

PUBLIC COMMENTS: in behalf of the people of the State of Utah, these comments and views are concerns representative of our opinions.

Concerns of the implementation of the proposed new R655-16-1 to 9 Administrative Procedures for Declaring Beneficial Use Limitations for Supplemental Water Rights by the Division of Water rights (DWRi).

#### GRAND SUMMARY OF CONCERNS IF THE NEW RULES ARE IMPLEMENTED AS PROPOSED.

1. It appears, based on the new rules, that there is a new proposed methodology to determine the present value of a water right entitlement that creates the possibility of a new reduced entitlement, and we believe this is not a step in the right direction or in the best interest of the water right owners or the public. The water right entitlement is based on current Utah laws. One of the laws, 73-3-3, gives clarity to what the water right change applicant (water right owner) is entitled to, based on the "**purpose of use for which the water was originally appropriated**" as documented by current filed documents of past DWRi approvals. We strongly oppose any new process that has the potential to reduce any historical water right entitlement.
2. It is our assessment that the supplemental water rights are equal in value to sole supply rights to the Utah economy if the use is documented or not. Under the proposed rules it appears DWRi will approve a change application for a supplemental water right and possibly all water rights in the future if "long term use of the full water right can be evidenced." As usual, the water cannot be used unless a valid paper right exists prior to the use. However, evidence of use of the supplemental rights may or may not exist. If the paper entitlement to use the water already exists, a change application should be approved by DWRi if the water is used or not. We agree that as a water right is evaluated through the traditional process, to further define the water right, the beneficial use values as originally or otherwise approved are an entitlement and should be constantly protected under the law as a junior, senior, supplemental, or sole supply right. The public waters must be distributed to each senior right based on priority. Supplemental rights are protected under the law even if not used based on the Utah Code 73-1-4, thus use is not an issue to quantify a supplemental right.
3. The DWRi has created Ground Water Management Plans. Most, if not all, plans include provisions to manage the water resource and distribute the public waters based on priority of rights. Priority is the bedrock foundation of water distribution. The new rules propose a new foundation of distribution that will erode our priority based distribution of the public waters.
4. We define the process of reducing on paper any water right below the approved original beneficial use values as administrative forfeiture. We adamantly oppose any kind of administrative forfeiture by the DWRi. To allow, as proposed, the current use or an average of it would become more important and take precedence over the historic approvals. This is confusing, illogical, and would not allow a person outside of DWRi methodology to evaluate any water right without the same long term average water use information. The public have no power to collect that information. That information has not been required in the past and is not a matter of the public record to date. So the implementation of the new rules would disallow the public to make an equitable determination of any right about to be purchased, sold, or leased. Therefore, we strongly oppose the new rules.
5. The "Summary of the new Rule or Change" R655-16 indicates the intent of this rule is to further define the supplemental water rights category. The text of the proposed rules seems to be unclear and vague and will likely establish the evaluation process for all water rights, not just supplemental water rights.
6. We **propose** and strongly support a much simpler process that more resembles or is the historical water right original evaluation process additionally simplified. This evaluation process would streamline and create a DWRi savings in time and effort required to evaluate any water right state wide. This proposed process would be simple enough to help, with few exceptions, all interested parties to create an evaluation of any type of water right, including supplemental rights, before selling, purchasing, or leasing the water right.

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SPECIFIC CONCERNS OF THE ABOVE GRAND SUMMARY.

1. All water rights individually, at the onset and perhaps later on, including supplemental rights have been given State Engineer (S. E.) approval(s). The approvals are documented and cannot be prejudiced. We agree that the original approval(s) and the subsequent S.E. approvals are the determination of each water right entitlement regardless of type or category (supplemental or sole supply rights), not the long term average use proposed in the new rules.

The public "record" of historical approvals or documentation thereof was created by a process approved by law when the Application to Appropriate or Change Application was S.E. approved. The Utah Code 73-3-3 (2) (a) allows "Any person **entitled to the use** of water may make permanent or temporary changes in the: point of diversion; place of use; or purpose of use **for which the water was originally appropriated.**" (bolds and underlines added). The water entitlement values or standard acre-foot (a-f) value is also defined in like manner, by the S.E. "approved uses."

The a-f values are also tied to an approved available source based on priority. (An owner is entitled to the a-f values annually only if the water is physically available annually, and also based on the seniority of the individual priority.) The point is that the water right is already defined. The only question remaining is: Is the water available annually? The water right a-f values have been defined based on the prior approvals; however, the S.E. is now stating, "No, that is not true -the average use is now the basis the limit and the definition of the water right," if the new rules are implemented. We strongly disagree to the new approach. We feel it is the responsibility of DWRi to require, to protect, and to insure that the water right entitlement remains constantly equal to the, "**purpose of use for which the water was originally appropriated.**" We do not see anywhere in the law or rules where the DWRi can reduce a water right after it has been appropriated unless by priority.

The new rules contradict the traditional method to define the a-f values of the water right based on historical S.E. approvals. The new rules propose a new methodology to determine water right values, using a long term average of use, which may negate the validity of the historical approval documents as the values are administratively changed. Therefore, we strongly oppose the new rules. We disagree to the implementation of these new rules as a basis to create a new procedure to re-define supplemental water rights or that may reduce any water right below the original approved beneficial use entitlement values.

2. The portion of the Utah economy related and based on water may be our largest state asset. Any reduction of water right values also reduces our water based economy. Supplemental rights are protected under the law if used or not, based on the Utah Code 73-1-4. (2)(f); "(viii) a supplemental water right during a period of time when another water right available to the appropriator or the appropriator's successor in interest provides sufficient water so as to not require use of the supplemental water right." Thus, any reduction of paper supplemental water right is contrary to the law. It is defined as an entitlement to the use of water, based on the original approval of the paper right. Any reduction of the paper right has the potential to reduce the Utah economy.

As stated above, the new rule changes the methodology of water right evaluation. Consequently, it has the potential to change the method of water right distribution of the public waters based on priority (seniority of right, also an entitlement based on the original S.E. approvals). It would render an applicant seeking his entitlement according to the Utah Code 73-3-3(2)(a) (as quoted above) powerless to get an approval from the state engineer equal to the **original entitlement** if the long term average evidence does not exist today.

To be reasonable, the State would first need to enact rules and policies that require every water right holder to create evidence of the water use annually and file it with DWRi. This act alone would cause too much additional burden on the DWRi staff and create a need for a huge additional data storage facility. The DWRi would become a data base for the Historical Society of Water Use. This would create yearly filing requirements of evidence of each annual water right use and cause millions of physical documents, not just scans of documents, to be made public. We just got our first DWRi request for 15 years of pumping records to evidence the "long term" use for a water right change application. The two page monthly billing record multiplied by 6 months multiplied by 15 years is 180 documents required for one water right. There is no law or

rule in America today that requires an individual to keep 15 years of evidence (pumping bills). We do believe that the water right limitation and measurement information required to evaluate each water right already exists in the public record. If not, the water right does not exist; thus, we oppose any implementation of the new rules.

3. We strongly approve the apportionment and distribution of the public waters based on water right priority. The new proposed rules would allow a reduction of a senior priority supplemental right based on the use rather than priority. The entitlement of a supplemental right may be a stand by right one year and a sole supply right next year. The new rules have no flexibility to allow the dual valued use. Once the right is defined as sole supply right, as proposed based on a long term evidence of use, the right will be limited to the average use because an owner cannot exceed the sole supply limitation in a given year. How can the right be used as a supplemental right again? Does the person value the right at the time of sale as supplemental or sole supply? All reductions ordered by the DWRi to water rights are intended to be permanent.

Any reductions to a water right must be priority based. If the right is a senior right, the supplemental water right could be used every year if needed. Many rights have been reduced already based on these rules. We have seen that a re-apportionment of the water occurs that allows a junior right or a part thereof to become a senior right. This is a government agency taking from the senior right. The same process that can reduce a senior water right is also defined as administrative forfeiture. Supplemental water rights have priority, too. They also have protection under the law 73-1-4 if used or not. The new rules would not protect the supplemental right unless it is used. If used at a reduced level, then the right will be permanently reduced. The evaluation proposed in the new rules would render the supplemental water right that is not used to be invalid forever so we strongly oppose the new rules. These government created rules of this type may enable the government to become stronger as the public becomes less empowered to create water right commerce.

The new rules suspend the use of the distribution process of priority contrary to what is implemented within the Ground Water Management Plans (GWMPs) according to priority. Thus, the new rules would create a contradiction in the plans. We would now distribute water based on the DWRi interpretation of the evidence available of the "long term use." This is a mistake. In the public hearings held to discuss the GWMPs, the priority process was discussed openly as a foundation to the allocation process. Priority was also used in the public hearing to gain public sentiment in favor of the Proposed Ground Water Management Plans before they were implemented. We quote from a ground water management plan text:

"If it becomes necessary to administer the water rights to meet the withdrawal limit, the water commissioner will be instructed to distribute the water based upon priority. In achieving the withdrawal limit set forth in paragraph 1 above, any reductions will be implemented over several years to allow water users reasonable time to make operational and financial adjustments."

These reductions are based on priority. There should be no other process that can reduce the entitlement of a senior right. Any other water right reduction upsets or nullifies family businesses; and, therefore, the final result is a reduction to the Utah economy and a financially broken or injured family.

The water right commerce of this state requires a stability that we do not currently have. We need to create a simple method of water right evaluation that is based on established historical documents that are straightforwardly available to the public. The proposed rules seemingly toss the traditional evaluation of the right using historical state approval documents and gives way for a new evaluation based on new usage evidence not currently in any water right files.

4. Every water right can be evaluated by most all people using the present public record using a simple, logical process. The State Engineer should use the same simplified process logically using existing documents to verify the existing evaluation as the water right entitlement. All water right commerce is based on the water right entitlement. Once an evaluation is completed, the water right should never need a new acre-foot evaluation or quantification again. This methodology of water right evaluation would bring stability to the water right commerce state wide immediately. We need to create a water right evaluation process so the public can confidently buy, sell, and trade water rights with ease. These new rules do not head us in that direction. In fact, the public will not be able to evaluate any water rights state wide, with the required accuracy, if the rules

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are implemented because the water right would be forever subject to administrative forfeiture by the government. Administrative forfeiture is a matter to only be heard in a District Court based on Utah law 73-1-4 (2) (c) (ii) "If forfeiture is asserted in an action for general determination of rights in conformance with the provisions of Chapter 4, Determination of Water Rights, the 15-year limitation period shall commence to run back in time from the date the state engineer's proposed determination of rights is served upon each claimant." ... (v) If in a judicial action a court declares a water right forfeited, on the date on which the water right is forfeited: (A) the right to use the water reverts to the public;... (c) (i) A water right or a portion of the water right may not be forfeited unless a judicial action to declare the right forfeited is commenced within 15 years from the end of the latest period of nonuse of at least seven years."

No where in this law does the DWRi have the right to forfeit, thus reduce, any water right. The State Engineer must take the action to District Court - just like the public. The new proposed rules contradict this law and forfeits constitutional rights away from a water right holder to protect and defend his rights unless he is willing to go to court. If we must go to court every time we need to defend a water right (every time the DWRi "Orders" a reduction), we have the rules and laws set up contrary to the economy of this state. There are literally hundreds of administrative reductions every year, and the general public has no idea of what is happening and why it is happening. The public does not understand that they must get a lawyer and file a claim, and take it to court or they lose the water right forever. If these rules are implemented, there will be thousands of reductions every year. As stated above, there should not be any reductions by DWRi once the right is approved and the priority set. Implementation of these rules would create an undue burden placed on the public, the court system, and the water right holder. Most all of the legal entanglements and the consequential drain on the economy of Utah, can entirely be avoided with a simplified evaluation method that we can all agree upon. The implementation of these rules would cause confusion to all water right commerce of any right that is administratively reduced, until the rule is abolished, and the reduction is repaired.

5. As the proposed rule reads: the Declaration of Beneficial Use Amounts, the (DIBUA) "shall be required ... R655-16-6 (2)(iv) where: the nature of the change requires quantification of the sole supply of the water right being changed." Our concern is this new process will allow the state to use this new evaluation process on all water rights and may reduce any or all rights as they are re-evaluated. We need to use all of the water right entitlement annually so the economy of the state is positively affected. We will not have the chance to use all of the water annually if the water right entitlements are always subject to reduction. As stated in the new rules, the state will re-define the right based on the new process that uses the average of the long-term beneficial use. The long term evidence is not a part of the current water right public record. Thus, DWRi requires the evidence to be submitted because they need to average the use to determine the water right values. Because the possibility does exist that the evidence is not available, the DWRi renders the water right change applicant powerless in the process; and the net result is that the applicant's right is lost. This process is a normal DWRi practice state wide today. These rules are only an attempt to openly legalize the taking. That is the definition of administrative forfeiture. The ironical part of this is that the applicant was only trying to innocently bolster the Utah economy by making a change to his water right entitlement to make the use more efficient.

6. We **propose** and strongly support a much simpler process that more resembles or is the historical water right original evaluation process additionally simplified. This evaluation process would streamline and create a DWRi savings in time and effort required to evaluate any water right state wide. This proposed process would be simple enough to help, with few exceptions, all interested parties to create an evaluation of any type of water right, including supplemental rights, before selling, purchasing, or leasing the water right.

6. The existing methodology of water right evaluation using all historical approvals is the **only** equitable way to verify any water right quantification. We propose that a simplified traditional process would be a much better process that can simply, with an excellent amount of efficiency and accuracy, verify the water right value of the entitlement according to and in complete agreement with the original documentation that exists in the public files today based only on prior DWRi and District Court documents. Simply done, the water right evaluation process would require less DWRi staff time and would create a savings in the process from the current implemented process or a more complicated one as proposed .

The new proposed evaluation based on the new rule would require an additional evaluation each time a water

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right is changed. The process is repetitive and wasteful. The process already requires that any new change applications must not contradict the historic water right values as we disallow enlargement of water rights. We have also disallowed any water right reduction, unless in District Court.

We propose using the approved application to appropriate the water right certificates, and the other readily available approval documents. The historical evaluation method can be simplified by using an **approved water right calculator** and the historical entitlement documents to arrive at the approved water right acre-foot values based on the approved uses. This would help eliminate misunderstanding by making the process simple. If the public calculated the evaluation and DWRi did not agree, the mistake could be easily brought to light based on the historical documents. These historic water right decisions are a matter of history - not subject to current prejudice. The average person could actually research the right and know the values of the water right so the water right could be sold, leased, or traded based on great accuracy. The implementation of the new proposed rules as written can effectively negate any historic water right evaluation or documents and render them void. Thus, we are against the implementation of the new rules because they cause repetitive work and wastefulness to re-create the evaluation of the water right on a re-occurring or ongoing basis.

With the design to create a stable foundation for the water right commerce market, the water right evaluation process must be simplified. If we use the new proposed rule to evaluate the water right, we will not have a state evaluation available when the water right is scheduled to sell because the evaluation of water right proposed is based on current use rather than the historical appropriation or entitlement itself. Under the new DWRi rules, water right commerce would continue to be more and more complicated over time. We would be moving in the wrong direction at a faster pace. Distribution of the public waters based on the priority system could not be implemented simply and unencumbered. Therefore, based on the above facts, we strongly oppose the implementation of any rules or laws based on the wishes of the newly proposed DWRi rules R655-16-1 to 9.

Any questions can be discussed by responding to the e-mail address given. We hope that we can be heard based on our rights of free speech and our desires to add this into the public process to enact government rules and also as a matter of public record forever. We strongly hope we will be heard. It is a matter of great importance to the general public of this great state.

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**From:** Ken Tuttle <waterrightmatters@gmail.com>  
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**Date:** 12/17/2009 1:47 PM  
**Subject:** Public Comments for Rule R655-16  
**Attachments:** Second Draft of Public Comments asd revised.docx

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