

Draft 10.31.08
Fred W. Finlinson
UTAH WATER COALITION
11955 West Fairfield Road
Saratoga Springs, UT 84045
Telephone: 801.554.0765
Fax: f2fwcrf@msn.com

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Hand Delivered

NATURAL RESOURCES
WATER RIGHTS
Room 220
1594 West North Temple
Salt Lake City, UT 84116-3154

Re: Comments on R655-16. Administrative Procedures for Defining
Beneficial uses for Supplemental Water Rights.

Dear Jerry Olds:

The Utah Water Coalition appreciates the courtesy extended by the State Engineer by holding a hearing on the proposed Rule on September 16, 2008 and by extending the period to comment on the above mentioned newly proposed rule, **R655-16. Administrative Procedures for Defining Beneficial Uses for Supplemental Water Rights.**

The Coalition and its members have participated in the above mentioned hearing and the matter has been discussed at several Coalition Meetings. These comments have been circulated with Coalition Members in draft form and revisions then made reflecting individual comments made by Coalition Members. These comments are reflective of the Coalition. Individual members of the Coalition have also been encouraged to respond in their individual capacity, so that the State Engineer will have meaningful comments from a broad sector of the water community.

The Coalition is mindful of the Engineer's responsibility to review supplemental rights so that in the process of subsequent ownership transfer that there is no enlargement of the underlying water right. The following comments follow the sequence utilized in the Notice of the Proposed Rule as it appeared in the **Utah State Bulletin**, and do not reflect any degree of prioritization.

Anticipated Cost or Savings To:

In both the Local Government and Small Businesses and Persons Other Than Businesses introduction there is a statement, *“The only cost is in effort to complete required items on the form which consist of water use quantities which should be known by the applicant and a verified signature. It is estimated the form can be completed in under 60 seconds.”*

The Coalition believes that this will not be the case, granted some small applications may be able to be completed in under 60 seconds, but for the most part sole source supply allocation will require both extensive legal and hydrologic engineering that will be expensive and take far beyond 60 seconds. For public water suppliers, most if not all water rights will be used together and under a strict reading of the proposed language, any change application, including a simple diversion point, will require a full blown report on all rights used in the entities service area which will be expensive and far beyond a 60 second allocation.

COMMENTS ON THE PROPOSED RULE**1. R655-16-2. Justification.**

Often the unique set of water right grouping has been generated at the State Engineer’s office without any request or input from the water right owners. Some of these groupings may not include supplemental water rights, yet they may be swept into the need to file the “Statement of Group Contribution” (aka the “Statement”) form and incur the extensive expenses identified above.

Many times there will be administrative actions that do not divide up the water use group; these types of administrative actions should not trigger the requirement to complete the Statement of Group Contribution form as required in Sections 16-2, 16-3, 16-4 & 16-5 of the proposed rule.

2. R655-16-4. Application of Rule.

This rule attempts to define when the Statement of Group Contribution Form is required. *“This 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 Division’s records as part of a supplemental group and have no designated sole supply.”* It seems that an “administrative action” applies to all change applications. Strict interpretation would require any water right holder with large groupings of water rights and those with supplemental rights to complete a Statement of Group Contribution Form, even if the administrative action was for a non water right transfer like a new diversion point for a well, or a change in point of diversion. Public Water Suppliers use all of their water rights in their service area and any “administrative change” could trigger the need for the use of the Form to sole source supply all of the

suppliers' water rights. There has been indication from the State Engineer that public water suppliers who have gone through the change application process to convert Ag water to M&I, or which hold municipal water applications originally approved for that purpose, will not be required to fill out the form each time any administrative action is requested from the State Engineer's office. However, the only current provision that appears to grant some discretion is found in Section 16-6 (1) (a) which seems to cut some discretion to the State Engineer. These conflicting provisions do not give any comfort that the State Engineer will be able to comply with his own interpretation of the rule as indicated at the September 16, 2008 hearing.

3. R655-16-5(b). Definitions. "Group contribution."

One of the difficulties suggested at the hearing is the difficulty in defining the amount of contribution. In those instances where the supplemental water right is a ground water right to support a surface water right, the use varies from season to season as conjunctive management occurs. There appears to be some help in Section 16-6(6) about quantifications which would allow average contributions, or other authorized evaluation consistent with information contained in the State Engineer's records, but this still requires an allocation dividing the water right between the two sources, which are used on the same acreage. The provision also attempts to allow conjunctive management while the rights are used together. Perhaps the trigger ought to be when some sort of an "administrative action" requires the division between the water rights and the actual use area.

4. R655-16-6. Statement of Group Contribution.

Subsection (1)(a) allows the Statement to be filed at any time, but it will be required in support of a water right administrative action as deemed necessary by the State Engineer for all water rights for which the group contribution has not been defined on the records of the State Engineer. There is no provision providing an exemption for public water suppliers that will have large groups of water rights that are all used in the service area. There is no standard to determine if the State Engineer correctly deems it necessary.

5. R655-16-6 (c) & (d). Statement of Group Contribution.

These two provisions create a veto for a non willing water right holder to stop an administrative change application of another water right holder simply by refusing to participate or sign the Group Contribution Statement. The Statement in reality becomes an informal adjudication of a group of water rights. When all of the parties work together the result can be very effective. However, when that cooperation breaks down, the change application is stopped because the statement may be filed only if all holders of unquantified rights in a water use group sign the form. If no Statement is filed or available with all of the holders in agreement, the change application can not be approved. R655-16-6(4). There is no mechanism in the rule to deal with this "veto"

provision. In a regular application process, a protest can be reviewed and a decision still made. In an adjudication, each party can present its evidence and a judge rules on the competing claims. There is no protection of due process in the proposed rule to avoid a veto in this proposed setting. The new rule requires total agreement or no change application approval and it just might be for a new diversion point. This is probably a fatal flaw contained in the existing draft of the proposed rule.

The Statement requires information from other water right holders that are completely different from the applying water right holder requesting the change. This creates a very difficult burden when the required information is withheld. There is no mechanism to obtain information from a non willing water right holder to complete the information required to develop the sole supply information. The veto will likely start at this stage.

6. R655-16-6(2). Effect of a Statement of Group Contribution.

Subsection (2) provides that once a Statement is filed, it becomes binding on all parties signatory to it. It will be used by the State Engineer to update water right records of all water rights referenced by the Statement, but it does not constitute a legal conveyance of any water right or portion thereof. 16-6(3). So the net effect is that a form that is not a legal conveyance of any water right is used as the basis for the State Engineer to change the ownership on his records of a water right.

If the Statement was only required when rights were being conveyed, it makes sense to create the binding provisions that are contained in this rule, but if it required for internal changes, then it creates blocks or impediments to conjunctive management and there does not seem to be a way to correct the information in the Statement. A review can be requested in Section 16-6(5) but the review appears to be limited to a review to see if the electronic records are consistent with official records. It does not allow for a change in the sole source supply information. Once it is made, it appears to never be allowed to change. Perhaps there should be a process to file an adjustment to the Statement, especially if there has been no transfer of the water right to a different holder for a use in a different place.

7. R655-16-7. Exceptions.

In Subsection (4) the State Engineer reserves the right to eliminate water rights from water use groups if the uses are based upon shares in a mutual irrigation company, a contract with a water supplying entity or a connection to a municipal water system. This may be OK but just reading it gives the impression that the state engineer can eliminate a person's right for the use of water from shares in a mutual irrigation company, a contract right with a water supplying entity or a hook up to a municipal water system. If he is just talking about removing other water interests that shouldn't be included under a grouping of water rights because they have been include erroneously then provision (5) may be all that is necessary. The phrase "eliminate water rights" perhaps should not be used because

only the courts have the ability to forfeit a water right.