

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

IN THE MATTER OF PRIORITY)
ADMINISTRATION OF THE)
LOWER PECOS RIVER)
WITHIN THE PECOS RIVER)
STREAM SYSTEM, NEW MEXICO)

Order No. 191

ORDER

WHEREAS, the surface water and groundwater of New Mexico 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 the authority and responsibility to supervise the measurement, appropriation, and distribution of the waters of the state, NMSA 1978, §§ 72-2-1 and 72-2-9; and

WHEREAS, under New Mexico law, priority of appropriation shall give the better right, N.M. Const., Art. XVI, § 2, NMSA 1978, § 72-1-2; and

WHEREAS, the adjudication process is slow, the need for water rights administration is urgent, and the State Engineer has the authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the State Engineer, § 72-2-9.1; and

WHEREAS, the State Engineer has promulgated the Active Water Resource Management (“AWRM”) regulations to carry out the responsibility to supervise the physical distribution of water to protect senior water rights, assure compliance with interstate stream compacts, and prevent waste by administration of water rights, § 72-2-9.1, 19.25.13 NMAC; and

WHEREAS, pursuant to NMSA 1978, §§ 72-3-1 and 2, and 19.25.13.12 and 15 NMAC, the State Engineer ordered the creation of the Lower Pecos River Basin Water Master District for the Administration of Rights to the Use of Surface Waters and Underground Water from the Lower Pecos River Basin of New Mexico (“District”) and authorized the appointment of a Water Master for the District (“Water Master”) by State Engineer Order No. 174, dated January 19, 2006, *see* attached Order No. 174 and map; and

WHEREAS, the State Engineer has general supervision of the measurement, appropriation, and distribution of the surface water and groundwater of the District, and the Water Master has immediate charge of the apportionment and distribution of the surface water and groundwater of the District under the general supervision of the State Engineer, NMSA 1978, §§ 72-2-1, 72-3-2, and 19.25.13.16 NMAC; and

WHEREAS, 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 the Water Master's authority to administer the water right, pending resolution of the objection, 19.25.13.23 NMAC; and

WHEREAS, pursuant to 19.25.13.23 NMAC objections to any act or failure to act by the Water Master shall be promptly made to the Water Master for informal action if warranted. If the objection is not resolved informally, appeals of acts or decisions of the Water Master to the State Engineer will be made in accordance with NMSA 1978, § 72-3-3. In order to facilitate the prompt final and appealable decision of the State Engineer, the State Engineer may set up a streamlined process for the prompt hearing of appeals, 19.25.13.23 NMAC; 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, district-specific AWRM regulations have not yet been promulgated for the Pecos River Stream System; and

WHEREAS, on March 25, 2003, the State Engineer, the Interstate Stream Commission, the Bureau of Reclamation, the Carlsbad Irrigation District ("CID"), and the Pecos Valley Artesian Conservancy District ("PVACD") signed a Settlement Agreement resolving certain claims that were pending in the ongoing adjudication in *State of New Mexico ex rel. State of New Mexico v. L.T. Lewis, et al.*, Nos. 20294 and 22600 Consolidated ("2003 Pecos Settlement Agreement"); and

WHEREAS, under Paragraph 10 of the 2003 Pecos Settlement Agreement, CID and the United States may not place a call for administration of priorities or otherwise seek to curtail water uses in the Roswell Artesian Basin except to the extent necessary to supply not more than 50,000 acre-feet in any one year at the Avalon Dam gate for delivery into the CID main canal; and

WHEREAS, on March 1, 2021, the total water supply available to the Carlsbad Irrigation District, reduced to Brantley Reservoir, was calculated to be less than 50,000 acre-feet; and

WHEREAS, on March 19, 2021, the Carlsbad Irrigation District passed a resolution calling for the State Engineer to administer water rights within the Pecos River Stream System by priority; and

WHEREAS, the Pecos River Stream System Adjudication, *State of New Mexico ex rel. State of New Mexico v. L.T. Lewis, et al.*, Nos. 20294 and 22600 Consolidated, is ongoing, and final, administrable decrees or subfile orders have not yet been entered for all water rights within the scope of that adjudication suit; 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 nothing in this Order is intended to foreclose the implementation of any form of alternative administration acceptable to the State Engineer; and

WHEREAS, the State Engineer has determined pursuant to 19.25.13.43 NMAC that the continued need for administration of surface and groundwater rights within the Pecos River Stream System is so urgent that water rights administration should proceed directly under this Order.

NOW THEREFORE, I, John R. D'Antonio Jr., New Mexico State Engineer, do hereby order that, in the event of a call for the administration in priority of water rights on the Pecos River ("Priority Call"), the procedures set forth in this Order shall govern the actions of the State Engineer and his staff working under his direction, including the Water Master, until such time as this Order is superseded by other Order or by District-Specific Regulations addressing these issues. The procedures of the State Engineer and his staff in responding to a Priority Call on the Pecos River Stream System shall be as follows:

1. The State Engineer (or the Water Master acting under the State Engineer's direction) may initially make the following threshold Determinations:
 - A. Whether the party asserting the Priority Call holds a valid water right or is an irrigation district or other entity with the legal authority to request the administration of water rights in priority on behalf of owners of valid water rights collectively (the "Calling Water Right"); and
 - B. Whether under the existing hydrologic conditions the 2003 Pecos Settlement Agreement or other agreement binding on the party asserting the Priority call that restricts the ability of that party to request the administration of water rights in priority.

If the State Engineer determines that the party asserting the Priority Call does not have the legal authority to request the administration of water rights in priority, then the State Engineer shall notify the party asserting the Priority Call in writing. Any person aggrieved by any Determination made pursuant to this paragraph may request a hearing before the State Engineer as provided by NMSA 1978, Section 72-2-16 to review the Determination.

2. If the State Engineer determines that the party asserting the Priority Call has the legal authority to request the administration of water rights in priority, then the State Engineer or his designee may make the following Determinations, as appropriate:

- A. With respect to a call from a water rights owner other than CID or the United States on behalf of CID: whether sufficient water is available at the point of diversion of the Calling Water Right to satisfy the Calling Water Right at its place of use, as limited by any binding agreement;

- B. If sufficient water is not available at the point of diversion of the Calling Water Right to satisfy that right at its place of use, whether the insufficiency is the result of diversions for water rights that are junior in priority to the Calling Water Right;
 - C. The identification of those water rights by file number, place and purpose of use, and total diversion amount that are junior in priority to the Calling Water Right, consistent with 19.25.13.27 NMAC;
 - D. Whether curtailment of administrable water rights that are junior in priority to the Calling Water Right would result in increased supply at the point of diversion to satisfy the Calling Water Right at its place of use;
 - E. The extent of curtailment of such junior administrable water rights necessary and appropriate to result in increased supply at the point of diversion to satisfy the Calling Water Right at its place of use;
 - F. The identification of those water rights by file number, place and purpose of use, and total diversion amount, or those categories of water rights that may be exempt from curtailment because their curtailment would be impractical, would threaten public health or safety, or would not result in increased supply at the point of diversion to satisfy the Calling Water Right at its place of use;
 - G. If applicable, in the absence of court orders or adjudication decrees, the farm delivery and/or project diversion requirements for administrable water rights, pursuant to 19.25.13.22 NMAC; and
 - H. If applicable, an Administration Date as described in 19.25.13.29 NMAC, as well as the date on which that Administration Date will be effective.
3. The State Engineer or his designee shall follow 19.25.13.27 and 19.25.13.28 NMAC in determining and administering the elements of administrable water rights.
4. Once any Determination under Paragraph 2 is made, the State Engineer shall provide notice to the public of those Determinations in the manner provided under NMSA 1978, § 72-2-20 and the date by which requests for hearing may be filed. The State Engineer or his designee may make Determinations regarding some or all of the issues or water rights under Paragraph 2, and need not make Determinations under all of the sub-paragraphs at the same time. Water right owners may challenge those Determinations pursuant to the following process:
- A. Water right owners who seek to challenge any Determinations under Paragraph 2, including Determinations as to the elements of their own water right or other administrable water rights, must submit requests for hearing to the State Engineer by the deadline provided in the public notice.
 - B. Requests for hearings on State Engineer Determinations under Paragraph 2 shall be resolved on an expedited basis. The Administrative Litigation Unit of the Office of the

State Engineer (“ALU”) shall promptly provide persons requesting a hearing with the relevant evidence providing the basis for the Determinations as soon as the hearings have been docketed. Where appropriate, multiple hearings raising common issues shall be consolidated.

- C. After a hearing and final decision of the State Engineer pursuant to NMSA 1978, § 72-2-16, any appeals shall be made to the district court pursuant to NMSA 1978, § 72-7-1.
- D. The actions of the State Engineer under this Order shall not be stayed pending the resolution of the requests for hearing or appeals under this Paragraph 4. *See* 19.25.13.27, 19.25.13.30, and 19.25.13.40 NMAC.

5. The State Engineer shall develop a generalized hydrologic analysis as the basis for the development, review, and approval of Replacement Plans for water rights subject to curtailment, pursuant to 19.25.13.32 NMAC, and shall provide notice of the generalized hydrologic analysis pursuant to Paragraph 4 of this Order. Any party seeking to challenge the generalized hydrologic analysis must do so pursuant to the procedures in Paragraph 4 of this Order. After the State Engineer adopts a generalized hydrologic analysis, water rights owners whose rights may be subject to curtailment under the State Engineer’s Determinations may apply to the State Engineer for approval of a Replacement Plan under 19.25.13.31 NMAC. The Approval of Replacement Plans shall be governed by 19.25.13.33 NMAC. Amendment and Renewal of Replacement Plans shall be governed by 19.25.13.34 NMAC. Revocation of Replacement Plans shall be governed by 19.25.13.36 NMAC.

6. The State Engineer shall consider applications for the expedited marketing or leasing of water rights by owners who would otherwise be subject to curtailment, pursuant to 19.25.13.44 NMAC and NMSA 1978, § 72-2-9.1. Such applications shall be processed on an expedited basis subject to the hearing process described in Paragraph 4.

7. Upon denying a Replacement Plan, the State Engineer shall provide written notice to the applicant within 30 days. Upon approving a Replacement Plan, the State Engineer shall provide notice of a summary of the Replacement Plan to the public as provided in Paragraph 4. Any party who seeks to challenge an action of the State Engineer with respect to the approval, denial, amendment, renewal, or revocation of a Replacement Plan may request a hearing in the manner described in Paragraph 4. Filing of an objection to an approval, denial or revocation of a replacement plan will not stay the state engineer’s action, pending resolution of the objection.

8. After the State Engineer or his designee makes a Determination under Paragraph 2, and if so warranted based on those Determinations, the Water Master (or other staff acting at the Water Master’s direction) shall administer water rights by priority, exercising the duties and responsibilities set forth at 19.25.13.16, 19.25.13.17, 19.25.13.19, 19.25.13.20, 19.25.13.21, 19.25.13.24, 19.25.13.25, 19.25.13.26 and 19.25.13.48 NMAC, and all other duties and responsibilities provided by law, as appropriate.

9. Any person who objects (hereinafter "Objector") to an action or decision by the Water Master pursuant to Paragraph 8 shall have the opportunity to challenge that action or decision in the manner set forth in this Paragraph.

- A. The Objector shall first raise the objection informally or in writing with the Water Master within three business days of the objected-to action or failure to act.
- B. If the objection is not resolved through this informal process, the Objector shall file a notice of appeal, in writing, with the hearing examiner designated by the State Engineer ("Hearing Examiner"), within ten business days of raising the informal objection with the Water Master, pursuant to NMSA 1978, § 72-3-3. In order to ensure the prompt hearing of such appeals, 19.25.13.23 NMAC, the State Engineer shall delegate his authority to decide the appeal to the Hearing Examiner.
- C. The Hearing Examiner shall notify the Objector and the Water Master in writing of the time, place, and date of the hearing. The Hearing Examiner may make reasonable accommodations for video or telephonic attendance at the request of the Objector or Water Master.
- D. The Objector and the Water Master shall have the opportunity to appear and to present evidence and argument on all issues involved. The hearing shall not be subject to the Rules of Evidence. The Hearing Examiner may instead rely upon evidence that is of the type commonly relied upon by a reasonably prudent person in the conduct of his or her affairs. Any part of the evidence or legal argument may be received in written form. Copies of all submissions to be considered by the Hearing Examiner must be exchanged by the parties at least one day before the hearing date. The Objector and the Water Master may be represented by counsel and shall have the opportunity to cross-examine live witnesses. A record shall be made of all hearings.
- E. Hearings before the Hearing Examiner will be scheduled on a weekly basis, as the schedules of the Hearing Examiner and the parties permit.
- F. The Objector and the Water Master may waive the right to appear at a hearing and to instead submit the appeal to the Hearing Examiner for decision on written submissions and documentary evidence. All such waiver submissions shall be made jointly in writing. If the Objector fails to make written submissions, and fails to appear at the scheduled hearing, the Objector waives the opportunity to participate in a hearing prior to the entry of a final appealable order by the Hearing Examiner.
- G. The Hearing Examiner shall issue a written decision within ten business days after the date of the hearing. If the Hearing Examiner has not issued a written decision within ten business days of the date of the hearing, the appeal shall be deemed denied and the Objector may appeal the decision to the district court pursuant to NMSA 1978, § 72-7-1. In the event that there is no written decision, the thirty-day period for perfecting an appeal pursuant to § 72-7-1(B) shall run from the date the appeal is deemed denied.

H. The actions of the Water Master shall not be stayed pending the hearing or appeal. *See* 19.25.13.23 NMAC.

10. If any portion of this Order is found to be invalid, the remaining portions shall continue to be in effect.


EFFECTIVE DATE: This Order shall become effective on the date of the signature of the State Engineer.

WITNESS my hand and seal of my office this 3rd day of December 2021.


JOHN R. D'ANTONIO JR., PE
New Mexico State Engineer



Reviewed by:


GREGORY C. RIDGLEY
General Counsel
Office of the State Engineer