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***Via Hand-Delivery***

Kent L. Jones, P.E.
Utah State Engineer
Utah Division of Water Rights
1594 W. North Temple, Suite 220
Salt Lake City, UT 84114-3154

Re: Proposed Rule R655-16 Administrative Procedures for Declaring Beneficial Use Limitations for Supplemental Water Rights

Dear Mr. Jones:

Provo River Water Users Association (the "Association"), respectfully submits the following comments on the proposed new Rule R655-16, Administrative Procedures for Declaring Beneficial Use Limitations for Supplemental Water Rights, published in the Utah State Bulletin November 1, 2009 (the "Proposed Rule").

It is apparent that careful consideration was made of comments submitted last year on a prior version of the Proposed Rule. Numerous problems with the prior rule have been addressed and resolved in the Proposed Rule. For example, a process has been provided for establishing the sole supply of a supplemental water right when the applicant is unable to secure an agreement with other water users after due diligence. In addition, the application of the rule appears to have been narrowed from "all administrative action" to certain change applications. These changes are welcome, and greatly improve the rule.

However, the Association remains concerned about the application of the Proposed Rule to the Association and other "Water Suppliers." In its comments filed November 3, 2008, the Association argued that "Water Suppliers" should be exempted from the operation of the rule:

> "The Proposed Rule should have an express exception for municipalities, mutual irrigation companies, water users associations and similar entities (referred to herein collectively as "Water Suppliers"). The exception should both (i) excuse such entities from preparing a Statement of Group Contribution when requesting administrative action relative to such entities' water rights, and (ii) excuse other water right holders from obtaining a quantification statement and

agreement from such entities when the entities' water rights are included in a supplemental group with such other water right holders."

In its 2008 comments, the Association argued that requiring a private water right holder to secure the agreement of a Water Supplier and the quantification of all of the Water Supplier's water rights whenever the private water right holder files a change application was an unnecessary burden on both the private water right holder and the Water Supplier; that such a quantification may not physically be possible; that because water rights of Water Suppliers can be used anywhere within a broad service area, such quantification would serve no useful purpose; that the water rights of a Water Supplier may not qualify to continue to be used in a supplemental fashion if, by the withdrawal of a private water right from the supplemental group, the supplemental group was no longer "used together;" and finally, that the administrative burden of responding to possibly thousands of requests to enter into quantification agreements would be very costly. Accordingly, we argued, Water Suppliers should be granted a categorical exemption from operation of the rule.

The Proposed Rule does not reflect such an exemption. Instead, while acknowledging virtually all of these points, the State Engineer has proposed solving the problem not with an exemption, but with a mechanism for removing troublesome water rights from supplemental groups. Section R655-16-6(1)(a)(ii) provides that, for a DIBUA to be complete, it must be "signed by all water right holders in the water use group." Instead of "exempting" from this requirement water right holders in the group who also happen to be Water Suppliers, the State Engineer suggests redefining them out of the group. Section R655-16-9(4) provides:

> "(4) The State Engineer may administratively cancel the assignment of a water right to a water use group if the water right is owned by a mutual irrigation company, a water supplying entity, a municipal water system, or a federal agency and if such action provides for more efficient or proper water right administration."

The Association believes this elevates the "form" of the existing water user groups over the "substance" of the purpose of the rule, and is the wrong approach. First, in most cases, the majority of the water rights in a water use group will belong to the Water Supplier, not the private water user. Therefore, at a minimum, subsection (4) should allow for the removal of the private right from the group, not the removal of all the Water Supplier's rights from the group.

This technicality aside, the focus should not be on the make-up of the water use group. The focus should instead be on what kinds of rights need to be quantified in connection with a change application, and which do not. The State Engineer correctly starts down this path in Section R655-16-6(2)(a)(iv) by requiring DIBUAs only in cases where "(iv) the nature of the

change requires a quantification of the sole supply of the water right being changed." In the Association's view, this Section is the heart of the Proposed Rule, and correctly so. This test, and not the mere fact that very different kinds of water rights have coincidentally been assigned to the same water user group, should drive all decisions regarding which supplemental water rights must be quantified. The fix is not to reshuffle the groups (an unnecessarily time consuming and administratively burdensome task for all involved), but to simply acknowledge that, as a general rule, and in the overwhelming majority of cases, the rights of Water Suppliers do not need to be quantified.

Some who have reviewed the Proposed Rule read Section R655-16-6(2)(a)(i)-(iv) itself as an exemption for Water Suppliers, with a backdoor discretionary "unexemption" in Section R655-16-9(1). We do not read the Proposed Rule this way. Section R655-16-6(2)(a)(i)-(iv) sets forth the criteria for when a DIBUA is required. All four of the criteria must be met for a DIBUA to be required, including subsection (iv), which states that the nature of the change requires a quantification. However, all four criteria could easily be satisfied, thus triggering the requirement for a DIBUA, if a private water right holder seeks to move an unquantified supplemental right out of a user group that includes other unquantified supplemental rights. Clearly, in this case, the nature of the change requires quantification. The coincidental presence of Water Suppliers in the group does not prevent all four criteria from being met. The DIBUA is therefore required. Section R655-16-6(1)(a)(ii) is quite clear that, once a DIBUA is required, it must be "signed by all water right holders in the water use group." This would include Water Suppliers. In this case (which we consider to be a very, very common example), the solution put forth in the Proposed Rule is to create new user groups, separating out the Water Suppliers.

In reviewing the eight examples listed on the State Engineer's PowerPoint presentation on the Proposed Rule, none illustrates an example of a Water Supplier water right requiring quantification. Only two examples deal with Water Suppliers. Neither requires the quantification of Water Supplier rights. In example No. 3, the owner of a well right supplemental to irrigation shares desires to move the POD and POU of the well right. The example suggests that he petition the State Engineer to remove the right from the irrigation company's water use group. (Please note that this example illustrates the minor technical flaw in Section R655-16-9(4)—in the example, it is the well right that is removed from the group; in the Proposed Rule, it is the irrigation company's rights that are removed.) This example also illustrates our point above that all four criteria can be met, even though logically the change does not affect the irrigation company's water rights. The Water Suppliers are stuck having to sign the DIBUA, unless they can be excluded from the group.

The example concludes by stating that "[t]he beneficial use associated with the well water right must be determined but *there is no need to submit a Declaration on the other [irrigation company's] water rights in the water use group.*" This statement is confusing. Is

there no need for the irrigation company to sign the DIBUA because the State Engineer granted the request to redefine the user group, or because there is no useful purpose to be served in forcing the irrigation company to quantify its rights? We hope the latter, but the Proposed Rule does not include language that supports this reading of Example 3. The Association strongly urges the State Engineer to include this language into the Proposed Rule.

The State Engineer has expressed the concern that a blanket exemption for Water Suppliers might not allow for special circumstances where quantification of a Water Supplier's supplemental water right is, in fact, proper. However, such an exemption would not need to be absolute or irrefutable. In fact, the Proposed Rule already includes language that very nicely handles unusual circumstances. Section R655-16-9 provides that:

> "At any time during a change application or proof process, if it becomes apparent, through State Engineer review, protest, or otherwise, that a DIBUA is necessary to complete the administrative process, the State Engineer may require the water right holder to submit a DIBUA."

The Association, and we believe the wider water community, would welcome an approach that begins with a general exclusion for Water Suppliers, but retains for the State Engineer the discretion to require quantification in special (we think very rare) circumstances. We believe this approach would both achieve the objectives of the State Engineer, and result in the least administrative cost and disruption to water right holders.

We appreciate your careful consideration of these comments.

Sincerely,

PROVO RIVER WATER USERS ASSOCIATION

Christopher E. Bramhall
General Counsel

cc: G. Keith Denos,
General Manager