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MEMORANDUM

To: House Memorial 42 Stakeholders

From: John Longworth, Cheri Vogel, Fred Abramowitz, Martha Franks

Subject: Condemnation

Date: August 7, 2008

The issue of condemnation has arisen during the stakeholder meetings concerning HM 42, principally by agricultural interests who are concerned that giving entities an expanded "planning horizon" would lead to the increased condemnation of water rights and/or farmlands by municipalities seeking to lock up the resource. While the state engineer has taken no position on the matter, he felt that it might improve communications between the various stakeholders if he facilitated some discussion on the issue. This simple memo is intended to serve as a springboard for such a discussion.

I will provide an overview of condemnation/eminent domain as it exists in New Mexico. I will also touch on other states to see whether the issue has been elsewhere addressed.

Summary:

Laws of eminent domain/condemnation are largely matters of state law, with the limitation that the United States Constitution prohibits the "taking" of property without "just compensation." The recent U.S. Supreme Court decision of Kelo v. City of New London, 545 U.S. 469 (2005) (a case which for various reasons attracted national attention) makes clear that the federal courts are unlikely to interfere much with any state scheme for condemnation, so long as the just compensation requirements are met. Thus, while I looked briefly at how other states have handled the matter of condemnation of water rights, it is by and large an issue for the New Mexico state legislature to address.

In my opinion, while municipalities and most utilities have the power of eminent domain over water rights, the procedures for condemnation make for an expensive and risky undertaking for the condemnor, so my initial reaction is the importance of this may be exaggerated. At least that's my view.

Discussion follows.

Municipalities' Powers of Condemnation in New Mexico

In New Mexico, the powers of eminent domain are created by statute; unlike in Colorado, there is no constitutional provision assuring municipalities of the right to condemn. New Mexico's condemnation procedure is set out in the Eminent Domain Code, NMSA 1978, § 42A-1-1 to -33 (1981). Municipalities are specifically granted the power to condemn water and sewer facilities located within and without their boundaries but must comply with the Code in so doing. NMSA 1978, § 3-26-1 (1994); NMSA 1978, § 3-27-2 (1994), see § 3-26-1(C) and § 3-27-2(D). While the power to condemn water rights in particular has never been directly addressed, numerous cases have in passing noted the power of municipalities to condemn water rights, and reading some of these cases fairly broadly, it seems likely as well that, geographically, they can probably condemn those rights anywhere in the state. City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (N.M. 12/14/1962) ("The city may...obtain these surface water rights by condemnation or ... by bargaining..."); State ex rel Martinez v. City of Las Vegas, 89 P.3d 47, 135 N.M. 375 (N.M. 04/07/2004) ("Alternatively, a more appropriate remedy might be to require the City to exercise its right of condemnation for necessary amounts of water ... consistent with NMSA 1978 Section 3-27-2 (1994)."). See, also, State v City of Albuquerque, 119 N.M. 150, 889 P.2d 185 (1994) (which has language suggesting that there is no geographic limitation on a city's power to condemn, if it is otherwise authorized by statute.) Similarly, electric, gas and water utilities also have the power of eminent domain (section 62-2-1, et. seq.) but also must comply with the Code, although there is a provision limiting those powers as far as using acequia water, Section 62-2-22.

Generally speaking, the power to condemn exists for these and other entities for any "public use," consistent with its statutory mandates. The procedures for effectuating the condemnation are set out in the 1981 Code; briefly, the condemnor is required to make diligent efforts to negotiate, Section 42A-1-4; failing that, three appraisers are appointed to seek to arrive at a joint appraisal; lastly, a Petition may still be filed by the condemnor affording a jury trial "de novo" on all issues. Section 42A-1-21.

As a practical matter the provision for a jury trial makes eminent domain proceedings a risky proposition for the condemnor (the issue of how much compensation is to be paid is determined by a jury, one not always sympathetic to a government or other entity that is trying to condemn, and the condemnor is responsible for paying the condemnee's attorneys' fees and costs if the award is more than they had offered) and the case of Santa Fe Southern Railway Inc. v. Baucis Limited Liability Co., 124 N.M. 430, 952 P.2d 31 (Ct. App. 1997) makes that risk even greater; there the Court (and this

is in the context of a railroad's right to condemn, but it would be applicable to all eminent domain proceedings), held that the 1981 Code afforded a right to jury on *all* issues beyond merely compensation (a difficult enough issue to resolve, given the myriad issues that go into pricing water rights), including the question of whether the proposed condemnation serves a "public use" at all. This would mean, for example, that one whose waters rights are being sought to be condemned could argue that holding water for an extended period of time without an adequate showing of need would constitute speculation in water, which is not a "public use" and leave the resolution up to a jury.

Effectively, and leaving aside the very real political consequences of engaging in a policy of water rights condemnation, this grants someone who is opposing condemnation of his water rights and has been unable to reach a settlement with the condemnor a great deal of leverage. Realistically, as I see it, this procedure means that those seeking to condemn water rights are unlikely to do so outside of a negotiated settlement (between essentially a willing buyer and willing seller) except under the most pressured of circumstances (and in fact, there have been few water rights eminent domain proceedings brought as of today).

Finally, the State Engineer's statutory scheme for the transfer and/or change of purpose and/or place of use of water rights is such that the above outlined procedure granting or denying a condemnor's right to condemn water will have been determined before any State Engineer action on those rights; that is, the Applicant (the condemnor) will have already condemned those rights and acquired ownership before the State Engineer will be asked to act.

Condemnation and Water Rights in Other States

Since the rules governing condemnation are largely state issues, I did not do an exhaustive state-by-state analysis, except to note that virtually all western states grant municipalities the right to condemn water, whether for "public good" (Utah), "public necessity" (Washington, which construes the public necessity very broadly, including allowing a city to hold water rights unused merely for the purpose of preventing a future risk of pollution: see, City of Tacoma v. Welcker, 65 Wn. 2d, 399 P.2d 330 (1965)) or otherwise. I didn't happen across any attempt to limit that right, except in Colorado. In Colorado, which adopted the "great and growing cities" doctrine authorizing municipalities to hold water rights unused for extended planning periods, a 1975 Water Rights Condemnation Act was passed in response (presumably driven by agricultural interests), limiting municipalities' right to hold such water to 15 years. That statute was challenged in City of Thornton v. Farmer's Reservoir and Irrigation Co., 194 Colo. 526, 575 P.2d 382 (1978), where the Colorado Supreme Court held the statute unconstitutional, at least insofar as home rule municipalities are concerned, since they had a constitutional right to condemn, and the 15 year limitation constituted an impermissible infringement on that right.

While New Mexico has no constitutional right to condemn, I think we can safely assume that any attempt to limit entities power to condemn here in New Mexico will be met by legal challenges.

Conclusion

Municipalities in New Mexico have the power to condemn water rights, but the risk of cities engaging in a wholesale condemnation of water rights for extended future planning horizons has probably been exaggerated. Still, any attempt by agricultural or other interests to limit that right is likely to meet a legal challenge by those having the right.

We hope that this brief memo will further the stakeholders understanding of condemnation and lead to further discussions.