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MEMORANDUM

To: House Memorial 42 Stakeholders

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

Subject: Draft Consensus Memo

Date: July 18, 2008

As a working document for the July 30, 2008 stakeholder meeting pursuant to House Memorial 42 (2007), the Office of the State Engineer (OSE) staff has tried to identify some general principles on which the stakeholders appear to agree, as well as areas where there is not yet agreement, based on our conversations so far. The OSE staff is not taking a position on these general principles, but is trying only to observe what has happened in the House Memorial 42 stakeholder process to date.

The following memorandum sets out the OSE's observations about agreement or disagreement on substantive principles without regard to the language of the existing statute that started these conversations, NMSA §72-1-9. The hope is that, to the extent that we can establish a common understanding of how we stand as a group on underlying general policies and ideas, it will be easier to work toward a practical, specific answer to the question of whether the law needs to be changed to reflect those policies and ideas, and then consider how that might be done.

1. The Ability to Hold Water Rights Unused or Have an Extended Period of Time to Show Beneficial Use.

Because it is important to be able to plan responsibly for a long-term water future, we agree there may be circumstances under which water right owners may have the need to hold water rights unused for extended periods of time or be given an extended period of time to put their water to beneficial use ("a longer planning horizon").

We agree that it is good public policy for New Mexico to allow for that.

There is not yet agreement on which water right owners should have a longer planning horizon, nor is there yet agreement on the exact circumstances under which a longer planning horizon should be recognized for any water right owner.

We agree that the central policy concern is finding the proper balance between the need for entities to do reasonable water planning and the danger of allowing speculation in water or hoarding of water.

2. The Length of Time

We agree that under certain circumstances, a longer planning horizon could extend up to forty years.

We agree that there may be exceptional circumstances where more than forty years may be justified, provided that certain criteria are met.

There is not yet agreement on whether forty years is the right figure, whether to substitute another specific figure such as one hundred years, or whether any figure should be specified, as opposed to providing for a case-by-case determination of what length of time makes sense for any given water rights owner.

We agree that the central policy concern is finding the proper balance between the time genuinely needed to be realistic about water planning, and the urgency reflected in the constitutional principle that “beneficial use is the basis, the measure and the limit of a water right.”

3. Criteria

We agree that no one should get a longer planning horizon automatically, but should be required to make a showing that justifies it.

We agree that there should be some criteria, whether by statute, rules, regulations or guidelines or through some other means, made available to all, that are used to evaluate water rights applications before the State Engineer that include requests for a longer planning horizon.

We agree that such criteria should apply to new requests by applicants as well as requests for extensions of time within which to put permitted rights to beneficial use.

We agree that such criteria should incorporate at the very least the following showings:

- A. That the applicant is not attempting to speculate in water or hoard water.
- B. That the applicant has a genuine need to plan for the future, whether justified by population projections or other means, depending on the applicant.
- C. That the projections are as reasonable as possible, under the circumstances.
- D. That the applicant has done actual substantive planning before asking for permission to hold water rights unused.
- E. That if granted, there will be periodical review or status reports to the State Engineer, to assure that the applicant is being diligent in putting the water to use, and to assure that the assumptions made underlying the request are still valid.
- F. That there be assurances for an opportunity for public input or review.
- G. That there be conservation requirements for the use of the water.

There is not yet agreement on any particular criteria, although we have reviewed and commented upon some proposed elements of a template circulated by State Engineer staff.

We agree that the central policy concern with respect to criteria is to find the right balance between, on the one hand, a uniformity of standards and level of detail that ensures consistency and effectiveness in the consideration of water rights applications and, on the other hand, a flexibility that allows tailoring of data requirements as appropriate when the amounts of water are small or the analysis simple.

4. Consistency Between Water Development Plans as Described in the State Engineer Regulations and the Criteria Used to Evaluate Applications to Hold Water Rights Unused or for Extensions of Time.

There is confusion as to the role that “water development plans,” as well as other types of water planning, have in relation to applications to hold water rights unused, either through request for extensions of time or 72-1-9 applications or otherwise. We agree that whatever inconsistencies there are among various avenues for water planning, they need to be addressed or resolved.

5. The Importance of Further Conversation

We agree that resolution of this matter is a critical one for the State of New Mexico and that we should continue to work together to create a workable compromise that furthers the interests of all stakeholders.