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November 3, 2008

Jerry Olds, Utah State Engineer
Division of Water Rights
1594 West North Temple
Salt Lake City, Utah 84116-3154

Re: **Comments to Proposed Administrative Rule R655-16**

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Dear Mr. Olds:

On behalf of our clients listed below, we hereby submit the following comments to the proposed administrative rule R655-16 Administrative Procedures for Defining Beneficial Uses for Supplemental Water Rights.

1. Scope of the Rule

The propose rule states “[T]his rule shall apply when the State Engineer is requested to take administrative action with regard to an individual water right or group of water rights that are designated in the Divisions’s records as part of a supplemental group and have no designated sole supply.”

The language suggests that whenever administrative action is requested for a water right that is part of a supplemental water use group, a Statement of Group Contribution must be filed for all of the water rights in the water use group that have not been otherwise quantified. Conceptually, we agree that water users seeking approval of actions that would separate water rights from a water use group should be responsible for quantifying the water rights removed from the water use group. However, when the administrative action sought by the applicant does not separate water rights from a water use group, the Statement of Group Contribution should not be required. This is particularly true in cases of public water suppliers holding multiple water

Jerry Olds, Utah State Engineer
November 3, 2008
Page 2

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rights for use within their service areas. If adopted, the rule should specifically state that its application is limited to cases where the State Engineer is asked to take administrative action that would result in the separation of a water right or water rights from a supplemental water use group.

2. Effect of Filing a Statement of Group Contribution

The proposed rule requires that the Statement of Group Contribution be sworn by all water right holders having an interest in the water rights comprising the water use group. In effect, the form is an affidavit of the use and limitation of all of the water rights in the water use group. Pursuant to the proposed rule, once filed the Statement of Group Contribution is binding on all parties signing the form and shall be used to update the water right records of the State Engineer. Therefore, water users seeking administrative action on their water rights are required to self-adjudicate their water rights, and, potentially, to adjudicate the water rights of others who are required to sign the form. Signing the Statement of Group Contribution under oath verifying the use of the water rights creates legal ramifications well beyond the understanding of most water right owners and is it incorrect to assume that water users will understand the impacts when they are asked to sign the Statement of Group Contribution. The matter is further complicated by the fact that the rule provides for the later filing of a revised Statement of Group Contribution. This could result in a different allocation among the water rights in the water use group. This has the potential of creating an evidentiary quagmire of multiple conflicting admissions signed under oath. The average water user will have no concept of the impacts of such action.

3. Signature Requirements

The proposed rule requires that the Statement of Group Contribution may only be filed if all holders of the unquantified rights in a water use group sign the form. If the proposed rule is adopted, it is likely that water users will be precluded from filing applications with the State Engineer and from using their water rights because the owners of the other water rights in the water use group refuse to sign the Statement of Group Contribution. In such event, the owner seeking administrative action will have no recourse other than the courts. This would deprive water users access to the administrative process and may result in the loss of water rights if they cannot obtain administrative action due to one hold-out who will not sign the form. It is inappropriate to adopt a rule that will deny water users due process and force the public to expensive and otherwise unnecessary litigation with their neighbors in order to use their water rights. It is also inappropriate to create a situation where the water users may file forms that are contrary to record title. Thus, the premise behind the proposed rule should be reevaluated. Notwithstanding, if the rule is adopted, it should allow an individual to seek administrative

Jerry Olds, Utah State Engineer
November 3, 2008
Page 3

action on his or her own water rights regardless of whether all other owners of the water rights in the water use group will sign the form and allow the individual to proceed with action on his or her water rights. The Statement of Group Contribution should not, however, constitute a binding admission that may conflict with the record title and create a cloud on the title of water users with little or no interest in the administrative action. The issue of quantification of water rights being separated from a supplemental water use group has been, and should continue to be, addressed administratively as part of the change application process where there is notice and an opportunity for appeal by the owners of the relevant water rights.¹ In evaluating the proposed rule the State Engineer should alternatively consider revisions to the existing change application process to require that the applicant provide information quantifying any water rights that will be separated from a water use group.

4. Anticipated Costs

The notice of the proposed rule states that there will be little or no cost to water users and estimates that the Statement of Group Contribution can be completed in under 60 seconds. Experience in preparing State Engineer sole supply forms (the predecessor to the proposed Statement of Group Contribution) has shown that in all instances the preparation of the form requires more than 60 seconds and in many cases the form can not be prepared without the assistance of engineering and/or legal counsel. In many cases water users have been required to spend several thousands of dollars to properly prepare sole supply forms. As noted in paragraph 3, significant additional costs may be incurred if all of the owners of the water rights in the water use group are not willing to sign the Statement of Group Contribution once it is prepared. Thus a more accurate statement should acknowledge that the proposed rule will result in a significant increase in the water right transactional costs for water users.

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¹ The current change application process requires that applicants state the quantity of water they are using pursuant to the water right and to provide maps showing both the existing place of use that they intend to retire and the proposed new place of use for the water right. The change application process provides for notice of the proposed change and an opportunity for other interested water right owners, including those owning water rights in the same water use group, to protest the application if they believe approval would result in harm to their water right.

Jerry Olds, Utah State Engineer
November 3, 2008
Page 4

Thank you for your consideration of these comments.

Yours truly,

Clyde Snow Sessions & Swenson



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