

## **R655. Natural Resources, Water Rights.**

### **R655-16. Administrative Procedures for Declaring Beneficial Use Limitations for Supplemental Water Rights.**

#### **R655-16-1. Authority.**

Section 73-1-3 declares, "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state."

Subsection 73-2-1(3) declares, "The State Engineer shall be responsible for the general administrative supervision of the waters of the state and the measurement, appropriation, apportionment, and distribution of those waters."

Subsection 73-2-1(5)(e) authorizes the State Engineer to make rules governing the form and content of applications and related documents, maps and reports.

Subsection 73-3-3(4)(b)(vii) requires the State Engineer to supply an application form for the permanent or temporary change of a water right which shall set forth, among other information, "the place, purpose, and extent of the present use."

Section 73-3-16 requires applicants to submit proof of appropriation or permanent change including, among other information, "a map showing the place of use", "the nature and extent of the completed works" and "the method of applying the water to beneficial use".

Section 73-3-20(2) states "The state engineer may require the owner of record of an approved exchange application to provide information concerning ... the extent to which the development under the exchange has occurred and other information the state engineer considers necessary ... to arrive at the quantity of water being exchanged."

Section 73-5-8 states, "Every person using water from any river system or water source, when requested by the State Engineer, shall within 30 days after such request report to the State Engineer in writing: (1) the nature of the use of any such water; (2) the area on which it is used; (3) the kind of crops grown; and (4) water elevations on wells or tunnels and quantity of underground water used."

#### **R655-16-2. Justification.**

Proper water right administration requires a quantification of the Beneficial Use(s) to which the holder of a water right is entitled. To facilitate record keeping, each unique Beneficial Use or set of Beneficial Uses is assigned a Water Use Group number in the State Engineer's records. Some of the State Engineer's records indicate the Beneficial Uses in a Water Use Group are authorized under two or more water rights (Supplemental Rights), but do not quantify the Beneficial Use Amount authorized under each individual right. Administrative activities requiring an evaluation of the Beneficial Use of a water right may necessitate the quantification of the Beneficial Use allowed under each supplemental water right in a Water Use Group.

This rule provides for a "Declaration of Beneficial Use Amounts" form to enable Water Right Holders to declare Beneficial Use information and document agreement with that declaration by those with supplemental water rights.

#### **R655-16-3. Purpose.**

The purpose of this rule is to allow Water Right Holders to determine and declare the amount of Beneficial Use that each water right contributes to the total Beneficial Use of a Water Use Group. To accomplish this, a Declaration of Beneficial Use Amounts form may be completed and submitted to the State Engineer. To complete the form, the Water Right Holders must quantify, by agreement, the amount of Beneficial Use that some or all of the supplemental water right contributes to the Water Use Group.

#### **R655-16-4. Application of Rule.**

This rule applies to all Water Use Groups defined in the State Engineer's water right records for which Beneficial Use Amounts of each of the individual water rights have not been established.

#### **R655-16-5. Definitions.**

(1) Terms used in this rule are defined as follows:

(a) "Application for Apportionment of Beneficial Use Amounts" means an application requesting that the State Engineer apportion the Beneficial Uses of a Water Use Group among the supplemental water rights that make up the Water Use Group.

(b) "Beneficial Use" means the purpose to which water diverted under a water right is applied and the amount of that Beneficial Use. Examples include but are not limited to irrigation (amounts measured in acres); stock watering (amounts measured in numbers of equivalent livestock units); domestic (indoor residential - amounts measured in numbers of equivalent domestic units); and commercial, industrial, municipal (amounts measured in acre-feet).

(c) "Beneficial Use Amount" means the amount of Beneficial Use a water right contributes to a Water Use Group that includes the subject water right.

(d) "Change Application" means an application for permanent or temporary change of a water right as defined in Section 73-3-3.

(e) "Declaration of Beneficial Use Amounts" (Declaration) means either a form provided by the State Engineer, or an alternative document containing the same information, for use by Water Right Holders to declare the Beneficial Use Amount of some or all of the individual water rights in a Water Use Group.

(f) "Party" means only the applicant and other Water Right Holders within the Water Use Group.

(g) "Proof" means Proof of Beneficial Use for an appropriation or permanent change as described in Section 73-3-16 or as may be required by the State Engineer under 73-3-20(2).

(h) "Sole Supply" means the amount of Beneficial Use allowed under a particular water right when used alone and separate from all Supplemental Rights. If a water right has been assigned to more than one Water Use Group, the Sole Supply of the water right is the sum of its Beneficial Use Amounts.

(i) "Supplemental Right" means a water right that is used together with one or more other water rights for a common Beneficial Use.

(j) "Water Right Holder" means the entity, person, or persons documented as owning a water right in the records of the State Engineer.

(k) "Water Use Group" means one or more water rights listed and assigned a unique number in the records of the State Engineer as being applied to a common Beneficial Use.

#### **R655-16-6. Declaration of Beneficial Use Amounts.**

(1) A Declaration shall be prepared by Water Right Holders using either a form provided by the State Engineer or an alternative document containing the same information.

(a) To be considered acceptably complete, a Declaration must:

(i) be signed by all Water Right Holders in the Water Use Group; and

(ii) include documentation supporting the Beneficial Use Amounts declared.

(b) A Declaration shall apportion the Beneficial Use Amount of a water right in the Water Use Group according to the average annual Beneficial Use of each water right being quantified on a long-term basis or by any other evaluation method consistent with the information contained in the State Engineer's records.

(c) The Declaration form shall include a statement acknowledged by those signing the form and recognizing that the Beneficial Use Amounts declared by the Declaration is not a general adjudication of the water rights involved under Chapter 73-4.

(d) The State Engineer may require additional documentation to support the Beneficial Use Amounts declared in a Declaration.

(e) The State Engineer will review and evaluate a Declaration as described in R655-16-7.

(2) A Declaration filed in connection with a Change Application.

(a) Shall be required in situations where:

(i) the Change Application is filed on fewer than all of the water rights in a Water Use Group;

(ii) the Change Application seeks to remove a water right from a Water Use Group;

(iii) the Beneficial Use Amount of a water right to be removed from the Water Use Group has not been quantified; and

(iv) the nature of the change requires a quantification of the Sole Supply of the water right being changed.

(b) Shall be prepared for each Water Use Group to which the water right or the portion of the water right to be changed has been assigned.

(c) May quantify only the Beneficial Use Amount of the water right that would be the subject of a Change Application.

(d) Must, together with any other Declarations required by the Change Application, if the water right has been assigned to more than one Water Use Group, declare the Sole Supply of the water right or the portion of the water right to be changed.

(3) A Declaration to declare the Beneficial Use Amount of a water right for which Proof has been filed:

(a) May be required in situations where:

(i) the Beneficial Use Amount has not been quantified for the water right in the Water Use Group for which Proof has been filed; and

(ii) the Proof is filed on fewer than all of the water rights in the Water Use Group; or

(iii) the Water Right Holder who has filed Proof does not hold all the water rights in the Water Use Group.

(b) Shall be prepared for each Water Use Group to which the water right for which Proof has been filed belongs.

(c) May quantify only the Beneficial Use Amount of the water right that would be the subject of the Proof.

(d) Must, together with any other Declarations required for the Proof, if the water right has been assigned to more than one Water Use Group, declare the Sole Supply of the water right for which Proof has been filed.

(4) The filing of a Declaration does not limit the ability of a Water Right Holder to continue to use the water rights together supplementally as they have historically been used. Regardless of the Beneficial Use Amounts declared in a Declaration, the previous supplemental use of the water rights may continue, with the exclusion of any water right removed from the group through an approved Change Application or invalidated through other legal or administrative process.

(5) Once accepted for filing, a Declaration may only be revised by filing a new Declaration:

(a) That is signed by at least all Water Right Holders within the Water Use Group affected by the revision and whose Beneficial Use Amounts were previously declared by the filing of a Declaration; and

(b) That addresses only water rights that have not been previously removed from the Water Use Group through an approved Change Application or invalidated through other legal or administrative process.

#### **R655-16-7. State Engineer Review and Evaluation.**

(1) If a Declaration is filed with the State Engineer:

(a) The State Engineer shall review the Declaration for consistency with the water right information contained in the State Engineer's records.

(b) If the Declaration is inconsistent with the water right information contained in the State Engineer's records, it will be returned without further action to the Water Right Holder who submitted the Declaration with an explanation of the inconsistencies.

(c) If there is reason to believe the Declaration is consistent with the State Engineer's records, the State Engineer shall update the water right records of all water rights listed in the Declaration, consistent with the Beneficial Use Amounts included in the Declaration. With the update, a memo documenting the Beneficial Use declarations shall be placed on the file of each affected water right.

(2) A Water Right Holder may request, in writing to the State Engineer, a review of the State Engineer's Water Right Database entries and the State Engineer's Water Right Files related to a Water Use Group.

(a) Such a request is not a request for agency action pursuant to Chapter 63G-4 because the review shall be limited to a determination as to whether the State Engineer's Water Right Database entries are consistent with the State Engineer's Water Right Files for the water rights in the Water Use Group.

(b) A request for a records review filed pursuant to this rule shall set forth a statement as to how the submitter believes the State Engineer's Water Right Database should be modified to be consistent with the State Engineer's Water Right Files for the water rights in the Water Use Group.

(c) The State Engineer shall complete a review of the Water Rights Database and the Water Right Files within a reasonable time from receipt of the written request and shall notify the requester in writing when the review has been completed.

(d) A copy of the State Engineer's reply to the request for a records review shall be placed on the water right file for each water right in the Water Use Group reviewed.

(3) The State Engineer may modify Water Use Group records at any time to resolve errors, deficiencies, or ambiguities. With the modification, a memo documenting the change in the Water Use Group shall be placed on the file of each affected water right.

#### **R655-16-8. Application to State Engineer for Apportionment of Beneficial Use Amounts.**

(1) An applicant may submit an application to the State Engineer requesting an informal adjudicative proceeding pursuant to Chapter 63G-4 for the apportionment of the Beneficial Use Amounts of the water rights in the Water Use Group if:

(a) An apportionment is necessary for an administrative action on a Change Application or Proof of Beneficial Use; and

(b) The applicant has exhausted all reasonable efforts and has been unable to produce a Declaration because:

(i) It is impossible to identify and/or contact one or more of the parties or their successors in interest in the Water Use Group.

In this case the applicant must document:

(A) the attempts to identify and contact the parties or their successors in interest; and

(B) the reasons why the parties or their successors in interest cannot be identified or no contact can be made.

(ii) One or more of the parties or their successors in interest refuses to participate in completing the Declaration or refuses to sign the Declaration. In this case the applicant must document:

(A) the attempts to reach agreement with the parties or their successors in interest; and

(B) the reasons, in detail, why no agreement could be reached.

(iii) Any other reason or reasons the applicant cannot cure, which prevents the completion of the Declaration. In this case the applicant must document why the Declaration cannot be completed.

(2) An Application for Apportionment of Beneficial Use Amounts shall be made on a form provided by the State Engineer and shall comply with Section 63G-4-201 as a request for agency action.

(a) The applicant shall provide all information requested on the form provided by the State Engineer including all affidavits and documentation gathered in the effort to prepare a Declaration.

(b) The application form shall include a statement acknowledged by the applicant signing the form and recognizing that the State Engineer's apportionment of the Beneficial Use Amounts of the water rights within the Water Use Group is not a general adjudication of the water rights involved under Chapter 73-4.

(c) To the extent possible, the applicant shall provide notice to the other parties pursuant to Section 63G-4-201(3)(b).

(3) The State Engineer shall review the application for completeness and compliance with the criteria described in (1). As part of the review, the State Engineer shall determine whether the applicant's effort to complete a Declaration without success has been sufficient.

(4) If the application is incomplete or does not meet the criteria described in (1), or if the State Engineer believes the applicant should make additional effort to complete the Declaration, the State Engineer shall return the application to the applicant without further action with an explanation of the inadequacies. Returning an incomplete or inadequate application is not a final agency action; it is an intermediate step instructing the applicant regarding further steps that must be taken before the application can be accepted for filing.

(5) If the application is complete and does meet the criteria described in (1), and if the State Engineer believes the applicant has exerted all reasonable efforts to complete the Declaration without success, the State Engineer shall accept the application for filing and apportion the Beneficial Uses of the water rights in the Water Use Group accordingly.

(6) For the purposes of this rule, the State Engineer shall apportion the Beneficial Use Amounts of the water rights in the Water Use Group according to the following procedure:

(a) The State Engineer shall notify all parties in accordance with Section 63G-4-201(3)(d)(iii) and (e)(ii) and shall issue a request for information to each Party as authorized in Section 73-5-8.

(b) The parties will be allowed at least thirty (30) days for submittal of the requested information.

(c) Upon expiration of the allotted response time, the State Engineer will review:

(i) all information received with the application; and

(ii) all information received pursuant to the State Engineer's request (including historical records of flows diverted, historical water use patterns, etc.); and

(iii) any other information relevant to the water rights in the Water Use Group, including the State Engineer's water right records (such as, relative priority and water flow limitations, distribution records, etc.).

(d) Based upon a review of the information described in (c), the State Engineer shall make a preliminary apportionment. The State Engineer may determine whether to make a preliminary apportionment of the Beneficial Use Amount for each of the water rights in the Water Use Group or an apportionment of only the Beneficial Use Amount of the water right involved in the administrative action.

(7) The State Engineer shall notify all parties by regular mail of the preliminary apportionment of the Beneficial Use Amounts apportioned. This notification is an intermediate rather than a final agency action.

(a) The parties shall be advised of their right to protest the preliminary Beneficial Use Amounts apportioned by the State Engineer.

(b) The parties will be allowed at least thirty (30) days for submittal of protests or other information.

(8) The State Engineer may hold a hearing if deemed necessary to obtain further information regarding the apportionment of the Beneficial Use Amounts of the water rights within the Water Use Group.

(9) The State Engineer shall review any further information obtained either through protest or the hearing process and may revise the preliminary apportionment of the Beneficial Use Amounts if necessary to ensure a proper apportionment of the Beneficial Use among the water rights in the Water Use Group.

(10) The State Engineer shall issue an Order, which shall be the agency's final action, setting forth the Beneficial Use Amount of each water right apportioned consistent with the apportionment.

(11) Orders of the State Engineer regarding the apportionment of Beneficial Use shall be subject to the applicable law including provisions of Rule R655-6-17 of the Division of Water Rights and to Sections 63G-4-302, 63G-4-401, 63G-4-402, and 73-3-14 which provide for filing either a Request for Reconsideration with the State Engineer or de novo review in the appropriate district court. A Request for Reconsideration must be filed with the State Engineer within 20 days of the date of the Order. However, a Request for Reconsideration is not a prerequisite to filing for de novo review. De novo review must be sought within 30 days after the date of the Order, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied or deemed denied. A Request for Reconsideration is deemed denied when no action is taken within 20 days after the request is filed.

(12) Once the time to seek de novo review of a State Engineer Order has passed, or if such review has been sought, once the courts have issued a final, non-appealable order, the State Engineer shall update the Division's documentary and electronic records for each of the water rights apportioned consistent with the State Engineer's Order, or the court order if one has been issued. With the update, a memo documenting the Beneficial Use apportionment shall be placed on the file of each affected water right.

#### **R655-16-9. Exceptions.**

(1) Water Use Groups created for public water suppliers that do not describe the extent of the Beneficial Uses but rather group water rights within a use area will not require a Declaration.

(2) At any time during a Change Application or Proof process, if it becomes apparent, through State Engineer review, protest, or otherwise, that a Declaration is necessary to complete the administrative process, the State Engineer may require Declaration be completed consistent with this rule.

(3) A Water Right Holder who wishes to declare that a water right contributes no Beneficial Use amount to a Water Use Group, where the holder is the sole owner of the non-contributing water right, may make that declaration by filing a Declaration signed only by that Water Right Holder. The Declaration may address only those rights declared to be non-contributing. Once accepted for filing, a Declaration filed to declare no Beneficial Use amount may not be withdrawn or modified by the Water Right Holder. No effort will be made to contact the other Water Right Holders in the Water Use Group concerning such filing. Once a Declaration of no Beneficial Use has been accepted for filing, the State Engineer shall update the water right records of all water rights listed in the Declaration, consistent with the Declaration. With the update a memo documenting the no Beneficial Use declarations shall be placed on the file of each affected water right.

(4) If the Beneficial Use Amount of a water right has been quantified by a court order or other legal instrument of equivalent effect, and which instrument is not a part of the State Engineer's documentary records, such instrument may be submitted by any person for consideration by the State Engineer.

(5) The State Engineer may administratively cancel the assignment of a water right to a Water Use Group if such action provides for more efficient or proper water right administration. When the database is updated to cancel the assignment, a memo documenting the cancellation shall be placed on the file of each affected water right.

(6) The State Engineer may waive the filing of a Declaration for a temporary Change Application when he believes sufficient water and Beneficial Use Amounts are available for the purposes of the change.

#### **KEY: beneficial use, supplemental water rights, water rights**

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