**OFFICE OF THE STATE ENGINEER**
**STATE OF NEW MEXICO**

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| IN THE MATTER OF PRIORITY | ) | |
| ADMINISTRATION OF THE DIRECT FLOW | ) | |
| OF THE MIMBRES RIVER WITHIN | ) | |
| THE UPPER MIMBRES WATER MASTER | ) | Order No. 177 |
| DISTRICT, NEW MEXICO | ) | |

## ORDER

**WHEREAS**, New Mexico law declares that the water of underground streams, channels, artesian basins, reservoirs or lakes having reasonably ascertainable boundaries belong to the public and are subject to appropriation for beneficial use, N.M. Const. art. XVI § 2; NMSA 1978, §§ 72-1-1 and 72-12-1; and

**WHEREAS**, the State Engineer has a statutory responsibility to supervise the measurement, appropriation, and distribution of the waters of the state, NMSA 1978, §§ 72-2-1 and 72-2-9, in accordance with the prior appropriation doctrine, as established by New Mexico law, N.M. Const. art. XVI §§ 2 and 3; NMSA 1978, § 72-1-2; and

**WHEREAS,** pursuant to NMSA 1978, §§ 72-3-1 and 2, and NMAC 19.25.13.12 and 15, the Upper Mimbres Water Master District ("District") was created and a Water Master appointed by State Engineer Order No. 171, dated December 16, 2005; and

**WHEREAS,** the groundwater within the District occurs in the Gila formation and the alluvium of the Mimbres River and together they form the basin-fill aquifer that is the major aquifer in the District; and the basin-fill aquifer is hydrologically connected to the Mimbres River within the District and is hydrologically distinct from the rest of the Mimbres Underground Water Basin, which therefore is not included within the District or subject to the Water Master's supervision; and

**WHEREAS,** this basin-fill aquifer is hydrologically connected to the Mimbres River, contributes flow to the river, and constitutes the same hydrologic unit, and therefore there is a need for conjunctive management of the River and the basin-fill aquifer; and

**WHEREAS,** since groundwater diversions from this basin-fill aquifer affect the flows of the Mimbres River, they are administered conjunctively with surface water diversions; and

**WHEREAS,** New Mexico's continued drought conditions are affecting the State's stream systems and the water supply available to water rights owners, including those within the District; and

**WHEREAS,** a priority call by one or more owners of water rights within the District can be reasonably anticipated before the district-specific regulations can be promulgated, NMAC 19.25.13.9; and

**WHEREAS,** the Water Master has charge of the apportionment of waters in the District which includes the appropriation, regulation and control of such waters for the public's safety and the interests of the water rights owners; and

**WHEREAS,** NMAC 19.25.13.23 provides that water right owners may object to any act or failure to act by the Water Master, but the filing of such an objection 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; and

**WHEREAS**, the State Legislature has recognized that the need for water administration is urgent, NMSA 1978, § 72-2-9.1; and

**WHEREAS,** the State Engineer determines that the need for water rights administration within the District is so urgent that administration must proceed immediately by his Order as provided at NMAC 19.25.13.43; and

**WHEREAS,** the Sixth Judicial District Court, Luna County entered its final decree adjudicating all water rights within the Mimbres River Stream System, but excluded from the adjudication rights to the use of groundwater for domestic and livestock purposes; and

**WHEREAS**, all adjudicated, permitted and licensed water rights and all domestic and livestock wells are subject to curtailment under the prior appropriation system according to the adjudicated or licensed priority date or the priority date of date of permit, but it is in the public interest that the State Engineer allow essential de minimis indoor domestic and livestock uses to continue; and

**WHEREAS**, in curtailing diversions by the priority dates of the water rights within the District, the Water Master is to allow limited diversions by owners of out of priority water rights sufficient to meet essential livestock and indoor domestic needs; and

**WHEREAS,** the State Engineer encourages alternative administration or shortage sharing agreements in lieu of strict curtailment of all water rights junior in time to the priority date of the water right calling for water; and

**WHEREAS,** water right owners in the Upper Mimbres Water Master District may enter into alternative administration or shortage sharing agreements in order to prevent implementation of or in response to priority administration in the District;

**NOW THEREFORE,** I, John R. D'Antonio Jr., State Engineer of the State of New Mexico, do hereby order that, in the event of priority administration by the Water Master in the Upper Mimbres Water Master District, (1) all water rights in the Upper Mimbres Water Master District that are out of priority shall be curtailed and limited to essential indoor domestic uses and all outdoor uses shall cease. Essential indoor domestic uses include drinking, cooking, indoor cleaning, sanitary, and cooling purposes, and exclude all uses made outside of a building; and (2) the Water Master will curtail out-of-priority groundwater and surface water rights for

livestock purposes in order to limit such diversions to the relatively small amounts of water required for essential livestock watering.

**IT IS FURTHER ORDERED** that this Order is limited to the administration of the direct flow of the Mimbres River and hydrologically connected groundwater. NMAC 19.25.13.7.

**IT IS FURTHER ORDERED** that the State Engineer will approve or conditionally approve an alternative administration plan proposed by water right owners within the District if he determines, based on information contained in the plan, that the plan will effectively distribute the available water supply among the owners that have agreed to the system of alternative administration and will not impair the water rights of those that have not participated in the plan. NMAC 19.25.13.7 C(4).

**IT IS FURTHER ORDERED** that making an objection to an act or failure to act by the Water Master will not stay the Water Master's actions and orders, or his authority to administer the Water Right. NMAC 19.25.13.23.

**IT IS FURTHER ORDERED** that the following procedures are hereby implemented to govern objections to and appeals of any act or failure to act of the Water Master:

**OBJECTIONS AND REVIEW PROCEDURES:**

**OBJECTIONS TO WATER MASTER ACTS OR DECISIONS:** Objections by an owner of a water right or by a community ditch representing the common interests of all of the owners of water rights on the ditch (hereinafter "Objector") to any act or failure to act of the Water Master shall be made in the first instance informally to the Water Master who shall, within three business days from the date of the objection, determine whether any action is warranted and either take corrective action, or notify the Objector in person or by telephone that no action is warranted. In the event that the Water Master does not act or notify the Objector within three business days, the informal objection is deemed to not warrant action.

**REVIEW OF WATER MASTER DECISIONS:** If an Objector is dissatisfied with the Water Master's determination in the informal objection, the Objector shall file a written request for a hearing at the State Engineer District III Office in Deming, New Mexico within ten days from the date of making the informal objection to the Water Master. The State Engineer hereby designates the District III Supervisor to hear and act on such objections. Hearings will comply with NMSA 1978, § 72-3-3 and shall be held at the District III Office. Hearings shall be held no less than five business days and no more than ten business days from the date of filing of the Objector's request for hearing. Upon the filing of a request for hearing, the District III Supervisor shall notify the Objector in writing of the time, place, and date of the hearing and provide a copy to the Water Master. Opportunity shall be afforded to the Objector and the Water Master to appear and present evidence and argument on all issues involved. All evidence necessary to ascertain relevant facts may be heard and reviewed if it is of a type commonly relied upon by a reasonably prudent person in the conduct of his affairs. Any part of the evidence may be received in written form. Hearings will be first scheduled during the first full week after the effective date of this Order and thereafter be scheduled every other week; provided, however,

that a hearing may be postponed and rescheduled after the next available hearing date by written notice to the Objector and the Water Master.

Both the Objector and the Water Master may waive the right to appear at a hearing and to make oral arguments and present testimony, but instead may submit the objection to the District III Supervisor for decision on written submissions and documentary evidence. All such waivers shall be made jointly by the Objector and Water Master in writing, and shall state their agreement that the decision of the District III Supervisor will be final and binding. Copies of all submissions to be considered by the District III Supervisor must be exchanged by the Objector and the Water Master at least one day before the hearing date.

The District III Supervisor shall hear the objection or, if the hearing is waived, review the objection based on the submissions of the Objector and the Water Master, and shall issue a written decision within five business days after the date of the hearing or, if waived, after the date the objection is submitted.

The Objector and the Water Master may be represented by counsel and may conduct cross-examination.

The decision shall be based exclusively on the relevant facts. There shall be a record of the hearing, which shall include all intermediate rulings; the evidence received or considered; any proposed findings of fact submitted; the District III Supervisor's decision; and the certificate of its mailing to the Objector.

The decision shall be final under NMSA 1978, § 72-3-3 and subject to appeal pursuant to NMSA 1978, §§ 72-7-1 and 72-7-2.

**EFFECTIVE DATE:** This Order shall become effective upon the signature of the State Engineer.

**WITNESS** my hand and seal of my office this 25th day of July, 2006.

JOHN R. D'ANTONIO JR., P.E.
State Engineer

Reviewed by:

Francis L. Reckard
Special Assistant Attorney General