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HOUSE BILL 450

54TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2019

INTRODUCED BY

Paul C. Bandy and Steven P. Neville

AN ACT

RELATING TO WATER; AMENDING SECTIONS OF CHAPTER 72 NMSA 1978;
AFFIRMING THE RIGHT TO DE NOVO REVIEW OF STATE ENGINEER-ISSUED
ORDERS; PROVIDING FOR EXPEDITED DETERMINATION OF WATER RIGHTS;
PROVIDING FOR VENUE IN THE DISTRICT COURT; PROVIDING FOR
APPEALS.

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

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

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

A. The state engineer may adopt regulations and
codes to implement and enforce any provision of any law
administered by ~~him~~ the state engineer and may issue orders
necessary to implement ~~his~~ decisions and to aid ~~him~~ in the

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1 accomplishment of [~~his~~] the state engineer's duties. In order
2 to accomplish its purpose, this provision is to be liberally
3 construed to protect the constitutional right of prior
4 appropriation and beneficial use, to protect the constitutional
5 right to de novo review by the district court and to minimize
6 the cost and delay to water rights owners.

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

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

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

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

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

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

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1 review shall be indicated [~~thereon~~] on the regulation, code or
2 special order.

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

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

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1 hearing on the special order and publish notice of the public
2 hearing in the same manner required [~~above~~] in Subsection D of
3 this section.

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

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

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

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

25 SECTION 2. Section 72-2-9.1 NMSA 1978 (being Laws 2003,

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1 Chapter 63, Section 1) is amended to read:

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

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

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

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

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

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

18 ~~G.]~~ A. The state engineer shall adopt rules based
19 on the appropriate hydrologic models to promote expedited
20 marketing and leasing of water in those areas affected by
21 priority administration. The rules shall be consistent with
22 the rights, remedies and criteria established by law for
23 proceedings for water use leasing and for changes in point of
24 diversion, place of use and purpose of use of water rights.

25 The rules shall not apply to acequias or community ditches or

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1 to water rights served by an acequia or community ditch.

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

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

9 "72-2-16. HEARINGS REQUIRED BEFORE APPEAL.--The state
10 engineer may order that a hearing be held before the state
11 engineer enters a decision, acts or refuses to act. If,
12 without holding a hearing, the state engineer enters a
13 decision, acts or refuses to act, any person aggrieved by the
14 decision, act or refusal to act is entitled to a hearing if a
15 request for a hearing is made in writing within thirty days
16 after receipt by certified mail of notice of the decision, act
17 or refusal to act. Hearings shall be held before the state
18 engineer or the state engineer's appointed examiner. Hearings
19 shall be held in the county in which the water right at issue
20 is adjudicated, licensed or permitted, unless the parties and
21 the state engineer stipulate another site for the hearing. A
22 record shall be made of all hearings. [~~An appeal shall not be~~
23 ~~taken to the district court until the state engineer has held a~~
24 ~~hearing and entered a decision in the hearing.~~]"

25 SECTION 4. Section 72-2-18 NMSA 1978 (being Laws 2001,

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1 Chapter 143, Section 1, as amended) is amended to read:

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

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

16 B. This section shall not be construed to affect or
17 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 cease
22 the violation of a requirement or prohibition of Chapter 72
23 NMSA 1978, a directive issued in accordance with the provisions
24 of Section 72-2-8 NMSA 1978, a condition of a permit or license
25 issued by the state engineer or an order entered by a court

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1 adjudicating a water right.

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

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

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

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

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

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

16 "72-7-1. APPEAL TO DISTRICT COURT--PROCEDURE.--

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

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1 have one year from the filing of the notice to file an appeal
2 in the district court. To facilitate possible settlement, the
3 applicant and the state engineer may extend the time for appeal
4 up to one additional year by filing a written agreement with
5 the state engineer.

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

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

25 D. Costs shall be taxed in the same manner as in

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1 cases brought in the district court [~~and bond for costs may be~~
2 ~~required upon proper application~~].

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

15 F. The rights, remedies and procedures set forth in
16 this section are not exclusive and shall not preclude the
17 exercise of any other rights, remedies and procedures that may
18 be available to an applicant or other party or the state
19 engineer. Exhaustion of administrative remedies shall not be
20 required when the pursuit of administrative remedies is futile,
21 or when the state engineer lacks authority to grant the right
22 sought by the applicant.

23 G. Appeals from the district court may be pursued
24 in the manner as other civil appeals. Appellants shall not be
25 required to apply for a writ of certiorari from the court of

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1 appeals or any other writ."

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