



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner,

v.

No. S-1-SC-41580

ELIZABETH ANDERSON *in her official capacity as*
NEW MEXICO STATE ENGINEER,

Respondent,

and

SANTA TERESA CAPITAL, LLC,

Real Party in Interest.

RESPONSE OF THE ATTORNEY GENERAL IN SUPPORT OF
PETITIONER'S EMERGENCY VERIFIED PETITION FOR WRIT
OF MANDAMUS AND REQUEST FOR STAY

RAÚL TORREZ
Attorney General

Justin McCarthy
Assistant Solicitor General

Aletheia V.P. Allen
Solicitor General
Ellen Venegas
Senior Solicitor General

408 Galisteo Street
Santa Fe, NM 87501
(505) 629-7741
Attorneys for State of New Mexico

The Attorney General, on behalf of the State of New Mexico, respectfully submits this Response to Petitioner’s *Emergency Verified Petition for Writ of Mandamus and Request for Stay* (Petition), filed on August 20, 2026. This Response is submitted pursuant to Rule 12-504(C)(1), (D)(1) NMRA, which authorizes the Attorney General to file a response to the Petition and Request for Stay.

INTRODUCTION

This case presents an important legal question: Whether the State Engineer may issue an emergency authorization to pump vast amounts of groundwater and, thereafter, indefinitely refrain from scheduling a hearing and determining whether the application is detrimental to the public welfare. New Mexico’s Water Code and Constitution supply the answer: No.

Here, Santa Teresa Capital, LLC (STC) applied for authorization to drill an emergency replacement well in Doña Ana County to support construction of the large-scale data center campus known as Project Jupiter. Two days later—on October 23, 2025—the State Engineer approved the application. But the State Engineer’s reliance on the “emergency” provision at NMSA 1978, Section 72-12-22 (1953) was

unlawful because the statute is inapplicable under the facts of this case, particularly where the purpose of use has changed. And in the ten months since, the State Engineer has failed schedule a hearing, leaving Petitioner and other protestants with no viable path forward. Due process, which is a hallmark of the Water Code, demands more. As such, the State Engineer's approval of STC's application and continued failure to hold a hearing exceed the scope of her authority under the Water Code and violate the New Mexico Constitution.

Given the volume of groundwater at issue and the location of STC's emergency authorization in the Lower Rio Grande Basin, which implicates New Mexico's obligations under the Rio Grande Compact, the State's interest in this case is even more significant. Thus, in this case—as in every case—the State Engineer also has a non-discretionary duty to evaluate whether an application will be detrimental to the public welfare or contrary to the conservation of water. But the State Engineer has failed to discharge this duty too. The Court should grant the Petition.

STANDARD OF REVIEW

This Court has original jurisdiction in mandamus actions “against all state officers, boards and commissions” and the power to issue

extraordinary writs to exercise its jurisdiction. N.M. Const. art. VI, § 3. The Court may issue a writ of mandamus “to compel the performance of an affirmative act by another where the duty to perform the act is clearly enjoined by law,” *State ex rel. Sugg v. Oliver*, 2020-NMSC-002, ¶ 7 (citation omitted), and where there is no other “plain, speedy and adequate remedy in the ordinary course of law,” *id.* (quoting NMSA 1978, § 44-2-5 (1884)). The writ may also be used “in a prohibitory manner to prohibit unconstitutional official action.” *Am. Fed’n of State, Cnty., & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 4, 150 N.M. 132.

ARGUMENT

I. Mandamus jurisdiction is proper because the State Engineer has failed to perform a non-discretionary duty in violation of the Water Code and New Mexico Constitution.

This Court should accept mandamus jurisdiction because the State Engineer has exceeded the scope of her authority and failed to perform a non-discretionary duty by approving STC’s emergency application and failing to hold a hearing. The State Engineer’s action and inaction violates due process, the Water Code, and the separation of powers doctrine under the New Mexico Constitution.

This Court may exercise original jurisdiction in mandamus proceedings where a petition presents a purely legal matter involving a non-discretionary duty of a government official that: “(1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.” *State ex rel. Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272.

All three requirements are met here. The State supplements Petitioner’s arguments to underscore the urgent need for the Court to grant the Petition. First, the Petition sets forth an important, unanswered, and recurring constitutional question of great public importance: Whether the State Engineer may approve an emergency authorization to pump vast amounts of groundwater and, thereafter, indefinitely refrain from docketing a protest, holding a hearing, and determining whether the application is detrimental to the public welfare.

Second, the material facts are not in dispute. Although the existing well was historically used for commercial purposes to irrigate a commercial sod farm, STC’s application—filed on October 21, 2025—

sought emergency authorization to drill a replacement well to both irrigate the existing sod farm *and* support construction of Project Jupiter, a “large-scale industrial project.” **[Pet., Attach. 2 at 9-22 (Santa Teresa Capital, LLC Appl.)]** In its application, STC identified nine discreet reasons justifying emergency authorization. **[Id. at 21-22]** Two days later—on October 23, 2025—the State Engineer approved the application. **[Id., Attach. 3 at 41-46]** Since then, it is undisputed that the State Engineer has failed to schedule a hearing. Meanwhile, a totalizing meter indicates that STC has pumped more than 100 million gallons of groundwater since data became available in April 2026. **[Id., Attach. 5 at 53-54 (Point of Diversion Summary)]** This Court may decide the legal claims in this Petition based solely on these undisputed facts.

And third, no other adequate remedy exists. At present, the State Engineer’s continued inaction has left Petitioner and numerous other protestants with no viable path forward. *See State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 56 (“[C]ircumstances which justify bringing an original mandamus proceeding in this Court include the possible inadequacy of other remedies[.]” (internal quotation marks and

citation omitted)). Although the State Engineer’s Response indicates that the Hearing Unit recently sent a Notice of Docketing to all parties on August 26, 2026, and asserts that expeditious resolution of the matter can be reached through the administrative process, [**see OSE Resp. at 4-5, 7-8**], such assurances warrant skepticism. The timing of the decision to docket the protests—a mere six days after the Petition was filed—raises its own concerns. While there is now the prospect of an administrative remedy, the State Engineer’s assurances do not alleviate concerns regarding the adequacy or timeliness of that remedy. *See Lovato v. City of Albuquerque*, 1987-NMSC-086, ¶ 6, 106 N.M. 287 (“Mandamus is the proper remedy where the public official refuses or *delays to act*[.]” (emphasis added)).

For these reasons, this Court should accept mandamus jurisdiction, grant the Petition, vacate STC’s emergency authorization, and direct the State Engineer to immediately schedule a hearing before approving any further use of groundwater to support construction of Project Jupiter.

II. The State Engineer’s approval of STC’s application under Section 72-12-22 is contrary to statute and violates the New Mexico Constitution.

As the Petition explains, the State Engineer improperly relied upon Section 72-12-22 to approve STC’s application prior to notice and hearing. Section 72-12-22 contains a narrow exception allowing the owner of an existing groundwater right to drill an emergency replacement well within 100 feet of the existing well. *See* § 72-12-22(A)(1)-(4).

But that narrow exception—particularly the two-part “emergency” provision found in Subsection (A)(3)—is inapplicable here because STC does not meet the criteria for emergency authorization. Specifically, STC cannot show: (1) the existence of an “emergency situation”; *and* (2) that it will suffer “crop loss or other serious economic loss[.]” Section 72-12-22(A)(3). Further, the emergency provision in Section 72-12-22 does not permit the State Engineer to authorize a change in the purpose or place of use prior to notice and hearing. In such cases, an application may *only* be approved “after such advertisement and hearing as are prescribed in the case of original applications.” NMSA 1978, § 72-12-7(A) (1931). The State Engineer’s approval of the application was therefore contrary to statute and the New Mexico Constitution’s directive that the waters of

the State are “subject to appropriation for beneficial use, *in accordance with the laws of the state.*” N.M. Const. art. XVI, § 2 (emphasis added).

A. Section 72-12-22 is inapplicable because the statutory emergency requirement is not met.

The State Engineer may issue a change in well location prior to publication and hearing when, among other requirements, an applicant shows “[a]n emergency situation exists in which the delay caused by application, publication and hearing would result in crop loss or other serious economic loss[.]” Section 72-12-22(A)(3). But an emergency authorization under this statute, as the phrase suggests, requires a showing of the existence of a genuine emergency. No such emergency exists here.

Where, as here, a term or phrase is not expressly defined by statute, this Court has instructed that it “must be interpreted in its usual, ordinary, and popular sense” and “may be ascertained from a dictionary.” *Battishill v. Farmers All. Ins. Co.*, 2006-NMSC-004, ¶ 8, 139 N.M. 24 (citation omitted). An “emergency” is “an unforeseen combination of circumstances or the resulting state that calls for immediate action” or “an urgent need for assistance or relief[.]” *Merriam-Webster Dictionary*, <https://perma.cc/9TA4-VJXZ> (last visited on Sept. 2, 2026).

Tellingly, the State Engineer’s own guidance, which it uses to evaluate applications for emergency authorizations, also interprets the term “emergency situation” narrowly.¹ **[See State Ex. A (Guidance re. Affidavits for Emergency Authorizations pursuant to NMSA 1978, § 72-5-25, Office of the State Engineer (June 12, 2023)) (“Emergency Authorization Guidance”)]** In evaluating whether emergency authorization is appropriate, the guidance instructs staff to consider whether there are “specific facts that support the existence of an emergency” and explains that the application must demonstrate the existence of “[s]ome unexpected event[.]” **[Id. at 3-4]**

Here, no such emergency situation justifies the State Engineer’s approval of STC’s application. In support of its application, STC stated that production from the original well had declined drastically, and that “[w]ithout replacing [the well], the commercial sod farm will suffer

¹ Although the State Engineer’s guidance primarily addresses emergency authorizations for surface water appropriations under NMSA 1978, Section 72-5-25 (1953), the guidance also states it may be considered “when evaluating the sufficiency of an affidavit filed in conjunction with any application that requests emergency authorization, even those for which no affidavit is required under OSE rules (e.g., replacement or supplemental well applications filed under Section 72-12-22, -23 or -24 NMSA 1978).” **[State Ex. A at 1 n.1]**

serious economic loss[.]” **[Pet., Attach. 2 at 21-22]** This might justify the State Engineer’s emergency authorization to ensure continued irrigation of the sod farm. But it does not permit the State Engineer to separately grant emergency authorization for a change in the purpose of use to support the construction of Project Jupiter. Delay in the construction of a private data center does not rise to the level of a genuine emergency. **[Cf. State Ex. B, Emergency Authorization for Permit For Permit to Change Location of Well in The Canadian River Underground Water Basin of New Mexico, *In re Appl. of Mora Mut. Water & Sewer Works Ass’n for Permit to Change Location of Well in the Canadian River Underground Water Basin* (Mar. 13, 2026) (granting emergency authorization to pump groundwater to ensure a sufficient drinking water for the local community)]** Simply put, STC’s application provides no basis for the State Engineer to conclude that delays related to the construction of Project Jupiter is, or ever was, a genuine emergency.

B. Section 72-12-22 is inapplicable because the statute’s “serious economic loss” requirement is not met.

The State Engineer’s approval of the application was also unlawful because STC’s economic loss resulting from the delayed construction of

Project Jupiter does not meet the criteria for “serious economic loss” set forth in Section 72-12-22(A)(3). In reaching the opposite conclusion, the State Engineer failed to follow her own guidance and disregarded two separate decisions by hearing examiners interpreting this specific provision of the statute.

Under Section 72-12-22(A)(3), an applicant seeking an emergency change in well location must also demonstrate that the time required for notice and hearing would result in “crop loss or other serious economic loss[.]” STC’s application failed to meet this requirement. Two separate Hearing Unit Orders adopted by the State Engineer—each entitled to persuasive weight—underscore this point. *See* Order Granting Carlsbad Irrigation District’s Motion for Partial Summary Judgment, *In re Appl. by Barbe Farm, LLC* (“*Barbe Farm Order*”), Hearing No. 21-016, (Aug. 31, 2021), <https://perma.cc/6E4L-UFW8>; Order Granting Carlsbad Irrigation District’s Motion for Partial Summary Judgment, *In re Appl. by Conquistador Council, Boy Scouts of America & Henry McDonald*, Hearing No. 20-038 (July 27, 2021), <https://perma.cc/6Q7T-RRGN>. In each case, the Hearing Examiner concluded the applicants failed to

establish they would suffer “crop loss or other serious economic loss” because of the delay caused by notice and hearing.

Barbe Farm is especially instructive. There, the applicant sought emergency authorization to change the purpose of use of appropriated surface water from irrigation to commercial and irrigation.² *Barbe Farm* Order at 1-2. In support of its application, it stated that “commercial use is required immediately to supply commercial water for oil field activities” and that “[t]he demand for commercial water is immediate and the application must deliver the water as soon as possible.” *Id.* at 3. However, the application “contained no additional statements regarding the nature or extent of the economic loss.” *Id.* Based on this information,

² NMSA 1978, Section 72-5-25 (1953), which applies to emergency authorizations to appropriate surface water, is almost identical to Section 72-12-22, which applies to emergency authorizations to appropriate groundwater. *Compare* § 72-5-25(A) (“... if an emergency exists in which the delay . . . would result in crop loss or other serious economic loss to the appropriator”), *with* § 72-12-22(A)(3) (“... [if] an emergency situation exists in which the delay caused by application, publication and hearing would result in crop loss or other serious economic loss”). The primary difference is that Section 72-5-25(A) requires an applicant to submit an affidavit “contain[ing] specific facts supporting the existence of the emergency.” By contrast, Section 72-12-22(A) contains no such requirement. The Hearing Examiner’s interpretation of the phrase “crop loss or other serious economic loss” is therefore persuasive under both statutes.

the Hearing Examiner determined that no genuine emergency existed and that, given the proposed change in use, the applicant's "purported economic loss is a loss of opportunity as opposed to a loss of investment akin to a crop loss." *Id.*

In this case, like *Barbe Farm*, the applicant did not provide any additional information regarding the nature or scale of the economic loss. **[See Pet., Attach. 2 at 21-22]** Because it is the responsibility of the applicant to include all required factual information and STC failed to include this essential information, STC's purported economic loss must be assumed to be a loss of economic opportunity rather than a loss of investment. The State Engineer's own guidance underscores this point. Where, as here, an applicant asserts an economic loss, it instructs staff to ask whether the applicant included a "specific description of the loss . . . [i]ncluding, but not limited to, contract damages, or penalties as a result of the delay caused by publication[.]" **[State Ex. A at 4]** But, because STC included no such information, the State Engineer's finding of a "serious economic loss"—the second required showing under Section 72-12-22(A)(3)—was unlawful.

C. Section 72-12-22 does not authorize a change in purpose or place of use prior to notice and hearing.

Further, even if an emergency were properly found, Section 72-12-22 simply does not permit the State Engineer to authorize a change in the purpose or place of use without notice and hearing. Under the Water Code, an application to change the purpose or place of use of an existing well may *only* be approved “after such advertisement and hearing as are prescribed in the case of original applications.” § 72-12-7(A). No exceptions permitting an emergency change in the purpose or place of use are set forth in the statute.

Under New Mexico’s well-established rules of statutory interpretation, “[t]he text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997). Here, Section 72-12-22(A) clearly permits an applicant to drill an emergency replacement well “within one hundred feet of the original well[.]” However, the statute makes no mention of permissible changes in the purpose or place of use. *See also* 19.27.1.25 NMAC (“The owner of a water right within a declared underground water basin cannot change the place or purpose of use of the right without the approval of the state engineer.”). And it certainly does not affirmatively authorize an applicant to make such changes.

Rather, the statute only permits an applicant to drill a new emergency well within 100 feet of the existing well.

A separate provision of the Water Code, Section 72-12-7, does provide a process by which an owner of an existing groundwater right may change the purpose or place of use. *See State v. Cleve*, 1999-NMSC-017, ¶ 8, 127 N.M. 240 (explaining that proper application of the plain meaning rule also requires considering the “context surrounding a particular statute, such as its history, its apparent object, and other [related] statutes”). Section 72-12-7(A) states:

The owner of a water right may change the location of his well or change the use of the water, but only upon application to the state engineer and upon showing that the change will not impair existing rights and will not be contrary to the conservation of water within the state and will not be detrimental to the public welfare of the state. The application may be granted only after such advertisement and hearing as are prescribed in the case of original applications.

(Emphases added). This variation in language is significant. As this Court recently emphasized, it is presumed that the Legislature “say[s] what it means and mean[s] what it says,” *State v. Rael*, 2024-NMSC-010, ¶ 41, and that “differences in language . . . convey differences in meaning when interpreting statutes.” *State v. Lopez*, 2023-NMSC-011, ¶ 14 (internal quotation marks and citation omitted).

Here, Section 72-12-7 expressly requires owners of an existing groundwater right who seek to change the place or purpose of use to go through the notice and hearing process before the State Engineer grants the application. The Legislature could have included similar language in Section 72-12-22 permitting an applicant to change the place or purpose of use of an emergency replacement well prior to hearing and publication. But it did not.

This is no accident. As discussed *infra* Section III, one of the primary purposes of the statutory notice and hearing requirement is to ensure that the proposed change in application will not “impair existing rights and will not be contrary to the conservation of water within the state and will not be detrimental to the public welfare of the state.” Section 72-12-7(A); *see also State ex rel. Off. of St. Eng’r v. Romero*, 2022-NMSC-022, ¶ 14 (holding that the groundwater forfeiture statute codified at NMSA 1978, § 72-12-8(A) (2002) allows for partial forfeiture under New Mexico’s beneficial use doctrine). Notably, this policy also underlies the notice and hearing process in the surface water context. *See* NMSA 1978, § 72-5-5(B) (2019) (conferring standing to any protestant objecting the proposed surface water application “will be detrimental to the

objector's water right[,] . . . contrary to the conservation of water within the state[,] or detrimental to the public welfare of the state”).

In this case, it is undisputed that STC's application seeks to change the purpose of use. STC's emergency application states that “the existing well LRG-3150 POD 36 . . . has historically been used for commercial purposes to irrigate a commercial sod farm[.]” **[Pet., Attach. 2 at 21-22]** But it also specifically states that the replacement well, LRG-3150 POD 50, will be used to irrigate the existing commercial sod farm *and* support construction of Project Jupiter. *Id.*

Applying the law to the specific facts of this case, the purpose of use has changed, placing STC's application outside the scope of Section 72-12-22. Stated differently, if STC sought to drill the replacement well for the sole purpose of irrigating the existing commercial sod farm (i.e., the same purpose of use), it is possible the application could have satisfied the requirements under Section 72-12-22 provided it also met the “emergency” criteria. But the change to the purpose of use, as stated in STC's application, forecloses that possibility. As the State Engineer's own regulations recognize, different purposes of use are significant and may not always be interchangeable because they may involve different

consumptive use and diversion amounts. *See* 19.27.5.7(E) NMAC (“The quantity of water beneficially consumed depends on the requirements of a particular enterprise and how it applies and consumes the water. The authorized diversion of water that is not beneficially consumed in the course of water use is not part of the allowable consumptive use allocation of the water right.”). That distinction is important here because the construction of Project Jupiter, unlike irrigation of a commercial sod farm, likely has a different consumptive use rate.

Accordingly, the State Engineer’s approval of STC’s application rests on an overly broad and fundamentally flawed reading of Section 72-12-22. The facts of this case do not support the existence of either a genuine emergency or a serious economic loss and, in any event, the STC’s application falls outside the scope of Section 72-12-22 because the statute does not permit the State Engineer to authorize an emergency change in the purpose or place of use.

III. The State Engineer’s failure to hold a hearing on STC’s application violates due process and exceeds her authority under the Water Code.

New Mexico’s Water Code establishes a comprehensive system for the regulation of surface water and groundwater. It imposes strict

procedural requirements, including notice and hearing, that must be satisfied before the State Engineer may approve any permit. This is true regardless of whether an applicant seeks to change an existing groundwater right under Section 72-12-7 or obtains temporary emergency authorization under Section 72-12-22. Under this statutory framework, the State Engineer has a non-discretionary duty to hold a hearing on STC's application.

Although the State Engineer retains some discretion under the Water Code to determine the time and manner of compliance, that discretion is not unbounded. The State Engineer may not evade public scrutiny and judicial review indefinitely by ignoring these statutory requirements altogether. Yet that is precisely what she has done here. STC's application was approved more than ten months ago under Section 72-12-22, but the State Engineer has since failed schedule a hearing in the matter. At some point, the State Engineer must hold a hearing to vindicate due process.

Even where the Constitution or a statute confers a public official with some degree of discretion, this Court has held that "mandamus is appropriate to determine the outer bounds of that discretion." *State ex*

rel. King v. Lyons, 2011-NMSC-004, ¶ 28, 149 N.M. 330; *see, e.g., Sender v. Montoya*, 1963-NMSC-220, ¶ 14, 73 N.M. 287 (“[E]ven though respondent had to exercise his judgment, the facts before him required the performance of the duty imposed by law[.]”).

In this case, the scope of the State Engineer’s discretion is defined by statute, regulation, and the New Mexico Constitution. Article XVI, Section 2 of the New Mexico Constitution provides that “[t]he unappropriated water . . . within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use[.]” It further provides that these public waters must be appropriated “in accordance with the laws of the state.” N.M. Const. art. XVI, § 2. Separately, Article II, Section 18 of the New Mexico Constitution provides: “No person shall be deprived of life, liberty or property without due process of law[.]” And as this Court has previously explained in the water context, “[i]t is fundamental to say that due process requires notice and hearing so that those who are to be bound or affected by a judgment may have their day in court.” *City of Albuquerque v. Reynolds*, 1962-NMSC-173, ¶ 17, 71 N.M. 428.

Consistent with these constitutional mandates, the Water Code grants the State Engineer broad authority to exercise “general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required.” NMSA 1978, § 72-2-1 (1907); *see also* *Lion’s Gate Water v. D’Antonio*, 2009-NMSC-057 ¶ 20, 147 N.M. 523 (explaining that the Water Code establishes an “exclusive and comprehensive means of acquiring water rights through the State Engineer”). However, this authority is not unlimited. As a creature of statute, the State Engineer may “exercise[e] only that power and authority expressly granted to [it] by statute or necessarily implied by statute.” *Concerned Citizens for Nuclear Safety v. N.M. Water Quality Control Comm’n*, 2026-NMCA-021, ¶ 22, *cert. granted* (No. S-1-SC-41092, Feb. 2, 2026).

Here, the State Engineer granted STC’s emergency application to drill a replacement well to irrigate an existing commercial sod farm and support the construction of Project Jupiter under Section 72-12-22, which, as explained above, contains a narrow exception permitting an applicant to drill an emergency replacement well prior to notice and hearing. Since then, ten months have passed and the State Engineer has

yet to hold a hearing on Petitioner’s timely protest, which filed on January 9, 2026.

However, a close reading of Section 72-12-22(B) expressly forecloses the process—or lack thereof—the State Engineer now seeks to exploit. It states:

The owners of other water rights who claim to be injured by the drilling of a replacement well under these circumstances, may not enjoin the drilling of such a well or the use of the water from the well, but are limited to an action at law to recover damages, *and to their right to protest the granting of a permit.*

Section 72-12-22(B) (emphasis added). Because this statute grants existing water rights holders the right to protest, it necessarily follows that a protestant must also have the right to an adversarial hearing. Otherwise, the right to protest would be a meaningless one. *See Whitley v. N.M. State Personnel Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308 (“No part of a statute should be construed so that it is rendered surplusage.”).

Thus, even when such exceptional circumstances do exist—and none are present here—the statute makes clear that the State Engineer may only *temporarily* relieve an applicant of these requirements. Once the State Engineer accepts a protest, the case must be assigned a docket number and transferred to a hearing examiner for administrative

proceedings. This interpretation is also consistent with a recent Attorney General Opinion, which concluded that the emergency surface water authorization provision found at Section 72-5-25 only “provides a short time period in which the normal application processes are stayed.” *N.M. Att’y Gen. Op.* 2023-01 at 3 (Jan. 30, 2023) (“Preliminary Approvals Under the Water Use Leasing Act”); *see also id.* at 6 (“[E]mergency permits . . . are issued either only after notice and opportunity for hearing or with procedures that provide guaranteed access to a hearing within a short and specific time after issuance.”).

A contrary interpretation of Section 72-12-22, as applied to the facts of this specific case, would lead to an absurd result. *See State v. Montano*, 2024-NMSC-019, ¶ 14 (explaining that specific absurdity refers to “those statutes that are absurd as applied to the facts of a particular case, but not absurd as applied generally” (citation omitted)). Such an outcome would not be consistent with the legislative intent of this statute or the Water Code more generally. *See State v. Padilla*, 2008-NMSC-006, ¶ 10, 143 N.M. 310 (“[The] ultimate goal in statutory construction is to ascertain and give effect to the intent of the Legislature.” (citation omitted)).

A review of the Water Code reinforces this conclusion. *See El Paso Electric Co. v. N.M. Pub. Reg’n Comm’n*, ___-NMSC-___, ¶ 24 (S-1-SC-40286, Apr. 24, 2026) (“[Courts] interpret statutory language in the context of the statute as a whole and in a way that facilitates the achievement of legislative purpose.” (citation omitted)). Section 72-12-7—a related statute permitting the owner of an existing groundwater right to change the location or purpose of use—provides: “The application may be granted *only* after such advertisement and hearing as are prescribed in the case of original applications.” Section 72-12-7(A) (emphasis added). Under this statute, if a timely protest is filed, the State Engineer has two options: “[I]f the state engineer is of the opinion that the permit should not be issued, the state engineer may deny the application or, before [s]he acts on the application, may order that a hearing be held.” § 72-12-7(C). The procedure to apply for a new groundwater right follows a similar process with the same due process protections. *See* NMSA 1978, § 72-12-3 (2019).

These statutory and regulatory requirements are well established and are almost universally applicable. *See Augustin Plains Ranch, LLC v. D’Antonio*, 2023-NMCA-001, ¶¶ 11-14 (providing an overview of the

statutory scheme governing notice, protest, and hearing). Here again, although none of these statutes identify a specific deadline by which the State Engineer must docket a protest and transfer the case to a hearing examiner, the requirements of due process dictate that she cannot refrain from doing so indefinitely.

Accordingly, even if an emergency exists that imposes great financial burden on STC and emergency relief for support of Project Jupiter were somehow supported in fact or law, neither Section 72-12-22 nor Section 72-12-7 permit the State Engineer to issue an emergency authorization and, thereafter, evade public scrutiny and judicial review by failing to act and hold a hearing. The State Engineer's continued inaction exceeds the scope of her discretion, violates due process, and is unlawful.

IV. The State Engineer's failure to schedule a hearing and analyze public welfare concerns implicates New Mexico's compliance with the Rio Grande Compact.

In addition to the procedural requirements discussed above, the State Engineer has a non-discretionary duty under the Water Code and New Mexico Constitution to determine whether approval of a permit would be detrimental to the public welfare, impair the rights of existing

water users, or otherwise be contrary to the conservation of water. *See* NMSA 1978, §§ 72-12-7, -22. Importantly, this analysis must be done *before* a permit is approved—not after. Section 72-12-3(D)-(F).

By failing to schedule a hearing for adjudication—one of the primary mechanisms used to assess an applicant’s compliance with these substantive requirements—the State Engineer has again exceeded the scope of her discretion and acted unlawfully. That failure is especially problematic in this case given the volume of water at issue and its location in the Lower Rio Grande Basin, which is subject to the Rio Grande Compact.

As outlined above, Section 72-12-7—which applies to changes in purpose and location of use of existing wells—imposes certain substantive and non-discretionary duties on the State Engineer. It provides that an application to change the purpose or location of an existing well may be approved only “upon showing that the change will not impair existing rights and will not be contrary to the conservation of water within the state and will not be detrimental to the public welfare of the state.” Section 72-12-7(A). Similar substantive requirements are found across the Water Code. *See, e.g.,* § 72-12-3(D) (conferring standing

to protest a new groundwater application that that “will be contrary to the conservation of water within the state or detrimental to the public welfare of the state”).

Although Section 72-12-22 does not use exactly the same language, the inclusion of Subsection (A)(4) in the statute show the Legislature was motivated by the same policy concerns. Section 72-12-22(A)(4) states that, as a condition of emergency approval, the applicant “shall file [an] application for a permit within thirty days after drilling begins.” The inclusion of this provision evinces a clear legislative intent to ensure that, even when an applicant seeks emergency authorization, the State Engineer complies with these substantive requirements in a timely manner.

The term “public welfare,” as used in the Water Code, has been interpreted broadly to include “state obligations under interstate compacts[.]” 19.25.16.14(C) NMAC; **[see also Pet., Attach. 7 at 78 (Report & Recommendation at 2, *In re Appl. by Tulla Res. Grp.*, Hearing No. 21-025 (Aug. 20, 2025)) (explaining that “[c]ompliance with the [Rio Grande] Compact is in the public welfare of the state”)]** Separately, the Legislature has also recognized that “compliance

with interstate compacts is imperative[.]” NMSA 1978, § 72-2-9.1(A) (2003). And in the case of the Pecos River Compact, the Legislature previously found that water shortages and the State’s obligations to Texas are “statewide problems affecting all the citizens of the state.” NMSA 1978, § 72-1-2.2(A)-(C) (1991).

The same public welfare considerations are applicable here. STC’s application seeks to pump groundwater located in the Lower Rio Grande Basin and proposes to pump up to 2,400 acre-feet—approximately 780 million gallons—of groundwater for the novel purpose of supporting construction of Project Jupiter. But like many places in New Mexico, the Lower Rio Grande Basin is also experiencing severe water shortages. *See* Martha Pskowski, *Facing drought and low snowpack, Rio Grande states expect a ‘challenging’ year*, Source NM (Apr. 22, 2026), <https://perma.cc/WG59-QW7U> (last accessed Sept. 1, 2026). The Rio Grande Compact, which was approved by the Legislature in 1939, is a federally enforceable agreement governing the apportionment of water from the Rio Grande Basin among New Mexico, Texas, and Colorado. *See* NMSA 1978, § 72-15-23 (1939); *see also Texas v. New Mexico*, 583 U.S.

407, 412 (2018) (“[O]nce Congress gives its consent, a compact between States—like any other federal statute—becomes the law of the land.”).

Earlier this year, the U.S. Supreme Court adopted a consent decree resolving a longstanding dispute regarding allegations that groundwater pumping in New Mexico was reducing downstream flows of the Rio Grande to Texas. *See Texas v. New Mexico*, 2026 WL 1463223 at *1 (U.S. May 26, 2026); *see also* Fourth Interim Report of the Special Master, App. A, *Texas v. New Mexico*, No. 141 Orig. (U.S. Feb. 6, 2026) (“Consent Decree”), <https://perma.cc/9WKJ-L6M6>. The Consent Decree and related documents affirm that “the Rincon and Mesilla aquifers in the Lower Rio Grande are hydrologically connected to the Rio Grande” and that “groundwater pumping in the Rincon and Mesilla basins depletes surface flows[.]” Joint Mot. of United States and New Mexico to Dismiss, Attach. B at 2, *Texas v. New Mexico*, No. 141, Orig. (U.S. Aug 29, 2025), <https://perma.cc/QF2A-A6GL>.

Under the terms of the Consent Decree, New Mexico is required to manage deliveries to avoid “Compact debt” and reduce groundwater pumping in the Lower Rio Grande basin by 18,200 acre-feet by 2036. *Id.* at 19-20. New Mexico’s failure to comply with this consent decree could

result in another costly lawsuit. For example, if the debt exceeds 200,000 acre-feet, it is considered a violation that could result in litigation. *See* Consent Decree, App. A at 63-64.

Given the volume of water at issue in this case and the location of the permit in the Lower Rio Grande Basin, the State Engineer's failure to hold a hearing and conduct a thorough public welfare analysis constitutes a violation of her statutory and constitutional duties to ensure any changes to an existing permit are not detrimental to the public welfare. This analysis includes determining whether approval of the permit would implicate compliance with the State's interstate compact obligations. Additionally, the need for diligent public welfare analysis is especially acute in this case because, as discussed above, the State Engineer has already issued an emergency authorization allowing STC to pump millions of gallons of groundwater in the Lower Rio Grande Basin.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court grant the Petition and direct the State Engineer to immediately schedule a hearing as required by statute and the New Mexico Constitution. Until

then, the Court should not permit any appropriations of groundwater by
STC to support the construction of Project Jupiter.

Respectfully submitted,

RAÚL TORREZ
New Mexico Attorney General

/s/ Justin McCarthy
Justin McCarthy
Assistant Solicitor General

Aletheia V.P. Allen
Solicitor General
Ellen Venegas
Senior Solicitor General

New Mexico Department of Justice
408 Galisteo St.
Santa Fe, NM 87501
(505) 629-7741
jmccarthy@nm DOJ.gov
aallen@nm DOJ.gov
evenegas@nm DOJ.gov

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-504(H) NMRA, I certify that this Response complies with the type-volume requirement of Rule 12-504(G)(3) NMRA. The body of this Response contains 5992 words as calculated by Microsoft Word.

/s/ Justin McCarthy
Justin McCarthy

CERTIFICATE OF SERVICE

I certify that, on September 2, 2026, I filed the foregoing document electronically through the Odyssey E-File & Serve system, which caused all parties or counsel of record to be served by electronic means.

/s/ Justin McCarthy
Justin McCarthy