

House Memorial 42
Written Comments from Stakeholders
June 30, 2009

Written comments were received from the following stakeholders following the June 11, 2009 meeting (in order received):

1. New Mexico Water Utilities Association (Paul Risso, President)
2. For Gallup, Espanola, Las Cruces, and Albuquerque Bernalillo County Water Utility Authority, Jay Stein (Stein & Brockman, P.A.)
3. New Mexico Municipal League (Regina Romero)
4. City of Santa Fe (Marcos Martinez, Claudia Borchert, Amanda King, Dale Lyons)
5. Sierra Club, Rio Grande Chapter (Sigmund Silber)

NEW MEXICO WATER UTILITIES ASSOCIATION

June 30, 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

Re: Comments *Discussion Draft Guidelines/Criteria for Water Development Plans* as discussed at the June 11, 2009 meeting

Dear Ms. Vogel and Mr. Longworth

New Mexico Water Utilities Association wishes to reemphasize the comments submitted on its behalf by Maria O'Brien of Modrall Sperling, dated June 4, 2009 and adds the following:

1. We support the position that the State Engineer has the authority to authorize guidelines/criteria that allows entities not specifically included in Sec. 72-1-9 the opportunity to seek and obtain 40-year protection for water rights.
2. We agree that such filings should include those related to new appropriations and transfers as noted in paragraphs two and three of the *Discussion Draft Guidelines/Criteria for Water Development Plans*, and feel strongly that this also include development plan filings for currently held water rights.
3. NMWUA supports Option 2 under the section heading *1. Who Can Apply*.

The New Mexico Water Utilities Association wishes to thank the State Engineer, both of you, your staff and consultants for providing us the opportunity to be involved in this vital process.

Sincerely,



Paul Risso, President
New Mexico Water Utilities Association

STEIN & BROCKMANN, P.A.
ATTORNEYS AT LAW

JAY F. STEIN*
JAMES C. BROCKMANN*
SETH R. FULLERTON

Of Counsel
KATHERINE W. HALL

* New Mexico Board Certified
Specialists in Water Law

STREET ADDRESS
460 St. Michaels Drive, Suite 603
Santa Fe, New Mexico 87505

MAILING ADDRESS
Post Office Box 5250
Santa Fe, New Mexico 87502-5250
Telephone: 505-983-3880
Telecopier: 505-986-1028

June 30, 2009

Cheri Vogel
Water Conservation Coordinator
NM Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504

Dear Cheri:

The municipalities represented by this law firm, *i.e.*, Gallup, Espanola, Las Cruces, and the Albuquerque-Bernalillo County Water Utility Authority are providing comments on the June 11, 2009, version of the "Proposed Criteria for Water Development Plans" pursuant to your e-mail of June 16, 2009.

The principal issue dividing the participants in the § 72-1-9 process, as reflected in the June 11 draft, is between those who believe that criteria must strictly follow what is set forth in § 72-1-9 and those who believe that the State Engineer has a broader authority on applications. The municipalities agree that § 72-1-9 creates a presumption, at the very least, that municipalities or entities listed in § 72-1-9 are entitled to a planning period of at least 40 years. The specific authority for the State Engineer to provide an extended planning horizon for municipalities was set forth in the case of *State ex rel. Reynolds v. Crider*, 78 N.M. 312, 431 P.2d 45 (1967). In *Crider*, the New Mexico Supreme Court addressed the need for the future use of water by the Cities of Roswell and Artesia holding that they could hold water, unused, to satisfy needs resulting from normal increase in population within a reasonable period of time. Earlier draft criteria had consensus on that issue, with the applicant bearing the burden of proof on a planning period in excess of 40 years under extraordinary circumstances. The present draft criteria leave the question of whether that period could be in excess of 40 years undecided by virtue of the legal issue set forth above, *i.e.*, whether the State Engineer has broader authority. The municipalities agree with the formulation in the earlier consensus draft that a planning period in excess of 40 years could be justified and that the State Engineer would have the broad authority to do so. We believe that the *Crider* case specifically provides the State Engineer with a common law basis for exercising broader authority on whether municipalities can hold water

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STEIN & BROCKMANN, P.A.

June 30, 2009

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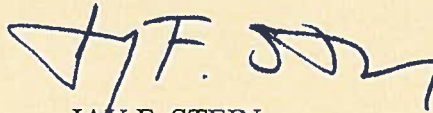
rights unused for periods in excess of 40 years. However, we would not extend the State Engineer's implied authority beyond that issue.

The meeting summary of June 11 from the facilitator, Lucy Moore, indicates that there are outstanding issues on the "self-fulfilling prophecy concept, language in B.1, and the language in D." We would have to have final language on these issues before commenting.

Paragraph 2.B which requires identification of "all current and future sources of water" in conservation and water supply efforts is too broad, speculative, and burdensome to be useful and should be stricken.

We believe that the 72-1-9 process has been very useful, and wish to thank the State Engineer and his staff for participating in it. We would support funding for its continuation.

Sincerely,

A handwritten signature in black ink, appearing to read "J.F. Stein", with a stylized flourish at the end.

JAY F. STEIN

JFS:sm

cc: Lance Allgood
Mark Sanchez
John Stomp
Jorge Garcia
Marvin Martinez

June 30, 2009

Cheri Vogel
Water Conservation Coordinator
State Engineer's Office
State of New Mexico
Santa Fe, New Mexico 87501

Dear Cheri:

REF: HM 42 Task Force – Proposed Criteria for Water Development Plans

Thank you for the opportunity to comment on the “PROPOSED CRITERIA FOR WATER DEVELOPMENT PLANS” Discussion Draft. The task force process we’ve been participating on for the past several years has been very educational.

Regarding the proposed criteria, we would like to note that any criteria should not restrict the planning process anymore than the current statute allows for. We agree that water development plans are a responsible way to provide for future water needs however, any guidelines, rules or regulations that are tied to any “specific” project completion date, or funding thereof, should not defeat the purpose of the 40 year water plan by creating artificial timelines that are lesser than allowed for beneficial use. Applications for 40 year water plans should demonstrate a genuine need and ability to hold water rights unused based on sound justifiable practices and processes.

Because of the numerous non-consensus issues on the discussion draft, there is definitely a need to continue the dialogue and brainstorming with all stakeholders before any “Criteria for Water Development Plans” are finalized.

We want to thank the State Engineer’s Staff and all of the Task Force participants for all their work on this issue.

Sincerely,
Regina Romero
Intergovernmental Relations Director
New Mexico Municipal League



City of Santa Fe, New Mexico

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SANTA FE, NM

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200 Lincoln Avenue, P.O. Box 909, Santa Fe, N.M. 87504-0909

David Coss, *Mayor*

Councilors:

Rebecca Wurzbarger, Mayor Pro Tem, Dist. 2

Patti J. Bushee, Dist. 1

Chris Calvert, Dist. 1

Rosemary Romero, Dist. 2

Miguel M. Chavez, Dist. 3

Carmichael A. Dominguez, Dist. 3

Matthew E. Ortiz, Dist. 4

Ronald S. Trujillo, Dist. 4

June 30, 2009

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

Re: Discussion Draft Proposed Criteria for Water Development Plans

Dear Ms. Vogel:

In response to the recent request for comments on the Discussion Draft Proposed Criteria for Water Development Plans, and in light of the fact that there are no further meetings scheduled for the HM42 process, the City submits the following comments, which focus both on the draft and on the process for the guidelines.

The process has been valuable for promoting communication between different stakeholder organizations and for describing the OSE's role in water planning. However, the guidelines raise questions, which though voiced during the course of meetings, no one has been able to address. At the beginning of this process there was no indication that the "recommendations to the state engineer relating to planning authority" would eventually evolve into guidelines for water development projects. Nor were "rules" for reaching consensus and proceeding to adoption laid out at the beginning of the process. Participants were a self-selected group, and the OSE facilitators assumed consensus from meeting to meeting, regardless of the presence or absence of attendees. This has led to some lack of clarity regarding consensus decisions. For example, the guidelines note that text in brackets indicates a lack of consensus, but whether and how any text in brackets becomes part of the guidelines is unclear.



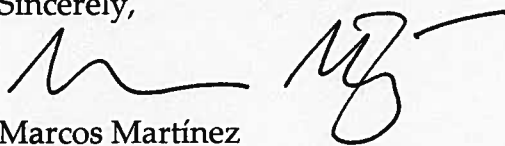
With regard to the draft guidelines themselves, the text is ambiguous in several sections. Moreover, the text does not define appropriate gallon-per-capita-per-day, best population projections, speculative use, or 'adequate' conservation, thus it is unclear how the guidelines can evaluate these factors.

As the OSE moves forward in the development of the guidelines, the City has several recommendations that would contribute to the transparency of the process beyond what has already been accomplished with the input from stakeholders:

- Define how the guidelines will be used. It should be clear 1) what, if anything, the guidelines require and 2) what they recommend. It should also be clear who is behind the guidelines;
- Before the guidelines are applied, the OSE should give the public a chance to comment. This would to some extent alleviate the problem of having a limited stakeholder group involved in their development;
- Define the responsibility of the OSE to the applicant (timeline to review, opportunity to re-submit, standards of the various factors (e.g. population growth); and
- State the OSE's official position regarding the guidelines. (Is this an OSE policy?) How do these Guidelines stand in relation to the statute, NMSA 1978 § 72-1-9, and the administrative code, NMAC 19.26.2(L)?

Having voiced our concerns and suggestions, we would like to express our appreciation again for the opportunity to participate in and comment on the development of the guidelines and for all the hard work of the OSE and stakeholder organizations.

Sincerely,


Marcos Martínez
Attorney for the City of Santa Fe

Working with:

Claudia Borchert, Amanda King, and Dale Lyons



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CLUB

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Rio Grande Chapter

VIA E-MAIL AND HAND DELIVERED
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

CC: John D'Antonio

June 30, 2009

Re: HM42 Stakeholder Working Group

The Sierra Club has appreciated the opportunity to be a member of this stakeholder working group. We realize that not all of the objectives of the working group were reached. In particular there was not agreement on adding additional entities that would be entitled to hold water rights unused nor was there agreement on extending the length of time beyond forty years for plans submitted in support of a request to delay the placing of water rights to beneficial use. It may have been discussed before I became involved but I was not aware of any discussion of interstate commerce limitations on the ability of entities to hold water rights unused although it appears to be a very relevant topic. I know there is some discussion in the legal memo submitted by Martha Franks but it was not clear to me that we had integrated this information into the status of NM Statute 72-1-9

Notwithstanding that we did not resolve all the issues which the Memorial requested be addressed, the Sierra Club believes the process has been very productive in a number of ways including:

A. Gaining an understanding of the issues associated with holding water rights unused and the various perspectives of different stakeholders. There now seems to be common understanding of the implications of 72-1-9 and the positions of the various stakeholders. This facilitates the discussion of this and other related issues.

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B. General agreement as to what should be included in a forty year plan. The development of criteria for preparation of a forty year plan in support of an application to hold water unused is itself a significant achievement of the working group.

Thus we believe this has already been a very successful working group and we believe that it would be useful for this working group to continue to meet. We recognize that budgets are tight but the issues being dealt with by this working group are extremely important so we encourage you to try to find a way for this working group to continue to meet or function in some other manner.

Best Regards,



Sigmund Silber
Sierra Club Rio Grande Chapter Water Issues Chair.