

**OSE – Stakeholders Meeting #9  
House Memorial 42**

**November 7, 2008 – 9:00 – 2:00  
Toney Anaya Building, Hearing Room 2**

**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 and the Draft Statute/Rules/Regulations/Guidelines (both revised following Meeting # 8), and alternate language by Liz Taylor for Section C. in the Draft document. [All handouts are on the OSE website] The purpose of this meeting, she said, was two-fold: to review and discuss the sections of the Draft document, reaching as much agreement as possible, and then to consider what format would be most appropriate for the document: statute, rules and regulations, guidelines, or some combination. Finally, the stakeholders would decide on next steps for the group.

**Timeline Update:** John Longworth reviewed upcoming dates. The Interim Water Resources Committee has put him on the agenda for the end of their two day meeting, November 24 - 25 in Santa Fe. John plans to update the IWRC on the progress of the group, and depending on the outcome of today's meeting and the wishes of members, he may present the draft legislation, rules, regulations or guidelines. 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 corrected Martha Franks' language summarizing the eighth 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 corrected.*

**Condemnation:** The Condemnation Subcommittee met and did not reach agreement on inclusion of condemnation in the work of the stakeholder group. Most members felt that the issue was not part of the HM42 mandate, and that it would be better addressed elsewhere. They also pointed out that there have been only three condemnations of water

rights, and none in recent years. The participant most concerned about condemnation may turn to water planning forums to address their concerns. She emphasized that the agricultural community feels that condemnation of agricultural water rights by municipalities, and perhaps others, is a very real threat, and that as water becomes scarcer the pressure to condemn will increase.

**Draft Statute/Rules/Regulations/Guidelines:**

Again, author, Fred Abramowitz emphasized that he had 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.

Section C: The group reviewed alternative language submitted by Liz Taylor. Her intention was to add to the existing list of entities in the existing statute, by permitting “those entities required by law to provide water or other essential public services” to transfer or appropriate water for an extended period of time. There was concern that the modified language implied that other entities – agriculture, for instance – would not receive the same privilege. Staff pointed out that the Crider decision gives rights to farmers to hold water unused.

Staff warned that if the list is arbitrary there may be constitutional issues. Making an exception of municipalities and counties may be constitutional, but indiscriminately adding others could create a hierarchy of use that would be unconstitutional. Those concerned about the constitutionality of the language favored language that gave equal opportunity to persons or entities to apply, and a rigorous application process to insure a high bar for holding water rights unused.

There was also discussion about whether the part of the section referring to “actual, non-speculative need for planning purposes” would be appropriate as a number 5 under Section E. Finally, the group considered the phrase “limited and exceptional circumstances.” Some favored removing it, or defining it; others felt that it was defined elsewhere and that it was critical to include the language in order to emphasize that holding water unused is not to be assumed.

There was a suggestion to add Section C to A and B of the existing statute, but there was widespread concern about opening the statute at this time.

A participant suggested that the group would never be able to agree on the list of entities, and should move on to other topics, namely the period of time question and the criteria for the water development plan. Whatever the form of the sections, the group needs to develop some of the specifics to be included in the water development plan.

The group agreed to leave Section C as written in the draft updated October 22.

**Format for document:** The group chose to turn to the question of what form the substance of the group’s work should take: statute, rule/regulation, guideline, or a

combination. It was difficult for them to continue discussing the document without understanding what form it would take.

Statute: There was some support for including Section C in the existing statute, and using Sections D-G as the basis for guidelines, perhaps eventually to become regulations. Some, however, were strongly opposed to opening the statute at this time, particularly to add language that has not been thoroughly vetted by the wider variety of interests in the state.

Regulations: Staff noted that 72-2-8 describes the State Engineer's rule promulgation process. The process, they added, is time and resource intensive, and could be a problem given the extremely tight budget the agency is facing this year.

Guidelines: Guidelines were favored by some for the relative ease of their development. They saw the potential for a phased process, where guidelines might become regulations after a trial period. There were concerns, however, about the lack of due process in drafting guidelines and the prospect that the State Engineer might move the guidelines to regulation status without going through the regulation development requirements. If the group were to support guidelines, said some, there should be a public involvement process and opportunity for comment.

Recommendations: Some felt that the group was not ready to propose even guidelines, and that "Recommendations from the HM42 Stakeholder Process" was a more appropriate label.

*The group agreed not to introduce legislation that would open the statute this year, understanding that as the group continues to work, they may in the future decide to pursue legislation.*

**Report to IWRC:** The group discussed the best approach for John to take in reporting to the IWRC at the end of the month. Following are their suggestions:

- Identify the participants, give an overview of the process, using the Draft Status Report, and emphasize the progress made by the group and its continuing support by the State Engineer.
- The Stakeholder group recognizes the complexity and the importance of the issue and the potential unintended consequences of opening the statute prematurely. Most of the members do not support opening the statute at this time, believing that they need more time to develop the details of the water development plan criteria and process.
- The Stakeholder group wishes to continue working on its draft document, with the expectation of coming to agreement on both the substance and the form of the recommendations.
- The Stakeholder group believes it is critical to take these recommendations out to the broader circle of interested parties for review and comment.

- The Stakeholder group welcomes comments on its Draft Consensus Memo, which is on the website, in the interest of a broader public involvement.
- The next stakeholder meeting will be by March 31, 2009. All are welcome to attend.

**Legislative Session:** Most felt it was important that this process be honored by its members during the session, and there be solidarity to the greatest extent against opening the statute at this time. OSE staff will update the stakeholders on issues of interest during the session. Members were asked to send Cheri any relevant news for forwarding to the group. Depending on the events, the group may want to have a conference call midway through the session.

**Next Steps:** No official revisions were made to the Draft Statute/etc. document. The draft document updated October 22 is on the website. Lucy will prepare a summary of this meeting within one week. Martha will update the Draft Status Report.

**NEXT MEETING: March 31, 2009 (including a working lunch) location to be announced**

Agenda items will include:

- Review of the legislative session
- Development of a work plan for the Stakeholder group for 2009
- Review and discussion of Draft Statute/Rule/Regulation/Guideline document

**Summary prepared by Lucy Moore. Please contact her with questions or corrections. 505-820-2166, or [lucymoore@nets.com](mailto:lucymoore@nets.com)**