House Memorial 42
Meeting 2
Written Comments from Stakeholders
October 17, 2007

Written comments were received from the following stakeholders (in no particular order):

1. Public Service Company of New Mexico ("PNM") (Rebecca Dempsey)
2. Valley Improvement Association and the Greater Belen Economic Development Corporation (Bob Davey—Pres. VIA; Ronnie Torres—Mayor of Belen; Claudette Riley—Ex. Dir. GBEDC)
3. Janet Jarrett, citizen
4. City of Santa Fe (Marcos Martinez and Claudia Borchert)
5. Albuquerque-Bernalillo County Water Utility Authority/City of Espanola/City of Gallup (Jay Stein)
6. NM Farm and Livestock Bureau and the Dairy Producers of NM (John Wortman, Jr., NMFLB; Sharon Lombardi, DPNM)
7. New Mexico Public Regulation Commission
8. Environment New Mexico (Lauren Ketcham and Randall Coleman)
9. 1000 Friends of New Mexico (Consuelo Bokum)
10. Pueblo of Acoma (Laura Watchempino)
11. Elaine Hebard, citizen (email)
12. New Mexico Municipal League (William Fulginetti) including Resolutions 48 and 52
13. Moriarty School District (Susan Kery)

WHITE,
KOCH, KELLY
&
McCARTHY
A Professional Association

Attorneys and Counselors at Law
John F. McCarthy, Jr.
M. Karen Kilgore
Sandra J. Brinck
Aaron J. Wolf
Rebecca Dempsey
Julie A. Wittenberger
Suzanne C. Odom
Jun Roh

September 25, 2007

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

Via email and U.S. Mail
elisa.sims@state.nm.us

Re: Forty-Year Water Planning Under NMSA 1978, Section 72-1-9

Dear Ms. Sims:

This letter provides supplemental written comments on behalf of Public Service Company of New Mexico ("PNM"), in addition to those previously submitted PNM on August 15 and August 24, 2007, as agreed to at the meeting of stakeholders on September 6, 2007. These comments address the following questions and concerns which were raised by other stakeholders at that meeting as to the basis for including electric public utilities regulated by the New Mexico Public Regulation Commission ("NMPRC") among the entities that are provided a 40-year planning period for utilization of water rights.

1. Why should electric public utilities be included?

PNM's previously submitted comments address this question. To summarize those comments, electric public utilities supply a service—electricity—which is essential to the health, safety and welfare of the public. Electric public utilities have a statutory duty to serve, *i.e.* they must maintain a sufficient source of generation to supply the demand for electricity within their service areas. In order to fulfill their duty to serve, electric public utilities must conduct long-range planning for generation supply. Water is required for generation of electricity. The restricted and highly competitive nature of the water rights market and administrative and judicial procedures required to change the place and purpose of use and point of diversion of water rights make the process of acquiring water rights necessary for generation facilities lengthy, expensive and unpredictable. Inability to acquire the water rights necessary for generation facilities that are required to meet public demand for electrical supply could adversely impact an electric utility's ability to fulfill its duty to serve and to supply the electricity required by the citizens of New Mexico. Accordingly, upon making the requisite showing in a 40-year plan, electric utilities should be allowed a 40-year planning period for utilization of water rights owned by them.

433 Paseo de Peralta
Santa Fe, NM 87501

Post Office Box 787
Santa Fe, NM 87504-0787
e-mail rdempsey@wkkm.com

Telephone (505) 982-4374
Fax Nos. (505) 984-8631; 982-0350

2. Will including electric public utilities result in allowing 40-year planning to mining and/or oil and gas interests?

No. PNM's proposal goes only to electric public utilities which have a statutory duty to serve, provide an essential public service and are regulated by the NMPRC. Electric public utilities, just as other 40-year planning entities, would have to file and obtain OSE approval of a 40-year plan showing their existing supply of water rights and need for water rights required for the generation of electricity within the 40-year period.

3. Why should entities which operate for profit be allowed a 40-year planning period?

Electric public utilities, as defined by the Public Utility Act, NMSA § 62-3-3(G) include both non-profit, member owned cooperatives and investor owned utilities. All such utilities are regulated as to their rates by the NMPRC to ensure that "reasonable and proper services shall be available at fair, just and reasonable rates, …." NMSA § 62-3-1(B); see also NMSA § 62-8-7. Because financing of utility facilities requires large sums of capital obtained from the public, setting of rates requires a balancing of the interests of consumers and investors and the public interest. NMSA § 62-3-1. But in all instances, "every rate made, demanded or received by any public utility shall be just and reasonable." NMSA § 62-8-1. The rates charged by utilities owned and operated by municipal corporations, on the other hand, are not regulated by the NMPRC. NMSA § 62-6-4(A). The fact that non-municipal public utilities must use investor financing in order to raise the capital necessary to construct and maintain generation facilities required to fulfill their duty to serve is not a reason to deny those utilities the ability to engage in long-range planning for the water rights needed in operation of those facilities.

4. Concerns as to fuel sources that might be used in future electric generating facilities located in New Mexico.

Before an electric public utility regulated by the NMPRC can construct a generating facility for provision of electricity to the public, it must obtain approval from the NMPRC and a certificate of public convenience and necessity ("CCN"). NMSA § 62-9-1(A). There are statutory and regulatory requirements for notice to the public and opportunity to be heard in those proceedings. In considering an application for a CCN, the NMPRC considers issues as to the necessity for the facility, the location, the type of fuel to be used, the utility's existing mix of fuel sources in its generation portfolio, cost, amount of water required and a multitude of other factors relating to the public interest. Allowing electric public utilities a 40-year planning period for use of their water rights will not dictate the type of generating facilities an electric public utility will construct and use to meet the utility's duty to serve. It will only allow utilities the flexibility to construct the generating facilities that best meet the needs of their customers, with the regulatory oversight of the NMPRC as to the type of facility that may be approved. It would not serve the public welfare of the citizens of New Mexico to deny electric public utilities the

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ability to engage in long-range planning necessary to fulfill their duty to serve because of concerns about the type of generating facilities that may be constructed, when those concerns can be and are fully addressed in proceedings before the NMPRC.

5. Would providing electric public utilities a 40-year planning period allow them to speculate in water rights?

No. Just as every other water user that is provided a 40-year planning period, electric public utilities would be required to file and obtain approval of a 40-year plan showing their existing water supply and expected demand over the 40-year period. The plan would have to demonstrate that the demand is required to meet the utility's reasonably projected needs for water supply. Utilities could not obtain approval to appropriate or transfer additional water rights without showing a need for those rights within the 40-year planning period. This requirement would prevent utilities from acquiring water rights simply for speculation, just as it prevents speculation in water rights by other entities allowed the 40-year planning period.

6. Does the 40-year planning period violate the New Mexico Constitutional provision that beneficial use is the basis, measure and limit of a water right?

No. New Mexico Constitution Art. XVI, Sec. 3 does not contain any arbitrary time limit. The length of time required to put water rights to beneficial use varies widely depending on the nature of the use, the entity putting the water to use, the planning and infrastructure required and a myriad of other factors. Where the facts and circumstances show that a 40-year planning period is a reasonable time for putting water rights to beneficial use for certain types of water users and certain purposes of use, the Constitutional provision does not prohibit allowance of that time period. Moreover, where the allowance of a 40-year planning period can be shown to be for the purpose of protecting the health and safety of New Mexico's citizens, it would not be subject to challenge under the federal Constitution either. Sporhase v. Nebraska, 458 U.S. 941, 956-7 (1982).

Thank you for the opportunity to submit these additional comments.

Very truly yours,

REBECCA DEMPSEY

RD/rms

RD/7471-62/OCT 1 SUPPLEMENTAL COMMENTS

GREATER Belen Economic Development CORPORATION

September 10, 2007

Ms Elisa N. Sims
Water use and Conservation Bureau
New Mexico Office of the State Engineer
PO Box 25102
Santa Fe, NM 87054-5102

Dear Ms Sims:

We are writing on behalf of the Valley Improvement Association and the Greater Belen Economic Development Corporation to support a change in NMSA 72-1-9, that will afford investor-owned water utilities and water and sanitation districts the same ability to plan for water use over a forty-year planning horizon, just as our municipal systems do.

Valley Improvement Association acts much as an interim municipality in Rio Communities, an unincorporated community of close to 7000 people just east of the City of Belen in Valencia County. The Association and the City are members of the Greater Belen Economic Development Corporation. They cooperate on such issues as transportation planning, recreation and economic development. And, there is much discussion about annexing parts of Rio Communities to Belen. Valencia County is among the fastest growing counties in the State, and southern Valencia County -- led by the City of Belen and Rio Communities -- contributes much to that growth.

One of the few industrial parks in the County is in Rio Communities. The Valencia County Commission has chosen a site in Rio Communities for the 65-acre Valencia Health Commons, a start-up effort involving Covenant Health Systems, the University of NM Medical School and four other healthcare providers, including a nursing home. The Rio Communities is home to five public schools and the University of NM-Valencia Campus.

In short, in the face of regional growth, we are trying to plan regionally. But in order to do that, and to assure quality execution of that planning, it is critical that we be able to plan for water and wastewater services, too. The provider of those services in Rio Communities, NM Water Service Company, is currently handicapped by the restrictions imposed through 72-1-9.

We wholeheartedly urge you to address those restrictions and remove them. Thank you for allowing us this input.

Sincerely,

Bob Davey
President
Valley Improvement Association

Ronnie Torres
Mayor
City of Belen

Claudette Riley
Executive Director
Greater Belen Economic Development Corp.

100 South Main
Belen, NM 87002
(505) 864-8221 ext. 23

belenedc@belenedc.org
www.belenedc.org

STATE ENGINEER OFFICE
STATE OF NEW MEXICO
BATAAN MEMORIAL BUILDING
P.O. BOX 25102
SANTA FE, NEW MEXICO 87504-5102

COMMENTS IN RESPONSE TO HM 42 STAKEHOLDERS MEETINGS

HM 42 discussed several proposed changes to Sec. 72-1-9 NMSA 1978, including providing criteria for water plans, and extending the time period wherein water can be held unused. Further, the memorial seeks stakeholders recommendations "...relating to planning authority that should be allowed..." various entities while considering "... interstate commerce limitations on the state's ability to conserve the state's water supplies...". Two meetings were held to discuss these issues, and a number of concerns and suggestions came to light. However, it is worth noting that the "stakeholder" representatives at the meetings were not proportional to the ownership of impacted rights. In point of fact, the "stakeholders" were primarily interests who seek either inclusion in the forfeiture exemption list, or who wish to extend the time frame for the forfeiture exemption and acquisition of water.

Section 72-1-9 has several issues. This statute was created for a specific purpose relating to protecting New Mexico water from El Paso, and apparently not otherwise closely considered. However, with our greater understanding of the limits of the resource, we have also gained a better understanding of the potential severe unintended consequences of this statute and any changes to it. Following are some observations and concerns:

1. The list of "entities" already excluded from forfeiture is so inclusive as to leave essentially only private uses of water subject to forfeiture. This is ironic considering the basis of water rights originate with the very uses excluded. Additionally, this leaves the statute potentially subject to litigation for being contrary to the constitution. This situation can only be exacerbated with the addition of various other "entities".

2. The list of non-forfeiture entities creates a potential for argument regarding an unconstitutional hierarchy of use.

3. There is no stated justification as to why only these entities are excluded from forfeiture. While many assumptions may be made, the fact is no criteria exists. No explanation of how this arrangement is equitable is provided.

4. With a large portion of energy produced in NM being exported, there is a question of the need for exemption from forfeiture to anticipate increased utility demand within the state.

5. While regulated, electrical utilities are private profit making enterprise. The dairy industry in particular has a highly regulated price structure, so could make similar claims to need for protection from forfeiture. Additionally, agriculture is not a whimsical endeavor; with the high capital investment and long time frame for return on investment,

the agricultural industry requires predictability and stability of water supply. Agriculture is critical for the survival of the community as a whole, and food security is of paramount importance. Certainly food is an essential good. Agricultural use is the original basis of water rights, and many arguments can be made for agricultural exemption from forfeiture.

6. There is no definition or criteria for "water development plan". Thus there is no basic standard for conservation or public welfare present in these plans. Nor is there a corresponding standard of response from the State Engineer.

7. There is no definition of "preservation of a ... water supply for reasonably projected additional needs within forty years." This leaves unnecessary and problematic ambiguity as entities vie for water acquisitions years in advance of projected use.

8. The statute has asserted the 40 year time limit. While this may have served the original purpose, this lengthy time frame far exceeds the term "reasonable" for many reasons. First is the unreliability of projections. In 2002, at a colloquy for population projections and water planning hosted by the Middle Rio Grande Water Assembly, Dr. Adelamar Alcantara from UNM's Bureau of Business and Economic Research, said accuracy of population projections varies after only 5 to 10 years. The current situation with speculation in the housing market and the increasing vacancy rate, along with the growing crisis in the mortgage industry belies the accuracy of projections. Additionally, basing assumptions based on the last 20 record wet years ignores resource scarcity as well as sustainability issues, not to mention that the mid-west and east are launching campaigns seeking population and industry based on their generous water supply.

9. If the 40 year time frame continues to be used, then entities in other states can make the same planning assertions of need, thereby justifying the exportation of New Mexico's waters. That's the very thing the statute was drafted to avoid.

10. Non-forfeiture based on planned future use could actually obligate entities to acquire sufficient water to meet that envisaged use far in advance. This creates greater demand and competition for water, resulting ultimately in condemnation of water in order to secure rights before others can purchase them at a potentially higher price on the open market. Additionally, the end result is that only those in a wealthy and protected utility will have access to water, sounding the death knell to private enterprise, rural communities and poorer municipalities, ending all hope for a self-sustaining economy and predictability. The fact that this water planning period could obligate an entity to acquire water for that projected future means that the likelihood of condemnation is higher the longer the planning period. This makes the discussion of condemnation germaine to the discussion of length of planning period. It should also be noted that in 2005, the Attorney General, in a legislative analysis, stated that the powers of municipal condemnation extended to the borders of the state. Thus, entities with municipal powers can condemn far outside their boundaries, even to the waters of smaller communities many miles away. This is a new power, with this vast jurisdiction only extended in 1996,

so 72-1-9 could never have fully accounted for this consequence of such an extended planning period.

11. Avoidance of forfeiture for 40 years provides the ability to operate a water bank by leasing acquired, potentially condemned, water at a profit for an extended period.

12. Advance acquisition of water rights negates any incentive for conservation or development of new technologies, as the entities with the most resources for such enterprises are also the most suited to acquire rights. Additionally, this advance acquisition ignores the fact that the greatest value of resources is in their potential, which is limited to current uses and rates of use with advance acquisition.

13. What is the consequence of lengthening the "planning period" for water acquisitions on other water rights settlements, such as those involving tribal interests?

14. What is the interaction of the planning statute with regional water plans? A great deal of time, effort, and resources have gone into regional water planning, with many plans now being updated. It behooves us to assure consistency between regional water plans and the entity water plans.

In short, the obligation of the state is to act conservatively, particularly in relation to our most precious resource. Without acting conservatively in protecting the resource, entities outside New Mexico's borders can make the same claims of need, and thereby justify exportation of our waters far in advance of their own need.

Clearly, there are many issues and valid concerns. The two meetings have been productive, but are only the beginning of the process toward a recommendation in compliance with HM42's directives. It is highly recommended that no legislation be put forward at this time, and that more meetings be held with adequate stakeholder participation.

Sincerely,

Janet Jarratt

City of Santa Fe, New Mexico

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

David Coss, *Mayor*

Councilors:
Miguel M. Chavez, Mayor Pro Tem, Dist. 3
Patti J. Bushee, Dist. 1
Chris Calvert, Dist. 1
Karen Heldmeyer, Dist. 2
Rebecca Wurzburger, Dist. 2
Carmichael A. Dominguez, Dist. 3
Matthew E. Ortiz, Dist. 4
Ronald S. Trujillo, Dist. 4

12 October 2007

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

Dear Ms. Sims:

The City of Santa Fe ("City") would like to submit comments on House Memorial ("HM") 42, Stakeholder Comments on NMSA 1978, §72-1-9 (2006). The City contends that § 72-1-9 should be narrowly construed and narrowly applied. The purpose of § 72-1-9, was to allow municipalities and other classes of local government to plan for the reasonable development and use of water. The State Legislature recognized local governments with the obligation of providing water to the public are distinct from other entities. Local governments inherently serve the public. Enlarging the statute beyond this specific purpose, risks offending the New Mexico Constitutional mandate that "Beneficial use shall be the basis, the measure, and the limit of the right to the use water." N.M. CONST., XVI § 3.

PNM suggests that the legislature strike the phrase, "supplying water to municipalities or counties," with the phrase "that are regulated by the New Mexico Public Regulation Commission." In so doing PNM desires to attenuate the already tenuous connection between public utilities and local governance. Although this change would benefit PNM, its benefit to the public is dubious. PNM argues that utilities regulated by the New Mexico Public Regulation Commission ("PRC") imply a public benefit. However, this argument conflates the purpose of the PRC with the purpose of the § 72-1-9. The PRC exists to regulate utilities, telecommunications, motor carriers, and insurance industries to ensure fair and reasonable rates, and to assure reasonable and adequate services to the public as provided by law. It is clear that the PRC has a public function, but it does not follow that the entities regulated by the PRC, by extension, assume a public function. Indeed, regulation by the PRC is more indicative that the regulated entity lacks a public function and needs to be regulated to ensure the protection of the public.

Therefore, the City recommends that § 72-1-9 remain faithful to its historic purpose: providing a limited horizon of 40 years in which local governments with the obligation of providing water to the public may plan for the reasonable development of water. By hewing closely to the purpose of the statute, we remain more closely aligned with the Constitutional foundations of water law in New Mexico.

Last the City contends that 40 years represents a reasonable balance between planning and beneficial use. A longer period of time may encourage unnecessary short term increases in demand to buy water now and plan later. A shorter planning period may encourage municipalities and other local governments to consider conservation more seriously.

Respectfully Submitted,

Marcos D. Martínez
Assistant City Attorney
City of Santa Fe

Claudia Borchert
Water Resources Coordinator
City of Santa Fe.

STEIN & BROCKMANN, P.A.
ATTORNEYS AT LAW

MEMORANDUM

TO: **FRED ABRAMOWITZ, MARTHA FRANKS, JOHN LONGWORTH, AND ELISA SIMS**

FROM: **JAY F. STEIN**

SUBJECT: **COMMENTS OF THE ALBUQUERQUE-BERNALILLO COUNTY WATER UTILITY AUTHORITY, THE CITY OF ESPANOLA, AND THE CITY OF GALLUP ON NMSA 1978, § 72-1-9 (1985) ISSUES**

DATE: **OCTOBER 9, 2007**

Discussion

Three issues were raised at the meeting of September 6, 2007. These were:

- Whether the cities' desire for a longer planning period is addressed by NMSA 1978, § 72-5-28 (C) and (G) (1907); NMSA 1978, § 72-12-8 (D) and (F) (1931);
- Whether private water utilities, hydro-electric interests, and agriculture should be granted a period in which to hold water rights unused;
- Whether the issue of condemnation should be raised.

Initially, the cities concur that a period of time longer than that for the January, 2008 session is required to fully analyze the issues.

With respect to the first issue, whether the cities' desire to obtain an additional period of time for planning purposes is accommodated by NMSA 1978, § 72-5-28 (C) and (G) (1907); NMSA 1978, § 72-12-8 (D) and (F) (1931), further research will be required.

In particular, NMSA 1978, § 72-12-8 (F) (1931) appears to provide an indefinite period in which cities may hold groundwater rights unused:

> "F. Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of

> municipal or county water supplies shall not be computed as part of the four-year forfeiture statute."

A canon of statutory construction is that statutes will be interpreted to be consistent with each other. The open-ended period provided in NMSA 1978, § 72-5-28 (C) and (G) (1907) and NMSA 1978, § 72-12-8 (D) and (F) (1931) could have been capped by a 40-year period of time in which to hold water rights unused in NMSA 1978, § 72-1-9 (1985). The issue requires additional research.

Accordingly, the cities' comments will be directed to the issues of whether additional entities should be included within NMSA 1978, § 72-1-9 (1931), and whether condemnation is appropriate in this process. In both cases, the answer is no.

N.M. Const. XVI, Section 3, states: "beneficial use is the basis, the measure, and the limit of rights to the use of water." This constitutional provision provides the requirement of continuous beneficial use, *i.e.,* "use it or lose it." NMSA 1978, § 72-1-9 (1985) provides a period of time for covered entities, principally municipalities, to hold water rights unused for up to 40 years for the purpose of essential municipal water supply planning. This statute was based on New Mexico case law as set forth in *State ex rel. Reynolds v. Crider,* 78 N.M. 312, 431 P.2d 45 (1967). That case provided the rationale for a municipal planning period based on the prior appropriation doctrine. The Court's rationale was based on public notice, *i.e.,* that an important component of the beneficial use requirement was to place other water users on notice of what amounts of water were being used by others. The Court noted that certain provisions of state law, such as *State ex rel. Reynolds v. Mendenhall,* 68 N.M. 467, 362 P.2d 998 (1961), provided for future use of water. The Court held: "[w]e see no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase in population within a reasonable period of time." 78 N.M. at 316. In other words, a period of time in which water rights are unused, consistent with prior appropriation doctrine, was found by the Court. Subsequently, NMSA 1978, § 72-1-9 (1931), quantified the reasonable period of time at 40 years.

In practical terms, a municipal planning period, managed by public officials, in which water resources may be held unused for ultimate use by cities, makes sense, particularly where large scale projects utilizing renewable surface water, and costing millions, are at stake. Each of the cities commenting has invested in such a project. Yet unused resources of groundwater will be necessary to meet demand when the surface supply is unavailable. Those rights have to be available, within a municipal water rights portfolio, when they are needed. Moreover, in the case of Gallup, the projected surface supply will not meet the City's demand over a forty year period, requiring the use of groundwater as a primary source.

Two problems exist with respect to the entities now seeking inclusion in the statute. First, the private water purveyors, hydro-electric power, and agriculture cannot

avail themselves of the same logic. They are not public entities. Second, the risk that is presented by opening the statute to non-public entities is to create such a broad exemption to prior appropriation doctrine that the statute will be held to be unconstitutional.

The issue of municipal condemnation is not germane for the task force, and is not covered by House Memorial 42, which deals with the holding of water rights unused during an appropriate planning period, not with methods of acquiring water rights, of which municipal condemnation is one.

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NEW MEXICO FARM & LIVESTOCK BUREAU

P.O. Box 20004 • Las Cruces, New Mexico 88004 • (505) 532-4700 • FAX (505) 532-4710

October 1, 2007

Elisa N. Sims
Water Use and Conservation Bureau
New Mexico Office of the State Engineer
Santa Fe, New Mexico 87505-5102

Re: Comments on House Memorial 42, Forty Year Water Planning

Dear Ms. Sims:

Dairy Producers of New Mexico and New Mexico Farm & Livestock Bureau wish to comment jointly to the proposals that have resulted from the task force formed pursuant to House Memorial 42 that passed during the 2007 Legislative Session. Below are our comments for Section 72-1-9 NMSA 1978 and Section 72-5-28 NMSA 1978.

1.) **Section 72-1-9**

*We are extremely concerned with additional entities such as public utilities and sanitation districts seeking to be covered in the provision of Section 72-1-9, in fact we feel that any additions of entities, past or future, to the original 72-1-9 is not good public policy.

According to the legal history of Section 72-1-9, the New Mexico Legislature enacted this statute due to the litigation with the City of El Paso, Texas. The original intent was not to include every entity that provides services to citizens. Should the statute be amended to include other entities, a fair approach would be to include the agriculture industry to secure the needs of our food supply and sustainable economy.

*The provision of a 40 year planning period is questionable. The time frame should be discussed in detail in the context of what is a reasonable planning period.

*The power of condemnation is a concern. We recommend that language be added to the statute to restrict condemnation in the planning period. Or it might be better to prohibit condemnation of water rights for planning purposes and mandate that cities or counties must purchase water rights as needed on the open market in a willing seller – buyer situation.

*The exemption of forfeiture is allowed. The statute must comply with the New Mexico State Constitution, Article XVI, Section 1. Water acquired must be put to

beneficial use. This language should be deleted from the statute. We need to discuss in detail the usefulness of the four year forfeiture statute.

2.) **Section 72-5-28**

* 72-5-28. C. The language in this section must comply with the New Mexico State Constitution in putting water to beneficial use. This language must be deleted from the statute. There are so many exceptions to this four year forfeiture statute and the lack of forfeiture in actual practice makes this provision questionable.

3.) Additional time is needed for more discussion pertaining to the 40 year planning period and condemnation, and the four year forfeiture period. We believe that amendments to (the) any of the two statutes are not ready to be amended at the 2008 Legislative session.

Thank you for your consideration of our comments concerning this issue.

Sincerely,

John F. Wortman, Jr.
Executive Vice President
NM Farm and Livestock Bureau

Sharon Lombardi
Executive Director
Dairy Producers of New Mexico

NEW MEXICO PUBLIC REGULATION COMMISSION

COMMISSIONERS

DISTRICT 1 JASON MARKS, VICE CHAIRMAN
DISTRICT 2 DAVID W. KING
DISTRICT 3 BEN R. LUJAN, CHAIRMAN
DISTRICT 4 CAROL K. SLOAN
DISTRICT 5 SANDY JONES

1120 Paseo de Peralta/P.O. Box 1269
Santa Fe, NM 87504-1269
1-888-427-5772
(505) 827-4194-Fax

October 4, 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

Re: Comments Pursuant to House Memorial 42 and Stakeholder Meetings Addressing 40-Year Water Planning Period

Dear Ms. Sims:

Thank you for the opportunity to provide our written comments on NMSA Section 72-1-9, the 40-year water planning statute that is administered by the Office of the State Engineer. In short, public water utilities should be specifically included among the entities covered by the provisions of Section 72-1-9.

The New Mexico Public Regulation Commission ("Commission" or "PRC") regulates public water utilities pursuant to a comprehensive regulatory scheme – the Public Utility Act, NMSA Section 62-3-1 to 62-13-15. Broadly, the Commission's mandate is to regulate public utilities in a manner that is consistent with the public interest, including the discouragement of unnecessary duplication and economic waste. Additionally, water utilities are subject to a set of Commission rules and regulations, including minimum standards for design, construction and operation, etc. See NMPRC Rule No. 17.12.1 NMAC et seq. at http://www.nmcpr.state.nm.us/nmac/_title17/T17C012.htm.

Public water utilities are defined as "any plant, property or facility for the supplying storage, distribution or furnishing to or for the public of water for manufacturing, municipal, domestic or other uses." Section 62-3-3(G)(3). A water utility has a legal obligation to provide reliable and adequate service at nondiscriminatory and reasonable rates throughout its service territory, even new customers. Commensurate with that duty is a legal right to make reasonable service extensions to customers in contiguous territory not receiving similar service from another utility. See Sections 62-8-1, 62-8-2, 62-8-6, 62-9-1, and 62-9-5. Commission approval is required of rate changes unless the utility has a limited number of service connections and there is no protest after notice. However, the Commission has authority to review utility rates and inspect their books and records at any time.

We understand that the State Engineer has concerns that investor-owned public water utilities may have the incentive or opportunity to speculate or market unneeded water rights. But according to the law, public

water utilities cannot sell or transfer utility plant or property without prior express Commission authorization. Section 62-6-12(A)(4). This Commission has recently approved a sale on the condition that all water rights be included in the transfer, despite both buyer and seller requesting that the seller be allowed to retain any presently unneeded rights. NMPRC Case No. 05-00208/05-00305, In the Matter of the Application of Independent Utility Company for Approval to Abandon Assets and Retain Certain Water Rights; the Joint Application of Independent Utility Company and New Mexico Water Service Company for the Several Approvals and Authorizations required in Connection with the Acquisition of Independent Utility Company's Assets, etc. Moreover, utilities may recover through rates only those reasonable expenses related to the provision of utility service.

The PRC regulates 34 water systems serving a reported 51, 566 residential customers in 2005. The 2005 monthly average residential use was 8,000 gallons per connection. Many of our regulated utilities have rate structures that promote conservation. The current Commission considers conservation practices in water rate cases and we expect this to continue. Just like the entities currently listed in Section 72-1-9, water utilities serve the same purpose of providing water to the public and must be able to acquire and hold water rights for future anticipated needs for residential, commercial, and institutional customers.

Section 72-1-9 currently includes "public utilities supplying water to such municipalities or counties" but whether that covers supplying water to customers within municipal boundaries or to municipalities as the customer is unclear. Therefore, the inclusion of public utilities, without the preceding limiting language, among the entities covered by Section 72-1-9 would resolve an ambiguity in favor of rational water planning by all entities having an obligation to provide for future demand by the public.

Sincerely,

BEN R. LUJAN, CHAIRMAN

JASON MARKS, VICE CHAIRMAN

TELEPHONICALLY APPROVED

DAVID W. KING, COMMISSIONER

CAROL K. SLOAN, COMMISSIONER

SANDY JONES, COMMISSIONER

October 5, 2007

Elisa N. Sims
Water Use and Conservation Bureau
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
elisa.sims@state.nm.us
(505) 827-4273

Dear Ms. Sims:

This letter provides Environment New Mexico's second round of commentary regarding House Memorial 42 as requested at the second stakeholder meeting held on September 6, 2007. Environment New Mexico appreciates having the opportunity to submit these comments on behalf of its approximately 5,000 members statewide.

We would like to signal our intention to continue participating in the stakeholder dialogue process particularly regarding the issues identified in our previous comments. However, we do feel that further stakeholder discussions should have a timeline and set goals to ensure it is a useful, organized and ultimately successful discourse that can create tangible progress for New Mexico. Discussions should not preempt legislative or administrative progress on these critical issues.

We have advocated requiring specific criteria for 40-year development plans (see 1st stakeholder comments). Despite contention around some of the issues raised, the notion of laying out specific, consistent criteria for development plans has found no opposition. We laid out a vision for what this criteria should look like in the first set of stakeholder comments, but we believe that the stakeholders should convene in a separate meeting to discuss specifically what information should be required in these development plans if an entity wishes to hold onto unused water rights in order to move forward.

By providing specific criteria for the 40-year planning process, review by the State Engineer will be expedited and allow these documents to be more useful at the local level. We also believe that the Office of the State Engineer should require these plans be made public to allow for more transparency and access to the documents for the public.

Thank you for considering the comments above.

Respectfully submitted,

Lauren Ketcham
Randall Coleman
Environment New Mexico
P.O. Box 40173
Albuquerque, New Mexico 87196
(505) 254-4819
www.EnvironmentNewMexico.org
Lauren@EnvironmentNewMexico.org

STATE ENGINEER OFFICE{PRIVATE }
STATE OF NEW MEXICO
BATAAN MEMORIAL BUILDING
P.O. BOX 25102
SANTA FE, NEW MEXICO 87504-5102

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

The following comments are in response to issues raised at a meeting on September 6, 2007.

1. SHOULD AMENDMENTS TO 72-1-9 PROVIDE FOR APPROVAL OF TRANSFERS FOR A PERIOD TO EXCEED 40 YEARS ON A CASE BY CASE BASIS?

As noted in the first comments submitted by 1000 Friends of New Mexico, the likelihood that information submitted in water development plans to justify acquisition of water rights into the future accurately predict the future is low. Given the odds against accurate predictions, caution is crucial. In no event, should amendments allowing entities to go beyond 40 years on a "case-by-case basis" be allowed without clear and substantive criteria that would justify an exception to the rule that requires that water be put to an immediate beneficial use. The 40 year exemption provided in 72-1-9 is already problematic for the reasons described in our earlier comments.

2. RELATIONSHIP BETWEEN 72-1-9, 72-5-28, AND 72-12-8.

75-5-28 C., 72-12-8 F. and 72-1-9 are related statutes. They all provide for nonuse of water rights to implement a "water development plan." However, 72-1-9 originally contained some specificity regarding it application and also has been subsequently amended to give other water providers that authority, whereas 72-5-28 and 72-12-8 have not. More problematic is the fact that 72-5-28 C and 72-12-8 F. provide no guidance for implementation. Consequently, many more transfers would qualify under these statutes than under 72-1-9 although only for a shorter

interval.

Rather than delete C. from 72-5-28 and F. from 72-12-8, 1000 Friends believes it is preferable to update the language in C. and F. rather than delete them to ensure there is no confusion about the relationship between the ability to acquire water rights that will not be put to beneficial use and the protection from forfeiture and to provide adequate safeguards in order to prevent enabling water rights to go unused without any justification. Given water scarcity in the state and the need to ensure that water is used in conformance with the New Mexico Constitution, far more clarity and criteria must be provided.

3. SUMMARY OF RECOMMENDATIONS FROM 1000 FRIENDS OF NEW MEXICO

A. Section 72-1-9 provides an exception to New Mexico's water management laws. Assuming that there is sufficient legal and policy justification for this exception, explicit criteria for determining what entities are entitled to inclusion is essential. Without such criteria, the statute will become a huge loophole available to more and more entities to the detriment of entities that are excluded without adequate justification or authority.

B. There is disagreement about how 72-1-9 is interpreted. All such ambiguity in the statute should be eliminated.

C. In most cases, predictions that would provide the basis for allowing acquisition of water rights out to 40 years are unreliable and the greater the period of time, the less reliable those predictions become. The statute should allow for acquisition for only *up to* 40 years and only for the period that is justified by the reliability of the justification submitted by the application in its water development plan. This concern should be addressed by ensuring that the criteria established for "water development plans" are rigorous and substantive enough to determine whether application of the *up to* 40 year time period is justified. It is possible that in some limited cases, there is a justifiable necessity for a period greater than 40 years, but this is clearly an exception and should not be granted without compelling circumstances and adequate justification. In order to prevent an unjustified expansion of a preferential exception to our water

code, the extension of the 40 year period requires that the statute provide defined and clear criteria.

D. Given the unreliability of demand projections, amendments to the statute must provide for monitoring, reporting, and conditions on permits to ensure that only those water rights that prove to be needed are allowed under the exception granted in 72-1-9.

E. Water development plans provide the justification for giving some entities privileges that are not granted to all water rights holders equally. In order to qualify for the exceptions allowed by the application of 72-1-9, criteria for water development plans are critical and must be sufficient to justify application of 72-1-9 to an application to acquire water rights that will not be put to beneficial use for an extended period of time.

F. In most of the state, both surface and ground water are fully if not over appropriated. If the state is to provide adequate water to as many people as possible, it is necessary to use every tool available to work toward that end. While water conservation alone will not close the gap between supply and demand, it is both effective and essential. In Santa Fe City for example, the toilet retrofit program has reduced water usage sufficiently to keep water demand flat despite serving new housing. 72-1-9 enables some entities to obtain water from other users and other areas which will in many cases cause intended and negative consequences to parties that are not the seller or the buyer. 72-1-9 also gives a substantive advantage in the market to only some entities while putting other entities at a disadvantage. The state should attempt to minimize these negative impacts by requiring an applicant using 72-1-9 to have implemented credible and effective conservation practices.

G. As noted in 1000 Friends of New Mexico's initial comments, New Mexico does not exist in a vacuum. It must be mindful in amending any statute of the prohibition in the *Sporhase* court decision which 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."

Failure to do so will give out–of-state applicants the same rights as in-state applicants and water could move out of this state which is already struggling with an inadequate water supply.

H. 1000 Friends of New Mexico has two recommendations regarding the report that will be submitted to the legislature in response to HM 42. We urge the OSE to include a clear and accurate history of the relevant statutes (including 75-5-28 C., 72-12-8 F), and summarize the pros and cons of all of the issues discussed by the people who have participated in this process.

Date: October 12, 2007

Respectfully submitted,
Consuelo Bokum
Director, Water Project
1000 Friends of New Mexico

Comments on House Memorial 42

The inclusion of electric public utilities in House Memorial 42 does not appear to fall within the letter and intent of NMSA 72-1-9. The statute "promotes the public welfare *and* the conservation of water within the state for municipalities and other water suppliers. Water development plans which guide the reasonable use of water within forty years is conducive to the public welfare and preservation of water within the state. Beneficial use is the goal and measure of water rights for all water users within the state. The federally reserved rights of Indian tribes form a well-recognized exception to the rule of beneficial use.

Electric generation facilities which use water to provide electric power to state residents are regulated by the Public Regulation Commission (NMPRC). The water required to generate and transport electrical power is based on the source fuel and the power transmission and distribution system. The renewable portfolio standard rules of the NMPRC will have an impact on the amount of water required for electric power generation and transmission in New Mexico. Nonrenewable fuel sources are generally water intensive and deplete both the fuel source and groundwater source. Such a multiple impact is contrary to the preservation of the state's domestic water supplies and detrimental to the public welfare of New Mexico's residents.

Just as municipalities can plan for smart growth which conserves and limits detrimental impacts to domestic water supplies, public electric utilities can expand reliance on renewable energy sources which have a smaller impact on the nonrenewable groundwater and natural resources of the state. Other adverse impacts to the public health and environmental justice communities in New Mexico from resource extraction have been the legacy of a virtual lack of environmental oversight prior to the formation of state regulatory agencies.

Water rights

The lack of unappropriated water throughout New Mexico and the possibility that the expansion of state water planning to include electric public utilities will cause impairment to valid existing rights, including tribal water rights calls for a cautionary approach.

The Office of the State Engineer should be cognizant of the uncertainty inherent in regional and state water plans which do not account for the senior water rights of tribal communities which predate any other communities in New Mexico. Until the water rights of tribes have been adjudicated or otherwise settled, most water plans within the state of New Mexico will not be worth the paper they are printed on. Active water resources management must account for this uncertainty in the planning process. The inclusion of tribal government stakeholders in the planning and preservation of the state's domestic water supplies should be a priority, along with an allocation of monetary and staffing resources necessary to make progress in state water rights adjudications.

Desertification

Arid lands and deserts throughout the world are expanding at a rate that could disrupt the global environment, according to a recent report issued by the United Nations. The phenomenon known as desertification is fueled by overgrazing and other unsustainable agricultural and development practices. Improving agricultural practices and adopting alternative energy sources, such as solar and wind power, can help maintain these fragile lands and reverse desertification.

Tribal people throughout the world who have maintained a relationship to the land and water know that environmental justice cannot exist without it.

Submitted by:

Laura Watchempino
Haaku Water Office
P.O. Box 309
Pueblo of Acoma, NM 87034
505-552-6604

Sims, Elisa N., OSE

From: elaine hebard [ehebard@yahoo.com]
Sent: Monday, October 15, 2007 12:25 PM
To: Sims, Elisa N., OSE
Subject: A short comment on HM42

A short comment on HM42

I congratulate the ideas behind HM42 in having stakeholders sit down and discuss a water sane future. Given the water situation in many of the regions, this discussion is not only necessary but action needs to be taken quickly as well.

However, my caution is that unintentional consequences always seem to catch us unawares. (A classic example comes from today's Albuquerque Journal article about how the tax increment development districts are being applied for: "I'll be the first to admit that I have buyer's remorse," [Councilor] Cadigan said. "I think the last thing the city should be doing is subsidizing growth, and that's what the ordinance does.")

I am certain that many of the comments submitted to HM42 raise considerations that should be investigated and discussed. In those deliberations, I hope that you will keep in mind that water is a finite resource that requires a healthy ecosystem to be able to sustain us over the long haul. Rather than figuring on how one area might be benefited to another's detriment, please consider and incorporate how both can remain healthy.

To do otherwise opens the floodgates. If relatively water richer but politically poorer regions cannot protect themselves from damaging consequences due to intra-state water transfers, how may we fare when faced with the same dilemma from out-of-state petitioners?

The state can say "basta!" to the ongoing water insane nearly non-administration which is going to ultimately drive us into the ground. We can be leaders in the movement to turn the train wreck around. Let's spend time figuring out how we're going to survive as a region rather than shouting "I've got mine and I'm going to get yours too!"

Elaine Hebard

PS – I do not mean to sound critical of the ISC or the OSE. They are operating under trying circumstances. The willingness to fund the activities necessary to do the job more adequately is tied up in trust and politics. A break-through on that problem, together with an influx of substantial resources, is essential.

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New Mexico Municipal League

ANNUAL 50TH CONFERENCE

October 5, 2007

Elisa N. Sims, Senior Specialist
Water Use and Conservation Bureau
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504

Dear Ms. Sims:

Thank you for the opportunity to comment on the 40 year water development plan and the preservation of municipal water supplies – Section 72-1-9 of the New Mexico Statutes Annotated, in response to House Memorial 42.

The New Mexico Municipal League (NMML) submits the following comments:

- 72-1-9 provides adequate protection for most of our municipal public water systems.
- We support the retention of 72-1-9 which grants municipal authority regarding the rolling 40 year planning process.
- We propose discussion and consideration of extending the 40 year planning period for those public water systems that are regionalizing, given the complexity in developing and completing such large public water systems.
- In order to make the most efficient use of state and municipal resources, there is a need to have a template for the 40 year water plan development and a timely process for review by the OSE of such plans.
- We must be cautious and prudent in authorizing additional entities under the provisions of 72-1-9. In order to protect the intent of the constitutional doctrine of beneficial use, serious consideration must be given regarding unintended consequences.
- Condemnation of water rights should be discussed in another forum since the "method of acquisition" is not a subject of House Memorial 42.

League Headquarters: 1229 Paseo de Peralta • Santa Fe, New Mexico 87501 • Mailing Address: P. O. Box 846 • Santa Fe, New Mexico 87504-0846
Telephone: 505-982-5573 • Toll Free: 1-800-432-2036 • Fax: 505-984-1392 • www.nmml.org

Attached, for your information, are two Resolutions adopted by the NMML membership on September 30th, 2007 concerning the "Extension of the Water Use Planning Period" and the "Forty Year Water Plan Process".

The New Mexico Municipal League appreciates the opportunity to participate in these serious discussions.

Sincerely,

William F. Fulginiti
Executive Director

Enclosures

Whereas, House Bill 1080 (HB 1080) was introduced in the 48th Legislature; and

Whereas, HB 1080 was supported by the Albuquerque-Bernalillo County Water Utility Authority, City of Alamogordo, City of Espanola and El Prado Water and Sanitation District;

Whereas, HB 1080 proposed an amendment to 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 1080, 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 30th day of August, 2007 at the City of Las Cruces, New Mexico.

2007 Resolutions Committee

RESOLUTION NO. 2007-52

CONCERNING FORTY YEAR WATER PLANNING PROCESS

Whereas, New Mexico statute 72-1-9 recognizes that planning by municipalities and other entities for the reasonable development and use of water resources promotes the public welfare and conservation of water within the state; and

Whereas, New Mexico statute 72-1-9 provides for a water use planning period of forty years for municipalities and other entities with water rights being based on a water development plan; and

Whereas, water development plans referred to in New Mexico statute 72-1-9 are commonly referred to as forty year water plans; and

Whereas, the New Mexico State Engineer has general supervision of waters of the state under New Mexico statute 72-2-1; and

Whereas, no formal guidance on the content of the forty year water plans prepared for application under New Mexico statute 72-1-9 or their review process has been issued by the State Engineer; and

Whereas, one or more entities recognized in New Mexico statute 72-1-9 have invested substantial resources in preparing forty year water plans, submitted them to the Office of the State Engineer in support of water rights filings and experienced lengthy delays and extensive comments on the content of the plans; and

Whereas, in order to make the most efficient use of state and local resources, there is a need to have a uniform template for the preparation of the plans and uniform and timely process for the review of such plans.

Now, Therefore, Be It Resolved that the New Mexico Municipal League supports the development and use of a template for the preparation of water development plans or forty year water plans prepared for application to New Mexico statute 72-1-9 and a uniform and timely process for the review of such plans.

Passed, Approved and Adopted this 30th day of August, 2007 in Las Cruces, New Mexico.

2007 Resolutions Committee

VIA EMAIL & U.S. MAIL

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

Re: Recommendations for NMSA 1978, § 72-1-9

Dear Ms. Sims:

I represent the Moriarty Municipal School District (MMSD). MMSD has authorized me to submit comments on its behalf relating to NMSA 1978, §72-1-9.

It appears that NMSA 1978, §72-1-9 is inconsistent with the forfeiture statutes. Both NMSA 1978, §§72-5-28(C) and 72-12-8(F) state that "Periods of nonuse when water rights are acquired by incorporated municipalities or counties for implementation of their water development plans or for preservation of municipal or county water supplies shall not be computed as part of the four-year forfeiture statute." To be consistent, these statutes should be amended to include all of the entities set forth in NMSA 1978, §72-1-9, including school districts. Therefore, there would be no question as to which entities are protected from the forfeiture statute.

Thank you for allowing MMSD to comment on this matter.

Very truly yours,

SHEEHAN, SHEEHAN & STELZNER, P.A.

Susan Kery

By: SUSAN C. KERY

SCK:djs

cc: Karen Couch, Superintendent
Moriarty Municipal Schools

SHEEHAN, SHEEHAN & STELZNER P.A. ATTORNEYS AT LAW

707 Broadway NE, Suite 300
Albuquerque New Mexico 87102
P.O. Box 271
Albuquerque, New Mexico 87103
505-247-0411
505-842-8890 FAX
www.ssslawfirm.com