

**OSE – Stakeholders Meeting # 1
House Memorial 42**

**July 24, 2007 – 9:00 – 11:30 am
Room 321, Roundhouse**

Summary of Points Raised by Participants

Facilitator/Recorder: Lucy Moore

Purpose of Process and Meeting: John Longworth, Chief, Water Use and Conservation Bureau welcomed the group and introduced OSE staff present, including Elisa Sims, Senior Water Resource Specialist, Water Use and Conservation Bureau, and Fred Abramowitz and Martha Franks, contract attorneys with the OSE. He explained the purpose of this stakeholder consultation process and the goal of the first meeting. In response to HM 42, the State Engineer asked staff to design and implement a process that would allow OSE staff and stakeholders to engage in an informal conversation about potential recommendations on the future of statute 72-1-9. At this first meeting, stakeholders will be given background on the statute, as well as some information on water rights and forfeiture. In addition, participants will be invited to propose options for consideration, and to discuss those options as candidly as possible, considering both the pros and cons of each for the range of interests.

Agenda Review and Schedule: Lucy Moore, facilitator and recorder, reviewed the agenda with the group, emphasizing the information and conversational nature of the discussion. Participants introduced themselves.

Lucy reviewed the process schedule, subject to change:

- Meeting # 1 -- July 24, 2007
- Meeting summary emailed to participants and posted on website by August 2
- Written comments on options submitted between August 6 and 13
- Informal meeting with OSE staff before August 20
- OSE emails preliminary matrix/presentation to participants prior to Meeting # 2
- Meeting # 2 -- September 6
 - OSE will present descriptions of options, including stakeholder contributions
 - Stakeholders will discuss options, identify common ground, clarify differences
- Comment window – between September 6 and mid-October
- [possible third meeting]
- OSE staff present recommendations to Interim Committee – October 29 – 30

Presentations: Fred Abramowitz and Martha Franks offered the history of 72-1-9, emphasizing that it was enacted in response to El Paso's efforts to acquire water rights in New Mexico, and that it was designed to provide relief from the forfeiture rule and

identify a reasonable time in which to put water to use. It was not a planning tool, they added. When it was enacted in 1984, there was unappropriated water in the state; today cases of "new" appropriations are rare. Water acquired for future use under 72-1-9 will be purchased from an existing user. The situation is different, and the legislature believes the law needs re-examination. Since enactment, the law has been amended many times, mostly in order to add covered entities.

Bills relating to 72-1-9 in the 2007 legislative session called for 1) adding entities; 2) extending the period to 100 years; and 3) addressing the content of plans. In answer to a request, Elisa will email these bills to participants.

Discussion: A participant asked whether the statute contemplated a "rolling 40 year period." If an entity purchased a permit, for instance, that was 30 years old, would it be possible to extend the life of the permit for another 40 years, or would the purchaser have only 10 years. Those entities that are conserving, "holding steady" for the time being, would benefit from a rolling system.

A participant asked if there are criteria for being included in the 72-1-9 covered entities list. The statute does not include criteria.

OSE staff knows of about 50 plans that have been submitted so far under the statute, although a count including district office records has not been done. In the past, plans were simply filed without review. More recently, the OSE is giving more scrutiny to them.

There have been no forfeitures since 1965, when the law was changed concerning notification of water right holder.

A participant asked if OSE staff saw conflict between the state's subdivision act and the 40 year horizon in 72-1-9. In some counties, subdivisions must prove 100 year supplies; how does this work when both water planning and 72-1-9 are based on a 40 year time period. Would the result be a 60 year uncovered period? Staff did not immediately see a conflict, believing that the Subdivision Act is implemented at the county level, and that 72-1-9 (conceptual, not specific) dictates how an entity holds water rights unused. The OSE role with subdivisions is to evaluate the water supply physical availability and legal divertability.

A Pueblo representative reminded the group of the value of holding water unused as a way of conserving. In some cases, communities are vulnerable to aggressive, fast-growing neighbors, and could benefit from the right to hold water without using it.

Identification and Discussion of Options:

Additional Entities:

Water and Sanitation Districts: Water and Sanitation Districts (W&S districts) are "quasi-municipal public corporations," with the same responsibilities as

municipalities, but without the same ability to manage future growth. They do have "dominant power of condemnation," superior to all other entities except the state itself. A spokesperson for the W&S districts recommended that the (W&S) districts be added to the 72-1-9 list of covered entities. The OSE has accepted their plans and included them de facto, but the W&S districts would prefer to have their status explicit. In answer to a question the spokesperson said that these W&S districts are not considered community-owned water systems, a category that refers to mutual domestics and systems with shareholders.

Mutual Domestics: A spokesperson noted that mutual domestics are now political subdivisions of the state, and as such are no longer member-owned. He recommended rectifying this unintended consequence, and specifying mutual domestics on the list of covered entities.

Acequias: Many *acequias* would benefit from being able to hold water unused for 40 years. The water right would be kept in the community, and the water could be leased short-term, to mutual domestics, for instance. If municipalities have that right under 72-1-9, it may be equitable to allow agricultural interests to have the right as well.

Content: Some advocated for specific requirements, or a template, for the content of the permit application. This could be accomplished through statute, or through direction to the agency to promulgate rules.

Some felt strongly that the content should be specified in statute, because of the opportunities for public notification and input inherent in legislative (as opposed to administrative) processes.

There was support for more explicit direction for updating plans, and perhaps allowing for updating in a rolling context.

Cover Use, not Entity: A participant suggested considering changing the statute to extend coverage to uses, not entities, in the interest of simplicity. Others had concerns that this would impact the first-in-time priority date system for water rights, giving priority instead to certain uses. There was also concern that this could lead to private speculation on water rights.

100 Year Extension: In the last session, several cities lobbied to change the time period from up to 40 years to up to 100 years. A spokesperson offered the example of Gallup, a beneficiary in the Navajo Nation water rights settlement now before congress for funding. The Navajo-Gallup pipeline project is critical for supplying Gallup's future water needs. The city needs a water supply for the next 60 years, and a drought reserve for 30 additional years. Without the ability to secure that water, he said, the settlement may be impacted.

Understanding others' concerns about extending the period, he emphasized that the burden of proof would still be on the applicant, and that the decision would remain with

the State Engineer. An alternative, he suggested could be to structure permits in a way to accommodate the need for a longer horizon.

A representative from the Municipal League stated that municipalities from across the state are looking at similar situations. The League is preparing a resolution to support extending the water use planning period with the caveat that they would like to discuss their resolution with the HM 42 stakeholders group.

A representative from the City of Santa Fe suggested that another option on the 100 year period would be for the OSE to structure individual permits to accommodate a longer planning period rather than amending the statute explicitly to 100 years.

A Pueblo representative suggested that 100 years was too long to permit holding water unused, and that Native people preferred not to put things in writing that would have such impacts far into the future. Such speculation, he said, seemed to benefit personal gain, not community welfare. Preserving and conserving water was to be encouraged, but the 100-year extension was too long.

Repeal Statute 72-1-9: The group considered the option of repealing the statute and returning to the pre-1984 condition, where the State Engineer considered each application on a case-by-case basis. Permits could be granted for 40, or 80 or 100 years, depending on the facts of the application. In addition, the OSE could be required to develop regulations for this application review process. Advocates felt that this was a preferable alternative to the ever-increasing list of covered entities under 72-1-9 – a path that could lead to constitutional questions.

Some expressed concern that repeal of the law would give too much discretion to a state agency (OSE), and that the only recourse to a decision would be litigation. They argued for clear, equitable criteria to prove the need for holding water unused for the long term. There was also concern that the longer permits could be a disincentive to conserve, and could trigger a "water-grabbing rush." The OSE was urged to consider the cumulative impacts of permit decisions.

A participant suggested the need for a way to deal with "special projects," like the Gallup situation, without triggering the mad rush. Without 72-1-9, rulemaking to cover certain conditions could be useful.

Some recommended a cap on the number of years specified in the statute, at some level short of 100. An acequia spokesperson pointed out that acequias usually lease water for no longer than 10 years, in order to protect the option of returning the water to agriculture in the near future. Tying up water for longer reduces this opportunity.

Concerning the repeal of the statute, there was a question about the likelihood of a repeat of the El Paso situation and litigation for New Mexico water that triggered 72-1-9. Staff attorneys thought this very unlikely. Also, there was a question about the impact on existing permits if the statute were repealed.

Pueblo Perspective: The Tribal Administrator at Zia Pueblo, offered the group his perspective. Some Pueblos are reluctant to participate in processes like this one for fear of losing some authority or credibility. He, however, believes it is important for the state and others to know what Pueblos are thinking and that he will participate whenever possible in processes like this. If the subject is water, it is always relevant to Pueblo people, even if their water rights are not directly impacted. The Pueblo of Zia, for instance, is threatened by their neighbor Rio Rancho's great thirst for water. Groundwater mining for the urban users is impacting water flows at the Pueblo. "Rio Rancho must talk to those of us in the Jemez Valley," he said, in order to develop a plan for the future that will support the traditional communities.

He urged agencies and entities to continue to seek out and include Pueblo interests in processes like this one. Talking, he said, leads to solutions.

The representative from Jemez Pueblo supported these remarks, and added that Pueblo people "are not going anywhere." Others who move into the area may leave when the resources are depleted, but the Native people will remain. The earth must sustain itself for the future, he said.

John Longworth provided a brief wrap-up of the meeting.

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