

EXECUTIVE WATER TASK FORCE BULLETS

April 23, 2008, 10:00 a.m.
Room 1060, Natural Resources Complex

Task Force Members:

Mike Styler, Department of Natural Resources
Lee Brown, US Magnesium LLC
Scott Ruppe, Uintah Water Conservancy District
Voneen Jorgensen, Bear River Water Conservancy District
Todd Bingham, Utah Farm Bureau Federation
Warren Peterson, Farmland Reserve, Inc.
Ed Bowler, Washington County Water Conservancy District
Merril Bingham, Provo City Public Works/Water Resources
Tage Flint, Weber Basin Water Conservancy

Ex-Officios:

Mike Mower, Governor's Office of Planning and Budget
Emily Brown, Legislative Research and General Counsel
Jerry Olds, Division of Water Rights
Norm Johnson, Attorney General's Office
Boyd Clayton, Division of Water Rights
Dennis Strong, Division of Water Resources

Guests:

Representative Mike Noel
Senator Dennis Stowell
Vern Loveless
Commissioner Bruce Clegg, Tooele County
Representative Jim Gowans
Grant Cooper, CPB-LDS Church
Representative Ben Ferry

I and II - Welcome and Introductions; Explanation and Purpose of the Committee

- * Mike Styler welcomed the task force and guests. The purpose of this task force was put into the language of House Bill 3 by Representative Ferry to study water rights issues. The language also states the task force must give a final report to the Natural Resources, Agriculture and Energy Interim Committee prior to its October meeting. Mike said there are many issues and an effort was made to balance this group geographically to get input from all different parts of the state. We would like to reach a consensus on all the issues we study. He also insisted this group be informal, if you have any comments, please feel free to share them even if you are not on the committee. Mike asked everyone to introduce themselves and explain why you wanted to be on the committee.

Everyone introduced themselves. Mike moved on to Agenda item III.

III. Potential Study Items

- * Jerry Olds handed out a list of possible study items put together by his office. He stated that documents and related information related to the task force will be posted on the division's Web page as well as the task force committee member list. Below is the division's list of suggested study items:
- 1. Clarify the **role of the state engineer in the administrative process to evaluate change applications where nonuse is an issue**. Examine the current statutes, clarify the administrative role of the state engineer in the evaluation of the historic beneficial use and setting limits to the quantity of water that can be changed.
- 2. **Two-Year (or three years on appeal) Rule** – In Section 73-5-15 it requires those who seek judicial review of a decision of the state engineer to diligently prosecute such action to completion. In the Western Water case, the Utah Supreme Court expressed some concern about this statute and the separation of power and the fact that the legislature is requiring the courts to conform to certain time frames without consideration for the facts or situation involved in the case. Before the statute is tested in the courts, it appears advisable to fix it.
- 3. **Proof of beneficial use for municipal water users** – With the growth component associated with municipal water rights, should the municipality be able to file proof of beneficial use before all of the water is placed to actual use. Some criteria to consider is if they can demonstrate that the facilities are constructed, they are able to develop and deliver the quantity of water and it is needed to meet the reasonable future requirements of the municipal entity. HB 225 in the 2008 General Session was directed at this issue.
- 4. 73-3-21, this statute is entitled **Priorities between appropriators**. The statute presents a potential takings issue if held that domestic water rights with late priorities have preference over early priority irrigation water rights. It appears advisable to fix the statute before it is tested in the courts.
- 5. **Water Rights Board**: Evaluate the proposal set forth in Senate Bill 85 of the 2008 General Session concerning the creation of a Water Rights Board within the Division of Water Rights. The Task Force will evaluate how the board could best operate and the advantages and disadvantages of a board.
- 6. The state engineer's **public safety responsibilities** are currently described in section 73-2-22. The section requires the state engineer with the approval of the Disaster Emergency Advisory Council to document in writing a finding that public safety in the current year is likely to be endangered or property damage is likely to occur due to a water emergency. He may then exercise emergency powers until the danger is abated.

6. Continued:

Specifically with respect to dams, 73-5a-103 provides that nothing in the state engineer's responsibility to regulate dams relieves owners of duties, obligations, and liability related to ownership or operation of a dam. Section 73-5a-502 further insulates the state and its officers from suit relative to the exercise of dam safety responsibilities noting that the legislature has found that there is a public interest in improving safety of existing dams and a prioritized system for improvement is necessary. In accordance with statute, the dam safety program is currently focused on bringing safety concerns to the attention of dam owners for correction rather than to the public for debate or disclosure. Does the legislature wish to change the focus the program to provide greater public disclosure and notice given media criticism of the Kennecott tailings dam issue?

7. **Water rights are conveyed by deed** in substantially the same manner as real estate (UCA 73-1-10[1]). Deeds conveying water rights may convey or retain a specific interest in a water right or by silence in a land conveyance convey whatever interest in a water right is appurtenant to land (UCA 73-1-11). The conveyance laws are intended to be flexible enough to automatically transfer water with land including diligence rights that have not been filed with the state engineer but still allow for specific instances where the intent is to not convey water rights. The problem is that the water right conveyance system is disconnected from the water right record system maintained by the state engineer so potentially deeds may convey a right which is not owned or convey the same interest more than once. Water right conveyance documents may also be vague enough that there potentially is not a shared understanding of what has been conveyed between buyer and seller. As water becomes more valuable there is an increasing need to formalize water right conveyances to avoid ambiguity and reduce the disconnect between water right records and conveyance documents.

8. The **Colorado River Basin** in Utah is over-appropriated based on Utah's allocation under the Upper Colorado River compact. Unfortunately many of the appropriated water rights are being held by public entities for future need and as a consequence have not been developed and are not being put to actual beneficial use. States in the Lower Colorado River Basin have been actively developing water available in the lower basin which may include water which is currently not being used by Utah or other upper basin states. The endangered fish program on the Upper Colorado River is increasingly moving toward a policy of no new depletion on the Green River. How should Utah water policy move forward encouraging water use today, to assure it will be available tomorrow? Can we accommodate reservations for future need which have been granted by application approval but allow other development in the meantime?

9. Section 73-1-4 now indicates if water right is not used for seven years the water right is subject to forfeiture if a judicial action to declare it forfeited is commenced within 15 years unless a **nonuse application** is filed. The statute further states that a nonuse application protects a water right from forfeiture from the date the application is filed to the date the application expires. What is the affect of the filing of a nonuse application? Does the statute mean the filing of a nonuse application bars all claims of forfeiture (including previous periods of nonuse) while the nonuse application is active, bars all claims of forfeiture if filed and extends that protection to nonuse periods until the expiration of the nonuse application, or bars claims of forfeiture for nonuse periods covered by the application.
10. There is currently some confusion about the propriety of **wildlife propagation** as a water right beneficial use. The statute sets clear limits on instream flow applications but does not address diverting and using water for wildlife uses. Division practice has generally limited application approval to entities with responsibility to maintain wildlife or the ability to control their movement and numbers such that they can be treated like domestic animals. Should the statute address who should be allowed wildlife uses, how proof of beneficial use is to be provided, and the measure and limit of such beneficial uses?
11. The statutes allow for the filing of a **water right claim for pre-statutory (diligence) water use** (73-5-13). It has now been over 105 years for surface water and 73 years for groundwater since any of these claims could have been initiated and there is little remaining evidence to substantiate most claims. Completion of adjudication is intended to foreclose the filing of pre-statutory claims (73-4-9). Given current resources it will be many years before adjudication of the state can be completed. Is there a need to do something now to see that all remaining claims are recognized and recorded so that our water right system may move forward with greater order and certainty?
12. The state engineer has a practice of evaluating historical uses during **change application processing** and limiting changes to equivalent uses. The statutory authority for this practice is “Beneficial use shall be the basis, the measure and limit of all rights to the use of water in this state.” (73-1-3); “any person entitled to the use of water may make changes” (73-3-3[2][a]); and “a change may not be made if it impairs any vested right without just compensation.” (73-3-3[2][b]). Practically the current analysis methodology consists of evaluating historic water use diversion and depletion requirements and limiting change proposals to an equivalent diversion and depletion. Would the change application process benefit from more definite direction on this issue?

13. **Interference between groundwater appropriators** has been addressed in a supreme court decision (Wayment vs Murray City) as an issue of reasonable access to a water supply. The decision suggests groundwater level (head) is not a component of a water right, that all water users have a reasonable responsibility to “go after” groundwater if it is available rather than rely on it at a particular pressure or head. Statute reinforces the concept that a junior appropriator can interfere with a senior appropriator’s water supply by providing replacement water (73-3-23). Two questions remain to be solved. What is reasonable and does this same concept extend to spring owners?
14. Senator Dennis Stowell asked whether enough studies have been done regarding ground-water resources throughout the state and, if not, is more funding needed? Also, other ground-water issues discussed were, what is the experience of other states with ground-water over-appropriation, and developing deep ground-water sources that are not hydrologically connected to surface sources. Mike Styler suggested this be study item #14.
15. Warren Peterson asked for a study item to address the management of water held by mutual irrigation companies, and as it is moved to other uses.
16. Lee Brown handed out a memorandum outlining a study item that addresses problems encountered by water rights users as they deal with the regulatory system. He suggested the water rights laws and obligations that are required to retain a water right should be given to every water right user. By improving communication and education of water users, it is probable that unintentional water rights forfeiture will be reduced. Can we simplify the law or improve communication so people can better deal with water law issues?
17. Senator Stowell asked for a study item for an appeals process for small water rights users in the form of an ombudsman.
18. Representative Sylvia Andersen ask for a study item regarding notification to water rights users in the application and adjudication process.
- * Mike Styler suggested, and the other task force members agreed, that Betty will e-mail to all attendees the meeting bullets that lists the study items. Task force members will prioritize their top five study items (#1, #2, #3, #4 and #5) and return their priority list to Betty by Friday, May 2. They will then be discussed at the next meeting.

IV. Next Meeting

Thursday, May 8, 1:00-4:00 p.m., room 1060, Natural Resources Complex.