during a drought, when an Out-of-Priority diverter is allowed to continue to pump, the State Engineer must be absolutely satisfied that depletions resulting from the Out-of-Priority diversion are fully replaced. The State Engineer further points out that he has a duty to protect surrounding affected In-Priority water right owners, as well as to promote Compact compliance, where appropriate, by requiring that any Depletions be fully made up, and further believes that he has the clear authority to condition Replacement Plans upon the willingness to make up Depletions, even if a shortfall in the sufficiency of Replacement Water was inadvertent.

19.25.4.37 REVOCATION OF REPLACEMENT PLANS: The State Engineer may revoke approval of a Replacement Plan, in whole or in part, where material information provided by the applicant for, or the present holder of, the Replacement Plan is inaccurate; for non-compliance with the terms and conditions of the Replacement Plan; or for non-compliance with these rules. Upon revocation of a Replacement Plan, to the extent of the revocation, all Diversions authorized by the revoked portion of the

Replacement Plan must cease and the holder of the Replacement Plan must, within a reasonable period after revocation of the Replacement Plan, replace the Diversion and Depletion overruns incurred, if any.

These changes incorporate the suggestion of a commentator that the State Engineer have the discretion to revoke a Replacement Plan in part as well as in its entirety.

19.25.4.38 FALLOWING AND NON-USE REQUIREMENTS: Water once committed to a Replacement Plan cannot be used for any other purpose during the term of the Replacement Plan. In the event that the source of Replacement Water is irrigated land, the land to which the water right being used for Replacement Water is appurtenant shall be fallowed. Fallowed land shall not be irrigated from any source, including domestic and supplemental wells, without written approval by the State Engineer. Fallowed land shall be specifically identified by map or survey, or by other means acceptable to the State Engineer. Without written approval by the State Engineer, no water shall be diverted on, or delivered to, fallowed land during the period in which the water is being used as Replacement Water. In the event the source of Replacement Water is not irrigated land, the use to which the owner of the water right that is the source of Replacement Water is entitled under his right shall, during the term of the Replacement Plan, be reduced by the amount of water committed to the Replacement Plan.

Several commentators were concerned that even where land was fallowed, some water use for groundcover is likely to be desirable. Other commentators pointed out that land fallowed for Replacement Plan purposes could possibly have another legal source of water. The State Engineer believes that it will be necessary to evaluate such situations on a case-by-case basis to assure that no additional depletions occur due to the approval of Replacement Plans.

The language also has been slightly revised to ensure that drilling of domestic wells on land fallowed as part of a Replacement Plan does not occur.

At the suggestion of one commentator, a provision was inserted to assure that the owner of the water right other than an irrigation right that is being used for Replacement Water reduces his water use by the amount of water committed to a Replacement Plan.

19.25.4.39 FORMATION OF WATER RIGHT OWNER GROUPS: Water right owners are encouraged to form water right owner groups for the purpose of discussion and negotiation among themselves, with other water right owners, or with the Water Master, regarding the possibility of shortage sharing agreements and other forms of Alternative Administration and joint application for Replacement Plans. Subject to the exemption for acequias and community ditches under NMSA 1978, § 72-2-9.1(C), in the event that water right owner groups, aided by the Water Master, attempt to reach an agreement for Alternative Administration, such efforts by the water right owner groups and the Water Master shall constitute promotion of Expedited Marketing and Leasing as required by that statute.

One commentator was concerned that the membership of such groups be limited to water right owners, in order to ensure that the chief stake owners maintain control of their property rights. The State Engineer agrees. Some commentators asserted that the State Engineer does not have the authority to facilitate such groups. As discussed above, the State Engineer disagrees.

A number of commentators have pointed out that it is unclear how water right owner groups will form and what their function will be. Language has been added to clarify these issues.

19.25.4.40 REPLACEMENT PLANS BY WATER RIGHT OWNER GROUPS: Water right owners may, individually or collectively, submit applications for Replacement Plans as described above. Except as may be limited by a specific regulation or order, water conservancy districts, irrigation districts, municipalities, or other entities may initiate and submit plans in accordance with these rules. Water right owner groups operating under an approved Replacement Plan shall notify the State Engineer of any plan participant who is not in compliance with the Replacement Plan.

19.25.4.41 OBJECTIONS TO, AND APPEALS FROM, APPROVALS, DENIALS AND REVOCATIONS OF REPLACEMENT PLANS : Within thirty days after approval of a Replacement Plan, the State Engineer shall cause to be published a summary of the approved Replacement Plan providing for the opportunity to appeal the approval, denial or revocation of a Replacement Plan pursuant to NMSA 1978, § 72-2-16. The State Engineer shall hear objections to his approval, denial or revocation of all part of a Replacement Plan in accordance with NMSA 1978, § 72-2-16 but shall endeavor to hear such objections in the same prompt manner as provided by NMSA 1978, § 72-3-3 for review of Water Master actions. Filing of an objection to an approval, denial or revocation of a Replacement Plan will not stay the State Engineer's determination that all water use under all, or part of, a revoked Replacement Plan must cease, pending resolution of the objection.

New provision intended to clarify the meaning or operation of these rules.

At the suggestion of one commentator, in order to alleviate due process concerns, the State Engineer has inserted a time limit for publication of a summary of an approved Replacement Plan.

At the suggestion of staff, the statutory reference to § 72-3-3 was changed to § 72-2-16.

One commentator suggested that there should also be language in this Rule to provide for court review of objections to Replacement Plans. Rule 19.25.4.42 addresses all appeals from State Engineer decisions.

19.25.4.42 APPEALS FROM STATE ENGINEER DECISIONS: All appeals from State Engineer review of objections to any actions or decisions made pursuant to these rules and regulations shall be in accordance with NMSA 1978, § 72-7-1.

19.25.4.43 REQUEST FOR ADMINISTRATION FROM THE INTERSTATE STREAM COMMISSION: The State Engineer shall proceed with water rights Administration when requested to do so by the New Mexico Interstate Stream Commission for the purpose of compliance with interstate stream Compacts, which request shall be in the form of a resolution.

This provision is in response to the category of comments at I.A, above.

19.25.4.44 EMERGENCY ADMINISTRATIVE ACTIONS: The State Engineer may determine that the need for water rights Administration in a specific District is so urgent that water rights Administration may proceed directly under order issued pursuant to the procedural requirements of NMSA 1978, § 72-2-8 (B)(3).

One commentator pointed out that special orders as provided by 72-2-8 are only for declaring groundwater basins. The language has been revised accordingly to reference "order."

New provision intended to clarify the meaning or operation of these rules.

19.25.4.45 EXPEDITED MARKETING AND LEASING: The State Engineer will review and analyze permit applications in Water Master Districts affected by Priority Administration on an expedited basis utilizing the appropriate hydrologic model adopted by the State Engineer for the Water Master District. Expedited review of permit applications in Water Master Districts affected by Priority Administration shall fulfill the requirements of NMSA 1978, § 72-2-9.1(C) for the promotion of Expedited Marketing and Leasing of water rights.

New provision intended to clarify the meaning or operation of these rules.

19.25.4.46 KNOWLEDGE OF AND COMPLIANCE WITH STATUTES, RULES, REGULATIONS AND CODES: It shall be the responsibility of all applicants and permittees to know of, and comply with, all applicable statutes, rules, regulations and codes.

Some commentators asserted that the proposed regulations were too difficult to understand for this to be a reasonable requirement. The clarifications made through the comment process should be helpful in this regard.

19.25.4.47 RETROACTIVE EFFECT: These rules and regulations shall have retroactive effect on all Water Master Districts already formed at the time of promulgation of these rules and regulations.

New provision intended to clarify the meaning or operation of these rules.

19.25.4.48 SEVERABILITY: If any provision or provisions of these regulations are found to be invalid, the remaining provisions shall continue to be in effect.

New provision, upon State Engineer initiative, to clarify the meaning or operation of these rules.

19.25.4.49 ENFORCEMENT: The State Engineer may enforce these rules by all means within his legal authority.

19.25.4.50 STATE ENGINEER OPTION TO REVISE RULES AND REGULATIONS: The State Engineer may modify these rules and regulations as needed to accomplish the objectives of these rules and regulations. Removal of a regulation or a section of these rules and regulations, whether by a court or by the State Engineer, shall not affect the validity of the remaining rules and regulations.

19.25.4.51 LIBERAL CONSTRUCTION: These rules shall be liberally construed to carry out their purpose in accordance with NMSA 1978, § 72-2-8(H).

One commentator suggested that this provision be changed to one of strict construction. The State Engineer disagrees.

By my order, these Active Water Resource Management regulations are hereby adopted.

John R. D'Antonio Jr., P.E.
New Mexico State Engineer

Dated: December 3, 2004