

Instructions for Parties in State Engineer Administrative Hearings

An administrative hearing before the New Mexico State Engineer has been requested. In protested applications, hearings are multi-party proceedings, with the Applicant, the Protestant(s) and the Water Rights Division (WRD) of the Office of the State Engineer (OSE) appearing as Parties. In aggrieved applications, the Applicant and the WRD are the only Parties.

1. Representation

Attorneys from the OSE Administrative Litigation Unit (ALU) usually represent the WRD in administrative hearings.

Applicants and Protestants may be represented by attorneys and are encouraged to obtain legal counsel. An individual Applicant or Protestant may represent himself or herself in the proceedings (appear *pro se* or self-represented litigant). Only an attorney licensed in the State of New Mexico may represent other groups, organizations that have multiple members; anyone not an individual must be represented by counsel. The Rules of Evidence for the District Courts of New Mexico are generally followed in State Engineer administrative hearings.

If you decide to appear as a *self-represented litigant or pro se* (*representing yourself*), you will be responsible for familiarizing yourself with these rules, the Rules of Civil Procedure for the District Courts of New Mexico, and all other rules of the OSE. Appearing *pro se* does not relieve you of the obligations of following the rules regarding discovery or evidence.

2. Burden of Proof

The burden of proof in administrative hearings concerning protested applications and aggrieved matters is on the Applicant. The Applicant must prove each element of the case by a preponderance of the evidence. The WRD may present its independent evaluation of the proposed matter. However, the burden of proof remains on the Applicant and neither the Applicant nor Protestant should rely on the WRD to present their case. Each Party is responsible for presenting its own evidence. ***The failure of the Applicant to meet the burden of proof will result in denial of the application.***

3. Authority of the Hearing Examiner

The State Engineer may hear any given matter. However, in most cases a Hearing Examiner appointed by the State Engineer conducts the administrative hearing. The appointed Hearing Examiner has the power to regulate the proceedings and take whatever actions are necessary for the efficient and orderly conduct of the hearings, including setting dates for hearings, ruling on motions, administering affirmation for sworn testimony by witnesses, issuing subpoenas, and limiting and receiving testimony and exhibits into evidence during the administrative hearing pursuant to the rules of evidence.

4. Ex Parte Contacts

Ex parte contacts between any of the Parties and the State Engineer or Hearing Examiner are prohibited. *Ex parte* contacts are discussions or communications on substantive issues regarding a pending application when all Parties are not present. The State Engineer or Hearing Examiner serves as an administrative judge and it is improper to contact him or her regarding your case without the other Parties being present or notified. Thus, you may not contact the State Engineer or Hearing Examiner either in person, by telephone or by mail without all other parties being informed and present. **All Parties must be sent copies of all correspondence between themselves and the Hearing Unit.**

5. Scheduling Conference

A scheduling conference is held (often telephonically) at which the Applicant, Protestants, counsel for the Parties, and staff for WRD meet with the Hearing Examiner to clarify the issues in dispute and establish a schedule for discovery and hearing. The possibility for settlement or mediation may also be explored. All Parties will receive notice of the time, place, and date of the scheduling conference from the Hearing Unit Administrator, as well as the amount of and date your hearing fee payment must be submitted. The notice will also state that the Parties shall be prepared to clarify issues that are in dispute, and the Applicant shall offer an agreed-upon schedule of proceedings. Without an agreed-upon schedule, Applicant risk delay in scheduling and shall otherwise be subject to a schedule set by the Hearing Examiner. ***Failure to appear at the scheduling conference or failure to submit the required hearing fee are sufficient grounds to dismiss you from the proceeding, or, if you are the Applicant, to deny the application.***

6. OSE Facilitated Mediation

For Parties willing to work toward settlement, an OSE Alternative Dispute Resolution (ADR) Officer may facilitate mediated settlement. The Parties may jointly move for an Order Referring Matter for Mediation Assessment or Mediation at any time prior to the start of the evidentiary hearing.

7. Scheduling Order

After the scheduling conference, the Hearing Examiner will issue a Scheduling Order that identifies the issues to be addressed at the hearing and sets forth the schedules for discovery and disclosure of witnesses and exhibits, the filing of motions and the date of the administrative hearing. The scheduling order provides the format for submittals by setting the caption and list of Parties entitled to notice.

The inclusion of a provision allowing electronic filing may be discussed at the pre-hearing scheduling conference and considered for adoption by the Hearing Examiner.

8. Discovery

The Parties are provided time to develop the evidence they wish to present at the hearing and to ascertain the evidence of the other Parties. While informal discovery by the Parties is encouraged to reduce costs, Parties may also utilize formal discovery methods, such as depositions, written interrogatories, and requests for production. All Parties are expected to comply with the rules of discovery as set out in the Rules of Civil Procedure for the District Courts of New Mexico.

9. Instructions for Filing of Motions

All motions must be filed with the Hearings Unit. ***Copies of the motion and attachments must be provided to all other Parties by the Party filing the motion.*** The motion must include:

- A. An affirmative statement that the consent of the other Parties was sought and whether such consent was given or the reason consent was not sought.
- B. If the motion is unopposed by all Parties, a proposed order must be submitted with the motion. The proposed order must include confirmation of the Parties' consent and must be sent to hu.admin@ose.nm.gov in Microsoft Word format.

Motions not in compliance with this instruction may be disregarded.

Parties may respond to an opposed motion in writing within fifteen days of its receipt. The moving Party may reply within fifteen days thereafter. Copies of responses and replies must be provided to all Parties. The Hearing Examiner may rule on a motion based on the pleadings or schedule a hearing at his or her discretion. ***Failure to timely file a written response in opposition to a motion constitutes sufficient grounds for granting the motion. Failure to appear at a hearing constitutes sufficient grounds for entry of an adverse judgment.***

10. Pre-Hearing Conference

Shortly before the administrative hearing, the Hearing Examiner may schedule a pre-hearing conference to address outstanding motions and admission of exhibits, obtain stipulations, define and narrow the issues to be decided at hearing so as to avoid duplicate, irrelevant or inadmissible testimony, and to review hearing procedures. The Hearing Examiner may take administrative notice of the relevant files on record at the OSE; however, the Parties shall be responsible for presenting copies of relevant documents from OSE files as exhibits at hearing.

11. The Administrative Hearing

The Administrative Hearing is a formal evidentiary proceeding at which the sworn testimony of witnesses is taken and exhibits are presented. All exhibits presented for admission into evidence must be submitted to the Hearing Examiner, in triplicate (one original and two

copies) and electronically (CD or flash drive) at the hearing. The hearing will be digitally recorded (audio recording) unless a Party arranges for the hearing to be stenographically transcribed. That Party is responsible for paying all costs associated with the stenographic transcription.

Generally, the Applicant presents its case first, followed by the Protestants. The WRD proceeds next. The Hearing Examiner may permit opening and closing statements and may allow rebuttal. The Rules of Evidence of the District Courts of New Mexico are generally followed, although the Hearing Examiner has the discretion to admit evidence that is not in strict conformity with those rules. At the conclusion of the administrative hearing, the Hearing Examiner may order post hearing briefs or request proposed findings of fact and conclusions of law.

12. Report and Recommendation of the Hearing Examiner and Decision of the State Engineer

Based upon review and evaluation of the evidence, the Hearing Examiner will submit a written report to the State Engineer that includes recommended Findings of Fact, Conclusions of Law and a proposed Order. The State Engineer may adopt the recommended findings and proposed order, in whole or in part, reject the recommendation and enter his or her own findings and order, or order that the hearing be reconvened to take further evidence. The State Engineer's decision will be sent by certified mail to the Parties or their attorneys.

13. Appeals from the State Engineer's Decision

Any Party dissatisfied with the decision of the State Engineer may appeal the decision to the district court of the county in which the Application or matter was initiated in accordance with Sections 72-2-16 and 72-7-1 of the New Mexico Statutes Annotated (1978 compilation). Appeals are made by serving a notice of appeal personally upon the State Engineer or his Administrative Secretary, the Attorney General, and all Parties, within thirty days after receipt of the decision, filing timely proof of service with the District Court and paying the court's docket fee.