

DISCUSSION DRAFT
PROPOSED CRITERIA FOR WATER DEVELOPMENT PLANS REQUIRED
[For those seeking an extended planning horizon]

The use of brackets indicates where lack of consensus exists.

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 72-1-9 limits the State Engineer's authority to the listed entities and to 40 years.

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?

Both of the following options are under discussion.

Option 1: [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.]

Option 2: [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.]

[This document is also intended 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.]

[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.]

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 development 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].

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 criterion 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. Historical Use

1. 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 that is used as a water supply, return flow credits, leased water, any other supply of water, and offset requirements.

Baseline/Current Water Demand – Describe the amounts of water diverted and used to the level of detail for which information is available. Drinking water suppliers should provide a detailed system audit using the American Water Works Association’s Water Audit (on an annual basis for a minimum of five years if available) and a system Gallons Per Capita per

Day (GPCD) analysis using the NMOSE GPCD methodology (on an annual basis for a minimum of five years if available).

In calculating the amount of water that may be held unused, the State Engineer shall consider that the conjunctive use of surface water and groundwater is a water management practice that promotes the sustainability of the State's groundwater resources and is in the public welfare, and promotes the conservation of water. An applicant may demonstrate to the State Engineer that ground and surface water sources are being used conjunctively to achieve a single sustainable level of water supply from conjunctive sources. If such a showing has been made, the two sources may not be simply added together to determine a water supply amount.

2. Description and Quantification of Existing Conservation and Other Water Supply Efforts

Describe supply-side and demand-side programs and document results from conservation and/or reuse programs that have been implemented.

B. Projected Use

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 reasonable and sound future conservation measures.

1. Demonstration of Projected Future Population Increase and Anticipated Demand.

Provide the projections to support amount requested, or population projections customarily used by applicant for other general planning efforts. If not relying on U.S. Census Bureau (or UNM-BBER) data, provide supporting documentation.

Provide a calculation of demand based on future GPCD and future population. If not relying on GPCD and population growth, provide supporting documentation for additional demand forecasts. Describe any mandates requiring developers in applicant's jurisdiction to obtain water rights for development. For applicants who are non-drinking water suppliers or where use of GPCD would otherwise be inappropriate, provide an alternative statement of demand with supporting documentation.

Indicate the extent to which projections of supply are based on historical averages or firm yield. Indicate what adjustments have been made to take into account the projected impacts of drought, increased temperatures or climate variability.

[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.] or [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.]

2. Description of Future Conservation Efforts

Describe proposed conservation efforts, including: relevant policies and ordinances, 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, and statement of projected future GPCD as a result of the new programs.

C. Need for Extended Planning Period [(not to exceed 40 years)] that is Reasonable and Necessary.

Indicate 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 by the county under the Subdivision Act if applicable

Indicate extent of public input, if applicable, in applicant's water planning process, describe the process to review and adopt the water development plan, and provide evidence the 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.

D. Demonstration that 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 which can be completed within a reasonable period of time.

2. The applicants should demonstrate a current or future ability and legal right to physically store, divert, deliver or otherwise put the water to beneficial use. That 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.

3. The applicant should demonstrate 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 and delivery infrastructure which can be completed within a reasonable period of time.; and

4. In short, they should show that they are ready, willing, and able to go forward with the plan.]

E. 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. All applicants must show that, should the application be granted, they will use reasonable diligence in putting the water to beneficial use by providing timelines, time frames or milestones.

F. Status Reports and Conditions on Permits

Should the application be granted, the applicants must use reasonable diligence in putting water to beneficial use. Reasonable periodic updates or status reports may be part of their permit, should it be granted, to assure that timelines and milestones are met, and that the underlying assumptions of the application are still valid.

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