

**House Memorial 42**  
**Meeting 10**  
**Written Comments from Stakeholders**  
**June 12, 2009**

Written comments were received from the following stakeholders following the April 21, 2009 meeting (in order received):

1. Pecos Valley Artesian Conservancy District (AJ Olsen, Hennighausen & Olsen, L.L.P. )
2. Conci Bokum, NM Water Project (e-mail to NMOSE with attachments)
  - a. Amended Memo: "Draft Guidelines" as discussed at the April 21, 2009 Meeting
  - b. Rewritten Proposed Elements Of A Water Development Plan Template
3. Pecos Valley Artesian Conservancy District and John Shomaker & Associates, Inc. (Roger Peery memo to Alvin Jones and Jack Atkins)
4. Conci Bokum, NM Water Project (e-mail to House Memorial 42 Participants with attachment)
  - a. Discussion Draft, Proposed Criteria For Water Development Plans Required Pursuant To Section 72-1-9
5. New Mexico Water Utilities Association (Maria O'Brien, Modrall Sperling Lawyers)
6. Haaku Water Office, Pueblo of Acoma (Laura Watchempino)
7. Conci Bokum, NM Water Project (June 11, 2009)

# HENNIGHAUSEN & OLSEN, L.L.P.

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May 4, 2009

## **MS. CHERI VOGEL**

Water Conservation Coordinator  
State of New Mexico  
Office of the State Engineer  
P. O. Box 25102  
Santa Fe, New Mexico 87504-5102

### ***Re: House Memorial 42/Draft Guidelines Comments***

Dear Ms. Vogel:

On behalf of the Pecos Valley Artesian Conservancy District ("PVACD"), the following comments are being provided subsequent to the meeting held April 21, 2009.

The PVACD recognizes that it is in the public's interest to allow the various entities authorized under Section 72-1-9, NMSA 1978, a reasonable period to plan and initiate a water supply plan for projected needs. Furthermore, the PVACD is cognizant that an entity's planning is an ongoing process and that a reasonable degree of latitude must be allowed for the planning and initiation process. With this said, the PVACD offers the following comments in regard to the proposed draft guidelines.

The PVACD respectfully submits that the draft guidelines are of no significant benefit because it will be nearly impossible to reach consensus on specific issues important to the diverse parties represented in the House Memorial 42 process. Although consensus may be reached on very general guidelines such as, "that the applicant is not attempting to speculate in water or hoard water", such guidelines are already a part of New Mexico's statutes. Furthermore, the current economic situation of New Mexico makes it nearly impossible to carry on the House Memorial 42 process. Thus the PVACD is opposed to continuing the House Memorial 42 process and PVACD recommends that no more action be taken.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

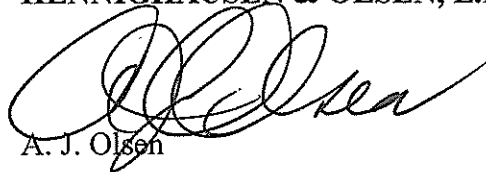
**MS. CHERI VOGEL**

May 4, 2009

Page Two

Sincerely yours,

**HENNIGHAUSEN & OLSEN, L.L.P.**

A handwritten signature in black ink, appearing to read "A. J. Olsen". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

A. J. Olsen

AJO:dd

xc: Client

\*From:\* conci [conci@1000friends-nm.org]  
\*Sent:\* Wednesday, May 06, 2009 12:04 PM  
\*To:\* Vogel, Cheri, OSE  
\*Subject:\* FW: Draft Memo: Suggested Content

\*Attachments:\* Draft Suggested Content.doc; HM 42 elements of WDP 52009.doc

Cheri:

I made a few comments on the draft suggested content. In addition, I had been working on adding requirements for the "guidelines" for each of the elements of a water development plan that we had all agreed to see attached.

I have two concerns:

The proposed draft envisions opening access to an extended 40 year period to entities not listed in the 72-9-1. I think the group was comfortable that a better way to deal with this issue may be to allow anyone access to an extended 40 year time frame PROVIDED they met certain criteria and our agreed-upon "Elements of a Water Development Plan" were a step in that direction; I feel strongly that these two cannot be separated. The basis of our talks I think was directed toward changing 72-1-9 legislatively. There is lots of case law that you can't do by regulation (and we are not even talking about a regulation but guidelines) something that is not allowed by statute. In sum, I think the draft guidelines cannot open up the extended planning period to non-listed entities.

In addition, I worry that we need some more specificity than appears in the draft. The guidelines are pretty useless if they are too general both for applicants who want some clarity and certainty and for the OSE who needs good information upon which to base their decision. I took a stab at that in the attached elements and maybe that is even too open-ended.

Conci

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## MEMORANDUM

To: House Memorial 42 Stakeholders

From: John Longworth, Cheri Vogel, Fred Abramowitz, Martha Franks

Subject: "Draft Guidelines" as discussed at the April 21, 2009 Meeting

Date: May 6, 2009

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### **Suggested Content For Applications Seeking An Extended Planning Horizon**

This document is intended to serve as a guideline of suggested content for applicants who desire an extended planning horizon of up to forty years, but beyond three or four years, within which to put water to beneficial use, and who therefore wish to acquire water rights through transfer or new appropriation and hold them unused for an extended period of time. This document is also intend to assist those who, justified only under very limited and exceptional circumstances, desire to hold water rights unused for a planning horizon in excess of forty years.

All applicants seeking to hold water rights unused will be required to file an application for transfer of water rights or new appropriation with the State Engineer in a form and manner prescribed by him. A water development plan as described herein shall be included with the application. These guidelines are not intended to conflict with state law or State Engineer rules or regulations and should be construed in a manner consistent therewith.

## I. Who Must Apply?

N.M.S.A 72-1-9, to promote the public welfare and conservation of water within the state, grants certain specified entities the right to apply to hold water rights unused for a planning period of up to 40 years. There may be circumstances in which other persons or entities (“non-listed entities”) also need an extended planning horizon. These recommendations, as indicated herein, apply to those entities specified, as well to “non-listed entities” who, under certain circumstances, and where sound public policy requires, can also demonstrate an actual non-speculative need for an extended planning horizon.

Can you do this??? I know we talked about this and agreed that maybe that is the way to go conceptually, BUT I think that assumed a change to the statute to allow that to happen. I don't think we can give the 72-1-9 option to non-listed parties without a legislative change. While I think this would be a good way to go, I also think it needs to be limited by the elements or conditions such as those we agreed to – see page 3 of July 18, 2009 draft consensus memo.

## II. Criteria for Allowing Persons or Entities an Extended Planning Horizon.

All persons and entities seeking to hold water unused for an extended planning horizon must demonstrate that their application is non-speculative, that it is based upon a genuine need for future water based on sound conservation practices **both existing and proposed as part of the application**, and that they are not seeking to hoard water. They must show a genuine need, willingness and ability to do long-term water planning, and they must submit a water development plan or similar document in support of their application.

The decision to grant such application will be based upon a sound balancing of the needs of the applicant to plan and the need to avoid speculation and/or hoarding of water. While each application will be evaluated on a case-by-case basis and no single criteria may be conclusive, the following are among the factors to be considered. Thus these factors, to the extent applicable and practical, should be included in the water development plan supporting the application.

### A. Showing the Need for an Extended Planning Horizon.

1. For non-listed entities, the applicant should demonstrate a genuine, out of the ordinary, need to plan into the future, whether because they are required by law to provide water for public services, or because the nature of the project requires an extended planning horizon, or for other good cause or reason. They should show that it is in the public good to grant their request for an extended planning horizon. Entities listed in 72-1-9 are presumed to have such need for future water planning and their need to plan for the future is presumed to be in the public good.

B. Showing the Application is Non-Speculative.

1. All applicants should show that they have an actual plan or project in place for using the water and demonstrate they are not simply attempting to lock-up the water or prevent others from acquiring it. This includes, but is not limited to, demonstrating that they have the financial capability of moving forward with the project and that they have an actual and specific design in place for the project which can be completed within a reasonable period of time.
2. The applicants should show that, prior to requesting this extended planning horizon, they have complied with all legal, administrative, licensing and other governmental permits or requirements so that they can proceed with the plan, or show that there is a substantial likelihood that these requirements will be met in the future.
3. The applicants should demonstrate an ability to physically store, divert and use the water. Additionally, the applicants should demonstrate a legal interest in the lands to be served or utilized or should demonstrate a reasonable expectation in acquiring the same. In short, they should show that they are ready, willing, and able to go forward with the plan.

C. Showing that the Requested Planning Horizon is Reasonable and Necessary.

1. All applicants should show that they generally use the requested planning horizon for other purposes, and/or that other similar entities use the same or similar extended planning horizon. The applicants should show why the requested planning horizon is necessary [Omit: as opposed to a lesser one. *The period for which water rights may be unused should be up to 40 years; the 40 year period should be a cap.*]. [Omit: applicants should not presume that the mere demonstration of a need to plan would support a grant of the full 40 years, but] Applicants should make a specific showing

of the need for the period requested. [Delete: Unless the applicants show a specific need to plan for the full forty years, and demonstrate a reasonable ability to do so, a lesser time frame may be appropriate, or the application may be denied.]

Omit: *We can't do this without statutory authorization. In rare situations, an applicant may request a planning horizon in excess of forty years. The ability, however, to project that far into the future is limited and thus the applicant should recognize that allowing them to hold water rights, unused, for periods in excess of forty years, will only be granted under very limited and exceptional circumstances. Applicants seeking such planning horizons must justify such an exceptional need and circumstance, and must demonstrate their ability to project such exceptional needs over such a period of time.*

D. Showing the Amount Needed; Conservation; Other Water Planning Documents.

1. The applicants should present reasonable projections for its future water needs, whether based on population projections or otherwise, that support the amount of water requested and that support the planning horizon requested. These projections should be as reasonable as possible under the circumstances and should consider all current and future sources of water and, in evaluating the amount of future need, should include all current conservation practices and all reasonable and sound future conservation measures.
2. The applicants should indicate to what degree their application and supporting water development plan is or is not consistent with other existing plans involving water, including, but not limited to, regional water plans, conservation plans, subdivision act requirements, and comprehensive plans.

E. Due Diligence in Putting the Water to Beneficial Use.

1. Should the application be granted, the applicants must use due diligence in putting water to beneficial use. All applicants must show that, should the application be granted, they will use due diligence in putting the water to beneficial use by providing timelines, time frames or milestones in the development of his project in their water development plan. Reasonable periodic updates or status reports will be part of their application, should it

be granted, to assure that timelines and milestones are met, and that the underlying assumptions of the application are still valid.

## **PROPOSED ELEMENTS OF A WATER DEVELOPMENT PLAN TEMPLATE**

In order to comply with the following criteria, the applicant must provide sufficiently detailed, updated and valid information to enable the state engineer to determine if the applicant has met the criteria.

### **A. That the applicant is not attempting to speculate in water or hoard water.**

Baseline/Current Water Supply - Provide information that includes the applicant's ability to deliver water and the status of all water rights, treated water, return flow credits, leased water, any other supply of water, and offset requirements.

Baseline/Current Water Demand - Describe the amounts of water used/diverted over the last 10 years; conjunctive use strategies for surface water and ground water in both wet and dry years for last ten years; an accounting of losses including evaporation and conveyance loss; water allocated to categories (such as emergencies, buffers, etc.) that are not included in GPCD calculations; annual average number of customers and Gallons per Capita per Day for each of the last 10 years (including a description of the current method used to calculate GPCD and any changes to method used to calculate GPCD in the last 10 years).

Discuss the ability of applicant to obtain other sources of water in the future.

Discuss consistency or conflicts with or updates since regional water plan analyses.

### **B. That the applicant has a genuine need to plan for the future, whether justified by population projections or other means, depending on the applicant, the applicant should demonstrate realistic information based on the following:**

Provide the projected future population and anticipated demand including a description of the method used to develop population projections and provide any studies or analyses used to develop or evaluate population projections. Provide at least three scenarios for future population growth that include methodology and assumptions for each.

Indicate extent of public input in applicant's water planning process, describe the public process to review and adopt water development plan, and provide evidence water development plan and related policies have been adopted by local governing body.

Discuss relationship and/or conflicts between the regional water plan and the applicant's water development plan

**C. That projections are as reasonable as possible, under the circumstances.**

If relevant, list population projections used by other planning entities in the applicant's service area, including the area's cities, county and regional water plan and describe similarities, differences and justification for using the method chosen by applicant.

Provide a demonstration that the future demand projections do not constitute a "self-fulfilling" prophecy; must recognize that absence of water is a limitation on growth

Document results from conservation programs that have been implemented for the last 10 years.

Demonstrate that the applicant has applied reasonable diligence in implementation of the application, that is a consistent effort to complete the appropriation in an expeditious and efficient manner, consistent with the project timelines or time frames established above; matters that are out of the control of the applicant shall not be considered in determining whether the applicant is proceeding with "reasonable diligence".

**D. That before asking for permission to hold water rights unused, the applicant has done planning appropriate to its circumstances.**

Describe current efforts to increase supply and any anticipated changes to available water supply. Indicate whether or not projections of supply are based on historical averages and incorporate any projected changes to water supply related to drought, increased temperatures and climate change that impact projected future demand.

Describe policies that allow, promote, or discourage the use of Section 72.1.1.1 wells to meet new demand.

Description and quantification of any other efforts to more effectively or efficiently manage water supplies or water demand, including efforts that were investigated but not pursued.

Demonstrate that planning and design of infrastructure have been completed for proposed project and describe project timeline and proposed timeframe for demonstrating a physical attempt to divert water and put it to beneficial use.

Demonstrate financial capability of moving forward with the project including anticipated financial needs timeline and methods of finance for project throughout timelines

Demonstrate that all legal, administrative, and licensing or other governmental permits or requirements necessary to proceed with this project have been or will be met.

Indicate proposed period for which applicant proposes to hold water rights unused (not to exceed 40 years); provide basis for belief that the planning period used in this application is appropriate and reasonable and the basis on which the applicant's request to hold water rights unused for an extended period of time would promote the public welfare and the conservation of water within the state.

Indicate planning period generally used by the applicant for other (non-water) planning purposes and planning period used by applicant for water planning, including period used under the Subdivision Act if applicable

**F. That there will be conservation requirements for use of the water.**

Describe proposed conservation efforts, implementation schedules of planned conservation activities, financing methods for implementing future water conservation programs, quantification of anticipated results of each program including tables, graphs and charts to show impact on closing the gap between supply and anticipated demand, statement of projected future GPCD as a result of the new programs.

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## TECHNICAL MEMORANDUM

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To: Alvin Jones, Jack Atkins

From: Roger Peery

Date: May 11, 2009

Subject: NMOSE House Memorial 42 Draft Guidelines of May 6, 2009

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I have not been intimately involved with the proposed memorial, and, therefore, may not be aware of issues that have been previously addressed. I offer the comments below for your consideration.

### **Applications for Extended Planning Horizon**

It appears that entities allowed to hold unused water rights per NMSA 72-12-9 must file application with the NMOSE. It is unclear if the application process applies to all 40-year planning periods, or to periods that extend beyond the 40-year period. The application process may be reasonable if the intent is to extend the ability to hold unused water rights beyond the 40-year planning period. The NMOSE already has a process for holding water rights unused for a 40-year period, and that process is filing extensions of time to put water to beneficial use. Otherwise, the benefit of filing an application for rights that may be held unused for 40-years is unclear.

There is no mention of a requirement for non-listed entities to submit a water development plan. Non-listed entities should not be excluded from the water planning process.

### **Criteria for Allowing Persons or Entities an Extended Planning Horizon**

The procedure for demonstrating that the need for water is “non-speculative” is undefined, and, therefore, subject to an arbitrary review process by the NMOSE. This type of review could allow the NMOSE to act unfavorably on a water plan for any number of reasons related to water demand projections including, but not limited to, disagreement over population projections and conservation standards, and the like. Also, forced water conservation standards based on per capita day calculations, are not applicable for many communities for a variety of reasons, including the Village of Ruidoso. Ruidoso has a large tourism influx that skews water demands figures in such a way that a simplistic per capita day conservation standard is not applicable.

Water providers that rely on both surface and groundwater, such as Ruidoso, must hold excess surface and groundwater rights in order to produce water during periods when surface water is not readily available. Holding excess rights in this circumstance should not be considered speculative or hoarding, and specific language should be included to address this issue.

Forty-year water development plans generally include projected water demand based on conservation, and population projections for low-, medium-, and high-growth scenarios. What is deemed “reasonable” is subject to interpretation, whether or not a water provider is responsible for providing the water to potential future users or not. Many municipalities deem it wise to hold, or acquire, water rights to meet projected high-growth demand. Unfortunately, the NMOSE or protestants to water-rights applications may use the speculative or hoarding argument to deny or protest an application. The proposed guidelines should have well-defined definitions for both speculation and hoarding.

The provision that the “applicant” state whether or not their plan is consistent with Regional Water Plans or other planning documents should not be required. The 40-year plan for a given municipality or other governmental agency should not be subject to other water plans or comprehensive plans. Regional and State water plans are too general to adequately represent all water-rights holders within the region. Other water plans may have been prepared according to the interests of other water-rights holders. The water rights held by other entities are individual and separate, and it is unreasonable to force one water-right holder to adhere to or explain the water rights or actions of others as described and proposed in other plans.

The provision for submitting due-diligence reports related to putting water to beneficial use is somewhat vague, and could limit the ability to put water to beneficial use to only those uses specifically described in the 40-year plan. In the event that a municipality chooses to provide water to new industries or uses not identified in their water development plan, the municipality could be required to submit a new plan. The current NMOSE process of filing extensions of time, and submitting meter records of diversion, already provides the NMOSE with required data to show that due diligence is being performed in putting water to beneficial use.

Details related to NMOSE responsibility are surprisingly absent from the draft guidelines. It would be useful for the NMOSE to provide a standard for their application review process, maximum time limit for review of draft and final documents, process for addressing NMOSE comments on draft documents, and a legal process for addressing differences that cannot be worked out in the event that the NMOSE acts unfavorably on an application, water plan, or other documents.

To House Memorial 42 Participants

From: Cecilia Abeyta, Conci Bokum, Guy Bradley, Joy Esparsen, Seth Fullerton, Regina Romero, Jay Stein, Liz Taylor

Date: May 18, 2009

Subject: Draft Guidelines/Criteria for Water Development Plans

The above-listed participants in the HM 42 process met on May 11, 2009. We discussed the "Draft Guidelines" attached to an email from John Longworth, Fred Abramowitz and Martha Franks dated May 6, 2009. The following summarizes that decisions made by the group that met.

1. The group agreed that any guidelines would apply only to those entities currently listed in Section 72-1-9. While the group may agree to recommend that the statute be amended to expand the availability of a 40 year planning period to entities not currently listed, the guidelines must only apply to the entities currently included in 72-1-9 until the statute has been amended. There is clear case law that holds an administrative agency can not provide for expanded powers not allowed by statute.
  
2. The group reviewed the memo distributed on May 6 and a document provided by Conci. The group agreed that Conci would prepare a new working draft of draft guidelines which would be reviewed by HM42 stakeholders at our next meeting scheduled on June 9. The new working draft is attached. We hope that the OSE will be able to provide any substantive comments on the draft to the group on or before June 9 so that we can include these concerns in our meeting.
  
3. Time and location of meeting: Tuesday, June 9, 2009, 10:00 to 4:30, Municipal League conference room, Santa Fe.
  
4. We propose that the agenda for June 9 include:  
  
    Finalize draft working guidelines if possible

Decide on future of HM 42 process – proposal to keep meeting during 2009 and 2010 in preparation for 2011 legislative session (possibly 3 meetings in the remainder of 2009 and meetings in 2010 as needed).

Discuss possible recommendation to OSE to issue regulations rather than guidelines.

**DISCUSSION DRAFT**  
**PROPOSED CRITERIA FOR WATER DEVELOPMENT PLANS REQUIRED**  
**PURSUANT TO SECTION 72-1-9**

This document is intended to serve as a guide for applicants who wish to acquire water rights through transfer or new appropriation and hold them unused for an extended period of time of up to forty years within which to put water to beneficial use.

All applicants seeking to hold water rights unused will be required to file an application for transfer of water rights or new appropriation with the State Engineer in a form and manner prescribed by him. A water development plan as described herein shall be included with the application. These guidelines are not intended to conflict with state law or State Engineer rules or regulations and should be construed in a manner consistent therewith.

**I. Who Can Apply?**

Section 72-1-9 grants specified entities the right to apply to hold water rights unused for a planning period of up to 40 years to promote the public welfare and conservation of water within the state. These guidelines apply to those entities specified in Section 72-1-9 who will need to demonstrate an actual, non-speculative need for an extended planning horizon.

**II. Purpose of Water Development Plans.**

Section 72-1-9 provides that entities specified in the statute “shall be allowed a water use planning period not to exceed forty years” which “shall be based on a water development plan.”

Applicants must show a genuine need and ability to hold water rights unused for up to 40 years as demonstrated in a water development plan. Water developments plans provided pursuant to Section 72-1-9 shall be based on updated and valid information and shall be submitted as part of the application to hold water rights unused for a period of up to 40 years. If the applicant’s water development plan includes a phased increase in demand over a period not to exceed 40, the applicant may rely on the same water development plan for applications for the number of acre feet of water needed yearly as described and discussed in the water development plan.

**III. Criteria for Water Development Plans Required Pursuant to Section 72-9-1.**

All entities subject to Section 72-1-9 seeking to hold water unused for a period up to 40 years must demonstrate that their application is based upon a genuine need for future water based on sound conservation practices. The decision to grant the application will be based upon a sound balancing of the needs of the applicant to plan and the need to avoid speculation and/or hoarding of water. While each application will be evaluated on

a case-by-case basis and no single criteria may be conclusive, the guidelines provide factors to be considered which, to the extent applicable and practical, should be included in the water development plan. Entities listed in 72-1-9 are presumed to have such need for future water planning and their need to plan for the future is presumed to be in the public good.

#### **A. Demonstration of Available Water Supply and Existing Demand**

Baseline/Current Water Supply - Provide information that includes the applicant's ability to deliver water and the status of all water rights, treated water, return flow credits, leased water, any other supply of water, and offset requirements.

Indicate whether or not projections of supply are based on historical averages. If not, indicate basis for estimates and what adjustments have been made to take into account the projected impacts of drought, increased temperatures or climate change.

Baseline/Current Water Demand - Describe the amounts of water used/diverted over the last 10 years; conjunctive use strategies for surface water and ground water in both wet and dry years for last ten years; an accounting of losses including evaporation and conveyance loss; water allocated to categories (such as emergencies, buffers, etc.) that are not included in Gallons per Capita per Day (GPCD) calculations; annual average number of customers and GPCD for each of the last 10 years (including a description of the current method used to calculate GPCD and any changes to method used to calculate GPCD in the last 10 years).

#### **B. Description and Quantification of Existing Conservation Efforts**

Describe supply-side and demand-side conservation programs and document results from conservation programs that have been implemented for the last 10 years.

#### **C. Description of Current Efforts to Increase Supply**

Describe current efforts to increase supply and any anticipated changes to available water supply.

#### **D. Demonstration of Projected Future Population Increase and Anticipated Demand.**

Provide the projected future population and anticipated demand including a description of the method used to develop population projections and provide any studies or analyses used to develop or evaluate population projections. Population projections shall be based on the most recent Bureau of Business and Economic Research (BBER) projections; deviations may be included along with justifications for any deviations. The applicant may provide up to three scenarios for future population growth which include the methodology and assumptions for each.

Describe methods to determine amount of water use by GPCD and statement of demand for applicants who are non-drinking water suppliers or where use of GPCD would otherwise be inappropriate.

If relevant, list population projections used by other planning entities in the applicant's service area, including the area's cities, county and regional water plan and describe similarities, differences and justification for using the method chosen by applicant.

Provide a demonstration that the future demand projections do not constitute a "self-fulfilling" prophecy and where the absence of water is a limitation on growth

#### **E. Description of Future Conservation Efforts to Close the Gap between Available Supply and Increasing Demand**

Describe proposed conservation efforts, implementation schedules of planned conservation activities, financing methods for implementing future water conservation programs, quantification of anticipated results of each program including tables, graphs and charts to show impact on closing the gap between supply and anticipated demand, statement of projected future GPCD as a result of the new programs.

#### **F. Description of Alternatives for Closing the Gap between Available Supply and Increasing Demand**

Describe any policies related to:

1. water transfers and new subdivisions in applicant's jurisdiction to obtain or pay for water rights for new development;
2. domestic wells (Section 72-12-1.1);
3. projects to increase or deliver additional surface or groundwater supplies; and
4. other efforts to more effectively or efficiently manage water supplies or water demand, including efforts that were investigated but not pursued;

#### **G. Need for Extended Planning Period (not to exceed 40 years) that is Reasonable and Necessary.**

Indicate proposed period for which applicant proposes to hold water rights unused (not to exceed 40 years); provide basis for belief that the planning period used in this application is appropriate and reasonable and the basis on which the applicant's request to hold water rights unused for an extended period of time would promote the public welfare and the conservation of water within the state.

Projections should be as reasonable as possible under the circumstances and should consider all current and future sources of water and, in evaluating the amount of future need, should include all current conservation practices and all reasonable and sound future conservation measures.

Indicate planning period generally used by the applicant for other (non-water) planning purposes and planning period used by applicant for water planning, including period used by the county under the Subdivision Act if applicable

Indicate extent of public input in applicant's water planning process, describe the public process to review and adopt water development plan, and provide evidence water development plan and related policies have been adopted by local governing body.

Discuss relationship and/or conflicts between the regional water plan and the applicant's water development plan.

#### **H. Demonstration that Application is Non-Speculative**

All applicants should show that they have an actual plan or project in place for using the water and demonstrate they are not simply attempting to lock-up the water or prevent others from acquiring it.

The applicants should demonstrate a current or future ability and legal right to physically store, divert or otherwise put the water to beneficial use and indicate to what degree their application and supporting water development plan is or is not consistent with other existing plans involving water, including, but not limited to, regional water plans, conservation plans, subdivision act requirements, and comprehensive plans.

The applicant should demonstrate a legal interest in the lands to be served or utilized or should demonstrate a reasonable expectation in acquiring the same. In short, they should show that they are ready, willing, and able to go forward with the plan.

Description and quantification of any other efforts to more effectively or efficiently manage water supplies or water demand, including efforts that were investigated but not pursued

#### **I. Showing of Reasonable Diligence in Putting the Water to Beneficial Use.**

Reasonable Diligence means a consistent effort to complete the appropriation in an expeditious and efficient manner, consistent with the project timelines or time frames established above. All applicants must show that, should the application be granted, they will use due diligence in putting the water to beneficial use by providing timelines, time frames or milestones as indicated in the water development plan.

#### **J. Feasibility of Project if Required in order to Put Water to a Beneficial Use.**

If the application involves new infrastructure for diversion or use, demonstrate that:

1. that planning and design of infrastructure have been completed for proposed project and describe project timeline and proposed timeframe for demonstrating a physical attempt to divert water and put it to beneficial use;

2. the financial capability of moving forward with the project including anticipated financial needs timeline and methods of finance for project throughout timelines and that they have an actual and specific design in place for the project which can be completed within a reasonable period of time.; and

3. all legal, administrative, and licensing or other governmental permits or requirements necessary to proceed with this project have been or will be met or show that there is a substantial likelihood that these requirements will be met in the future.

#### **K. Status Reports and Conditions on Permits**

Reasonable periodic updates or status reports will be required as appropriate as part of the permit to assure that timelines and milestones are met with reasonable diligence in an expeditious and efficient manner and that the underlying assumptions of the application are still valid. A purpose of status reports is to ensure that water rights that are no longer needed are not being unused inappropriately or that if conditions have changed, they provide an opportunity to extend or reduce the period for which water rights are being unused.

Matters that are out of the control of the applicant shall not be considered in determining whether the applicant is proceeding with “reasonable diligence”.



MODRALL SPERLING

L A W Y E R S

June 4, 2009

**VIA E-MAIL AND U.S. MAIL**

Ms. Cheri Vogel  
Mr. John Longworth  
New Mexico Office of the State Engineer  
Bataan Memorial Building, Room 101  
Post Office Box 25102  
Santa Fe, New Mexico 87504-5102

Maria O'Brien  
505.848.1803  
Fax: 505.848.9710  
mobrien@modrall.com

Re: Comments regarding Draft Guidelines/Criteria for Water Development Plans submitted on behalf of New Mexico Water Utilities Association

Dear Ms. Vogel and Mr. Longworth:

These comments are submitted on behalf of the New Mexico Water Utilities Association ("Association") in response to a "Discussion Draft – Proposed Criteria for Water Development Plans Required Pursuant to Section 72-1-9" which was e-mailed to House Memorial 42 Participants on May 15, 2009 ("May 15<sup>th</sup> proposal"). The Association has significant concerns regarding the May 15<sup>th</sup> proposal submitted by a small group of House Memorial 42 Participants.

Specifically, the May 15<sup>th</sup> proposal appears to disregard many previous efforts at consensus on draft guidelines regarding the planning authority that should be afforded various entities for purposes of water allocation and supply. Instead of providing for guidelines which would allow the State Engineer to evaluate, on a case by case basis, the merits of allowing an applicant an extended planning period where it could demonstrate the demand and need for water based on certain objective criteria and sound policy, the May 15<sup>th</sup> proposal suggests that any proposed guidelines should "apply [only] to those entities specified in Section 72-1-9 . . . ." This view is contrary to the May 6, 2009 Memorandum from John Longworth, Cheri Vogel, Fred Abramowitz and Martha Franks ("May 6<sup>th</sup> Memorandum"). The May 6<sup>th</sup> Memorandum included under the guidelines entities specified in § 72-1-9 "as well as to non-listed entities, who under certain circumstances, and where sound public policy requires, can also demonstrate an actual non-speculative need for an extended planning horizon". May 6<sup>th</sup> Memorandum at 2. In contrast the May 5<sup>th</sup> proposal takes too narrow a view of the ability of the State Engineer to address individual applications before him on a case by case basis as they relate to water demand, planning, diligent development and beneficial use. Accordingly, the May 5<sup>th</sup> proposal is contrary to sound policy to address

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water need and allocation, the existing authority of the State Engineer, and the original purpose of House Memorial 42.

House Memorial 42 itself did not limit the inquiry tasked to the State Engineer and stakeholders to those entities explicitly set forth in NMSA § 72-1-9. Rather, the legislature directed that the State Engineer convene stakeholders for the purpose of "informing and making recommendations to the state engineer relating to planning authority that should be allowed to municipalities, counties, school districts, state universities, member-owned community water systems, special water users associations and regulated water and electric public utilities."<sup>1</sup> Accordingly, the legislature itself directed that entities other than those explicitly listed in § 72-1-9 be considered with regard to water planning, and the House Memorial itself does not explicitly relate to, nor limit the requested inquiry to the language of § 72-1-9.

Moreover, NMSA § 72-1-9 does not limit the authority of the State Engineer to consider extended planning horizons both as those relate to requests for additional water in the context of transfers or appropriations, or in the context of a variety of entities holding rights unused for extended planning periods even once acquired. Rather, under the Water Code the State Engineer is tasked with ensuring that use of water is not speculative and that a water supply is diligently developed within a reasonable period of time. The determination of diligent development within a reasonable period of time is something which can and should be determined by the State Engineer for purposes of determining the appropriate planning horizon in both the application context as well as in the context of determining whether to grant extensions of time or otherwise allow water rights to be held for extended planning periods. NMSA § 72-1-9 did not circumscribe this broader authority. Moreover, while there is a presumption as to extended water planning horizons given the entities set forth specifically in § 72-1-9 as to specific coverage by that statute, that presumption does not preclude the consideration of additional entities which can substantiate non-speculative demand for similar reasons and for a similar time frame as explicitly covered entities.

Accordingly, to argue now that the guidelines the House Memorial 42 Participants have been working on should be limited strictly to reliance on NMSA § 72-1-9 or the entities explicitly listed in that statute, is misguided and unnecessary. It is also contrary to the more sound approach set forth in the May 6<sup>th</sup> consensus draft. The Association strongly urges the State Engineer and the stakeholder participants to adhere to the approach that a variety of entities can be considered by the State Engineer for extended planning horizons. Such an approach embraces sound public

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<sup>1</sup> Notably, House Memorial 42 specifically includes regulated water utilities as one of the entities which should be considered for extended planning authority. Indeed, public water utilities are already recognized in NMSA § 72-1-9 as one of the kinds of entities which could be considered under certain circumstances for purposes of extended planning horizons.

Ms. Cheri Vogel  
Mr. John Longworth  
June 4, 2009  
Page 3

policy to consider the needs of a variety of entities providing or requiring water for public purposes and allows the State Engineer to utilize his broad discretion to allocate the waters of the State where an applicant appropriately demonstrates future need premised on sound water planning.

Another issue which the Association would like to note is also an issue with regard to the May 6<sup>th</sup> Memorandum. Both the May 15<sup>th</sup> proposal and the May 6<sup>th</sup> Memorandum appear to contemplate a water development plan filing only in the context of a request for additional water through and application for transfer or appropriation. However, it also may be appropriate for some entities to file a water development plan with respect to their existing water rights to demonstrate that already permitted rights will be utilized within a reasonable planning horizon and otherwise satisfy the criteria necessary for a water development plan.

The Association appreciates the opportunity to submit these comments and looks forward to successfully concluding the stakeholder discussions.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Maria O'Brien', with a stylized, flowing script.

Maria O'Brien

c: John Chavez  
Paul Risso  
Martha Franks

## **MEMO**

To: John Longworth, Cheri Vogel, Fred Abramowitz, Martha Franks

From: Laura Watchempino  
Haaku Water Office, Pueblo of Acoma

Date: June 8, 2009

### **Comments regarding Applications Seeking an Extended Planning Horizon**

No applications for an extended planning horizon, including an initial application for transfer of water rights or a new appropriation, should be accepted in unadjudicated basins. All such applications should be considered speculative until priority determinations have been made within a basin. Trespasses on senior water rights holders will ensue in the absence of at least preliminary priority determinations by the Office of the State Engineer.

Evaluations of future need should include sustainability projections, which will help to determine whether the proposed water sources can reasonably sustain those projections. The resource, rather than the need, must be the focus of a sustainability analysis. Without such a showing, it will be difficult for an applicant to show that the requested planning horizon is both reasonable and necessary.

Applicants should further be required indicate to what degree their application and supporting water development plan is consistent with other regional water plans, including negotiated settlements of tribal water rights.

**From:** conci [conci@1000friends-nm.org]  
**Sent:** Wednesday, June 10, 2009 3:23 PM  
**To:** Vogel, Cheri, OSE  
**Subject:** comments for June 11 HM42 meeting  
**Cheri:** Are you still posting comments? If not, let me know. Thanks, Conci

**Draft language to explain use of brackets:**

The HM 42 group was not able to reach consensus on whether or not the OSE is able to develop guidelines that would allow entities not listed in Section 72-1-9 the ability to hold water unused up to 40 or to allow periods beyond the 40 year time frame prior to amending the statute to do either or both of those things. Proponents of including that authorization in the guidelines believe that the statutes in the water code give the State Engineer inherent power to do things necessary to pursue his duties; opponents believe that case law prohibits the State Engineer from expanding his power beyond that specified in statute. The use of brackets indicates where that lack of consensus exists.

**Draft language to get at whether or not future demand projection do or do not constitute a “self-fulfilling prophecy” – last item in B. 2. (This doesn’t really work, but maybe it will inspire something great from someone else.)**

In recognition of the fact that water supplies are not unlimited and over-appropriation of water supplies is not good public policy, it is important that applicants not expect more than their equitable share of water. Therefore, applicants should provide information on land use and other policies that demonstrate efforts to use available water supplies wisely in recognition that water supplies are limited state-wide and it is not possible for everyone to have unlimited access to water.

**I have also copied below some case law on the ability of the OSE to assume power broader than that specified in statute from another proceeding:**

New Mexico courts have clearly ruled that statutory provisions must be followed in consideration of transfers of water rights. Anyone seeking to change a water right is “required to follow a certain statutory procedure.” Honey Boy Haven, Inc. v. Roybal, 92 N.M. 603, 604, 592 P.2d 959 (1978). Water rights may only be acquired or changed using the procedures set forth in statute. State ex rel. Reynolds v. King, 63 N.M. 425, 428, 321 P.2d 200 (1958); State ex rel. Reynolds v. Mitchell, 66 N.M. 212; 345 P.2d 744 (1959). “Administrative agencies may not amend or enlarge their authority through rules and regulations.” Carrillo v. Compusys, Inc. 132 N.M. 710, 54 P.3d 551 (2002-NMCA-099). An administrative officer who is given authority to determine facts is not also granted legislative or judicial authority; the statutory method is exclusive. State ex rel. Bliss v. Dority, 55 N.M. 12, 19, 225 P.2d 1007 (1950).

Section 72-2-8 gives the state engineer authority to adopt regulations and states that this section shall be “liberally construed.” While the State Engineer may argue that this provision is sufficient authority to allow him to adopt the regulations as drafted, his authority is restricted to the authority granted to him by the legislature,

either expressly or by necessary implication. Application of Brown, 65 N.M. 74, 77; 332 P.2d 475 (1958).

Specifically relevant here is the court's ruling in Brown in which the court held that while the state engineer "needs a reasonable degree of flexibility and opportunity for exercise of sound discretion in performance of his duties," his authority is no greater than that given him by the legislature. In this case, the state engineer claimed "complete compliance where statutory procedure as followed *after* the change in location had been made. The statutes, however contemplate application, notice, hearing and approval *prior* to a change... The language can bear no other interpretation" (emphasis in original). The court overruled a "so-called emergency permit when the state engineer is given no express or implied authority for such action." Application of Brown, 65 N.M. at 76-77.