

## **OSE-Facilitated Mediation of Disputed Water Rights Frequently Asked Questions (FAQs)**

This document describes OSE-facilitated mediation of water rights disputes that come before the Hearings Unit of the New Mexico Office of the State Engineer. All participants in OSE-facilitated mediations should review this information before mediation begins.

1. **What is mediation?** Mediation is a form of alternative dispute resolution (ADR) in which a neutral third party works with disputants to facilitate discussion, negotiation, and settlement. The defining characteristics of mediation are self-determination and voluntary participation. Mediation is intended to help parties reach their own, mutually satisfactory agreement.
2. **Who are the parties to mediation?** Parties to OSE-facilitated mediation are the applicant, protestants, if any, and the OSE Water Rights Division (WRD). An applicant or protestant may participate on his or her own behalf or be represented by an attorney. Discussion is typically more effective when individuals express their own positions and concerns; so, even if represented, the applicant or protestant should attend and participate in the session.
3. **May people other than parties and their attorneys attend a mediation session?** Generally, only those who are identified as parties to the mediation may attend a mediation session. However, the parties and the mediator may agree that experts may attend if needed for part of a session. The mediator may require that the parties provide a list of participants before each session.
4. **With whom will the mediator communicate?** If an attorney represents a party, the mediator will communicate with the attorney, and with the party or their experts *only* with the attorney's permission. The mediator will, of course, communicate directly with non-represented parties.
5. **What authority must participants have?** Someone for each party must have authority to *negotiate* an agreement; ideally, he or she will have authority to *approve* an agreement. OSE recognizes, however, that organizational representatives may need to present a proposed agreement to their organization for review and approval.
6. **When is mediation appropriate?** Parties should request OSE-facilitated mediation when they believe it is reasonably likely to resolve their dispute. Similarly, the hearing examiner may order OSE-facilitated mediation based on an assessment of the dispute. In any event, the parties can conduct settlement discussions independently.

7. **Are mediation sessions confidential?** Yes. The New Mexico Mediation Procedures Act and rules of evidence provide that, subject to limited exceptions, statements made as part of mediation are confidential.<sup>1</sup> The mediator, like other participants, may take personal notes, but keeps no formal record. The mediator will not reveal anything discussed in mediation without the consent of all parties.
8. **Who is responsible for reaching agreement?** The parties are responsible for reaching agreement. The mediator *facilitates* a process by which parties identify and evaluate ways to settle the dispute and craft their own written agreement.
9. **What are the possible results of mediation?** The parties may resolve all, some, or none of the issues that arise during mediation. For example, the parties may jointly propose conditions for an application's approval, may narrow issues to be addressed at hearing, or may decide to go to hearing as originally scheduled. In cases with multiple parties or issues, mediation may resolve some issues and thus simplify or shorten the administrative hearing.
10. **Who mediates?** An OSE hearing examiner who is not assigned to the case may serve as mediator. Should the case go to administrative hearing, the hearing examiner who mediates *will not participate* in decision-making related to the case.
11. **How does the OSE mediator conduct a mediation session?** The OSE mediator takes a facilitative approach to mediation. In this approach, the objective is to create a forum that promotes effective communication directly among the parties and thus creates an opportunity for the parties to negotiate their own agreement. The mediator will ask about parties' understanding of their own and others' interests; parties' assessments of strengths and weaknesses of each party's case; benefits and costs of settlement compared to formal hearing; and alternatives to proposed offers. The mediator may offer suggestions but will not advise the parties about legal rights or responsibilities, offer conclusions of fact or law, or predict how the hearing examiner might rule.
12. **Will the parties meet face-to-face?** Yes. The mediation session will begin with all parties together in a joint session. However, the mediator may meet privately with each party (caucus) to assist in identifying interests and generating options for resolving the dispute. Unless the mediator receives permission from a party to discuss any comments made in a caucus, the mediator will not disclose those comments to the other parties.

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<sup>1</sup> Mediation Procedures Act, NMSA 1978, §§ 44-7B-1 to 44-7B-6 (2007); NMRA Rule 11-408. Please see [New Mexico Law and Mediation](#).

13. **How is mediation initiated?** Parties may agree to OSE-facilitated mediation at the pre-hearing scheduling conference or may later file a joint motion to request that the hearing examiner refer the matter to mediation. Before referral, the hearing examiner will ask the ADR officer to assess whether a case is suitable for OSE-facilitated mediation. Occasionally, the hearing examiner will refer a case for mediation assessment on his or her own motion. Following referral, the ADR officer will consult privately with the parties and recommend to the hearing examiner whether OSE-facilitated mediation appears to be appropriate.
14. **When will mediation sessions be scheduled?** The hearing examiner may set a mediation date at the scheduling conference or in an order referring the case to mediation; otherwise, the mediator and parties will set a date. In either case, the mediation schedule will take into account the administrative hearing schedule and the need to prepare for settlement discussions. Based on experience, parties may prefer to hold their first session after they exchange exhibits.
15. **How should parties prepare for mediation?** Parties must understand technical and legal issues of the case, be prepared to present their underlying interests and concerns, and be prepared to offer settlement options. Before joint session, the mediator will request each party to submit a written mediation statement that identifies issues and provides background information.
16. **Should parties exchange information *before* mediation?** Yes. Doing so enables more focused mediation sessions. To allow common understanding of technical data, parties typically exchange exhibits prepared in advance of hearing. To describe issues, concerns, and options, they should consider exchanging non-confidential portions of mediation statements. Parties must provide the mediator with copies of documents sent to other parties.
17. **May parties meet privately with the mediator *before* mediation?** Yes. Private discussions between a party and the mediator are acceptable. Before the first session, the mediator will speak separately with each party and their experts to review their mediation statement, preview the mediation process, and identify agenda topics. If time and distance allow, pre-mediation meetings will be in-person; otherwise, the mediator will schedule telephonic meetings. Unless agreed to otherwise, these discussions are confidential.
18. **May experts meet *before* joint session?** Yes. Such meetings, conducted with the parties' approval, with or without the mediator, can be very useful. Experts' joint review of technical data often makes the mediation process more effective by identifying areas of technical agreement, isolating issues that merit further discussion, and generating settlement options for the parties to consider before or during joint session.

19. **What happens during the first joint mediation session?** To open the session, the mediator will review and answer questions about the mediation process and propose an agenda based on topics identified by the parties during pre-mediation meetings. Next, each party will present their positions and concerns, after which the parties engage in open discussion.

Based on this discussion, the mediator will summarize issues and work with the parties to set a detailed agenda for the rest of the session. The agenda will focus on clarifying issues and on identifying, evaluating, and selecting settlement options. Each party should be prepared to propose specific options and explain why they are fair and reasonable for all parties. The session will conclude with documenting any agreement that is reached or on identifying next steps in the mediation process.

20. **May parties make presentations?** Yes. Structured presentations of technical data can usefully guide discussion. Upon request, the OSE mediator will provide a laptop and projector.
21. **What does the mediator expect of parties?** Representatives from each party should engage in good faith discussions with an intent to negotiate a settlement. Parties should emphasize their underlying positions and objectives and respectfully listen to and consider other parties' positions, concerns, and proposals. Parties taking this approach are far more likely to find mutually agreeable solutions compared to those who take hard-line bargaining positions.
22. **How long will the session last? How many sessions will be held?** Most cases are scheduled for a full day; a few cases are scheduled for a half-day. Well-prepared parties can reach settlement in a single joint session. Cases with multiple or complicated issues may require two or more sessions to fully develop technical data, evaluate settlement options, and reach agreement.
23. **How does a session end?** Parties may end mediation by reaching full or partial agreement or by concluding that further discussion will not lead to agreement. Because mediation is voluntary, a party may withdraw at any time, but the remaining parties may choose to continue. A party proposing to withdraw should discuss their decision during the mediation itself. If the mediator concludes that the dispute will not be resolved through mediation, he or she may propose to end the mediation.

24. **If the parties reach agreement, must they put that agreement in writing at the end of joint session?** Yes. The parties will, with the mediator's assistance, reduce their agreement to writing. If a final agreement has not been reached, the document should capture the terms of agreement so far, identify next steps and who is responsible for carrying them out, and set a date to reconvene to discuss unresolved issues or to review a final agreement.
25. **What follow-up steps will the mediator take after joint session?** Until the parties file a pleading with the hearing examiner that indicates agreement has been reached or agree that mediation has failed to resolve the dispute, the mediator will maintain contact with the parties. If appropriate, the mediator may suggest resuming the mediation process; often, follow-up allows the parties to report progress toward a final, executed settlement agreement.
26. **What will the mediator report to the hearing examiner?** As authorized by the Mediation Procedures Act, the mediator will report the "administrative facts" of the mediation to the hearing examiner: date, time, and location of mediation sessions, a list of participants, whether the parties reached agreement, and an assessment of whether mediation should continue or end.<sup>3</sup> The mediator may submit interim status reports to inform the hearing examiner of mediation progress. In some cases, the hearing examiner may require that the parties separately or jointly file status reports on mediation progress and prospects.
28. **Must parties submit the final agreement to the hearing examiner?** The need to submit the final agreement depends on the nature of the agreement.

If all protests are resolved by private agreement between applicant and protestant, each protestant should file a notice of withdrawal of protest and the parties should file a joint motion to remand the matter to WRD. The parties *may* file the settlement agreement in this case if they wish to do so.

On the other hand, if proposed conditions of approval for the application are part of the settlement agreement, the agreement *must* be included with the parties' joint motion to remand.

**Questions?** Contact:

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<sup>3</sup> NMSA 1978, § 44-7B-5(A)(9).