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November 3, 2008

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. 31692)

To Whom It May Concern:

This law firm represents water right holders from many segments of the water community, including the following: Anderson Development; 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; Redstone Development; 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.

The proposed rule contains significant practical and legal deficiencies and should not be implemented or should be significantly revised before implementation. The proposed rule's apparent goal of achieving greater clarity and certainty in the water rights database is laudable, but the method by which the rule seeks that clarity and the scope of administrative actions to which the proposed rule would apply is very problematic. As currently drafted, the rule (1) imposes an excessive and unjustifiable burden on the water community and (2) is illegal in that it exceeds the State Engineer's rulemaking authority and violates nondelegation and takings provisions of the Utah Constitution. The remainder of this letter discusses each of these deficiencies in turn and then proposes alternative mechanisms for moving towards the desired clarity and certainty.

I. The Proposed Rule Imposes an Excessive, Unjustifiable Burden on the Water Community

If the Proposed Rule were implemented as currently drafted, it would drastically increase the time and expense to the average water right holder of seeking approval of a Change Application. The Proposed Rule R655-16 requires a change applicant to submit a Statement of Group Contribution signed and sworn to by all water right owners within a supplemental group before a Change Application will be considered acceptably complete. Administrative Procedures for Defining Beneficial Uses for Supplemental Water Rights, 15 Utah Bull. 68, 69–70, § R655-16-6 (August 1, 2008) [hereinafter "Bulletin"]. The increased burdens include the following: (A) an applicant must quantify the group contributions for the various water rights within each group implicated by an application, (B) the applicant must obtain notarized signatures from each person shown as an owner of any of those water rights, and (C) the applicant's ability to satisfy the notarized signature requirement is occasionally rendered virtually impossible because title to other water rights in the group may not be updated or correct on the State Engineer's records.

A. Allocating Sole Supply Is Often a Complex and Expensive Process

To complete a Statement of Group Contribution, an applicant must first determine the proportion of the beneficial use that should be allocated to each of the water rights within that group (i.e., the water right's group contribution). Although the Rule Analysis states that the group contributions "should be known by the applicant," Bulletin at 68, the reality is that few water right holders even understand the concept of sole supply, and fewer still have a firm grasp on the group contribution values for their various water rights. Additionally, the Proposed Rule requires that the entries on the Statement of Group Contribution form "be consistent with water right information contained in the State Engineer's records." Bulletin at 70, § R655-16-6(1)(e). Thus, contrary to the assertion in the Rule Analysis, "specialized assistance is [often] required in . . . preparation" of the Statement of Group Contribution form. *Id.* at 68. Indeed, an analysis of the group contributions can easily cost thousands of dollars to complete. While some applications may merit this depth of analysis, the proposed rule would require it for every change application as well as, potentially, other applications. The benefit potentially gained through this process does not justify the burden it would place on the water community.

B. Non-Applicant Water Right Holders Are Often Hesitant or Unwilling to Sign the Form

In addition to the time and expense of making the sole supply allocation, the time and expense necessary to obtain notarized signatures on the form is also significant and occasionally cost-prohibitive. The Proposed Rule states that the Statement of Group Contribution "may be filed only if all holders of unquantified rights in a water use group sign the form," and the form "shall be sworn to by all water right holders having an interest in any unquantified water right in the water use group." *Id* at 70, § R655-16-6(1)(c) to (d). These requirements are often very difficult to satisfy because other water right holders in the group have little-or-no incentive to sign.

First, the Proposed Rule makes clear that "[o]nce filed, a Statement of Group Contribution . . . becomes binding on all parties signatory to it." *Id.* § R655-16-6(2)(a). As a general rule, people do not want to be bound unless there is some discernable present benefit to them. While it is true that completing the form earlier may simplify an administrative process later if that water right holder seeks to change or sell their water right, that benefit is of little consequence to a person with no present intent to sell or change his or her water right. Second, the fact that the statement must be sworn to is a disincentive for people to sign. The Proposed Rule requires a water right owner to, under oath, make the following statement: "I hereby declare my agreement with the Group Contribution values as stated on page 1 of this document." *See* Statement of Group Contribution *at http://www.waterrights.utah.gov/wrinfo/forms/default.asp.*[1] Implicit in this statement of agreement is an acknowledgement that the allocation is "consistent with water right information contained in the State Engineer's records" and reflects either "the average annual group contribution on a long-term basis or any other reasonable evaluation." Bulletin at 70, § R655-16-6(1)(e) & (6)(a). This forces a water right holder to either place significant trust in the applicant or the applicant's expert in making the sworn statement, or expend significant time and resources to verify the proposed allocation before making the sworn statement. Neither option is particularly appealing to an unmotivated water right holder.

Finally, the notarized signature requirement creates a serious holdout problem. Sometimes, no matter how fair an allocation, or how favorable it may be to a water right holder, that water right holder may refuse to sign the form. Sometimes the refusal is based on an unwillingness to trust the applicant or expend any funds to verify the allocation. Other times, the refusal could be based on personal grudges unrelated to water rights. Still others may be extortionist in nature (i.e., if you want me to sign that form so that you can move forward with your Change Application, you need to allocate X acres of sole supply to me or give me X). Regardless of the reasons for refusal, however, the result is the same—the Change Application cannot move forward.[2] The only alternative is through the courts, which in the simplest contested case can cost more than $10,000. Often, the value of the water right would not support such an expense.

C. *If Title for Other Water Rights Is Not Correct on State Engineer Records, Completion of the Group Contribution Form Is Even More Difficult*

The Proposed Rule presents another serious problem when not all water right holders within a group have submitted the necessary Reports of Conveyance to update title on State

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[1] This is the web address for the water right forms page. To generate a sample Statement of Group Contribution, select the Statement of Group Contribution link on the left side of the page and follow the instructions on that page.

[2] This is not merely a theoretical concern. The requirements contemplated by the Proposed Rule have already been informally implemented by the Division of Water Rights without the benefit of formal rulemaking proceedings. Accordingly, many of our clients that have sought Change Applications over the course of the past year and a half have been required to submit a form similar to the Statement of Group Contribution. At least one client has been unable to proceed with a Change Application because another water right holder has refused to even consider the Statement of Group Contribution.

Engineer Records. The Proposed Rule defines "[w]ater right holder" as "an entity, person, or persons who is listed as an owner of a water right in the records of the State Engineer." *Id.* at 69, § R655-16-5(1)(f). As discussed above, the Statement of Group Contribution must be signed and sworn to "by all *water right holders* . . . in the water use group." *Id.* at 70, § R655-16-6(1)(c) to (d) (emphasis added). Thus, under the Proposed Rule, the only person authorized to sign the Statement of Group Contribution is the person shown as the owner on the State Engineer Records.

This presents a problem, however, because the office of record for perfected water rights is the relevant county recorder's office, not the State Engineer's Office. Utah Code Ann. § 73-1-10(b). As a result, it is all too common for the State Engineer's Records to show an owner of a water right different from the actual record owner of that right. Under the Proposed Rule, an applicant could arguably file a Statement of Group Contribution signed by the persons shown as owners on the State Engineer's Records regardless of whether they actually own the rights. But most people would refuse to sign the form if they no longer owned the right involved. Indeed, their signing such a form purporting to bind property they do not own would border on fraud. Therefore, even though the Proposed Rule purports to allow the person shown as the owner on the State Engineer Records, regardless of actual ownership, to sign, the reality is that title must be updated before a Statement of Group Contribution can be completed.

This would put an additional burden on an applicant. Indeed, it may place an applicant in a "Catch-22" situation if title has not been updated by the other water right holders in the group because only the owner of a water right may submit a Report of Conveyance for that water right. Utah Code Ann. § 73-1-10. Specifically, (1) the applicant cannot submit a change application without a complete Statement of Group Contribution, Bulletin at 70, § R655-16-6(4), (2) the Statement of Group Contribution must be signed by the owner as shown on the State Engineer Records, *Id.* at 69-70, §§ R655-16-5, -6(1)(d), (3) a Report of Conveyance must be submitted to update title so that the actual owner shows on State Engineer Records, Utah Code Ann. § 73-1-10, but (4) only the actual owner can submit a Report of Conveyance, *id.*. Thus, an applicant must incur the time and expense necessary to determine the actual owner of the water right, convince them to file and pursue a Report of Conveyance to update title on the State Engineer's Records, and convince them to sign the Statement of Group Contribution. In addition to the expense and potential controversy that attend title issues, this additional step offers another opportunity for other water right holders to unreasonably refuse to allow a Change Application to be processed.

Ultimately, the Proposed Rule should not be enacted as currently drafted because it would place an excessive and unjustifiable burden on water users. Completion of the form is expensive and will usually require professional assistance. Obtaining the necessary notarized signatures is also expensive and sometimes impossible. And additional time and money could be required if title is not updated for the other water rights in the group.[3]

[3] The Rule Analysis that accompanies the Proposed Rule does not acknowledge these expenses and burdens on water right holders, which include local governments, businesses, and others. Bulletin at 68-69. Instead, the Analysis asserts that "[t]he only cost is in effort to complete required items on the form" and estimates that "the form can be completed in under 60 seconds." *Id.* This is simply not an accurate assessment of the costs.

II. The Proposed Rule Should Not Be Implemented Because It Is Illegal

In addition to the Proposed Rule's practical deficiencies discussed in Part I, it also suffers from several legal deficiencies. The Utah Administrative Rule Making Act provides that a rule may be declared invalid if it "violates constitutional or statutory law or the agency does not have legal authority to make the rule." Utah Code Ann. § 63G-3-602(4)(a)(i). The Proposed Rule, if implemented as currently drafted, could be invalidated under this provision because it (A) is not authorized by statute, (B) effects an unconstitutional delegation of authority, and (C) effects an unconstitutional taking of a valuable component of a water right.

A. The Proposed Rule Is Not Authorized By Statute

The Proposed Rule is illegal because certain portions of it are beyond the scope of rulemaking authority delegated by the legislature to the State Engineer. An administrative agency's authority to promulgate rules extends only as far as the legislature has delegated that authority to the agency. *Id.*; *accord Sanders Brine Shrimp v. Audit Div. of the Utah State Tax Comm'n*, 846 P.2d 1304, 1306 (Utah 1993) (invalidating an administrative rule because it exceeded the scope of the statutory authorization). The Rule Analysis claims that the Proposed Rule is authorized under the following statutory sections: Utah Code sections 73-3-2(1)(b)(viii), 73-3-3(4)(b)(ix), and 73-3-27. Bulletin at 68. But these sections merely allow the State Engineer to require additional information on various applications and do not grant any rulemaking authority.

The State Engineer's rulemaking authority is granted by Utah Code section 73-2-1(4) to (5). Subsection 4 lists the subjects on which the State Engineer must promulgate rules, and subsection 5 lists the subjects on which the State Engineer has discretion to promulgate rules. Any rules outside the subjects listed in subsections four and five are not within the State Engineer's rulemaking authority. Although subsection 5(e) allows the State Engineer to make rules about "the form and content of applications and related documents, maps, and reports," such rules must be consistent with the statutory framework set by the legislature. The Proposed Rule is inconsistent with that framework.

The State Engineer's rulemaking authority over the form and content of applications grants him authority over the "information" that he will require for such an application. *See, e.g.*, Utah Code Ann. §§ 73-3-2(1)(b)(viii), 73-3-3(4)(b)(ix), 73-3-27. But the Proposed Rule is not looking merely for additional information, it requires sworn signatures from all water right holders within a use group. This requirement not only exceeds the State Engineer's rulemaking authority, it is also inconsistent with the statutory scheme. For example, under the statutory

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Accordingly, the Proposed Rule does not comply with Utah Code section 63G-3-301, and its failure to comply with this requirement would invalidate the rule were it to go into effect. *See Lane v. Bd. of Review of the Indus. Comm'n of Utah*, 727 P.2d 206, 208 (Utah 1986) ("[T]he rules of an administrative agency are not valid unless the agency complies with the rule-making procedures in the Rule Making Act."). Thus, at the very least, the Proposed Rule should be republished in the Utah State Bulletin with a revised Rule Analysis that acknowledges the significant costs of complying with the Proposed Rule.

framework for Change Applications, an applicant submits information as required by the State Engineer, the State Engineer publishes notice of the application, *id.* § 73-3-6, interested persons may file a protest, *id.* § 73-3-7, and the State Engineer considers and acts on the application, *id.* § 73-3-8. The Proposed Rule would essentially require particularized notice to other water right holders within a group, and it would give those other water right holders veto power over the application. This is nowhere contemplated within the statute.

Additionally, the Proposed Rule requires a notarized signature from both the applicant and the other water right holders within a group. The legislature has been careful, however, to indicate specific instances where a notarized signature is required. For example, a notarized signature is required under Utah Code section 73-4-5 for a Water User Claim in a general adjudication. A notarized signature is also required under Utah Code section 73-5-13 for a Diligence Claim. If the legislature wanted this additional procedural hurdle for other applications and filings, it could have easily done so. Because the legislature has not elected to require a notarized signature, the State Engineer cannot by rule overrule the legislature's judgment and require notarized signatures from both the applicant and other water right holders in the use group. Finally, the Proposed Rule essentially requires water right holders to adjudicate their respective water rights by agreement. This is inconsistent with the adjudication framework set forth in Chapter 4 of Title 73. Thus, the Proposed Rule, if enacted as currently drafted, would be declared invalid because it exceeds the scope of the State Engineer's rulemaking authority and is inconsistent with the statutory scheme set forth in Title 73.

B. By Requiring Agreement Within a Supplemental Group, the Proposed Rule Unconstitutionally Delegates the State Engineer's Authority

In addition to being inconsistent with the water code, the Proposed Rule also results in an unconstitutional delegation of legislative authority. The Utah State Legislature delegated authority to the State Engineer to administer the waters of the state. Utah Code Ann. § 73-2-1(3)(a). Furthermore, the legislature specifically delegated to the State Engineer the duty to act on any Change Applications filed. *Id.* § 73-3-8. Utah law is clear that governmental power "cannot [be] constitutionally delegate[d] to private parties," especially where that power "can be used to further private interests contrary to the public interest." *Stewart v. Utah Pub. Serv. Comm'n*, 885 P.2d 759, 776 (Utah 1994); *accord Revne v. Trade Comm'n*, 192 P.2d 563 (1948); *Union Trust Co. v. Simmons*, 211 P.2d 190 (1947).

The Proposed Rule violates this constitutional principle because it delegates a portion of the State Engineer's duty to act on a Change Application to private parties. As discussed above in Part I.B, a Change Application is not considered to be "acceptably complete . . . until the affected water right(s) sole supply has been properly defined on records of the State Engineer." The Proposed Rule's process for defining this sole supply is through the Statement of Group Contribution, which must be signed by all water right holders within the group. A water right holder may, however, refuse to sign the form for any number of reasons, most of which are self interested in nature. If a water right holder refuses to sign the Statement of Group Contribution, the Change Application is not even submitted to the State Engineer for consideration of the application under section 73-3-8. In essence, the Proposed Rule gives private water right holders

a veto power over any Change Application filed within their water use group. This is, on its face, an unconstitutional delegation of governmental power, and cannot stand.

C. *Requiring a Binding Statement of Group Contribution Would Result in a Taking of a Right's Supplemental Portion and Its Changeability*

Another constitutional problem with the Proposed Rule is that it may result in an unconstitutional taking of a valuable aspect of a water right or of the entire water right. The Utah Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Utah Const. art I, § 22. The supplemental nature of a water right is an important component of that water right and cannot be taken by the government without just compensation. *Cf. Shurtleff v. Salt Lake City*, 82 P.2d 561, 564 (Utah 1938) (recognizing the significance of all attributes of a water right, not just the quantity). The ability to change a water right is also valuable and cannot be taken without just compensation. *Cf. id.* By requiring water right holders to enter into a binding agreement defining the sole supply of each particular water right, the supplemental aspect and changeability of the right could be lost in many instances. This would certainly damage a water right, and in some cases, it may completely eliminate any value the water right has. In either case, it results in an unconstitutional taking under Utah Law and should be avoided.

Ultimately, the statutory and constitutional deficiencies of the Proposed Rule are such that it would not survive judicial challenge even if it were passed. Accordingly, the State Engineer should not implement the Proposed Rule, or should implement the rule only after significant revisions to cure these legal deficiencies.

III. The Rule's Deficiencies Could Be Cured by Limiting the Scope of the Rule and Relying on the Informal Adjudicative Process to Set Sole Supply Values

While the Proposed Rule, as drafted, contains significant deficiencies, many of these could be cured so that the purposes of the rule would be realized over time. First, the Proposed Rule should be modified to require the information on the Statement of Group Contribution form for only Change Applications that seek to separate a water right from a supplemental group. Second, for the Change Application seeking to separate a water right from a supplemental group, only the signature of the applicant should be required. There should not be any requirement that the form be signed by the other water right holders, and there should not be any requirement that any signature be notarized. Finally, the other water right holders' interests are protected through the procedure outlined by statute. In other words, after the group contribution information is submitted with the Change Application, notice of the application is given to the public, the other water right holders are able to protest the application and associated group contribution analysis, and there may be a hearing on the application. In essence, disputes with respect to the group contribution are then resolved through the informal adjudicative process. An aggrieved water right holder may then appeal the ruling or bring a quiet title action as necessary. This is the procedure that the legislature provided, and any rule issued by the State Engineer should conform and complement this procedure.

Thank you for the opportunity to provide comments on this Proposed Rule.

Yours truly,
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