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MEMORANDUM

To: House Memorial 42 Stakeholders

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

Subject: "Draft Guidelines" as discussed at the April 21, 2009 Meeting

Date: May 6, 2009

Suggested Content For Applications Seeking An Extended Planning Horizon

This document is intended to serve as a guideline of suggested content for applicants who desire an extended planning horizon of up to forty years, but beyond three or four years, within which to put water to beneficial use, and who therefore wish to acquire water rights through transfer or new appropriation and hold them unused for an extended period of time. This document is also intend to assist those who, justified only under very limited and exceptional circumstances, desire to hold water rights unused for a planning horizon in excess of forty years.

All applicants seeking to hold water rights unused will be required to file an application for transfer of water rights or new appropriation with the State Engineer in a form and manner prescribed by him. A water development plan as described herein shall be included with the application. These guidelines are not intended to conflict with state law or State Engineer rules or regulations and should be construed in a manner consistent therewith.

I. Who Must Apply?

N.M.S.A 72-1-9, to promote the public welfare and conservation of water within the state, grants certain specified entities the right to apply to hold water rights unused for a planning period of up to 40 years. There may be circumstances in which other persons or entities (“non-listed entities”) also need an extended planning horizon. These recommendations, as indicated herein, apply to those entities specified, as well to “non-listed entities” who, under certain circumstances, and where sound public policy requires, can also demonstrate an actual non-speculative need for an extended planning horizon.

II. Criteria for Allowing Persons or Entities an Extended Planning Horizon.

All persons and entities seeking to hold water unused for an extended planning horizon must demonstrate that their application is non-speculative, that it is based upon a genuine need for future water based on sound conservation practices, and that they are not seeking to hoard water. They must show a genuine need, willingness and ability to do long-term water planning, and they must submit a water development plan or similar document in support of their application.

The decision to grant such application will be based upon a sound balancing of the needs of the applicant to plan and the need to avoid speculation and/or hoarding of water. While each application will be evaluated on a case-by-case basis and no single criteria may be conclusive, the following are among the factors to be considered. Thus these factors, to the extent applicable and practical, should be included in the water development plan supporting the application.

A. Showing the Need for an Extended Planning Horizon.

1. For non-listed entities, the applicant should demonstrate a genuine, out of the ordinary, need to plan into the future, whether because they are required by law to provide water for public services, or because the nature of the project requires an extended planning horizon, or for other good cause or reason. They should show that it is in the public good to grant their request for an extended planning horizon. Entities listed in 72-1-9 are presumed to have such need for future water planning and their need to plan for the future is presumed to be in the public good.

B. Showing the Application is Non-Speculative.

1. All applicants should show that they have an actual plan or project in place for using the water and demonstrate they are not simply attempting to lock-up the water or prevent others from acquiring it. This includes, but

is not limited to, demonstrating that they have the financial capability of moving forward with the project and that they have an actual and specific design in place for the project which can be completed within a reasonable period of time.

2. The applicants should show that, prior to requesting this extended planning horizon, they have complied with all legal, administrative, licensing and other governmental permits or requirements so that they can proceed with the plan, or show that there is a substantial likelihood that these requirements will be met in the future.
3. The applicants should demonstrate an ability to physically store, divert and use the water. Additionally, the applicants should demonstrate a legal interest in the lands to be served or utilized or should demonstrate a reasonable expectation in acquiring the same. In short, they should show that they are ready, willing, and able to go forward with the plan.

C. Showing that the Requested Planning Horizon is Reasonable and Necessary.

1. All applicants should show that they generally use the requested planning horizon for other purposes, and/or that other similar entities use the same or similar extended planning horizon. The applicants should show why the requested planning horizon is necessary, as opposed to a lesser one. Applicants should not presume that the mere demonstration of a need to plan would support a grant of the full 40 years, but should make a specific showing of the need for the period requested. Unless the applicants show a specific need to plan for the full forty years, and demonstrate a reasonable ability to do so, a lesser time frame may be appropriate, or the application may be denied.
2. In rare situations, an applicant may request a planning horizon in excess of forty years. The ability, however, to project that far into the future is limited and thus the applicant should recognize that allowing them to hold water rights, unused, for periods in excess of forty years, will only be granted under very limited and exceptional circumstances. Applicants seeking such planning horizons must justify such an exceptional need and circumstance, and must demonstrate their ability to project such exceptional needs over such a period of time.

D. Showing the Amount Needed; Conservation; Other Water Planning Documents.

1. The applicants should present reasonable projections for its future water needs, whether based on population projections or otherwise, that support the amount of water requested and that support the planning horizon requested. These projections should be as reasonable as possible under the circumstances and should consider all current and future sources of water and, in evaluating the amount of future need, should include all current conservation practices and all reasonable and sound future conservation measures.
2. The applicants should indicate to what degree their application and supporting water development plan is or is not consistent with other existing plans involving water, including, but not limited to, regional water plans, conservation plans, subdivision act requirements, and comprehensive plans.

E. Due Diligence in Putting the Water to Beneficial Use.

1. Should the application be granted, the applicants must use due diligence in putting water to beneficial use. All applicants must show that, should the application be granted, they will use due diligence in putting the water to beneficial use by providing timelines, time frames or milestones in the development of his project in their water development plan. Reasonable periodic updates or status reports will be part of their application, should it be granted, to assure that timelines and milestones are met, and that the underlying assumptions of the application are still valid.