

## MEMORANDUM

TO: DL Sanders, John Longworth

FROM: Martha Franks

SUBJECT: Analysis of NMSA §72-1-9

DATE: May 18, 2007

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### I. Introduction

The following memorandum addresses your request that I prepare a detailed analytical and historical perspective on NMSA §72-1-9, including:

- a. How the statute came into existence
- b. Law review
- c. If possible, interviews with individuals involved in crafting legislation
- d. Examination of “covered entities”
  - i. Does the SE have authority to include entities that are not explicitly covered in the statute? Included in this is Water and Sanitation Districts, San Juan Water Commission, PRC covered entities, etc
- e. Native American concerns
- f. Marketing water across State lines
- g. Importance of water conservation
- h. Interstate water allocation legislation and water planning in the western states
- i. Issues associated with time period

I will be out of the country from May 20 through June 21, 2007. I have asked Fred Abramowitz to be available to answer any questions about this memorandum, and to do any further research on it that might be required during that time.

## II. How the Statute Came into Existence; Law Review<sup>1</sup>; Issues Related to the Time Period--(a), (b) and (i)

The statute came into existence in the context of litigation over the City of El Paso, Texas' effort to appropriate groundwater in two New Mexico underground basins, the Hueco and the Lower Rio Grande. The litigation lasted for approximately eleven years, and was pursued in various courts, as well as through extensive administrative hearings before the New Mexico State Engineer. While a great number of intertwined issues were addressed in the course of that litigation, the result ultimately turned on NMSA §72-1-9. A brief history of the El Paso case should thus be helpful in examining that statute.

### A. Events Establishing Legal Standards for State Engineer Proceedings

On September 5, 1980, the City of El Paso, Texas filed a declaratory judgment action in the United States District Court for New Mexico challenging a New Mexico statute (NMSA §72-12-19), which forbade the export of water outside New Mexico's boundaries. This or similar statutes were common in Western states at the time, and El Paso's challenge was similar to a challenge to the Nebraska version of the statute. On September 11 and 12, 1980, State Engineer Steve Reynolds declared the Lower Rio Grande and Hueco Underground Water Basins, respectively. On September 12 and 18, 1980, the City of El Paso filed 266 well applications in both basins, seeking a total of 296,000 acre feet of water annually. Leaving aside federal projects, this was by far the largest attempted appropriation in New Mexico history. On April 21, 1981, the State Engineer denied the applications, on the basis of the statute forbidding the export of water.

While the declaratory judgment action challenging that statute was pending in New Mexico, the similar Nebraska case found its way up to the United States Supreme Court. The USSC in *Sporhase v. Nebraska*, 458 U.S. 941 (1982) held that water was an article of interstate commerce, which meant that statutes forbidding the export of water were unconstitutional. The federal district court in New Mexico, Judge Bratton, relying on *Sporhase*, found for the City of El Paso and struck the New Mexico statute, in effect reinstating the City's 266 applications for well permits.<sup>2</sup> *City of El Paso v. Reynolds*, 563 P. Supp. 379 (1983).

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<sup>1</sup> It is my understanding from discussions at my presentation on May 7, 2007 that the history and analysis that I have given in Section II is what was meant by "Law Review." I did search recent law review articles and found one which directly discussed NMSA 72-1-9: *Note: Recent Developments in the El Paso/New Mexico Interstate Groundwater Controversy—the Constitutionality of New Mexico's New Municipality Water Planning Statute*, 29 Nat. Res. J. 223 (1989). The article argues that, while the forty-year statute passes constitutional muster easily with respect to Commerce Clause issues, it may be found to be protectionist when applied to El Paso. In the light of the results of the El Paso case, this possibility was never tested.

<sup>2</sup> The federal district court also made findings regarding the Rio Grande Compact, rejecting the arguments of the OSE that the Compact prevented out of state appropriation by apportioning the waters between the states.

In response, the New Mexico legislature did several things. First, in February of 1983, it passed legislation that became NMSA §72-12B-1, which deals with the circumstances under which out of state appropriations of water may be allowed. Similar statutes were passed throughout the West in the wake of *Sporhase*. The statute provides for a process to consider applications for out of state water uses. Such uses, under the statute may only be permitted if they are not “detrimental to the public welfare” or “contrary to the conservation of water within the state.” The statute also lists factors that the State Engineer must consider in acting upon applications to for out of state water use.

The original district court action had been appealed to the Tenth Circuit, which remanded the case so that Judge Bratton might review these new developments. On remand, El Paso challenged the new statute as facially unconstitutional. Judge Bratton upheld the statute, reserving for future consideration whether it would be constitutionally applied.<sup>3</sup> *City of El Paso v. Reynolds*, 597 F. Supp. 694 (1984). This result meant that administrative hearings on El Paso’s applications would go forward under the new statute.

The 1983 New Mexico legislature enacted a second statute that was not considered by Judge Bratton’s court, and that was the first step toward what became NMSA §72-1-9. In March, 1983, the legislature amended Section 8F the Water Right Forfeiture Statute, NMSA §72-12-8, to add a sentence stating that municipalities “shall be allowed a water use planning period not to exceed forty years, and water rights for municipalities . . . shall be based upon a water development plan, the implementation of which shall not exceed a forty-year period from the date of application for an appropriation . . .” The State Engineer promulgated regulations embodying this statutory language by Order No. 136, issued on January 30, 1985. El Paso attempted to appeal the adoption of these regulations, seeking *de novo* review in state district court. The state district court dismissed the appeal on the grounds that it lacked subject matter jurisdiction to review State Engineer rule-making *de novo*. In effect, the court found that the proper way to challenge the regulations would be by writ.

While El Paso’s attempt to appeal State Engineer regulations was pending, the New Mexico legislature removed the amendatory language from NMSA §72-12-8, returning it to a single sentence that merely exempted municipalities from the four-year forfeiture rule. At the same time, the legislature enacted what became NMSA §72-1-9.<sup>4</sup> The changed language specifically included a legislative recognition that the State Engineer had an administrative policy of not allowing municipalities to acquire and hold unused water rights in an amount greater than their reasonable needs within forty years. State Engineer regulations pursuant to Order No. 136 remained in place despite the legislative change.

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<sup>3</sup> El Paso also challenged in that case a law passed in February 1984 (two months after the case had been remanded by the Tenth Circuit) that imposed a two-year moratorium on new appropriations of groundwater hydrologically connected to the Rio Grande below Elephant Butte. The district court struck that law as unconstitutional on the grounds that it had a protectionist purpose.

<sup>4</sup> In its original form, the statute applied exclusively to municipalities and counties. Other entities were added in 1990.

In July 1985, El Paso came to state district court again to challenge both the new statute and the regulations. This time, the City filed a declaratory judgment action, alleging that the statute was an unconstitutional “special law” designed to discriminate against El Paso in violation of the Equal Protection Clause of the New Mexico Constitution. Further, the City alleged that the law was an unconstitutional effort to affect the outcome of a pending case, and that the State Engineer’s rule was arbitrary, capricious and outside of his authority.

Strategically, El Paso read the situation in the following way. Under the original NMSA §72-12-8F, El Paso believed, municipalities had been allowed to plan as far into the future as seemed right to them, without restraint. Thus, they saw the new law as a limitation on a right they previously had, as well as being motivated by a discriminatory purpose against an out of state entity. New Mexico argued that the situation was different. From New Mexico’s point of view, public policy favored immediate, active use of water, and strongly disfavored water being held, unused. Thus, the ordinary deadline for water use was four years, after which it would be forfeited. Municipalities and counties, having population growth to plan for, can be allowed water for future uses, but even under those conditions, beneficial use must be shown within a reasonable time. *State ex rel. State Engineer v. Crider*, 78 N.M. 312, 315 (1967) (“ . . .cities’ rights to the appropriation of water for future use is subject to the condition that the needed water be applied to beneficial use within a reasonable time.”); *See also State ex rel. Martinez v. City of Las Vegas*, 118 N.M. 257 (N.M. Ct. App. 1994), *appeal after remand at State ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 89 P.3d 47 (2004) (The New Mexico Court of Appeals, citing *Crider*, notes that, while cities have always been given time to plan for future uses, that time has never been unlimited, and that the “pueblo water rights” claimed in that case would in effect impermissibly allow an unlimited time to plan). Thus, New Mexico viewed the law as providing a *preference* for cities, rather than a limitation, but that preference was not open-ended. Possibly, El Paso’s attempt at an enormous appropriation for a hundred years into the future was the occasion for the statutory codification of a precise definition for the phrase “reasonable time,” but that definition already existed in administration practice. At no point, New Mexico argued, forcefully, were New Mexico cities ever permitted to tie up water for anything like as long as El Paso wanted to do. That was mere hoarding. *See Kaiser Steel Corp. v. W.S. Ranch*, 81 N.M. 414, 467 P.2d 1986 (1970) (water should be put to maximum beneficial use as a matter of public policy).

The case never came to the merits, as the state district court dismissed again for lack of subject matter jurisdiction, or alternatively on the grounds that El Paso had no standing. The ruling rested on the court’s finding that El Paso’s arguments were premature.

When the State Engineer made some minor revisions to his regulations under Order No. 138, El Paso tried again, this time in the form of a petition for a writ of certiorari. The state district court rejected this effort as well, on *res judicata* grounds, as the changes to the regulation were minimal, the regulations themselves were ministerial, and El Paso’s real agenda was to attack the constitutionality of the statute, which attack had already been held to be premature. Thus, despite three tries through three different procedural means, El Paso did not succeed in getting to the merits of their constitutional challenge to NMSA §72-1-9 before going to hearing before the State Engineer.

## B. Proceedings Before the State Engineer

The next step in the El Paso controversy was the administrative proceeding before the State Engineer. The state took the view that the upshot of all this prior litigation was that there were three types of issues for the State Engineer to decide with respect to the El Paso applications. First, the State Engineer must decide the ordinary issues concerning the existence of unappropriated water and whether the use of that water would impair valid existing rights. Second, the State Engineer must decide, under NMSA §72-12B-1, whether granting El Paso’s applications would be detrimental to the public welfare or contrary to the conservation of water within the state. Third, the State Engineer must decide, under §72-1-9, whether El Paso had a need for the water within forty years of the date of application.<sup>5</sup>

What should be underscored here is that the “public welfare and conservation” standards of §72-12B-1, which were reviewed by Judge Bratton, were an entirely different matter than the “forty year rule” of §72-1-9, which was not reviewed by the federal district court, and with respect to which the state district court had found it did not have jurisdiction. Thus, while the forty-year statute includes the phrase “public welfare,” it was not necessarily referring to the *Sporhase* analysis regarding the basis of a “limited preference” for the citizens of New Mexico, but was instead using the phrase in a way that was even-handed as between in-state and out-of-state uses in the same way that impairment standards are even-handed. In any event, the phrase is not well defined, even after twenty-five years. *See Comment: The Public Vote in the Game of Water Wars; An Unquenchable Thirst to Define and Implement “Public Values” in Western Water Laws*, 70 U.M.K.C. L. Rev. 647 (2002).<sup>6</sup> It may be simpler to speak directly in terms of the public policy on which the forty-year rule is specifically based; that is, the special needs of cities with growing populations must be balanced against the public policy disfavoring the hoarding of water unused.

The hearing on the applications of the City of El Paso began on November 18, 1986. Throughout the proceedings, the City of El Paso was dismissive of the forty-year rule. On the first day of the hearing Pete Schenkkan, the attorney for the City, raised the forty year rule and said to Hearing Examiner Reynolds: “if that’s an issue on which this case is going to turn, you can rule on it right now because we stipulate that it is possible that that may happen.”—that is, that the City could make it forty years without any new sources of water. Hearing Transcript Vol. 1, pg. 114. Dr. Lee Wilson, the chief expert witness for the City, testified as an expert water planner that forty years was an arbitrary, magic date, pointing out that the Bureau of

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<sup>5</sup> The State Engineer bi-furcated the hearings on the El Paso applications with respect to possible factual differences between the Hueco and Lower Rio Grande basins, but combined them with respect to the public welfare, conservation, and forty year questions. The only hearings actually held related to the Hueco, but covered the legal and policy issues for both sets of applications.

<sup>6</sup> The State did not follow this advice at the time of the hearing, but hedged its bets by arguing that the forty-year rule was justified both directly under §72-1-9, and also as a matter of public welfare. As I understand the present situation, however, no one is attempting to challenge the statute, but instead people are attempting to add themselves to the entities covered by it and also to extend the period to 100 years. Under these circumstances, the cleaner public policy analysis might be easier to deal with.

Reclamation ordinarily uses fifty years, plus implementation time. Tr. Vol. 1, pg. 136. Dr. Wilson also testified as an expert in State Engineer practices, and claimed that there was no factual basis for the statutory claim that limiting municipalities was an established administrative practice. *Id.* at 228. He was particularly scornful of the claim that it was appropriate to count the forty years from the date of application, rather than the date of permit approval. *Id.* at 232. Mr. John Hickerson, General Manager of the El Paso Water Utility, defended the size of the City's applications by stating that he believed he should be permitted to plan for 80-100 years. Tr. Vol. 54 at 12, 067. In general, the City took the view that it was irreproachably engaged in reasonable planning practices against a tide of unreasoning Texas-hatred, partly expressed in this ridiculous statute, and that Mr. Reynolds would rise above the fray and recognize El Paso's needs by ignoring the statute.

The state's case paid a good deal of attention to the forty-year rule. Dr. Charles Howe, an economist and an expert in water planning, testified that it was an essential part of reasonable water planning that it have some end-point, particularly from the perspective of the administrator making decisions on scarce resources. Tr. Vol. 47, at 10, 531. That is, while El Paso could certainly be expected to make an effort to acquire water for even very distant future demands if the costs of acquisition are low, a resource allocator like the Hearing Examiner "has a larger set of responsibilities." *Id.* at 10, 539. The Hearing Examiner, unlike the applicant, must consider the "scarcity value" of the resource; that is, the cost to others of locking up the resource. *Id.* at 541. In view of this "scarcity value" consideration, the Hearing Examiner must use a finite planning period to maintain an essential flexibility in allocating the resource. *Id.* at 10, 613. A period of forty years, Dr. Howe testified, stretches to the utmost our ability to make reasonable forecasts of need. *Id.* at 10, 530. Allowing someone to acquire water in excess of their forty-year needs is allowing them to hoard. *Id.* at 10, 613.

Dennis Cooper testified, as an expert in State Engineer practices, that the forty-year planning horizon in fact reflected long time State Engineer practices. Tr. Vol. 46 pg. 10, 417 ("my understanding of the rule as applied to municipalities was a municipality could only appropriate the amount of water—and I'm talking about new appropriations—the amount of water that it could require for its next 40 years of operation"). The rule, he testified, was not formal, but reflected in administrative decisions. *Id.* He was asked whether the State Engineer had ever required forty-year plans, and responded that the applications in questions were mostly for urgent needs, and that there was not really a question about holding water unused for forty years. *Id.* at 10, 418. Asked about a municipality with long-term needs, that is, Albuquerque, he testified that Albuquerque worked with the OSE staff in such a way that its applications were recurrent for ten years or twenty years. Those incremental steps never took Albuquerque beyond what they would need within forty years. *Id.* at 10,419. On cross-examination, he stated two pertinent things. First, he had never—until the El Paso applications--seen an application protested on the grounds that the water would not be needed within forty years. *Id.* at 10, 441. Second, of the instances proffered to prove that the State Engineer had applied a forty-year rule prior to enactment of §72-1-9, none were quite unequivocal, and most dated the limitation from the approval of the permit rather than the date

of application.<sup>7</sup> The state's only argument with regard to the question of whether it made sense to date the forty-year period from the date of application was pretty weak. The states argued that, unless the application date was used, a city could file applications and then sit on them indefinitely, tying up water. El Paso responded that the State Engineer had it in his power to force a resolution of those applications.

### C. The State Engineer's Ruling

The State Engineer issued his ruling on December 23, 1987. Although nearly two hundred pages of briefs had been filed following a 58-day hearing, the ruling was eight pages long, of which the first two were background facts. Based on a few findings as to population, hydrology and the existence of alternative sources of supply, the Hearing Examiner found that El Paso would not need the water for which it had applied within forty years of the date of the application. The Hearing Examiner remarked, in his discussion of possible alternative supplies for El Paso, that the City had the power to condemn water rights. It is possible that the Hearing Examiner included this consideration specifically to address arguments that NMSA §72-1-9 unconstitutionally singled out cities for a special standard. Having established that the City had enough water to meet its needs by forty years from the date of application, the ruling quoted §72-1-9, noted that the New Mexico legislature had specifically made this law applicable to pending applications, and found that, therefore, the law and the accompanying regulations "mandate that none of the subject applications be granted." *In the Matter of the Applications of the City of El Paso, Texas*, Nos. HU-12 through HU-71 and LRG-92 through LRG-357, Findings and Order, at 8.

### D. El Paso's Efforts to Appeal

El Paso tried two avenues to challenge the ruling. First, El Paso went back to the federal district court and filed a Third Supplemental Complaint, alleging a pattern of unconstitutional discrimination against the City. The state resisted, arguing on procedural grounds that there was no basis on which to open a case that had been closed for three years. Because the applications had been denied on the basis of §72-1-9, instead of on the "public welfare" language in 72-12B-1, which had been the subject of the second federal district court case, the subject matter of the attempted new complaint had nothing in common with the older case that would justify re-opening it. In fact, the state argued, it would be prejudicial to the

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<sup>7</sup> *In the Matter of the City of Hobbs*, L-7474 et al, L-7475 et al., L-7476, L-7477 and L-7496 et al. (1976); *In the Matter of the Applications of the City of Carlsbad*, L-7317 et al., L-7318 et al., L-7319 et al, L-7322 et al., L-7323 et al., and L-7324 et al. (1976); *In the Matter of the Applications of the City of Roswell*, L-5767 through L-5775-X (1965). The state offered to the Tenth Circuit in one of the many El Paso appeals two applications that are dated after the enactment of the statute: *In the Matter of the Applications of the City of Portales*, P-2560 through P-2565 (1986); and *In the Matter of the Applications of the City of Bayard*, 4750 through M-4755 and M-4757 through M-47 59 (1988).

Linda Gordon tells me that, since the El Paso case, she is aware of at least one application that was partially denied on the grounds that the city in question (Roswell) would not be able to use the water within forty years of the date of application. She thought it might be RA-241 and be under the name Burke Snyder.

state to accept the Third Supplemental Complaint because it would imply that there was truth to El Paso's allegation that there was a pattern throughout the controversy of unconstitutional discrimination against El Paso. The federal district court refused to accept the Third Supplemental Complaint. El Paso appealed that refusal to the Tenth Circuit, arguing passionately that New Mexico was shutting them out. They brought all kinds of charts to oral argument and tried to re-present a lot of the evidence at the hearing, trying to show the Tenth Circuit that only unconstitutional discrimination could possibly justify awarding them nothing. The Tenth Circuit refused to look behind the district court's discretion to reject the complaint.

While this was going on, El Paso also attempted a *de novo* appeal in state district court. A variety of issues arose. All of the judges in the district were recused or recused themselves, and Judge Manuel Saucedo had to be specially appointed by the New Mexico Supreme Court. El Paso asked for his recusal too, on the grounds that he had worked in the Senate office of Jeff Bingaman, who as New Mexico Attorney General had worked on the federal district court cases. El Paso sought discovery as to the extent of Judge Saucedo's actual knowledge of the case, which meant that there was a related proceeding in the district court of the District of Columbia, as Senator Bingaman claimed executive privilege in response to an attempt to depose him. Ultimately, El Paso had to live with Judge Saucedo. We all prepared for extensive litigation in state district court.

But El Paso had slipped up badly on the technical issue of service of process. They served process on the lawyers for EBID in their capacity as representing EBID, but the City failed to serve process on the 255 individual Protestants that these lawyers also represented. Especially because the hearings had been bifurcated, so that EBID was addressing only some of the issues that went to hearing, while some of the individual Protestants were allowed to address all of the issues that went to hearing, this failure of service made a theoretical difference. Judge Saucedo dismissed the appeal for lack of subject matter jurisdiction.

El Paso appealed the dismissal, but the heart had gone out of them. The appeal was settled on the basis of promises from all parties to enter into negotiated efforts to address regional water issues. Meetings were had pursuant to that settlement, and no doubt those meetings played a part in the relations among the interested parties in the area, but no general agreement was reached by that means regarding a water supply for El Paso.

### III. Interviews with Individuals Involved in Crafting the Legislation—(c)

I was somewhat unsure about how discreet this project is designed to be, and thus confined a first round of calls to people who are presently working with the OSE, and did not call people who are presently adversarial to the OSE. I can expand this research if necessary. In New Mexico, however, legislative history is not admissible in court, and it is unclear to me that there is much of value to be gained by talking to people who might be disposed to pursue a present agenda in searching their memories.

I interviewed:

- A. Fred Abramowitz—Fred (and I) represented the Water Rights Division (WRD) at the administrative hearing before Mr. Reynolds on El Paso’s applications. His memory was that the statute was discussed within the legislative group formed in 1983 in response to the *Sporhase* case, and possibly drafted by Chuck DuMars. Steve Hernandez, he thought, might also have some memory of how it came about. Fred was instrumental in choosing the litigation strategy, described above, of gearing the WRD’s presentation to the forty-year statute that became the basis for Mr. Reynolds’ ruling. Thus, he prepared the witnesses at the hearing who addressed the policy issues, including Professor Charles Howe and Dennis Cooper, quoted above.
- B. Debbie Hathaway—Debbie, who was a state employee at the time, testified as the WRD hydrology expert at the administrative hearing, providing support for the conclusions of outside expert S.S. Papadopoulos that El Paso would not need water within forty years of the date of application. Although she is not certain where she got these impressions, Debbie’s memory is that the statute had a dual purpose. Enshrining the existing administrative forty-year limit in statutory law to make sure that it applied to El Paso was one purpose. The second had to do with the language of the *Sporhase* case. She recalls people concluding that, in order to fall within the *Sporhase* “limited preference” language that had been embodied in NMSA §72-12B-1, it was critically important to show that New Mexico needed every drop of water we had. The way to do this was to get serious about water planning. She also remembers discussions about how the forty-year deadline would operate as a practical matter. The thought at the time was that El Paso could have waited a few years and then applied again as soon as they could show need within forty years. Debbie has continued her work in water planning and is publishing some articles on water planning in New Mexico in a set of guidelines for decision-makers being published by the Bureau of Mines. Attached are drafts of those articles.
- C. Dennis Cooper—Dennis thought that Steve Reynolds must have drafted the statute, although he did not know this for a fact.<sup>8</sup> At least, he thought, Mr. Reynolds was heavily involved in discussions

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<sup>8</sup> In some of its pleadings seeking to file a Third Supplemental Complaint in Judge Bratton’s court, El Paso also suggested that State Engineer Reynolds himself had drafted the statute on the basis of which he denied El Paso’s applications. The State in its answer briefs flatly denied this, with every appearance of indignation. Surrebuttal Reply of the State Defendants in Opposition to the City of El Paso’s Motion for Leave to Supplement, filed March 4, 1988 in *City of El Paso v. Reynolds*, Civ. No. 80-730-JP, pg. 5, ftnt 2.

about it, as the legislative approach of asserting an existing policy sounded like Mr. Reynolds' brand of craftiness. Under this approach, even if the statute had been found unconstitutional, Mr. Reynolds could have denied the applications based on the existing administrative policy. Dennis did not think that Chuck DuMars was involved.

I have calls in to Jeff Forniciari and Steve Dillon, both of whom represented the State Engineer in the El Paso litigation, but they have not yet returned them. I will ask Fred to follow up on these calls.

#### IV. Examination of "covered entities"-(d)

The history given above does not address the issue of entities covered by the statute, as different types of entities have been added over time without legislative explanation. There is no obvious public policy rationale for the particular types of entities included in the statute. This may be a weakness. Clearly, the ability to apply for large amounts of water and hold it unused in order to ensure a future supply is a very desirable thing for anyone, so that entities will wish to be covered by the statute, and wish to extend its forty year limit into the future as far as possible. But, as the testimony at the El Paso hearing made clear, the State as the resource allocator has a different perspective than the individual water planning entities. The State needs to ensure flexibility in water planning, which cuts against allowing entities to lock up large amounts of water into the far future. *See* testimony of Dr. Charles Howe, *supra*. Reflecting this latter consideration, the ability to hold water unused for long periods of time is contrary to the long-standing State policy of ensuring that water is, to the extent possible, put to present use and not hoarded. This policy is founded in the New Mexico constitutional precept that "Beneficial use shall be the basis, the measure and the limit of a water right." N.M. Const. Art. XVI, Sec. 2. Thus, it could be argued that the statute is unconstitutional because holding water unused, as the statute permits, creates an exception to the constitutional requirement that water be put to beneficial use. The defense to that argument characterizes the statute as limited, public policy based postponement of the expectation of beneficial use. That is, the statute is properly viewed as providing a practical, temporary delay of the ordinary constitutional requirement that present, actual beneficial use is the measure of a water right.

This potential constitutional infirmity affects how the statute should be construed. You have asked, for example, if the State Engineer has the discretionary authority to apply the statute to entities that are not explicitly covered by the statutory language. Under ordinary principles of statutory construction, the answer is almost certainly "no." If a statute provides specifically for something, it is held to have excluded alternatives. *E.g. Fernandez v. Espanola Pub. Sch. Dist.*, 138 N.M. 283; 119 P.3d 63 (2005) (the principle of "*expressio unis est exclusio alterius*" means that where authority is given to do a particular thing in a particular way, all other ways are excluded—the district court had no discretion to construe a statute to include alternatives).

Even if an argument could be made that the State Engineer has the authority to exercise discretion about which entities should be included under the statute, however, the

constitutional issues would require the State Engineer to construe the statute as narrowly as possible. The legislature may have the authority to define “beneficial use” to include a delay in actual use for planning purposes, but an executive agency may not undertake independent discretion to make those sorts of determinations. That means that the State Engineer may not expand the terms of the statute to include entities not explicitly named and may not as an administrative matter accede to an extension of the statutory period beyond forty years. This is so especially in the light of the evidence on the record in the El Paso hearing, presented by the State of New Mexico, that planning beyond forty years is so speculative as to be useless.

At my presentation on May 7, 2007, questions arose also about how the forty-year period should be counted. As cited above, there was testimony at the El Paso hearing regarding how the City of Albuquerque’s applications had been treated. The OSE had accepted applications from the City on a rolling basis, no one of which required water that could not be used within 40 years. This picture of how the OSE did business comports with Debbie Hathaway’s memory of how people thought the new statute would work also.

Another exchange from the hearing might be relevant to this latter question. El Paso threatened, if New Mexico applied the forty-year rule, to sabotage its own water planning by, for example, raising the water quality standards in order to show need within forty years. The City implied that there were a variety of similar strategies it could use to render the law meaningless. *See* Testimony of Lee Wilson, Tr. Pg 223 *et seq.* Mr. Reynolds made specific findings on what water quality standards were appropriate, but no doubt other entities will have the same sorts of ideas that El Paso had and try to shuffle their water planning in such a way as to show early need. Regulations addressing those possibilities might be valuable.

V. Native American Concerns—(e)

I see no issues here that have any unique affect on Native American interests.

VI. Marketing water across State lines—(f)

This issue more properly falls within an analysis of NMSA §72-12B-1. The two statutes intersect on a strategic level if water planning is taken to be part of an effort to make sure that New Mexico interests are first in line for any unappropriated water. That is, New Mexico entities might argue that it is valuable to allow them to hold water far in advance of their needs because they might oust out-of-state applications. This runs a constitutional danger of looking like a pretext for discrimination, and also conflicts with the WRD’s testimony at the administrative hearing.

VII. Importance of Water Conservation—(g)

The OSE may want to consider regulations defining the concept of “water conservation.” For most of New Mexico’s water law history, the concept of “water conservation” has been synonymous with the concept of “beneficial use;” that is, it was thought to be wasteful, and contrary to conservation, to allow water to remain unused. More recently, some people associate “water conservation” with water use efficiency; that is,

various water use strategies to stretch supplies--preventing evapo-transpiration or, in some people's minds, lining ditches (which is often in fact a false economy). In the context of NMSA §72-1-9, in yet another alternative meaning for the phrase, some people seem to consider "water conservation" to mean hoarding water for the future by "conserving" it *from* use. Each of these definitions of "water conservation" would give rise to a different analysis with regard to the meaning of the statute. The OSE should develop an articulate policy about how the phrase should be used.

I should note that, at the administrative hearing, the WRD put on considerable testimony about El Paso's conservation practices, using the term to mean water use efficiency, the second of these alternatives. The WRD argued, in effect, that El Paso could increase the length of time in which its present supplies would be adequate by reducing per capita use, or fixing system leaks, etc. The State Engineer did not accept or comment upon this evidence in his ruling, so that there is no reason to think it is a formal part of water planning.

VIII. Interstate Water Allocation Legislation and Water Planning in the Western States—  
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In 2001, Professor David Getches published a comprehensive article addressing the extent to which states have acted on west-wide expectations in the 1980s that there would be extensive reforms in water law, including water planning. D. Getches, The Metamorphosis of Western Water Policy; Have Federal Laws and Local Decisions Eclipsed the States' Role? 20 Stan. Envtl. L.J. 3 (January, 2001). Professor Getches argues that to a great extent the states have failed to act to reform water law and in many instances have backtracked on the progressive-seeming laws that were passed in the 1980s in the wake of *Sporhase*. Getches, at 24. He warns that states now risk obsolescence as federal and local interests drive important water issues in the West.

Among the topics that Professor Getches discusses in detail in support of his thesis are water conservation and water planning. With respect to water conservation, he observes that a great many states in the 1990s passed laws regarding conservation, and related planning requirements, but few of those statutes did much. *See* Getches at 25-26, where he lists minor statutory measures promoting water planning and water efficiency in Kansas, Texas, Washington, Montana, Oregon, New Mexico, Arizona, Colorado, Nevada and Utah. Only in California were significant measures on water conservation taken in fulfillment of the 1980s expectations of extensive reform. *Id.* Please let me know if you would like me to do a detailed analysis of the California experience.

With respect to the specific question of water planning for municipalities, Professor Getches notes that many Western states, either judicially or legislatively allow for cities to hold water unused for longer than other entities, which he calls the "great and growing cities doctrine." *City and County of Denver v. Northern Colo. Water Conservancy District*, 276 P.2d 992, 997 (Colo. 1954); *See* Janis E. Carpenter, Water for Growing Communities: Refining Tradition in the Pacific Northwest, 27 Envtl. L. 127, 128 (1997). Professor Getches associates this fact with his claim that water planning has not been carried through as extensively as had originally been hoped, as there is no systematic evaluation of the needs of cities in the context

of all of the considerations that must be analyzed in order to produce a useful water plan. Professor Getches suggests, for example, that water planning cannot be done outside the context of land use planning, so that development issues are explicitly considered in connection with water supply. Individual cities, he argues, cannot undertake reasonable growth planning because other cities will grab whatever water is freed up by decisions to conserve. Thus, only statewide or regional planning can be successful, and that has not been rigorously undertaken. Getches, at 38-39. For this reason, state planning initiatives tied to specific projects or entities, such as that embodied in NMSA 72-1-9, have accomplished very little since their passage in the 1980s.

A search of the law reviews and treatises suggests that there have been no noteworthy statutory changes in this area since Professor Getches' analysis in 2001. Because of this, given the short time available before I leave the country, I have not tracked down the conservation and planning laws he discusses state-by-state, which will take some time. I can do this work later in the summer.

Despite the apparent lack of comprehensive statutory reform in the West (pending further research), certain policy and systemic changes may be happening in New Mexico in response to increasing drought that foreshadow some of the recommendations in Professor Getches' article. In his conclusion, Professor Getches observes that, as of 2001, various federal and local initiatives had given rise to watershed efforts that, in effect, were planning sessions that include the full range of needed interests, by contrast to the less ambitious and comprehensive planning efforts (such as NMSA 72-1-9) that states have pursued. Getches, *supra*, at 42-47. In the last few years, New Mexico may be catching up in pursuing such comprehensive planning. For example, New Mexico has undertaken the State Water Plan, NMSA §72-14-3.1, and has pursued stronger efforts toward regional plans. *See* Debbie Hathaway articles, attached. In addition, the Active Water Resources Management program, in requiring the negotiation of basin-specific regulations for water management, promises (however painfully) to pull a full range of interests into the planning process.

In construing NMSA 72-1-9 or considering suggested changes to it, the OSE might want to take this general context into account. That is, to the extent that 72-1-9 was intended to promote water planning (as opposed to the alternative purpose of balancing the special needs of cities to accommodate expected growth against the public policy of ensuring actual beneficial use), its effect should be made to harmonize with the other planning initiatives in New Mexico. Such a consideration may have an affect on how the OSE thinks about, for example, what entities are included in the statute, as inclusion or exclusion puts New Mexico entities in different positions for planning purposes, which in turn might change the state and regional planning processes. Similarly, the timelines for the statute and the timelines considered in the regional and state plans should be thought about together.

## IX. Conclusions

### A. Weaknesses in the Statute

Despite El Paso’s repeated efforts, the constitutionality of the statute has never been tested. Some of the grounds urged by El Paso are either moot (the application of the statute to a pending case) or related only to El Paso’s out-of-state status, but some issues may still be raised, or may be urged in a legislative context in an effort to change the statute. For example:

- b. The statute purports to exempt water right holders (or holders of permits) from beneficial use requirements for an extended period of time. To relieve a water right holder of the requirement of beneficial use is contrary to New Mexico’s constitutional principle that “Beneficial use is the basis, the measure and the limit of a water right.” N.M. Const. Art. XVI, Sec. 2. Therefore, the statute is unconstitutional.
- c. Even if some delay in the constitutional requirement of beneficial use could be defensible, the particular figure of forty years is an arbitrary and capricious number that is contrary to beneficial use principles because it forces cities to do less than optimal planning in order to get in under the arbitrary forty year limit. We have strong expert testimony at the El Paso administrative hearing supporting the forty-year figure, but there is also testimony from El Paso that it is unrealistically short.
- d. The limit applies (or applied at the time) only to cities and counties, allowing everybody else, essentially a “reasonable time” in which to perfect beneficial use. The City threatened to expose how many water right permit holders had not proved up beneficial use within four years, and in fact that there are some that have not proved up in more than forty years. Mr. Reynolds may have been addressing this point when he made the observation that cities can condemn water rights, but that distinction between cities and other water right holders, if it was meant originally to be significant, has disappeared with the later amendments that added other types of entities to the forty-year planning list. Issues of discrimination based on the inclusion of some types of entities and the exclusion of others could be raised, so that, to defend the statute, the OSE should explore whether there are reasonable policy bases for those legislative choices. If not, then the OSE should consider what could be defended, and submit those analyses as part of a report to the legislature.
- e. The question of dating the forty years from the date of application, rather than the date of the granting of the permit may be raised, as El Paso raised it. Because the State Engineer controls the length of time between the application and the permit, and because there have been in some cases long delays between the two, a due process argument might be made.
- f. It is not at all clear how successfully we could defend the assertion in the legislation that the State Engineer had an existing policy of allowing cities to plan for forty years. The testimony at the El Paso hearing was equivocal on this. If the assertion is wrong, the effect is unclear. Probably it doesn’t

matter, but possibly it could be argued that because the factual predicate of the statute is wrong, the statute fails.

## B. Construction of the Statute Based on Its History

- a. Although the creation of the statute was spurred by El Paso's effort to appropriate water in New Mexico, the arguments in the pleadings of the El Paso case support the position that the statute is not, as a matter of law, necessarily bound up with notions of "public welfare" as that phrase was considered in *Sporhase* as part of a Commerce Clause analysis. Rather, §72-1-9 represents a legislative balancing between the needs of cities to plan and the state's long-standing public policy against hoarding water unused. Legislative determinations about how to make those types of balances are the ordinary work of the legislative branch, so that the forty-year figure, because there is testimony on the record of the El Paso case demonstrating that it has a reasonable basis, is likely to be upheld.
- b. The chief strategic purpose related to the El Paso case behind the statute was to highlight the fact that El Paso did not need the water it was seeking for a very long time. Thus, rather than being a means by which New Mexico cities could ensure themselves a water supply long into the future, the statute was intended to prevent El Paso from ensuring itself a water supply beyond forty years, which El Paso considered to be a short time.
- c. At the same time, in some contrast with both of these points, interviews with people about the origins of the statute make it clear that part of the behind-the-scenes thinking was that encouraging water planning in New Mexico was one way to show that all water located in New Mexico was urgently needed in New Mexico, so that the NMSA §72-12B-1 factors, which flowed from the *Sporhase* case, would weigh against out-of-state-transfers. Thus, NMSA 72-1-9 seems to have given rise to the regional planning process. Viewed from this angle, there is some justice in the claims of some entities that an alternative purpose of the statute was to lock up all of New Mexico's water in long term plans in order to prevent out-of-state appropriators from getting it.

## C. Remaining Questions about the Statute--Recommendations

- a. The OSE needs to develop a policy basis for which entities are included in the statute and which are not. In the meantime, or if this proves difficult, the State Engineer should construe the statute narrowly rather than expand its coverage, given the constitutional issues involved.
- b. The OSE needs to develop a policy for how the forty years should be counted. Evidence at the hearing suggests that water right applicants may file at any time, pushing the forty years back each time.

- c. The OSE needs to develop a definition of “water conservation.” The approach taken at the El Paso hearing was to equate “water conservation” with water use efficiency.