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**To:** "Kaelyn Anfinsen" <kaelynanfinsen@utah.gov>  
**Date:** 10/28/2008 12:16 PM  
**Subject:** Re: Comment to Rule R655-16  
**Attachments:** comments to sole supply rule R655-16.doc

Kaelyn,

Thank you for your help with rule R655-16. The meeting that the State Engineer held to discuss the rule was very informative. I am attaching my comments to the proposed rule. The past role of the State Engineer Office in resolving ownership and use issues has been significant. Lack of assistance or alternative remedies for water users is a grave concern if the rule is adopted. These issues needs to be addressed adequately before the rule is enforced.

Thank you again for the opportunity to comment.

bobf.

Thank you for the opportunity to comment on proposed rule R655-16. The State Engineer's Office has helped customers in the past resolve water use and ownership issues. Understandably, with changes in the law and the real danger of enlargement of supplemental water rights, the State Engineer is attempting to provide order and certainty in the records of his office. While the proposed rule provides an opportunity to more clearly define water use, it also asks the un-schooled water user to independently establish the supplemental nature of his right—a difficult task without assistance from the State Engineer's Office.

The intermixing of sources or water rights (supplemental groups) to fully supply a water use is one of the tools the State Engineer has used to prepare proposed determinations in all areas of the state. The inability to clearly define the value (sole supply) of a supplemental number when a proposed determination was prepared for the court is expressed in the inability of science to predict the hydrologic system. This rule requires owners to arbitrarily define their right because the State Engineer does not have the science available to do so. Further, it asks them to do it without any assistance provided by the State Engineer. This rule seems to be a way for the State Engineer to absolve himself of assisting water users to resolve ownership and use issues.

The justification for this change in process is based on an administrative change in how the State Engineer defines beneficial use as a water use group. The “new” water use group number is not part of a water right as defined in a proposed determination, decree or on a certificate and would be unclear to many water right owners. This rule defines the water use group number as the limit of use for a set of water right numbers. The State Engineer has created the group administratively to represent beneficial use rather than dealing with inconsistencies and undefined uses in supplemental groups on each decreed or certificated water right.

Citizens do not understand water rights well enough to deal with this rule, and it will ultimately lead to more problems than it remedies. Implementation of the rule will slow an already cumbersome process, and to suggest that it would cost nothing to the water users is misleading. The requirement of the applicant is too burdensome, and it requires the courts to adjudicate issues on which the court would rather the State Engineer provide some guidance. It places a burden on the courts in an area they have little expertise.

Many of the water rights in the State Engineer's Office require significant title work. Water rights are divided as land splits occur. Ownership issues become a hurdle that a supplemental water owner may have little ability to resolve except through litigation. This is a complex issue and the rule is less than sufficient in helping water users resolve difficult relationships between rights and uses. The citizens of the state would be better served if the State Engineer developed rules that would require the Enforcement Engineer or his designee to make a recommendation based on the best science and records of the State Engineer for sole supply after the request offered in R655-16-6.5 was complete. The recommendation would be sent to all owners of record allowing response. The Enforcement Engineer would then prepare an order for the State Engineer with the final recommendation for Sole Supply for each water right involved. The Order would be

subject to appeal through established administrative remedies, giving interested parties the ability to take a reasonable assessment of the water rights to the Courts for clarification if necessary. As it stands, however, the proposed rule requires a judicial remedy before an administrative remedy. Another option, if the State Engineer wants the resolution to be adopted external to his office, may be to have an ombudsman review the water record after it was reviewed under rule R655-16-6.5. The ombudsman could work with the parties and potentially seek a recommendation from a third party with experience in the field, who would then make a recommendation to help resolve sole supply issues. If the opinion were unacceptable to the owners, a reasonable assessment of the water rights could be presented to the courts for clarification if necessary.

The proposed rule places a heavy burden on the public to resolve issues in a litigious manner rather than having the State Engineer's Office provide the assistance for which it was partially created. As water rights become divided and segmented, if there is not a more reasonable approach to define sole supply, many water rights will go unused and be subject to forfeiture. Water rights in non-use status create ambiguity and uncertainty. The process proposed in this rule is not in the best interest of the state or its citizens.

I would respectfully request that the State Engineer more fully disclose his course of action on the issue of assistance to the general public. In the hearing held on September 16, 2008 the State Engineer responded by saying he had looked at other solutions but seemed less than committed to take any significant action toward those other approaches. Please more clearly define resolutions to the topics addressed in this comment to the State Engineers proposed rule before a rule is adopted.

Here are a few additional thoughts.

- Although the rule merely formalizes an existing practice, it is not a good practice.
- There are potential logistical nightmares for water users even before taking sole supply issues to court.
- The State Engineers ability to create a group number to define beneficial use is very aggressive and may not be in the best public interest.
- Requires parties who may be part of a supplemental group (Water Use Group) to be before the court, although for them their water rights have already been perfected—a huge headache even though they are not changing their water use in any way.