

House Memorial 42
Written Comments from Stakeholders
August 21, 2007

Written comments were received from the following stakeholders:

1. Water and Sanitation Districts (John Appel)
2. Environment New Mexico (Lauren Ketcham)
3. San Juan Water Commission/Entramosa Water & Wastewater Authority
(Liz Taylor)
4. New Mexico Water Utilities Association
5. 1000 Friends of New Mexico (Consuelo Bokum)
6. PNM—Public Service Company of NM (Tim Jones)
7. Albuquerque-Bernalillo County Water Utility Authority/City of
Española/City of Gallup (Jay Stein)
8. New Mexico Rural Water Association (Matt Holmes, via email)

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August 13, 2007

Elisa N. Sims
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Re: Comments with Regard to 40-Year Water Planning (H.M. 42)
Our No.: 1985.63

Dear Ms. Sims:

This letter provides our written comments, as requested at the meeting of July 24, 2007, on 40-year water planning under Section 72-1-9, NMSA 1978. We offer these comments as general counsel for several water and sanitation districts, including districts located in rapidly-growing areas of New Mexico.

Water and sanitation districts should be specifically included among the entities covered by the provisions of Section 72-1-9.

We recommend that the words "water and sanitation districts," be inserted before "member-owned community water systems" in both sentences of Section 72-1-9(A) and at three locations in Section 72-1-9(B).

The present language of Section 72-1-9 on this matter is not clear because, strictly speaking, water and sanitation districts are not "member-owned community water systems" and may not be "special water users' associations." Also, water and sanitation districts are not municipalities, although within their service areas they may provide a number of public services that elsewhere may be provided by municipalities and counties.

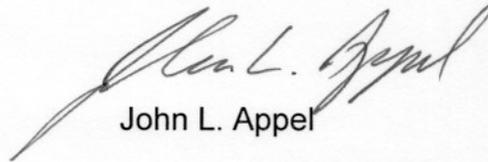
Water and sanitation districts are quasi-municipal governmental subdivisions of the State. See NMSA 1978, § 73-21-9(l) (1943). They are governed by elected boards of directors, and are specifically empowered to provide for water, wastewater, and solid waste utility services, construction of streets and street improvements, construction of parks and recreational improvements, construction and operation of other public facilities, and economic development projects. NMSA 1978, § 73-21-3 (1943, as

amended through 2005). They have the power of eminent domain and dominant eminent domain. NMSA 1978, § 73-21-16(J) (1943). They are governmental bodies, not membership organizations. Their powers are much broader than (for example) associations formed under the Sanitary Projects Act, but are not so broad as the powers of municipalities and counties.

Some New Mexico water and sanitation districts presently serve as many as 3,000 water or sewer connections, providing water and/or wastewater services to populations of 7,000 persons or more. Many districts are located in areas of rapidly expanding population and increasing commercial development, and just like municipalities and other public entities must be able to acquire and hold water rights for future anticipated needs for residential, commercial and public water supply. Explicitly including water and sanitation districts among the entities covered by Section 72-1-9 would resolve an ambiguity in the present statute, in favor of rational water planning and the inclusion of all public entities having an obligation to provide for future growth in the demand for water within their service territories.

Very truly yours,

COPPLER & MANNICK, P.C.



John L. Appel

Pat Bânegäs
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**Office of the State Engineer Comments on House Memorial 42
August 9, 2007**

The following stakeholder comments are provided on behalf of Environment New Mexico and our approximately 5,000 members state-wide. Environment New Mexico is an environmental advocacy nonprofit group working on global warming, energy, preservation and water issues state-wide. We appreciate this opportunity to provide input into this process.

During the legislative session, Environment New Mexico was a leading proponent for HB 1234 (Rep. Peter Wirth) and SB 1118 (Sen. Carlos Cisneros) legislation, "Water Plans for Certain Entities." Ultimately, in part because of opposition from the Office of the State Engineer, the legislation did not pass, but consideration of our concerns were included in House Memorial 42. We continue to support the principles that formed the core of those bills.

Our proposed legislation would have amended existing statute, which holds that municipalities, counties and other entities that want to hold water rights they won't put to immediate use be required to produce a water development plan for a forty-year period, which is submitted to the State Engineer.

Our bills outlined specific criteria that would be included in these water development plans. The water management plan would also need to be approved by the appropriate governing body and be made available to the public. More specifically, information required in the bills' water development plans would have included:

- An assessment of (1) existing water demand, including surface water diversions and groundwater depletions by category of use; (2) existing water supply, including point of diversion, purpose of use, place of use and priority of the rights; and (3) future water demands and needs for the forty-year planning period;

- A description of proposed management alternatives for balancing water demand and supply over the forty-year planning period; and
- An evaluation of the consistency of the water development plan with the regional water plan.

We maintain that the current statute requires modification because it does not:

- Outline useful and specific criteria which must be included in the plan to increase the consistency of these plans and let local planners know what they can expect. Doing so would expedite review by the State Engineer and allow these plans to become more useful, effective planning documents;
- Require that these plans be adopted by the appropriate governing body, so that they can be more useful as on-the-ground planning documents used to drive local decisions; and
- Require that these plans be made public to increase transparency and access to important information by the public and other interested parties.

Regarding a previous proposal by State Engineer staff regarding repealing the statute entirely, we have several concerns and remain uncertain as to what this course of action would mean exactly in practice.

First, doing so could prove problematic by allowing complete discretion by the State Engineer, and create even less consistency in the process. Second, this could be a move in the wrong direction, as we need to delineate equitable, specific criteria, not create more ambiguity. Third, this proposal is not a part of HM 42, but instead has been injected into this process as a result of input from the State Engineer, not by stakeholders. Forth, some sort of cap on the number of years should probably be included in the statute to help prevent unnecessary holding of water where a need is not demonstrated.

Thank you for considering the above comments.

Respectfully submitted,

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August 13, 2007

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Re: Comments on Possible Changes to 40-Year Planning Statute

Dear Ms. Sims:

Thank you for the opportunity to comment on the 40-year planning statute, NMSA § 72-1-9 (1985, as amended through 2006). My firm represents several types of water providers, and two of them, the San Juan Water Commission and Entramosa Water and Wastewater Association, have authorized us to make these comments.

One problem with the statute, as we learned at our meeting last month, is that it has been amended several times to add more types of entities, but the result has been more confusion than clarity about which entities can qualify for protection and which cannot. One change that could eliminate future "tinkering" with the statute to add more entities would be to eliminate the list of entities and, instead, substitute two categories of entities that would qualify: political subdivisions and member-owned community water systems. Therefore, we recommend the following changes (shown in redline):

A. It is recognized by the state that it promotes the public welfare and the conservation of water within the state for ~~municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations~~ political subdivisions, member-owned community water systems and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources. The state further recognizes the state engineer's administrative policy of not allowing ~~municipalities, member-owned community water systems, counties and state universities~~ political subdivisions and member-owned community water systems to acquire and hold unused water rights in an amount greater than their reasonable needs within forty years.

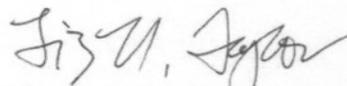
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B. ~~Municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations~~ Political subdivisions, member-owned community water systems and public utilities supplying water to municipalities or counties shall be allowed a water use planning period not to exceed forty years, and water rights for ~~municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations~~ political subdivisions, member-owned community water systems and public utilities supplying water to such municipalities or counties shall be based upon a water development plan the implementation of which shall not exceed a forty-year period from the date of the application for an appropriation or a change of place or purpose of use pursuant to a water development plan or for preservation of a ~~municipal, county, school district, member-owned community water system or state university~~ political subdivision or member-owned community water system water supply for reasonably projected additional needs within forty years.

All of the entities currently included in the list of individual entities are included in the change proposed here, and the addition of "political subdivision" would clarify that mutual domestic associations, water and sanitation districts and other political subdivisions fall under the statute. We did not attempt to clarify what is meant by "public utilities supplying water to municipalities or counties," primarily because we're not sure what the Legislature intended, but we would welcome an explanation by the utilities. The proposed change may also alleviate some of the concerns that the statute is vulnerable to attack on equal protection or similar grounds because two simple categories present a more "rational" basis for distinction than six specific descriptions.

Thank you again for the opportunity to participate in this process, and we look forward to continuing our work on this issue with you and other stakeholders.

Very truly yours,



Elizabeth Newlin Taylor

CC: HM 42 participants (by e-mail attachment)
Randy Kirkpatrick
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August 13, 2007

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Re: Comments on H.M. 42 (40-year water planning)

Dear Ms. Sims:

As requested at the meeting of July 24, 2007 regarding 40-year water planning under Section 72-1-9, NMSA 1978, the New Mexico Water Utility Association (NMWUA) offers the following comments and suggestions.

Our members are governed by the rules and regulations of the New Mexico Public Regulation Commission (NMPRC) and provide water service to a significant number of New Mexico residents. They are also obligated to provide this service to new customers and must make every reasonable attempt to do so.

Meeting this obligation in a fast growing state will require long-term planning and the assurance that adequate water supplies can be made available. What regulated utilities do not have control over is the growth itself. This falls largely under the control of other governmental agencies, such as those at the city and county levels.

Currently, NMPRC regulated utilities are not afforded the same protections under NMSA 72-1-9, which is provided to other entities, such as municipalities, counties, member-owned community water systems, etc. It is our contention that public water utilities regulated by the NMPRC should be afforded these same protections under NMSA 72-1-9.

We respectfully suggest the following changes to NMSA 72-1-9, with additions in blue font, deletions in strikethrough:

72-1-9. Municipal, county, member-owned community water systems, school district, ~~and~~ state university and regulated public utilities' water development plans; preservation of municipal, county and state university water supplies.

A. It is recognized by the state that it promotes the public welfare and the conservation of water within the state for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities that are regulated by the New Mexico Public Regulation Commission ~~supplying water to municipalities or counties~~ to plan for the reasonable development and use of water resources. The state further recognizes the state engineer's administrative policy of not allowing municipalities, member-owned community water systems, counties ~~and~~ state universities and public utilities that are regulated by the New Mexico Public Regulation Commission to acquire and hold unused water rights in an amount greater than their reasonable needs within forty years.

B. Municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities that are regulated by the New Mexico Public Regulation Commission ~~supplying water to municipalities or counties~~ shall be allowed a water use planning period not to exceed forty years, and water rights for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities that are regulated by the New Mexico Public Regulation Commission ~~supplying water to such municipalities or counties~~ shall be based upon a water development plan the implementation of which shall not exceed a forty-year period from the date of the application for an appropriation or a change of place or purpose of use pursuant to a water development plan or for preservation of a municipal, county, school district, member-owned community water system or state university water supply for reasonably projected additional needs within forty years.

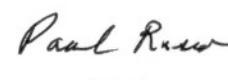
The only two types of entities that provide water and are regulated by the NMPRC are investor owned utilities (IOUs) and Water and Sanitation Districts. Our Association represents IOUs but we are not opposed to the inclusion of Water and Sanitation Districts. Like IOUs, Water and Sanitation Districts have a duty to provide water service.

We appreciate the efforts of the Office of the State Engineer to address the concerns of all interested parties who will be affected by this Legislation.

Sincerely,


By *etc*
Denny Rogers
President


John T. Chavez
Treasurer


By *etc*
Paul Rizzo
Secretary

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**COMMENTS FROM 1000 FRIENDS OF NEW MEXICO
IN RESPONSE TO HOUSE MEMORIAL 42**

I. INTRODUCTION.

HM 42 (2007) provides for recommendations relating to the “planning authority that should be allowed” to specified entities and the “state’s ability to conserve the state’s water supplies” given interstate commerce limitations. These comments address both observations and recommendations.

**II. SECTION 72-1-9 IS UNCLEAR AND AT A MINIMUM SHOULD BE
AMENDED TO PROVIDE CERTAINTY IN INTERPRETATION AND
IMPLEMENTATION.**

At the meeting July 24, 2007, one of the issues discussed was differences in interpretations of the provisions in Section 72-1-9.

Some believed that the 40 year period provided a limit on the number of years that water could be used. Others believed that if a covered entity needed the water within the ensuing 40 year period, they could obtain water rights without putting those rights to beneficial use until they were needed to supply increased demand during the 40 year period.

Some interpreted the statute to require that water rights that have been transferred pursuant to the statute not be used until they are needed, while some cities may be allowing the seller to lease and use the transferred water rights until they are needed. The former interpretation deserves examination. There may be unintended consequences that should be considered. If hundreds of acre feet of water are purchased by covered entities and are not used for a number of years, that water associated by those rights will be used and depended upon by other owners of

water rights. When the time comes to re-establish use of purchased water rights that have been obtain pursuant to Section 72-1-9, water that was available to other users will be cut off and mild to severe disruption is likely.

Finally, one attorney who did not attend the meeting relies on §3 of Laws 1985, Ch. 198, which provides that the provisions of the act are applicable to all applications pending before the state engineer, to argue that decisions by the state engineer made prior to 1985 are not limited by the 40 year provision.

Ambiguities in the statute should be addressed, and the statute should be amended to remove any uncertainty in interpretation or meaning.

III. PROPOSALS TO ADD ENTITIES TO SECCION 72-1-9 A.

The State Engineer, legislature and the courts recognized that municipalities and counties with growing populations needed to plan for that growth and should be allowed to obtain water for future uses, provided the water be put to beneficial use within a reasonable time. In *State ex rel. State Engineer v. Crider*, 78 N.M. 312, 315 (1967), the court noted "...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." Section 72-1-9 enacted in 1985 enabled municipalities and counties to plan 40 years into the future and stated that this provision codified an existing state engineer administrative policy. In four subsequent legislative sessions, additional entities were added to Section 72-1-9, and there have been requests that other entities be added as well.

However, Section 72-1-9 gives no indication why some entities should be given preferential treatment not accorded others. The most important qualification for this exemption to the general principal that water must be put to beneficial use within the near future is the need to meet an ever increasing demand resulting from population growth. One possible

recommendation would be to amend the statute to clarify why the statute exists and be explicit about what kinds of entities qualify for the exemption from the more limited time frame allowed all other entities.

The state recognizes those municipal, county, member-owned community water systems, school district and state universities facing continuous growth in water demand need to plan for and acquire water for future use. Municipalities, counties, member-owned community water systems, school district and state universities may file applications to put water to beneficial within a period not to exceed forty years from the date of the application provided they make a demonstration of need.

IV. SHOULD THE FORTY YEAR PLANNING PERIOD BE EXTENDED?

During the 2007 legislation session, there was a bill that would have extended the 40 year time period to 100 years; the bill was tabled in its first committee hearing. This proposal raises a number of questions.

In New Mexico, beneficial use is “the basis, the measure and the limit of the right to the use of water.”¹ Applicants who apply for an appropriation or transfer of water are required to apply water to a beneficial use within a limited time which is largely tied to the construction needed to divert the water. Section 72-5-6, for example, sets a limit of five years which may be extended in which to complete construction. At some point, an exemption was allowed for certain entities, beginning with cities and counties, to obtain water rights needed in the future to meet their reasonable needs.

As noted in the history of Section 72-1-9 which was distributed to the participants in the July 27, 2007 meeting, testimony from the state in a lawsuit focused on the responsibilities of the State Engineer resulting from allocation of a scarce resource:

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

¹ New Mexico Constitution, Article XIV, §3.

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.

As noted above, one real danger is that those entities listed in Section 72-1-9 have an advantage over all others seeking water rights. If those entities can buy water rights that will not be needed for as long as 100 years, they could soon have control most of the water rights - and wet water - that become available. Those water rights will be locked up or hoarded by one sector of the public to the detriment of other sectors. The New Mexico Constitution provides that water be put to beneficial use precisely to prevent hoarding of water rights. Those entities may be able to plan for the future, but other public needs are likely to suffer.

Moreover, if 40 years is more than doubled to 100 year, all those parties not benefiting from Section 72-19 will be able to challenge the statute arguing that their rights to equal protection under the Constitution are being violated.

Second, it is unlikely that water plans that look 100 years into the future can have any degree of accuracy or certainty. Even in the short-term, population projections are inaccurate. The Jemez y Sangre region has begun a plan update of its regional water plan which was accepted by the Interstate Stream Commission in 2003. Only four years later, the update shows that population increases are less than projected. It is possible that growth trends will decrease – whether only a little or substantially is unknown.

Water demand projections rely heavily on population projections. Population projections are reliable only if the historical and current trends on which they are based do not change. The further out in time, the less accurate population projections become.² As a result, the likelihood is that any long-term projections based on the near past could be unrealistic. During the mid-1970s to the mid-1990-s, New Mexico experienced an unusually wet period along with unprecedented growth. Because of greater precipitation, people moved here with little, if any, awareness that water scarcity would be a problem. Serious drought trends only began in 1996. With drought becoming the norm instead of unusually high levels of precipitation, it is likely that some businesses may well choose not to relocate to New Mexico and seek places with more reliable water resources, people will follow jobs, and population will not increase as quickly as anticipated..

To compound the unreliability of population projections, errors in population projections are compounded over time. For example, if a projection is based on a 2% rate of increase in population and the population rate turns out to be 1.5%, the error rate is 13% after 25 years and 64%.³

It is also true that demand projections should take into account factors other than population projections. For example, how will conservation impact future demand? The benefits of Santa Fe's toilet retrofit program probably exceeded almost everyone's expectations: demand has been constant for years despite continuing growth. There will also be impacts from technological changes, and improved management. How will these be acknowledged, yet alone accurately accounted for?

² Conversation with Lindsey Grant, former Deputy Assistant Secretary of State for Population and the Environment.

³ Id.

Another unforeseen development is that cities and counties are increasingly putting the burden of acquiring water rights on developers. Those developments, once built, will have a constant demand. Because cities and counties have shifted the burden for meeting new demand from new building, cities and counties will not need to acquire nearly as many water rights as indicted by increased growth.

There is no way to predict what will happen in New Mexico twenty years from now, let alone 100 years from now. On the one hand, the likelihood of continuing drought which could be compounded by the impacts of climate change would argue for increasing demand and the need to acquire water rights. Conversely, the need to acquire water rights may be drastically reduced if conservation is emphasized or technological changes have major impacts. Long-term allocation of scarce water resources should not be based on unpredictable and unreliable projections.

Finally, the legal burden of proof is on the applicant. Population projections 100 years into the future are speculative. There are many other variables, some of which are unforeseen and many of which are also speculative. There is no way to know what will happen to New Mexico 100 years from now. Applicants by definition will not be able to meet their burden of proof.

The courts have allowed a 40 year planning period, but they also have ruled that no entities be allowed an open-ended period to plan. *See 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). 100 years may be a defined period, but because of our inability to see so far into the future, 100 years functions as an unjustified, open-ended period to plan.

V. SHOULD SECTION 72-1-9 REQUIRE MONITORING AND REPORTING PROVISIONS AS WELL AS CONDITIONS ON THE APPROVED APPLICATIONS IF

DEMAND IS LESS THAN PROJECTED?

As noted above, demand forecasts into the future – even as soon as ten or twenty years from now - are not likely to be very accurate. Should updated water development plans be required for each application? Should the covered entities be required to monitor actual increases in demand and report to the State Engineer every five or ten years to prevent acquisition and hoarding of water rights not needed to meet actual demand? Should such a review revise the estimated number of water rights approved? Should approved transfer be conditioned on proving that the demand projections on which they are based were accurate? Should there be provisions to divest water rights that were acquired for demand that does not materialize?

VI. THE STATE NEEDS TO CONSERVE AND PRESERVE ITS WATER SUPPLIES; WATER DEVELOPMENT PLANS SHOULD BE SUBSTANTIVE, ACCURATE, AND CONSISTENT.

Section 72-1-9 requires that approval of water rights for future use be based on a water development plan but is silent beyond that one requirement. The State Engineer has not developed any guidance on what should be included in water development plans or on a process for review of those plans.

Given that Section 72-1-9 bestows preferential treatment for a limited number of entities, it is important that decisions to approve such applications be based on adequate and accurate information. The report to the legislature should address this issue and make a recommendation regarding amendments to Section 72-1-9. Preferably, a template should be created to provide for consistency among water development plans, equity between the entities submitting applications under Section 72-1-9, and sufficiency of information to justify preferential treatment. Covered entities should provide all information that will impact the demand based on the most recent

information available; detail existing supply; discuss implementation of regional and local water plans, detail conservation measures and their impact on demand reduction; anticipated access to new water sources (for example, Buckman Direct Diversion Project); and proposed management strategies for balancing supply and demand. It should be noted that the Jemez y Sangre region has begun a plan update. It began by accessing current supply and demand. Information gathered in that process shows that the region has been closing the gap between supply and demand, in large part because of conservation measures and construction of the BDDP. Water development plans which do not capture these kinds of developments will be flawed and should not be the based for granted water rights that will not be put to beneficial use in the near future. Water development plans should be made available to the public for comments and be adopted by the local governing body. Once submitted to the State Engineer, there should be a review process to examine the reliability of the water development plan.

VII. WATER DEVELOPMENT PLANS SHOULD PROVIDE FOR WATER CONSERVATION.

Surface water in New Mexico has been fully or over-appropriated in all but limited parts of the state. Large quantities of ground water are being mined and not recharged. It is only since the 1980's that the State Engineer has required offsets to keep rivers whole and then only in declared basins. Many ground water appropriations made prior to the mid-1980's or the date of the declaration of a groundwater basin continue to draw water from nearby streams and rivers without any offsets made by retiring a proportionate amount of surface water to keep the river whole. Many of those rivers are subject to mandatory interstate stream compact delivery requirements. The impacts are serious in some places. An estimated long-term average annual surface water deficit of 40,000 acre feet and an additional reduction of aquifer storage of 71,000

acre feet per year for the entire reach is likely in the Middle Rio Grande Basin.⁴ Water which is tied up for one use is not available to help the state deal with an over appropriated water supply or with other needs such as meeting interstate stream compact delivery requirements.

Section 72-1-9 creates a preference for some entities, allowing them to acquire water rights for use up to 40 years into the future. Given the lack of elasticity in the system described above, it would be wise to include provisions in 72-9-1 that would move the system toward greater reliability for both the entities covered by Section 72-1-9 as well as all of their citizens and neighbors who have water rights. In particular, applications submitted pursuant to Section 72-1-9 should be approved only if the entity is meeting a portion of its increased needs by lowering demand through water conservation. As noted above, conservation can have real impacts on supply and demand, as can other factors.

Moreover, without requirements to compare and evaluate options other than water transfers, the state will have removed incentives to conserve or take actions other than relying on the market to meet new demand. Given the scarcity of our water supplies and the need for water by all sectors of our state, we should be taking ever possible action to preserve water for everyone in the state, not just some favored entities.

VIII. ANY PROVISIONS GRANTING EXEMPTIONS OR DIFFERENT TREATMENT TO SOME ENTITIES WILL ALSO BE USED BY THE SAME ENTITIES OUT-OF-STATE.

In 1983, New Mexico's statutory prohibition against out-of-state transportation of ground water was declared unconstitutional based in part on the holding in *Sporhase v. Nebraska* in which the U.S. Supreme Court found that a Nebraska statute prohibiting withdrawal and

⁴ SS Papadopoulos and Associates (SSPA) 2004, available at http://www.ose.state.nm.us/isc_planning_mrgwss.html.

transportation of Nebraska's water by another state placed an impermissible burden on interstate commerce. The *Sporhase* court allowed a state some leeway to protect its water supplies, but emphasized that state statutes must "regulate evenhandedly to effectuate a legitimate local public interest."

Consequently, it is important to remember that if, for example, the state extends the 40 year planning period to 100 years, cities like El Paso would be entitled to seek water rights for use 100 years in the future as well. Likewise, if the state fails to require entities covered by Section 72-1-9 to actively pursue water conservation to meet increased demand, it will not be able to make that demand from cities outside New Mexico who are only looking to New Mexico water resources to meet demand. This would be ironic since in part the statute was first used to deny El Paso's applications in 1985.

IX. SHOULD CLARIFYING LANGUAGE IN SECTION 72-1-9 BE DELETED AS PROPOSED IN 2007?

Proponents of legislation in 2007 proposed to delete from Section 72-9-1 A. the following:

The state further recognizes the state engineer's administrative policy of not allowing municipalities, member-owned community water systems, counties and state universities to acquire and hold unused water rights in an amount greater than their reasonable needs within forty years.

The purpose of the language should be discussed and the report to the legislature should include that discussion and a recommendation should be made regarding its possible exclusion.

X. DISCUSSION OF RELATIONSHIP PLANNING PERIODS IN SECTION 72-1-9 AND THE SUBDIVISION ACT.

During the July 27th meeting, one participant asked about the differences between the 40 year planning period in 72-1-9 and the periods adopted by individual counties pursuant to the Subdivision Act. The periods in the two statutes have different applications. Under 72-1-9, the 40 year period is used to forecast increases in demand. Under the Subdivision Act, counties require that water rights obtained to serve individual subdivisions be available for the period set

by the county commission. Once a subdivision is built, water demand is static, not increasing. Section 72-1-9 is focused on projected demand; the Subdivision Statute is focused on the availability of supply for new subdivisions once they are built. This will probably be a questions asked by legislators as well, and the report should clarify that there is no conflict between Section 72-1-9 and the Subdivision Act.

XI. CONCLUSION.

In drafting the report and making recommendations, the Office of the State Engineer should also consider not only what purpose Section 72-1-9 serves, but also what is needed to ensure that our management of water will need to look like to provide for a secure water future for the state. What would be the impacts of allowing some sectors of the state to accumulate and hoard water rights? Will the preference granted the entities listed in 72-1-9 harm other communities and interests in New Mexico? What will be the unintended consequences and cumulative impacts if 72-1-9 plays a big role in where water is used in New Mexico? Acknowledging that some entities have a continuing increase in demand, what steps can be taken to enable them to plan judiciously for future growth?

For the foregoing reasons 1000 Friends request that the State Engineer redraft sections of the proposed regulations as noted above to provide greater clarity about what is required and be cautious in making recommendations regarding Section 72-1-9.

Date: August 13, 2007

Respectfully submitted,

Consuelo Bokum
Director, Water Project
1000 Friends of New Mexico

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*A personal commitment
to New Mexico*

August 15, 2007

Elisa N. Sims
Water Use and Conservation Bureau
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, New Mexico 87504-5102

Dear Ms. Sims:

The letter provides our written comments as requested at the meeting of July 24, 2007, on 40-year water planning under Section 72-1-9, NMSA 1978. We offer these comments on behalf of Public Service Company of New Mexico, an electric and gas utility regulated by the New Mexico Public Regulatory Commission. We have earlier provided a redline markup of the statute, which adds electric utilities to the entities that may be afforded the protections of NMSA 72-1-9. The following bullet points provide the summary of the policy justifications for the inclusion of electric utilities.

- Electric utilities have an obligation to serve the public welfare.
- A diversified generation portfolio requires water rights to support the operation of plants.
- Responsible resource planning by electric utilities involves long-term planning horizons.
- Lack of certainty as to demand in long-range planning requires that electric utilities maintain sufficient water rights on hand in order to be able to provide service for unexpected load growth.
- Maintaining a portfolio of water rights allows electric utilities to meet future generation needs without subjecting customers to the risk of significant increases in commodity prices.

- Difficulties in acquiring and transferring water rights could prevent electric utilities from providing generation to meet demand and provide reliable service if they are unable to maintain sufficient amounts of water rights on hand.

These points apply generally to all electric public utilities in New Mexico. We also offer the following specific points with respect to water needs of Public Service Company of New Mexico.

1. Allowing electric public utilities a 40-year planning period for water rights serves the same purposes as allowing it for other entities. PNM utilizes a 20-year planning horizon for Integrated Resource Planning (“IRP”), but it should be noted that coal/nuclear plants are operated over a much longer life; therefore, having adequate water supplies for the evolving needs of large base load plants is important.
 - a. NMSA § 72-1-9 gives “municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties” a 40-year planning period on the ground that this “promotes the public welfare and the conservation of water within the state.”
 - b. The Public Utility Act, NMSA § 62-3-1 (A), declares that “public utilities ... are affected with the public interest in that, among other things: (1) a substantial portion of their business and activities involves the rendition of essential public services to a large number of the general public; ... and (3) the development and extension of their business directly affects the development, growth and expansion of the general welfare, business and industry of the state.”
 - c. Public utilities have a duty to serve. NMSA § 62-8-2: “Every public utility shall furnish adequate, efficient and reasonable service.”

2. Virtually all electric generating plants require water for cooling and environmental control systems.
 - a. The amount required depends on the cooling technology utilized, generating unit capacity, the capacity factor of the plant and design of environmental controls.
 - b. Current technology designs allow water use to be significantly reduced, but water usage is still substantial.
 - c. Future environment regulations may require the addition of new equipment designs to control pollution, which may increase water usage.
3. Provision of electric service to the public requires long-term planning, but supply requirements are not entirely predictable over the long term; consequently, electric utilities have to be prepared to meet the growing electric demand for energy with new generation resources. Long term planning is less certain in the out years but is a good indicator of when larger facilities are needed.
 - a. PNM is required to file an Integrated Resource Plan every three years with the NM Public Regulation Commission ("PRC"), providing details on its current and projected supply and demand needs for next two decades,
 - b. New base load supply resources generally require a multi-year planning process and construction period and a 20-40 year operational timeline.
 - c. Load growth and peak demand are often greater than forecasted, as in the last three years in PNM's service area.
 - d. While a utility might not have an immediate (within 10 years) need for a water right for use in a base load facility, the need could arise unexpectedly or sooner than anticipated; likewise, a projected need could diminish if load decreases or doesn't

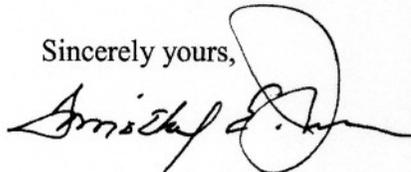
grow as fast as expected, so water rights acquired for a new generation facility might not be needed right away if the plant construction is delayed.

4. Utilities must maintain adequate reserve margin in order to meet unexpected load growth and peak demand.
 - a. The NMPRC requires that PNM meet current electric demand and target a 15% reserve margin.
 - b. Person and Reeves Generating Stations, the current places of use for PNM groundwater rights in the Middle Rio Grande Basin, or their equivalent, are critical to maintaining reliable service for PNM's customers. In addition to serving peak demand in the summertime, these plants are used to support the Albuquerque transmission system. These facilities may only occasionally be required to meet demand but provide critical transmission support, which limits water diversion requirements for those facilities.
5. Considerations such as transmission constraints and regulatory requirements for new transmission lines require that PNM maintain the ability to construct new generation within central New Mexico load center to meet demand in the major metropolitan areas.
 - a. PNM's ability to bring in power from outside the State of New Mexico to serve customers is constrained from the north (Four Corners area), west (West Mesa intertie), east (Blackwater converter station) and south (Afton area).
 - b. Even if transmission capacity is increased, generation supply outside of the NM area is extremely limited as the electric demand is increasing nationwide and excess reserves are being used by utilities to serve native loads instead of selling on the market.

6. The public welfare and the duty to serve require that utilities not be prevented from constructing new generation plants in locations required to meet demand due to inability to obtain and transfer necessary water rights.
 - a. In some areas water rights available for purchase are limited
 - b. Water rights appropriate for transfer (i.e. that meet the hydrologic criteria, historic supply and depletion amounts, etc.) are even more limited
 - c. Protests requiring extended administrative hearings and possible court appeals can delay transfers, sometimes for years thus delaying the ability to add resources to the system
7. Extending the 40-year planning period to electric public utilities would help to ensure that utilities like PNM that provide this essential public service have the necessary water resources available to construct and maintain the generation facilities required to respond to the public need for electric supply.

In summary, there are significant policy justifications for including electric utilities in NMSA 72-1-9. PNM is interested in continuing to participate in the process of addressing revisions or alternatives to the statute and appreciates the opportunity to engage in these discussions.

Sincerely yours,



Timothy E. Jones
Water Resources Project Manager
Public Service Company of New Mexico

STEIN & BROCKMANN, P.A.
ATTORNEYS AT LAW

MEMORANDUM

TO: ALISA SIMS
FROM: JAY F. STEIN
SUBJECT: EXPANSION OF 40-YEAR PLANNING PERIOD IN NMSA 1978,
§ 72-1-9
DATE: AUGUST 17, 2007

Discussion

Section 72-1-9 presently provides a 40-year planning period in which it is recognized that it promotes the public welfare and the conservation of water within the state for municipalities, counties, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources. The statute provides that planning entities "shall be allowed a water use planning period not to exceed forty years" In practical terms, this means that water rights can be held unused for forty years.

The Albuquerque-Bernalillo County Water Utility Authority, Espanola, and Gallup propose that the statute be amended to state that these entities "shall be allowed a water use planning period of up to one hundred years" The particular planning period shall be dependant on a given application.

The cities proposing this legislation seek this amendment for the following reasons:

- Consistency with other water rights planning. Most counties request that water providers and developers provide a statement that they have adequate water supplies for anywhere from 70 to 100 years. Regional plans have different periods. For example, the Middle Rio Grande Regional Water Plan states that municipalities and other water providers need to look beyond the required 40-year horizon;
- To promote flexibility and efficiency in the acquisition of water rights and water rights management particularly with respect to large water supply projects;
- To provide groundwater reserves when cities using surface water (Alamogordo) or transitioning to surface water (Gallup) (the Albuquerque-Bernalillo County Water Utility Authority) have shortages of the surface water supply for a more extended period eliminating the need for multiple applications; and

MEMORANDUM

August 17, 2007

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- To provide for drought contingencies when cities transition to renewable surface water.

The following are examples:

- Under current projections, the Albuquerque-Bernalillo County Water Utility Authority has a shortfall under its present 40-year plan in 2037, with five or more years left in the planning period;
- The proposed Navajo-Gallup settlement projects a planning period of 50 years. This is inconsistent with the City's pending Application G-22 which would provide a base of groundwater for the City of Gallup and the Navajo Nation when the surface water to be provided by the Gallup-Navajo settlement is not available but does so over a 40-year planning horizon;
- To promote regional planning with sufficient reserves of water as considered by Espanola, Alamogordo, and Gallup.

Attached are the draft legislation and the draft Resolution for the Municipal League.

RESOLUTION NO. 2007- ____

CONCERNING AMENDMENT TO SECTION 72-1-9 NMSA 1978 (being Laws 1985, CHAPTER 198, SECTION 1, AS AMENDED, RELATING TO EXTENSION OF THE WATER USE PLANNING PERIOD

WHEREAS, House Bill 1080 (HB 1080) was introduced in the 48th LEGISLATURE; and

WHEREAS, HB 1080 was supported by the City of Alamogordo, the Albuquerque-Bernalillo County Water Utility Authority, the City of Española, and the City of Gallup;

WHEREAS, HB 1080 proposed an amendment to Section 1. Section 72-1-9 NMSA 1978 (being Laws 1985, Chapter 198, Section 1, as amended, which would extend the current Water Use Planning Period to One hundred (100) years; and

WHEREAS, HB 1080 died in committee; and

WHEREAS, as a result of HB, HM 42 and HJM 48 (duplicates) were introduced calling for the NM State Engineer to evaluate and make recommendations relating to the Water Use Planning Period. HM 42/a Passed as Amended; and

WHEREAS, in relation to HM 42/a the State Engineer has organized stakeholder meetings to gather input and explore the advantages/disadvantages and discuss options for extending the current Forty (40) year planning period; and

WHEREAS, municipalities and other qualifying water suppliers subject to the Forty (40) year planning period, must protect their ability to adequately plan and manage their water supply portfolio in a manner consistent with the protection of the public welfare; and

WHEREAS, the current planning period is inadequate to meet this need.

Now, Therefore, Be It Resolved That the New Mexico Municipal League supports a reasonable extension of the Water Use Planning Period as may be reached by consensus through the stake holder meetings being organized by the State engineer.

Passed, Approved And Adopted this ____ day of August, 2007 at the Town of _____, New Mexico.

72-1-9. Municipal, county, member-owned community water systems and state university water development plans; preservation of municipal, county and state university water supplies

A. It is recognized by the state that it promotes the public welfare and the conservation of water within the state for municipalities, counties, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources. ~~The state further recognizes the state engineer's administrative policy of not allowing municipalities and counties to acquire and hold, unused, water rights in an amount greater than their reasonable needs within forty years and recognizes that this administrative policy was incorporated in law by Chapter 2, Laws 1983.~~

B. Municipalities, counties, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties shall be allowed a water use planning period ~~not to exceed forty~~ of up to one hundred years, and water rights for municipalities, counties, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to such municipalities or counties shall be based upon a water development plan the implementation of which shall not exceed a ~~forty year period~~ one hundred year period from the date of the application for an appropriation or a change of place or purpose of use pursuant to a water development plan or for preservation of a municipal, county, state university, member-owned community water system, special water users' association and public utility water supply for reasonably projected additional needs within ~~forty~~ one hundred years.

Sims, Elisa N., OSE

From: Matthew Holmes [matt@nmrwa.org]
Sent: Tuesday, August 21, 2007 9:55 AM
To: Sims, Elisa N., OSE; AbramowitzLaw@aol.com; 'Anthony Armijo'; Armijo, Myron, OSE; 'Barbara Deaux'; Beadles, Cydney, PRC; Bordegaray, Angela, OSE; carlos.cisneros@nmlegis.gov; cecilia.abeyta@nmfarmbureau.org; 'Claudia Borchert'; 'Clay Koontz'; 'Consuelo Bokum'; 'Evan Williams'; Follingstad, Gretel, OSE; 'Janet Jarratt'; 'Jay Stein'; 'John Appel'; 'John Chavez'; 'John Utton'; Johnson, Mike S., OSE; 'Kyle Harwood'; 'L. Moore'; 'Lance Allgood'; haakuwater@yahoo.com; 'Lauren Ketcham'; 'Linda Martinez'; 'Liz Taylor'; Longworth, John W., OSE; marthacfranks@earthlink.net; Martinez, Timothy, PRC; mstewart@osogrande.com; ng@lrpa-usa.com; Paisano, Stuart, EDD; 'Paul Risso'; 'Paula Garcia'; 'Peter Pino'; peter.wirth@nmlegis.gov; 'Randy Kirkpatrick'; 'Regina Romero'; Romero, John, OSE; 'Tasia Young'; 'Tim Jones'; Vogel, Cheri, OSE; Wells, Paul, OSE
Cc: Romero, John, OSE; Dantonio, John, OSE; Clarence Aragon; Dave Kenneke; Debra Ingle; Don Wells; Edward Silva; Gilbert Miera; Gloria Gonzales; Ivan Roper; Jim Dunlap; John Eckley; John Jones; Karen Bray; Keith Lee; Larry Covington; Michael Stroud; Mike Vigil; 'Nick Ashcroft'; Norman Saunders; Ophelia Gonzales; Pat Banegas; Ralph Dunlap; Rick Leal; 'Sherman Martin'; talleagle2@yahoo.com; 'Wesley Shafer'
Subject: RE: Legal History 72-1-9/Important Dates

Hello all,

Our Association Board of Directors met last Friday (8/17), and we support the comments submitted by Liz Taylor. In our view, this will clarify the statute and will preserve a reasonable planning period for water systems to provide safe drinking water to their communities. New Mexico Rural Water Association will not support elimination of 72-1-9.

Thank you,

Matthew Holmes
 Executive Director
 New Mexico Rural Water Association
 1-800-819-9893
 505-884-1031
 www.nmrwa.org

From: Sims, Elisa N., OSE [mailto:elisa.sims@state.nm.us]
Sent: Tuesday, July 31, 2007 8:50 AM
To: AbramowitzLaw@aol.com; Anthony Armijo; Armijo, Myron, OSE; Barbara Deaux; Beadles, Cydney, PRC; Bordegaray, Angela, OSE; carlos.cisneros@nmlegis.gov; cecilia.abeyta@nmfarmbureau.org; Claudia Borchert; Clay Koontz; Consuelo Bokum; Evan Williams; Follingstad, Gretel, OSE; Janet Jarratt; Jay Stein; John Appel; John Chavez; John Utton; Johnson, Mike S., OSE; Kyle Harwood; L. Moore; Lance Allgood; haakuwater@yahoo.com; Lauren Ketcham; Linda Martinez; Liz Taylor; Longworth, John W., OSE; marthacfranks@earthlink.net; Martinez, Timothy, PRC; Matt Holmes; mstewart@osogrande.com; ng@lrpa-usa.com; Paisano, Stuart, EDD; Paul Risso; Paula Garcia; Peter Pino; peter.wirth@nmlegis.gov; Randy Kirkpatrick; Regina Romero; Romero, John, OSE; Sims, Elisa N., OSE; Tasia Young; Tim Jones; Vogel, Cheri, OSE; Wells, Paul, OSE
Cc: Romero, John, OSE; Dantonio, John, OSE
Subject: Legal History 72-1-9/Important Dates

Hi all,

After our meeting on 7/24/07, several people inquired about getting some written notes on the 72-1-9 legal history

8/21/2007