

**STATE OF NEW MEXICO
INTERSTATE STREAM COMMISSION**

**IN THE MATTER OF
PROPOSED NEW RULE 19.25.16
NMAC – Regional Water Security Planning**

No. NMISC 25-01 (R)

**New Mexico Interstate Stream
Commission, Water Planning
Program,**

Movant.

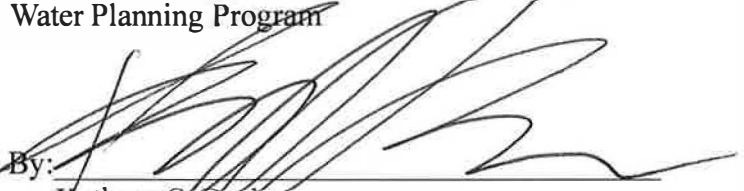
**NOTICE OF FILING OF WRITTEN DIRECT TESTIMONY
OF NATHANIAL CHAKERES**

The Water Planning Program (“Program”) of the New Mexico Interstate Commission hereby submits the attached Written Direct Testimony of Nathaniel Chakeres.

DATED this 1st day of October, 2025.

Respectfully submitted,

New Mexico Interstate Stream Commission,
Water Planning Program

By: 

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WRITTEN DIRECT TESTIMONY OF NATHANIEL CHAKERES

I. INTRODUCTION and QUALIFICATIONS

My name is Nathaniel Chakeres and I go by Nat Chakeres. I serve two roles at the Office of the State Engineer, one as General Counsel to the State Engineer, and one as Director of the Litigation and Adjudication Program (LAP). I am providing my testimony in my capacity as Director of LAP. I have been in this position since January 2022. I previously worked as the deputy general counsel to the State Engineer, and prior to that, starting in 2018, I was an attorney for the New Mexico Interstate Stream Commission. Attached is my resume as Exhibit 28.

My testimony is focused upon the provisions in the Proposed Rule regarding public welfare, how those provisions carry out the requirements of the Water Security Planning Act with respect to public welfare, and how water planning intersects with the State Engineer's administration of water rights, particularly as it relates to public welfare.

II. HISTORY OF PUBLIC WELFARE IN THE NEW MEXICO WATER CODE

The concept of public welfare first arose in New Mexico's water code in the 1980s. At the time, the City of El Paso had applied to appropriate a large quantity of groundwater in New Mexico to export and use in Texas. New Mexico's State Engineer blocked the proposed transfer. El Paso sued, claiming that New Mexico's prohibition of the export of water was a violation of the dormant Commerce Clause (which prevents states from discriminating against other states in the regulation of commerce). El Paso prevailed in district court on its claim. The U.S. Supreme Court, meanwhile, decided a case involving a similar issue, *Sporhase v. Nebraska ex rel Douglas*. In that case, the Supreme Court affirmed that water was in fact an article of commerce subject to the dormant Commerce Clause. It stated, however, that statutory provisions allowing the denial of transfers that were contrary to conservation of water within the state or contrary to the public welfare of the state were not facially impermissible under the dormant Commerce Clause.

In response to the El Paso litigation and the *Sporhase* case, New Mexico passed laws that mimicked the allowable standards in a Nebraska statute. New Mexico also passed the first iteration of its water planning statute in 1987. The intent was for the water plans to inform the State Engineer as to what would be in the public welfare of the state.

The way that New Mexico chose to place considerations of public welfare into the Water Code is that it incorporated the concept into the State Engineer's decision-making on permit applications. Historically, a permit application to the State Engineer requires a demonstration that the application would not impair the water rights of others. Now, with these changes in the late 1980s, applicants also must show that their application will not be contrary to conservation of water within the state or contrary to the public welfare of the state. The dormant Commerce Clause prohibits in-state transfers from being treated substantially differently than transfers out of state, and so the provisions regarding conservation and public welfare were made to apply to all water rights permit applications.

Unlike how public welfare or similar concepts have been incorporated into the laws of some other states, public welfare in New Mexico only goes in one direction, as a singular basis for denial, but not a basis for approval, which I think of as a "one-way ratchet." That is, an application may be denied because it is contrary to the public welfare of the state, but just because an application is beneficial for the public welfare of the state, this does not mean it will be approved if it does not meet the other statutory criteria. This contrasts with a system where a state might require the state engineer to consider public welfare in deciding whether to grant an application. This second example is potentially more neutral and can weigh in either direction. In what I would call "two-way" public welfare jurisdictions, it's typical for statutes and regulations to provide many other required criteria for the regulating agency to consider in addition to "positively" affecting public welfare or the "public interest" as one Colorado statute explicitly states. In "one-way ratchet" states like New Mexico, there are not many published criteria for rejection.

Public Welfare is an extremely broad term. The State Engineer and NMOSE staff have expertise in water rights administration and management, engineering, hydrology, and related subjects, but there are other topics in which our staff do not have specialized expertise. For example, there are no economists on staff. While some staff have expertise in biology or environmental science, that is not the agency's core competency. Additionally, the State Engineer does not employ sociologists, nor do we have staff who are experts in cultural preservation or community health. Yet, all these areas might, in someone's view, constitute the public welfare of the state.

Prior to the Water Security Planning Act and the Proposed Rule, some of the earlier regional water planning groups did come up with statements regarding public welfare with respect to transfers of water rights. Some did not. Some of the difficulties with that process were that the prior regional plans did not have participation from all relevant entities and sectors. Nor was there

a systematic approach that would allow the State Engineer to review those public welfare statements as they relate to prospective permitting actions.

There is also the question of what is meant by the public welfare of the state. As the LAP Director, my approach is that there are some issues and areas that are of primarily local concern, and there are other issues that are so important that they implicate the public welfare of the entire state. That is a challenging line to draw, but the Water Code specifically references the public welfare of the state, and we must apply the statute as it is written.

For a long time, the NMOSE did not do in-depth analyses regarding public welfare as a matter of routine practice, in part because the NMOSE did not and does not have standards to apply, particularly in areas that are outside of our expertise. NMOSE has been in litigation from time to time where parties have sought to define public welfare and give NMOSE some standards. The Legislature has, at times, also taken up bills that have attempted to give NMOSE more standards regarding public welfare; however, none of them have passed.

More recently, the NMOSE has been clearer about applying consistent standards of public welfare to significant water rights applications. In one recent administrative case, *In the Matter of the Application by Tulla Resources Group*, HU-21-025, the State Engineer ruled that an application that would materially impact the state's ability to comply with interstate compacts is contrary to the public welfare of the state. I attach to my testimony the cover page from the *Tulla* case and the final conclusion regarding whether the proposed use and location of use would be detrimental to the public welfare of the state. Notably, the Hearing Officer concluded that the application should be denied, in part because compliance with the Compact is in the public welfare of the state and approval of the Application would adversely affect New Mexico's Compact obligations and benefits, which would be detrimental to the public welfare of the state. The State Engineer accepted and adopted the Hearing Officer's recommendation and denied the application. The NMOSE is increasingly consistently clear that New Mexico's compacts are the law of the land and compliance with the compacts is in the public welfare of the state.

In another case, *Augustin Plains Ranch*, the State Engineer argued in court that an application that is speculative and would therefore lock up significant amounts of water that would otherwise be available for others, is contrary to public welfare. These are useful standards that the NMOSE is applying, although they don't represent the universe of public welfare concepts that may be relevant to the administration of water rights. They might be thought of as the floor, and not the ceiling, when it comes to public welfare. Generally, in tandem with the ISC Staff and Director, the statewide objectives of both the ISC and are four-fold: compact compliance; compliance with federal statutes like the Endangered Species Act; comprehensive water settlements, including federally and state executed Indian Water Right Settlements; and Alternative Water Resource Management (AWRM). While not defined, public welfare of the state is contained within the statewide objectives and requires adherence to existing laws, both state and federal.

In my view, the communities and regions where water is used and relied upon have important insights into whether a prospective water rights application would be contrary to the public welfare of the state. Therefore, what the NMOSE is trying to do, and what the WSPA and the Proposed Rule try to foster, is to generate genuine input for the state engineer to consider when determining whether a water rights application would be contrary to the public welfare of the state, through the plans submitted to the Commission by Regional Councils, as provided in the Proposed Rule, Section 16.

III. SUMMARY OF PROVISIONS IN WSPA

Among other requirements, the WSPA requires the ISC to promulgate rules that establish:

- The procedure for a water planning entity to develop and provide notice to the ISC of issues and concerns relating to the public welfare of the water planning region, and
- The procedure for a regional water planning entity to consider public welfare values and the needs of future generations of New Mexicans. NMSA 1978, § 72-14A-4(C)(1)(c) & (e) (2023).

These two statutory provisions require the Commission to (1) give regional planning entities a procedure to articulate issues and concerns of public welfare for their region that they represent so that those issues can be heard and considered by State Engineer, and (2) establish a framework to ensure that the regional planning entities are not working contrary to the public welfare of the state. To summarize, the statute requires the Commission to provide a procedure for the State Engineer to hear what, if any, public welfare concerns are raised by the Regional Councils, and a process for the ISC to communicate to the Regional Councils how they themselves need to be conscious of the statewide objectives and compliance with state and federal laws so that Plans submitted to the Commission are approvable and do not conflict with the law or statewide objectives.

These functions are closely related to other provisions in the Act. Most significantly, the Act also requires the ISC to support regional planning entities by communicating “statewide objectives for regional water security plan development, including compliance with interstate compacts, the Endangered Species Act, and congressionally recognized tribal water settlement acts,” as well as “supporting the development of alternative administration through active water resource management” § 72-14A-4(C)(9)(b) & (c). In other words, the Act identifies as “statewide objectives” interstate compact compliance, ESA compliance, Indian Water Rights Settlements, and the development of alternative administration plans under framework of Active Water Resources Management. There is a link between these statewide objectives and baseline public welfare values for the state. If these objectives are not supported, that would be contrary to the public welfare of all New Mexicans. These objectives have been identified specifically in the WSPA because they are some of the core mechanisms by which New Mexico’s elected and appointed officials have sought to apportion the available waters of the state in a fair, legal, and practical manner, as well as, in some cases, the external legal constraints to which we are all subject. Finally,

the state has dedicated time and resources to making sure that the efforts of the state and the laws are followed, and it would not be in the Commission's interest to approve a plan submitted by a Regional Council that obviated such dedication and legally enforceable commitments.

IV. SUMMARY OF THE PROPOSED RULE

Here is a summary of the two sections corresponding to the two statutory directives relating to public welfare in the Water Security Planning Act.

A. Procedure for Councils to provide notice of issues and concerns relating to public welfare.

First, one of the critical components of the rules is the provision related to representation under Proposed Rule Section 12. It is critical that any statement regarding public welfare values comes from a process whereby all of the significant water use sectors are represented through the governing body of elected or appointed leadership of the Council. Likewise, the provisions regarding public input and engagement in Proposed Rule Section 13 are also critical to ensure that any Council statement regarding public welfare reflects robust public involvement.

It is not a requirement for every regional water plan to include a statement of issues and concerns related to the public welfare of the region. However, Proposed Rule Section 16 provides that they may do so if they choose to do so. If they choose to do so, the State Engineer, who is Secretary of the Interstate Stream Commission, must consider the issues and concerns raised by each Regional Council, as they relate to prospective permit applications, and make a determination as to whether they constitute something that would be detrimental to the public welfare of the state if not addressed. The State Engineer's reasoning for this decision must be made in writing.

I am aware that there have been comments raised about why the Proposed Rule gives the State Engineer the power to reject some of the issues or concerns as not constituting the public welfare of the state. Some of these commenters suggest that anything that is identified by the Regional Councils should be binding on the State Engineer. Making these statements binding is not the correct approach for the following reasons:

- First, each Regional Council only represents that region, and not the entire state. Issues of concern to their region may not be the same as issues of concern to another region – and in fact may be in direct conflict with the interests of another region. In my experience with groups developing regional policy preferences of and for water users, it is extremely easy for them to do two things: insist on getting more water from other regions and insist on having less of their water go to other regions. Obviously, NMOSE can't honor every region's preference to maximize its water supply at the expense of its neighbors.
- There may be issues that are important and significant to local communities but simply aren't so generally applicable as to affect the public welfare of the state as a whole. For example, I am aware of communities that would like to ban the use of water for cannabis

cultivation. Other communities might like to prioritize the use of water to preserve agriculture in their areas. Other communities might like to maximize the amount of water available for riparian habitats. Others may like to have water set aside for manufacturing or other economic activities. In general, statewide, the New Mexico Water Code does not prioritize one type of use over the other, and there is not anything (or “there is nothing”) in the WSPA that is intended to overcome that neutrality in state law.

- Finally, making Regional Council’s statements of issues and concerns binding on the State Engineer would have the effect of displacing the State Engineer from the role that is assigned to her by state law – to act on water rights applications by applying statutory criteria. Regional Councils play a critical role in developing water plans, but they are not themselves NMOSE or NMISC policymaking entities. They are not given the power under statute to act on water rights applications. The State Engineer is accountable to the governor and confirmed by the Senate and thus has political accountability commensurate with this duty.

B. Procedure for ensuring that planning councils consider public welfare values.

As stated previously, it is critical for regional planning entities to perform their voluntary planning role consistent with the public welfare of the state. The public welfare of the state is not something that has been fully defined; however, there are certain core concepts that must be followed in order to be consistent with the public welfare of the state. Those are the statewide objectives that are listed in the Proposed Rule Section 14(C): (1) state obligations under interstate compacts; (2) compliance with the Endangered Species Act; (3) implementation of water rights settlements, including local and federally executed Indian Water Rights settlements; and (4) the state’s existing administration plans under the Active Water Resources Management program.

All these objectives are necessary for the public welfare of the state. With respect to compacts and the ESA, they are founded in federal law and are not obligations that New Mexico can change. If New Mexico ignores or does not follow them, there can be external, federal preemption of New Mexico’s water rights administration, and all users are at risk of having their water rights preempted. As for the settlements (including Indian Water Rights Settlements) and the alternative administration plans, those represent decisions that have been made and ratified by the State of New Mexico regarding the division of available water among existing users. Those parties who sign on to these agreements and plans do so with the expectation that they will be honored by the commitments of the State and all other parties. With respect to the Indian Water Rights Settlements, New Mexico’s Nations, Tribes, and Pueblos settle significant claims in exchange for certainty, as well as significant investment in infrastructure. Thus, the parties to these settlements, including the State, have significant reliance interests in seeing these settlements honored and fully implemented. If Regional Councils were to disregard those settlements or make recommendations

that would undermine those settlements, that would harm New Mexico as a whole and jeopardize our ability to reach new settlements and would therefore be contrary to public welfare.

V. SUGGESTED CHANGES TO THE PROPOSED RULE BASED ON PUBLIC COMMENT

I have reviewed the public comments that were posted on the public comment portal of the ISC Rulemaking and Public Comment page from July 17 to September 27 and based on my review and reflection, I do have one further edit to make to the Proposed Rule and that is that the word “may” be replaced with the word “shall” in the Proposed Rule Section 16.A. I recommend this change based on the comment from the Water Security Tribal Advisory Council (WSTAC) that I find, while not essential, is beneficial to be clear that the state engineer shall, instead of may, consider issues of public welfare of a water planning region identified by a council if the state engineer determines that such regional issues are related to or may impact the public welfare of the state. This change still does not bind the state engineer’s determination, but it does give certainty to the level of review and is responsive to the request of WSTAC.

IV. CONCLUSION

Based on my longstanding involvement in these issues and my employment at the ISC and OSE and my participation in the passage of the WSPA, I recommend the Commission adopt the Proposed Rule as filed with the Commission on July 17, 2025, with the change recommended above.

BEFORE THE NEW MEXICO STATE ENGINEER

**IN THE MATTER OF THE APPLICATION
BY TULLA RESOURCES GROUP PTY
LTD AND SANTA TERESA CAPITAL,
LLC FOR A PERMIT TO CHANGE
POINTS OF DIVERSION AND PLACE
AND PURPOSE OF USE UNDER THE
WATER-USE LEASING ACT, NMSA 1978,
§§ 72-6-1 TO -7 WITHIN THE LOWER RIO
GRANDE UNDERGROUND WATER
BASIN IN THE STATE OF NEW MEXICO**

**Hearing No. 21-025 OSE
File No. LRG-3150-E into
LRG-17825**

REPORT AND RECOMMENDATION

THIS MATTER came before Sandra L. Skogen, the State Engineer's appointed Hearing Examiner, upon an evidentiary hearing held on August 7-10, 13-16, and 21-23, 2023, via videoconference originating from Santa Fe, New Mexico (Evidentiary Hearing). The parties appeared as follows: Tanya L. Scott, Esq. and Charles T. DuMars, Esq. represented Tulla Resources Group PTY LTD and Santa Teresa Capital, LLC; Samantha R. Barncastle, Esq. represented Elephant Butte Irrigation District; Seth R. Fullerton, Esq. represented Santa Teresa Land, LLC, Paseo del Norte, LLC, and Westpark I, LLC; Tessa T. Davidson, Esq. represented Turner Ranch Properties, LP; Charles de Saillan, Esq. and Mara Yarbrough, Esq. represented Hillsboro Pitchfork Ranch, LLC, Percha-Animas Watershed Association, Gila Resources Information Project, and the Rio Grande Chapter of the Sierra Club; John W. Utton, Esq. represented Camino Real Regional Utility Authority; Christopher D. Shaw, Esq. and Nicholas R. Rossi, Esq. represented the New Mexico Interstate Stream Commission; and L. Christopher Lindeen, Esq. and Gordon Lazar, Esq. represented the Water Rights Division.

The parties submitted Proposed Findings of Fact and Conclusions of Law and Post-Hearing Briefs on January 12, 2024, and Response Briefs on February 23, 2024.

F. WHETHER THE PROPOSED USE AND LOCATION OF USE WOULD BE DETRIMENTAL TO THE PUBLIC WELFARE OF THE STATE

45. “The state of New Mexico recognizes the importance of public welfare. . . in administering its public waters.” § 72-5-5.1.
46. Under WULA, Applicants are required to have reasonably shown that the proposed use and location of use of leased water will not be detrimental to the public welfare of the state. § 72-6-5(A)(2).
47. The Compact Clause of the United States Constitution permits states to enter into agreements among themselves with the consent of Congress. Art. I, §10, cl. 3.
48. Once Congress gives its consent, “a compact between States—like any other federal statute—becomes the law of the land.” *Texas v. New Mexico*, 583 U.S 407 at 412, 138 S. Ct. 954 (2018).
49. The Compact is codified in New Mexico as NMSA 1978, Section 72-15-23 (1939).
50. Compliance with the Compact is in the public welfare of the state.
51. Approval of the Application would adversely affect New Mexico’s Compact obligations and benefits, which would be detrimental to the public welfare of the state.
52. On balance, the proposed use and location of use of the leased water will be detrimental to the public welfare of the state within the meaning of Section 72-6-5(A)(2).

III. CONCLUSION

53. The Application should be denied.

THEREFORE, IT IS ORDERED that the Application be **denied**.

DONE this 15th day of August, 2025

Sandra L Skogen

Sandra L. Skogen
Hearing Examiner

I ACCEPT AND ADOPT THIS REPORT AND RECOMMENDATION AS THE ORDER
OF THE STATE ENGINEER THIS 19 DAY OF August, 2025.

E. K. Anderson
ELIZABETH K. ANDERSON, P.E.
NEW MEXICO STATE ENGINEER

