

1 HOUSE BILL 265

2 **52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

3 INTRODUCED BY

4 Paul C. Bandy

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10 AN ACT

11 RELATING TO WATER; AMENDING SECTIONS OF CHAPTER 72 NMSA 1978;
12 PROVIDING RIGHT TO DE NOVO REVIEW; PROVIDING FOR EXPEDITED
13 DETERMINATION OF WATER RIGHTS; PROVIDING FOR DISTRICT COURT
14 VENUE; PROVIDING FOR APPEALS.

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 SECTION 1. Section 72-2-8 NMSA 1978 (being Laws 1967,
18 Chapter 246, Section 1) is amended to read:

19 "72-2-8. ADMINISTRATIVE REGULATIONS, CODES, INSTRUCTIONS,
20 ORDERS--PRESUMPTION OF CORRECTNESS.--

21 A. The state engineer may adopt regulations and
22 codes to implement and enforce any provision of any law
23 administered by [~~him~~] the state engineer and may issue orders
24 necessary to implement [~~his~~] decisions and to aid [~~him~~] in the
25 accomplishment of [~~his~~] the state engineer's duties. In order

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1 to accomplish its purpose, this provision is to be liberally
2 construed to protect the constitutional rights of prior
3 appropriation and beneficial use, to protect the constitutional
4 right to de novo review by the district court and to minimize
5 the cost and delay to water rights owners.

6 B. Directives issued by the state engineer shall be
7 in form substantially as follows:

8 (1) regulations are written statements of the
9 state engineer of general application to the public,
10 implementing statutes, prescribing procedures and interpreting
11 and exemplifying the statutes to which they relate;

12 (2) codes are written standards and
13 specifications governing design and construction of dams;

14 (3) orders are written statements of the state
15 engineer to implement ~~[his decision]~~ the state engineer's
16 decisions; and

17 (4) special orders are written statements
18 defining the declared boundaries of underground streams,
19 channels, artesian basins, reservoirs or lakes.

20 C. To be effective, a regulation, code or special
21 order issued by the state engineer shall be reviewed by the
22 attorney general or other legal counsel of the ~~[state~~
23 ~~engineer's]~~ office of the state engineer prior to being filed
24 as required by law and the fact of ~~[his]~~ the state engineer's
25 review shall be indicated ~~[thereon]~~ on the regulation, code or

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1 special order.

2 D. To be effective, a regulation or code shall
3 first be issued as a proposed regulation or proposed code and
4 filed for public inspection in the office of the state engineer
5 along with the findings of fact that in the opinion of the
6 state engineer justify the regulation or code. Distribution
7 shall also be made to each district and field office for public
8 inspection and to each of the persons ~~[on]~~ in the file of
9 interested persons ~~[hereinafter]~~ mentioned in Subsection G of
10 this section. After the proposed regulation or code has been
11 on file for one month, ~~[he]~~ the state engineer shall publish it
12 or, if it is lengthy, a resume of it in not less than five
13 newspapers of general circulation in the state, once a week for
14 two consecutive weeks, with the statement that there will be a
15 hearing on the proposed regulation or code on a day set in the
16 publication, which hearing shall be not more than thirty days
17 nor less than twenty days after the last publication. The
18 hearing shall be held in Santa Fe, if the matters apply
19 statewide, or in the district that is most convenient to the
20 persons most affected, and any person who is or may be affected
21 by the proposed regulation or code may appear and testify.

22 E. Special orders may be promulgated without prior
23 notice and hearing, but the state engineer shall, within ten
24 days of promulgation of a special order, set a date for a
25 hearing on the special order and publish notice of the public

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1 hearing in the same manner required [~~above~~] in Subsection D of
2 this section.

3 F. In addition to filing copies of regulations as
4 required by law, the state engineer shall maintain in [~~his~~] the
5 office of the state engineer duplicate official sets of current
6 regulations, codes and special orders, which sets shall be
7 available for inspection by the public.

8 G. The state engineer shall develop and maintain a
9 file of names and addresses of individuals and professional,
10 agricultural and other groups having an interest in the
11 promulgation of new, revised or proposed regulations and shall
12 at convenient times distribute to these persons all such
13 regulations, making such charges [~~therefor~~] as will defray the
14 expense incurred in their physical preparation and mailing.

15 H. Any regulation, code or order issued by the
16 state engineer is presumed to be in proper implementation of
17 the provisions of the water laws administered by [~~him~~] the
18 state engineer, but subject, in all cases, to full de novo
19 review by the district court.

20 I. The state engineer shall state the extent to
21 which regulations, codes and orders will have retroactive
22 effect and, if no such statement is made, they will be applied
23 prospectively only."

24 SECTION 2. Section 72-2-9.1 NMSA 1978 (being Laws 2003,
25 Chapter 63, Section 1) is amended to read:

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1 "72-2-9.1. PRIORITY ADMINISTRATION--EXPEDITED WATER
2 MARKETING AND LEASING--STATE ENGINEER.--

3 ~~[A. The legislature recognizes that the~~
4 ~~adjudication process is slow, the need for water administration~~
5 ~~is urgent, compliance with interstate compacts is imperative~~
6 ~~and the state engineer has authority to administer water~~
7 ~~allocations in accordance with the water right priorities~~
8 ~~recorded with or declared or otherwise available to the state~~
9 ~~engineer.~~

10 ~~B. The state engineer shall adopt rules for~~
11 ~~priority administration to ensure that authority is exercised:~~

12 ~~(1) so as not to interfere with a future or~~
13 ~~pending adjudication;~~

14 ~~(2) so as to create no impairment of water~~
15 ~~rights, other than what is required to enforce priorities; and~~

16 ~~(3) so as to create no increased depletions.~~

17 ~~G.]~~ A. The state engineer shall adopt rules based
18 on the appropriate hydrologic models to promote expedited
19 marketing and leasing of water in those areas affected by
20 priority administration. The rules shall be consistent with
21 the rights, remedies and criteria established by law for
22 proceedings for water use leasing and for changes in point of
23 diversion, place of use and purpose of use of water rights.
24 The rules shall not apply to acequias or community ditches or
25 to water rights served by an acequia or community ditch.

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1 [~~D-~~] B. Nothing in this section shall affect the
2 partial final decree and settlement agreement as may be
3 entered in the Carlsbad irrigation district project offer
4 phase of *State of New Mexico ex rel. State Engineer v. Lewis,*
5 *et al.*, Nos. 20294 and 22600 (N.M. 5th Jud. Dist.)."

6 SECTION 3. Section 72-2-16 NMSA 1978 (being Laws 1965,
7 Chapter 285, Section 4, as amended) is amended to read:

8 "72-2-16. HEARINGS REQUIRED BEFORE APPEAL.--The state
9 engineer may order that a hearing be held before [~~he~~] the
10 state engineer enters a decision, acts or refuses to act.
11 If, without holding a hearing, the state engineer enters a
12 decision, acts or refuses to act, any person aggrieved by the
13 decision, act or refusal to act is entitled to a hearing if a
14 request for a hearing is made in writing within thirty days
15 after receipt by certified mail of notice of the decision,
16 act or refusal to act. Hearings shall be held before the
17 state engineer or [~~his~~] the state engineer's appointed
18 examiner. A record shall be made of all hearings. [~~No~~
19 ~~appeal shall be taken to the district court until the state~~
20 ~~engineer has held a hearing and entered his decision in the~~
21 ~~hearing.~~] Hearings shall be held in the district where the
22 matter is located or in Santa Fe on matters that affect the
23 entire state."

24 SECTION 4. Section 72-2-18 NMSA 1978 (being Laws 2001,
25 Chapter 143, Section 1, as amended) is amended to read:

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1 "72-2-18. STATE ENGINEER--ENFORCEMENT--COMPLIANCE
2 ORDERS--PENALTY.--

3 A. When a person, pursuant to a finding of fact,
4 violates a requirement or prohibition of Chapter 72 NMSA
5 1978, a regulation, code, order or special order adopted by
6 the state engineer pursuant to Section 72-2-8 NMSA 1978, a
7 condition of a permit or license issued by the state engineer
8 pursuant to law or an order entered by a court adjudicating a
9 water right, the state engineer may, in addition to any other
10 remedies available under law, issue a compliance order
11 stating with reasonable specificity the nature of the
12 violation and requiring compliance within a specified time
13 period. A compliance order shall not be effective against
14 any party other than the person against whom the compliance
15 order is issued.

16 B. This section shall not be construed to affect
17 or interfere with any jurisdiction of an irrigation district,
18 conservancy district, a state court, a federal court or an
19 Indian nation, tribe or pueblo to enforce its orders and
20 decrees pertaining to water rights.

21 C. A compliance order may include an order to
22 cease the violation of a requirement or prohibition of
23 Chapter 72 NMSA 1978, a directive issued in accordance with
24 the provisions of Section 72-2-8 NMSA 1978, a condition of a
25 permit or license issued by the state engineer or an order

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1 entered by a court adjudicating a water right.

2 D. The state engineer shall provide an
3 opportunity for the person named in the compliance order to
4 have a hearing on the alleged violation pursuant to Section
5 72-2-16 NMSA 1978. A hearing shall be held if a written
6 request is made to the state engineer within thirty days
7 after receipt of the notice of the compliance order sent by
8 certified mail. A compliance order issued pursuant to this
9 section shall become final unless the person named in the
10 order submits a written request for a hearing to the state
11 engineer within thirty days of receipt of the order. A
12 compliance order shall be enforceable only upon becoming
13 final. Nothing in this section shall prohibit the person
14 named in the order from pursuing an informal resolution of
15 the matter after a timely request for hearing has been made.

16 E. A compliance order may require repayment of
17 water that was overdiverted or illegally diverted.
18 ~~[Repayment of water may be up to double the amount of the~~
19 ~~overdiversion or illegal diversion. In determining the~~
20 ~~repayment of water beyond the amount overdiverted or~~
21 ~~illegally diverted, the state engineer shall take into~~
22 ~~consideration the seriousness of the violation, any good~~
23 ~~faith efforts to comply with the applicable requirements and~~
24 ~~any other relevant factors.] Any requirement to repay water~~
25 shall not be enforceable until the compliance order becomes

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1 final. Installation of a measuring device may be required
2 prior to any future diversion of water.

3 F. Any appeal to district court shall be
4 conducted pursuant to Chapter 72, Article 7 NMSA 1978 and
5 shall not stay enforcement of the compliance order unless
6 ordered by the district court.

7 G. After a compliance order becomes final, the
8 [~~state engineer~~] district court may assess a civil penalty of
9 up to one hundred dollars (\$100) per day for violation of the
10 compliance order. Any civil penalty assessed shall accrue
11 from the date of assessment of the penalty.

12 H. If a person does not comply with a compliance
13 order, the state engineer may file a civil action to enforce
14 the compliance order and receive any of the remedies provided
15 in this section, including injunctive relief."

16 SECTION 5. Section 72-7-1 NMSA 1978 (being Laws 1907,
17 Chapter 49, Section 63, as amended) is amended to read:

18 "72-7-1. APPEAL TO DISTRICT COURT--PROCEDURE.--

19 A. Any applicant or other party dissatisfied with
20 any decision, act or refusal to act of the state engineer may
21 appeal to the district court of the county in which the work
22 or point of desired appropriation is situated. If the state
23 engineer has not issued a final decision on any matter that
24 has been pending before the office of the state engineer for
25 one year or longer, the applicant at any time may elect to

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1 treat the absence of a final decision as a refusal to act by
2 filing written notice with the state engineer. The applicant
3 shall have one year from the filing of the notice to file an
4 appeal in the district court. To facilitate possible
5 settlement, the applicant and the state engineer may extend
6 the time for appeal by filing written agreement with the
7 state engineer for a period not to exceed one additional
8 year.

9 B. Appeals to the district court shall be taken
10 by serving a notice of appeal upon the state engineer and all
11 parties interested within [~~thirty days~~] one year after
12 receipt by certified mail of notice of the decision, act or
13 refusal to act. If an appeal is not timely taken, the action
14 of the state engineer is conclusive against the applicant or
15 other party.

16 C. The notice of appeal may be served in the same
17 manner as a summons in civil actions brought before the
18 district court or by publication [~~is~~] in some newspaper
19 printed in the county or water district in which the work or
20 point of desired appropriation is situated, once a week for
21 four consecutive weeks. The last publication shall be at
22 least twenty days prior to the date the appeal may be heard.
23 Proof of service of the notice of appeal shall be made in the
24 same manner as in actions brought in the district court and
25 shall be filed in the district court within thirty days after

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1 service is complete. At the time of filing the proof of
2 service and upon payment by the appellant of the civil docket
3 fee, the clerk of the district court shall docket the appeal.

4 D. Costs shall be taxed in the same manner as in
5 cases brought in the district court [~~and bond for costs may~~
6 ~~be required upon proper application~~].

7 E. The proceeding upon appeal shall be de novo as
8 cases originally docketed in the district court. Evidence
9 taken in a hearing before the state engineer may be
10 considered as original evidence subject to legal objection,
11 the same as if the evidence was originally offered in the
12 district court. The court shall allow all amendments [~~which~~
13 ~~may be necessary in furtherance of justice~~] and additional
14 evidence and arguments that the parties may offer and may
15 submit any question of fact arising therein to a jury [~~or to~~
16 ~~one or more referees~~] at its discretion. The district court
17 shall also consider all matters within its original
18 jurisdiction under Article 6 of the constitution of New
19 Mexico.

20 F. The rights, remedies and procedures set forth
21 in this section are not exclusive and shall not preclude the
22 exercise of any other rights, remedies and procedures that
23 may be available to an applicant or other party or the state
24 engineer. Exhaustion of administrative remedies shall not be
25 required when the pursuit of administrative remedies is

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1 probably futile, or when the state engineer lacks the
2 authority to grant the right sought by the applicant.

3 G. Appeals from the district court may be pursued
4 in the same manner as other civil appeals. Appellants shall
5 not be required to apply for a writ of certiorari from the
6 court of appeals or any other writ."