

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 25 ADMINISTRATION AND USE OF WATER - GENERAL PROVISIONS
PART 2 HEARINGS UNIT PROCEDURES

19.25.2.1 ISSUING AGENCY: Office of the State Engineer (“OSE”).
[19.25.2.1 NMAC - Rp, 19 NMAC 25.2.1, 8-30-2013]

19.25.2.2 SCOPE: This rule governs the conduct and procedures of hearings before the state engineer conducted pursuant to NMSA 1978, Sections 72-2-16, 72-2-17, and 72-2-18. This rule shall not govern public rulemaking proceedings held pursuant to NMSA 1978, Section 72-2-8, expedited proceedings under NMSA 1978, Section 72-2-9.1, or appeals from a district water master to the state engineer in accordance with NMSA 1978, Section 72-3-3.
[19.25.2.2 NMAC - Rp, 19 NMAC 25.2.2, 8-30-2013]

19.25.2.3 STATUTORY AUTHORITY: NMSA 1978, Section 72-2-8 (authorizing state engineer to adopt regulations prescribing administrative procedures), Section 72-2-12 (authorizing state engineer to promulgate rules in connection with hearings and to appoint hearing examiners), Section 72-2-16 (granting state engineer authority to conduct hearings prior to appeal), Section 72-2-17 (establishing certain requirements for hearings) and Section 72-12-18 (granting state engineer authority to issue compliance orders).
[19.25.2.3 NMAC - Rp, 19 NMAC 25.2.3, 8-30-2013]

19.25.2.4 DURATION: Permanent.
[19.25.2.4 NMAC - Rp, 19 NMAC 25.2.4, 8-30-2013]

19.25.2.5 EFFECTIVE DATE: August 30, 2013, unless a later date is cited at the end of a section.
[19.25.2.5 NMAC - Rp, 19 NMAC 25.2.5, 8-30-2013]

19.25.2.6 OBJECTIVE: The objective of this rule is to establish procedures that govern hearings before the state engineer and the hearings unit and to ensure the expeditious and orderly handling of all administrative and enforcement matters consistent with the requirements of due process.
[19.25.2.6 NMAC - Rp, 19 NMAC 25.2.6, 8-30-2013]

19.25.2.7 DEFINITIONS: Unless otherwise defined below, terms used in this rule have the same meaning as set forth in NMSA 1978, Chapter 72. The use of a masculine pronoun to refer to individuals is for grammatical convenience and is intended to be gender neutral.

A. “Administrative litigation unit” or “ALU” means that division of the OSE designated to provide legal counsel to and legal representation of the water rights division (“WRD”) in administrative hearings and to represent the state engineer in judicial proceedings.

B. “Aggrieved applicant” means an applicant whose unprotested application has been acted on by the WRD without hearing, and who disagrees with the action or decision and files a timely request for a hearing on the merits of the application.

C. “Applicant” means a person who has filed an application involving the beneficial use of water with the OSE.

D. “Alternative dispute resolution (“ADR”) officer” means that person appointed or designated by the state engineer to facilitate settlement or alternative resolutions of disputed matters pending before the hearing unit.

E. “Compliance order” means a written administrative directive issued on the authority of the state engineer pursuant to NMSA 1978, Section 72-2-18 that states the specific nature of an alleged violation of a state engineer-issued permit, license or order, or any statute, regulation, or court order subject to administration by the state engineer; and that requires compliance by the respondent within a specified time period.

F. “Docket” means the hearings unit’s record containing the date of entry of a case, its numerical designation, and the calendar of those cases awaiting action through the hearing process.

G. “Ex parte communication” means a communication regarding substantive issues between a party to a matter pending before the hearings unit and the hearing examiner or state engineer, without all other parties being present or having received prior notice of such communication.

H. “Hearing” means a formal proceeding or hearing before the state engineer or his hearing examiner. This rule governs the following three types of hearings:

(1) **“compliance hearing”** that provides a person named in a compliance order an opportunity to respond to or contest the alleged violation of law or order;

(2) **“aggrieved application hearing”** that provides an aggrieved applicant an opportunity to be heard on the merits of the application; or

(3) **“protested application hearing”** that provides an applicant whose application has been protested and any protestant an opportunity to be heard on the merits of the application, including whether it will be detrimental to the objector's water right or otherwise result in impairment to existing water rights, be contrary to the conservation of water within the state, or detrimental to the public welfare of the state.

I. “Hearing examiner” means that person appointed or designated by the state engineer to conduct hearings with respect to matters properly before the state engineer. Hearing examiners report directly to the state engineer and are assigned to the hearings unit. For purposes of this rule, references to a hearing examiner shall apply to the state engineer when he presides at hearing.

J. “Hearings unit” means the division of the OSE comprising the hearing examiners, alternative dispute resolution officers and the hearings unit administrator.

K. “Hearings unit administrator” means that person designated by the state engineer to direct, provide and perform administrative duties in support of the hearing process and serve as the official custodian of the hearings unit files and official record of proceedings.

L. “Party” means an applicant, respondent, or protestant who has paid any required hearing fees and appears and participates in a hearing. The WRD shall be a party to every proceeding. A party other than an individual must be represented by an attorney licensed in the state of New Mexico.

M. “Person” means an individual, firm, corporation, or other entity, or a political subdivision of the state or its agencies, instrumentalities and institutions.

N. “Pro se party” means an individual who appears on his or her own behalf and participates in a hearing without legal representation by an attorney.

O. “Protestant” means a person who files a timely written protest to an application in the form and manner required by the WRD.

P. “Respondent” means a person named in a compliance order.

Q. “Water rights division” or “WRD” means the OSE division designated by the state engineer to process applications and administer water rights pursuant to the permits and licenses issued by and declarations filed with the state engineer and water rights as adjudicated by decree pursuant to NMSA 1978, Section 72-4-19. [19.25.2.7 NMAC - Rp, 19 NMAC 25.2.7, 8-30-2013]

19.25.2.8 LIBERAL CONSTRUCTION: This rule shall be liberally construed to carry out its purpose. [19.25.2.8 NMAC - Rp, 19 NMAC 25.2.8, 8-30-2013]

19.25.2.9 DOCKETING AND STANDING:

A. WRD transmittals. WRD shall transmit timely for hearing by aggrieved applicants and any timely protests to an application to the ALU for filing with the hearings unit through a request to docket the matter for hearing.

B. Timeliness. An aggrievment by the applicant to initial action taken by the WRD on an application and any protest to an application must be timely filed.

(1) **Aggrieved applications.** An aggrieved applicant must file a request for a hearing within 30 days of the date of receipt, by certified mail, of WRD’s action on an application. If no request for hearing is filed with the WRD within 30 days, the state engineer’s findings, decision or action taken through the WRD shall be conclusive.

(2) **Protests to applications.** Protests to an application must be filed on or after the date of the first publication of notice of application and before the close of business on the tenth day after the last date of publication. Only persons filing a timely protest may participate at hearing with the applicant and ALU. Motions to intervene are disallowed and shall be rejected by the hearings unit.

C. Request to docket a hearing. The ALU will file a request to docket a proceeding within a reasonable amount of time of its receipt of a request for hearing transmitted by the WRD. The ALU pleading shall:

(1) request that the hearings unit administrator issue a notice of scheduling conference that identifies a hearing examiner, and sets the date for the scheduling conference;

(2) state the grounds, if any, to extend or delay the hearing, including but not limited to, prior pending hearings, or ongoing settlement negotiations among parties to the hearing;

(3) include background documents to the hearings unit administrator such as a copy of the application, publication materials, written protests accepted by the WRD, and other relevant information that the ALU determines may be useful for docketing a proceeding; and

(4) provide a list of parties entitled to notice of the proceedings.

D. Compliance orders. A respondent named in a compliance order may request a hearing on the alleged violations, pursuant to the procedures set forth in 19.25.2.23 NMAC.

E. Special procedure for standing of protestant upon docketing. The standing of protestants may be challenged by the applicant, WRD, or the hearing examiner at any point once an application has been docketed by the hearings unit: Upon such challenge, the protestant shall be required:

(1) if alleging impairment to the protestant's water right, to provide evidence of a valid existing water right, including but not limited to, the protestant's OSE water right file number(s) or if there is no OSE file number, then a description of the affected water right(s) that specifies the place and purpose of use, amount of water placed to beneficial use, point of diversion and the water source (aquifer or stream) by name, and priority date; or

(2) if alleging conservation or public welfare issues, to provide evidence that the protestant will be substantially and specifically affected by the granting of the application.

[19.25.2.9 NMAC - N, 8-30-2013]

19.25.2.10 HEARING UNIT DOCKET AND FEES:

A. Docketing procedures. The hearings unit shall maintain a docket of matters to be heard and a hearing calendar. Upon receipt of a docketing request from the ALU, the hearings unit administrator shall assign a hearing examiner and a docket number. The hearings unit administrator or the hearing examiner shall issue a notice that:

(1) shall advise the parties of the docketing of the matter, the hearing number and caption, and procedural requirements concerning filing and service of documents with the hearings unit, including electronic service and posting of documents;

(2) shall set a deadline for the applicant and all protestants to pay any required hearing fee;

(3) may set a deadline for all protestants to identify in writing, by OSE file number or other description, all water rights under the protestant's ownership or control that may be adversely affected by the application, including a description of the affected water right(s) that specifies the place and purpose of use, amount of water placed to beneficial use, point of diversion and the water source (aquifer or stream) by name, and priority date, together with a statement explaining how the protestant will be substantially and specifically affected by the granting of the application;

(4) may set a date and time for a scheduling conference to be held, no earlier than 10 business days after the deadline for payment of fees and identification of affected water rights;

(5) may direct one or more parties to file and serve on all other parties a proposed date for scheduling conference and a proposed pre-hearing order that includes proposed procedural dates for discovery, motions and hearing, identifies all issues the party proposes to address at hearing, and sets forth the party's position on each known or anticipated issue; and

(6) may include a draft form of scheduling order and hearing instructions for parties.

B. Hearing fees. Pursuant to NMSA 1978, Section 72-2-6(J), the state engineer shall require a nonrefundable payment of twenty-five dollars (\$25.00) from an applicant and from each protestant.

C. Copying and other fees. The hearings unit may impose fees for copying papers, testimony, or records as are reasonable, in accordance with Section 72-2-6 and based on charges set by the state records center for similar types of copies. The hearing examiner shall order that costs associated with the issuance of any subpoena, as further described by this rule, be borne by the requesting party.

D. Failure to comply with fee or docketing requirements. If an applicant fails to make the payment as required, the hearing examiner shall deny the application and dismiss the docket. If a protestant fails to make the payment as required, the protest shall be dismissed by the hearing examiner. Failure to comply with any other docketing requirement may result in dismissal of an application or a party from the proceedings, the exclusion of information or issues at hearing, or other limitation as determined by the hearing examiner.

E. Inactive dockets. If a matter docketed for hearing has been inactive for six months, the hearing examiner may place the case on the hearings unit's inactive docket, and the hearings unit administrator shall maintain a separate docket list for inactive cases. If a matter placed on the inactive docket has not had any activity for six months thereafter, the hearing examiner, after notice to the parties, may deny the application. In no event

shall any matter remain on the inactive docket for more than 12 months without an order so specifying from the hearing examiner.

[19.25.2.10 NMAC - Rp, 19 NMAC 25.2.13, 8-30-2013]

19.25.2.11 REPRESENTATION OF PARTIES: Parties may be represented by an attorney or may appear pro se, as described below, in hearings before the state engineer or designated hearing examiner. All communications by parties with the hearings unit shall be made through a party's attorney or a person appearing pro se, unless otherwise provided for by the hearing examiner.

A. Attorneys. An attorney representing a party shall enter his appearance in the record. Withdrawal or substitution of counsel shall be by notice to the parties and hearings unit, and all issues relating to withdrawal or substitution of counsel shall be resolved in a form and manner at the discretion of the hearing examiner.

B. Pro se appearance. An individual may appear as a pro se party. Parties appearing pro se shall be responsible for familiarizing themselves with this rule, the rules of civil procedure for the district courts of New Mexico, the rules of evidence governing non-jury trials for the district courts of New Mexico, the instructions for parties in administrative proceedings, and all other rules of the OSE.

C. Applicants, respondents and protestants other than a pro se party. A party that is not an individual shall be represented by an attorney.

D. Ex parte communications prohibited. There shall be no ex parte communications with the hearing examiner or the state engineer in any pending proceeding on any substantive issue unless notice is given and an opportunity afforded all parties to participate or respond. Any continued ex parte communications after a single state engineer order to cease will result in dismissal of the offending party. Routine procedural questions may be addressed to the hearings unit administrator.

[19.25.2.11 NMAC - Rp, 19 NMAC 25.2.19, 8-30-2013]

19.25.2.12 HEARINGS UNIT FILING REQUIREMENTS:

A. Filing of documents and number of copies. Written communications shall contain the name, address, and telephone number of the communicator and an appropriate reference to hearings unit files by docket and OSE file number(s) pertaining to the subject of the communication. All motions and other pleadings shall be filed with the administrator of the hearings unit in triplicate, consisting of the original plus two copies. Motions requesting an order from the hearing examiner shall be accompanied by a proposed order and stamped, addressed envelopes for service by the hearings unit administrator of such order on all parties.

B. Rejection of documents. A document that does not reference the hearings unit's docket number and OSE file number in the caption of the document, or that is not in substantial compliance with this rule, may be rejected by the hearings unit administrator or hearing examiner. No motion or pleading requesting discovery shall be filed with the hearings unit prior to the matter being docketed by the hearings unit.

C. Date of filing. A pleading or document is considered filed on the date stamped by the hearings unit administrator, unless the pleading or document is subsequently rejected. Any pleading or document received after regular business hours will be stamped and considered filed on the next regular business day.

D. Facsimile and electronic filing. In the discretion of the hearings unit administrator, a pleading or document, not to exceed 10 pages, may be filed by facsimile transmission, subject to any additional filing requirements that may be required by the hearings unit administrator. Such facsimile transmissions must be received before 4 p.m., mountain standard or daylight time. When feasible, the hearing examiner may order pleadings and other documents to be filed electronically if electronic filing procedures by the hearings unit have been established.

E. Service. Except as otherwise provided by this rule or by order of the hearing examiner, a party shall serve upon all parties to the proceeding all pleadings and documents that are filed with the hearings unit. Service shall be made by delivering or mailing a copy to the party's counsel and to any individual party appearing pro se. Proof of service shall be made by a certificate of service, which shall include a list of all parties served. Upon agreement, service among parties may be by electronic means.

F. Notification of change of address or other information. Each party shall provide the hearings unit administrator and other parties with a current mailing address, telephone number, and facsimile information. A party shall be deemed to have received notice of all pleadings and notices mailed or sent by facsimile to the address or facsimile number of record. If a party fails to provide a current mailing address, and pleadings or notices sent to the address of record are returned by a postal service as undeliverable, the hearing examiner shall dismiss that party.

G. Amendments and withdrawal. Requests to amend or withdraw a pleading shall be made by motion or application subject to response by the WRD or other parties, and if granted shall be subject to such

conditions as the hearing examiner may deem appropriate. Amendments to any pleading shall not broaden the scope of the issues originally filed unless allowed by the hearing examiner, and shall be subject to such additional notice or other responses as ordered by the hearing examiner.

H. Computation of time. The time within which an act is to be done as provided in any rule or order, when expressed in days, shall be computed by excluding the day of the act or event from which the time begins to run and including the last, except that if the last day be Saturday, Sunday, or a legal holiday, the act may be done in the next succeeding business day.

I. Extensions of time. Except as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the hearing examiner for good cause, upon a motion made before the expiration of the period prescribed or previously extended. The filing of the motion does not toll the running of the time period prescribed.

[19.25.2.12 NMAC - N, 8-30-2013]

19.25.2.13 AUTHORITY AND DUTIES OF THE HEARING EXAMINER:

A. Powers of hearing examiner. In the absence of any limiting order, a hearing examiner appointed to hear any particular case shall have the power to regulate the proceedings before him and to perform all acts and take all measures necessary to conduct such hearing, including the following powers:

(1) to explain the events and requirements of the hearing process, including the use of electronic service, notice and posting on the OSE website;

(2) to establish a procedural schedule for the administrative proceedings and to modify procedural orders on his own motion or on motion of a party when necessary or appropriate;

(3) to schedule and conduct conferences and preliminary hearings when necessary or appropriate to: identify substantive issues for hearing, set a discovery schedule and hearing date, establish an official service list, address other preliminary matters, encourage settlement, and rule on preliminary motions;

(4) to order parties to hold appropriate settlement conferences before or during any hearing, provided that the hearing examiner shall not take part in any settlement conference unless all parties agree to his participation;

(5) to dismiss parties or actions;

(6) to apply the procedures of this rule and to grant such waivers to those procedures as he deems necessary or appropriate;

(7) to issue subpoenas to produce materials and to require persons to appear;

(8) to provide for appropriate methods of discovery;

(9) to administer oaths and affirmations;

(10) to ensure that all relevant issues relating to impairment, conservation of water within the state and the public welfare of the state are considered during the evidentiary hearing and to request, receive and make part of the record all evidence (testimony and exhibits) determined necessary to decide the issues and rule upon all objections and motions;

(11) to regulate the conduct and course of the hearing consistent with due process, including the scheduling, recessing, reconvening, and adjournment thereof;

(12) to cause a complete record of the proceedings to be made in accordance with the requirement of NMSA 1978, Section 72-2-17(C);

(13) to make a report and recommendation to the state engineer based upon the record of the proceedings; and

(14) to take such other action as may be necessary and appropriate to the discharge of these duties, consistent with the statutory authority or other authorities under which the state engineer functions and with the rules and policies of the OSE.

B. Limitation of authority. The state engineer may limit the authority of the hearing examiner to the specific consideration of enumerated issues or the performance of certain acts, such as presiding as directed at hearing, pursuant to a limiting order.

C. Subpoenas. In accordance with NMSA 1978, Section 72-2-14, the hearing examiner has the authority to issue subpoenas and to require the production of evidence in any proceeding before the state engineer, including all hearings, conferences and discovery proceedings. If a subpoena is issued, the return of service shall be filed with the hearings unit promptly after service, and shall include a certificate or affidavit attesting to service.

D. Substitution of parties. Substitution of parties may be permitted upon motion and for good cause, at the hearing examiner's discretion.

[19.25.2.13 NMAC - Rp, 19 NMAC 25.2.10, 8-30-2013]

19.25.2.14 DISQUALIFICATION: Any party may file a motion to disqualify a hearing examiner for lack of impartiality. A motion to disqualify a hearing examiner must be filed no later than 10 days after the initial scheduling conference and shall state with specificity the grounds for disqualification. A hearing examiner shall excuse himself in a proceeding in which the hearing examiner's impartiality might reasonably be questioned, including but not limited to instances of personal bias or prejudice concerning a party or a party's attorney or disputed evidentiary facts; or other bias or prejudice which would cause the hearing examiner to not render an impartial decision.

[19.25.2.14 NMAC - Rp, 19 NMAC 25.2.12, 8-30-2013]

19.25.2.15 SCHEDULING AND CONDUCT OF PRE-HEARING MATTERS: The hearing examiner may establish conferences at regular times and places and at intervals sufficiently frequent for the orderly management of the proceedings. These may include scheduling conferences, status reviews, settlement conferences, motions hearings, pre-hearing conferences, and all other matters relevant to the achievement of a productive and efficient decision making process.

A. Procedural schedule. The hearing examiner shall issue a procedural order that contains a statement of the issues to be heard and sets a procedural schedule. In the absence of a specific finding and order from the hearing examiner, all discovery and motions shall be completed within 150 days from the date of the initial scheduling conference, and the final hearing shall be held within 180 days from the date of the scheduling conference. The hearing examiner may periodically conduct status reviews of the progress of the proceedings, and may issue procedural orders modifying the procedural schedule as necessary or appropriate.

B. Pre-hearing and status conferences. The hearing examiner may conduct pre-hearing or other status conferences to simplify issues for hearing; rule on or otherwise consider outstanding motions or other pleadings; address stipulations, and admissions of fact and documents; address limitations on the number of witnesses or time allocated to particular witnesses or issues at hearing, order of witness presentation and scheduling of testimony and amount of time anticipated for direct and cross examinations; and any other relevant matters that may aid in the hearing process. The orders and rulings resulting from the pre-hearing conference shall control the subsequent course of the proceedings and final hearing, unless otherwise ordered by the hearing examiner.

C. Alternative dispute resolution. The hearing examiner may order any or all parties to participate in an OSE-facilitated ADR process or to attend a settlement conference to assist in reaching a settlement at the earliest possible stage, resolve disputed facts or issues, expedite the hearing process, and conserve resources.

D. Motions hearings. The hearing examiner may rule on a motion, other than for summary judgment, based on the pleadings or may schedule a hearing on the motion, at the hearing examiner's discretion.

E. Summary judgment motions. Motions for summary judgment that are dispositive of any administrative or enforcement matter shall not be granted without a hearing. The hearing examiner shall submit a report and recommendation as to the dispositive motion to the state engineer for final decision in accordance with 19.25.2.28 and 29 NMAC.

F. Attendance at scheduled proceedings. All parties shall attend scheduled hearings, conferences or other proceedings fully prepared to discuss all matters noticed and to address any outstanding motions or pleadings. Without good cause shown, the failure of a party to attend or be prepared to discuss those matters set to be heard shall constitute a waiver of any objection to any agreement reached or to any order or ruling made as a result of the proceeding, and may be grounds for adverse action by the hearing examiner on the pleading of the party failing to appear.

G. Scheduling of site visits. The hearing examiner may schedule site visits, subject to notice to the parties and the opportunity for parties to attend.

[19.25.2.15 NMAC - Rp, 19 NMAC 25.2.14 & 15, 8-30-2013]

19.25.2.16 PROCEDURAL REQUIREMENTS AND DEADLINES:

A. Applicability of Rules of Civil Procedure. Conduct and procedure with respect to discovery and prehearing matters before the hearing unit shall be generally consistent with the New Mexico Rules of Civil Procedure for the District Courts, except as otherwise set forth in this rule or as otherwise permitted by the hearing examiner.

B. Specificity of motions. All motions, except those made orally during a hearing, shall be in writing, specify the grounds for the motion, state the relief sought, and state whether the motion is opposed or unopposed. An opposed motion shall state that consent of the other parties to the motion was sought and not obtained, or the reason such consent was not sought. An unopposed motion shall state that concurrence of all other

parties was obtained. The moving party shall submit a proposed order approved by all parties for the hearing examiner's consideration.

C. Deadline for response and reply to motions. Any party upon whom an opposed motion is served shall have 15 days to file a response. A non-moving party failing to file a timely response may be deemed to have waived any objection to the granting of the motion. The moving party may file a reply within 15 days after a response to a motion.

D. Prefiled testimony and exhibits. The hearing examiner may require advance filing of certain exhibits (subject to objections), including but not limited to copies of the application, notice, expert reports or written testimony, locational photographs or maps, and any other exhibits which may aid in an efficient hearing process. Where a proceeding involves complex and technical issues to be presented through multiple witnesses, the hearing examiner may require the filing of written testimony by witnesses in advance of the hearing. [19.25.2.16 NMAC - Rp, 19 NMAC 25.2.9, 8-30-2013]

19.25.2.17 DISCOVERY: No discovery shall be had on the state engineer, a hearing examiner, or ADR officer in proceedings before the hearings unit. The hearings unit favors prompt and complete disclosure and exchange of information and encourages informal arrangements among the parties for this exchange.

A. Types of discovery. Discovery shall include all depositions, written interrogatories, requests for production of documents, and requests for admissions. Parties shall have the right to take the testimony of any witnesses by deposition and may seek a subpoena for the attendance of witnesses and the production of documents or records. Parties shall make a good-faith effort to obtain public records through the relevant agency's open records process prior to requesting production of such documents from other parties.

B. Filing and service, and limitations. Discovery requests and responses, or objections thereto, and deposition transcripts, shall not be routinely filed with the hearings unit; provided however that the party making a discovery request shall file a certificate of service with the hearings unit. Interrogatories, requests for production or inspection of documents, requests for admissions and other written discovery requests shall be served upon the party to which such discovery is directed and all other parties requesting such service. Any given discovery request shall be limited to no more than a total of 50 interrogatories, requests for production of documents, and requests for admissions, including subparts, which shall be separately counted toward the limit of 50. Parties desiring copies of the written discovery materials of other parties may request copies from either party, subject to the requesting party's agreement to pay the reasonable costs of reproduction.

C. Responses, objections and supplementation. Written answers or responses to discovery requests shall be served within 30 days of service of the discovery requests, unless otherwise directed by the hearing examiner or agreed to by the parties. Written answers or responses to discovery requests shall be verified by the person providing the answer or response. Objections shall identify the request objected to and shall state with particularity the factual and legal basis for the objections, and the response to the request shall be deferred until a determination has been made on such objections. A party who has responded to a request for discovery shall reasonably and promptly amend or supplement a previous response if he subsequently obtains information which would have been responsive if the information had been available at the time the response was served.

D. Motions to compel. Parties are expected to engage in discovery in good faith for the purpose of fair and efficient presentation of evidence at hearing, and they are expected to make every good faith effort to resolve discovery disputes informally. A party may move for an order compelling discovery only if the movant has made a good faith effort to resolve the dispute and was unable to do so. Any motion for an order compelling discovery shall document the good faith efforts taken by the movant to resolve the dispute, and shall include copies or complete restatements of the discovery requests or notices to which the movant seeks compelled responses, along with copies of any responses or objections to the subject discovery requests or notices, and any other pertinent materials.

E. Order for protection of parties, or witnesses. The hearing examiner may issue such orders for the protection of parties or witnesses from annoyances, embarrassment, or oppression as may be just and proper under the circumstances. If the hearing examiner determines that a party has not acted in good faith in propounding, undertaking, responding to, or otherwise participating in the discovery process, the order may include, but is not limited to, the exclusion of evidence, limitation of issues, or dismissal of a party. [19.25.2.17 NMAC - Rp, 19 NMAC 25.2.9, 8-30-2013]

19.25.2.18 STIPULATIONS AND SETTLEMENTS: Parties to a proceeding shall make a reasonable effort to stipulate to facts to be relied upon in a hearing or on appeal. Stipulations of fact or of resolutions of specific issues shall be in writing and signed or approved by all stipulating parties, and shall be filed with the

hearings unit administrator, unless entered into within five days of any final hearing, whereupon the stipulation shall be presented at hearing. Objections to a stipulation shall be in writing, unless the stipulation is presented at hearing, whereupon any objections shall be presented at hearing. Settlements of all or a portion of the issues pending may be presented in writing before hearing or in writing or orally at hearing, and shall include the parties' procedural recommendation for disposition of the pending matter. The state engineer shall review and either accept, modify or reject any stipulation or settlement. If the state engineer modifies the stipulation or settlement, the parties shall have the opportunity to accept such modification or to void the stipulation. If the state engineer rejects any stipulation or settlement, the hearing shall proceed or be reconvened to take evidence on the merits of the pending matters, which may include the resolution of issues as presented in the stipulation or settlement.
[19.25.2.18 NMAC - N, 8-30-2013]

19.25.2.19 CONTINUANCE AND POSTPONEMENT:

A. Continuance of hearing. A scheduled hearing or conference may be continued with notice prior to the hearing or conference, or it may be recessed during the hearing or conference and reconvened at a later date. Grounds for continuance may include, but are not limited to: mandatory deference to the resolution of prior pending applications; limitations with regard to OSE resources available to investigate or evaluate the application and claims of the parties; and settlement of some or all issues among any or all parties.

B. Postponement of evidentiary hearing. A party may request postponement of the scheduled hearing, subject to determination by the hearing examiner. Grounds for postponement may include, but are not limited to, ongoing settlement negotiations, the unavailability of an expert witness, or the inability of a party to complete technical reports and exhibits. Repeated requests for postponement will not be viewed favorably unless good cause is presented.

[19.25.2.19 NMAC - Rp, 19 NMAC 25.2.25, 8-30-2013]

19.25.2.20 DISMISSAL OR WITHDRAWAL OF PARTY OR ACTION:

A. Dismissal of party or action for failure to participate. If the hearing examiner determines that the applicant has failed to meet his or her obligation to go forward with the application by timely participation in the administrative hearings process, the hearing examiner shall deny a protested application or shall reinstate the action by the WRD on an aggrieved application, and shall dismiss the hearing. If the hearing examiner determines that a protestant has failed to meet his burden of timely participation in the administrative hearings process, the hearing examiner shall dismiss the protestant. In the event that all protestants are dismissed, the hearing examiner may remand the application to the WRD for further action.

B. Withdrawal of request for hearing from aggrieved WRD decision. An aggrieved applicant may file a motion to withdraw the request for a hearing with the hearings unit and shall serve the motion on the ALU attorney of record. If granted, the hearing examiner shall reinstate the original decision or action of WRD. Upon motion by the applicant or the WRD, the hearing examiner may order that the application be withdrawn or remanded to WRD for other action, including but not limited to modification of the original WRD decision or action. The hearing examiner shall not grant the withdrawal of an aggrieved application once a hearing on the merits has concluded.

C. Withdrawal of protested application. A protested application may be withdrawn by the applicant by pleading filed with the hearings unit and served on the ALU attorney of record and all protestants, prior to hearing. The hearing examiner may require that upon withdrawal of a protested application, the applicant shall not file the same or substantially similar application for a specified period of time. Once the hearings unit has concluded a hearing on the merits a protested application may not be withdrawn.

[19.25.2.20 NMAC - Rp, 19 NMAC 25.2.32, 8-30-2013]

19.25.2.21 LOCATION OF HEARINGS: All hearings shall be held in Santa Fe, New Mexico, unless otherwise ordered by the hearing examiner. Scheduling, status, and pre-hearing conferences and motions hearings shall be held in Santa Fe, New Mexico. At the discretion of the hearing examiner, any conference or hearing may be held telephonically.

[19.25.2.21 NMAC - Rp, 19 NMAC 25.2.16, 8-30-2013]

19.25.2.22 CONDUCT OF HEARINGS ON AGGRIEVED AND PROTESTED APPLICATIONS:

Evidentiary hearings on the merits of a pending matter are formal, recorded proceedings at which the testimony of witnesses is taken under oath and exhibits are presented for consideration of the hearing examiner for admission as

evidence in the record. The course of the hearing shall generally proceed as follows, unless otherwise directed by the hearing examiner:

A. Entry of appearances. The parties shall enter their appearances at the beginning of the hearing and shall be made through counsel of record, or individually by any pro se party.

B. Preliminary matters. The hearing examiner will address preliminary matters, including outstanding motions, the presentation and admission of exhibits deemed admitted pursuant to the scheduling order, stipulations, and other items not previously ruled on as deemed appropriate.

C. Opening statements. At the discretion of the hearing examiner, the parties may present brief opening statements summarizing their positions concerning the issues in dispute, prior to the presentation of any witnesses.

D. Order of witnesses. Unless otherwise directed by the hearing examiner, evidence will be presented in the order of applicant's direct case, including witnesses and exhibits, in support of its position; protestant(s)' responsive case, including witnesses and exhibits, in support of their position and in rebuttal to applicant's position and evidence; the WRD's presentation of its direct and rebuttal case, including direct witnesses and exhibits and rebuttal witnesses and exhibits; and applicant's rebuttal case. Surrebuttal shall only be allowed at the discretion of the hearing examiner.

E. Cross-examination. The parties shall have a reasonable opportunity to cross-examine the witnesses of opposing parties. Cross-examination shall be limited to matters addressed on direct examination of the witness or matters contained in exhibits prepared by the witness, unless otherwise permitted by the hearing examiner. The hearing examiner may limit repetitious cross-examination.

F. Supplementation of testimony. Testimony of a witness may, at the discretion of the hearing examiner and subject to cross examination and objection, be supplemented with graphics or computerized presentations, provided that the presenting party has given advance notice of its intent to do so, the projected images presented are disclosed as proposed exhibits pursuant to the scheduling order, and the proposed exhibit number or identifiers are clearly marked and visible on each graphic presentation.

G. Closing statements. Closing statements may be allowed at the discretion of the hearing examiner.

H. Conduct of participants. All parties, witnesses, counsel, staff, spectators and other persons shall conduct themselves in a respectful and orderly manner. Disruptions of any kind at hearings shall not be permitted. Any disregard of the rulings of the hearing examiner on matters of order and procedure by any person may be noted on the record and the hearing examiner may take appropriate action pursuant to Chapter 72 of the New Mexico Statutes Annotated, the Rules of Civil Procedure for District Courts and the Rules of Professional Conduct. The hearing examiner may adjourn, recess, or continue any hearing if the behavior of any person interferes with the proper and orderly conduct of a hearing, and for any other cause or circumstance that may prevent the proper conduct of a hearing.

[19.25.2.22 NMAC - N, 8-30-2013]

19.25.2.23 COMPLIANCE ORDERS AND ENFORCEMENT HEARINGS:

A. Compliance order. A compliance order shall consist of a written statement that identifies the subject water right or docket number and describes the following with specificity:

- (1) acts or omissions with which the respondent is charged;
- (2) citation of the statute, rule, order, or other authority that the respondent is alleged to have violated, or any other grounds for the compliance order;
- (3) directive as to whether the alleged violation must cease immediately, or a specific time period in which a respondent must come into compliance.

B. Service. The WRD shall cause the compliance order to be served upon the respondent by certified mail, return receipt requested.

C. Evidence of compliance. The respondent shall have 10 days to contact the water master by telephone, email, or in writing to demonstrate that the alleged violation has ceased or that the respondent has come into compliance. Upon confirmation of compliance from the water master, WRD shall request dismissal of the docket.

D. Request for hearing. If the respondent desires a hearing or otherwise contests a compliance order, the respondent shall submit a written request for hearing to the state engineer within 30 days of receipt of a compliance order.

E. Failure to request hearing. If a written request for hearing is not submitted by the respondent within 30 days after receipt of a compliance order, the order shall be final, enforceable and non-appealable.

F. Procedures for compliance hearings. The hearings unit shall establish regular hearing dates in Santa Fe for compliance orders. Requested hearings shall be held no less than 15 and no more than 60 days from the date the request is filed. The conduct of hearings on compliance orders shall be established in accordance with the general procedures and requirements set forth in this rule. The hearing examiner shall issue a written decision within five business days after the scheduled hearing date.

G. Waiver of appearance at hearing. The respondent may waive the right to appear at hearing and make oral arguments or present testimony, and instead may submit the matter to the hearing examiner for decision on written submissions and documentary evidence. All such waivers shall be made in writing and shall be final and binding upon the respondent. Upon receipt of a written waiver, the hearing examiner shall render a decision within five business days on the basis of the submissions.

H. Failure to appear or participate at hearing. Failure to appear or participate at hearing shall constitute a waiver of the respondent's right to a hearing and to contest the merits of the compliance order. The hearing examiner may dismiss the request for hearing. Upon dismissal for failure to appear or participate, the compliance order shall be final, enforceable and non-appealable. The respondent may appeal the order of dismissal pursuant to NMSA 1978, Section 72-7-1.

[19.25.2.23 NMAC - N, 8-30-2013]

19.25.2.24 EVIDENCE:

A. General. Each party is responsible for presenting evidence on the record. The New Mexico Rules of Evidence as applied in the district courts of the state shall generally apply. At the discretion of the hearing examiner, evidence not otherwise admissible under those rules of evidence may be admitted when necessary to ascertain relevant facts. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded upon the determination of the hearing examiner.

B. Oral and written testimony under oath. All testimony received by the hearing examiner in formal hearings shall be made under oath, except matters officially noticed or entered into by stipulation. All witnesses must be present at the hearing unless a witness' presence at hearing is waived by the hearing examiner upon notice to and without objection from the parties. Written testimony shall be introduced as an exhibit and shall be on pages containing line and page numbers, and shall identify the witness and party for whom the witness is testifying, and the hearing caption and docket number. Written testimony shall be accompanied by a statement by the witness attesting to or verifying the contents and substance of the written testimony. Where written testimony has been filed in advance of the hearing, such testimony shall be adopted by the witness at hearing, subject to any necessary or appropriate corrections or amendments, and shall have the same force and effect as though it were stated orally by the witness and need not be repeated. The witness shall be subject to cross-examination on both oral and written testimony. Expert witnesses providing oral testimony shall also provide a detailed summary of their testimony in exhibit form, in the form of a written report or pre-filed testimony, in accordance with the scheduling order.

C. Stipulation as to facts and issues. The parties may, by stipulation in writing filed with the hearings unit or entered in the record at hearing, agree upon facts or issues involved in the controversy, which stipulation shall be binding upon the parties entering into the stipulation and may be regarded and used by the hearing examiner as evidence at the hearing. The hearing examiner may require proof or evidence of the facts stipulated to, notwithstanding the stipulation of the parties.

D. Exhibits. Documentary factual or legal information may be received in evidence in the form of accurate copies or duplicates of the original. The original plus two copies of any document or exhibit shall be filed with the hearings unit pursuant to the requirements of the scheduling order. A copy of the document or exhibit, including any expert report that forms the basis of a witness' testimony or is anticipated to be sponsored by a witness, must be served by the submitting party upon the other parties to the proceeding prior to hearing, in accordance with the scheduling order. To the extent practicable all exhibits, including those to be introduced on cross-examination, shall be marked before the start of hearing. All exhibits shall be marked numerically in the order of introduction by the moving party. Documentary and other physical evidence may be authenticated or identified by any reasonable means that shows that the evidence is what the proponent claims it to be. Upon admission by the hearing examiner of an exhibit, it shall be entered into the record. A party shall make reasonable efforts to limit the amount of voluminous evidence when preparing and offering exhibits. Where an exhibit is an excerpt, summary or abstract of a larger document or set of materials, other parties shall be given reasonable opportunity in advance of the hearing to examine the underlying source of the exhibit and the excerpt, abstract, or summary.

E. Administrative notice. Requests to take administrative notice of OSE files are discouraged. In lieu of requesting that administrative notice be taken of documents, parties are encouraged to submit those

documents or portions of documents in the form of exhibits in accordance with the scheduling order. The hearing examiner may take administrative notice of matters of which the district courts of this state may take judicial notice. In addition, administrative notice may be taken of generally recognized technical or scientific facts, published reports of governmental and state agencies, site visits conducted by the hearing examiner with notice to parties, and studies and conclusions within the state engineer's specialized knowledge. In addition, the hearing examiner may take administrative notice on the record of the results of the hearings unit previous experience in similar situations and general information concerning a subject within the OSE's or hearings unit's expert knowledge. When a party requests that the hearing examiner take administrative notice of a fact, the noticed fact and its source shall be stated at the earliest possible time before or during the hearing and other parties, upon timely request, shall be provided an opportunity to show why notice should not be taken.

F. Additional evidence. At any stage of the proceeding the hearing examiner may require the production of further evidence upon any issue. Such evidence may, at the discretion of the hearing examiner, be in writing or presented orally. All parties will be given an opportunity to rebut or otherwise respond to such evidence submitted and cross-examine the witness under oath.

G. Objections. Any evidence offered in whatever form shall be subject to appropriate and timely objection. The evidence to be admitted at hearing shall be material and relevant to the issue. When objection is made to the admissibility of evidence, such evidence may be received subject to later ruling by the hearing examiner. The hearing examiner has discretion, with or without objection, to exclude inadmissible, incompetent, cumulative, or irrelevant evidence or order the presentation of such evidence discontinued. Parties objecting to the introduction of evidence shall briefly state the grounds of objection at the time such evidence is offered. Formal exceptions to rulings are not necessary and need not be taken.

H. Offers of proof. An offer of proof for the record may be made and shall consist of a statement of the substance of the evidence to which objection has been sustained. The hearing examiner may require offers of proof to be submitted in writing in question and answer form.

I. Rebuttal evidence. Rebuttal evidence is evidence that tends to explain, counteract, repel, or disprove evidence submitted by another party or by staff. Evidence that is merely cumulative or could have been more properly offered in the case in chief is not proper rebuttal evidence. The hearing examiner may permit or require rebuttal evidence to be submitted in prepared form in accordance with this rule prior to its introduction. [19.25.2.24 NMAC - Rp, 19 NMAC 25.2.21 & 22, 8-30-2013]

19.25.2.25 BURDEN AND STANDARD OF PROOF: The burden of proof in a proceeding on a pending application is on the applicant to demonstrate that unappropriated waters are available for appropriation where a new appropriation is sought, and that the application will not impair or be detrimental to existing water rights, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state. In a compliance order hearing the burden of proof is on the WRD. The standard of proof for hearings unit proceedings shall be based on a preponderance of the evidence. [19.25.2.25 NMAC - N, 8-30-2013]

19.25.2.26 RECORDING AND TRANSCRIPTION: All hearings shall be recorded or transcribed by the hearings unit. In accordance with NMSA 1978, Section 72-2-17(B)(5), the oral proceedings may be transcribed upon the request of any party. Parties requesting that proceedings be transcribed shall arrange for the appearance by a stenographer and shall pay the cost of the transcription directly to the preparer of the transcript. In the event that the proceedings are transcribed upon the hearing examiner's own request, the parties may obtain copies of the transcript upon payment of any applicable fees. Copies of recorded proceedings may be obtained by the parties upon payment of applicable fees charged by the hearings unit. [19.25.2.26 NMAC - Rp, 19 NMAC 25.2.18, 8-30-2013]

19.25.2.27 PROPOSED FINDINGS OF FACT AND RECOMMENDATIONS: At the conclusion of the hearing, the hearing examiner may request that the parties submit proposed findings of fact, conclusions of law, and recommendations that will become part of the administrative record. At the hearing examiner's discretion, proposed findings of fact, conclusions of law, and recommendations may be accompanied by supporting legal memoranda from the parties. [19.25.2.27 NMAC - Rp, 19 NMAC 25.2.29, 8-30-2013]

19.25.2.28 HEARING EXAMINER'S REPORT AND RECOMMENDATIONS: After completion of an evidentiary or summary judgment hearing on the merits, the hearing examiner shall prepare and submit a report and recommendation to the state engineer for final decision.
[19.25.2.28 NMAC - Rp, 19 NMAC 25.2.30, 8-30-2013]

19.25.2.29 FINAL DECISION: Upon filing of the hearing examiner's report and recommendation, the state engineer shall issue a written final decision.

A. Record evidence. The state engineer shall base the final decision upon the record, including the hearing examiner's report and recommendation. Evidence upon which the state engineer may base the final decision includes the following:

- (1) any records, investigation reports, stipulations, and other relevant documents in the state engineer's possession that is offered and made a part of the record of the proceeding;
- (2) sworn testimony of witnesses and exhibits entered into the record by the hearing examiner; and
- (3) any facts that have been administratively noticed.

B. Entry of decision. After submission and consideration of the hearing examiner's report and recommendation, the state engineer shall enter the final decision or shall order the hearing examiner to reopen the record of proceedings in order to take further evidence or testimony.

C. Notice of decision. The state engineer's decision shall be mailed to all parties, or to their counsel of record if legally represented, by certified mail, return receipt requested, within 10 days after entry of the decision.

D. Finality. A decision of the state engineer is final after 30 days, unless an appeal has been timely filed in accordance with NMSA 1978, Sections 72-2-16 and 72-7-1. The state engineer shall not seek enforcement of a compliance order until it is final, except where an emergency exists or the public health or safety necessitates.
[19.25.2.29 NMAC - Rp, 19 NMAC 25.2.31, 8-30-2013]

19.25.2.30 RECONSIDERATION: A party may file a written request for reconsideration with the state engineer within 10 days of receipt of a final decision, and shall serve such request on all parties to the proceeding. A request for reconsideration shall state the factual and or legal basis for reconsideration of the state engineer's decision, and shall contain appropriate citations to the record. The filing of a request for reconsideration does not operate to toll or otherwise delay the time for filing an appeal as set forth in NMSA 1978, Section 72-7-1. If the state engineer takes no action on a request for rehearing within 10 days of its filing, it shall be deemed denied. If the state engineer grants a request for reconsideration, the state engineer shall issue an order vacating the final decision.
[19.25.2.30 NMAC - N, 8-30-2013]

19.25.2.31 APPEAL FROM FINAL DECISION: After hearing, appeal of the state engineer's decision may be taken by a party to a district court of the state, pursuant to NMSA 1978, Section 72-7-1, and other applicable laws of the state.

A. Time for filing notice of appeal. Any applicant or other party dissatisfied with the decision of the state engineer shall serve a notice of appeal within 30 days after receipt by certified mail of notice of the state engineer's decision, in accordance with the requirements of NMSA 1978, Section 72-7-1. The filing of a request for reconsideration by any party shall not operate to toll or otherwise delay the time for filing an appeal as set forth by statute.

B. Transmittal of record. Upon being served with a notice of appeal, the hearings unit administrator shall provide counsel for the state engineer a certified copy of the administrative hearing record for transmittal to and filing with the district court in accordance with NMSA 1978, Section 72-7-2.
[19.25.2.31 NMAC - N, 8-30-2013]

19.25.2.32 ADMINISTRATIVE RECORD: In accordance with NMSA 1978, Section 72-2-17(C), the administrative record shall include, at a minimum, all pleadings, motions, and intermediate rulings; evidence admitted at hearing; matters or items administratively noticed; questions and offers of proof, and objections and rulings thereon; any proposed findings submitted; the transcript or recordings of the administrative hearing; and any decision, opinion, or report by the state engineer or hearing examiner who conducted the hearing.
[19.25.2.32 NMAC - Rp, 19 NMAC 25.2.28, 8-30-2013]

19.25.2.33 DECISION OF DISTRICT COURT: The decision of the district court shall be binding on the state engineer upon the expiration of the deadline for appeal from the district court's decision if an appeal has not been taken in accordance with statutes and the procedural rules of the New Mexico supreme court. The state

engineer shall take such action as is necessary or required in accordance with such decision, and shall include a copy of the decision from the court in the OSE files.
[19.25.2.33 NMAC - N, 8-30-2013]

HISTORY OF 19.25.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:

SE 66-1, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, Article 3 Hearings, filed with the Supreme Court Law Library, 11-1-66; filed with the State Records Center, 6-27-91.

History of Repealed Material:

SE 66-1, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, Article 3 Hearings, filed with the Supreme Court Law Library, 11-1-66; filed with the State Records Center, 6-27-91. Article 3, Hearings - Repealed effective 8-30-2013.

19 NMAC 25.2, Hearing Procedures, filed 3-11-98 - Repealed effective 8-30-2013.