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Census Bureau Releases Local Government Data

The Governments Division of the U.S. Census Bureau has issued a summary of local governments in New Mexico. Their summary states that “government is an intricate and perplexing subject to understand at every level. Traditional federalism is no longer the case. We now live in a time that is intertwined and dependent upon one another.

Providing every American with the most comprehensive, comparable and precise account of government financial activity is what the U.S. Census Bureau strives to accomplish.”

The Governments Division’s data are used to account for approximately 12 percent of the nation’s Gross Domestic Product and are the basis for the Flow of Funds for the Federal Reserve and the National Income Products Account for the Bureau of Economic Analysis. These dates serve as important indicators for national economic and public policy. Governments Division’s data serve as the foundation for developing national policy and analysis for a variety of entities, including state and local governments, the U.S. Congress, the private sector, teachers and students and the general public.

Some of the data for New Mexico include:

- 36th in population
- 32nd in overall number of local governments (863)
- 35th in number of counties (33)
- 39th in number of municipalities (104)
- 22nd in number of special district governments (633)
- 33rd in number of independent school districts (96)
- 36th in total amount of taxes collected
- 36th in expenditures on education

(Continued on page 2)

Plan to Protect Drinking Water: Why Are Source Water Protection Plans Important?

By Sandra Fallon, National Environmental Services Center

This is the first of a two-part article that provides a brief overview of water pollution and water use problems in the U.S., discusses how we currently go about managing these problems, and poses some considerations for moving ahead.

Water is critical to life. Ensuring that our drinking water sources are protected—now and in the future—not only means safe drinking water for us, but for our children and grandchildren.

Source water protection refers to the concept of protecting sources of drinking water, including water from lakes, rivers, and underground aquifers, from overuse and contamination. Source water protection plans can help drinking water systems and the communities they serve keep our drinking water safe. But that’s not the only reason for developing these plans. Consider the value of a dependable supply of clean, safe drinking water to the local economy, development opportunities, and quality of life. Or the importance of saving money on expensive water treatment costs, especially savings that can be realized from pollution prevention.

(Continued on page 5)

Drug Testing for Municipal Employees

By Randy Van Vleck
League General Counsel

In recent weeks, the League has been asked questions concerning drug testing of municipal employees. Some municipalities want to initiate a random drug testing policy for all employees; some already have such a policy in place and are seeking information on implementation of the program. This article is offered in an effort to try to bring the issue of drug testing into focus. As with all such articles, it is intended as general information and not as legal advice. Your municipal attorney or legal counsel should always be contacted about how the law applies to your municipality and any specific fact pattern.

The most frequently asked question is whether the municipality can perform random

(Continued on page 3)

Other data collected by the Division concerning local governments include the following:

State and Local Government Employment

Total Full-time Employees:	120,948
State:	45,276
Local:	75,672

State and Local Government Finances (thousands)*

Total Revenues:	\$20,972,137
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State:	17,103,483
Local:	7,656,419

Total Expenditures:

Total Expenditures:	\$18,122,659
State:	14,907,222
Local:	7,389,921

State and Local Debt Issued (thousands)*

Total:	\$12,194,625
State:	7,323,101
Local:	4,871,524

State and Local Government Cash and Security Holdings (thousands)*

Total:	\$52,885,121
State:	47,610,559
Local:	5,274,562



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drug tests. In true lawyer form, I will answer this question directly—"It depends." It really depends upon the specific fact situation and the particular employees you want to test. Generally, a municipality may conduct a random drug test (one initiated without individualized suspicion) only if there is a "special need" that outweighs the individual employee's privacy interest. See: *Skinner v. Railway Labor Executive's Association* 489 U.S. 602 (1989); *National Treasury Employees v Von Raab* 489 U.S. 656 (1989). This means that most municipal employees cannot be required to submit to random drug testing. A person must be under some sort of reasonable suspicion that is specific to that person before they can be subject to random drug testing. This may not be the case for private employers. Government entities are more restricted under the United States Constitution and the Fourth Amendment prohibition against unreasonable searches and seizures. Yes, a drug test is considered to be a "search" under the Fourth Amendment.

Employees who perform work in what are to be considered as "safety sensitive" or "security-sensitive" positions may, however, be drug tested on a random basis. This might include some, but not all police officers and firefighters, as well as backhoe and wastewater treatment plant operators. In some circumstances U.S. Department of Transportation regulations provide the authority to perform random testing. Absent a specific authorization, drug testing, especially random drug testing should only be conducted if there is an individualized reasonable suspicion that the individual is under the influence of drugs.

Random drug testing is authorized for those persons occupying "safety sensitive" positions. Examples that have been upheld by courts include: DOT-licensed operators of motor vehicles in excess of 26,000 pounds, school bus attendants and drivers, armed law enforcement officers whose duties involve the interdiction of drugs, and gas line workers. Some duties may seem to be safety sensitive, but they do not, standing alone, justify random drug testing. These positions include: handling money, driving a city vehicle, driving a police vehicle, working with the public and even a history of prior drug use. You should always consult with your municipal attorney before making a determination that a position or specific worker is considered to be in a safety sensitive position.

Other than random testing for safety sensitive positions, public employees may be drug tested during the application process after an offer of employment is made, but before the job is taken. This is called a "conditional offer of employment" and is contingent upon a "clean" drug screen. Employees may also be tested if they drive commercial vehicles and are subject to U.S. Department of Transportation regulations concerning drug testing. These regulations require and employee with a commercial driver's license (CDL) to be tested for drugs pre-employment, post accident, when there is reasonable suspicion and on other occasions provided for in the regulations. More information may be obtained at www.dot.gov/ost/dapc/employee.html. Finally, an employee may be tested if there is an individualized reasonable suspicion that the employee is using drugs. Reasonable

suspicion means that there is objective evidence such as appearance or behavior that would lead a reasonable person to believe that the person may be under the influence of drugs. Arguably an employee may be tested following an accident, if the employee's actions and appearance cause the supervisor to suspect that drugs may have been a factor in the accident.

Another factor to be considered is the requirement that the results of any drug testing be kept confidential. Drug testing is a medical test under the Americans with Disabilities Act and is required to be kept confidential. Results must be kept in a separate file apart from the regular personnel file, and access must be restricted only to those people with a need to know.

Municipalities should carefully consider any drug policy they choose to adopt. Such policies raise constitutional issues such as the right to privacy and the Fourth Amendment right to be free from unreasonable searches and seizures. Any policy should include which employees may be tested, when an employee may be tested, a minimally intrusive and private procedure to administer the test, reasonable notice provisions for those who will be tested, which positions are considered to be safety or security sensitive, and provisions and consequences for those who test positive for drugs. Policies must be strictly and consistently followed in order to afford the best protection for both the worker and the employer.

Most importantly, seek the advice of your HR director, municipal attorney and employment attorney prior to adopting and implementing a drug testing policy.

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Term Lengths and Limits

From National League of Cities

Common Term Lengths

The most common term length for chief elected officials (CEOs) is four years. However, the use of a four-year term varies based on the region of the city within the United States. In 89 percent of East South-Central cities, the four-year term length is applied to the CEO, while in New England, only 2 percent of cities impose a four-year term length for CEOs. Often the governance structure of a city correlates to the practice of term lengths given that only 1 percent of communities governed by a town meeting use a four-year term length whereas 57 percent of central cities employ a four-year term limit for CEOs. A two-year term is the second most frequent length of term, utilized by slightly more than 33 percent of cities polled.

Term Limits

A term limit is a clause placed in a constitution, statute or bylaw which limits the number of terms a person may serve in a particular elected office. For example, the 22nd Amendment of the United States Constitution states that no person can be elected to the office of President more than twice. Fort Collins, Colorado, demonstrates term limits in action on the city level. Council members are elected to a four-year term, with a limit of two total terms. As for the Mayor of Fort Collins, he or she can be elected for a two-year term, limited to three total terms in office.

Pros and Cons of Term Limits

Those who favor term limits feel they can reduce any potential abuses of power by incumbents who stay in office too long. Some believe term limits also encourage political participation by newcomers. Proponents of term limits see them as a tool to make government more responsive to public needs through a continuous process of renewal.

On the other hand, opponents to term limits maintain that elections already serve as a structural limitation. Some view term limits as an infringement on the public right to select a candidate they believe should remain in office, regardless of years served.

Critics of term limits feel the practice is unconstitutional and undemocratic and note that a seasoned official can bring valuable experience to their office. In recent years, the trend toward term limits in state and federal offices has not taken hold in municipal-level government. Of surveyed cities, just 9 percent chose to restrict the term of their chief elected official. Larger cities are more likely to limit the terms of their elected officials than smaller cities. Term limits have been employed most often in the Mountain division (30 percent) of the country. Of cities which apply term limits the most often, 55 percent restrict the Chief Elected Officials [CEO] to two terms.

Source: MacManus, Susan A. and Charles S. Bullock, III. "The Form, Structure, and Composition of America's Municipalities in the New Millennium." In *Municipal Year Book 2003*. Washington, DC: International City/County Management Association 2003, p. 3-18.

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Potential Threats to Local Water Sources

Any substance that goes down the drain, runs off of urban or agricultural landscapes, or is buried or stored underground, could eventually end up in drinking water sources. A variety of activities or land uses could pose a threat to your local waters, including agricultural practices, logging, mining, military bases, active and abandoned industrial or commercial facilities, hazardous waste sites, solid waste landfills (especially older ones), oil and gas operations, construction sites, storm water runoff from urban areas, failing septic systems and deteriorating sewer mains and wastewater treatment plant discharge, salt water intrusion (contamination) of coastal aquifers, forms of transportation that may create avenues for spills (railroads along rivers or creeks, storm water discharge from interstate highways, barges on rivers), underground tanks or wells that store waste disposal, and lawn care practices. The list could go on.

Another concern is the unsustainable use of groundwater from our underground aquifers. Over the past 75 years, as a result of improved energy sources and technologies for pumping groundwater to the surface, this resource has become an important supply of water in the U.S. Approximately one-half of the population relies on groundwater for drinking water, and up to three-fourths of groundwater withdrawals are used for agricultural irrigation. Although groundwater supplies in the U.S are vast, this water is essentially being pumped out of the ground faster than nature can replenish it. According to the U.S. Geological Survey, while the extent of depletion in groundwater levels due to increased pumping is not regularly monitored or analyzed, available information indicates that underground water-level declines in the U.S. are widespread. The consequences of these declines include increased pumping costs, water quality deterioration, reduced amount of water in streams and lakes, and land subsidence.

Current Measures That Protect Drinking Water Sources

According to Robert Glennon in his book *Groundwater Follies: Groundwater Pumping and the Fate of America's Fresh Waters*, groundwater withdrawal is regulated in different ways in different states. Many western states use the prior appropriation doctrine, which protects the rights of senior water users (those who were first to use the water). This doctrine generally means that water rights are not linked to land ownership, and senior users can continue to use it for beneficial purposes; subsequent users may use the remaining water only if it does not interfere with senior users' rights. Some western states and most eastern states rely on the reasonable use doctrine, which allows pumping for any beneficial use but does not protect senior pumpers from newer pumpers. Some states rely on the English rule of absolute ownership, which allows property owners to pump unlimited amounts from beneath their property. Two states require that all landowners above the aquifer share the water. Although some states require groundwater pumpers to obtain a permit from their state agency, the general outcome of these practices is that most states regularly allow new wells to be developed.

For surface water use, two water rights doctrines generally apply. Most western states rely on the prior

appropriation doctrine; most eastern states rely on the reasonable use doctrine, which allows property owners adjacent to the water body to make reasonable use of it. These rules can generate controversy and legal challenges, especially in times of drought or limited water availability.

Various laws are in place to manage the impacts of water pollution. For example, laws regulate the burial and monitoring of underground storage tanks (UST) that contain fuels, chemicals, or other hazardous substances that can leak out and pose a threat to groundwater. There are 640,000 USTs subject to regulation; many others are not. Other laws govern the injection of hazardous and nonhazardous wastes, including industrial, oil and gas production, radiological, and other waste, into deep or shallow wells or natural underground formations. Underground injection is used to dispose of more than 50 percent of these liquids generated in the U.S. While most underground injection wells are considered to be safe, some types of shallow wells that hold motor vehicle wastes or stormwater drainage, for example, are some of the most overlooked sources of groundwater contamination. An estimated 1.5 million of these wells are in existence.

Great strides have been made to curb the level of pollution discharged into U.S. waterways from point sources. Point source pollution is wastewater from sewage treatment plants, power plants, manufacturing or other facilities that is treated and discharged directly into a water body through one point, such as through a pipe or ditch. Being able to trace the source of contamination helps to determine ways to reduce the contaminant's concentration or eliminate it as a problem. Point source pollution is regulated by the Clean Water Act, the federal law that sets contaminant and discharge limits for specific waterways.

(Continued on page 6)

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Drinking Water . . . continued from page 5

Contaminants also enter water bodies through dispersed, or nonpoint sources. Nonpoint source pollution occurs when water that flows over the landscape or through the soil as a result of rain, snow melt, or irrigation, picks up natural or human-made pollutants and makes it way into surface waters (rivers, lakes, streams) or underground aquifers. Pollutants can include chemicals, pesticides, sediment, animal waste, and in the case of faulty septic or sewer systems, human waste. This nonpoint source pollution process can occur in agricultural, urban, or forested areas, and on public or private property.

According to the U.S. Environmental Protection Agency, nonpoint source pollution is the primary cause of water quality problems, and is harmful to drinking water sources, recreation, fisheries, and wildlife. Water that runs off agricultural land is considered to be the number one source of water quality problems in the rivers and lakes assessed by federal and state governments. Faulty septic and other sewer systems have been identified as a leading cause of water pollution in small communities and rural areas.

Because there are so many types of nonpoint sources of pollution from so many dispersed locations across the country, it is considered to be difficult to regulate. For the most part, the Clean Water Act leaves the regulation of nonpoint pollution sources up to each state. While some states have adopted regulations, many states use other incentives to curb this pollution, such as facilitating local watershed and land use planning efforts, encouraging the use of best management practices (a wide variety of strategies, such as planting vegetation along a waterway to help remove or filter pollutants flowing from adjacent land), providing technical assistance, and sharing costs with local partners for implementing prevention and control measures.

The Rural Community Assistance Partnership (RCAP) and the National Environmental Services Center (NESC) (www.rcap.org; 800-321-7227) and its programs across the country offer water and wastewater training and assistance to small and rural communities, tribes, and water utilities. NESC (www.nesc.wvu.edu; 800-624-8301) offers information, technical assistance via telephone, educational resources, and magazines and newsletters addressing water and wastewater issues for these same audiences.

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