**Change Applications and Priority**

Boyd Clayton, Utah Division of Water Rights

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**History**

Water right change applications have been a part of Utah water law since 1909. Early efforts to adopt a water right code in Utah called for all new surface water to be appropriated by application to the state engineer beginning in 1903. The grand plan was that a record of all new appropriations would be created through the application process while existing water rights (prior to 1903) would become of record through the general adjudication process. While the adjudication process struggled, the application process was very successful in creating records of new water rights. Water right applications received by the state engineer were numbered sequentially as the applications were filed and recorded in index books.

Changes to existing water rights had been occurring prior to 1903 and were allowed under the application to appropriate laws of 1903. The Territorial laws of Utah as early as 1880 recognized that a change in place of use may occur without affecting the validity of the water right. But no person can change the place of use to the damage of his co-owners in such right without just compensation. Territorial Laws 1880, ch. XX, section 7. In 1897 the law added that a person entitled to the use of water may change the place of diversion and may use the water for other purposes. Laws 1897, ch. LI, section 3. The 1903 statutes provided requirements for changes that dealt primarily with recording them after they occurred. The law provided that a change in place of diversion or a change in purpose of use shall not be made if it impairs any vested right, without just compensation. Every such change made shall be immediately reported to the State Engineer. If the change was a change in place of diversion, the report must be accompanied by a map showing the changes in place of diversion. Laws 1903, ch. 100, section 51.

It became apparent early on in the application process that a means to control changes to existing rights and document those changes would become necessary. The first change applications were filed under authority of Section 1288x24, Chapter 62, Session Laws of Utah, 1909. That law provided “no change in point of diversion or purpose of use shall be made except upon the approval of an application by the state engineer”. The first water right change application which appears in the state engineer’s index books is change application a20 which was received June 12, 1909 and is part of water right file 54-1. Interestingly, Change Application a19 has been found and is part of water right file 63-1604 but it was received December 5, 1909. It is not known why application a19 is out of sequence or exactly why the first 19 change applications are not in the indexing books. At this point it is just interesting trivia.

The change statute from its earliest days has provided that any person entitled to the use of water, may change the place of diversion or place of use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made, if it impairs any vested right, without just compensation; no change of point of diversion, place or purpose of use shall be made except on the approval of an application of the owner by the State Engineer. Although the phrase “a person entitled to the use of water” contained in the change application statute is now the subject of some controversy, its roots were likely born from the reality that in 1909 there were no records of most water rights. Since the plan to bring them into the record relied upon adjudication (no diligence claim statute existed at the time) and adjudication was working slowly, a means to allow changes in the interim was necessary. Change applications a19 and a20 illustrate how that early need was accommodated. Change Application a20 was filed on a pending application to appropriate and specifically mentions the application to appropriate by number on the form. Change Application a19 was filed with the water right blank on the change application form struck out indicating it was based upon an entitlement to use water not then of record in the state engineer’s office.

In the history of change applications, the water right upon which Change Application a20 was filed (water right file 54-1), is significant because it also contains change application a1377. Change Application a1377 was rejected March 8, 1939 by the state engineer and holds the distinction of being one of the first change applications rejected because the applicant was found not to be a person entitled to the use of water because of prior nonuse by which the water right to be changed was presumed forfeited by operation of law. In the documentation included in the file it is clear the state engineer concluded he did have a responsibility to act as a gatekeeper 70 years ago. One of the interesting questions remaining for the water user community in the wake of the Jensen v Jones decision is whether this right and others like it which were considered forfeited for over 70 years are in fact alive again by a change in the statute in 1996 which now requires a declaration of forfeiture in court within 15 years of the latest period of nonuse of at least seven years. Utah Code Section 73-1-4.

**The Necessity of Filing Change Applications**

Although the necessity of filing change applications to authorize new uses of water under existing rights was established in statute in 1909 various controversies have persisted over the years regarding the necessity of the process. One of the basic issues was addressed in 1916 when the court found one may not appropriate water for one purpose and then apply it, or any part of it, to another purpose. Big Cottonwood Tanner Ditch Co. v Shurtliff, et al., 164 P. 856 (Utah 1916). In the case of changing existing conveyance systems after the point where water is diverted from a natural source, it has been decided it does not require a change application. The court found a change application is not necessary for changing water from one company ditch to another company ditch. Arnold v C. & R. Association, 231 P. 622 (Utah 1924). Further, a change application is not necessary to change the place of use or point of diversion for water diverted from a canal of a mutual water company. Syrett v Tropic & East Fork Irr. Co., 89 P.2d 474 (Utah 1939).

The question of whether the courts could independently address changes without state engineer involvement was resolved in favor of the change application process by the legislature in 1937. The change statute was amended and the provision remains in Section 73-3-3(3): A person entitled to use water shall change a point of diversion, place of use, or purpose of water use, including water involved in a general adjudication or other suit, in the manner provided in this section.

Small changes in point of diversion for underground sources and approval of small applications by an expedited process have been added to the statutes over the years (see 73-3-3(5)(b), 73-3-28, 73-3-5.6). However, Section 73-3-3(9) remains, which reads: Any person who changes or who attempts to change a point of diversion, place of use, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this section: (a) obtains no right; (b) is guilty of a crime… if the change or attempted change is made knowingly or intentionally.

**Priority and Water Rights**

Priority is an essential component of Utah water right law. Property rights in water consist not only of the amount of appropriation, but also in priority of the application. Often the chief value of an appropriation consists in its priority over other appropriators from the same source. Whitmore v. Murray City 107 Utah 445, 154 P.2d 748 (1944). Each appropriator in a source is entitled to receive the appropriator’s whole supply before any subsequent appropriator has any right. Utah Code Section 73-3-21.1. The Governor may declare a water shortage emergency which allows some classes of water use to divert water preferentially rather than by priority, but even in those circumstances the prior rights are recognized and compensation for the loss experienced is due the prior appropriator.

Below are some basic principles which apply to priority distribution under Utah’s prior appropriation laws.

1. Any water diverted by a junior priority water user which deprives a senior user of its entire supply is impairment of the senior use and not allowed under Utah Law. A diversion of water that causes a diminution in the quantity of water available to an established water right is actionable. North v Marsh 29 Utah 2d 73, 504 P.2d 1378 (1973). An approved application is subject to all vested rights of prior appropriations, and all rights which may be acquired under applications filed prior to the particular application. Tanner v Bacon 103 Utah 494, 136 P.2d 957 (1943).
2. An appropriator of water from a channel is entitled to rely and depend on all the sources which feed the main stream above his own diversion, clear back to the farthest limits of the watershed. Richland Irrigation Co. v Westview Irrigation Co. 90 Utah 403, 80 P.2d 458 (1938).
3. Beneficial use is the basis, the measure, and the limit to all rights to the use of water. Utah Code Section 73-1-2. While a prior appropriator may have a prior and paramount right to the use of water, the prior appropriator has no right to the water except to put it to a beneficial use. The prior appropriator cannot prevent a junior appropriator from using the water when the prior appropriator cannot put the water to beneficial use. Cleary v Daniels 50 Utah 494, 167 P. 820 (1917).
4. The state engineer is charged with securing the equitable apportionment and distribution of the water according to the respective rights of the appropriators. Utah Code Section 73-2-1. However, the engineer’s powers are limited such that such regulation must either accomplish that purpose or an alternate purpose with delegated authority such as flood control as described in Section 17-8-3. In other words the state engineer has no authority to regulate where the regulation is not required to secure the distribution of water according to the respective rights of the appropriators. So long as a water user has sufficient water at its point of diversion to satisfy his right, he has no complaint about upstream users of water whether by prior or junior appropriators. In the Matter of Drainage Area of Bear River College Irr. Co, v Logan River & Blacksmith Fork Irr. Co. 780 P.2d 1241 (Utah 1989).
5. The owner of a water right may capture water after it has been put to beneficial use as long as he maintains control of the water. However, the right to recapture terminates when the owner loses control of the water. The owner loses control when the water commingles with the natural water table or reenters a natural channel where it becomes return flow, thus losing its identity as irrigation water. Estate of Steed v New Escalante Irrigation Co. 846 P.2d 1223 (Utah 1992).
6. Although diversion of groundwater is generally not subject to distribution in the sense that curtailing one diversion enables another, Utah Code Section 73-5-15 requires the state engineer to develop management plans which limit withdrawals from the aquifer to a safe yield on the basis of priority. There has come to be recognized in underground water law what may be referred to as the rule of reasonableness in the allocation of rights in the use of underground water. This involves an analysis of the total situation: the quantity of water available, the average annual recharge in the basin, the existing rights and their priorities. All users are required where necessary to employ reasonable and efficient means in taking their own waters in relation to others to the end that wastage of water is avoided and that the greatest amount of available water is put to beneficial use. Wayman v Murray City Corporation, 548 P.2d 861 (Utah 1969). It is interesting to note that the circumstances which would create a priority call under the Colorado River Compact between upper and lower basins may be more related to the current state of groundwater law than surface water law. A call is created by a shortage of water provided to the lower basin over a period of 10 years that presumably must be rectified by long-term water use reductions by priority.

**Priority and Water Right Applications**

Utah water right law narrowly addresses administrative authority to set priority dates for water rights. Utah Code Section 73-3-18 provides that the priority of a water right application is the date an application is received by the State Engineer. “Received” is defined in Section 73-3-4 as the date the application is first deposited in the State Engineer’s office, as opposed to “filed” which is defined as the date when the application is acceptably completed in form and substance.

The state engineer is authorized by statute to modify priority dates in two specific instances. If an application lapses, the state engineer may reinstate the application under limited circumstances but must set the priority date to the date of reinstatement. Utah Code Section 73-3-18. The state engineer when considering an extension of time in which to submit proof on an application is authorized in Section 73-3-12(2)(i) to reduce the application priority if he finds unreasonable delay or lack of reasonable and due diligence in completing the appropriation. Notably, the state engineer is instructed in Section 73-3-12(2)(h) to 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 50 years from the date on which the application is approved. Beyond those statutory provisions the Supreme Court has indicated: “The determination of the priority of water rights is a judicial function and not among the powers of the state engineer.” Whitmore v Murray City 107 Utah 445, 154 P.2d 748 (1944). The court has also noted that the reduction in priority making an application subsequent in time to the protestant’s water right was fundamentally prejudicial. In re Application No 7600 63 Utah 311, 225 P.605 (1924). That would seem to suggest that the state engineer may not resolve protests by ordering a change in priority as a condition of approval.

Water right applications follow a set administrative process overseen by the state engineer. An application is filed with the state engineer. The state engineer gives notice, hears concerns raised by others, studies issues, and issues a decision based on statutory criteria to grant the application (with or without conditions) or reject it. The applicant has the responsibility, if the application is approved, of implementing the project and submitting proof the project has been completed and the water placed to beneficial use to the state engineer within a set time frame dictated by the engineer. Failure to comply with the conditions of approval within the set time frames causes the water right application to lapse. Proof submitted must establish the project has been implemented as approved by the state engineer. If the proof is proper the state engineer will issue a certificate which ends the application administrative process.

Applications once perfected, by definition, are beyond the reach of the state engineer. State engineer certificates of appropriation were found to follow the same rules and principles which controlled in cases of land patents issued by the United States. “If there be any lawful reason why the patent should be cancelled or rescinded the appropriate remedy is a bill in chancery… , but no executive officer is authorized to reconsider the facts on which it was issued, and to recall or rescind it, or to issue it to another party for the same tract.” Warren Irrigation v Charlton 58 Utah 113, 197 P 1030 (1921).

While the state engineer’s authority over a water right application ends with the issuance of a certificate, prior appropriators do not lose any rights if they do not protest the original application. The state engineer’s approval of the application nor his issuance of the certificate of appropriation can in any way disturb prior rights whether or not the prior users protest or whether they succeed in their protest. Eardly v Terry 94 Utah 367, 77 P.2d 362 (1938). A certificated application is considered a “vested” or “perfected” right in the sense that it is no longer just an application to secure a right in the future managed by the state engineer, but has transformed or matured to a protected property right to be lost only on the condition of future failure to use. The right remains subject to the condition that it not impair prior rights, and the state engineer retains authority under the statutes to regulate its use consistent with the right established.

**Priority and Change Applications**

The basic priority concept employed in water right change applications was articulated in 1898. “When water has been lawfully appropriated the priority acquired is not lost by changing the use for which it was first appropriated and applied, or the place at which it was first employed, provided that the alterations made are not injurious to the rights acquired by others prior to the change.” Hague v Nephi Irrigation Co. 16 Utah 421, 52 P. 765 (1898). The state engineer is precluded by statute from adjusting the priority of an unperfected application which is the subject of a change application as part of the change application approval. Utah Code Section 73-3-3(8). Similarly the state engineer may not change the priority of a perfected water right through the change application process since that is a judicial function and not among the powers of the state engineer. The statutes as currently constructed guarantee the right of a person entitled to the use of water the right to file a change application but that is not synonymous with having the change application approved. The condition under which the application can be approved is that the change not impair other rights without just compensation and be approvable under the further requirements of Section 73-3-8.

The state engineer is instructed in Section 73-3-3(7) to not reject change applications for the sole reason that the change would impair a vested water right. If the application is otherwise proper, the state engineer may approve the change with conditions to mitigate impairment. The philosophy behind this procedure was explained by the court in 1951. In granting a change application, the state engineer “only finds there is reason to believe that the application may be granted and some water beneficially used there under without interfering with the rights of others. Under such a holding, the Engineer rejects applications only when it is clear that the applicant can establish no valuable rights there under, he does not adjudicate claims but decides only that there is probable cause to believe that applicant may be able to establish rights under his application without impairing the rights of others. Such a decision is administrative in nature and purpose and the decision of the court on review, except for the formalities of the trial and judgment is of the same nature and for the same purpose. The object of the engineer's office is to maintain order and efficiency in the appropriation, distribution and conservation of water and to allow as much water to be beneficially used as possible. So construed, the law provides aperiod of experimentation during which ways and means may be sought to make beneficial use of more water under the application before the rights of the parties are finally adjudicated. If we were to finally adjudicate applicant's right to change or to appropriate water at the time that such application was rejected or approved, he would get only such rights as he could establish by a preponderance of the evidence that he could use beneficially without interfering with the rights of others and in such hearing he would not have the benefit of any opportunity to experiment and demonstrate what he could do. Such a system would cut off the possibility of establishing many valuable rights without a chance to demonstrate what could be done." United States v. District Court, 238 P.2d 1132, 1137 (Utah 1951).

So the question becomes how does priority work in a change application context. The standard answer is that the priority of the change application governs for issues of local interference while the priority of the underlying water right or application governs for system wide priority. Practically, what does that mean? All that an applicant may ask for and all that an applicant may receive under a change application is the water that is had under the underlying right. If there is a potential that a proposed change application may enlarge the underlying water right the application may be approved with conditions to prevent the enlargement of the right. Tanner v Humphries 87 Utah 164, 48 P.2d 484 (1935). A change application cannot be rejected without a showing that vested rights will thereby be substantially impaired. While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such application must fail if the evidence does not disclose that his right will be impaired. Salt Lake City v. Boundary Springs Water Users Ass'n, 270 P.2d 453, 455 (Utah 1954). A change in place of diversion or the place or nature of use or a combination of such changes cannot be made if the lower users, whether prior or subsequent to the rights of the parties making the change will thereby be deprived of the use of water which they would have had under the use which the upper appropriators made before the change. Such a change would enlarge the rights of the upper appropriators and impair the vested rights of the lower users because their rights were established on the basis that no such enlargement or changes of use would be made after the lower users had perfected their appropriation, and this is true of storage as well as direct flow waters. East Bench Irr. Co. v. Deseret Irr. Co., 271 P.2d 449, 454-55 (Utah 1954).

The answer to the question it seems depends upon the circumstances of the change. If no existing rights are impaired, the change applicant may assert rights to priority under the underlying right. If existing rights are impaired, the priority may be as low as that of the change. In the end that will be a judicial determination because it is not in the purview of the state engineer.

A number of approved but undeveloped applications to appropriate persist on records of the state engineer. Most if not all of these applications now contemplate uses which require a change. Most if not all of these applications are now years from their approval date without any development and protected from lapsing by statutory exemption. It should be noted in spite of the exemptions they must ultimately compete with other water users for priority under a change. A word to the wise, if you aren’t using the water you are entitled too, it would be best to start sooner than later. Impairment is a constitutional principal inherit in the exercise of property rights. Due process is guaranteed, and compensation for takings by the public.