

**OSE – Stakeholders Meeting #8
House Memorial 42**

**October 22, 2008 – 9:00 – 2:00
NM Municipal League Offices -- 1229 Paseo de Peralta**

Summary of Points Raised by Participants

Facilitator/Recorder: Lucy Moore

Welcome and introductions: Lucy welcomed the group and introduced OSE staff 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: the agenda, the Draft Status Report for HM 42 Process, the Draft Consensus Memo (both revised following Meeting # 7), and the Draft Statute/Rules/Regulations/Guidelines. [All handouts are on the OSE website.] She reminded the group that the primary purpose of this meeting was to review the Draft Statute/Rules/Regulations/Guidelines prepared by OSE staff and consultants, identify areas of concern, and explore the potential for agreement, both on the content of the document and on the appropriate form.

Timeline Update: John Longworth reviewed upcoming dates. If needed, this group will meet on November 7, from 9:00 to 2:00. The Interim Water Resources Committee will meet November 24 - 25 in Santa Fe, and depending on the outcome of this meeting and the next, John may make a presentation on the progress of the group. He emphasized that his office is deferring to participants on the timing and work product of the stakeholder group. The legislature will convene on January 20 and close on March 21, 2009.

Draft Status Report for HM 42 Process [revised]: The group reviewed and accepted Martha Franks' language summarizing the seventh meeting. This document is intended to provide a running description of the HM 42 stakeholder process, including the schedule of meetings, discussion highlights and issues raised. Martha reminded the group 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 on accepting the draft status report, as amended.

Condemnation: The condemnation subcommittee will report at the next meeting.

Draft Consensus Memo [revised]: At the previous meeting, the stakeholders had reached tentative consensus on the Draft Consensus Memo. They were asked to confirm this consensus with constituents, management, membership, etc. Lucy asked if concerns had been raised. There were none.

Draft Statute/Rules/Regulations/Guidelines:

As author, Fred Abramowitz introduced the document. He emphasized that he arbitrarily chose to put the language in the form of a statute, but that the group could choose any of the formats (statute, rule, regulation or guideline) or combinations of those formats.

General comments:

Participants were concerned with the length of the document if it were introduced as a statute. For consideration by the legislature, many advised the briefer the better. There were also concerns about the vagueness of some of the language, although the group understood that the language was intended to reflect the “principle level” agreed to in the Draft Consensus Memo.

There was a question about the constitutionality of sections A and B (taken from the existing statute) and the authority of the OSE to implement the requirements in the document. Participants noted that this issue, and others, had been discussed at length by the group in previous meetings, and either resolved or set aside as not appropriate for consideration in this forum.

Section A: Although many favored leaving Sections A and B as currently written in the existing statute (72-1-9), there was a suggestion to remove the last sentence of Section A. Some felt it was dated and not substantive; others were concerned about the implications if it were removed, and that it would not be worth it to open the statute for this change alone.

There was a request to include agricultural interests in the list of entities, on the basis that they are deserving of the same priorities as cities, counties and the others listed. As the question of who is covered was also considered, in depth, at previous meeting, the group chose to leave the section unchanged and to revisit the question after considering the rest of the document, which offers other entities the option to apply to hold water rights unused.

Section B: There were questions about the OSE’s current timeline and procedure for water development plan review and consideration. Since the statute does not give direction to the OSE for response to the plans, some felt that applicants were confused about when they might receive a response, and in what form that response might be – approval? acknowledgement of filing? etc. John explained that over fifty plans have been submitted, and that the process varies greatly depending on the application’s completeness and complexity. The OSE reviews the application, identifies missing data, offers an opinion on completeness, etc. and the applicant addresses the comments in its next submittal. There are no deadlines.

Some suggested that the forty-year period in Section B should run from the date of approval not from the date of the application, given the time that may elapse between application and approval (if in fact there is an actual approval). Others argued that the original request was to hold water until a certain fixed date, and that this date should not “roll forward” without new justification.

Section C: There were questions about the use of the phrases not seen in the existing statute and not defined -- “limited and exceptional circumstances” and “public policy.” In discussion, the group noted that the underlying meaning of remaining sections is to insure that the water is non-speculative and refers to actual water. The group chose to leave this unchanged until the rest of the document was covered.

Again, there was the issue of adding others to the named list, including subdivisions of the state and state agencies. Participants acknowledged the problem the legislature now faces with entities pressing for inclusion on the list. This stakeholder effort hopefully will offer an alternative to this “me too” way of making law.

There was also a question about the use of the word “person” and the potential for favoring corporate or pro-development interests.

OSE staff clarified that this new language applies to new water rights only.

Sections D and E: In response to concerns, OSE staff said there was no intent in this section to create new notice requirements. In addition, the right to protest would remain the same as in other relevant statute language.

There was agreement to merge Sections D and E. Fred was asked to re-write the new Section D and clarify the confusion.

Section F [now E]: The group discussed at length the list 1 – 7 of showings. It was understood that an applicant must make a showing for all items, not some.

#1 Non-speculative, non-hoarding: A participant suggested that item # 1 should be expressed in the positive, not the negative. Some felt that this was the over-arching criteria, and that the other items should be a sub-set of this one. This would provide a definition for the term “non-speculative.” Others suggested that # 1 be deleted from this list, and either elevated in priority to Section C, or included in Sections A or B to insure its link with constitutionality.

2 In the public interest, promotes the public good: Others suggested that # 2 was the more over-arching, basic criteria and should be given priority at the top of the list. There were concerns about whether “public interest” and “public good” would include agricultural interests. Fred explained that he did not use “public welfare” because of its specific meaning in state law, although some favored it for its consistency with state law.

There was a concern that the application should include consideration of the potential impact on existing water uses (human, wildlife, environment) if water is left unused, and then is withdrawn for other uses years later in accordance with the water development plan. Some felt the application process should include an evaluation of removing that water from those that had been accustomed to having it available.

There was agreement to remove #2 from the list, with the understanding that the impact on existing users of withdrawing water for use under a water development plan is already considered in the application process.

3 Applicant's capacity to store, divert, use: There was a question about whether or not leased water would be considered unused water.

7 Updates or status reports: This appeared to the group not to belong in the list of criteria, but elsewhere in regulations or guidelines. It was changed to the new F.

Section G: Although there was support for the possibility of apply for a planning period in excess of forty years, there was confusion about whether or not the words “clear and convincing” applied to the whole period, or simply the period in excess of forty years. The intent of the author, and the wish of the group, was the latter. It was agreed that staff would rewrite this bullet to reflect the wish of the group. The rewrite is included on the website Draft Statute/Rules/Regulations/Guidelines - Updated October 22.

Section H []: There was discussion about the pros and cons of using guidelines. Existing regulations – Surface Water, for instance – were also discussed.

Unity of the Stakeholder Group: Some participants expressed concern that the time, energy and commitment invested in this process, both by stakeholders and by OSE staff and consultants, not be wasted. They urged all those participating to honor the work of the group, particularly during the legislative session, and resist the temptation to “go around this process” and seek addition to the list of entities, or in other ways subvert the work product of the group. OSE staff and facilitator expressed appreciation for the wide diversity of interests that have come together for an honest, open discussion of issues. The good faith negotiations of these interests have resulted in an impressive level of agreement and the potential for consensus recommendations that would reconcile the conflict between the need for reliable public water supplies and the need to prevent speculation and hoarding.

Next Steps: Cheri will post a revised Draft Statute/etc. document on the website as soon as possible. Lucy will prepare a summary of this meeting within one week. Martha will update the Draft Status Report.

**NEXT MEETING: NOVEMBER 7, 9:00 – 2:00 (including a working lunch)
location to be announced**

Agenda items will include:

- Discussion of the form of the content – statute? rule? etc.
- Review and exploration of consensus of the Draft Statute/etc. document
- Condemnation Subcommittee report
- Next steps, including role in the November 24 – 25 IWRC

Summary prepared by Lucy Moore. Please contact her with questions or corrections. 505-820-2166, or lucymoore@nets.com