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MEMORANDUM

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TO: Board of Directors, Las Campanas Water and Sewer Cooperative
FROM: Seth Fullerton
SUBJECT: Status of Water Rights
DATE: August 20, 2020

LAS CAMPANAS WATER RIGHTS

In 2012, the LCLP and the Co-op completed the turnover of 709.4591 acre-feet per year of water rights in the City of Santa Fe's Buckman well field to the Co-op without any right of reverter. The supply of water to Las Campanas was made through the City of Santa Fe's Permit No. RG-20516. Under Permit No. RG-20516, the City of Santa Fe has acquired rights up to 10,000 acre-feet of water per year from the Rio Grande Underground Water Basin with points of diversion at the Buckman well field, located west of the City.

The City of Santa Fe's right to pump from the RG-20516 wells is subject to the "offset requirement," established in New Mexico law in the case of City of Albuquerque v. Reynolds, 71 NM 428, 379 P.2d 73 (1963). Under the principle of law established in that case, water users whose groundwater pumping has a depletive effect on the hydrologically connected Rio Grande can continue to exercise their pumping only if they acquire "offset rights," in an amount sufficient to compensate for and negate the effect of their pumping on the surface flows of the Rio Grande. Pursuant to this requirement, the 709.41 acre-feet of water was transferred into the City wells in order to receive water from the City.

The supply obligations were clarified in the Settlement Agreement of September 30, 2003, settling litigation between the City of Santa Fe and LCLP, and setting the stage for the construction of the "Buckman Surface Diversion Project". As defined in the Environmental Impact Statement

(“EIS”) and the Facility Operation Procedures Agreement (“FOPA”), this became the Buckman Direct Diversion Project (“BDD”) which was intended as the point of diversion to supply the City and County of Santa Fe, as well as Las Campanas, with renewable surface water. Under the FOPA, the City, County, and Las Campanas were required to transfer its Buckman water rights from RG-20516 to the BDD. The Co-op’s water rights were transferred to the BDD through two applications with the Office of the State Engineer, with a portion reserved to cover ongoing offset obligations that will continue on a declining basis through the year 2100. The offsets owed in 2020 due to historic pumping are 105.50 acre-feet.

Therefore, using 2020 as the basis for discussion of the potential loss of the Co-op water rights, of the 709.4591 acre-feet originally owned by the Co-op:

- 332 acre-feet have been deeded to the County, and
- 105.50 acre-feet are obligated to offset historic pumping, leaving
- 271.9591 acre-feet that are under contract for use by the Club.¹

LOSS OF WATER RIGHTS IN NEW MEXICO

If a holder of water rights fails to put the water to beneficial use, they risk “losing” the right to use the water and the water rights reverting back to the public. Losing the water rights for nonuse could occur by either forfeiture or abandonment, which are two distinct concepts under New Mexico water law. Losing the water rights by eminent domain is the third possible scenario. All three potential losses of the Co-op’s water rights are exceedingly unlikely.

Forfeiture of surface and groundwater rights are governed by separate statutes, though similar in construction. State ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist., 2012-NMCA-090, ¶15. To forfeit the right to use an appropriated water right, the holder must fail to put the amount of water to beneficial use for a period of four years. Id. at ¶ 14. After such amount of time, the OSE must provide notice and an additional one-year time period of nonuse must occur before the water right may be deemed forfeited. Id. at ¶ 15, *See also Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172 (1911). However, member-owned community water systems, such as the Co-op, are exempt from the four-year period of nonuse and have a separate statute allowing them 40 years from the time of the water rights transfer, in this case the two 2011 transfers of the Co-op’s water rights to the BDD, to place the water to beneficial use. NMSA 1978, § 72-1-9. Therefore, forfeiture is not a threat to the Co-op’s water rights.

Losing the right to use water due to abandonment requires that the State Engineer prove a holder’s intent to relinquish the water right. If intent is not express (by a declaration of intent to

1. The historic offset obligations were calculated by Las Campanas’ hydrology expert, Greg Gates, in 2009 working for CH2MHill (attached as an excel spreadsheet). The Club’s right to use the Co-op’s water rights is based on the “Effluent Supply and Excess Water Rights Agreement” signed in March 2020, which is the source of the Club’s use of Co-op water rights.

abandon the right), it “may be inferred from acts or failures to act so inconsistent with the intention to retain [the right] that the unprejudiced mind is convinced of the renunciation.” State ex rel. State Engineer v. Monteverde, No. A-1-CA-35398 (N.M. Ct. App., Dec. 14, 2018), ¶ 23 (citing S. Springs Co., 1969-NMSC-023, ¶¶ 10, 12. Further, if an “unreasonable period of nonuse” has occurred, a rebuttable presumption of intent arises and “the burden of proof shifts to the holder of the right to show the reasons for nonuse.” Monteverde, ¶ 22 (citing S. Springs Co., 1969-NMSC-023, ¶ 20). Under no circumstance could the Co-op’s use of water to payback historic offset obligations or its lease of water rights to the Club be insufficient to overcome an intent to abandon.

Finally, condemnation of water rights through eminent domain is possible in New Mexico, but again unlikely. NMSA 1978, Section 3-27-2 gives municipalities the power to condemn water rights but that the power in particular has never been directly addressed by New Mexico Courts rather numerous cases have in passing noted the power of municipalities to condemn water rights. See City of Albuquerque v. Reynolds, 1962 -NMSC- 173, ¶ 46 (“The city may...obtain these surface water rights by condemnation or ... by bargaining...”); State ex rel Martinez v. City of Las Vegas, 2004 -NMSC- 009, ¶ 64 (“Alternatively, a more appropriate remedy might be to require the City to exercise its right of condemnation for necessary amounts of water ... consistent with NMSA 1978, Section 3-27-2 (1994).”).

In addition, in 2009, the legislature clarified the process for condemnation of water rights making it much more onerous on municipalities. The following requirements of Section 3-27-2, added to the statute:

- G. In any condemnation proceeding pursuant to this section, the entity shall have reasonably satisfied the following criteria prior to commencing any such proceeding:
- (1) the entity has a requirement for water or water rights for public health or safety purposes; or
 - (2) the entity has a requirement for water or water rights for other purposes and:
 - (a) suitable water rights are unavailable for voluntary sale at up to one hundred twenty-five percent of appraised value;
 - (b) suitable water rights in the public domain are unavailable for purchase at up to one hundred twenty-five percent of appraised value;
 - (c) the entity has implemented a water conservation plan; and
 - (d) the acquisition and purpose is consistent with the regional water plan.

Using Section (G)(1) to justify condemnation would likely fail as the County has more than sufficient surface water rights for its needs. The County lacks groundwater rights for use during drought years and the Co-op’s water rights would not address this need. Section G(2) is also unlikely given the cost. Water rights are currently selling for \$25,000 per acre-foot in Santa Fe so the County would have to pay approximately \$8.5 million dollars to acquire an asset that could be purchased in the public domain and transferred to the County system for half of the cost or less.

Because of the large availability of other water rights at a much lower price in the public domain, it is unlikely the County would attempt, or be successful, in condemning the Co-op's water rights.

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