



April 19, 2019

John R. D'Antonio, P.E.  
New Mexico State Engineer  
Office of the State Engineer  
130 S. Capitol Street  
Concha Ortiz y Pino Building  
P.O. Box 25102  
Santa Fe, NM 87504-5102

Wayne Canon, District 1 Supervisor  
Gary Stansifer, Middle Rio Grande Water Master  
5550 San Antonio Drive NE  
Albuquerque, NM 87109-4127

**Request for Hearing Re: State Engineer's Extension of Time for Filing Proof of Beneficial Use for Permit No. 1690**

Pursuant to NMSA 72-2-16, WildEarth Guardians ("Guardians") hereby requests a hearing from the State Engineer over his decision to grant an extension of time for the Middle Rio Grande Conservancy District ("MRGCD") to file Proof of Beneficial Use ("PBU") for Permit No. 1690. The State Engineer gave the MRGCD until August 20, 2021, to file PBU. *See* Exhibit 1 (attached). However, under NMSA § 72-5-14, the maximum time period in which the State Engineer can extend the time for the PBU demonstration from the original date set in the permit approval is 10 years. Permit No. 1690 was issued in 1930, therefore the State Engineer lacks the authority to further extend the deadline for the MRGCD to demonstrate PBU.

**Basis for Hearing Request**

The provision at NMSA § 72-2-16 states:

If, without holding a hearing, the state engineer enters a decision, acts or refuses to act, any person aggrieved by the decision, act or refusal to act is entitled to a hearing if a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act.

The State Engineer granted the PBU extension on January 11, 2019, without any public notice. Guardians learned of this decision on March 20, 2019, in response to an Inspection of Public Records Act ("IPRA") request. Although it is Guardians' position that the necessary condition triggering the 30-day time period for making this request has not occurred, *i.e.*, receipt by Guardians of a certified mail notice from the State Engineer of his decision to extend the PBU deadline, Guardians makes this hearing request consistent with the 30-day period for filing a request under the statute (within 30 days of receipt of the decision through Guardians' IPRA request).

Although Guardians has litigation pending against the State Engineer in the Court of Appeals related to the issue of his failure to perform his mandatory duty to set a PBU deadline for MRGCD's permit, the State Engineer did not affirmatively inform Guardians, either before or after granting the PBU extension, that it was taking this action. Because of pending litigation on the issue of the PBU deadline for Permit No. 1690, Guardians believes it was entitled to formal notice about this decision. Guardians also believes that the State Engineer should have provided public notice of its decision to extend the PBU deadline.

In its Answer to Guardians Petition for Writ of Mandamus against the State Engineer in the district court proceeding on the PBU issue, the State Engineer asserted that Guardians should first have requested a hearing on the PBU issue from the State Engineer pursuant to NMSA § 72-2-16. *See* Exhibit 2 at 2-3, 6 (excerpt from SE's Answering brief in *WildEarth Guardians v. Blaine*, Case No. D-101-CV-2016-00734) (attached). In filing this hearing request, Guardians does not concede that the State Engineer's position in *WildEarth Guardians v. Blaine* is correct. Moreover, Guardians could find no guidance in statutes, regulations, or the State Engineer's website on the procedure for requesting a hearing on a State Engineer decision that was made behind closed doors with no public notice. However, Guardians is proceeding pursuant to NMSA § 72-2-16 to resolve this issue with the State Engineer administratively in an attempt to avoid litigation over the issue of the State Engineer's violation of the law in granting an extension to MRGCD for PBU well after the 10-year statutory maximum for PBU extensions.

### **Grounds in Support of Hearing Request**

In issuing a permit to appropriate water, the State engineer "shall state in such approval the time within which the construction [of works to appropriate water for beneficial use] shall be completed and the time within which water shall be applied to beneficial use." NMSA § 72-5-6. The statute provides limits on the State Engineer's discretion in setting a time frame for proof of beneficial use:

The time allowed by the state engineer for completion of works or application of water to beneficial use shall be governed by the size and complexity of the project, but *in no case shall exceed five years from the date of approval within which to complete construction, and four years in addition thereto within which to apply water to beneficial use*; provided that the state engineer shall have the power to grant extensions of time for completion of works or application of water to beneficial use as provided in Section 72-5-14 NMSA 1978."

*Id.* (emphasis added).

Once the State Engineer approves a permit to appropriate water that includes the requisite time period within which the water will be put to beneficial use, he may subsequently grant extensions of time for the permit holder to apply water to beneficial use and file proof of doing so upon the permit holder's showing of "due diligence or reasonable cause for delay." NMSA 1978 § 72-5-14. The statute provides the State Engineer the authority to grant further extensions of time to apply water to beneficial use as set forth below:

Extensions of time not exceeding five years beyond the time for construction allowed in the original permit, *and in no case exceeding a total of ten years after the date of approval of the application*, may be granted by the state engineer for construction of works and application of water to beneficial use; provided, that if it shall be made to appear to the state engineer by affidavit of the applicant . . . and by such other evidence as the state engineer may require, that at least one-fourth of the actual construction work has been completed within such period as extended, the state engineer may, if he is satisfied of the good faith of the applicant and that the project will be to the interest of the development of the state, extend the time for completion of works and application of water to beneficial use *for any additional periods he may deem necessary, but not exceeding two years for any one extension*, upon such reasonable terms and conditions as he may prescribe; and at the time of granting such extension shall endorse his approval thereon and shall make the proper entry in his records.

*Id.* (emphasis added).

The State Engineer adopted Title 19, Chapter 26, Part 2 of the New Mexico Administrative Code to aid him in accomplishing his statutory duties. Section 19.26.2.13(B). Section 19.26.2.13(C)(1) NMAC adds guidance regarding the parameters surrounding extensions of time to show proof of beneficial use, as follows:

An extension of time may be granted for a period not to exceed three (3) years. Except as provided in Subsections F and G of 19.26.2.19 NMAC, no extensions of time shall be granted which in combination extend the time allowed by the permit beyond ten (10) years from the initial date of approval of the application, unless the state engineer in his discretion expressly waives this limitation pursuant to Section 72-5-14 NMSA.

Because the State Engineer approved MRGCD's permit over 80 years ago, the time for granting additional PBU extensions has passed. The State Engineer can no longer extend the PBU deadline for MRGCD's permit, and must either cancel the permit or set a deadline for MRGCD to demonstrate PBU without further extensions. The State Engineer has exceeded his authority under the statute and regulations by granting the PBU extension in Exhibit 1, rather than setting a firm deadline for the PBU demonstration and explicitly stating the no further extensions will be granted.

Guardians is aggrieved by the State Engineer's failure to comply with the law. Guardians is "beneficially interested" in the State Engineer's compliance with the law governing appropriation of water for beneficial use. *State el rel. Coll v. Johnson*, 1999-NMSC-036 ¶ 17, 128 N.M. 154, 159 (holding that parties that are "beneficially interested" are entitled to sue for mandamus relief). Guardians and its members are beneficially interested in compelling the State Engineer to provide an accounting of MRGCD's water use or cancel the subject permits because such actions would (1) provide accountability of water use in the Middle Rio Grande, ensuring that MRGCD was not exceeding the amount of water permitted to it, (2) serve to limit MRGCD's diversions to the acreage actually put to beneficial use and leaving the excess water in the river to support the non-consumptive values and uses of Guardians and its members,

including obtaining water for instream flows to support recreation, terrestrial and aquatic wildlife, and a healthy river ecosystem, and (3) free up water in an otherwise over appropriated system allowing that water to become available for non-consumptive uses by Guardians and its members, such as an instream flow appropriation in the Middle Rio Grande or for filling the environmental storage pool in Abiquiu Reservoir. By continuing to allow MRGCD to divert water without an accounting that such water is being put to beneficial use, the State Engineer is ignoring his constitutional and statutory duties, and is not acting in the public interest.

Guardians requests a response from the State Engineer within 30 days of receiving this request. Please feel free to contact me if you have any questions.

Sincerely,



Samantha Ruscavage-Barz  
WildEarth Guardians  
516 Alto St.  
Santa Fe, NM 87501  
(505) 401-4180  
[sruscavagebarz@wildearthguardians.org](mailto:sruscavagebarz@wildearthguardians.org)

*Counsel for WildEarth Guardians*

cc (via fax and U.S. Mail): OSE Litigation and Adjudication Program

cc (via email and U.S. Mail): Middle Rio Grande Conservancy District

cc (via email): Greg Ridgley



STATE OF NEW MEXICO  
OFFICE OF THE STATE ENGINEER

DISTRICT I

John Romero, P.E.  
Acting State Engineer

5550 San Antonio Drive NE  
Albuquerque, NM 87109  
(505) 383-4000

January 11, 2019

Mike Hamman, CEO/ Chief Engineer  
MRGCD  
1931 2<sup>nd</sup> St., SW  
Albuquerque, NM 87102

RE: Extension of Time for Permit No. 1690

Greetings:

Your copy of the Application for Extension of Time (ET) in which to perfect an appropriation of surface water for Permit No. 1690 is enclosed. Your application has been approved with a limiting date for filing Proof of Application of Water to Beneficial Use (PBU) of August 20, 2021. The Extension of Time is subject to the rules and regulations of the State Engineer.

This is the only notification you will receive concerning the next due date for filing the Proof of Application of Water to Beneficial Use. The deadline for filing is **August 20, 2021**, as shown above.

Please call if you have any questions.

Sincerely,


  
Gary Stansifer  
Middle Rio Grande Water Master

Exhibit 1

HC7-58476  
Receipt No. \$1,600 \$50.00

File Number: 1690

**NEW MEXICO OFFICE OF THE STATE ENGINEER  
APPLICATION FOR EXTENSION OF TIME  
IN WHICH TO PERFECT AN APPROPRIATION OF SURFACE WATER**

**1. PERMITTEE**

Name: The Middle Rio Grande Conservancy District      Work Phone: 505-247-0234  
Home Phone: N/A  
Address: 1931 2<sup>nd</sup> St., SW  
City: Albuquerque      State: NM      Zip: 87102

**2. HEREBY APPLIES FOR AN EXTENSION OF TIME IN WHICH TO**

Apply water to beneficial uses.

**3. REASON**

Extensions of time are requested for the periods August 20, 2018 through August 20, 2021  
for the purpose of filing PBU.

See attached summary statement and MRGCD Resolution No. M-09-24-18-157  
authorizing filing.

The State Engineer is hereby requested to extend the time previously granted by extending the  
limiting date to August 20, 2021.

**ACKNOWLEDGEMENT**

We, the Middle Rio Grande Conservancy District, a political subdivision of the State of  
New Mexico affirm that the foregoing statements are true to the best of our knowledge and  
belief.



Permittee Signature  
Glenn Duggins, Chairman  
MRGCD Board of Directors



Permittee Signature  
Charles T. Dumars, Esq.  
Attorney for MRGCD

STATE ENGINEER  
2018 DEC 26 PM 1:40

**ACTION OF STATE ENGINEER**

By authority vested in me, this application for Extension of Time in which to Apply Water to Beneficial Use is granted to the period: August 20, 2021 to bring this permit into compliance.

Witness my hand and seal this 11<sup>th</sup> day of JANUARY, ~~2018~~ 2019

~~Tom Blaine, P.E. State Engineer~~  
**JOHN ROMERO, ACTING**

By: Gary Stanifer  
for **Wayne G. Canon, District 1 Manager**

Do Not Write Below This Line

File Number: 1690  
Form: wr-13

Trn Number: \_\_\_\_\_

STATE ENGINEER  
2019 DEC 26 PM 1:40

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT COURT

WILDEARTH GUARDIANS,  
Petitioner,

v.

Case No. D-101-CV-2016-00734

TOM BLAINE, the New Mexico State  
Engineer,  
Respondent,

Hon. Francis J. Mathew  
District Judge

and  
MIDDLE RIO GRANDE CONSERVANCY DISTRICT,  
U.S. BUREAU OF RECLAMATION,  
Real Parties in Interest.

**STATE ENGINEER'S ANSWER TO ALTERNATIVE WRIT OF MANDAMUS**

COMES NOW, Respondent New Mexico State Engineer ("State Engineer"), by and through his attorneys of record, and hereby files this Answer to the Alternative Writ of Mandamus issued by the Court on April 7, 2016 ("Writ").

**I. ANSWER TO ALLEGATIONS IN THE WRIT**

The Writ and the State Engineer's Answer shape the issues before this Court concerning Petitioner WildEarth Guardians' ("Petitioner") plea for mandamus. *State ex rel. State Highway Comm'n v. Quesenberry*, 1963-NMSC-113, ¶ 11, 72 N.M. 291 ("The issues in mandamus are created solely by and are limited to the allegations of the writ and the answer thereto."). In determining the legal sufficiency of the Writ, the Court should not consider the allegations of the Petition underlying the Writ. *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶ 13, 124 N.M. 698. Accordingly, in responding to the Writ the State Engineer is required only to answer the Writ's two enumerated paragraphs. The State Engineer answers paragraphs 1 and 2 of the Writ as follows:

Exhibit 2



1. Paragraph 1 of the Writ requires a legal conclusion by the State Engineer and therefore no response is necessary. To the extent a response is required, the State Engineer lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 and therefore denies them.

2. Paragraph 2 of the Writ requires a legal conclusion by the State Engineer and therefore no response is necessary. To the extent a response is required, the State Engineer lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 and therefore denies them.

## II. AFFIRMATIVE DEFENSES

### A. The District Court Lacks Jurisdiction to Issue the Writ

Petitioner's mandamus action against the State Engineer is an unavailing gambit to circumvent the State Engineer's statutorily-delegated exclusive jurisdiction over the matter referenced in paragraph 1 of the Writ. Petitioner is apparently aggrieved by the State Engineer's supposed failure to "either set a due date for demonstrating proof of beneficial use of water under Permit Nos. 0620 and 1690 or cancel the permits." Writ, ¶ 1. Rather than pursue the statutory remedy that is the exclusive avenue to this Court's jurisdiction, Petitioner seeks mandamus relief to compel action by the State Engineer. *Id.* Because this Court lacks jurisdiction, the Writ should be quashed.

NMSA 1978, Section 72-7-1 of the water code provides that any "party dissatisfied with any decision, act or *refusal to act* of the state engineer may appeal to the district court . . . ." (Emphasis added). Before such an appeal may be made to the district court, however, Section 72-2-16 requires that an administrative hearing be requested by the aggrieved party and that the hearing be held before the State Engineer:

If, without holding a hearing, the state engineer enters a decision, *acts or refuses to act*, any person aggrieved by the decision, act or refusal to act, is entitled to a hearing. . . . *No appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing.*

§ 72-2-16 (emphasis added). In this case, no hearing has been held before the State Engineer regarding the relief requested in the Writ, nor has Petitioner requested a hearing. New Mexico law is clear. Jurisdiction over State Engineer administrative matters, including administration of the State Engineer permits identified in paragraph 1 of Writ, “does not lie in the courts until the statutorily required administrative procedures are fully complied with.” *In re Angel Fire Corp.*, 1981-NMSC-095, ¶ 5, 96 N.M. 651; *accord El Dorado Utils., Inc. v. Galisteo Domestic Water Users Ass’n*, 1995-NMCA-059, ¶ 2, 120 N.M. 165.

The State Engineer’s exclusive administrative jurisdiction over the issues raised in the Writ is confirmed by several cases wherein the New Mexico Supreme Court recognized the legislature’s intent that, because of the scarcity and flowing nature of water, State Engineer administration of water must be exclusive and comprehensive. *See Lion’s Gate Water v. D’Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523 (purpose of water code’s grant of broad powers to the State Engineer “is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process”); *State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, ¶ 8, 111 N.M. 4 (“The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him.”); *Headen v. D’Antonio*, 2011-NMCA-058, 149 N.M. 667 (affirming district court’s dismissal of declaratory judgment action to establish validity of water right where plaintiff had failed to exhaust administrative remedies before the State Engineer on application to transfer the water right). *See also* §72-2-1 (providing that the State Engineer “has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as

1956-NMSC-078, ¶ 11, 61 N.M. 361 (the rules for testing the sufficiency of a complaint in an ordinary civil action apply to a writ of mandamus). Applying this standard proves fatal to Petitioner's request for mandamus relief because the Court may consider the allegations in the Writ but cannot rely on the Petition to cure deficiencies of the Writ. *Brantley*, 1998-NMCA-023, ¶¶ 13, 20. As the Writ alleges *no* facts to show that Petitioner is entitled to the requested mandamus relief, it follows that the Writ fails to state a cognizable claim and should be quashed. *See id.*; § 44-2-6.

**2. A Writ May Not Issue Where, As Here, There is a Plain, Speedy, and Adequate Remedy at Law Pursuant to NMSA 1978, Section 44-2-5.**

"A writ of mandamus shall not issue in any case when there is a plain, speedy and adequate remedy at law." NMSA 1978, §44-2-5. The Writ fails to allege, much less show that Petitioners are without a plain, speedy and adequate remedy at law. On the contrary, as established above in Section II of the State Engineer's Answer, Petitioner has improperly sought mandamus from this Court for the very purpose of avoiding the mandatory administrative and statutory process available to Petitioner for addressing the purported act or failure to act by the State Engineer referenced in paragraph I of the Writ. Because Petitioner has refused to pursue the administrative remedy dictated by the water code, the Writ also contravenes the statutes and case law governing mandamus. *See* §44-2-5 ("A writ of mandamus shall not issue in any case when there is a plain, speedy and adequate remedy at law."); *State ex rel. Hyde Park Co. v. Planning Comm'n*, 1998-NMCA-146, ¶11, 125 N.M. 832 ("mandamus is a drastic remedy and will issue only if no other remedy is available"); *Sanchez v. Bd. of Ed. of Town of Belen*, 1961-NMSC-081, ¶ 11, 68 N.M. 440 (failure to follow a statutory remedy negates a right to proceed by mandamus). Such authority further confirms Petitioner is not entitled to mandamus relief and