

**OSE – Stakeholders Meeting #3  
House Memorial 42**

**March 20, 2008 – 9:00 – 11:30 am  
Room 321, Roundhouse**

**Summary of Points Raised by Participants**

**Facilitator/Recorder:** Lucy Moore

**Welcome and introductions:** Lucy welcomed the group and introduced OSE staff present, including John Longworth, Chief, Water Use and Conservation Bureau (WUCB); Elisa Sims, Senior Water Resource Specialist, (WUCB); Cheri Vogel, Conservation Coordinator, (WUCB); and Fred Abramowitz and Martha Franks, contract attorneys with the OSE. Those present introduced themselves. Lucy explained the goal of this meeting: to update the group on activities since the last meeting and to present the draft “Elements of a Template” for water development plans developed by OSE staff.

**Purpose of the Process and Update:** Elisa Sims reviewed the history of this stakeholder consultation process. In response to HM 42, the State Engineer asked staff to design and implement a process that would allow OSE staff and stakeholders to engage in an informal conversation about potential recommendations on the future of statute 72-1-9. To date this process included two stakeholder meetings with a comment period between during which those interested could comment either in writing, or by visiting with OSE staff, or both. The goal was to have a process that was as transparent and accessible as possible.

The two stakeholder meetings in July and September 2007 resulted in consensus on the need to continue the discussion on options for 72-1-9, in an attempt to reconcile the need for entities to plan for the future, and the contradictory mandate of state law that requires water to be put to beneficial use within four years. There was no consensus, however, either on the entities that should be included in this category, or on the amount of time water could be held without forfeiture. The OSE appeared before the Interim Committee on Water and Natural Resources in October 2007 to report their progress to date.

As requested by stakeholders at the last meeting, OSE staff has developed draft elements of a template for water development plans. The invitation list for this meeting was expanded to include those suggested by the Interim Committee, and others who desired to participate.

John Longworth described the template development process. Staff considered three sources of information: 1) New Mexico case law, existing plans, OSE guidance, etc.; 2) over 60 pages of stakeholder comments and meeting summaries; and 3) experiences in other states. The challenge, he explained, is to create an opportunity for long-range planning in the context of prior appropriation. He emphasized that the proposed elements in the draft template *do not* represent the final work product of the State Engineer. They are offered in the hope of spurring discussion with this group.

John asked stakeholders to submit written comments to his office by May 1. He urged those present to let him know which elements have their support, as well as which ones they would like to see changed. ***The next stakeholder meeting will be May 28, 9:00 – 11:30, location to be announced.***

**Context for this Effort:** Fred Abramowitz offered thoughts on New Mexico water law and the context in which these questions are raised. There is a tension, he said, between what made sense in the past, and what may not make sense now. State policy needs to be able to adapt in ways that will accommodate the prior appropriation and beneficial use doctrine, while allowing for necessary planning and conservation to assure a secure water future. Where is the line, he asked, between hoarding and planning? Other states, as well as New Mexico, provide exemptions for cities to allow for growth. These exemptions have been upheld in court. But these exemptions are not automatic, and must be shown to be part of a reasonable planning horizon, with valid population projections, and realistic water amounts.

**Condemnation:** Some stakeholders were very concerned about the potential for condemnation of agricultural water rights as a result of any changes in state policy regarding securing water for future use. They emphasized that New Mexico is unique, and that what might work in another state will not necessarily work here. Currently, a local government cannot condemn property without showing a public necessity, and without fair compensation for the property. Agricultural interests point to a significant difference between land and water condemnation: land is site-specific, but water is not. There were questions about the right of a local government to condemn water, or acquire additional water, without showing a reduction of current water supplies. If a subdivider needs water, said a participant, he/she should be able to buy agricultural rights at the time of development, and not need to purchase and hold (or condemn and hold) water rights.

OSE spokespersons understood the concerns, but said that this particular forum, examining 72-1-9 in light of House Memorial 42, was not the proper place for resolution of the condemnation issue. There is no mandate from the State Engineer to address condemnation issues, and such a discussion would call for a different gathering of stakeholders and experts. Furthermore, this process anticipates the State Engineer reviewing the application *after* water rights have been secured; the question of whether or not the water rights should have been condemned would have already been dealt with by the court. In any case, John and Fred urged those present to put concerns regarding condemnation in writing, so that they could become part of the written record for this process. A participant asked that there be a special meeting called to address the condemnation issue.

**Elements of the Template:** John Longworth walked the group through the draft Elements of a Template (available on the OSE website, under “hot topics”). He admitted that this was a very challenging task, and pointed out that his office is still working on the organization of the template and that the enactment/implementation question remains for a later phase. The goal is to develop a process that is transparent and equitable. Any entity (whether currently identified in 72-1-9, or not) wanting to extend the period of non-use would be required to prepare a water development plan as part of the application process.

## Discussion:

A participant suggested that this template be made consistent with the Regional Water Planning template, with respect to terms and organization.

Others questioned what was meant by “municipal,” offering a list of entities that are quasi-municipal – Public Infrastructure Districts, Water and Soil Conservation Districts, Mutual Domestics, and more.

In answer to a question, OSE staff said that they did not specifically anticipate having to change 72-1-9.

A participant suggested developing two templates, municipal and non-municipal, since much of the application is not relevant for one or the other. Another said that although sections 1 – 4 were appropriate for small water systems, the rest of the template was not. OSE staff agreed that the elements could be sorted a variety of ways, including into two or more templates.

There was some concern about the burden proof being on the applicant to determine impact to public welfare, amount of unappropriated water, etc. Some of the requirements seemed overly burdensome on the applicant. There were also questions about the timing of the application and its review, and how this schedule would interact with the water development plan.

A participant wanted to know what the remedy would be to denial of an application. Another asked what would happen if there was an objection to the transfer of water rights.

A participant suggested that additional expertise – in economics, for instance – was needed for a comprehensive review of water development plans.

OSE staff was asked to consider the economic burden on the non-municipal applicant. A developer might need as much as \$ 10 million and 5-7 years to gather sufficient water rights to proceed. Sections 5, 6, and 7 of the template are not feasible, he added, and will result in municipal condemnation. A developer should be granted 20 – 40 years to develop a water plan, to avoid having to turn to a municipality for water.

**Conclusion:** Stakeholders were reminded that the OSE would accept written comments, due May 1. Staff will compile the comments and distribute them to the group via email or the webpage. The next HM 42 meeting is scheduled for May 28 from 9-11: at a Roundhouse location to be announced.

**Summary prepared by Lucy Moore. Please contact her with questions or corrections. 505-820-2166, or lucymoore@nets.com**