

1 HOUSE BILL 498

2 **56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023**

3 INTRODUCED BY

4 Jason C. Harper and Crystal R. Diamond and Joseph Cervantes

5  
6  
7  
8  
9  
10 AN ACT

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

.225029.2

underscoring material = new  
[bracketed material] = delete

underscored material = new  
[bracketed material] = delete

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

.225029.2

underscored material = new  
[bracketed material] = delete

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

.225029.2

underscored material = new  
[bracketed material] = delete

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:

.225029.2

underscored material = new  
[bracketed material] = delete

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                   ~~6.]~~ 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.

underscored material = new  
[bracketed material] = delete

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 the state  
10 engineer enters a decision, acts or refuses to act. If,  
11 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 the state engineer's appointed examiner.  
18 Hearings shall be held in the ~~[county in which the water~~  
19 ~~right at issue is adjudicated, licensed or permitted, unless~~  
20 ~~the parties and the state engineer stipulate another site for~~  
21 ~~the hearing]~~ district where the matter is located or in Santa  
22 Fe on matters that affect the entire state. A record shall  
23 be made of all hearings. ~~[An appeal shall not be taken to~~  
24 ~~the district court until the state engineer has held a~~  
25 ~~hearing and entered a decision in the hearing.]"~~

.225029.2

underscoring material = new  
~~[bracketed material]~~ = delete

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

3           "72-2-18. STATE ENGINEER--ENFORCEMENT--COMPLIANCE  
4 ORDERS--PENALTY.--

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

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

23           C. A compliance order may include an order to  
24 cease the violation of a requirement or prohibition of  
25 Chapter 72 NMSA 1978, a directive issued in accordance with

.225029.2

underscoring material = new  
~~[bracketed material] = delete~~

1 the provisions of Section 72-2-8 NMSA 1978, a condition of a  
2 permit or license issued by the state engineer or an order  
3 entered by a court adjudicating a water right.

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

18 E. A compliance order may require repayment of  
19 water that was overdiverted or illegally diverted.

20 ~~[Repayment of water may be up to double the amount of the~~  
21 ~~overdiversion or illegal diversion. In determining the~~  
22 ~~repayment of water beyond the amount overdiverted or~~  
23 ~~illegally diverted, the state engineer shall take into~~  
24 ~~consideration the seriousness of the violation, any good~~  
25 ~~faith efforts to comply with the applicable requirements and~~

.225029.2



underscored material = new  
[bracketed material] = delete

1 ~~any other relevant factors.]~~ Any requirement to repay water  
2 shall not be enforceable until the compliance order becomes  
3 final. Installation of a measuring device may be required  
4 prior to any future diversion of water.

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

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

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

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

20 "72-7-1. APPEAL TO DISTRICT COURT--PROCEDURE.--

21 A. Any applicant or other party dissatisfied with  
22 any decision, act or refusal to act of the state engineer may  
23 appeal to the district court of the county in which the work  
24 or point of desired appropriation is situated. If the state  
25 engineer has not issued a final decision on any matter that

.225029.2

underscoring material = new  
~~[bracketed material] = delete~~

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

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

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

.225029.2

underscoring material = new  
[bracketed material] = delete

1 same manner as in actions brought in the district court and  
2 shall be filed in the district court within thirty days after  
3 service is complete. At the time of filing the proof of  
4 service and upon payment by the appellant of the civil docket  
5 fee, the clerk of the district court shall docket the appeal.

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

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

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

.225029.2

underscoring material = new  
~~[bracketed material]~~ = delete

1 engineer. Exhaustion of administrative remedies shall not be  
2 required when the pursuit of administrative remedies is  
3 probably futile, or when the state engineer lacks the  
4 authority to grant the right sought by the applicant.

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

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25