

**OSE – Stakeholders Meeting #6
House Memorial 42**

**August 27, 2008 – 9:00 – 4:00
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, , Cheri Vogel, OSE Water Conservation Coordinator, and Fred Abramowitz and Martha Franks, contract attorneys with the OSE. Those present introduced themselves.

Agenda Review: Lucy reviewed the agenda and the handouts, which included: Draft Status Report for HM 42 Process (revised), Draft Consensus Memo (revised), memorandum from the OSE on condemnation, a Water Right Application Flow Chart, and the agenda. She noted that there was time on the agenda for discussion of the condemnation issue. [All handouts are on the OSE website]

Remarks of the State Engineer: John D’Antonio, State Engineer, thanked the group for their commitment and hard work to resolve some of the problems inherent in 72-1-9. He said that he, too, was committed to the stakeholder process, and would continue to support the participation of his staff. He was confident that the group’s energy and cooperative spirit would result in a product that would consider all interests and benefit the state of New Mexico.

Draft Status Report for HM 42 Process [revised]: Martha Franks had revised the Draft Status Report based on comments at the last meeting, and had added three paragraphs to include a description of the activities of the last meeting. The document is intended to provide a running description of the HM 42 stakeholder, including the schedule of meetings, discussion highlights and issues raised. She emphasized that it is not intended to reflect any consensus or support for one position or another, but to provide a common foundation for the group to move forward.

The group reached consensus (unanimous) on accepting the draft status report, with changes. [available on the website]

Condemnation: As agreed at the last meeting, the group turned its attention to the issue of condemnation. Fred Abramowitz reviewed the State Engineer’s memo, concluding that “the risk of cities engaging in a wholesale condemnation of water rights for extended future planning horizons has probably been exaggerated.” The New Mexico constitution does not guarantee the right to condemn; the entity must show public need for the resource being condemned. The entity must engage in a good faith negotiation with the

owner, based on three appraisals, and if the owner protests the condemnation effort, all court matters must be before a jury.

Discussion:

Many felt that the subject was not relevant to the work of this stakeholder group since the water right is acquired prior to the application process before the State Engineer. It is not part of the charge of the group to deal with the acquisition of water, they said.

Others felt strongly that this process should include some provisions to protect the rights of those poorer agricultural interests that could be vulnerable to condemnation, and unable to afford to defend themselves legally. One of the ways suggested by stakeholders of guarding against this exploitation would be to limit the planning horizon, since the longer the horizon, the more attractive the condemnation. These planning horizons should be based on realistic population projections, they added. Finally, they pointed to an important difference between land and water rights. When a piece of land is condemned, it is *the* one and only piece of land that will satisfy the entity's need (to connect two highways, for instance). In the case of water, there is a large pool of rights from which to choose, and the poorer, more senior rights will be the most vulnerable.

A participant noted that the city of Santa Fe agreed to not condemn water rights to satisfy its current and future needs.

Municipal and local government interests spoke of the disincentive to condemn water rights. The process is very costly, and if the case goes to the jury, chances are that the entity will have to pay double or triple the appraised value. They also observed that requiring cities and local governments to identify sources of water in advance could result in an unintended consequence of forcing those entities to consider condemned water.

Some participants urged that the stakeholder process find a way to at least acknowledge the potential for unintended consequences and seek to minimize them.

A subgroup of participants formed to further discuss ways of protecting water users from condemnation, in this process, and perhaps in other venues. If this subgroup can reach consensus on language for this process, they will bring that language for consideration of the larger group.

Draft Consensus Memo [revised]: John reminded the group that this document is intended to represent broad principles that the group can agree on. If this higher level of agreement can be reached, the group may want to delve deeper and discuss some of the specifics found in the template. A third task, he said, would be addressing the question of format for the recommendations. At the last meeting, the group reviewed the majority of the memo, and reached tentative agreement on some of the language in the memo. Sections where there was no agreement were bolded. The group began this meeting by picking up where they had left off.

Cheri Vogel made changes to the document on the screen.

Comments on the Draft Consensus Memo:

Elements of a water development plan:

F. At the initial application there be assurances for an opportunity for public input or review

There were questions about whether or not this requirement applied to new applications or transfers, or both. Staff assumed it applied to both, and asked if the notice in 72-1-9 was adequate. Some felt that the notice should include whether the water was to be put to immediate use or future use.

The discussion evolved to focus on the process of moving a water development plan through the system. A participant was concerned that proponents of the water development plan receive assurance early in the process that the plan meets the criteria for such a plan. He suggested that the plan be submitted to the OSE for review prior to the application process. Others felt that if there were a clear and comprehensive template, or checklist of what should be included in the plan, the plan drafters would be able to know without consulting the OSE if their plan was complete. The assumption was that the public notice and input process would be part of the application process, not some earlier plan review process.

A participant was also concerned about the length of time currently required for review of water development plans, and asked for a time limit to insure that the OSE reviewed plans in a timely manner.

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.

The group re-titled this number to reflect the more pertinent point of defining the relationship between the water development plan and other planning processes. There was a general discussion about the intent and function of other planning processes. Both regional water plans and the county ordinances implementing subdivision plans are concerned with water supplies and availability. The water conservation plan is statutory, and may be submitted (not “accepted”) with the OSE as a condition of funding (72-14-3.2). The water development plan, by contrast, is submitted as part of the application process to establish the need for, and to justify, holding water for future use. The only context in which the State Engineer will “accept or not accept” a water development plan would be in the application process. Again, the group suggested that there be a template, or checklist, to assist the proponents in creating a water development plan that will be complete. There was general feeling that this kind of review for completeness was not the role of the OSE. Some suggested that the public would benefit from seeing the water development plan as soon as possible, and that an OSE “stamp of approval” prior to the application process could facilitate that.

The group agreed that the water development plan submission should be in conjunction with the application process. They further agreed that a template, or list of elements, would help the plan drafters insure the plan is complete.

Review of all bolded language: The group returned to the beginning of the Draft Consensus Memo to review the bolded language. The discussion focused on how to describe entities eligible for application to hold water rights unused. The close link between this question of “who” and the consideration of criteria to be met in a water development plan made the discussion complex. Some felt it was critical to first determine the criteria, and that perhaps no list would be necessary if the criteria were clear and adequate. In other words, any entity meeting the criteria could apply. Others felt strongly that certain entities (cities and counties, at least) should be named specifically as potential applicants. Some further believed that the 72-1-9 list should be honored in any new system. To further complicate things, HM42 includes a list that is not inclusive of all the named entities in 72-1-9. Still others felt that the question of time of the planning horizon should be settled first, before consideration of eligible entities.

The group decided to use the word “qualifications” instead of “criteria” to describe the kind of entities that might apply, since “criteria” is already used to describe the elements of the water development plan.

The group identified three possible ways of handling eligibility of applicants:

- Keep the 72-1-9 list
- Keep the 72-1-9 list plus others who can meet qualifications set out in statute
- Anyone who can meet the qualifications set out in statute, and criteria of the water development plan

The group further considered dividing the third section into two parts, to distinguish the application process for holding water rights unused from the criteria/required elements of a water development plan.

NEXT MEETING: SEPTEMBER 24, 9:00 – 2:00 (may including a working lunch)

Summary prepared by Lucy Moore. Please contact her with questions or corrections.

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