

## **The Enforcement Program**

In 2005, the Utah Legislature enacted four new sections of statute (Utah Code Ann. §§ 73-2-25 through 28) granting the State Engineer administrative enforcement authority regarding violations of water law. Prior to 2005, Utah law, as it relates to water rights, had been enforced primarily through private lawsuits or, in the case of deliberate misuse, civil litigation initiated by the State Engineer. Moreover, the call for enforcement power had been building for years as notices and orders issued to water users believed to be in violation of law often failed to bring about the desired change in the water use practices.<sup>1</sup>

The ineffectiveness of this approach to enforcement became evident in the relatively dry 2004 that followed many years of extreme drought conditions. Specifically, water conflicts arose along the Bear River when water users with rights to water released from storage were unable to get their appropriated share of water because intervening water users were diverting the water using pumps. The intervening users continued to pump water despite several cease and desist orders from the State Engineer. Although the State Engineer was eventually able to obtain a court order to terminate the pumping, the statutes of the time provided no penalties for the water users who had disregarded the State Engineer's orders. This situation became the "poster child" to demonstrate the need for statutes giving the State Engineer enforcement powers that could effectively discourage abuse of water rights. Thereafter, legislation was passed and the Enforcement Program was implemented. In 2005, Kerry Carpenter was selected as the Division's first Enforcement Engineer.<sup>2</sup>

### ***Standard Operational Procedures***

The Enforcement Program operates collaboratively with other sections within the State Engineer's Office and works to terminate violations and, where appropriate, by assessing monetary penalties and ordering replacement of water taken without a water right. In addition to administrative penalties, the State Engineer may require reimbursement of the Division's enforcement expenses.<sup>3</sup>

The Enforcement Program relies largely on the public for enforcement referrals. A standardized referral form is made available online for printing, completion, and submission. Damaged parties not fully recompensed by compliance of violators may seek compensation for damages in civil courts. To this point, Carpenter notes, "Often,

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<sup>1</sup>Sim, Lee. Interview by Kevin Arthofer, 24 August 2008. Division of Water Rights, State Engineer's Office, Salt Lake City, Utah.

<sup>2</sup>(See 28).

<sup>3</sup>Utah Division of Water Rights Water Users Work Shop (Session 5) - Water Rights Enforcement Issues, 6 and 7 March 2007, St George, Utah. Available at:

<http://www.waterrights.utah.gov/regulation/enforcement.ppt>

enforcement actions will bring some relief to a ‘wronged party,’ but the Enforcement Program does not operate with that end in mind.’<sup>4</sup>

Early in 2006, a publicly available Regulation database was created on the Division’s website. This database depicts all regulation and enforcement actions initiated by the Division. Available menu functions also allow a listing of all active and inactive regulation and enforcement cases, as well as providing a search capability using defining criteria. Details of each regulation and enforcement case and all pertinent file documents can be accessed through this database.

### ***Initiating and Prosecuting an Enforcement Action***

Enforcement actions commenced by the Division of Water Rights are typically initiated with the filing of a “referral” by a private citizen,<sup>5</sup> Regional Office personnel, a Distribution Commissioner, or a member of the Division’s distribution or adjudication field staff. The Enforcement Program does not presently have the resources to “police” water users and generally relies on other programs or persons to discover and report potential violations. When a referral is submitted, the enforcement engineer begins an informal investigation using Division records, aerial photography, field reviews and consultation with Region personnel. If the initial investigation indicates sufficient cause, the matter will be assigned a State Engineer Agency Action (SEAA) number and will be posted on the Division’s Regulation database. As previously noted, the Regulation database summarizes the status and proceedings associated with the alleged violation, including access to scanned images of pertinent public record documents.<sup>6</sup>

Enforcement actions resulting from violations of notices or orders regarding dam safety, stream channel alterations, water measurement, or water distribution will typically arise only after an alleged violator has been the subject of a Utah Administrative Procedures Act (UAPA) governed informal process and has failed to comply with a specific performance requirement. Likewise, enforcement actions pertaining to certain well drilling activities are only commenced after violation of a specific statutory provision governing those activities. In those situations, referrals to the Enforcement Program are initiated by personnel administering the Division’s Dam Safety, Stream Alteration, Distribution or Well Drilling Programs.<sup>7</sup>

A guiding principle of the Enforcement Program dictates that the alleged violator will be given full due process of law, including an opportunity to review the evidence available to the Division before an enforcement action is formally commenced. If the alleged violator is unable or unwilling to demonstrate that the available evidence fails to justify commencement of enforcement action, the action is formally commenced by the issuance of an “Initial Order” (IO), being comprised of a “Notice of Violation” and/or “A

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<sup>4</sup> (See 28).

<sup>5</sup> Information regarding the identity of a citizen referent is treated as a protected record under GRAMA regulations.

<sup>6</sup> (See 28).

<sup>7</sup> Ibid.

Cease & Desist Order.” From the IO forward, the process is guided by Administrative Rule R655-14 and pertinent statutes.<sup>8</sup>

Once commenced, an enforcement action is typically concluded with a Final Judgment and Order (FJO). The FJO may take the form of a stipulated Consent Order, a Default Order (if the alleged violator fails to participate in the proceedings), or a conventional Final Order as determined by the Presiding Officer. The most common outcome to date has been a Consent Order that allows the Division and the violator to negotiate a settlement that is agreed to be equitable and sufficient.<sup>9</sup>

### ***Guiding Principles***

As the Enforcement Program has evolved since its inception in 2005, the experience gained from each action has guided ensuing enforcement efforts. However, each enforcement action must address a specific set of facts and circumstances surrounding the alleged infraction; each action is evaluated in that specific context.

Attempts to standardize enforcement actions to assure equal treatment and relative uniformity of outcome are ongoing, but never at the expense of giving full consideration to specific field observations, mitigating circumstances and other pertinent findings. Further complications arise when the evidence establishing the nature or extent of the violation is substantially inconclusive or when there are grounds for conflicting conclusions regarding the degree to which the violator acted knowingly in committing the violation.<sup>10</sup>

### ***Conclusion and Prospective***

Although perhaps not yet fully recognized even by Division personnel, the legislative grant of enforcement authority to the State Engineer represented a significant addition to the mission and responsibilities of the Division of Water Rights. While that enforcement power is not a “policing” authority in the conventional sense, the ability to levy monetary fines and penalties against confirmed violators outside the normal constraints of UAPA brings a greater obligation to assure due process of law and to seek just and equitable results. Procedures developed and adopted to this end represent a quantum shift from the Division’s earlier – and continuing – administrative and record-keeping functions. The importance of acknowledging and understanding this shift in the agency’s mission and continuing obligation to the citizens of the State of Utah should not be underestimated or disregarded.

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> (See 112).

<sup>28</sup> Carpenter, Kerry. Word document edit [electronic mail on the Internet]. Message to: Kevin Arthofer, 24 November 2008 [cited 9 December 2008].

<sup>112</sup> Division of Water Rights. *State of Utah Water Well Handbook*, 2008. Available online: <http://www.waterrights.utah.gov/wellinfo/handbook.pdf>