

**MINUTES OF THE
WATER ISSUES TASK FORCE**

Thursday, August 31, 2006 – 1:30 p.m. – Room W135 House Building

Members Present:

Rep. David Ure, House Chair
Sen. Patrice Arent
Sen. Mike Dmitrich
Rep. David N. Cox
Rep. Margaret Dayton
Rep. Ben C. Ferry
Rep. Brad King
Rep. Michael T. Morley
Rep. Patrick L. Painter

Members Absent:

Sen. Peter C. Knudson, Senate Chair
Sen. Beverly Ann Evans
Sen. Thomas V. Hatch
Rep. James R. Gowans

Staff Present:

Mr. Brian Allred, Policy Analyst
Mr. Mark Steinagel, Policy Analyst
Mr. Chris Parker, Associate General Counsel
Ms. Emily Brown, Associate General Counsel
Ms. Joy Miller, Legislative Secretary

Note: A list of others present, a 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 1:35 p.m. Sen. Evans, Sen. Hatch, and Rep. Gowans were excused from the meeting.

2. Water Conservation

Mr. Steven Clyde, Clyde Snow Sessions & Swenson, P.C., discussed his paper "Water Conservation Under the Prior Appropriation Doctrine - Why It Does Not Work." He commented that the appropriation doctrine as presently constituted does not foster conservation. He noted the appropriation doctrine creates some major disincentives to conserving water because the party who makes the effort to conserve can rarely hang on to and beneficially use the water they conserve. Mr. Clyde pointed out that any activity to save water upstream will have an impact downstream. If the law is changed to allow conservation to take precedent over return flows, in some areas of the state there will be takings lawsuits. He stated every water right is appropriated subject to the public's interest. He discussed the use of sprinkler systems and their effect on return flows. Currently return flows are entitled to absolute legal protection against upstream interference caused by changes of use. Mr. Clyde said the doctrine can be changed as a matter of public policy if the Legislature and the courts were to determine that conservation was a paramount public policy over protecting rights and return flow.

Rep. Dayton asked if other states have trumped vested rights and would that create a precedent. Mr. Clyde said the state of Washington has done it under the context of the Clean Water Act. He briefly discussed a rule adopted by California on this issue and stated he did not feel a rule could be made to apply statewide and have equal application. Individual applications would have to be considered on a case-by-case basis with the courts and state engineer determining how it is best applied.

Rep. King asked why unallocated water conserved from sprinkler system use can't be used to site a power plant. Mr. Clyde explained that in terms of a farmer going from flood irrigation to sprinkler irrigation and no longer needing his full allocation per acre, the water no longer needed belongs back in the system. If the water can be captured before it leaves the land and treated as wastewater as opposed to return flow water, it can be reused on the ground without expanding the acreage. New acreage cannot be opened with

the water conserved and the water cannot be sold for new beneficial use because the farmer does not have title to it. Montana and California have given the salvager title to the water affording them the ability to have a saleable asset that provides them economic incentive to convert to sprinklers and more efficient use of the water or even to expand new acreage.

Rep. Ure stated that the courts have traditionally been protector of an individual's rights. He expressed concern with allowing the courts to change their philosophy and put doctrine in place for the public.

Mr. Warren Peterson, Waddingham & Peterson, stated that it is a mistake to confuse efficiency on site with conservation. The Sevier Basin has been determined by comparison of river basins in 62 countries in the world to be the most efficient river system ever to be examined in terms of the amount of precipitation that falls to the amount of water utilized. If sprinklers were placed in the upper Sevier, 15 percent of the water use in the basin would be lost. He said policies need to be determined on a river to river basis. He encouraged a broad frame of reference when considering conservation.

Mr. Fred Finlinson, Coalition (Utah Water Coalition), distributed "Water Coalition Conservation Concepts." He outlined current state conservation practices. Currently all conservancy districts and retail water providers serving more than 500 connections are required to submit a water conservation plan. The Board of Water Resources funds a variety of projects that could be considered conservation projects but not all are clearly identified as such.

Rep. Dayton asked who appoints the Board of Water Resources and to whom it reports. She also asked who appoints the governor's conservation team and if that team reports to an entity other than the governor. Mr. Finlinson explained that the governor appoints members of the Board of Water Resources subject to the advice and consent of the Senate. The conservation team is an ad hoc group that was established under Governor Leavitt.

Mr. Finlinson said the Coalition questioned whether a state water conservation policy should be adopted and if so, where should it be located. He proposed the following suggestions for a state water conservation plan which are limited to urban M&I practices: require all state agencies to comply with water wise practices, review current water conservation plan requirements for fine tuning, provide more education, consider additional conservation funding projects, and identify existing work being accomplished at the state level.

Rep. Ferry questioned putting philosophical issues in statute. Mr. Finlinson stated he would prefer it be put in statute so that state agencies must comply with it.

Rep. Ferry asked at what point does the policy of requiring a reduction in water use exceed the cost of the benefit. Mr. Finlinson responded that input from the Division of Water Resources is necessary. He said reduction in water use is an integral part of the state water plan in meeting the total water demands for the state.

Rep. Ferry expressed concern that the waiting lists for the Community Impact Fund and the LeRay McAllister Fund are beyond what is available. If those lists are expanded, does conservation take priority over those on the waiting lists. Mr. Finlinson stated that would be a key component to be considered in the development of the state water policy.

Rep. Painter questioned if a farmer puts in a second wheel line and reapplies his recaptured water, although he is not expanding his acreage, could he be sued by someone downstream. Mr. Clyde said they would have a good argument that the farmer is now taking water that is part of their vested return flow rights and under the nonimpairment aspect doctrine of appropriation system they could contest it and probably win.

3. Instream Flow

A. Montana's Instream Flow Water Right Statute

Ms. Brown reviewed Montana's instream flow water right statute which was included in the mailing packet. In Montana, a water owner can change a consumptive use right to instream flow for the benefit of a fishery resource. She stated that there is an existing concept in Montana water law called salvage water which is the water available for beneficial use from an existing water right through application of water-saving methods. Montana's policy is to encourage the conservation and full use of water so water owners who salvage water retain the right to use the salvage water. However, the owner must file a change application if the salvage water is to be leased, sold, or used for a purpose or on a place not associated with the original water right.

Mr. Boyd Clayton, Assistant State Engineer, commented that instream flow is a changing issue. He pointed out that instream flow permits issued in Montana are not permanent changes. He expressed concerns with the concept of salvage and conserved water. He hoped the Task Force would discuss the policy of when instream flow is a beneficial use. The Task Force may also want to consider the possible allocation of private water rights to provide instream flows. He indicated that the state engineer has expressed concern with the possible fiscal impact of instream flow legislation.

Rep. Ferry asked if the definition of instream flow should be expanded. Rep. Ure questioned whether it has been defined or has the Division of Water Rights been allowed to use their judgment on the issue. Rep. Ferry agreed that it has been defined indirectly by what has been allowed. He questioned whether instream flow should be expanded beyond what is currently allowed.

Rep. Morley questioned if instream flows could possibly pull vested rights from downstream users in order to preserve a nonindigenous, endangered species that was allowed to be instituted into the stream solely on the basis of instream flows. Mr. Clayton responded that there are burdens placed on projects as they are constructed to accommodate those kinds of situations.

B. Additional Instream Flow Policy Decision Comments

Mr. Finlinson distributed a memorandum from the Coalition regarding instream flow. He stated that although the Coalition could not reach a consensus, several concerns were identified as a result of its discussions. He reviewed those areas of concerns outlined in the memorandum. He pointed out that the lynch pin to the Central Utah Project is the volume of water derived from return flows. Any proposed change negatively impacting the return flow of water would require a vigorous protest from the Central Utah Water Conservancy District to protect its return flow.

Rep. Ferry asked what is the base year for determining the concentration of pollutants at a certain point

in time. Mr. Finlinson stated permits are done on a five-year basis. Rep. Ferry expressed concern that using a five-year rolling average is not a fair practice.

Rep. Ure asked how can a POTW (publicly owned treatment works) acquiring instream flow upset Washington County's conservation district. Mr. Finlinson stated that giving the right to someone who is not a public entity is upsetting to them. There would be similar concerns with other entities in the water development process.

Mr. Finlinson indicated the Coalition also discussed the instream flow proposals concerning POTWs and Trout Unlimited. The single most compelling reason for a change allowing a POTW to hold an instream flow right is that bonding requirements for public financing would not allow the purchase of a water right that is not going to be held and owned by the issuer of the public bond. He outlined the actions recommended by the Coalition regarding POTWs and Trout Unlimited.

Rep. Ferry questioned why is it necessary to take water outside of the POTW's existing water right? Mr. Finlinson stated that not all POTWs are the same type.

Mr. Jerry Kinghorn, Parsons Kinghorn Harris, said water that comes through the POTW system is included in its discharge. That counts against the POTW in the formula when considering what is diluted by the instream flow. The water has got to be in the instream flow in order for it to dilute its discharge. He stated a combination of tools is needed in order to develop a strategy of compliance for the future. Mr. Kinghorn pointed out that in their proposal, a POTW would only be able to use the depletion portion of a water right as its instream flow protected quantity.

Rep. Ferry said it would be important to know the cost for the East Canyon service area to impose a membrane filter process to take the pollutants out of the system. Mr. Kinghorn stated cost estimating is difficult for the future. He said it is clear that both instream flow issues regarding POTWs and Trout Unlimited cannot be solved in one bill.

Rep. Ure requested Rep. Ferry to put his concerns in writing for the Task Force to make sure they are addressed.

Mr. Tim Hawkes, Trout Unlimited, agreed that there should be two separate bills because there are different implications. He said he has discussed director approval with the Division of Wildlife Resources as the mechanism approving instream flow.

Mr. Finlinson indicated he would like to have one bill with two provisions.

4. Other Items / Adjourn

The Task Force is scheduled to meet on September 14 and September 28.

Chair Ure adjourned the meeting at 4: 05 p.m.