

House Memorial 42
Meeting 4
Written Comments from Stakeholders
June 11, 2008

Written comments were received from the following stakeholders following the May 28, 2008 meeting (in order received):

1. San Juan Water Commission (Elizabeth Newlin Taylor, Taylor and McCaleb, P.A.)
2. Jay Stein, James Brockmann, and Kim Bannerman (Stein & Brockman, P.A.)
3. Sig Silber (article published in Sierran, May/June 2008)
4. New Mexico Municipal League (William Fulginiti, Regina Romero)

July 2, 2008

5. Pueblo of Acoma (Laura Watchempino)

TAYLOR & MCCALED, P.A.
ATTORNEYS & COUNSELORS AT LAW

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* ALSO ADMITTED IN ARIZONA

June 6, 2008

Cheri Vogel (Via e-mail and U.S. Mail)
Water Use and Conservation Bureau
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102

Re: Comments on HM 42 Stakeholder Comments and Template

Dear Ms. Vogel:

Thank you for the opportunity to comment on the Stakeholder Meeting on May 28, 2008, concerning House Memorial 42 and the comments from other stakeholders in anticipation of the preparation of a report for us to consider and eventually submit to the State Engineer. These comments are made on behalf of the San Juan Water Commission.

After reviewing the comments filed by many others and the discussion at the Stakeholder Meetings, we are pleased that the staff clarified that the draft template is to be used for water development plans in conjunction with applications for transfers or new appropriations. That clarification answers many of the comments made about the inappropriate burden of proof for a water development plan. The information outlined, however, may still be more appropriate in the application itself, instead of in the water development plan. In addition, the requirement for infrastructure to be in place, which drew several comments, should be removed. It not possible for water providers, in many cases, to build infrastructure without the necessary water rights, in part because bonds are not available, and in other cases, the infrastructure will come along many years later as the plan matures.

One issue emerging from the comments is that the water development plans should coordinate with and be consistent with regional water plans. This is good and should be encouraged. Concomitant with that proposal is one that the water development plans should be reviewed periodically, say every 5 years, to check that the predictions in the plans are still generally valid. This is the goal of regional planning and it should be incorporated in this level of planning.

One other commenter, the Village of Ruidoso, proposed time limits for review of plans—this is a good suggestion and should be considered in the context of the application process. It is very difficult for water providers to plan to provide timely services if their applications and plans are allowed to grow moldy on the desks of state employees. We are aware of a number of such

“moldy” proposals, and they have stifled good planning and, more importantly, the related implementation efforts.

The role of the State Engineer in encouraging growth or not encouraging growth was raised by several commenters, and they are correct that the Office of the State Engineer has no role in those issues. The local governments—counties and cities—are responsible for planning growth, and the State Engineer should stay out of it.

On a related issue, perhaps one way to define who should be “in” the planning statute would be to include any entity that is required by a governmental authority, statute or practical considerations to provide water—that is, if a water provider (public or private) will serve all people who move into its service area, it should be able to hold water rights for future use. This is a preliminary idea, but it may offer one way to resolve the issue of which entities can use NMSA 1978 § 72-1-9 and harmonize it with the constitutional requirement to put water to beneficial use.

We appreciate the opportunity to continue working on this process and look forward to receiving the draft Status Report and participating in the workshop set for July 30.

Very truly yours,



Elizabeth Newlin Taylor

CC: Randy Kirkpatrick, San Juan Water Commission

STEIN & BROCKMANN, P.A.
ATTORNEYS AT LAW

MEMORANDUM

TO: FRED ABRAMOWITZ, JOHN LONGWORTH, MARTHA FRANKS, CHERI VOGEL

FROM: JAY E. STEIN
JAMES C. BROCKMANN *KB*
KIM BANNERMAN

SUBJECT: ADDITIONAL COMMENTS ON HOUSE MEMORIAL 42 TEMPLATE

DATE: JUNE 10, 2008

Attached are additional comments addressing the issues brought up by other stakeholders and the Office of the State Engineer panel at the meeting on May 28, 2008.

- 1.) Certain stakeholders brought up the possibility of filing a water development plan in regard to already existing rights rather than only in new appropriation situations. The water development plans should be able to be used in this way. Often water rights are permitted but it takes many years to put them to full beneficial use. The Office of the State Engineer's practice is to grant an Extension of Time every three years if an application for an extension is filed. Instead of having to go through the extension of time practice every three years, entities with large water rights permits should be able to file a water development plan upon filing their first application for extension of time.
- 2.) Several stakeholders addressed concern with the elements in the template not specifically addressing or not being applicable to certain entities. For example, some elements of the template seemed more tailored to municipalities not smaller entities. At the May 28th meeting there was some discussion on developing two tracks for entities to pursue in developing a water development plan depending on the entity's specific characteristics. This issue requires further discussion.
- 3.) At the May 28th meeting some stakeholders discussed the need for consistency between other water plans, like regional plans, and water development plans submitted under 72-1-9. These requests included consistency in population predictions and gallons per day usage. While certain consistency, as in population predictions, would be fine (if a regional plan has already been submitted and approved – not if just pending) other

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consistency is not feasible. For instance, gallons per day usage cannot be consistent throughout the State for climate reasons. Also, for municipalities, city officials have to determine what usage best fits their needs. This is a determination that is extremely specific to each individual municipality. For instance, a gallon per day usage that may be fine in Santa Fe would not be fine in a place like Albuquerque or Alamogordo where the economy is driven by different industry. There must be room in these water development plans to tailor to the individual needs of each entity submitting such a plan. Thus, requested consistency is not viable.

- 4.) Some stakeholders suggested that large uses within the state should be adjudicated and interstate and international compacts before any water development plan should be considered. This would essentially put a complete stop to any and all water development plans for years, probably decades. Water development plans, just like applications for new appropriations, should not be made dependent on these items.
- 5.) Some stakeholders suggested that the water development plans should not be expanded past the current 40 year period while other stakeholders suggested that the amount of time should be expanded for up to 100 years. Our view is that the water development plans should not be limited to 40 years. Rather the time limit should be expanded and left open ended to be determined on a case-by-case basis.
- 6.) The issue of condemnation was again brought up in some of the stakeholders comments. Condemnation is an issue completely separate and apart from that of water development plans. This is not the forum in which to address condemnation.

P:\House Memorial 42\Memoranda\Additional Comments.doc

From: ssilber1@juno.com
Sent: Tuesday, June 10, 2008 11:44 PM
To: Vogel, Cheri, OSE
Subject: Fw: Re: HM 42 May 28, 2008 Presentation

Attachments: Is Groundwater in Place a Sound Measure of Sustainability.doc

Looks like my attachment didn't make it the first time. Let's see if it works this time.

Best regards,

Sig Silber,

From: "ssilber1@juno.com" <ssilber1@juno.com>
Date: Wed, 11 Jun 2008 04:21:33 GMT
To: cheri.vogel@state.nm.us
Bcc: ssilber1@juno.com
Subject: Re: HM 42 May 28, 2008 Presentation

The attached should be added to the record. It is an article that I published in the current issue of the Sierran which is the publication of the Sierra Club Rio Grande Chapter. It expresses what I consider to be important thoughts with respect to how we define groundwater sustainability.

This inbound email has been scanned by the MessageLabs Email Security System.

Is Groundwater in Place a Sound Measure of Sustainability?

Some believe that groundwater in place tells us a lot about the available groundwater supply.

The definitions of “groundwater in place” vary but generally involve multiplying the average height of the column of groundwater by the area of the parcel in question. There may be reductions based on the perceived ability to actually lift this groundwater to the surface.

Once groundwater in place has been determined, there is a tendency to use this to determine the sustainability of an intended use. Basically people divide the groundwater in place on their property by the forecasted rate of usage to get the number of years of supply. Does this make sense? Is it a useful way to determine sustainability?

I think not. If we were talking about a static situation where the water under my property just stayed there until I pumped it, then it would make sense. Thus it might make sense where water cut off from streams (fresh or brackish) is being mined. But water that is not connected to streams is the exception. In most cases our groundwater is on the move and flowing towards streams. Thus the water that is under the surface of my property today is not the water that will be there some time in the future.

Water currently in place may not tell us much about the future water supply. If we take only that amount of groundwater where recharge allows most wells to remain reasonably functional, then we have an indefinite supply subject only to the natural precipitation cycles and perhaps unnatural cycles due to human-assisted climate change. If we take more than that amount, where there is little water in storage, we will experience negative impacts almost immediately. So to me there is no such thing as a 100-year supply where groundwater is moving. It is either indefinite or very short. Where some of the water is not moving but represents long-term storage, the answer will be somewhere in the middle. Here where I live in the Galisteo Basin south of Santa Fe, there is little, if any, long-term storage in the aquifers currently being utilized.

Because my future water exists today up-gradient from my well (at a higher elevation and flowing underground towards me), the supply for me and other users depends less on my planned usage and more on the future plans of others. It is not like there is a supply of water under each property that each property owner can draw on, which is the way I hear 40- and 100-year sustainability being expressed, i.e. I have X acre-feet of water in place. It is more like the Everglades where there is a sheet of fresh water flowing in their case to the ocean, and here where I live to the Rio Grande, and in other parts of New Mexico to the Pecos or other surface water. Everyone up-gradient from a given well impacts that well, which in turn impacts everyone down-gradient. Each well is impacted by the future diversions up-gradient. And generally there is no control over the future because of domestic wells and the ability to transfer in water rights. We may need a different concept to determine groundwater sustainability. Such sustainability calculations must factor in planned and allowable additional diversions or tapings.

I am challenging the concept of water in place when you have a moving aquifer with little storage. The water does not stay in place; it is moving. So my water 100 years from now is in the

atmosphere somewhere right now overhead or in India or who knows where, or is ancient groundwater flowing towards my well. So if you want to know if I will have water in 10 years or 40 years or 100 years, you have to know what is going on up-gradient between me and the recharge area.

I am challenging the notion that the height of the water column is at all relevant to sustainability. The water column at my property is about 30 feet. I am more concerned about the water flowing towards me than the water that happens to be above my pump today. If there are few straws between me and the recharge zone, I have an infinite amount of water and the well will never go dry. If there are enough straws, it will go dry quickly. Recharge, rather than storage, is what is important.

Transmissivity is very important. If the transmissivity is low enough, that which is on my property is stored water. But even as low as 2 feet per day, this is 730 feet per year, which is a mile in seven years. So if I were lucky enough to have a property with a radius of a half of mile and if I had a lot of water on my property and just up-gradient a large village was created that used all or most of the flow onto my property, I would be out of water in seven years pretty much independent of my rate of consumption. And in another short period of time, those downgradient from me would be out of water also.

Based on my modeling experience, I believe we need a water budget for every large well applicant. This water budget should address water in, water stored, water out, and water consumed or lost. Then we need to adjust all of those estimates by what we see happening over N years. Only then can we say that something is sustainable for N years.

Many of the same issues also apply to surface water that moves. You either have an indefinitely sustainable situation when average annual consumption equals or is less than average annual stream flow, or you have shortages in a short period of time. In most cases, the concept of 40-year sustainability or 100-year sustainability means nothing more than plans are in place to divert water from agricultural use.

We need a different mindset in regards to sustainability. Part of that mindset involves being honest with ourselves rather than looking for ways to make untenable situations appear to be acceptable. New Mexico has extensive water resources both developed and undeveloped. Opportunities for conservation are also plentiful. If we approach our water situation intelligently, we can meet all important needs for people while preserving wildlife, and preserving or possibly even expanding agriculture. But to do this we have to get away from our instincts which are to justify land-use decisions rather than attempt to make better decisions. Realistic concepts for assessing sustainability will help with improved decision-making, which will both improve the future and reduce its cost.

For more information, contact Water Issues Chair
Sigmund Silber ssilber1@juno.com



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

FROM: William Fulginiti, Executive Director
Regina Romero, Intergovernmental Relations Director

DATE: June 11, 2008

COMMENTS ON HOUSE MEMORIAL 42 TEMPLATE

- In order to make the most efficient use of state and municipal resources, there needs to be a timely process for review by the OSE of such plans.
- The proposed template for the Water Plan should not mirror the required provisions of the Application. There seems to be some redundancy in the proposed template. The Plan should be more generic whereas the application should be subjective and detailed
- There should be a clearly stated reason for submitting Water Plans to the OSE. It obviously is an appropriate step prior to the application for water appropriations or transfer of water rights.
- Clarification as to whom (municipal parties or other entities) and how some of the proposed elements in the template apply.
- Many of the elements in the Plan should be addressed as “projected” or “estimated” with the more specific data addressed in the Application process.
- There should not be any implication of “financial guarantees” in any planning process.
- Specific infrastructure documentation is more appropriate in the application process.

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- In order to protect the intent of the constitutional doctrine of beneficial use, serious consideration must be given regarding unintended consequences throughout this process.
- Discussion is needed regarding the issue of extending the 40 year planning period for those public water systems that are regionalizing, given the complexity in developing and completing such large public water systems. With the technology available today, it makes sense that 40+ years of planning is very feasible.
- Condemnation of water rights should be addressed in another forum since the “method of acquisition” is not a subject of House Memorial 42.

Cheri,

I'm forwarding an article which I would like to be referenced in the NMOSE status report. A summary of the article is given below as well as a link to the full article. You can attach the article to my written comments of April 7, 2008 if you would like.

I would also like to suggest that the summary and link be made available to the Water & Natural Resources Committee in the HM42 task force report.

Thank you for your assistance,

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

Environmental News

June 11, 2008

Trial Court Partially Invalidates Washington's Municipal Water Law – Developers Not Entitled to Municipal Water Supplier Exemption

By [Jeff Kray](#)

In a blow to the development community, a Washington state trial court has invalidated portions of Washington's highly contentious Municipal Water Law (MWL or Act). The [court ruled](#) that the Legislature had violated the state Constitution by including developers in the definition of "municipal water supplier(s)" entitled to an exemption from Washington's "use it or lose it" relinquishment laws.[\[1\]](#) The court also ruled that portions of the MWL allowing developers to establish water rights based on constructing "pumps and pipes" for diverting or withdrawing and distributing water rather than putting water to actual beneficial use are unconstitutional. The Legislature had, in part, enacted the MWL in response to a Washington Supreme Court decision, *Theodoratus v. Ecology*,[\[2\]](#) which held that state law does not allow Ecology to grant water rights based on water system capacity. The trial court said the Legislature's actions were unconstitutional because they violated the separation of powers between the courts and the Legislature. Appeals are almost certain to follow.

The Order the court entered yesterday decides two lawsuits that environmental groups, small-boat fisherman, individuals, and tribes filed in late 2006: *Lummi Indian Nation v. State of Washington*, and *Burlingame v. State of Washington*, each alleging that the MWL is unconstitutional on its face.^[3]

The trial court decision affirmed many of the MWL's provisions.^[4]

However, by invalidating the MWL's key definitions of "municipal water supplier" and "municipal water supply purposes" the trial court decision returns to Washington water law much of the uncertainty about the scope of the municipal water right exemption that led the Legislature to enact the MWL in the first place. The practical result of yesterday's decision is that cities, water districts, and, in particular, developers will be left without clear guidance as to the amount of water they have available for future use.

It is very likely that the defendants in the *Lummi* and *Burlingame* suits, the Washington Departments of Ecology and Health, the Washington Water Utilities Council, Cascade Water Alliance, and Washington State University will seek to appeal the trial court's decision directly to the Washington Supreme Court. For the parties' reactions to the decision see Robert McClure, [Judge's water ruling a blow to builders](#), Seattle P-I, June 11, 2008.

An in depth article on this decision will appear in a subsequent issue of the Marten Law Group Environmental News. For more information on the trial court's MWL decision, the Municipal Water Law litigation, and Marten Law Group's [water resources](#) practice, contact [Jeff Kray](#).

^[1] The MWL's full title is the 2003 Municipal Water Supply – Efficiency Requirements Act, Chapter 5, Laws of 2003 Second Engrossed Second Substitute House Bill (SESSHB) 1338 (Chapter 5, Laws of 2003). For Marten Law Group's previous Environmental News Articles on the MWL, see [Washington's Municipal Water Law Challenged as Unconstitutional](#) and [Tribes and Water Utilities Wade Into Municipal Water Law Litigation](#).

[\[2\]](#) 135 Wn.2d 582, 957 P.2d 1241 (1998).

[\[3\]](#) The Plaintiffs in *Burlingame*, the first of the two lawsuits to be filed, are environmental groups, small-boat fisherman, and individuals. The Plaintiffs in *Lummi* are six Indian Tribes (Lummi Indian Nation, Makah Indian Tribe, Quinault Indian Nation, Squaxin Island Indian Tribe, Suquamish Indian Tribe, and the Tulalip Tribes).

[\[4\]](#) Order on Cross Motions for Summary Judgment at 5-6.

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