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M E M O R A N D U M

TO: House Memorial 42 Stakeholders

FROM: Fred Abramowitz, John Longworth, Elisa Sims, Martha Franks
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SUBJECT: Water Planning in the West

DATE: March 18, 2008

Overview: Western water law and policy was largely developed at the turn of the last century, when the western United States was largely under populated, with most water uses dedicated to agriculture and mining. The policy and the law that developed around it, usually referred to as the prior appropriation doctrine, embedded in many cases (like in New Mexico's) in various state constitutions, was designed to promote the rapid development of the resource by encouraging appropriators to put water to beneficial use and keep it there. Thus, laws and doctrines evolved that discouraged hoarding of or speculation in water, and, through abandonment and/or forfeiture, punished those who failed to keep their water in use. Today, however, those laws and doctrines are oftentimes at odds with the needs of those who need to plan for the future. The current discussion surrounding 72-1-9 fits directly in with what is essentially a debate within western-states. Thus as an aid to the stakeholders we decided to survey, in a general way, how other western states have addressed this matter.

Because the issues involved here in many ways go to the heart of much of western water law, it is easy to get subsumed in the nuances of the doctrine as it has evolved in the various states. Some states for example, rarely enforce abandonment or forfeiture, there may be different standards for approval of extensions of time or different time frames, and some forfeit or abandon only at the request of another appropriator. Some states handle water matters primarily in water courts, some administratively and some statutorily, or in various combinations thereof.

Constitutional restrictions also vary from state to state. Degrees and methods of adjudication vary. This memo is thus not intended to be a state by state primer on western water law but rather an overview of the basic, overarching approaches, with the purpose of gleaning what, if anything, might be useful to us in New Mexico.

Summary: We limited our inquiry to states that we assumed confronted a situation similar to New Mexico. We looked at, in varying degrees of depth, Colorado, Wyoming, Idaho, Montana, Nevada, Oregon, Washington and Utah. Only a cursory glance was made at Arizona and California, states where water allocations for cities and others are largely made as part of large federal projects (we did, however, look briefly into Arizona's 1980 Groundwater Management Act, which requires that groundwater be managed to reach "safe yield" by 2025, and also defines an adequate municipal water supply as sufficient water for 100 years. The GMA was required as part of Arizona's request for funding for the Central Arizona Project. It appears that the 100 years was more or less randomly selected, and it appears nearly certain that the "safe yield" target will not be met.) Virtually all western states have attempted to address what we would call the "water planning" issue in the context of municipalities, although near as we could tell none have adopted a specific, forty-year or otherwise, time frame as we provide in New Mexico (although Utah is considering it). We would also note that we found no statutory references to "water planning" or "regional planning" as it is referred to here in New Mexico elsewhere. This is not surprising, given that "water planning," inasmuch as it may mean evaluating one's future needs and supplies and making decisions thereupon, may be at odds with the prior appropriation doctrine which in its most basic form, provides for simple, first in time, first in right planning. Not surprisingly, no other states have unearthed a magic bullet. By and large, western states grant their water resource manager, whether called the State Engineer or Water Resource Director or some other name, fairly broad discretion in addressing water planning issues. Still, a general body of law has evolved (called, in the northwest, the "Growing Communities Doctrine" and in Colorado, the "Great and Growing Cities Doctrine").

These doctrines are effectively subsets of the prior appropriation doctrine, embracing a variety of ways in which legislatures, courts, and state water agencies give municipal water suppliers special consideration within the prior appropriation system. The special consideration may be expressed as withdrawals, reservations, exclusive rights to certain water sources, exceptions to various elements of the prior appropriation doctrine, relation-back theories, and preferences. The common themes converge with two key features. First, municipal water suppliers have more time to perfect their water rights. The concepts of "reasonable time" and "due diligence" are construed liberally so that municipal water suppliers may hold the rights in anticipation of future needs and develop the water gradually as the needs arise. Second, the doctrine usually exempts municipal water rights from loss for nonuse. In effect, these features allow a municipal water supplier to hold a priority date for rights to water in anticipation of reasonably foreseeable future water uses in the community.

Colorado has developed the most thought out and sophisticated approach towards this doctrine and we will address that last with some discussion of how New Mexico might incorporate their methods.

Discussion: Throughout the west, municipal appropriators, like others, must apply to the state water agency for a permit to use a specified amount of water; from a particular source and point of diversion, and like others, they must "prove up" or "perfect" the right within a reasonable period of time by putting the water to beneficial use. They apply for a certificate (in New Mexico, a license) to finally establish the water right with a priority date that ranks them, at least in theory, in the "first in time, first in right" scheme for regulating water rights when water supply is insufficient for all. Thus, there are two distinct areas of issue that states have addressed in dealing with municipal uses. First, traditional water law and the law in most western states mandates that an appropriator has only a "reasonable" time to "diligently" put an unperfected right to beneficial use or that right to develop is lost, usually requiring that some actual physical "first step" be taken to perfect the appropriation (Arizona, for example, requires that, *other than municipalities* "construction of works" for the diversion begin within two years and must be completed within five; in Oregon, construction must be commenced within one year, barring "good cause" shown). An unperfected right (called a "conditional" right in Colorado) is analogous to our permitted right in that it is not a "water right," it is a right to develop a water right. Second, most states have either "forfeiture" or "abandonment" laws for water rights that have been perfected (a vested, licensed or adjudicated right, here) but then are not used for some period of time (forfeiture generally being a time frame mandated by statute; abandonment usually the result of an "intent" to abandon with no specific time frame but with some time frame of non-use creating a presumption; oftentimes, as in New Mexico, the loss of the right operating automatically, by law). Both of these policies – not being allowed to develop a right and losing what you already have – present challenges to growing municipalities that various states have attempted to address in various ways.

Abandonment/Forfeiture: Again, the standards of abandonment and forfeiture vary from state to state as to burdens of proof, presumptions, whether specific intent is required, who may initiate the proceedings and who has standing, whether resumption of use operates against forfeiture, and whether the matter is pursued administratively or in the courts. There are other differences as well. In the current context, some states, like New Mexico, have simply statutorily or otherwise exempted municipal uses from forfeiture. Oregon statutorily lists "water right is for a municipal use" as a defense against a claim of abandonment or forfeiture, as a defense that abandonment by a third party would impair the rights of cities to use the water. Washington also exempts water for "municipal supply purposes" from what they call "relinquishment." In Idaho, case law has exempted from forfeiture water rights held by a municipal provider to meet "reasonably anticipated future needs." Utah law is similar.

Unperfected or Inchoate Rights: In the Northwest (Idaho, Montana, Washington, Oregon) a body of case law and statutes have evolved (referred to as the "Growing Communities Doctrine") which gives preferences to municipalities in perfecting their water rights and in avoiding losing them. In the 1940's in Idaho, for example, a court noted that municipal corporations have the power "to supply its inhabitants with water" without limiting that power to "present" inhabitants and it refused to rule in favor of a claim that a city had abandoned its rights for nonuse. That, it concluded, would nullify the power granted to a municipality to acquire and hold water for future needs, "an absolute necessity to the life and existence of a municipality."

Today Idaho has a statutory provision allowing municipalities to hold "dormant" water rights upon a showing and documentation of "reasonably anticipated future needs."

As Idaho is beset by increasing claims for water by tribal interests, fisheries, environmental needs and others, there are increasing concerns over municipalities "hoarding" water, and the statute now provides for loss of a municipal water right if the planning horizon specified in the license has expired and the quantity of water authorized for use under the license is no longer needed to meet the reasonably anticipated future needs. Similarly, Montana law requires the Montana Department of Natural Resources and Conservation to review water reservations made by the state, cities, or state or federal agencies at least every ten years to ensure that the objectives of the permit are being met. There are also concerns that, since these unused "dormant" rights are senior to uses that may develop or be needed in the future, when those rights are exercised, they will operate to harm those intervening uses or needs that have developed in the meantime, that those intervening users will have inadequate notice of the senior right, or that, alternatively, the water will go unused.

As is the norm throughout the West, these states grant their respective state water agencies the authority and responsibility for making determinations of what constitutes reasonable future needs and for granting permits for appropriation of water with time frames to perfect those rights. Generally, the time set for proving up the rights is established in the initial permit, with subsequent allowances for extensions of time, and it is usually done on a case-by-case basis. In Washington, for example, the Department of Ecology has the authority to grant extensions of time to perfect water rights for "good cause shown" which are, apparently, granted freely. Nevada generally requires a Proof of Beneficial Use within three and one-half years but grants special consideration, on a case-by-case basis, to municipal or quasi-municipal uses that may take a longer time to develop. Wyoming also allows a permit holder to seek an extension of time prior to the expiration of the permit, extensions which may be up to five years each, as does Idaho. Utah allows extensions beyond the time set out in the permit upon a showing of "due diligence." Oregon requires perfection within five years or an extension of time must be obtained for "good cause," and their statute lists factors to be considered in whether to grant such an extension (they are quite broad: "good faith" is one).

What Constitutes a Municipal Water Supplier: Just as in New Mexico, where non-municipal entities are seeking the water benefits of our forty-year planning statute, other states are also struggling with the concept of where to draw the line. In Washington, for example, there have been a series of cases in which private water suppliers have sought to be considered as municipal suppliers for purposes of getting the exemption under the forfeiture statute. Originally, the courts found a "bright line" between public and private entities, since a private corporation may limit its customers, while a municipal corporation is obliged to accept as customers whoever are within the boundaries of the municipality. That line has been blurred recently, and now a private developer may hold water sufficient to meet the needs of all of the lots of its proposed development, where the developer has had his development approved and thus in a sense has become a public water supplier. In those sorts of circumstances, the "planning horizon" requested be would be shorter and more strictly scrutinized than that of a municipality.

The Colorado Approach: Colorado, sitting at the top of the food chain in terms of providing the source of water, also sits at the bottom in terms of sympathy from the courts when it fails to deliver that water downstream; in the various United States Supreme Court original actions for equitable apportionment and in interstate compact fights, the upstream state loses far more often than not. The result is that, since every drop of Colorado surface water is subject to interstate compact, Colorado over the past several decades has been forced to thoroughly rethink through its system of water administration so that its interstate obligations will be met.

In response to Colorado's growing municipal use, the "Great and Growing Cities" doctrine evolved. The most important points as to how the doctrine applies to municipal water supply entities seeking an appropriation to reserve water for its future needs are as follows:

First, a governmental water supply entity, in making a request for an appropriation of water, must demonstrate what constitutes a "reasonable planning period." While there is no fixed period of time, and applications are reviewed on a case-by-case basis, population projections in excess of thirty years are difficult to make and projections in excess of fifty years will be "closely scrutinized" (which may in fact be a "de facto" cap). Second, the entity has the burden of demonstrating what the normal, substantiated population projections for that period are. In making those projections, the entity must avoid "self-fulfilling prophesies," since it is understood that, with water available, population growth is more likely to occur. Third, the entity has the burden of demonstrating how much water will be needed within that planning period. In any event, there should be periodic "reality checks" (six years in one case) to verify that the projections and assumptions made are proving to be reasonable and that the entity is proceeding with "due diligence." In addition, the entity must demonstrate that its proposed appropriation is "non-speculative." That means that, while they need not show actual customers, they must have a specific plan and specific intent to divert or otherwise use a specific amount of water for specific uses; they don't have simple carte blanche to reserve the water based only on some vague notion that they will need it or to keep others from getting it first. Finally, the entity must show that it "can and will" be able to perfect the appropriation and must do so in subsequent "reality check" proceedings. That means they must show a "substantial probability" that their intended appropriation will come to fruition, and that they will actually build the water projects necessary to complete the appropriation. The factors to be considered in evaluating this include whether there are economic feasibility studies, the expenditures made, the governmental approvals sought, the status of ongoing engineering studies, and the status of design and construction of facilities. Other factors may be considered as well.

Suggestions and Recommendations: The heart of the issue, which began with looking at 72-1-9 and stakeholder input, and whether that "exemption" should be broadened or modified, is resolving the dichotomy between allowing flexibility in development of water while avoiding hoarding or speculation. What is clear is that most western states have, to some degree, sought to accommodate the special needs of cities and municipal users in that regard (since, as a practical matter, cities can't just build infrastructure and acquire water piecemeal).

So, where do we go from here? How we got here is that, understandably, everyone would like 1) the opportunity to plan and reserve water as far into the future as possible, 2) to keep others from what might be perceived as "hoarding", and 3) to have a transparent decision-making process. But we need to look at the context in which these requests may arise. They are limited. Cities are already immune from claims of forfeiture for non-use. We believe that section 72-1-9 need not be read as an absolute limitation, but merely as a preference in line with what much of the rest of the west has done, and that it is not inconsistent with, and may in fact overlap, the State Engineer's more general authority when acting on water rights applications. Other appropriators, whether seeking extensions of time to perfect their rights or to avoid forfeiture, are not statutorily limited to any time frame – in our view, if an appropriator can establish that their request for water is "non-speculative," and they can otherwise comply with New Mexico law, a 100 year planning horizon may be appropriate and permitted under current law. What are needed are guidelines, whether through rules, regulations, templates or otherwise, that incorporate those principles to put those on notice of what is expected.