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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 amended at the July 30 and August 27, 2008 meetings)

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.

The stakeholder group acknowledges the present state of the law. No changes to that law have yet been agreed upon. The discussion below is concerned only with general principles and does not constitute any agreement with regard to changing or not changing NMSA §72-1-9.

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 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 beyond the customary three or four-year period identified in permits (“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 particular water right owners or permit holders 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 or permit holder. **Options have been considered but are pending until criteria of a WDP has been developed. Three options are considered: 1. Keep present list, 2. Keep present list and set qualifications 3. Set qualifications and meet criteria, 4. Develop perfect list.**

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 there are circumstances under which a water rights owner or permit holder should be permitted to hold water rights unused for a period that 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 agreement that a number or cap is needed but not yet agreement on whether forty years is the right figure.

We agree that a discussion of “rolling forty-year planning period” is needed.

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

3. WDP in the Context of Application

We agree that no one should be granted an application to hold water rights unused for an extended period of time automatically, but should be required to make a showing that justifies it.

We agree that there should be criteria, developed pursuant to 72-2-8, setting out the required content of water development plans. Water development plans will be submitted with water rights applications that include requests for a longer planning horizon. Water development plans will be used to evaluate whether the longer planning horizon is justified.

4. Elements of a Water Development Plan

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 where the applicant cannot demonstrate due diligence within the three-year statutory period.

We agree that the central policy concern with respect to application 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, subject to existing rules and regulations.

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 projections are as reasonable as possible, under the circumstances.
- D. That before asking for permission to hold water rights unused, the applicant has done planning appropriate to its circumstances.
- E. That if granted, there will be appropriate 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. At the initial application there shall be assurances for an opportunity for public input or review.**

While we agree that current State Engineer notice requirements of publication and opportunity for protest are adequate such notice should

include a statement that the applicant intends to hold water rights for future beneficial use.

OR

In addition to current SE requirements for publication and opportunity for protest, the application should include a statement that the applicant intends to hold water rights for future beneficial use.

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.

4. The Relationship of Plans

There is confusion as to the role that “water development plans,” as well as other types of 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 the criteria for WDP should include a review of consistency or lack of with other relevant plans included but not limited to regional water plans, conservation plans, subdivision act requirements, comprehensive plans.

5. The Importance of Further Conversation

We agree that resolution of issues related to HM42 is critical for the State of New Mexico and that we should continue to work together to create workable compromises that further the interests of all stakeholders.