

BEFORE THE NEW MEXICO STATE ENGINEER

**IN THE MATTER OF THE MIDDLE RIO
GRANDE CONSERVANCY DISTRICT'S
APPLICATION FOR AN EXTENSION OF
TIME IN WHICH TO FILE PROOF OF
BENEFICIAL USE IN THE STATE OF NEW
MEXICO**

**Hearing No. 19-021
OSE File No. Permit No. 0620/1690**

ORDER GRANTING MRGCD'S MOTION TO DISMISS

This matter came before Uday Joshi, the State Engineer's appointed Hearing Examiner, on January 8, 2020, at a Hearing on: Middle Rio Grande Conservancy District's Motion to Dismiss (MRGCD's Motion) filed November 1, 2019; Protestant/Aggrieved Party WildEarth Guardians' Motion for Summary Judgment and Memorandum in Support (Guardians' Motion) filed November 1, 2019; and Water Rights Division's Motion for Summary Judgment (WRD's Motion) filed on November 1, 2019; at which the following parties appeared: Charles Dumars, Esq. and Tanya Scott, Esq. represented Applicant Middle Rio Grande Conservancy District (MRGCD or the District); Samantha Ruscavage-Barz, Esq. represented Protestant WildEarth Guardians (Guardians); and, Simi Jain, Esq. Maureen Dolan, Esq. and Christopher Lindeen, Esq. represented the Water Rights Division (WRD).

Being fully briefed in the premises, the Hearing Examiner finds the following:

Background

1. The State Engineer issued Permit SP-1690 on August 20, 1930.
2. On August 16, 1935, MRGCD filed its proof of completion of works for the construction of El Vado Dam.
3. On December 26, 2018, MRGCD filed a retroactive Application for Extension of Time in Which to Perfect an Appropriation of Surface Water from the previously approved deadline

- of August 20, 1987, through August 20, 2018.
4. On December 26, 2018, MRGCD filed a separate Application for Extension of Time in Which to Perfect an Appropriation of Surface Water from August 20, 2018, through August 20, 2021 (the Application for Extension of Time).
 5. On January 11, 2019, the State Engineer granted to the MRGCD both applications for extension of time under Permit No. 1690.
 6. On April 19, 2019, Guardians requested a hearing before the State Engineer regarding the State Engineer's decision to grant an extension of time to file proof of beneficial use until August 20, 2021. In its request, Guardians asserted that the State Engineer must either cancel the permit or set a deadline for MRGCD to demonstrate proof of beneficial use without further extension.
 7. The Hearing Examiner held a Scheduling Conference on August 29, 2019, and subsequently issued a Scheduling Order on September 5, 2019, identifying the issue to be heard, setting forth deadlines for dispositive motions and the respective responses and replies, and scheduling a hearing to be held on January 8, 2020.
 8. The Parties stipulated to the following issue to be heard: "Did the Water Rights Division have the discretion to accept and approve the MRGCD's extension of time for this permit? In limiting the issue, the Parties are not waiving other relevant issues related to this issue."
 9. In addition to the above-mentioned stipulated issue, the Parties briefed other issues, some of which are addressed herein; the remaining issues do not need to be reached or decided to resolve the central issue.

10. A hearing was held on January 8, 2020, as set forth in the Scheduling Order.¹

Acceptance and Approval of an Extension of Time

11. In considering whether the Water Rights Division's approval of the Application for Extension of Time was proper, the Hearing Examiner finds that NMSA 1978, Section 73-14-1 *et seq.* (the Conservancy Act) and NMSA 1978, Section 72-1-1 *et seq.* (the Water Code) both apply to the MRGCD.

12. The statutes are not inconsistent in their application to the activities of the District. The Water Code, however, will serve as the primary authority by which the Hearing Examiner makes most of his findings with due attention given to the Conservancy Act.

The Conservancy Act

13. The MRGCD appears to state that the filing of an application for extension of time and approval thereof is unnecessary, as it is the Conservancy Act NMSA Section 73-14-47 (D) and (E) that governs the recognition and definition of its water rights.

14. "[T]he development, conservation or reclamation of water is hereby declared to be an appropriation thereof by the district, and the disposition thereof under the terms of this act is hereby declared to be a beneficial use thereof by said district and by the lands included therein." NMSA 1978, Section 73-14-47 (F) (1927).

15. Accordingly, the District asserts that it has appropriated water by virtue of its development, conservation or reclamation and a determination of the extent of its rights is within the province of the Conservancy Court.

¹ Because the January 8, 2020 hearing satisfied Guardians' request for hearing, it is not necessary to address the Parties' arguments regarding Guardians' right to a hearing or Guardians' standing in this matter.

16. However, the issue here is not to delineate the statutory authority between the MRGCD and the State Engineer but whether the State Engineer acted within his broad powers to accept and approve the application for extension of time.

Water Code

17. It is clear that the Conservancy Act applies and governs the MRGCD and its operations, but the Water Code exclusively governs the administration and regulation of water within the state and applies to this request for extension, especially when the District has for over a century operated under the benefit of State Engineer permits.

18. In turning to the Water Code, both NMSA 1978, Section 72-5-14(1927) and Section 72-5-28(2002) apply to this matter and inform and support the Water Rights Division's decision on the Application for Extension of Time.

19. NMSA 1978, Section 72-5-14 states in relevant parts:

[t]he state engineer shall have the power to grant extensions of time in which to complete construction of works, to apply water to beneficial use and for such other reasonable purpose...upon proper showing by the applicant of due diligence or reasonable cause for delay...provided, that if it shall be made to appear to the state engineer by affidavit of the applicant, his successors or assigns, or by any person for or on behalf of such 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....

20. NMSA 1978, Section 72-5-28(B) states, "Upon application to the state engineer *at any time* and a proper showing of reasonable cause for delay or for nonuse or upon the state engineer finding that it is in the *public interest*, the state engineer may grant extensions of time, for

- a period not to exceed three years for each extension in which to apply to beneficial use the water for which a permit to appropriate has been issued....” [emphasis added].
21. NMSA 1978, Section 72-5-28 allows for a three-year extension of time to be granted, as in this case, if the State Engineer finds it in the public interest. Based on this statute, Rule 19.26.2.13(C)(1) NMAC also provides for an extension not to exceed three years.
 22. The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him. *State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, ¶ 8.
 23. Pursuant to NMSA 1978, Section 72-5-28, the State Engineer, in consideration of the public interest, had the discretion to grant the MRGCD’s Applications for Extension of Time.²19.26.2.13(C) NMAC states, “the state engineer may grant an extension of time upon a proper showing of due diligence or reasonable cause for delay, or upon the state engineer finding that it is in the public interest to allow additional time.”
 24. The State Engineer has the sole authority to decide whether to grant an extension of time based on the discretion afforded (analysis of the public interest, reasonable cause for delay, etc.) to him, and that is what occurred.
 25. Neither Section 72-5-28 nor Rule 19.26.2.13(C) NMAC mandates that the State Engineer cancel the permit or set a deadline for MRGCD to demonstrate proof of beneficial use without further extension.

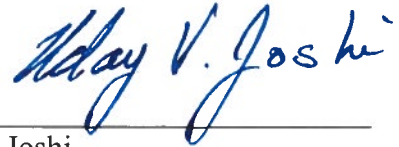
² Guardians did not expressly challenge the State Engineer’s decision to grant the retroactive extension from August 20, 1987 to August 20, 2018, nor did Guardians challenge the retroactive nature of the extension from August 20, 2018, to August 20, 2021 (i.e. requested approximately four months after the start date of the requested extension). For the avoidance of doubt, the Hearing Examiner finds that NMSA 1978, Section 72-5-28 allows for an application for extension “at any time.” This language authorizes the State Engineer to approve retroactive extensions. *See Aamodt, supra*, 1990-NMSC-099, ¶6 (upholding the retroactive approval of an extension to file proof of beneficial use regarding a ground water permit pursuant to NMSA 1978, Section 72-12-8(B), which contains the same “at any time” language.)

26. MRGCD's Motion should be granted insofar as it seeks dismissal of this case based on NMSA 1978, Section 72-5-28.³

THEREFORE, MRGCD's Motion is granted, and Hearing No. 19-021 is dismissed.

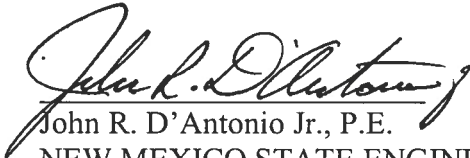
All other pending motions are deemed moot.

Done this 31st day of March, 2020.



Uday V. Joshi
Hearing Examiner

I ACCEPT AND ADOPT THE ORDER OF THE HEARING EXAMINER THIS 2nd
DAY OF November, 2020.



John R. D'Antonio Jr., P.E.
NEW MEXICO STATE ENGINEER



³ Except as expressly stated in this Order, the Hearing Examiner does not address the other issues raised in MRGCD's Motion, including without limitation, (i) whether Guardians has a statutory right to a hearing; (ii) whether Guardians has a constitutional right to a hearing; and (ii) whether Guardians has standing.

PARTIES ENTITLED TO NOTICE

**Hearing No. 19-021
Applicant(s): MGRCD**

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I certify that a copy of the foregoing Order was electronically mailed to all the above-listed parties on the 9th day of November, 2020.


Irma E. Corral, Law Clerk
Hearing Unit Administrator