

**OSE – Stakeholders Meeting #5
House Memorial 42**

**July 30, 2008 – 9:00 – 4:00
Room 326, Roundhouse**

Summary of Points Raised by Participants

Facilitator/Recorder: Lucy Moore

Welcome and introductions: Lucy welcomed the group and introduced OSE staff present, including John Longworth, Chief, Water Use and Conservation Bureau, 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: Draft Status Report for HM 42 Process, Draft Consensus Memo, Proposed Element of a Water Development Plan (March 2008), Outline of HM 42 Task Force Status Report, and the agenda. [All handouts are on the website]

At the request of the group, this meeting was scheduled for a full day, and was devoted to review and discussion of the two memos. OSE staff expressed appreciation to the stakeholders for the time, energy and cooperative spirit they were bringing to this process. They hoped that the group would work to reach some level of consensus on the two memos at this meeting, and subsequent meetings if necessary. OSE staff will present to the Water and Natural Resources Interim Committee at the end of November. They will report any progress and any recommendations developed by the OSE in consultation with this group.

July Presentation to the Water and Natural Resources Interim Committee: John Longworth reviewed his very brief presentation to the Interim Committee on the group's progress and the elements of the template. Several in the group had attended that meeting as well.

Draft Status Report for HM 42 Process: Martha Franks explained that this memo was intended to document the HM 42 process to date, including the schedule of meetings, discussion highlights and issues raised. It is not intended to reflect any consensus or support for one position or another. The OSE staff hopes that the stakeholders will reach agreement on this draft status report, and that it will provide “a record of where we've been,” a common foundation for the group to move forward. After each meeting, Martha will update the report regularly, so that it is current with the thinking and decisions of the stakeholder group.

Cheri Vogel made changes on the screen during discussions of the two memos.

Comments on the Draft Status Report:

A participant asked if “publicly regulated utilities” were limited to water utilities. John answered that other utilities could also be included.

Another suggested that any entity required by law to provide a future water supply, such as a mutual domestic, should be included.

The group discussed the need for a period longer than 40 years, and concluded that complex, regional projects involving large infrastructure construction might be justified in requesting more than 40 years.

There was a reminder that the work of the group should always include the protection of constitutional doctrines.

The group reached consensus (unanimous) on accepting the draft status report, with changes. [available on the website]

Draft Consensus Memo: John gave an overview of the memo. OSE staff used stakeholders written comments, as well as discussion from the meetings, to build the memo. The process was difficult, he added, as they tried to deal with differences. Their goal was to present the broadest principles behind the template. If the group can reach agreement on how to express the principles, it may be possible to delve deeper to some of the specifics found in the template. Beyond that, he said, lies the question of the format for the recommendations – law change, new rule, guidance, etc. Today, the hope is to discuss and see if there is agreement at the broad principle level.

Fred walked the group through the five points in the memo. Lucy facilitated the line by line discussion of the memo.

Comments on the Draft Consensus Memo:

There was a general question about the relationship between the Proof of Beneficial Use process and the 72-1-9 application process. OSE staff explained that this process is intended to consider a blank slate, and create the most reasonable, efficient and fair process.

Participants noted that they had only had a day to review the memo, and that it would be difficult to offer consensus on any part without time to consider the document with clients and constituents. OSE staff apologized for the late release of the document, and said that they group could take whatever time it needs. This is not a legislatively-driven process; what the OSE reports in November is up to the group.

A participant asked why eminent domain was not included in the memo. OSE staff answered that the issue was documented in the Draft Status Report, but was not included in this memo, which presents principles that the stakeholder group might agree to. As requested at previous meetings, OSE staff posed the question of the relevance of eminent domain in this process to the State Engineer. He asked for a memo outlining the issue, and has yet to respond to that memo. Participants asked to see, where possible, copies or summaries of any research done by OSE staff or contract attorneys relating to the work of

the HM 42 group. The stakeholder raising the eminent domain issue said she felt “brushed off” in this process, and hoped that the issue could be addressed in an upcoming meeting. If the group deems it not relevant, she will accept that and seek to have the issue addressed in another forum.

The group agreed to put the issue of eminent domain and its relevance to this process on the agenda for the next meeting.

Section by section discussion of Draft Consensus Memo:

The ability to hold water rights unused or have an extended period of time to show beneficial use.

- Some asked that the longer planning horizons already afforded cities and counties by law be acknowledged in the memo.

Others pointed to the fact that this document is assuming a clean slate and seeking basic principles to build a new system. OSE staff volunteered to include a statement in the opening paragraph that acknowledges the present state of the law, and emphasizes that the following principles may contemplate changes.

- The group discussed various ways of handling the criteria question. Some felt that a list of entities (or types of entities) is not needed, and that any entity that meets the criteria for a water development plan application would be acceptable. Others favored criteria for eligible entities, and listing those entities by name, or type. There was also a suggestion to grandfather in entities currently covered under 72-1-9.

The group agreed to continue the conversation about the pros and cons of having criteria for entities or criteria for water development plan applications.

- A new application process for every extension of time would be burdensome, said several. Others feared an easy extension process could result in a 40 year period to hold water without showing due diligence. Perhaps a clear definition of due diligence is needed. OSE staff understood the dilemma. They were not contemplating a public hearing for extensions, only for the initial application. The group agreed to discuss this question at the next meeting.

The group agreed to discuss further the applicability of this new application process to extensions of time, renewals, etc.

The Length of Time:

- The *Crider* case gave municipalities the right to hold water rights unused. Cities need to be guaranteed at least 40 years for planning purposes, said a participant; “that baseline is not on the table.”
- Many supported identifying a number of years, but there was no agreement on what that number should be.
- Certain projects (Navajo/Gallup pipeline, Eastern Plains, etc.) may be required by federal agencies to have a water supply beyond 40 years.
- The group discussed the concept of a “rolling 40-year plan,” where the applicant would review its needs periodically, and readjust its planning horizon accordingly. There were questions about the impact of conservation on the planning horizon, and whether or not the applicant could use that to justify an extension of the period.

The group agreed to elaborate further on the rolling 40-year concept, including questions about the disposition of unused water that is released and of water that is conserved.

Criteria [title was changed at the meeting]

- There was discussion of the disposition of conserved water, and some confusion over the fact that cities are able to benefit from conservation and agriculture does not. Cities do not lose conserved water but, they do not gain a new water right. There was a question about whether a planning horizon could be extended through conservation, or whether conserved water would be lost. OSE staff said that cities currently cannot ask for a 70 year planning horizon, for instance, based on future conservation.
- Changing economics, climate conditions, etc. may cause plans to change. There was concern about a municipality or other entity losing water that it fails to use within the planning horizon. There was also concern that a city might be able to hoard unused water, and that the water should be freed up for other beneficial uses. A participant hoped that entities in that position would be able to use that water in other ways, partnering with other entities, for instance, to insure the wisest use of the resource. There was concern about the state “repossessing” unused water, and the need for due process.
- The differences between water consumption and water diversion, and between water rights and water availability/supply were raised. The life expectancy of closed basin is also a factor.

The group agreed to clarify the relevance and place in this process of water rights, water supply, diversion and consumption, and any other distinctions necessary.

- Participants spoke of the need to tailor the application requirements to the scale of the applicant's plan. The project size, the city's capacity, the number of water rights, all may impact the detail needed in the application and plan.
- A municipal representative was concerned with the potential burden to the applicant (and the OSE) of periodic reviews and reporting requirements. A participant added that periodic reviews would insure accountability of the applicant to the greater public. Another participant noted the irony of a government agency complaining about burdensome reporting.

The group agreed to further discuss the periodic review and reporting requirements.

- Participants raised issues of public involvement as the HM 42 process continues, and perhaps changes to the law, rulemakings, or other processes take over. Although revising laws and rulemakings both have public involvement requirements, some participants wanted to be sure that the State Engineer was open to public, as well as stakeholder, contributions.
- A participant suggested that parts of these recommendations could be implemented in different forums. The template could be a rule-making process, for instance. There may also be a need to amend the law, or develop other policies and guidelines.

The next stakeholder meeting will be August 27, 2008 9:00 – 4:00, location to be announced. [perhaps at the Toney Anaya building]

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

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