

OSE – Stakeholders Meeting # 2
House Memorial 42

September 6, 2007 – 9:00 – 11:30 am
Room 321, Roundhouse

Summary of Points Raised by Participants

Facilitator/Recorder: Lucy Moore

** NOTE: These meeting notes are intended to be a summary of points raised by the participants at the HM42 meetings. They are not a blow-by-blow account of all things said by each participant. Group dialogue frequently shifted back and forth across multiple subjects. We have tried our best to capture the essence of what the participants were saying and organized those thoughts by general category.

Welcome and Introductions: Lucy welcomed the group and introduced OSE staff present, including John Longworth, Chief, Water Use and Conservation Bureau, Elisa Sims, Senior Water Resource Specialist, Water Use and Conservation Bureau, and Fred Abramowitz and Martha Franks, contract attorneys with the OSE. Those stakeholders present introduced themselves.

Purpose of the Process and Update: Lucy reviewed the purpose of this stakeholder consultation process. 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 the 72-1-9 statute.

At the first meeting, on July 24, stakeholders were given background on the statute, as well as some information on water rights and forfeiture. In addition, participants identified and discussed options for ways in which 72-1-9 could be modified. Lucy prepared and emailed a summary of the points raised during this meeting to all those who attended. In addition, the summary will be posted on the OSE website (http://www.ose.state.nm.us/hot_HouseMemorial42.html).

Following the meeting, stakeholders were given the opportunity to submit written recommendations and/or to meet informally with OSE staff to discuss options. OSE staff received 12 written comments, and held 8 informal meetings. Written comments are posted on the OSE website.

The purpose of the second meeting was twofold. First, OSE staff reflected to the group the comments received, highlighted themes raised, and offered observations on the process to date. Second, and most importantly, OSE staff and contractors encouraged those present to continue the dialogue on the options, delving deeper into the pros and cons of each.

Summary of Comments and Themes: PowerPoint presentation by John Longworth
[PowerPoint presentation will be available on the OSE website and is attached to the end of these notes]

Include all water users: OSE staff noted that there seemed to be no opposition to the inclusion of all water users in the group of those exempted. Several stakeholders pointed out that the absence of expressed opposition was not the same as support, and that in fact there was opposition to including all water users.

Time Period: OSE staff said the comments revealed no consensus on a period of time for a reasonable planning period.

Following the summary of comments and themes, OSE staff and contractors suggested the following possible avenues:

- Add all water users (this would include farmers) and extend the period to 100 years
- Use 72-5-28 (the “forfeiture statute”) as the vehicle for allowing certain users to hold water rights unused
- Repeal 72-1-9
- Promulgate Rules and Regulations

DISCUSSION:

Add all water users and extend the period to 100 years:

There was concern that this option would result in two counterproductive consequences. First, there would be a "mad scramble" to be first in line to get all the water possible, regardless of need or merit. Second, it would devolve to the State Engineer and ultimately the courts to make decisions about who gets to hold water unused and why, thus creating a hierarchy of water uses.

A participant observed that agriculture stands to suffer most if the period of non-use is expanded. They stated forty years is too long and is likely to create an atmosphere of "obligation" to hold water for the future, generating a justification to take water from beneficial use. They further stated that, entities will have reason to condemn more and more water rights, and agricultural users are most vulnerable. Agriculture must have the same rights in order to protect their future supplies, or the "large will have power over the small."

There was concern that once entities are included in the category of those allowed to hold water rights without forfeiture, there is no way to discriminate. "We have to go all the way, and then the point is defeated." Another said, "let's not all jump on the bandwagon and sink it."

It was stated that there might be justification for a longer period for select projects, such as the costly Gallup Water Supply project.

Use of 72-5-28 as a vehicle: OSE staff distributed copies of 72-5-28 NMSA, "Failure to Use Water; forfeiture," and asked the group's opinion on its relevance to HM42 including-- Does the statute offer a window of opportunity to address the need and process for exempting certain water users from forfeiture? A participant asked --Could the OSE use this statute as a shell, as a blank slate, and "make it what they want?"

Participants wanted more information about the background and intent of the 72-5-28 statute. It was noted that this statute applies to surface water only. Martha Franks noted that surface water statutes also apply to groundwater.

A participant observed that an application process could be very unsatisfactory, and that an applicant may wait years for approval. [It should be noted that under 72-1-9 an entity still files an application to appropriate water and that a decision on that application can also take numerous years.] Someone thought that 72-1-9 was more of a guarantee than 72-5-28. One participant noted that there was no planning term (like the up to 40 years in 72-1-9) identified in 72-5-28.

72-5-28 (G): The group raised questions about the water conservation program referred to in (G).

- What is a "water conservation program" and how many have been approved?
- What is the difference between a water conservation program and a water conservation plan? (A "program" may be a vehicle for holding purchased water rights, as the ISC did in the Pecos.)
- Could the natural augmentation of the river be considered a beneficial use?
- Does (G) apply to all water users since it refers to "an individual or entity that owns water rights"?
- Is the list of others identified in the statute intended to include those who don't own water rights?

72-5-28 (C): A participant suggested that (C) also addressed the municipal and county needs for holding water rights unused. Another asked if a water conservation plan could be used in place of the water development plan mentioned here, since the section mentions "preservation." Water development could imply conservation within the context of development, said another.

72-1-9: Several stakeholders felt that 72-1-9 is unconstitutional and should be abandoned for that reason. A system for allowing holding of water rights without forfeiture must honor the constitution, they said, and its beneficial use mandate. Non-use of water is not a beneficial use, they said, and 72-1-9 can therefore be considered unconstitutional. If there is to be non-use, it must be available to all, and must be administered fairly. Municipalities that need time to plan can point to case law that supports their right to stretch the forfeiture period beyond four years.

A participant suggested that the entities listed in 72-1-9 could be added to either 72-5-28 (C) water development plans, or to (G) water conservation programs and that the two should be reconciled to be consistent..

Governmental water systems: A participant suggested that there is a difference between a municipality or county (elected to serve the people) and any entity that wants to grow. Cities and counties, for instance, are in business to provide for the public good, and as such may have priority in planning for future water supplies. A PRC spokesperson reminded the group that public utilities are mandated to provide water, electricity and gas for the public good, as well. It was also noted that there is a need to re-define the term "political subdivision" which was suggested in the written comments as a possible modification to 72-1-9.

Inclusion of tribal governments and communities: A pueblo representative reminded the group that it is critical to include tribal governments and communities in discussions like these, especially when there is a connection to water rights. They urged the state to move quickly on the water rights adjudications that affect tribes. They also observed that tribal water rights were not taken into account when the interstate compacts were negotiated. They questioned how and when electric utilities have been included in the HM42 process. Finally, they stated they strongly opposed the inclusion of utilities in any class that is allowed to hold unused water rights. They stated utilities use coal and uranium, and in the production of these resources huge amounts of water are used. They added that an application by Tri-State Generation to transfer the source of its water supply for the Plains Escalante Generating Station (near Prewitt) to wells near the Rio San Jose would likely have interfered with Acoma's use of the river. That application has been withdrawn.

Value of water: A participant asked the group to consider the true value of water – as the source of life -- in these discussions. The systems are dynamic and fragile, and are impacted by unintended consequences as a result of resource extraction. Decision-makers should also consider the profit factor of some of these industries when decisions that will impact water resources.

Statutory review: Many suggested a review of the statute to consider its original purpose and intent, looking at who should qualify to hold unused water rights and what the criteria should be. Either of the statutes could be used as a starting framework, to build the kind of program that the OSE and stakeholders alike could support. It was felt by some participants that this effort would need to explore the relationships (existing and desired) between state water plans, water conservation programs, water development plans, forfeiture, and condemnation.

Collaboration between OSE and Stakeholders: There was support among participants for development of a process that would allow the OSE and stakeholders to work together to develop the kind of program that would address the need for certain water users to hold water rights for a certain period without forfeiture. The goal would be to "go together to the legislature with something reasonable," to develop criteria and guidelines that would

be implementable, equitable and have broad support. There was support in the group for continuing to meet – perhaps quarterly – in this format for the purpose of deepening the dialogue and reaching consensus on the broader questions relating to the need for some entities to hold water rights for the future. It would be useful at the next meeting of this group to have OSE staff present a strawman proposal, so that stakeholders could have something more concrete to focus on.

The devil is in the detail, they agreed, but they were enthusiastic and optimistic that together stakeholders and OSE staff could craft recommendations for the State Engineer to take to the legislature.

Next Steps:

- OSE staff will meet with the State Engineer and report the discussion of this meeting, and the request for further dialogue.
- The meeting summary and the power point presentation will be emailed to participants within two weeks.
- A comment period will remain open until October 1, for further stakeholder comments.
- A tentative third stakeholder meeting is scheduled for October 12.
- The State Engineer will appear before the Interim Committee on October 29-30.
- If possible, OSE staff will email a preview of the State Engineer's presentation to participants prior to October 29.
- Stakeholders are able to respond to the State Engineer's report to the committee, either at the meeting, or following.

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

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