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Commissioner, District 5

Katherine Miller
County Manager

MEMORANDUM

DATE: *February 14, 2017*

TO: *Board of County Commissioners*

VIA: *Katherine Miller, County Manager*

FROM: *Michael Kelley, Public Works Department Director*

ITEM AND ISSUE: BCC Meeting February 28, 2017

Action item on policy direction to staff regarding 1) the Office of State Engineer Water Master Rules, and 2) the Motion and proposed Order to Show Cause related to the well election in the Pojoaque Basin as required by the Aamodt Settlement Agreement. (Public Works Department/Sandra Ely)

SUMMARY:

The first issue involves whether to allow partial transfers of water rights from customers connecting to the County Water Utility (CWU) that will serve the Pojoaque Valley as part of the Aamodt Settlement Agreement (Settlement Agreement). The Settlement Agreement requires the Office of the State Engineer (OSE) to promulgate proposed rules to govern its administration of Pueblo and non-Pueblo water rights in accordance with the Settlement Agreement (Section 5.3). Santa Fe County staff have been involved in the development of the draft rules as they affect the County or its future customers in the basin.

The purpose of this memorandum is to request direction from the Board on whether OSE's rules should include a provision that allows for partial transfer of water rights to the CWU to enable water rights owners to connect to the CWU. In addition, if the Board favors the allowance of partial transfers, staff further requests direction on the use of the Pojoaque Valley Water Use Connection Fund (Connection Fund), which the Settlement Agreement and a related agreement require the State to establish and fund to cover the connections costs for those electing to connect to the CWU. The issue is whether domestic well owners who transfer only part of their water right to the County should have access to the Connection Fund to cover the cost of the meter on their well.

Second, the Settlement Agreement requires domestic well owners to make a "well election" in which they elect to (1) connect to the CWU when service is available, (2) continue using their well and not connect, or (3) commit subsequent property owners to connect to the CWU (Section 3.1.7). The Settlement further requires that the Pueblos, the United States and the State file a Motion and proposed Order to Show Cause (Order) with the Federal Court, which will include a simple check-

box election form and a recommended election deadline. Although not required by the Settlement, County staff will be involved in this process and are requesting direction from the Board regarding whether to propose language that would allow domestic well owners to “opt out” of the Settlement Agreement. Furthermore, for well owners that do not respond, staff recommends support for changing the default election from option #1 (connecting to the CWU) to option #2 (continue using their wells).

BACKGROUND

On March 14, 2013, the Board of County Commissioners approved and signed the revised Settlement Agreement and the Cost-Sharing and System Integration Agreement (Cost-Sharing Agreement). These approvals launched efforts by the County, the State, the United States, and the Pueblos of San Ildefonso, Pojoaque, Nambe and Tesuque (the Parties) to implement the Settlement Agreement including the planning, design and construction of the Regional Water System (RWS) and negotiation of agreements necessary to own and operate the RWS.

Water Master Rules: Pursuant to Santa Fe County policy adopted under Resolution No. 2014-101, County staff have been working with the Parties to implement several aspects of the Settlement Agreement including drafting proposed Water Master Rules (Rules) to govern the administration of Pueblo and non-Pueblo water rights in accordance with the Settlement Agreement. The Settlement Agreement requires rules to be promulgated prior to Entry of the Final Decree, the final judgement adjudicating all water rights in the Aamodt case. Entry of the Final Decree is on schedule to occur July, 2017. The Rules will include provisions for, among other things, well metering, replacement wells, establishing historic beneficial use, and the transfer of water rights to the CWU for use in providing water to the its customers. The Settlement Agreement requires domestic well owners who elect to connect to the CWU to transfer their water rights to the County when service becomes available.¹ In most instances, the transfer from the customer to the County will be 0.5 acre-feet per year (afy). After transferring all of their water rights to the County, the Settlement calls for the customer to discontinue using their well so long as they are receiving water service from the CWU.

The rules may also address the Connection Fund. Well owners electing to connect to the CWU as soon as service is available, will have access the Connection Fund to cover the cost of connecting to the CWU. According to the Settlement Agreement and the Cost-Sharing Agreement (Cost-Sharing Agreement), the State will establish the Connection Fund and appropriate \$4,000,000 to the fund. The County will administer the Connection Fund. Any portion of the fund not needed for connections will be available for the County to pay for construction.

Order to Show Cause: The Settlement Agreement calls for a well election in which water rights owners in the Pojoaque Basin would elect to 1) connect to the CWU, 2) continue using their well, or 3) commit subsequent property owners to connect to the CWU (Section 3.1.7). In preparation for the well election, the Parties will file a Motion and proposed Order to Show Cause (Order) with the United State District Court for the District of New Mexico. The proposed Order is expected to recommend a date in 2017 for the well election and will include proposed language for the well election form. The Federal Court will consider the proposed Order and may adopt all or portions of the recommended language for the final Order.

¹ This is an exception to OSE’s general position that statutory domestic water rights are not transferrable to other lands or uses.

DISCUSSION:

Water Master Rules

1. **Partial Water Rights Transfer.** Community members are requesting that the Rules provide for “partial” transfers to the CWU, which would allow customers receiving CWU service to continue using their well to the extent they retained part of their water right. Staff generally supports this position, because allowing partial transfers will likely increase community support and result in more customers for the CWU. However, staff would advocate that the Rules require a minimum transfer to the CWU of 0.3 afy.² For well owners with 0.5 afy, the minimum amount allotted by the Settlement Agreement, they would retain 0.2 afy (or more if their water right is more than 0.5 afy) for outdoor watering from the well.

Concerns have been raised by some Parties about whether partial water rights transfers would adversely affect the settlement goal of recharging the aquifer and promoting stream flows. To answer this question staff compare the amount of water rights involved in the transfer of a full water right to the CWU and a partial water rights transfer. Assuming a higher subscription rate for the partial transfer scenario, staff determined that it is unlikely that partial water rights transfers would negatively impact the aquifer.

It should be noted that if this recommendation is approved and staff successfully negotiates inclusion of the partial water rights transfer in the Rules such that well owners can connect to the CWU and use their well for outdoor purposes, the SLDC would need to be amended to allow County residents to use their well for domestic purposes on property supplied by the County water utility (7.13.3.7).

Recommendation: Staff will propose language for the Water Master Rules allowing for the partial transfer of water rights to the CWU and for the remainder of the water right for outdoor use. If the Rules as promulgated by the OSE allow for the partial transfer of water rights, staff will develop and propose to the BCC changes to the SLDC that are consistent with the Rules.

2. **Connection Fund:** All wells in the Pojoaque Basin are required to be metered and to report the quantity diverted to OSE regardless of use. It is anticipated that OSE will require meter installation sometime this year. Meters will be installed at the well owner’s expense.

The Parties have proposed that wells taking advantage of the partial water rights transfer (if available) would have Advanced Metering Infrastructure (AMI) meters to better enable OSE to track the diversion of water from these wells. AMI meters allow readings to be taken remotely or with a hand held device rather than climbing into the well vault. AMI meters for the wells would ideally be the same type as the AMI meter used by the CWU in delivering water to the residence. The cost of an AMI meter is approximately \$220, while the cost of a non-AMI meter is approximately \$60, not including installation. Because of the added cost of the AMI meter, the Parties have suggested that the cost of the well meter for well owners using the partial water rights transfer could come from the \$4 million

² The transfer of 0.3 afy represents the amount required for planning purposes under the SLDC plus the 20% add on required by resolution 2006-057

Connection Fund. The total cost to purchase and install AMI meters for 600 customers is approximately \$300,000.

The purpose of the Connection Fund is to cover the costs of connecting to the RWS; however, the Connection Fund may be used for the construction of the County Distribution System if the amount in the funds exceeds that needed to pay for service connections. Using the Connection Fund to cover the cost of AMI meters would decrease funds available for constructing the County's portion of the RWS.

Recommendation: Staff will not propose or support the use of the Connection Fund to cover the cost of AMI meters for well owners utilizing the partial water rights transfer. Staff may consider alternative mechanisms for paying for these meters including applying for and utilizing grant money.

Order to Show Cause

- 1. Opt Out Provision:** In April, 2014 water rights owners in the Pojoaque Basin had the opportunity to object to the Settlement Agreement. The Federal Court over ruled all the objections, and issued the Final Partial Decree last March. Well owners that filed objections are not required to be a party to the Settlement Agreement, but may accept the agreement and make a well election as described above. While the opportunity to object has passed, the Parties are considering language for the proposed Order that would allow water rights owners who did not previously object another opportunity to opt out of the Settlement Agreement. Generally, participation in any settlement agreement is voluntary. Well owners that opt out would not receive the benefits of the Settlement Agreement including priority protection. While the Settlement Agreement may preclude the Pueblos, the United States, and the State from proposing "opt out" language, the County could still propose language to the Court.

Recommendation: Staff will advocate for language in the proposed Order to Show Cause allowing water rights holders in the Pojoaque Basin to "opt out" of the Settlement Agreement. If the Pueblos, the United States, and the State are unable to support the "opt out" language, the County would propose it to the Court.

- 2. Non-responding Water Right Owners:** Section 3.1.9 of the Settlement Agreement considers water rights owners who did not file an objection or do not become a Settling Party by making a well election 'non-responding owners'. Under the Settlement Agreement non-responding owners will be deemed a Settlement Party and are required to connect to the CWU. Staff proposes that a better approach would be to not force non-responding owners to connect, but to deem them a Settlement Party and allow them to keep their well according to the terms of Settlement Agreement. While the Settlement Agreement may preclude the Pueblos, the United States, and the State from proposing the default language; the County could still propose the language to the Court (possibly along with other parties).

Recommendation: Staff will advocate for language in the proposed Order to Show Cause allowing non-responding well owners to keep their well and be deemed a Settling Party. If the Pueblos, the United States, and the State are unable to support the "default" language, the County would propose it to the Court.

ACTION REQUESTED:

Consideration and approval of proposed recommendations.