



Orders from this Court. These Orders have been without prejudice to the claims of any parties and have been considered an interim distribution practice. The exact quantification of many of the water rights on the Duchesne River System may be in controversy, and can only ultimately be determined in the general adjudication process. In the meantime it is necessary, in dry years, to provide for a fair and equitable interim method of water distribution to prevent waste or excessive use until such time as all such matters can be fully adjudicated. Again, such interim distribution Orders are without prejudice to the ultimate claims of any water user.

It has not been necessary to place the System on a distribution schedule every year; however, based on snowpack, flow and other water supply data, the State Engineer concluded it was necessary to place the System on a distribution schedule for the 1989 irrigation season. A motion requesting such action was filed with the Court on or about March 22, 1989. The proposed 1989 distribution schedule is basically the same as those ordered by this Court in 1980, 1981, 1985, 1987, and 1988.<sup>1</sup> However, based on additional data and information, and pursuant to input received by the State Engineer at various public meetings with

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1. Due to adequate water availability in 1982, 1983, 1984, and 1986, it was not necessary to place the System on a delivery schedule in those years.

the water users of the Duchesne-Strawberry River System, the State Engineer has slightly modified the proposed distribution schedule for the 1989 season. It is proposed to utilize this distribution schedule on a trial basis this year to determine if it will result in a more efficient distribution of water and resolve some of the general concerns raised by the water users at the public meetings. The specific modifications are set forth in the State Engineer's Motion and will not be repeated here, other than to point out that, as in past years, the proposed 1989 distribution schedule is based on a duty of four (4) acre-feet per irrigated acre over the irrigation season.

It is essential that a distribution schedule be ordered on the System before the runoff recedes and claimed demands exceed the supply available. The State Engineer believes that his proposed distribution schedule provides for a fair and equitable distribution of water on the System without undue waste, and will maximize the beneficial use of water in this dry year.

#### Argument

The specifics of Protestants' objections to the temporary distribution Order are not clear to the State Engineer. However, it appears that Protestants are objecting to the four acre-foot per acre duty of water set forth in the delivery schedule. While it is true Protestants' water rights are set forth in their cer-

tificates of appropriation or water user's claims, all water users are limited to the amount of water they can put to beneficial use.

In addition to the priority system, one of the cornerstones of water law in the arid West is that beneficial use of water is the basis, the measure and the limit of all rights to the use of water, and no one has a right (regardless of priority) to use more water than is necessary with reasonable efficiency to satisfy his requirements. McNaughton v. Eaton, 212 Utah 394, 242 P.2d 570 (1952); Rich County-Otter Creek Irrigation Co. v. Lamborn, 12 Ut.2d 1, 361 P.2d 407 (1961); In Re Water Rights of Escalante Valley Drainage Area, 10 Ut.2d 77, 348 P.2d 679 (1960); and Section 73-1-3, Utah Code Annotated 1953, as amended.

Thus, users are restricted to the amount of water they can beneficially use. Otherwise, water is wasted. This concept is not in conflict with the priority doctrine, but, rather, the two concepts compliment each other. In years of plentiful supply, it may not matter as much if an irrigator is a bit more "liberal" in his application of water if he is not wasteful and if the supply is sufficient to meet all existing rights. But in years of short supply in a fully-appropriated river system, it is important that water users divert no more water than is beneficially required. If there still is insufficient water to satisfy all rights--then users are shut off in order of their priority.

But no water user, no matter what his priority, may divert more water than he can beneficially use. The amount of water diverted is not the measure of the right; rather, it is the amount of water which can be beneficially used. As Section 73-1-3, Utah Code Annotated, clearly states: "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state."

The distribution schedule is intended, based on the best data available to the State Engineer, to deliver water users the full amount of water they can beneficially use with reasonable efficiency. This will hopefully result in the full satisfaction of all rights. However, if shortages still occur, water users will be shut off in order of priority.

Such interim distribution orders are not uncommon in general adjudication proceedings and have been approved by the Utah Supreme Court. In the case of In Re Water Rights of Escalante Valley Drainage Area, 10 Ut.2d 77, 348 P.2d 679 (1960), the Utah Supreme Court upheld an interlocutory distribution schedule in a general adjudication proceeding. In so doing, the Court stated:

It is the settled rule that beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State. No water should run to waste. In this arid country it becomes increasingly necessary, as the demand for water use increase, to pay careful attention to the manner of use so as to insure the greatest duty possible for the quantity of water available . . . . The duty to accomplish this desired

end falls upon all users regardless of the priority of appropriation.

(10 Ut.2d at 81; Emphasis added.)

Based on current information, the State Engineer believes that a duty of four (4) acre-feet per irrigated acre is a fair and reasonable duty of water on an interim basis for this year. This conclusion is more fully set forth in the Affidavit of Jerry D. Olds, submitted herewith.

Protestants allege that the proposed 1989 distribution schedule will change the "traditional" methods of distributing water, and will result in a 20% decrease in the amount of water delivered. It is difficult to understand these arguments in light of the fact that this Court has adopted the four (4) acre-foot duty in every interim distribution schedule since 1980, albeit without prejudice to any water user's ultimate claim in the full general adjudication.<sup>2</sup> Thus, the present schedule preserves the status quo. It is the Protestants who now want to change the method of distribution.

In sum, the distribution schedule does not deprive water users of any rights, and will ensure that water users do not divert more water than they can beneficially use in this dry

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2. In 1978, the Court adopted a duty of 3.5 acre-feet per acre.

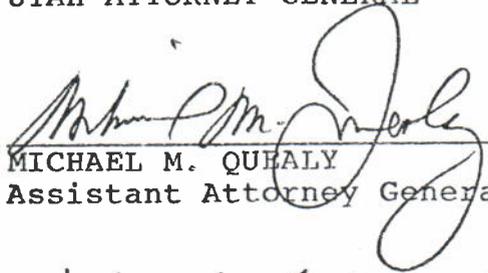
year. Further, the distribution schedule was adopted after input from a great majority of the water users on the System.

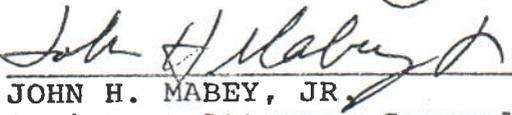
Conclusion

The Distribution Order will not impair or otherwise deprive the Protestants of their rights; and is without prejudice to any claims they may wish to make in the general adjudication action. Protestants' Objections should be denied and the Order of Distribution for the 1989 irrigation season should be approved.

DATED this 26<sup>th</sup> day of April, 1989.

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