

# **Supporting Document G-2**

## **Legal Feasibility Fact Sheets**

Prepared by Daniel B. Stephens and Associates

## Legal Feasibility Fact Sheet

### Alternative 66: Watershed Plans

*Acknowledgements: This legal feasibility fact sheet was written by John Utton, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-66: Implement local and regional watershed management plans through all land and water agencies in the planning area.

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

Management of high-elevation forests, especially forest thinning, implicates a number of federal laws. These federal laws are essentially the same laws discussed in the corollary alternative, A-1, *Bosque Management*.

Two different types of legal requirements would affect implementation of this alternative. The first is imposed by federal laws that govern what can be done to land and trees and surface waters and how it can be done. These laws place constraints on management activities affecting federal interests. Presumably, most lands that would be affected by high-elevation forest management would be in national forests or national forest wilderness areas, although it is possible that some such lands might be within national parks or monuments. Because no roads, commercial enterprises, or motorized equipment are permitted in wilderness areas, little significant forest management can occur in those areas, other than non-invasive fire management.

In the national forests, any management actions taken to increase water supply emanating from the forests must comply with a number of federal laws, including the National Forest Management Act (NFMA) (16 U.S.C. §1600, *et seq.*), the National Environmental Policy Act (NEPA) (42 U.S.C. §4321 *et seq.*), the Clean Water Act (CWA) (33 U.S.C. §1251 *et seq.*), the Endangered Species Act (ESA) (16 U.S.C. §1531 *et seq.*) and possibly the National Historic Preservation Act (NHPA) (16 U.S.C. §470 *et seq.*) and the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. §1996). Most of the constraints placed by these laws relate to process, studies, and planning that must be done before the advent of significant surface-disturbing work.

There would, however, also be substantive constraints on how much logging and road-building can be done. NFMA (and its regulations) places limits on methods and locations of logging and road-building (e.g., limiting clear-cuts and certain other methods of logging, prohibiting logging on very steep slopes, limiting logging adjacent to rivers). The ESA may limit these actions where species listed as threatened or endangered are located, the CWA may limit the amount of sediment that can run into streams from logging and road-building actions, and AIRFA and NHPA may limit land disturbance near sites of religious, cultural, or historical significance. In addition, planning and environmental studies for any major watershed thinning operation can be expected to take many months or even years in areas where there is significant opposition to a proposed project. In a riverine setting, in contrast to alpine forests, some of these requirements may be more easily met, mainly because of fewer access problems.

Because the purpose of this alternative is to enhance stream and river flows, federal environmental approval would be expected in most instances. Increased flows are likely to benefit the endangered Rio Grande silvery minnow, but such restoration must not harm other listed species using the forests as habitat.

Finally, watershed management would not be prohibited or regulated by the Rio Grande Compact.

### **3.2 Tribal**

Watershed management on Pueblo lands would require approval and cooperation of the participating Pueblos.

### 3.3 State

A regional or interjurisdictional watershed management body would be permissible under state law if management took the form of cooperation among local, state, and federal governments within their existing authorities. On a local level such a function would fit within the role already established for the Mid-Region Council of Governments. Joint Powers Agreements among local governments could also initiate regional management. By contrast, regional management that ventured into the regulatory arena probably would require authorization by state law. If the functioning of this type of regulatory body conflicted with the authority of state agencies, such as the Office of the State Engineer, amendment to state law reconciling the conflict would be required.

Another significant question of state law is: Who would own any surplus water generated by watershed management? The quick answer to this question is that additional water created by watershed management would simply become part of the public waters of the state and could be used by existing water right holders to fully exercise their water rights. Thus, any increase in supply through land management activities would occasionally allow more junior appropriators to fulfill water rights that would not otherwise be fulfilled. Under current state law, existing water right holders would have the first right to divert additional supplies, as long as these did exceed their rights. If thinning and management produced excess water, that water might be secured under existing law by filing an application to appropriate with the State Engineer under NMSA 1978, §§72-5-1 & -6 (1907).

No mechanism exists that allows the person or entity that funds or carries out a program to enhance the amount of runoff to claim any of that water except by attempting to obtain a new, very junior water rights permit. A change in state law would be required to authorize the entity responsible for making additional water available to claim that water, and thereby benefit from its efforts. This is the same saved-water/ownership question raised by A-38, *Surface Modeling*, and A-1, *Bosque Management*.

Finally, like any other landowner, the state will be called upon to authorize activities on state-owned lands.

### **3.4 Local**

A regional watershed management authority would need agreement from those local entities deciding to participate. As discussed under A-67, *Water Authority/Banking*, such an organization could take various forms. Where organization takes the form of cooperative regional management established by a Joint Powers Agreement or other consensual mechanism, the local participants, along with state and federal participants, would be called upon to adopt rules and ordinances to comprehensively address watershed management needs. These may include (1) management practices for roads, culverts, or other construction projects that minimize erosion and protect water quality from increased sedimentation; (2) projects that address water quality issues such as elevated stream temperatures and impacts from septic systems, mining, or potential contaminant sources; and (3) grazing practices that minimize water quality degradation and riparian impacts.

It is unlikely that local governments will own upper watershed lands. Nonetheless, to the extent that they or private landowners have lands in designated management areas, the owners' approval would be required on lands where activities occur or rights-of-way are needed.

## Legal Feasibility Fact Sheet

### Alternative 1: Bosque Management

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-1: Restore Bosque habitat and manage vegetation in the Bosque to reduce evapotranspiration by selectively removing vegetation and promoting native plants.

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

Federal law should not impose a barrier to this alternative, but will require that processes be followed to assure that federal interests are protected while bosque restoration and management are carried out. Restoration and management of bosque areas would have to comply with a number of federal laws, especially where activities occur on federal lands. Any management actions taken to increase water supply emanating from the national forests must comply with a number of federal laws, including the National Forest Management Act (NFMA) (16 U.S.C. §1600, et seq.), the National Environmental Policy Act (NEPA) (42 U.S.C. §4321 et seq.), the Clean Water Act (CWA) (33 U.S.C. §1251 et seq) the Endangered Species Act (ESA) (16 U.S.C. §1531 et seq.), and possibly the National Historic Preservation Act (NHPA) (16 U.S.C. §470 et seq.) and the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. §1996). Most of the constraints placed by these laws relate to process, studies, and planning that must be done before significant surface-disturbing work is done.

There will, however, also be substantive constraints on the amount of tree removal and road-building allowed. NFMA (and its regulations) places limits on methods and locations of tree-removal and road-building (e.g., limiting clearcutting and certain other methods of logging, prohibiting logging on very steep slopes, limiting logging adjacent to rivers). The ESA may limit these actions where species listed as threatened or endangered are located, the CWA may limit the amount of sediment that can run into streams from logging and road-building actions, and AIRFA and NHPA may limit land disturbance near sites of religious, cultural, or historical significance. In addition, the planning and environmental studies for any major watershed thinning operation can be expected to take many months or even years in areas where there is significant opposition to a proposed project. In a riverine setting, in contrast to alpine forests, some of these requirements may be more easily met, mainly because of fewer access problems.

Because the purpose of this alternative is to enhance river flows and increase diversity of native habitat, federal environmental approval would be expected in most instances. Increased flows are likely to benefit the endangered Rio Grande silvery minnow, but such restoration must not harm other endangered species such as the southwest willow flycatcher, which has been found nesting in saltcedars along the river.

Finally, riverine restoration and management would not be prohibited or regulated by the Rio Grande Compact.

### **3.2 Tribal**

Restoration and management on Pueblo lands will require approval and cooperation of that Pueblo.

### **3.3 State**

The significant question of state law is: Who would own any surplus water generated by watershed management? The quick answer to this question is that additional water created by watershed management would simply become part of the public waters of the state and could be used by existing water right holders to fully exercise their water rights. Thus, any increase in supply through land management activities would occasionally allow more junior appropriators to fulfill water right allocations that would not otherwise be fulfilled. Under current state law, existing water right holders would have the first right to divert additional supplies, as long as

these did exceed their rights. If thinning and management produced excess water, that water might be secured under existing law by filing an application to appropriate with the State Engineer under NMSA 1978, §§72-5-1 & -6 (1907).

No mechanism exists that allows the person or entity that funds or carries out a program to enhance the amount of runoff to claim any of that water except by attempting to obtain a new, very junior permit. A change in state law would be required to authorize the entity responsible for making additional water available to claim that water, and thereby benefit from its efforts. This is the same saved-water/ownership question raised by A-38, *Surface Modeling*, and A-1, *Bosque Management*.

Finally, like any other landowner, the state will be called upon to authorize activities on state-owned lands.

### **3.4 Local**

Likewise, approval of local landowners, such as the Middle Rio Grande Conservancy District, would be required where activities occur on their lands. Finally, in some instances local governments may assert environmental and land use constraints that may affect bosque initiatives.



## Legal Feasibility Fact Sheet

### Alternative 45: Reservoir Management

*Acknowledgements: This legal feasibility fact sheet was written by John Utton, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-45: Reduce open water evaporation in storage reservoirs by retaining water at higher elevations or latitudes, or by reducing surface areas. This alternative is further described by the following categories:

45A—Move stored water to reservoirs at higher elevations / more northern latitudes:

- i. Move water to an existing storage space
- ii. Move water to currently unauthorized storage space in an existing reservoir
- iii. Move water to a new reservoir

45B—Reduce reservoir surface area for a given volume of water by dredging

45C—Apply surfactant to Elephant Butte Reservoir water surface to reduce evaporation

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### **3.1 Evaluation of Alternative 45A: Move Water to Upstream Reservoirs**

Of the three sub-alternatives for moving water upstream, use of existing storage space through changes in storage/release management in general would require less demanding legal authorization. The second sub-alternative, obtaining authorization for new storage space in

existing reservoirs requires an additional level of approval. Finally, construction of new reservoirs is the most legally demanding, requiring multiple authorizations. The primary hurdles for all three alternatives are federal law and compact restrictions, in particular the Rio Grande Compact's post-1929 storage restrictions on native water. In addition state permitting requirements will apply.

### 3.1.1 *Federal/Compact*

*Use existing upstream storage space.* This sub-alternative is essentially inapplicable to upstream federal reservoirs on the main stem of the Rio Grande because no authorized storage space is available. In particular, storage space in Cochiti and Heron Reservoirs is not authorized for this proposed use. Nonetheless, storage in and release changes from other reservoirs, such as El Vado and Abiquiu, could be limited by federal environmental laws, primarily the National Environmental Policy Act (NEPA) (42 U.S.C. §4321 et seq.) and the Endangered Species Act (ESA) (16 U.S.C. §1531 et seq.), to avoid detrimental environmental changes in the river hydrograph and ecosystem around the reservoir.

For reservoirs with currently authorized space, the most onerous restrictions are derived from the Rio Grande Compact of 1938. In order to fundamentally change the river's storage regime, approval by the three-state compact commission would be necessary. The Compact places limitations on storage of water (NMSA 1978 §72-15-23). Under Article VI of the Compact, New Mexico's accrued debit shall not exceed 200,000 acre-feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929; however, New Mexico shall retain water in storage at all times to the extent of its accrued debit. This means that the water could not be released for any local use, but must be held for release to Texas if called upon. Under Article VII, New Mexico in general shall not increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre-feet of usable water in project storage in Elephant Butte and Caballo Reservoirs. Finally, under Article VIII, Texas may demand release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of New Mexico and Colorado, sufficient to bring the quantity of usable water in project storage to its regular annualized amount of 790,000 acre-feet. This affects El Vado, Abiquiu, Nambe Falls, and McClure Reservoirs, all of which were constructed after 1929; Nichols (1946), Two Mile (1894), and Santa Cruz (1929) Reservoirs are not regulated by the Compact.

*Obtain storage authorization in existing reservoirs.* Although Abiquiu Reservoir has a capacity of 1.5 million acre-feet, federal legislation would be required to store water there above the total authorized storage amount of 200,000 acre-feet. Likewise, Cochiti Reservoir would require federal legislation allowing the storage, in addition to needing approval by the U.S. Army Corps of Engineer, Bandelier National Park and the U.S. Forest Service. Environmental changes to the river hydrograph and reservoir ecosystem would have to comply with ESA and NEPA. In addition, increased storage would be subject to the post-1929 restrictions of the Rio Grande Compact discussed above.

*Construct new reservoirs.* Construction of new reservoirs would present the most legal hurdles of the three sub-alternatives. In the national forests, dam construction and reservoir expansion or creation must comply with the National Forest Management Act, 16 U.S.C. §1600, et seq. (NFMA). In addition, other federal laws would apply: NEPA, ESA, the Clean Water Act (CWA) (33 U.S.C. §1251 et seq.) and possibly the National Historic Preservation Act (NHPA) (16 U.S.C. §470 et seq.) and the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. §1996). Most of the constraints placed by these laws relate to process, studies, and planning that must be done before significant surface-disturbing work is done. There will, however, also be substantive constraints on how much earthmoving, logging, and road-building can be done. NFMA places limits on methods and locations of earthmoving, logging, and road-building (e.g., limiting clearcutting and similarly extreme methods of logging, prohibiting logging on very steep slopes, limiting logging adjacent to rivers). The ESA may limit these actions where species listed as threatened or endangered are located. The CWA will come in to play because dams or dikes or any diversions that are constructed in arroyos or streams, which are considered “waters of the United States,” are subject to CWA jurisdiction and will require a permit from the Army Corps of Engineers under §404 (33 U.S.C. §1344). The bigger the land disturbance, the more onerous the permit conditions will be. AIRFA and NFMA may limit land disturbance near sites of religious, cultural, or historical significance. In addition, new reservoirs would be subject to the post-1929 restrictions of the Rio Grande Compact discussed in above.

### 3.1.2 State

*Use existing upstream storage space.* Changing management of storage and releases from existing reservoirs to increase upstream storage and thereby reduce downstream will not require additional water rights under state law, as long as the change in operations does not increase depletions. Any proposed increase in depletions above existing rights would require

acquisition and approval of additional rights. Changes in storage and release amounts and frequencies may also require State Engineer permitting approval, requiring the applicant to demonstrate that a change in river flows would not injure other water right holders.

*Obtain storage authorization in existing reservoirs.* As in subsection 3.1.2, increased storage would in most instances have to be permitted by the State Engineer.

*Construct new reservoirs.* Storage in a new reservoir would require a State Engineer permit. Before constructing a dam, one must obtain a permit from the State Engineer (and meet the statutory criteria: not cause impairment of any existing water rights, not be detrimental to the public welfare, and not be contrary to the conservation of water) (§72-5-6). Dams that are exempted from State Engineer permitting include “erosion control structures whose maximum storage capacity does not exceed ten acre-feet,” and “dam[s] constructed for the sole purpose of sediment and flood control under the supervision of the United States army corps of engineers.” Until 1997, no dams that were less than 10 feet in height and that impounded less than 10 acre-feet were subject to State Engineer regulation. In 1997, the legislature amended §72-5-32 to greatly restrict that exemption. Such storage would not require an additional water right, as long as the change in storage from downstream to upstream does not increase depletions beyond the recognized right, which is the intent of this alternative.

### 3.1.3 Tribal

*Use existing upstream storage space.* Increasing storage in reservoirs on Pueblo lands, such as in Jemez Canyon or Cochiti Reservoirs, would require approval the affected Pueblo.

*Obtain storage authorization in existing reservoirs.* Increased storage in Cochiti Reservoir, in addition to needing federal agency approval, adoption of federal legislation and State Engineer permitting, would require approval of Cochiti Pueblo.

*Construct new reservoirs.* Construction of a reservoir on Pueblo lands would require approval of the affected Pueblo.

### 3.1.4 Local

*Use existing upstream storage space.* Two local governments own or operate upstream reservoirs and their authorization would be required. On the Chama, rights to excess storage

capacity could be obtained by agreement with the Middle Rio Grande Conservancy District with respect to El Vado Reservoir and with the City of Albuquerque with respect to Abiquiu Reservoir. Because of less water in Elephant Butte Reservoir, lakeside and surrounding communities could be harmed but there is no apparent legal recourse for this effect.

*Obtain storage authorization in existing reservoirs.* Easements would have to be obtained from private landowners affected by higher water levels in Abiquiu Reservoir. Again, downstream lakeside and surrounding communities could be harmed but there is no apparent legal recourse for this effect.

*Construct new reservoirs.* Construction of a reservoir on private lands would require approval of the landowner. Again, downstream lakeside and surrounding communities could be harmed but there is no apparent legal recourse for this effect.

## **3.2 Evaluation of Alternative 45B: Reservoir Dredging**

### *3.2.1 Federal/Compact*

The main legal obstacle to reservoir dredging is environmental effects. The environmental requirements applying to reservoir construction and expansion, as discussed in Section 3.3.1, would generally apply to dredging; however, maintenance of an existing reservoir should pose far less of an environmental concern in terms of on-site effects. The primary environmental issue would be disposal of dredged material and/or downstream water quality and siltation effects, especially if sluicing is used as a dredging method.

### *3.2.2 State*

No significant state law issues arise, as long as depletions do not increase

### *3.2.3 Tribal*

This alternative does not implicate Tribal legal issues, except where access to Tribal lands is required.

### *3.2.4 Local*

This alternative does not implicate local legal issues.

### **3.3 Evaluation of Alternative 45C: Apply Surfactant to Elephant Butte Reservoir**

#### **3.3.1 Federal/Compact**

Application of surfactant to Elephant Butte Reservoir could only be carried if it were shown to be environmentally safe under federal laws, including ESA, NEPA and CWA.

The Rio Grande Compact would not prohibit such a water savings technique. It would not be surprising, however, if the other two states claimed a right to some of the saved water, as the Compact's accounting was based on specified depletion assumptions, now changed by technological advances.

#### **3.3.2 State**

As long as the use is safe, likewise there would be no state law issues.

#### **3.3.3 Tribal**

This alternative does not implicate Tribal legal issues.

#### **3.3.4 5.4 Local**

This alternative does not implicate local legal issues.

## Legal Feasibility Fact Sheet

### Alternative 38: Surface Modeling

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-38: Increase monitoring and modeling of surface water system to improve water management at the watershed level, and retain excess water flow from Elephant Butte Reservoir during wet cycles.

#### 2. Assumptions

This analysis assumes that “retention of excess flows” refers to times where there is an actual or hypothetical spill at Elephant Butte Reservoir.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

Modeling does not require federal or compact approval. Monitoring will require authorization or cooperation by the federal government for the installation, use, and upgrading of fixed-site data collection stations on federal lands in the Upper Rio Grande Basin. If the consequent management of regional water affects flows in area streams and rivers, this action could require approval under the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). Those statutes should not pose a barrier; however, as flows under this alternative would be expected to increase.

The overriding federal and compact issue is the retention of excess flow from Elephant Butte Reservoir during a wet cycle, under the Rio Grande Compact. If, as this analysis assumes, retention of water upstream occurred during spills at Elephant Butte Reservoir, then no federal

or compact barrier exists to that use of water. An actual or hypothetical spill at Elephant Butte wipes out accrued debits and credits and, therefore, in a spill year flood flows could be appropriated without violating the Compact's delivery obligations.

On the other hand, retention of water in non-spill years would have to comply with the strict allowances provided under the Compact. The Compact utilizes an input-output model to determine the water delivery obligations of Colorado and New Mexico.<sup>1</sup> Delivery schedules, measurements at gages in the Rio Grande and its tributaries in Colorado, determine Colorado's delivery obligation to New Mexico. Delivery is measured at the Lobatos gaging station near the Colorado/New Mexico state line.<sup>2</sup> Similarly, inflow measurements at the Otowi gage in New Mexico determine New Mexico's delivery obligation to Elephant Butte Reservoir for subsequent deliveries to Mexico, southern New Mexico, and Texas.<sup>3</sup> As a result, water could only be retained if it did not impair other existing water rights and cause New Mexico to violate its delivery obligation.

### **3.2 Tribal**

Modeling does not require Tribal approval. Monitoring would require authorization or cooperation by the Tribal governments if monitoring infrastructure were placed on Tribal lands.

A regional management system could include any Pueblo deciding to participate and would, in those instances, require Tribal agreement.

### **3.3 State**

There are no state legal restraints on modeling and measurement of water within the region, aside from approval to locate monitoring equipment on state lands, if necessary. Management of water on a region-wide basis also does not implicate state law if management takes the form of cooperation among local governments within their existing authorities, a function that would fit within the role already established for the Mid-Region Council of Governments. Joint Powers

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<sup>1</sup> Rio Grande Compact of 1938 at arts. III, IV.

<sup>2</sup> Rio Grande Compact of 1938 at arts. II, III.

<sup>3</sup> Rio Grande Compact of 1938 at art. IV.



Agreements among local governments could also initiate regional management. By contrast, regional management that ventured into the regulatory arena would require a change in state law if regional management conflicted with the authority of state agencies, most notably the Office of the State Engineer.

Regional water management that produced more water for the region also raises the question of who gets the additional water. Under current state law, existing water right holders could divert additional supplies in order to fully exercise their rights. If good management produced unappropriated water, that water could be secured under existing law by filing an application to appropriate with the State Engineer under NMSA 1978, §§ 72-5-1 & -6 (1907). A change in state law would be required to authorize the managing entity producing the additional water to claim that water, and thereby benefit from its efforts. This legal issue also has bearing on A-1 Bosque Management, and A-66, *Watershed Plans*.

A permit to appropriate flood flows would have to be obtained from the State Engineer under NMSA 1978, §§ 72-5-1 & -6 (1907). On May 22, 2001, the City of Albuquerque filed an application to appropriate 200,000 acre-feet per annum of flood flows in Abiquiu Reservoir. That application is pending.

### **3.4 Local**

There are no state local restraints on modeling and measurement of water within the region, aside from approval to locate monitoring equipment on privately or locally owned lands.

A regional management system would need agreement from those local entities deciding to participate. As discussed in the technical fact sheet for A-67, *Water Authority/Banking*), such an organization could take various forms.

## Legal Feasibility Fact Sheet

### Alternative 46: Aquifer Storage

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-46: Inject water treated for drinking water standards for aquifer storage in appropriate locations throughout the water planning region.

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

The technical and physical feasibility fact sheet for A-46, *Aquifer Storage*, outlines several scenarios in which federal or compact legal issues may arise.

First, one type of aquifer storage involves transferring Elephant Butte reservoir storage to aquifer storage. If such storage were undertaken to make compact deliveries and complied with all conditions of its storage permit, as outlined below, compact issues should not arise. Nonetheless, any aquifer storage by New Mexico is arguably the same as reservoir storage, and would be subject to a post-1929 call by Texas. Article VIII of the Rio Grande Compact provides for release of water from upstream storage in New Mexico upon the demand of the Texas Commissioner. During the month of January of each year, the Texas Commissioner may demand that New Mexico release water from storage reservoirs constructed after 1929 up to the amount of New Mexico’s accrued debit. In this event, New Mexico must release stored water at the greatest rate practical and to the extent of its debit to bring the quantity of usable water in

project storage to 600,000 acre-feet by March 1 and to maintain 600,000 acre-feet in project storage until April 30. The purpose of the Texas demand and subsequent release is to accomplish a normal release of 790,000 acre-feet from project storage in that year.

Another type of aquifer storage involves the use of infiltration basins. Since the construction of an infiltration basin potentially involves substantial excavation, depending on the location of the proposed project, it may be necessary to obtain a federal permit from the U.S. Army Corp of Engineers (USACE). Section 404 of the federal Clean Water Act, 33 U.S.C § § 1251 *et seq.* (2002) establishes a permit program to regulate the discharge of dredged or fill material into the waters of the United States. The USACE and the U.S. Environmental Protection Agency (EPA) share the federal responsibility for regulating the discharge of dredged material. This includes the discharge of dredged material resulting from mechanized land clearing, ditch and channel construction, and other excavation activities.

Further, any federal permitting would bring into play the National Environmental Protection Act (NEPA) process. NEPA is a federal act dealing with the environmental impact of water use.<sup>1</sup> NEPA dictates the steps that must be taken to analyze environmental impacts of actions; it does not place limits on what actions may be taken. NEPA requires that an analysis of environmental impacts be prepared for all “major federal actions significantly affecting the quality of the human environment.”<sup>2</sup> “Major federal actions ”subject to a NEPA analysis include “projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies.”<sup>3</sup> Thus, any type of federal permitting would involve the NEPA process. This process would include, among other things, an analysis of the Endangered Species Act (ESA) impacts of the proposed project.<sup>4</sup>

A final federal issue related to meeting federal drinking water standards for water injected into the aquifer, the Safe Water Drinking Act, is discussed in Section 3.3.

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<sup>1</sup> 42 U.S.C. § § 4321 *et seq.* (2000).

<sup>2</sup> 42 U.S.C. § 4332 (2000)

<sup>3</sup> 40 C.F.R. § 1508.18(a) (2002)

<sup>4</sup> 16 U.S.C. § § 1531 *et seq.* (2000 and 2002 Cum. Supp.).

### 3.2 Tribal

State regulatory issues discussed below do not apply to Tribal lands, since the state has no jurisdiction over such lands. The only federal law at issue herein that applies to Tribal lands is the Safe Drinking Water Act, discussed in Section 3.3.

### 3.3 State

Injecting water treated for drinking water standards into an aquifer for storage primarily involves state legal issues. The Ground Water Storage and Recovery Act, NMSA 1978 § 72-5A-2 (1999) (Act), provides the legal mechanism for aquifer storage and recovery. The Act specifically recognizes that the “conjunctive use and administration of both surface and ground waters are essential to the effective and efficient use of the state’s limited water supplies” and that ground water recharge, storage and recovery have the potential to reduce the rate of aquifer decline, promote conservation, serve public welfare, and lead to more effective use of water resources. Water can be stored pursuant to the Act only by permit issued by the State Engineer, and a number of criteria must be met before a permit will issue.<sup>1</sup> Water stored pursuant to the Act is exempt for forfeiture by the State for non-use.<sup>2</sup> The State Engineer has adopted underground storage and recovery regulations that govern the application process, the hydrologic, technical, and financial capability report requirements, and permit terms and conditions (19.25.8 NMAC).

Aquifer storage of treated water must also comply with all requirements of New Mexico’s Underground Injection Control (UIC) Program, as implemented through the Water Quality Act<sup>3</sup> and the UIC regulations found at 20.6.2.5000 NMAC. The New Mexico Environment Department (NMED) administers the UIC Program, which is a federal groundwater protection program established by the Safe Drinking Water Act (SDWA) (42 U.S.C. § 300f *et seq.*). Pursuant to these regulations, a groundwater discharge permit must be obtained from NMED prior to the use of a groundwater management injection well. These regulations also control discharges from UIC wells to protect groundwater that has an existing concentration of 10,000

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<sup>1</sup> NMSA 1978 § 72-5A-6 (1999)

<sup>2</sup> NMSA 1978 § 72-5A-8 (1999)

<sup>3</sup> NMSA 1978 § 74-6-1 *et seq.* (1967)

milligrams per liter (mg/L) of total dissolved solids. Groundwater management injection wells used to replenish water in an aquifer are governed by the UIC regulations.

This alternative assumes that all injected water will be treated to drinking water standards. Drinking water standards are governed through federal regulations promulgated through the SDWA. NMED administers the Drinking Water Bureau, which works to preserve, protect, and improve New Mexico's drinking water quality, with an emphasis placed on upholding the SDWA. Water quality standards promulgated under the SDWA can be found generally at 40 C.F.R. Parts 141, 143.

The ownership of any water saved through the use of an aquifer storage and recovery project depends on whether the entity undertaking the project is a water right permit holder abiding by the terms of its aquifer storage permit. The right to divert and consume water is limited by conditions of a permit. If, through conservation measures, a permittee reduces the amount of water it is consuming under its permit, the "saved" water should be available to the permittee for further use.

### **3.4 Local**

There are no local legal issues related to this alternative.

## Legal Feasibility Fact Sheet

### Alternative 24: Reuse Greywater

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-24: Promote, through incentives, on-site residential and commercial greywater reuse and recycling.

#### 2. Assumptions

- Assumes residential greywater reuse and recycling.
- Assumes review is of legality of greywater reuse, not legality of incentives to promote greywater reuse.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

There are no federal or compact legal issues related to this alternative.

##### 3.2 Tribal

There are no Tribal legal issues related to this alternative.

##### 3.3 State

“Greywater” is defined in New Mexico by regulation as “water carried waste from kitchen (excluding garbage disposal) and bathroom sinks, wet bar sinks, showers, bathtubs and washing machines. Greywater does not include water carried wastes from kitchen sinks equipped with a garbage disposal, utility sink, any hazardous materials, or laundry water from

the washing of material soiled with human excreta” (20.7.3.107(AF) NMAC). Essentially, greywater is any water, other than toilet water, draining from a household. Since greywater is normally thought of as household water, *commercial* greywater reuse and recycling must be examined only for those types of commercial entities which (1) produce greywater (for examples, hotels and restaurants) and (2) have a viable use for reclaimed greywater (for example, irrigation).

The current New Mexico Liquid Waste Disposal Regulations would apply to a plumbed greywater reuse system, since by definition those regulations apply to on-site liquid waste systems that are designed to receive and do receive 2,000 gallons or less of liquid waste per day (20.7.3.102(A) NMAC). The term “liquid waste,” by definition, includes greywater. Therefore, a person using a household greywater reuse and recycling system would have to apply for a liquid waste disposal permit (20.7.3.201(A) NMAC) or petition for a variance from such permitting requirement (20.7.3.202(A)).

During the 46<sup>th</sup> Legislature (First Session, 2003), House Bill 114 was introduced. This bill seeks to amend the New Mexico Water Quality Act (NMSA 1978, § 74-6-2 [1967]) to allow for the limited use of greywater without a permit. House Bill 114 defines “gray water” as “untreated household wastewater that has not come in contact with toilet waste and includes wastewater from bathtubs, showers, washbasins, clothes washing machines, and laundry tubs, but does not include wastewater from kitchen sinks or dishwashers or laundry water from the washing of material soiled with human excreta, such as diapers.”

Under House Bill 114, a permit would not be required for use of greywater for gardening or irrigation less than 250 gallons per day of private residential greywater if:

- (1) A constructed greywater distribution system provides for greywater overflow to go to the sewage or septic system
- (2) The greywater storage tank is covered to restrict access and to eliminate habitat for mosquitoes and the like
- (3) The greywater system is sited outside of a floodway

- (4) Greywater is vertically separated at least five feet above the ground water table
- (5) Greywater pressure piping is clearly identified as a nonpotable water conduit
- (6) Greywater is used on the site where it is generated and does not run off the property lines
- (7) Ponding is prohibited, and standing greywater does not remain for more than 24 hours
- (8) Greywater is not sprayed
- (9) Greywater used within municipalities or counties complies with all applicable municipal or county ordinances

### **3.4 Local**

There are no local legal issues related to this alternative.



## Legal Feasibility Fact Sheet

### Alternative 27: Reuse Treated Effluent

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-27: Reuse treated wastewater for non-potable uses.

#### 2. Assumptions

All treated wastewater comes from wastewater treatment plants.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

Any discharge of treated wastewater to surface water would require the discharger to obtain a National Pollution Elimination System (NPDES) permit, issued by the U.S. Environmental Protection Agency pursuant to the Clean Water Act.<sup>1</sup>

##### 3.2 Tribal

Any discharge of treated wastewater to surface water would require that any downstream water quality standards adopted by a Tribe would not be derogated.

##### 3.3 State

Any reuse of treated water as a land application (for example, for irrigation use) must be permitted by the State of New Mexico Environment Department (NMED). Such permitting is

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<sup>1</sup> 33 U.S.C. § 1342 (2002).

accomplished through NMED's Ground Water Quality Bureau, Pollution Prevention Section. By regulation, "no person shall cause or allow effluent or leachate to discharge so that it may move directly or indirectly into ground water unless he is discharging pursuant to a discharge permit issued by the secretary [of NMED]. When a permit has been issued, discharges must be consistent with the terms and conditions of the permit" (20.6.2.3104 NMAC).

In issuing such permits for the use of domestic wastewater effluent for irrigation, NMED currently follows guidelines implemented in 1985 (NMEID Policy for the Use of Domestic Wastewater Effluent for Irrigation, December, 1985). The guidelines generally outline conditions a discharger may expect in a permit. For example, application of wastewater effluent for irrigation must occur at times when public contact is minimal; all domestic wastewater lines used for irrigation must be labeled as nonpotable; wastewater systems must have no direct or indirect cross connections with potable water systems; and domestic wastewater, even if disinfected, cannot be sprayed within 100 meters of houses, nor can food crops be sprayed. More specifically, wastewater used for surface irrigation of food crops or for the irrigation of freeway and similar landscapes must be disinfected so that the fecal coliform bacteria concentration does not exceed 1,000 organisms per 100 milliliters (ml). Wastewater used for the irrigation of parks, playgrounds, school yards, golf courses, cemeteries and similar areas must be disinfected so that the fecal coliform bacteria concentration does not exceed 100 organisms per ml.

Another state legal issue which arises under this alternative is whether return flows to a wastewater treatment plant can be reused without violating a State Engineer permit. If a water supplier wishes to reuse or recycle effluent directly for immediate use, it will result in less water returning to the river system for use by other users and, consequently, raises questions of whether State Engineer approval is necessary and whether other users may oppose the reuse.

A water supplier may wish to go to a reduced or no-discharge system, where treated effluent is reused and consumed for either turf irrigation or manufacturing/industrial purposes. Where the State Engineer has already issued a permit to divert a specified quantity of water with no return-flow requirement, the permittee may proceed to reuse treated effluent. Other than the power to prohibit a user from using more water than permitted, the State Engineer's authority is restricted to evaluating proposed new uses or new points of diversion to determine whether the change would impair other users or be contrary to public welfare or conservation. Accordingly, the State

Engineer lacks jurisdiction to regulate the implementation of a reduced discharge system, as long as the system would not result in the use of municipal water in a place, for a purpose, or in an amount not already allowed by the city's permit.

In the case of *Reynolds v. City of Roswell* (99 N.M. 84, 654 P.2d 537 [1982]), the New Mexico Supreme Court addressed the issue of the State Engineer's imposition of a return-flow requirement on a city permit that previously contained no condition. The court held that the requirement was unlawful, concluding that all of the water appropriated under the permit could be used and consumed by the city, as the water was artificial water belonging to the city.<sup>1</sup>

A more complex question concerns a municipality's ability to reuse waters when some or all of its permits contain discharge requirements. A return-flow condition will typically require a city to return all measurable return flow to the river, including sewage effluent, or may state a percentage of pumping, such as 30 percent, that must be returned to the river system. Under these circumstances, the municipality may not use more than its consumptive use right. However, it could reuse some or all of its effluent if it reduced its pumping correspondingly, so that the total consumptive use did not increase. In other words, by limiting diversions under a permit to the consumptive right and replacing any consequent shortfall in municipal supply with effluent, the municipality could make use of its return flows within its legal authority. Again, as long as the substitution of effluent did not result in a change in the purpose or place of use of municipal water, State Engineer approval would not be necessary, in most instances. However, the first use plus the reuse must stay within the total allowed consumptive right.

With respect to challenges by downstream users, the issue is one of title to water once it is released back into a public watercourse. New Mexico law contains an exemption for artificial waters from the general rule that waters returned to the river system are appropriable public waters. The fact that a city has discharged waters in the past does not extinguish the city's right to its use and consumption and, further, does not create a right to the waters in another; a downstream user could not assert a claim against the city for the use of the discharged effluent, absent agreement by the city.<sup>2</sup> However, if the reduced discharge left less water for a

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<sup>1</sup> 99 N.M. 87-88, 654 P.2d 540-1 (1982).

<sup>2</sup> 72-5-27 NMSA 1978 (1907)

downstream senior user, replacement of the reduced discharge could be required in times of shortage.

### **3.4 Local**

There are no local issues related to this alternative.

## Legal Feasibility Fact Sheet

### Alternative 39: Desalination

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-39: Utilize technological advances for treating deep saline and brackish water for potable or non-potable use in the region.

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

Brackish water could be appropriated by the State Engineer to meet state-line compact delivery requirements. Further, any discharge of brackish water to surface water would require the discharges to obtain a National Pollution Elimination System (NPDES) permit, issued by the U.S. Environmental Protection Agency pursuant to the Clean Water Act.<sup>1</sup>

##### 3.2 Tribal

There are no Tribal legal issues related to this alternative.

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<sup>1</sup> 33 U.S.C. § 1342 (2002).

### 3.3 State

The legal restraints arising in the context of the groundwater desalination are primarily state-based. In New Mexico, the State Engineer has no jurisdiction over aquifers that are 2,500 feet or more below the surface of the ground *and* contain nonpotable water (defined as water containing more than 10,000 parts per million of total dissolved solids).<sup>1</sup> Thus, one way to acquire new, unappropriated water is to tap nonpotable water that meets both these criteria. Conversely, if the water to be appropriated fails to meet one of these two criteria, such water can be appropriated only upon application to the State Engineer, as described below.

Before a well can be drilled in such an aquifer that meets both criteria for depth and potability, a “notice of intent” to drill such a well must be filed with the State Engineer and published in a newspaper in the county in which the well will be located. Such notice must state the location and depth of the proposed well, the purpose for which the water will be used, and the estimated amount of water that will be used. The proposed well can be drilled ten days after publication of the notice.<sup>2</sup>

Any person claiming impairment of existing water rights due to an appropriation of nonpotable water may bring an action in state court.<sup>3</sup> Such impairment may be subject to a plan of replacement pursuant to state law (NMSA 1978, §72-12A-4 [1980]). Once acquired, nonpotable water that will be used for municipal purposes must be treated to comply with Safe Drinking Water Act standards (42 U.S.C. 200f *et seq.* [2002]) and New Mexico’s drinking water regulations (20.7.1 NMAC). If the water is meant for nonpotable use (e.g., irrigation), applicable land application standards must be met. See legal feasibility fact sheet for A-27, *Reuse Treated Effluent*.

Brackish water available in the region generally does not meet the criteria necessary to avoid State Engineer jurisdiction, since the aquifer in the region with brackish water is less than 2,500 feet above the surface of the ground. Therefore, any appropriation of this water requires

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<sup>1</sup> NMSA 1978, §72-12-25 (1967).

<sup>2</sup> NMSA 1978, § 72-12-26 (1967)

<sup>3</sup> NMSA 1978, §72-12-28 (1967)

submission of an application to the State Engineer.<sup>1</sup> However, the groundwater in the region is generally considered to be connected to surface water, which means that no unappropriated water is available for new permits. Thus, a permit can only be issued if surface water offset rights are obtained. In addition, such a transfer can occur only after publication and notice and after a determination that the proposed appropriation and its point of diversion and place and purpose of use will not impair existing water rights, will not be contrary to the conservation of water, and will not be detrimental to the public welfare.<sup>2</sup>

The state legal restraints associated with the disposal of brine include the necessity of obtaining a groundwater discharge permit pursuant to the state Underground Injection Control (UIC) Program, as implemented through the Water Quality Act (NMSA 1978 § 74-6-1 *et seq.*) and the UIC regulations (20.6.2.5000 NMAC).

### **3.4 Local**

There are no local issues related to this alternative.

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<sup>1</sup> NMSA 1978, § 72-12-1 (1931)

<sup>2</sup> NMSA 1978, § 72-12-3 (1931)

## Legal Feasibility Fact Sheet

### Alternative 18: Urban Conservation

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-18: Adopt and implement local water conservation plans and programs in all municipal and county jurisdictions, including drought contingency plans.

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

There are no federal or compact legal issues related to this alternative.

##### 3.2 Tribal

There are no Tribal legal issues related to this alternative.

##### 3.3 State and Local

This alternative relates to the imposition of local water conservation ordinances by municipalities and counties within the region. If such ordinances restrict the use of “private water” (for example, domestic or commercial well water), such ordinances can be challenged in two ways: (1) as an unconstitutional “taking” of property and (2) as an improper infringement upon the regulatory authority of the State Engineer. Due to the police powers afforded to both municipalities and counties, such challenges would most likely fail. Since both state and local legal issues are intertwined in this analysis, they will be examined concurrently.



### 3.3.1 Police Powers of Municipalities and Counties

The power of a municipality to enact water ordinances emanates from several sources. If the municipality is a home rule municipality (such as Albuquerque) it “may exercise all legislative powers and perform all functions not expressly denied by general law or charter” (N.M. Const. Art. X, § 6 (D)). “Thus, home rule municipalities do not look to the legislature for a grant of power to legislate, but only look to statutes to determine if any express limitations have been placed on that power.”<sup>1</sup> There are no statutes in New Mexico that expressly limit the ability of Albuquerque or other home rule municipalities to enact conservation ordinances.

Further, several statutory provisions specifically allow municipalities to regulate wells and water. First, pursuant to NMSA 1978, § 3-53-1 (D) (1965), a municipality may regulate the use of wells. Second, pursuant to NMSA 1978, §3-53-2 (1965): “In order to prevent waste and to conserve the supply of water, a municipality which owns and operates a water utility, or has granted a franchise for the operation of a public water system, may by ordinance regulate and restrict the use of water.”

Two other statutes specifically allow municipalities to regulate domestic wells, another source of “private” water. Pursuant to NMSA 1978, §72-12-1 (A) (1931), a State Engineer permit for domestic water use within a municipality must be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978. Another statute, NMSA 1978, § 3-53-1.1 (1965), restricts the drilling of new domestic wells if the property line of the applicant is within 300 feet of the municipal water distribution lines and the property is located within the municipal limits. An issue that arises upon examination of these statutes is whether, by limiting the power of municipalities to regulate domestic wells, the legislature did not intend for private, commercial use of water to be regulated by municipalities. Although a challenge to a municipality’s power to enact conservation ordinances could be brought on the grounds that the legislature, when allowing for the municipal regulation of domestic wells did not allow for the same regulation of private, commercial water, such a challenge would be difficult, in light of the home rule provisions and the power of a municipal utility to enact ordinances to regulate and restrict the use of water.

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<sup>1</sup> State ex rel. Haynes v. Bonem, 114 N.M. 627, 631, 845 P.2d 150, 154 (1992)

Counties within the region have similar powers to municipalities. Pursuant to NMSA 1978, § 4-37-1 (1975), all counties are granted the same powers as municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties. Included in the powers granted to counties are those which are necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of any county or its inhabitants. This broad grant of power would necessarily include the power to enact conservation or drought ordinances. NMSA 1978, § 4-37-1 (1975) also allows the board of county commissioners to make and publish any ordinance to discharge powers not inconsistent with statutory or constitutional limitations placed on counties.

The question becomes whether these statutory provisions are broad enough to allow a municipality or county to regulate the use of private water. Although this specific issue has not been tested in New Mexico, it appears that these statutes, along with the home rule provision, convey adequate power to enact such ordinances.

### *3.3.2 Regulatory Taking*

It is unconstitutional for a governmental body to “take” private property without adequate compensation. The question is whether the action by a municipality or county within the Middle Rio Grande planning region to limit the use private water by ordinance represents an unconstitutional taking, or in other words, to a taking by regulation(regulatory taking). A very recent United States Supreme Court case definitely answers this question, and shows that such actions do not represent a regulatory taking, since they do not deprive such water users of all economically beneficial use of their property.<sup>1</sup> This decision comports with a number of other regulatory takings cases, including *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566 (10th Cir. Wyo. 1995) (citing *Dolan v. City of Tigard*, 512 U.S. 374 [1994]), which found that a regulation “goes too far” so as to effect a regulatory taking if: (1) it deprives an individual of all economically beneficial use of the property or (2) it does not substantially advance legitimate state interests. Clearly, conservation and drought management imposed by a municipality or county advances legitimate state interests.

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<sup>1</sup> *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)

### 3.3.3 Preemption

A county or municipal ordinance cannot be sustained to the extent that it is contradictory to, or inconsistent with, a state statute. In other words: Is the ordinance preempted by a state statute? The question becomes whether the powers and jurisdiction conferred upon the State Engineer preempts counties and municipalities from exercising control over private water use.

Under the law of preemption, the ability to regulate within an area may be preempted either expressly, by the language of a statute, or by implication, due to a conflict between the ordinance and the contents, purposes, or pervasive scheme of the statute (*San Pedro Mining Corp. v. The Board of County Commissioners of Santa Fe County*, 121 N.M. 194, 197, 909 P.2d 754, 757 [Ct. App. 1995]). In other words, the court must determine whether the statutory scheme is so pervasive that it effectively precludes the co-existence of municipal or county regulation, or whether the local ordinance conflicts with the state statute or stands as an obstacle to accomplishing the legislature's objectives (*Id.* [citation omitted]) Since there is not a state statute in place that expressly prohibits a municipality or county from enacting water conservation ordinances, express preemption could not be argued.

But, even in the absence of express preemption by the legislature, an ordinance may be preempted if it conflicts with a state statute, or if the statute demonstrates an intent to occupy the entire field (*Id.* at 199, 909 P.2d at 759). The question becomes whether an ordinance conflicts with the power afforded by the legislature to the State Engineer. In New Mexico, the legislature has conferred upon the State Engineer the general supervision of the waters of the state and of the measurement, appropriation, and distribution thereof (NMSA 1978, § 72-2-1 [1907][emphasis added]).

This particular issue of whether the State Engineer's powers preempt the ability of a county or municipality to enact conservation ordinances has not been tested in New Mexico courts. Although arguments could be made to support the position that the State Engineer's powers "trump" such ordinances, the better analysis would conclude that the State Engineer's powers do not preempt the ability of municipalities and counties to enact such ordinances. This is because such ordinances do not specifically conflict with the State Engineer's powers, nor do they interfere with the ability of the State Engineer to generally supervise the distribution of water, nor are they inconsistent with the purposes of the legislature in conferring power to the State Engineer. Further, the purpose of the Water Code (the compilation of all statutes

regulating water in New Mexico) is to conserve, protect and develop the waters of the state (State ex rel. Red River Valley Co. v. District Court, 39 N.M. 523, 51 P. 2d 239 [1935]). Thus, a municipality or county's desire to conserve water through the enactment of conservation ordinances does not conflict with the New Mexico's overall statutory scheme pertaining to water use.

## Legal Feasibility Fact Sheet

### Alternative 21: Urban Water Pricing

*Acknowledgements: This legal feasibility fact sheet was written by John Utton, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-21: Examine a variety of water pricing mechanisms and adopt those that are most effective at conserving water. The mechanisms to be examined include: a) price water to reflect the true value, b) institute a moderately increasing block price schedule, c) institute a steeply increasing block price schedule, and d) other feasible incentives and subsidies for conserving water.

#### 2. Assumptions

This alternative only applies public and private water utilities. It does not, for instance, apply to providers of irrigation water.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

This alternative is essentially a state and local legal issue. In the Middle Valley, water for municipal and irrigation uses is provided under contracts with the U.S. Bureau of Reclamation for delivery of San Juan-Chama Project water and irrigation water. As a result, price adjustments for that bulk water are not feasible and are not the focus of this alternative. In addition, where a water recipient owns the water right for use of the delivered water (e.g., the Middle Rio Grande Conservancy District [MRGCD], valley farmers, private water users, and public entities, such the City of Albuquerque), pricing changes may not only run afoul of contractual obligations but may also amount to a taking of private property, under the takings

clause of the Fifth Amendment of the U.S. Constitution. By contrast, the strongest basis for pricing regulation is within a municipal system with customers subject to conservation measures. Such a scenario is well within the general police powers of the local government and will allow reasonable price adjustments, as discussed below, without implicating and federal rights.

### **3.2 Tribal**

This alternative raises no Tribal issues.

### **3.3 State**

Under state law, local both public and private utilities have considerable latitude to structure water pricing to achieve conservation. A distinctive feature of a municipal utility is the New Mexico Public Regulation Commission's (PRC) limited oversight of it. Unless a municipality opts for general PRC regulation,<sup>1</sup> the utility is regulated by the municipality that owns it. While the PRC has limited oversight of revenue bond financing for the acquisition of municipal utilities, it does not have jurisdiction over municipal rates and service regulations.<sup>2</sup> The statute specifically withholds from the commission any jurisdiction to regulate or supervise the rates or service of any utility owned and operated by a municipal corporation—either directly or through a municipally owned corporation—unless the municipality exercises its option to be regulated under the provisions of the Public Utility Act, as provided in §62-6-5 NMSA 1978.<sup>3</sup>

Municipalities may levy assessments for the operation of the utility.<sup>4</sup> Section 3-23-1 allows municipalities to charge a reasonable payment in advance, or a reasonable deposit for water and sewer service, in addition to enforcing penalties for nonpayment.<sup>5</sup> A municipality may open, construct, repair, keep in order, and maintain water mains, laterals, reservoirs, stand pipes,

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<sup>1</sup> NMSA 1978 §§ 62-3-3(E), 62-6-5, 62-6-4 (A).

<sup>2</sup> NMSA 1978 § 62-6-4.

<sup>3</sup> 1957-1958 Op. Att'y Gen. No. 57-101.

<sup>4</sup> NMSA 1978 §3-18-25.

<sup>5</sup> NMSA 1978 §3-23-1.

sewers, and drains, and may assess and collect the amount necessary to cover the cost of the work.<sup>1</sup> The assessment must be reasonable according to the benefits accruing to the lot or land and to its value.<sup>2</sup>

Because, as discussed above, cities are exempt from PRC rate regulation, general standards of rate fairness apply. In *Apodaca v. Wilson*,<sup>3</sup> the court reiterated the requirement of fairness in determining municipal water utility assessments. The court found that where the municipality owns and operates a water and sewer system, the rates charged by it must be fair, reasonable and just, uniform, and nondiscriminatory.<sup>4</sup> The court held that the city has the power to set reasonable rates in excess of actual expenditures in furnishing municipally owned utility services, if such rates compare favorably with those received by private utility companies.<sup>5</sup>

A municipality owning and operating a water utility may levy, by general ordinance, a just and reasonable service charge for the purpose of (1) maintaining, enlarging, extending, constructing, and repairing water facilities and (2) paying the interest and principal on revenue bonds issued for the acquisition, condemnation, or construction of water facilities.<sup>6</sup> The service charge must be based upon a front-foot, volume of water, or other reasonable basis related to (1) an improved or unimproved lot or land that adjoins a street in which a water supply system exists or which is otherwise accessible to such water supply system or (2) premises and improvements otherwise situated but connected to the water system.<sup>7</sup>

Arguably, municipalities may apply water and sewer service revenues to any municipal purpose. The statute does not limit or prohibit the application of revenues from sewer or water systems

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1 NMSA 1978 §3-18-25.

2 *Id.* at (B)

3 86 N.M. 516, 525 P.2d 876 (1974).

4 *Id.* at 524.

5 *Id.*

6 NMSA 1978 §3-27-4 NMSA.

7 *Id.*; In determining whether the charge made is one of fee or assessment, the name given the charge is not controlling. *Leigh v. Hertzmark*, 77 N.M. 789, 427 P.2d 668 (1967).

operated by a city to other municipal purposes.<sup>1</sup> The only limitation, as in the case of any legislative action or function by the city, is that the city exercise its authority in a reasonable manner and act pursuant to constitutional authority.<sup>2</sup> To avoid claims of unreasonable pricing, the better practice is to reinvest additional revenues generated through price increases into water-related projects and programs, and thereby to operate the water department or municipal utility as an enterprise fund, where excess revenue are not shared with the general fund. Projects could include water conservation programs and water supply development projects.

In contrast, the rate structure for privately formed public water utilities is closely regulated by the state. Private parties may form public water utilities for irrigation, mining, manufacturing, domestic, and other public uses.<sup>3</sup> These public utilities are called investor-owned utilities (IOUs). They are governed by Chapter 62, Article 2 (Incorporation and Powers of Waterworks Act),<sup>4</sup> and are comprehensively regulated by the PRC under the Public Utilities Act.<sup>5</sup> IOUs may serve existing cities or towns, or may be formed to promote development, settlement, and improvements in outlying areas.<sup>6</sup> Regardless of the specific purpose of an IOU, it must serve a public use<sup>7</sup>.

Within a utility regulatory environment, an IOU public water utility will be allowed to recover its operating and capital costs and make a fair rate of return. Revenue enhancements (i.e., price increases) are allowed if it can be documented that the water utility has increased operating cost of service or additional capital expansion needs. Because price increases for water conservation goals may result in revenue enhancements and potentially excess profits,

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1 Apodaca v. Wilson, 86 NM 516, 523, 525 P.2d 876 (1974).

2 *Id.* at 523-524.

3 § 62-2-1.

4 Note: Chapter 62, Article 2 is repealed effective July 1, 2003. *Eds.*

5 Chapter 62, Article 3 Sections 1 to 5 NMSA 1978 (1999 Repl.); See also Suede Kelly, "Water Entities in New Mexico" presentation paper, CLE International New Mexico Water Law Conference, August 1995 at 2 (on file with author)

6 §62-2-1 NMSA 1978 (1999 Repl.).

7 *Id.*



increased revenues will have to be reinvested in operations and projects to avoid exceeding a fair rate of return.

### **3.4 Local**

Within the constructs of state law of reasonable pricing and fair return, design and implementation of an effective price structuring system is left to local control. For a municipal water utility a water rate increase is usually initiated by the water utility department whenever a rate increase is necessary to fund increased operating costs or capital expenditure needs of the public water system. City staff designs a new water rate structure, documenting that the proposed water rates will raise enough water revenue to cover operating costs and debt service on water revenue bonds without generating excess reserves. The proposed new water rates are presented to the City Council for review and approval. The Mayor then must sign off, after City Council approval. City Council and/or the Mayor could also initiate a water rate increase as part of a city water policy strategy to conserve water, with increased water revenues dedicated to fund water conservation programs or new water supplies for the city.

For a privately held public water utility, the manager of the private water utility would bring a proposal for a water rate increase to the PRC for approval. The proposal would have to document that the proposed new water rate structure would raise sufficient revenue to cover the operating cost of the private water utility as well as a fair rate of return on the utility's invested capital. The PRC staff would review the proposed new water rate structure and make recommendations to the commissioners, who would then exercise approval or disapproval authority.

## **Legal Feasibility Fact Sheet**

### **Alternative 7: Agricultural Metering**

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### **1. Definition of Alternative**

A-7: Meter and manage surface water distribution flows through all irrigation systems to conserve water.

#### **2. Assumptions**

- Metering and management would occur within and by the Middle Rio Grande Conservancy District (MRGCD)
- Metering and management would result in saved water

#### **3. Alternative Evaluation**

##### **3.1 Federal/Compact**

There are no federal or compact legal issues related to this alternative.

##### **3.2 Tribal**

There are no Tribal legal issues related to this alternative. Since Pueblo lands are located within the MRGCD, any changes to MRGCD conveyance systems could impact Pueblo lands.

### 3.3 State

The MRGCD has been granted broad powers by the New Legislature. Such powers necessarily include the power to meter and manage surface water distribution flows through the MRGCD system.<sup>1</sup> As such, there are no legal barriers to metering and managing water within MRGCD, with a resulting savings in water. The only state legal issue that arises is to determine who, or which entity, has the right to use the saved water.

This alternative anticipates that the MRGCD would meter and manage surface water distribution flows throughout its system. The purpose of using such metering and management would be to increase irrigation efficiency, and save water. To determine how the saved water could be used, an understanding of MRGCD's permitted water rights is critical.

The MRGCD has two surface water permits, numbered 0620 and 1690. On November 15, 1930, the MRGCD filed Application No. 0620 for a permit to change points of diversion from the Rio Grande. The application sought to change the diversion points of 71 old ditches diverting water from the Rio Grande and located within the MRGCD. The application proposed abandoning these 71 diversion points, and constructing six new diversion dams to replace the old diversions. The application also stated the water rights claimed by the MRGCD as totaling 123,267 acres of land, of which 80,785 acres were considered pre-MRGCD irrigated acreage, and 42,482 were described as new acreage to be irrigated. Permit No. 0620 was granted by the State Engineer on January 26, 1931. Further, the State Engineer granted MRGCD the right to store 198,110 acre-feet per year at El Vado Reservoir pursuant to Permit No. 1690, issued on August 20, 1930. This is not a water right, but a right to use storage space.

In New Mexico, beneficial use is the measure of a water right (N.M. Const. art. XVI, § 3). To show beneficial use, all water right permit holders have a duty (usually implemented through a permit condition) to file with the State Engineer a "proof of beneficial use" (PBU). The MRGCD has this duty, but has not yet filed its PBU for Permit Nos. 620 and 1690. The purpose of the PBU is to enable the State Engineer to issue a license to appropriate water. Pursuant to the Rules and Regulations Governing the Appropriation and Use of the Surface Waters of the State of New Mexico, Section II.O (Aug. 1953), a license defines the extent and conditions of use

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<sup>1</sup> NMSA 1978, § § 73-14-39, 48 (1927)

under which a water right is granted. It is limited by actual beneficial use, and cannot be extended beyond the limits prescribed in the permit. (Id.) When issued, MRGCD's license will define its right to divert, use, and store water.

It is impossible at this time to determine the ownership of any saved water resulting from more efficient use of water within the MRGCD under this alternative. Once MRGCD's license is issued, any water saved may ultimately be available to water users within the MRGCD, if such saved water falls within MRGCD's licensed right to divert, use, and store water. By way of a very simplified illustration, if MRGCD's license allows it to divert 7.1 acre-feet per acre to irrigate 100,000 acres, and through efficiencies, it is able to irrigate the same number of acres with a diversion of 6.5 acre feet per acre, any saved water could be used by the MRGCD. Conversely, if any saved water does not fall within the parameters of MRGCD's license, under the current state of the law, any saved water would return to the system as "public water".

### **3.4 Local**

There are no local legal issues related to this alternative.

## Legal Feasibility Fact Sheet

### Alternative 9: Agricultural Conveyance

*Acknowledgements: This fact sheet was written by Susan C. Kery, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-9: Develop conveyance alternatives for water transportation in agricultural irrigation systems.

#### 2. Assumptions

- The conveyance alternatives would be developed within and by the Middle Rio Grande Conservancy District (MRGCD).
- Use of the conveyance alternatives would result in saved water.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

There are no federal or compact legal issues related to this alternative.

##### 3.2 Tribal

There are no Tribal legal issues related to this alternative. Since Pueblo lands are located within the MRGCD, any changes to MRGCD conveyance systems could impact Pueblo lands.

##### 3.3 State

There are no legal barriers to developing conveyance alternatives to transport water through agricultural irrigation systems. The only state legal issue that arises is to determine who, or which entity, has the right to use the saved water.

This alternative anticipates that the MRGCD would develop and use conveyance alternatives. The purpose of these conveyance alternatives would be to increase irrigation efficiency and save water. To determine the use of such saved water, an understanding of MRGCD's permitted water rights is critical.

The MRGCD has two surface water permits, numbered 0620 and 1690. On November 15, 1930, the MRGCD filed Application No. 0620 for a permit to change points of diversion from the Rio Grande. The application sought to change the diversion points of 71 old ditches diverting water from the Rio Grande and located within the MRGCD. The application proposed abandoning these 71 diversion points, and constructing six new diversion dams to replace the old diversions. The application also stated the water rights claimed by the MRGCD as totaling 123,267 acres of land, of which 80,785 acres were considered pre-MRGCD irrigated acreage, and 42,482 were described as new acreage to be irrigated. Permit No. 0620 was granted by the State Engineer on January 26, 1931. Further, the State Engineer granted MRGCD has a right to store 198,110 acre-feet per year at El Vado Reservoir pursuant to Permit No. 1690, issued on August 20, 1930. This is not a water right, but a right to use storage space.

In New Mexico, beneficial use is the measure of a water right (N.M. Const. art. XVI, § 3). To show beneficial use, all water right permit holders have a duty (usually implemented through a permit condition) to file with the State Engineer a "proof of beneficial use" (PBU). The MRGCD has this duty, but has not yet filed its PBU for Permit Nos. 620 and 1690. The purpose of the PBU is to enable the State Engineer to issue a license to appropriate water. Pursuant to the Rules and Regulations Governing the Appropriation and Use of the Surface Waters of the State of New Mexico, Section II.O (Aug. 1953), a license defines the extent and conditions of use under which a water right is granted. It is limited by actual beneficial use, and cannot be extended beyond the limits prescribed in the permit. (Id.) When issued, MRGCD's license will define its right to divert, use, and store water.

It is impossible at this time to determine the ownership of any saved water resulting from more efficient use of water within the MRGCD under this alternative. Once MRGCD's license is issued, any water saved may ultimately be available to water users within the MRGCD, if such saved water falls within MRGCD's licensed right to divert, use, and store water. By way of a very simplified illustration, if MRGCD's license allows it to divert 7.1 acre-feet per acre to irrigate 100,000 acres, and through efficiencies, it is able to irrigate the same number of acres with a

diversion of 6.5 acre feet per acre, any saved water could be used by the MRGCD. Conversely, if any saved water does not fall within the parameters of MRGCD's license, under the current state of the law, any saved water would return to the system as "public water".

### **3.4 Local**

There are no local legal issues related to this alternative.

## Legal Feasibility Fact Sheet

### Alternative 30: Land Use

*Acknowledgements: This legal feasibility fact sheet was written by John Utton, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-30: Adopt policies to integrate land use and transportation planning and water resource management in all government jurisdictions in the Middle Rio Grande water planning region.

#### 2. Assumptions

This alternative would be carried out at the local level by mutual agreement, not by a top-down change in state law.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

The adoption by local governments of ordinances and plans to implement regional land-use management linked to water availability does not raise new federal legal issues and does not implicate the Rio Grande Compact. With respect to federal protections, especially governing due process and private property rights, those legal protections apply whether a land use or other development regulation applies locally or regionally.

##### 3.2 Tribal

This alternative raises no Tribal issues, unless the scope of regional planning included Pueblo land uses. In that event, Tribal authorization and participation would be required.



### **3.3 State**

A regional or multi-jurisdictional land-use initiative would not implicate state law if management took the form of cooperation among local, and perhaps state, Tribal, and federal agencies, within their existing authorities.

### **3.4 Local**

As discussed under A-67, *Water Authority/Banking*, a regional organization could take various forms. The role of regional planner and coordinator would fit within the function already established for the Mid-Region Council of Governments. A regional land-use management authority would require agreement from those local entities deciding to participate. A Joint Powers Agreement among local governments would be the most likely vehicle for creating such an authority.

A cooperative land use authority could call on local, state, and federal participants to adopt rules and ordinances that: (1) integrate or create linkages between water management and land use plans, such as policies requiring higher densities, conservation, xeriscaping, storm water management and reuse, (2) impose development fees that reflect the cost of water, (3) require proponents of land uses requiring additional water to acquire the commensurate water rights, and (4) use transfer of development rights to protect hydrogeologically sensitive areas.

**See the Technical and Physical Feasibility Fact Sheet for  
Alternatives 67, 144, and 63  
in  
*Evaluation of Alternative Actions for  
Technical, Physical, Hydrological, and Environmental Feasibility***

## Legal Feasibility Fact Sheet

### Alternative 52: Growth Management

*Acknowledgements: This legal feasibility fact sheet was written by John Utton, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-52: Develop a sustainable and coordinated growth management plan for adoption and implementation by local governments in the Middle Rio Grande region in order to: (1) reduce water consumption, (2) minimize impact on water resources, (3) encourage conservation-oriented economic development, and (4) ensure adequate water supplies for any proposed development.

#### 2. Assumptions

This alternative assumes that Pueblo governments would not likely be parties to regional growth management plans.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

The adoption by local governments of ordinances to implement a regional and coordinated growth management plan does not raise new federal legal issues and does not implicate the Rio Grande Compact. With respect to federal protections, especially due process and private property rights, those legal protections apply whether a land use or other development regulation applies locally or regionally. See legal fact sheet for A-18, *Urban Conservation*, for a discussion of the legal implications of the “taking” of private property.

##### 3.2 Tribal

There are no Tribal legal issues related to this alternative.

### 3.3 State

The technical feasibility fact sheet for A-52, *Growth Management* (in *Evaluation of Alternative Actions for Technical, Physical, Hydrological, and Environmental Feasibility*), raises several legal issues related to the power of counties and municipalities to enact managed growth systems, and to the part the availability of water plays in such systems. Managed growth systems have been litigated in California, Colorado, New York, and a number of other states. Well-designed systems have almost always been upheld. The typical issues that have been raised in these cases have included a taking of private property without just compensation, violation of due process rights, and infringement upon the right to travel. See legal fact sheet for A-18, *Urban Conservation*, for a discussion of the legal implications of the “taking” of private property.

On the other hand, California courts have invalidated planning processes due to an inadequate discussion of water. (See, e.g., *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, 91 Cal. App. 4th 342 [2001]). Although these decisions were interpretations of the California Environmental Quality Act, and do not apply to New Mexico, they indicate a trend in recognizing the importance of linking water supplies and land use planning.

The issue of whether a planned development which will not be on a municipal or county water supply has an adequate supply of water is addressed primarily through the New Mexico Subdivision Act, NMSA 1978, Chap. 47, Art. 6 (1973). It is important to distinguish the New Mexico Subdivision Act from the Land Subdivision Act, NMSA 1978 § § 47-5-1 to 8 (1967). Pursuant to NMSA 1978, § 47-5-9 (1973), the Land Subdivision Act applies to all subdivisions except where the subdivision is located within a county for which subdivision regulations have been adopted as provided in the New Mexico Subdivision Act. The Land Subdivision Act was passed in response to complaints of consumer fraud and gave local government control, primarily over misrepresentation. The Land Subdivision Act has no specific requirement requiring a showing of water availability.

The New Mexico Subdivision Act has a requirement for a showing of water availability. Before approving the final plat for a subdivision containing twenty or more parcels, any one of which is two acres or less in size, the board of county commissioners for the county in which the proposed subdivision is located may require that the subdivider provide a copy of a surface or groundwater water permit obtained from the state engineer for the subdivision water use. In

acting on the permit application, the State Engineer must determine whether the amount of water permitted is sufficient in quantity to fulfill the maximum annual water requirements of the subdivision, including water for indoor and outdoor domestic uses. The board of county commissioners may elect not to approve the final plat if the state engineer has not issued a permit for the subdivision water use. This statute may be deemed insufficient in ensuring that proposed developments have adequate water supplies, since the requirements imposed by the statute are not mandatory. The board of county commissioner may require that an adequate supply of water be shown through the acquisition of a permitted water right, and the board may elect not to approve the final plat if the state engineer has not issued a permit for the subdivision water use. Conversely, the board of county commissioners has the power under this statute to allow a subdivision to be developed without a adequate water supply. Nonetheless, it would be within the powers a county to impose regulations or ordinances making the availability of the water supply mandatory. See legal fact sheet for A-18 for a discussion of county powers.

The issue of the imposition of impact fees on developers arises in the context of obtaining a development's water supply through a municipal or county utility. An "impact fee" is defined in the Development Fees Act (NMSA 1978, § 5 8 1 to 5 8 42 [1993]) as "a charge or assessment imposed by a municipality or county on new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development."<sup>1</sup> Thus, municipalities and counties can use impact fees to offset the costs of operating and maintaining their water utilities. An impact fee cannot be enacted or imposed unless it complies with the Development Fees Act.<sup>2</sup> Such a fee can only be imposed upon notice and a public hearing to "consider land use assumptions within the designated service area that will be used to develop the capital improvements plan."<sup>3</sup> Finally, any new development for which an impact fee has been paid is entitled to the permanent use and benefit of the services for which the fee was exacted and is entitled to receive prompt service from any existing facilities with actual capacity to serve the new service units.<sup>4</sup>

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<sup>1</sup> NMSA 1978, § 5 8 2(I) (1993)

<sup>2</sup> NMSA 1978, § 5 8 3 (1993).

<sup>3</sup> NMSA 1978, § 5 8 19 (1993).

<sup>4</sup> NMSA 1978, § 5 8 12 (1993).

### **3.4 Local**

A regional and coordinated growth management plan would need agreement from those local entities deciding to participate. As discussed under the technical fact sheet for A-67, *Water Authority/Banking* (in *Evaluation of Alternative Actions for Technical, Physical, Hydrological, and Environmental Feasibility*) such an organization could take various forms, and has legal and political considerations which must be measured.

## Legal Feasibility Fact Sheet

### Alternative 59: Severance Tax

*Acknowledgements: This legal feasibility fact sheet was written by John Utton, Esq. of Sheehan Sheehan & Stelzner, P.A. as part of the “Evaluation of Alternative Actions for Technical, Physical, Hydrological, Environmental, Economic, Social, Cultural, and Legal Feasibility and Water Quality Issues and Legal Overview” contracted to Daniel B. Stephens & Associates, Inc. The format and organization of the fact sheet and definition of the alternative were developed by the Water Assembly.*

#### 1. Definition of Alternative

A-59: Establish a State-based water severance tax for water projects, planning, and conservation.

#### 2. Assumptions

None.

#### 3. Alternative Evaluation

##### 3.1 Federal/Compact

There are no specific federal impediments to imposition by the state of a tax on water use. As a general matter, such a tax must not infringe on constitutionally protected rights, as is the case with any other tax. A tax on water use would have to be carefully crafted to take into account the varying legal status of water users. Some water users own water rights, and thus have a protectible real property right. Others are customers and do not themselves own water rights. A middle group, such as valley farmers, may own their own water rights but look to a water providing entity to deliver their water, and in that latter sense are also customers. As discussed below, a new tax must take into account these different interests so as not to unduly impact one group over the other.

There are no Compact prohibitions to institution of a water tax.

### **3.2 Tribal**

This alternative may raise Tribal issues. Generally, state tax laws do not apply on Tribal lands, but there may be instances where a tax could apply to use of Pueblo water. If, for instance, a Tribe sold water off its lands, a state tax might apply.

### **3.3 State**

The primary legal obstacle is passage of a state law imposing a water tax. The power of taxation is inherent in the state, and may generally be exercised through its Legislature in its discretion without hindrance, except in so far as limited by the Constitution.<sup>1</sup> Given the variety of water users and water rights owners in this state, a uniform, across-the-board excise or severance tax does not appear legally feasible. If for example every water user paid the same amount for an acre-foot of water, for instance \$100, that amount would be relatively affordable for municipal water utility customers, but for many farmers would likely make prohibitive continued farming. Taken in the context that utility customers do not own water rights, while farmers typically do and may have negotiated long-term or perpetual, often federal contracts at a set or stable price for delivery of water, a uniform tax holds little promise. For utility customers, such a tax would be a fraction of their water payments, but for farmers it might be many times their total annual water payments.

A tax based on transaction amount, like a gross receipts tax, is more legally viable. Under that approach, a specified percentage of the amount paid for water would be assessed and collected. Although it would omit individuals who self-supply, it would capture all those paying others to deliver supply, including private and public municipal and domestic suppliers and irrigation water suppliers. It could be collected in the same way that gross receipts taxes are currently collected. It would also avoid the necessity of trying to meter the amount of all water use in order to calculate the tax.

The corollary issue is how the collected funds would be disbursed. Under state law there are models for either state collection and distribution or local collection and use.

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<sup>1</sup> *Asplund v. Alarid*, 29 N.M. 129, 219 P. 786, 789 (1923).



### **3.4 Local**

There are no local legal barriers to enactment of a state water tax. Once a law were in effect, it may be necessary to adopt local ordinances to assess and collect the tax proceeds, depending on how administration of the tax is structured. In addition, a local or regional process might need to be established for allocation of the proceeds.