

## **AGENDA**

### **EXECUTIVE WATER TASK FORCE**

June 15, 2010, 2:00 PM  
Room 2000, Natural Resources Complex

- I. Welcome and Introductions - Mike Styler
  
- II. Draft of Aging Infrastructures – Dennis Strong  
What is being worked on, funded, to be funded, and funding sources
  
- III. Preliminary report– Troy Rindlisbacher  
Management of Surface and Ground Water
  
- IV. Beneficial Use – Kent Jones  
Specifics, conflicts with developed use, and public welfare
  
- V. Other Issues - All

## **EXECUTIVE WATER TASK FORCE MINUTES**

June 15, 2010 2:00 p.m.  
Room 2000, Natural Resources Complex

### **Task Force Members:**

Mike Styler, Department of Natural Resources  
Voneene Jorgensen, Bear River Water Conservancy District  
Sterling Brown, Utah Farm Bureau  
Mark Stratford, Ogden City/Utah League of Cities and Towns  
Dallin Jensen, Parsons, Behle & Latimer  
Ed Bowler, Washington County Conservancy District  
Steve Clyde, Clyde Snow and Sessions  
Troy Rindlisbacher, U. I. A.

### **Ex-Officios:**

Dennis Strong, Division of Water Resources  
Kent Jones, Division of Water Rights  
Boyd Clayton, Division of Water Rights  
Mike Quealy, Utah Attorney General's Office  
Norm Johnson, Utah Attorney General's Office

### **Guests:**

John Mabey, Mabey Wright and James  
Rusty Vetter, Salt Lake City Corporation  
Scott Martin, Snow, Christensen and Martineau  
Scott Wilson, Central Iron County WCD  
Shawn Draney, Snow, Christensen and Martineau  
Patrick Casaday, Sandy City  
Don Barnett, Barnett Water  
Todd Adams, Division of Water Resources  
Jay Franson, Franson Civil Engineers  
Dan Davidson, Bear River Canal Company  
Bob Fotheringham, Cache County  
Chris Bramhall, Kirton & McKonkie  
Richard Bay, Jordan Valley WCD  
Fred Finlinson, Utah Water Coalition  
The Honorable Mike Noel, House of Rep./KCWCD  
Mike Mower, Governor's Office of Planning & Budget  
David Hartvigsen, Smith Hartvigsen  
Jared Parkinson, Water Law PC  
Chris Parker, Legislative Research  
Paul Ashton, WCWID  
Grant Cooper, LDS Church  
Justin Record, Bureau of Reclamation  
Eric Millis, Division of Water Resources

## **I. Welcome and Introductions**

- Mike Styler welcomed the group and excused Warren Peterson, Merrill Bingham, Tage Flint, and Craig Johansen. Mike then asked everyone to introduce themselves.

## **II. Draft of Aging Infrastructures – Dennis Strong**

- Dennis distributed the attached document “Projected Funding Needs” to all. Discussed were the 20 year projections on the front page. The second page contains active projects that are being funded. The third page explains where Water Resources funding comes from. And the last page is the allocation to the counties made by the Water Resources Board.
- A discussion was held on what amounts would be needed to replace aging infrastructure, however, with the lack of state funds and budgeting issues we face the decision was made that at this time we need to educate Legislators and increase awareness for future needs.
- Also discussed was the sales tax distribution and a handout was provided with that explanation (attached).

## **III. Planning discussion and assignments**

- *Agenda items were finalized for the next Task Force Meeting on June 29<sup>th</sup>.*
  - *Lost Share Certificates – Fred Finlinson*
  - *Wording Changes on 73-3-18 – Kent Jones*
  - *Share Changes (SB99) re: Aug. 19 draft – Steve Clyde*
- *Agenda items for the Task Force Meeting in July.*
  - *Management of Surface and Ground Water – Troy Rindlisbacher*

## **IV. Management of Surface and Ground Water – Troy Rindlisbacher**

- Three (3) ideas and areas of interest were formatted from the committee on this issue:
  - Recharge Recovery Act
  - Protect recharge areas
  - How does conserved water fit?
- The committee is looking for direction in how to proceed in these areas and requested help from someone more familiar with the laws and specific facts.
- *Boyd Clayton was assigned to meet with this committee for further discussion and clarification.*
- This committee will present more information at the July meeting.

## **V. Beneficial Use – Kent Jones**

- There are three (3) items that need to be addressed regarding this issue.
  - Better define what Beneficial Use can be.
  - Jr. vs. Sr. right. Should there be consideration to Jr. user?
  - How should public welfare be defined? / What is public welfare?
- A vote was taken on whether or not to continue discussion on each of the above items and it was determined that discussions continue on all three.
- *Kent Jones will bring starting language on the three items to a future meeting for further discussion and definition.*
- *A continued discussion and decision that we need to Hold The Line and Educate Legislators of the upcoming plight re: Aging Infrastructure. It was determined that we need to get on a future agenda of an Interim Committee Meeting.*

## **VI. 73-3-17 and 73-3-18 Distribution – Kent Jones**

- Distributed were a copy of 73-3-17 and 73-3-18 with wording changes marked.
- Members should be familiar with these changes as there will be further discussion on approving these changes at the June 29<sup>th</sup> meeting.

## **VII. Other Items – Boyd Clayton**

- Boyd Clayton distributed an “Open Discussion” paper regarding water changes in Chile, this may be of interest to most of you.

The meeting was adjourned and the next meetings were scheduled for Tuesday, June 29, 2010 at 1:30 PM with the following meeting to be held on July 13, 2010 at 1:30 PM, both to be held at DNR in Room 2000.

**73-3-17. Certificate of appropriation -- Evidence.**

(1) Upon it being made to appear to the satisfaction of the state engineer that an appropriation, a permanent change of point of diversion, place or purpose of use, or a fixed time change authorized by Section **73-3-30** has been perfected in accordance with the application, and that the water appropriated or affected by the change has been put to a beneficial use, as required by Section **73-3-16** or **73-3-30**, the state engineer shall issue a certificate, in duplicate, setting forth:

- (a) the name and post-office address of the person by whom the water is used;
- (b) the quantity of water in acre-feet or the flow in second-feet appropriated;
- (c) the purpose for which the water is used;
- (d) the time during which the water is to be used each year;
- (e) the name of the stream or water source:
  - (i) from which the water is diverted; or
  - (ii) within which an instream flow is maintained;
- (f) the date of the appropriation or change; and
- (g) other information that defines the extent and conditions of actual application of the water to a beneficial use.

(2) A certificate issued on an application for one of the following types of projects need show no more than the facts shown in the proof submitted under Section **73-3-16**:

- (a) projects constructed according to Title 73, Chapter 10, Board of Water Resources - Division of Water Resources;
- (b) federal projects constructed by the United States Bureau of Reclamation, referred to in Section **73-3-16**; and
- (c) a surface water storage facility in excess of 1,000 acre-feet constructed by a public water supplier.

(3) A certificate under this section does not extend the rights described in the application.

(4) Failure to file proof of appropriation or proof of change of the water on or before the date set therefor shall cause the application to lapse.

(5) One copy of a certificate issued under this section shall be filed in the office of the state engineer and the other shall be delivered to the appropriator or to the person making the change who ~~may shall, within 30 days,~~ cause the same to be recorded in the office of the county recorder of the county in which the water is diverted from the natural stream or source.

(6) The certificate issued ~~and filed~~ under this section is prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

**73-3-18. Lapse of application -- Notice -- Reinstatement -- Priorities -- Assignment of application -- Filing and recording -- Constructive notice -- Effect of failure to record.**

When an application lapses for failure of the applicant to comply with the provisions of this title or the order of the state engineer, notice of such lapsing shall forthwith be given to the applicant by regular mail. Within 60 days after such notice the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement. The original priority date of a lapsed or

forfeited application shall not be reinstated, except upon a showing of fraud or mistake of the state engineer. The priority of an application shall be determined by the date of receiving the written application in the state engineer's office, except as provided in Section ~~73-3-12~~ ~~73-3-17~~ and as herein provided.

Prior to issuance of certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred or assigned by instruments in writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgement or proving of conveyances of real estate, may be filed in the office of the state engineer and shall from time of filing of same in said office impart notice to all persons of the contents thereof. Every assignment of an application which shall not be recorded as herein provided shall be void as against any subsequent assignee in good faith and for valuable consideration of the same application or any portion thereof where his own assignment shall be first duly recorded.

**73-3-12. Time limit on construction and application to beneficial use -- Extensions -  
- Procedures and criteria.**

- (1) As used in this section:
  - (a) "Public water supplier" is as defined in Section **73-1-4**.
  - (b) "Wholesale electrical cooperative" is as defined in Section **54-2-1**.
- (2) (a) Within the time set by the state engineer under Subsection **73-3-10(5)**, an applicant shall:
  - (i) construct works, if necessary;
  - (ii) apply the water to beneficial use; and
  - (iii) file proof with the state engineer in accordance with Section **73-3-16**.
- (b) Except as provided by Subsection (4), the state engineer shall extend the time in which an applicant shall comply with Subsection (2)(a) if:
  - (i) the date set by the state engineer is not after 50 years from the day on which the application is approved; and
  - (ii) the applicant shows:
    - (A) reasonable and due diligence in completing the appropriation; or
    - (B) a reasonable cause for delay in completing the appropriation.
  - (c) An applicant shall file a request for an extension of time with the state engineer on or before the date set for filing proof.
  - (d) The state engineer may grant an extension of time authorized by Subsection (2)(b) if the state engineer sets a date:
    - (i) no later than 14 years from the day on which the application is approved if the applicant meets the requirements of Subsection (2)(b); and
    - (ii) after 14 years from the day on which the application is approved if:
      - (A) the applicant meets the requirements of Subsection (2)(b); and
      - (B) the state engineer publishes notice as provided in Subsection (2)(e).
  - (e) (i) The state engineer shall publish a notice of the request for an extension of time:
    - (A) once a week for two successive weeks, in a newspaper of general circulation, in the county:
      - (I) in which the water source is located; and
      - (II) where the water will be used; and
      - (B) in accordance with Section **45-1-101** for two weeks.
    - (ii) The notice shall:
      - (A) state that a request for an extension of time has been made; and
      - (B) specify where an interested party may obtain additional information relating to the request.
  - (f) A person who owns a water right or holds an application from the water source referred to in Subsection (2)(e) may file a protest with the state engineer:
    - (i) within 20 days after the notice is published, if the adjudicative proceeding is informal; and
    - (ii) within 30 days after the notice is published, if the adjudicative proceeding is formal.
  - (g) The approved extension of time is effective so long as the applicant continues to exercise reasonable and due diligence in completing the appropriation.
  - (h) The state engineer shall consider the holding of an approved application by a public water supplier or a wholesale electrical cooperative to meet the reasonable future

water or electricity requirements of the public to be reasonable and due diligence in completing the appropriation for the purposes of this section for 50 years from the date on which the application is approved.

(i) If the state engineer finds unreasonable delay or lack of reasonable and due diligence in completing the appropriation, the state engineer may:

(i) deny the extension of time; or

(ii) grant the request in part or upon conditions, including a reduction of the priority of all or part of the application.

(3) Except as provided by Subsection (4), an application upon which proof has not been filed shall lapse and have no further force or effect after 50 years from the date on which the application is approved.

(4) (a) If the works are constructed with which to make beneficial use of the water applied for, the state engineer may, upon showing of that fact, extend the time in which to file proof by setting a date after 50 years from the day on which the application is approved.

(b) (i) The state engineer may extend the time in which the applicant shall comply with Subsection (2)(a) by setting a date after 50 years from the day on which the application is approved if the applicant:

(A) is:

(I) a public water supplier; or

(II) a wholesale electrical cooperative; and

(B) provides information that shows the water applied for in the application is needed to meet the reasonable future requirements of the public.

(ii) The information provided by a public water supplier shall be in accordance with the criteria listed in Subsection **73-1-4(2)(f)**.

(c) The state engineer shall extend the time in which to file proof by setting a reasonable date after 50 years from the day on which the application is approved if the applicant:

(i) meets the requirements in Subsection (4)(b); and

(ii) has:

(A) constructed works to apply the water to beneficial use; or

(B) made substantial expenditures to construct the works.



## Evolution of 73-3-18

Prior to 1933 state statutes for appropriation and change of water rights generally contemplated approval of an application and up to a 14 year period to develop the project. Although the state engineer set proof due dates and regulated extensions before the 14 year period, the limit of his authority was basically to approve or not approve the extension and any action to deny an extension would generally not be construed to lapse the application completely but limited additional development and caused a “postponement” of priority when the proof was finally submitted. Extensions after 14 years were under the supervision of the district court with generally the same consequence as before 14 years with the caveat of judicial discretion to invalidate the application if exercised. This system made sense at the time because water was generally considered available for appropriation, the question was not whether there was water to appropriate but who would be first in priority.

After 1933 the water right system was fundamentally modified in recognition of a finite water supply. Key among those changes was that all water must be appropriated through application (not just surface water) and a desire to get applications off the books if they weren't moving to perfection on the state engineer's schedule so his records more reliably reflected the state of appropriation of a source. A series of changes between 1933-1940 in many water right sections accomplished that shift. In 1933 the code section on proofs and certificates which later became 73-3-16 and 73-3-17 contained the following language which was modified as shown in red by 1939.

“Failure to make proof of beneficial use of the water on or before the date set therefore, shall cause the ~~application to lapse~~ ~~postponement of the priority from the date fixed theretofore, to the date when the proof of beneficial use of the water is made and all applications subsequent in time shall have the benefit of such postponement or priority.~~”

The 1933 and prior version of 73-3-18 did not address lapsing in the way we think of it now but instead addressed priority as the date of filing an application and addressed lapsing in terms of not paying the fee to process the application in a timely manner. The section referred to what is now 73-3-17 (proof and certificates) because it was there that a reduction in priority if the proof was not timely filed was described as stated above. 73-3-18 in the pre-1933 period read as follows:

“The priority of an application shall be determined by the date of receiving the written application in the state engineer's office, except as provided in section 73-3-17 and as herein provided. Where the applicant after sixty days written notice by regular mail fails to pay the statutory fees for advertising or approval, his application shall lapse and all applications subsequent thereto shall receive the benefit of the priority thus forfeited.”

A series of changes occurred to section 73-3-18 and elsewhere in 1933-1939 time period in conjunction with the transition from a “postponement” system to one of lapsing applications if proof was not timely filed. Notably the reference to 73-3-17 remained in 73-3-18 even though that section no longer addressed a “postponement of priority”. That appears to be just an oversight with all the changes that were occurring. By 1939 section 73-3-18 read as follows (with changes after 1933 marked in red):

“When an appropriation lapses for failure of the applicant to comply with the provisions of this title or the order of the state engineer, notice of such lapsing shall forthwith be given to the applicant by regular mail. Within 60 days after such notice the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement. The original priority date of a lapsed or forfeited application shall not be reinstated, except upon a showing of fraud or mistake of the state engineer. The priority of an application shall be determined by the date of receiving the written application in the state engineer's office, except as provided in Section **73-3-17** and as herein provided. Where the applicant after sixty days written notice by regular mail fails to pay the statutory fees for advertising or approval, his application shall lapse and all applications subsequent thereto shall receive the benefit of the priority thus forfeited.”

In 1959 the fee “lapsing or forfeiture” concept was removed from statute and evolution to the current 73-3-18 which addressed lapsing and reinstatement was complete. It continued to include an ambiguous reference to 73-3-17 most likely because its purpose had long since faded from memory (over 20 years had elapsed since the concept was changed). The 1959 and forward version of 73-3-18 is as follows:

“When an application lapses for failure of the applicant to comply with the provisions of this title or the order of the state engineer, notice of such lapsing shall forthwith be given to the applicant by regular mail. Within 60 days after such notice the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement. The original priority date of a lapsed or forfeited application shall not be reinstated, except upon a showing of fraud or mistake of the state engineer. The priority of an application shall be determined by the date of receiving the written application in the state engineer's office, except as provided in Section **73-3-17** and as herein provided. ~~Where the applicant after sixty days written notice by regular mail fails to pay the statutory fees for advertising or approval, his application shall lapse and all applications subsequent thereto shall receive the benefit of the priority thus forfeited.~~“