

November 3, 2008

Sent via e-mail

Jerry Olds, State Engineer
Department of Natural Resources
Water Rights Division
1594 West North Temple
Salt Lake City, UT 84116-3154

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

Dear Jerry,

The Utah Farm Bureau Federation appreciates the opportunity provided by the State Engineer to comment on the proposed Rule, **R655-16. Administrative Procedures for Defining Beneficial Uses for Supplemental Water Rights.**

The Utah Farm Bureau Federation and our members participated in the September 16, 2008 hearing and the proposed rule has been discussed at our Annual Midyear Conference in July with our Water Users Committee. A presentation has also been made by individuals in the water community before our Policy Research Committee held just prior to the public hearing. These comments consist of thoughts and concerns raised by members of the Federation during the above mentioned meetings.

The Utah Farm Bureau understands the responsibility of the State Engineer and the Division of Water Rights to review supplemental rights. We further understand the need to review the process of ownership transfer in the future and the need to ensure that there is no enlargement another water right that potentially would be detrimental. Below are some of the areas of concern that agricultural water right holders have expressed. These are for your review and are in no significant order.

In both the Local Government and Small Businesses and Persons Other Than Businesses introduction there is a statement, "*It is estimated the form can be completed in less than 60 seconds.*"

The Water Users Committee within the Utah Farm Bureau Federation is not so confident that this will occur. Recognizing that some small applications may be able to be completed in under 60 seconds, however, we do not feel this is the norm and is rather the

exception as to the time, investigation and effort required for due diligence in cases such as this. There will be a requirement for both extensive legal and hydrological information to be gathered that will be expensive and arguably consume much more time than 60 seconds.

COMMENTS ON THE PROPOSED RULE

R655-16-2. Grouping of Water Rights

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" form.

Many times there will be administrative actions that do not divide up the water use group; these types of administrative actions should not require the triggering of the requirement to complete the Statement form.

R655-16-4. Practical Application of the Proposed Rule.

As stated in the proposed rule: *"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 a new diversion point for a well, a change in point of diversion or something similar.

However, the only current provision that appears to grant some discretion is found in Section 16-6 (1) (a). This seems to allow some latitude and discretion in decisions. These provisions are in conflict with each other and create more questions and doubt as to how the proposed rule may be applied in a practical application.

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 management can occur. 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.

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.

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 is 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 seems to be no way within the proposed rule to deal with this potential problem. In a regular application process, a protest can be reviewed and a decision still made. With adjudication, each party can present its evidence and a judge rules on the competing claims. In this proposed situation there is no protection of due process to avoid a veto. 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 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.

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

Furthermore, subsection (2) provides that once a Statement is filed, it becomes binding on all parties signatory to it. Will this be used by the State Engineer to update water right records of all water rights referenced by the Statement? Does it constitute a legal conveyance of any water right or portion thereof? I don't think so, however this appears to be unclear.

The bottom line is that a simple form (that is arguably not a legal conveyance of any water right) is going to be used as the basis to change the ownership 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.

R655-16-7. Exceptions .

The phrase "eliminate water rights" is somewhat troubling in this area. Perhaps it should not be used because only the courts have the ability to forfeit a water right.

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. This may be permissible; however, on the surface in reading the proposed ruling 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. If this only addresses the removing of other water interests that shouldn't be included under a grouping of water rights because they have been include erroneously then perhaps provision (5) is all that may be needed to address this concern.

Thank you for the opportunity to address the areas of concern for the agricultural community.