

## MEMORANDUM

TO: Stakeholders in HM 42 Process

FROM: Martha Franks

SUBJECT: Existing Plans

DATE: June 10, 2008

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The Office of the State Engineer (OSE) was requested by House Memorial 42 to conduct stakeholder discussions to explore the advisability of various changes proposed to NMSA §72-1-9 during the 2007 legislative session. Several meetings have been held and documents and comments exchanged on this topic. At one meeting, an issue arose about existing law and regulation about the circumstances under which water plans should be filed at the OSE. Following the meeting, because of the seeming confusion about when a plan should be filed, the OSE undertook a review of the statutes, regulations and internal OSE documents that allow for such submittals. We also examined the plans presently on file in order to see why they were filed from the point of view of the entities making the filing.

### I. Existing law and regulation on Water Plans

NMSA §72-1-9, which is the subject of House Memorial 42, says that water rights for the entities covered under the statute “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 . . .” This language does not address when a water development plan should be filed. Section 19.26.2.19 of the OSE Surface Water regulations, however, after referring to NMSA §72-1-9, states that “A water development plan may be filed at any time.” The regulation adds “If a plan is not already on file, a water development plan shall be filed with an application to appropriate water or transfer a water right where the water right will be held unused or undeveloped pursuant to the plan.” Subsections D and

E of that section imply that the State Engineer has undertaken to review such plans whenever filed (that is, without regard to whether there is a pending application), stating that he may return them if found incomplete or approve them following review.

There are other calls for the submission of water plans to the State Engineer. For example, NMSA 72-14-3.2 (B) states that “[municipalities, counties and anyone using more than 500 AFT for other than agriculture, excluding Indians] may develop, adopt and submit to the state engineer . . . a comprehensive water conservation plan . . .” Nothing in this section suggests that the State Engineer will review or approve these plans, nor how they fit, if at all, with water development plans under NMSA §72-1-9.

In addition, the OSE in the late 1990s developed a template for “Water Conservation Plans,” and distributed that template broadly. NMSA §72-1-9 is mentioned as part of the rationale for requiring these water conservation plans, but the program may have been directed to a broader public policy view that conservation should be a part of every water decision. Through this program, the OSE responded to and commented upon about thirty plans with varying stated purposes. Very few water conservation plans were found acceptable through this review process.

In 1987, through the Interstate Stream Commission, New Mexico set up regional water planning groups. NMSA §72-14-44. While these plans are not intended to be done by individuals, and are not routinely submitted to the State Engineer, the two agencies might easily be lumped together in people’s minds. More generally, the relationship between regional water planning and water planning for individual entities might not be clear.

Finally, NMSA §6-23-5(3) requires OSE certification that personnel to be hired for certain building projects be appropriately experienced and that the projections of water savings for the new construction be reasonable. At least one entity has submitted a plan for OSE review under this provision, and the review was done through the review template for water conservation plans (the certification was issued).

Thus, there are a number of authorities providing for various types of plans to be submitted to the State Engineer (or the Interstate Stream Commission), and it is not clear how these plans are to be reviewed and used.

## II. Reasons Given in the Plan Documents for Filing

The Water Use Conservation Bureau has two file drawers of plans, including the cover letters reflecting the reasons for submitting the plans and, in most cases, some response from the OSE. We briefly examined those files and provide here a sampling of the reasons given for filing plans:

1. One plan was created a water-planning document for contract reasons. The Environment Department approved the contract purposes and recommended that the entity submit it to the OSE. The OSE took no action.
2. One plan, created under the water conservation plan template, requested certification under NMSA §6-23-5(3).
3. One entity filed a plan citing NMSA 72-1-9 as part of a specific application process, although the cover letter states that a secondary reason for filing the plan was “in order to fulfill the State requirement of having a water conservation plan actually in place . . .”
4. One entity said that they had “determined that [submitting a plan] may be necessary and beneficial.”
5. One entity requests State Engineer approval for the plan submitted partly because they are “planning for future water use” and partly because they need to meet the funding requirement of NMSA 72-14-3.2.
6. One plan states merely that the document was “part of our planning”—no application is cited.
7. One entity states that it expects approval of the plan and consequent approval of a certain amount of water that the plan showed was needed. It is not clear whether there is an application for that amount of water.
8. One entity submitted the plan for funding purposes and also because they thought they might want to hold water unused someday.
9. One entity listed three purposes in submitting a plan: a) to estimate needs over 40 years; b) to settle a dispute over their service area; c) to get the State Engineer to make other water claimants back off.
10. Several plans were required by existing permits.
11. One entity submitted a plan, but is not sure that the State Engineer needs to review it; they are trying to protect their groundwater.
12. One entity wanted to consider how to conserve.
13. One entity asserts that the “OSE requires municipalities to prepare water plans that identify water needs,” citing NMSA 72-1-9.
14. A lawyer on behalf of an entity states in a cover letter that “It is my understanding if the OSE approves [the entity’s] 40 year plan, then we can acquire additional water rights if and when [a certain] agreement closes. Please expedite.”
15. One entity states its understanding that a “40 year plan establishes needs and it protects the water rights required for future use.” This language suggests a misunderstanding of the effects of a water plan, which does not by itself protect water rights.



ATTORNEYS AT LAW

16. One entity submits its plan “to justify enlargement of existing rights.”

17. One entity submits a draft “FYI.”