

**MINUTES OF THE
WATER ISSUES TASK FORCE**

Friday, June 9, 2006 – 2:00 p.m. – Room W125 House Building

Members Present:

Sen. Peter C. Knudson, Senate Chair
Rep. David Ure, House Chair
Sen. Patrice Arent
Sen. Beverly Ann Evans
Rep. David N. Cox
Rep. Margaret Dayton
Rep. Ben C. Ferry
Rep. James R. Gowans
Rep. Brad King
Rep. Michael T. Morley
Rep. Patrick L. Painter

Members Absent:

Sen. Mike Dmitrich
Sen. Thomas V. Hatch

Staff Present:

Mr. Chris Parker, Associate General Counsel
Ms. Emily Brown, Associate General Counsel
Ms. Joy Miller, Legislative Secretary

Note: A list of others present, copy of related materials, and an audio recording of the meeting can be found at www.le.utah.gov.

1. Task Force Business

Chair Ure called the meeting to order at 11:40 a.m. Sen. Dmitrich and Sen. Hatch were excused from the meeting.

2. Water Company Amendments

Mr. Parker apprised the Task Force of efforts being taken by outside groups concerning water company revisions. He highlighted some of the issues being addressed by these groups, including expired corporations, voting requirements, shareholder access to corporate records, and enforcement of shareholder assessments.

Rep. Dayton asked whether the one vote per share issue requires legislation or can be decided within the individual company. Mr. Parker responded that the corporate bylaws can specify the method. The issue is changing the default in the nonprofit corporation act so that if it wasn't specified in the bylaws it would default to one vote per share as opposed to one member, one vote. Mr. Parker pointed out that the statute is very broad and is probably used by most nonprofit entities in the state.

Rep. Painter suggested that changes to laws governing water companies be made in a separate area of the code from laws governing other nonprofit entities.

Mr. Warren Peterson, Waddingham and Peterson, commented that the group studying this issue has a great deal of experience. Rep. Painter asked that he be notified when the group meets.

Rep. Dayton questioned if the Legislature requested the group to meet and is expecting information to be available for the next session.

Rep. Ure said the issue was becoming a problem for water companies. The chairs asked the group to

participate in establishing a solution. The group will submit its recommendations later in the year.

Mr. Fred Finlinson, Coalition (Utah Water Coalition), stated the Coalition has identified the voting issue as one of its priorities. Another priority issue for the Coalition is the prohibition of the use of public bonds by governmental water companies to obtain stock to acquire a water right.

Rep. Painter asked what rights a municipality has with bonding to acquire shares. Mr. Finlinson said municipalities that have water authorization can acquire stock so they will have the right to use the water represented. Under IRS rules, public tax exempt funding is not eligible for that type of purchase.

Mr. Peterson commented that in 2000, Sen. Hillyard sponsored legislation which expanded the nonprofit corporation act. However, the legislation did not address water companies. Sen. Hillyard asked the water community to establish a group to review the code and develop water company provisions to be included in the statute.

3. Instream Flow

Ms. Brown distributed and reviewed "Instream Flow Appropriations in Western States" and "Instream Flow: Utah Code Sections." She reviewed background information about instream flow and outlined five different methods states use to obtain instream flows. Ms. Brown also addressed methods used to obtain instream flows that are outside the state's statutory scheme.

Rep. Ferry asked if any authority existed that could override the suspension of a water right by a proclamation of the governor. Ms. Brown responded that the governor cannot actually suspend someone's water right. If there is unappropriated water in a stream, the governor can pull the stream from being further appropriated. That would not affect existing rights, only potential applications.

Rep. Dayton asked what the effect was to existing water shares when Oregon pulled 23 streams to protect waterfalls. Ms. Brown stated the shares were not affected, but no new applications could be filed on the streams. She explained that instream flows are designated for a specific stretch of stream. After the stretch has been completed, water that is left would be available to be appropriated downstream.

Mr. Jerry Olds, State Engineer, stated there are four instream flow water rights that have been approved within the state. They have to be based on an existing perfected water right. He stressed the importance of finding the balance between providing the streams for a healthy environment for recreation and at the same time meeting the growing water needs of the state.

Mr. Olds outlined other areas where instream flow rights exist. In 1980 an agreement was entered into on the CUP (Central Utah Project) to provide 44,400 acre feet of water to provide for instream flows and protect resource values associated with certain streams. The state has been asked and taken measures to protect the flows in the Green River under the recovery program for endangered fish in the Colorado River Basin. Instream flow water rights have been recognized through the state's negotiation with the federal government for Indian tribes and national parks and monuments in Utah.

Rep. Ure asked who has standing to request an instream flow. Mr. Olds said the water rights he referred to are created under federal law and the state addresses them through the adjudication process.

Rep. Ferry asked if some water rights were withheld by the federal government on federal lands except those which Utah received through the Enabling Act. Mr. Olds stated that through the Enabling Act, there are lands under navigable waters and streams for which Utah received title. Other portions of the land were part of the public domain still held by the federal government.

Mr. Ken Tuttle, Sunrise Engineering, asked how the federal government obtains an instream flow right if a private individual in the state owns enough water to shut the river off. Mr. Olds stated that in all of the instream flow cases they have negotiated for the federal government, the federal government would be recognized based on the priority date of when the federal reservation was created. In almost all other cases they have subordinated those to all existing water uses as of the date of the agreement.

Rep. Dayton asked if the instream flow protected by the CUP is based on an amount or a percentage of what is needed for consumptive use and if it varied during drought years. Mr. Olds responded that the amount was a compromise reached by many parties involved in the process. He said drought conditions have not yet threatened that amount.

Ms. Brown explained that in compliance with the Clean Water Act effluent limits are set to meet water quality standards. If there is a change in the streamflow, there may have to be a change in effluent limits in order to maintain water quality standards. She briefly reviewed the public trust doctrine and how it has been used in other states.

Rep. Ure asked if other western states have the same problem with instream flow versus tracking water rights. Mr. Olds said there is a numerous variety of systems in place. Each state is different. He noted Utah is behind some of its neighboring states in addressing the issue of instream flows.

Mr. Finlinson said the Coalition recommends that the Task Force review the provision expanding the use for water quality, since those at risk have POTWs (publicly owned treatment works) that discharge into the area. If the stream dries up above the POTW, what the plant can discharge will be dramatically impacted as a result of water quality standards. In those situations it may be more beneficial to acquire a water right on the open market from a perfected use to keep the water in the stream so that the treatment process doesn't have to be significantly increased.

Mr. Gerald Kinghorn, Parsons, Kinghorn, Harris, distributed "Proposed Amendments to Utah Instream Flow Statute." He explained that the amendments propose that entities which operate wastewater treatment plants be authorized to acquire, from a voluntary seller, instream flow water rights for very limited purposes. The economic impacts of denying them the ability to acquire instream water rights falls on the public that has to support the increased costs of expanding the treatment plants.

Rep. Ferry asked why cities that have an indefinite holding of a water right need instream flows. Mr. Kinghorn responded that many of the undeveloped water rights are groundwater rights. Some of

them are special districts that don't own water rights but exist to treat wastewater. It is very rare to find a municipality that owns a water supply that could be bypassed to create water as a receiving water for discharge. Mr. Kinghorn stated there are not always undepleted water rights upstream. Many of the water rights are not associated with the stream that is receiving discharged water. He stressed the need to develop a way to protect increased flows into the system from other diversions.

Mr. Tim Hawkes, Trout Unlimited, said his organization is interested in preserving and restoring habitat for fish and wildlife. They would like to have the ability to work directly with farmers and ranchers to accomplish this goal and are interested in finding solutions that will work for all parties. Mr. Hawkes discussed a project negotiation that the organization was able to accomplish in Montana. He said these negotiations are very complex because they need to be sure the water right is not being expanded.

Rep. Ferry asked why Trout Unlimited could not accomplish its goals within the existing system. Mr. Hawkes responded that the answer is to increase flexibility. He indicated that Trout Unlimited's interests align with the DWR's (Division of Wildlife Resources) in enhancing fisheries, however, the priorities may differ.

Rep. Dayton requested that the Task Force followup with more detail regarding monitoring and enforcing of the negotiated projects referred to by Mr. Hawkes.

Mr. Todd Bingham, Utah Farm Bureau, stated the vast majority of agriculture producers want to stay in agriculture. He said Mr. Hawkes' proposal could be a possibility on a case-by-case willing seller/willing buyer basis. He encouraged the Task Force to look at instream flows to make sure there are no negative impacts on existing water rights. Mr. Bingham said there should be no major change in Utah water law in considering instream flows and encouraged caution in moving forward with the issue.

Mr. Randy Crozier, farmer, pointed out that existing water law already contains the tools necessary to accomplish what needs to be done.

Mr. Finlinson suggested the following issues could be addressed by the Task Force: conservation measures - including what is being done in Las Vegas and some type of encouragement to achieve conservation goals; request for funding for administration of the Division of Drinking Water; the practice of allowing high flow water rights in upper reaches of given watersheds to be converted into well rights; and source protection for drinking water.

Sen. Arent requested that the Task Force pursue the conservation issue. She expressed interested in hearing more about the Las Vegas project.

4. Other Business / Adjourn

The Task Force scheduled the following meeting dates: Thursday, July 13 at 9:00 a.m.; Friday, August 4 at 9:00 a.m.; and Thursday, August 31 at 9:00 a.m.

MOTION: Rep. Gowans moved to adjourn the meeting. The motion passed unanimously.

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Chair Ure adjourned the meeting at 2:00 p.m.