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**MEMORANDUM**

TO: House Memorial 42 Stakeholders

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

SUBJECT: Draft Status Report for HM 42 process

DATE: May 11, 2009

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The following memorandum is a status report on the work of a stakeholder's group convened by the State Engineer pursuant to legislative directive. The memorandum is an effort to describe the work of the group and the issues discussed in the group as neutrally and factually as possible, with an emphasis on identifying any consensus that has emerged. The State Engineer has taken no position on any of the issues discussed by the group, and nothing in this memorandum should be understood to reflect a State Engineer position on these issues.

I. History of HM 42 Process

The Office of the State Engineer (OSE) was requested by House Memorial 42 (2007) (HM 42, attached) to conduct stakeholder discussions to "convene representative stakeholders for the purpose of informing and making recommendations to the state engineer relating to planning authority . . ." Although HM 42 does not cite NMSA §72-1-9, the memorial tracks the language of that statute, which was the subject of various proposed changes during the 2007 legislative session. This statute first states that water planning by certain entities promotes the public welfare and recognizes that the State Engineer has a policy of not allowing certain entities to acquire and hold water rights that exceed their reasonable needs within forty years. The statute then allows a water use planning of forty years for these entities and states further that water rights for these entities shall be based on water development plans demonstrating need within forty years.

HM 42, apparently characterizing the changes proposed to the statute during the 2007 session, mentions various entities in addition to the entities presently listed in the statute, and then refers to “proposals to extend the forty-year planning period to a one-hundred year period,” and “proposals to adopt criteria to be included in water development plans.” Broadly, therefore, the subjects for consideration through the stakeholder process were whether the statutory list of entities should be changed; whether the statutory period of forty years should be lengthened; and whether criteria should be developed to address required content or standards for the water development plans. Specific suggestions also mentioned in the memorial, such as making the plans public, having them adopted by a governing body, requiring that they be regularly updated, and considering interstate compact limitations on state conservation where discussed in connection with proposed criteria for water development plans.

OSE staff led by John Longworth and assisted by Lucy Moore as a facilitator and two contract attorneys, held four public meetings to discuss the subject matter of HM 42.

#### A. Public Meeting One—July 24, 2007

Summaries of each of the public meetings is posted at the State Engineer website under “Hot Topics,” <http://www.ose.state.nm.us/>. At this first meeting, following a welcome, OSE staff presented a brief background history of the statute (a memo has been posted on the State Engineer website) and then hosted a wide-ranging discussion of the substance of the issues and the options available for change. OSE staff asked for written comments from the stakeholders on their substantive positions, and offered to meet separately with anyone who wished to convey an opinion in person, either instead of or in addition to written comments.

#### B. Comments and Separate Meetings

Twelve sets of written comments were received, which were posted on the State Engineer’s website. In addition, eight separate meetings were held, some to discuss the written comments and some to discuss the issues without written comments. The comments and conversations were analyzed by OSE staff.

#### C. Public Meeting Two—September 6, 2007

At the second public meeting, OSE staff presented to the stakeholders, in the form of a power point presentation (posted at the State Engineer website), their analysis of the comments received. The OSE staff organized the presentation in the light of the three broad types of issues at stake in the conversation, and asked the stakeholders to correct any errors in the OSE’s observations on the comments. Thus, for example, the OSE staff saw in the comments no stated opposition to the addition of new entities to the statutory list. At the second public meeting, however, this perception was contradicted, and no consensus emerged on this issue. With respect to the issue of whether forty years was an appropriate time period for planning, the OSE saw no consensus in the comments, and

this perception was confirmed. With respect to the issue of whether there should be criteria to address requirements and standards for water development plans, the OSE staff saw no opposition in the comments to the idea of a template for water development plans. The stakeholders at the public meeting were cautious about agreeing to the idea of a template without seeing what it might actually look like. There was consensus, however, around the idea that it would be valuable to develop a proposed template for the group's consideration, and the OSE undertook to do so.

Substantive discussions continued during the meeting, growing more sophisticated as the OSE asked the group to consider the role of the existing forfeiture statutes in water planning, and stakeholders presented specific arguments and suggestions. The group reached a consensus that the process was valuable and that it was possible that a recommendation could be reached to bring to the legislature if there were more time to work together.

#### D. Interim Committee presentation

The State Engineer appeared before the Interim Committee on Water and Natural Resources in October of 2007, and reported on the work of the HM 42 group. While there were concerns about proper notice to certain groups, there was also a sense that the process was valuable and should continue.

#### E. Public Meeting Three—March 20, 2008

At the third public meeting, OSE staff presented the “Proposed Elements of a Water Development Plan Template” that the staff had developed as discussed in the previous meeting. This document is posted at the State Engineer website. Contract attorney Fred Abramowitz also presented an analysis of water planning processes in other states, from which some ideas had been drawn for the template. In the course of the discussion that followed, among many good points made and explored, two topics stood out. First, at least one stakeholder felt that the issue of condemnation by municipalities as a means of gaining water should be addressed in the template, while other stakeholders felt that this issue was not relevant. No consensus on how the group should handle this issue was reached. OSE staff, while inclined to the view that the topic of condemnation was outside the scope of HM 42, promised to raise the possibility of further discussions on the topic with the State Engineer. Second, it became very clear that there were a great many questions about when exactly the template would be used and, more generally, how the planning contemplated in the template would fit with other water planning requirements or opportunities.

OSE staff invited stakeholders to submit written comments on the proposed template for distribution and discussion by the group.

#### F. Public Meeting Four—May 28, 2008

At the fourth public meeting, Cheri Vogel of the OSE staff presented to the stakeholders, in the form of a power point presentation (posted at the State Engineer website), the staff's analysis of the ten comments received on the proposed template. The OSE also spoke about its view that the template represents a possibility of resolving the disagreement around the issues of what entities should be on the statutory list and how long the planning period should be by directly identifying and addressing standards for water planning. Thus, no matter what entity was applying to hold water rights unused, or for how long the entity wanted to hold them unused, they would have to meet the criteria listed in the template. In this way, two of the three broad issues of HM 42 might be mooted if the stakeholders could agree on a template. The OSE staff's review of the comments to the template suggested that there were conflicting responses to the substance of the template, although no commenter had objected to the idea of a template. The stakeholders at the public meeting were asked whether there were objections to the idea of a template, and again expressed caution about agreeing to the idea before there had been more discussion about some of the issues raised in the comments.

In addition to the conversation about the template, contract attorney Martha Franks presented information at this meeting about the water plans that have in fact been submitted to the State Engineer and the contexts and reasons given for those submissions. State Engineer files reflect a great many different reasons for submitting plans to the State Engineer, and there was consensus that it would be a good idea to make the situation more clear to people. A request was made for the information presented to be posted on the State Engineer website.

John Longworth suggested the creation of a status report—that is, this memorandum--so that stakeholders could see how this process has unfolded and consider next steps. This idea was approved, and there seemed to be consensus that the process still felt fruitful and should continue.

#### G. More comments

Since the fourth public meeting, three more written comments, an article on groundwater planning, and an article on Washington State's municipal water law have been received.

#### H. Public Meeting Five—July 30, 2008

The fifth public meeting was scheduled for a full day, as the stakeholders had expressed the desire to take the time to discuss the issues in detail, without feeling pressed for time. At this meeting, the stakeholders considered the draft status report prepared by OSE staff—that is, this memorandum—as well as a second memorandum, also prepared by OSE staff, reflecting perceived areas of agreement among the stakeholders. With a few changes, the draft status report was tentatively approved by the stakeholders and it was agreed that it would be regularly updated to reflect the process as it unfolded.

The second memorandum, called “the consensus memo,” occasioned extensive discussion. OSE staff projected the draft on a screen so that stakeholders and staff could make changes easily as the discussion required. Agreement was tentatively reached in some areas, subject to further thought. Other issues were flagged as needing to be considered at a later meeting. The group did not finish going through the draft by the end of the meeting and agreed to return for another long meeting on order to finish the document and make a second effort to address those issues that had been flagged for further consideration.

The issue of eminent domain was raised again at this meeting and there was some discussion. The OSE staff agreed to discuss with the State Engineer sending out a research memorandum on this subject and scheduling time at the next meeting for the topic. A research memorandum was posted on the OSE website a few weeks after the meeting.

#### I. Public Meeting Six—August 27, 2008

The sixth public meeting was also a full day, as the previous long session had seemed productive. The State Engineer began the meeting by speaking briefly to express his sense of the group’s good work and his willingness to support it. The group then approved the update to the status report in paragraph I.H, above. Next, as had been promised at the last meeting, there was discussion of the issue of condemnation (eminent domain), which some stakeholders wish to be part of the HM 42 process and some do not. The action item decided upon following the discussion was that the entities interested in the issue of condemnation would meet as a subcommittee to see if agreement could be reached about what, if anything, should be included within the recommendations of the stakeholder group on that issue.

The stakeholders then returned to consideration of the draft consensus memorandum, which had not been fully reviewed at the previous meeting. In the course of finishing review of the document and then going back to look again at questions that had remained open in the previous review, a wide-ranging conversation was held about the proper relationship between water plans submitted as part of water rights applications before the state engineer and other types of water planning documents, some of which may be filed with state engineer applications and some of which are produced for other purposes. After discussion, there seemed to be a tentative consensus that the state engineer need not review planning documents outside of the applications process, but there may be further thinking on that point.

The next major topic was how to identify the entities that should be eligible for a longer planning horizon under NMSA 72-1-9. The group considered several options, including the statutory list, or some other list, as well as the option of including qualifications for the eligible entities within the criteria for the water development plans. The stakeholders agreed that more discussion is needed on this topic, and on the consensus memo generally, and a seventh meeting date was set.

#### J. Public Meeting Seven—September 24, 2008

The stakeholders met for the seventh time at a conference room at a state building on Cerrillos Road, so that lunch could be brought in during a working session. The subcommittee on the condemnation issue reported that they had met and were hopeful that language could be agreed upon for inclusion in the consensus memo. The stakeholders then returned to the substance of the draft consensus memo and discussed the remaining issues with respect to which consensus had not been reached at the earlier meetings. The stakeholders were able to reach agreement on those issues, or, in some cases, agreement to drop issues from the memo, so that the final result was a statement of issues on which the stakeholders could all agree. The stakeholders then committed to consult with those they represented and let the stakeholder group know if the consensus memo could be made final. Following this, there was discussion about the next steps of the group, building on the consensus memo. Office of the State Engineer staff offered to put the points of agreement into language that would be appropriate for statute, regulation or guideline for the stakeholders to discuss, and this suggestion was adopted. There was also discussion of the upcoming legislative session. The stakeholders agreed that the preferred way forward was to try to present a commonly developed suggestion for how to approach the issues of NMSA 72-1-9. A next meeting was set for October 22, 2008 to try to develop that approach together.

#### K. Public Meeting Eight—October 22, 2008

The stakeholders met for the eighth time at the New Mexico Municipal League office. After accepting the update paragraph from the last meeting and receiving no comments from principals on the consensus memorandum, the stakeholders began review of draft language offered by the Office of the State Engineer (OSE) staff members toward embodying the consensus memo. Fred Abramowitz introduced the document, noting that he had put it in the form of a draft statute, but that no decision had been made as to the form that any product from the stakeholder group might ultimately take. Deferring the question of form, a wide-ranging discussion followed of constitutionality issues for both proposed changes in the law and the present statute, as well as questions about the State Engineer's existing water rights application procedures. In addition, the long-running substantive questions of NMSA 72-1-9 were reviewed again in the light of the new task of finding specific language to reflect the general agreement in the consensus language. The stakeholders discussed whether there should be a list of entities or qualifications of entities eligible to submit applications in which the applicant proposes to hold water unused for an extended period of time; if so, who should be on the list; how extended the period should be, and what the standards for State Engineer review of water rights applications for such extended periods should be. Several new voices were present in the group, which prompted discussion of the group's process, occasional review of the consensus memo, and an expression of intent to work together through this process rather than offer individual positions in the upcoming legislative session. OSE staff members agreed to post the document as revised by the stakeholder group. A next meeting was set for November 7, 2008.

#### L. Public Meeting Nine—November 7, 2008

The stakeholders met for the ninth time at the Toney Anaya Building. The update paragraph from the previous meeting was accepted for the status memo, and the timelines of the process were reviewed and discussed. The condemnation subcommittee reported that they had been unable to agree on language for inclusion in the HM42 process and would pursue separate paths. The group then turned to discussion of draft language developed initially by the OSE staff to try to embody the consensus of the group in a form that could be made into law. One of the stakeholders had offered proposed changes regarding the inclusion of certain categories of water users, but no agreement could be reached on that language, and there was discussion of the extent to which the group might not be able to agree on who should or should not be included in a list of entities eligible to be considered for permits allowing water to be held unused for extended periods of time. The group elected to try to make progress on the issue of what form any changes to law or State Engineer practice should take, suggesting that the question of form might affect the way in which the substance of the issues were expressed. The relative merits of a change in statute, a process of adopting new regulations and the creation of guidelines were discussed, including the practical and financial consequences of each option. No agreement was reached, although some entities were in favor of guidelines as an inexpensive and immediate way to test out concepts while others felt that guidelines might not be in conformity with the statute. At the end of the meeting, the stakeholders raised the question of the approach to reporting to the Interim Water Committee, as well as the approach to the legislative session. There was agreement that no legislation would be introduced by the group, and agreement that John Longworth should report to the Interim Committee that the group found the discussions valuable and wished to continue the process. A next meeting was set for after the legislative session in March, 2009.

#### M. Public Meeting Ten—April 21, 2009

The stakeholders met for the tenth time at the Municipal League Building. After a brief review of the history and purpose of the stakeholder group, the update paragraph from the previous meeting was accepted for the status memo. A report was given on those activities of the 2009 legislature that were related to the interests of the group. The final item in that report was the state of the budget for the Office of the State Engineer (OSE), which was cut by the legislature, affecting the funding for the stakeholder group. After considerable discussion of this changed circumstance, the group agreed to consider a final document to be produced by the OSE that would attempt to reflect and summarize the work of the group in proposed guidelines or standards for applications before the State Engineer to hold water unused for extended periods of time. Written comments could be submitted in response to that document. In addition, the stakeholders agreed to hold two meetings without the OSE to consider this document, and the OSE agreed to try to arrange for a final facilitated meeting following the stakeholder meetings to discuss the conclusions of the stakeholder group. Some stakeholders suggested that they would explore the possibility of obtaining funding from outside sources so that the facilitated meetings could continue.

## II. Consensus and Non-consensus

### A. Should other entities be added to the statute?

At present there is no consensus on the specific question of who should or should not be on a list. Taking the written comments together with the views expressed at the public meetings, it appears that the following general positions are represented among the stakeholders:

1. All publicly regulated utilities should be included in the statute
2. All publicly regulated water utilities should be included in the statute
3. All mutual domestics should be included in the statute
4. Entities required by law to serve all residents should be included in the statute
5. Agricultural interests should be included in the statute
6. Pueblos should be included in the statute
7. No further entities should be included, and it is not clear what the public policy behind the present list is
8. Electric utilities should not be included
9. The State Engineer has the authority to grant or deny permits on the basis of public policy, whether or not an entity is listed in the statute
10. The intent of the constitution should be protected
11. Serious consideration must be given to unintended consequences throughout the process

### B. Is forty years the right planning period?

At present there is no consensus on the specific question of whether the period for which water could be held unused should be extended beyond forty years, or even shortened. Taking the written comments together with the views expressed at the public meetings, it appears that the following general positions are represented among the stakeholders:

1. Forty years is reasonable
2. An amount of time “up to” forty years is reasonable
3. Forty years is not long enough--one hundred years is reasonable, at least for some entities



4. Given the complexity in developing and completing regional public water supply projects, consideration may be needed beyond forty years
5. One hundred years will set off water wars
6. Anything over a short number of years is unconstitutional
7. The State Engineer should decide on a case by case basis
8. The State Engineer should not have discretion to decide on a case by case basis
9. It might be acceptable for the State Engineer to decide on a case-by-case basis if he does so in accordance with an acceptable template.

### C. Should criteria be developed to address water development plans?

In addition to the comments made either in written form or at the public meetings on the specifics of the proposed elements, the following general, contextual issues have arisen repeatedly:

1. Are water development plans submitted with application or independently of an application for transfer?
2. What is the process for approval?
3. How do water development plans relate, if at all, to water conservation plans and other water planning?
4. The template should be consistent with regional water plans
5. It needs to be clearer what form the template would take—statute, regulation, or guideline?
6. If a template were adopted, would the statute be left on the books? Repealed? Changed to include the template?
7. Different templates could be developed for different entities
8. It needs to be clearer what relationship there is between a water development plan and a request for an extension of time to put water to beneficial use

## III. Present Status

### A. Drafting a Status Report

The Stakeholders agreed that it would be useful to draft a status report—that is, this memorandum—to record what has happened in the process and explore what consensus has been reached.

### B. Continued conversation about these matters is important

The stakeholders appeared to agree that more conversation on these matters should be pursued, and that it was possible that further, more specific consensus could be achieved on how to go forward.