



# BARNETT INTERMOUNTAIN WATER CONSULTING

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Jerry Olds, P.E., State Engineer  
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Division of Water Rights  
1594 W. North Temple, Suite 220  
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Re: Comments on Proposed Rule R655-16

Gentlemen:

We greatly appreciate the opportunity to comment on the above proposed rule relative to determining the sole supply amount associated with water rights which are part of a supplemental group of water rights. As you know, we don't own water rights but rather represent a number of water users within the State. In a given year we might work with many hundreds if not several thousand water rights. Therefore, our perspective on this subject is not as an owner of water rights but rather as the consultants that will be assisting water users in applying the rule. With that perspective, let us offer the following observations:

- 1) **Something is Needed:** The supplemental nature of water rights is often poorly understood. We absolutely recognize the need to create a more uniform system for determining the sole supply associated with a given water right when the water right is being separated from its supplemental group. Therefore, we applaud the State Engineer's actions in seeking to create a more uniform system.
- 2) **Using Rule Making:** We also applaud the State Engineer's efforts to use ruling making to create this uniform system. Often, many procedures are treated in a much less formal manner. However, because this is such a big deal and can greatly impact the value and utility of a water right, we believe that the more formal rule making option chosen by the State Engineer is better.
- 3) **This is a Big Deal:** The supplemental attributes of water rights are important and add greatly to the utility and value of the water rights. Unlike other states, in Utah there hasn't historically been the concept of primary versus secondary or auxiliary water rights. Therefore, each water right within a supplemental group can be

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used, up to its other limitations (i.e. flow limits, priority, etc.), to its fullest extent at the discretion of the water user. Artificially putting a new definition or limitation on the water right will devalue the utility of the water right, and therefore, should only be applied when the user forces the issue by separating the water right from the other supplemental water rights. In several places in the notice of the proposed rule it gives the impression that the filing of a Statement of Group Contribution will only be required "when a water right is to be used by itself" and that it will not apply "if the water rights under consideration continue to be used together." Yet the rule itself indicates that a change application will not be considered acceptably complete until the sole supply amount for each right has been defined (see R655-16-6 (4)). The filing of a statement should only be required when it is absolutely necessary and when it is being separately from other supplemental rights. Simply adding a point of diversion or changing the place of use or even the nature of water rights which are part of the a supplemental group of water rights should not in of itself require the filing of a statement. As long as the water rights remain grouped and supplemental they already have been defined. Putting in the rule that requiring the filing of a statement "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" is of great concern (see R655-15-6 (1)(a)). If the rule is specifically limited to change applications which seek to break up groups of supplemental water rights then it is a good rule. If it applies in other circumstances then it reaches too far.

- 4) The Filing of a Statement of Group Contribution is NOT a Small Matter: While it may be true that the actual filling out of the form may only require 60 seconds, the research and leg work involved in defining the historic uses of the supplemental water rights and in acquiring required signatures etc., will often require many tens of hours of professional assistance. Therefore, it should only be required of water users when they file a change application which breaks up supplemental groups of water rights and not associated with other change applications.
- 5) Authority: There is some question or concern about the authority that a water users has of his own doing to declare the quantity of water associated with previously supplemental water rights. Clearly in the adjudicative setting such a declaration is appropriate. But does simply having a declaration notarized and recorded make binding a declaration which could affect other water users? It seems to us that if such declaration were only made in association with a change application which is duly noticed to other water users and then acted on by the State Engineer that there would not be as much concern about the authority issue. Clearly the State Engineer has the authority to quantify water rights in an administrative action whereas water users may not.

Based on the above discussion, we would suggest to the State Engineer that the draft rule be revised such that:

- 1) the rule specifically only apply to change applications where previously supplemental water right groups are being broken up, and
- 2) that the Statement of Group Contribution be amended such that it is more of a worksheet which is required to be completed at the time of the filing of such a change application and that it be revised so that it is not notarized declaration but rather submits all of the required information so that it can be used by the State Engineer when he issues his order on the change application. We believe that the declaration or determination as to the quantification is best done in the State Engineer's order which an advertised action and not in a private declaration which may only involved one or a few water users.

Again we appreciate the opportunity to comment and applaud the State Engineer for taking the leadership in this very important matter. If you have any questions regarding the above thoughts or require additional information, please do not hesitate to contact me.

Sincerely,



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