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December 17, 2009

Natural Resources
Water Rights
1594 W. North Temple, Room 220
Salt Lake City, UT 84116-3154

Via Hand Delivery

Re: Written Comments on Proposed Administrative Rule R655-16 (DAR File No. 33066)

To Whom It May Concern:

This law firm represents water right holders from many segments of the water community, including the following: Anderson Development; Glade Berry, Bona Vista Water Improvement District; B. DeLyle Carling; Draper Irrigation Company; Duchesne City; Gardner Development; Grantsville City; JLS Properties, LLC; Lake Bottom Irrigation Company; Magna Water Company; Morgan Secondary Water Association; Park City Municipal Corporation; Pleasant View City; Providence City; and South Farm, LLC. This diverse group of clients has requested that we submit these written comments about Proposed Rule R655-16 on their behalf. We also submit this comment on behalf of this law firm and its other interested clients.

This rule is a successor to the proposed rule with the same number (Dar file no. 31692) that was issued last year. We submitted a comment letter to that rule dated November 3, 2008, outlining many concerns. Specifically, the previous rule imposed a significant and unjustifiable burden on a broad range of water users, exceeded the State Engineer's rulemaking authority, and constituted an unconstitutional delegation of administrative authority.

It is clear based on the current proposed rule that the State Engineer heard these concerns and made great effort to address them, and we appreciate that effort. We also appreciate the State Engineer's and staff's willingness to meet with members of the water community to further explain how the newly proposed rule will be applied. Some of the improvements in this proposed rule are as follows: the segment of water right holders to which the new rule will be applied has been narrowed, the proposed rule contains a mechanism to address the problem of hold outs, the rule specifies the procedure and authority to correct errors in some supplemental groupings, the rule allows flexibility where efficiency would be served, and the fiscal notes for the rule acknowledges the

potential burden on water users who wish to file change applications. Although we are still of the opinion expressed in our earlier letter that the purpose of the rule could be adequately served through the change application process without the necessity of these new procedures,[1] these myriad improvements make this rule much more manageable than its predecessor.

Notwithstanding these improvements, there remain items in the rule that can and should be improved to assure that the Rule does not become unnecessarily burdensome to both water users and the Division of Water Rights. Additionally, the proposed rule could be clarified to ensure consistency with the stated plan for application of the rule. Finally, some procedures could be implemented to protect water users from abuses under the proposed rule.[2]

First, certain minor language changes in the rule could bring it into better conformance with the planned implementation of the rule. For example, at both the November 17th Hearing and the December 2nd Coalition meeting, the State Engineer explained that the purpose of subsection R655-16-6(2)(a) of the rule was to limit the types of change applications that will require the DIBUA. Specifically, it was explained that only where all four of the criteria were met would a DIBUA be required before a Change Application could be filed. The current wording suggests that a DIBUA is certainly required when all four are met, but it does not foreclose the State Engineer requiring a DIBUA in other circumstances. Accordingly, the word "shall" in subsection R655-16-6(2)(a) should be replaced with the words "may only." This will clarify the intended effect of the provision and will, in effect, give the public water supplier exemption that has been discussed for both this rule and the previous rule. This same purpose would be served by removing subsection R655-16-9(1) from the proposed rule.[3]

Another potential, unintended burden on both the water community and the state engineer could occur with the Application for Apportionment of Beneficial Use Amounts provided in section R655-16-8. As noted above, this or a similar process is necessary to prevent hold outs. But this process presents a dubious tool for those wishing to delay or prevent a change application. Accordingly, the rule should be modified to allow a applicant to request a preliminary apportionment and a ruling on a proposed change application that is contingent on the validation of the apportionment. This would allow appeal of both rulings simultaneously rather than allowing a protestant to hold up a change application in court for many years through two consecutive proceedings.

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[1] Indeed, it appears that this process, which was intended to lighten the burden on the Division of Water Rights, may actually increase the burden beyond what it has been.

[2] Some of these concerns have been addressed by Fred Finlinson's letter on behalf of the Water Coalition. We approve of those comments.

[3] An alternative to removing the subsection entirely would be to revise it to acknowledge that the four criteria in subsection R655-16-6(2)(a) must still be satisfied (e.g., if the State Engineer originally believed that subsection 6(2)(a)(iv) was not satisfied, but it became apparent later in the process that a DIBUA is in fact necessary).

Second, in the course of the hearing and meeting with the Water Coalition, there were two items that, while not in the Rule itself, are worth putting in the record. First, it was discussed that a temporary change application would usually not require a DIBUA based on section R655-16-6(2)(a)(iv). Second, the process for correcting errors in the supplemental groupings under section R655-16-7(2) or removing certain water rights from groups based on section R655-16-9(4)[4] could allow an adverse effect on a water right without any notice to the water right owner. The State Engineer suggested that a note be placed in the water rights files for any water right removed from a supplemental group under one of these provisions. This would allow water right holders to obtain notification through the e-mail notification system of that change in the database and verify that the action was proper and does not adversely affect their rights. We would request that this policy be implemented.

Thank you for the improvements in the new proposed rule and the opportunity to provide comments. Please feel free to contact us as necessary.

Yours truly,
SMITH HARTVIGSEN, PLLC

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[4] We agree with the Coalition recommendation that the language "the water right is owned by a mutual irrigation company, a water supplying entity, a municipal water system, or a federal agency and if" be removed from the rule to allow the State Engineer greater flexibility in promoting efficient application of this rule.