

**MINUTES OF THE
WATER ISSUES TASK FORCE**

Friday, August 4, 2006 – 9:00 a.m. – Room W125 House Building

Members Present:

Sen. Peter C. Knudson, Senate Chair
Rep. David Ure, House Chair
Sen. Patrice Arent
Sen. Mike Dmitrich
Sen. Beverly Ann Evans
Sen. Thomas V. Hatch
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

Staff Present:

Mr. Brian Allred, Policy Analyst
Mr. Chris Parker, 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 9:15 a.m.

MOTION: Rep. Painter moved to approve the minutes of the July 13, 2006 meeting. The motion passed unanimously.

2. Water Companies

Mr. Jerry Olds, State Engineer, indicated that as new growth occurs, there has been a conversion of agriculture water to M&I (municipal and industrial). He explained that the Utah Lake/Jordan River basin is closed to any new appropriations of water. New communities must acquire an existing water right and file a change application to move the water from its historical use to the new proposed development. Many of the senior water rights in the Utah and Salt Lake valley areas are reliant upon Utah Lake and the Jordan River. He said Utah Lake receives about 725,000 acre feet per year of inflow, half of which is from groundwater. Water rights that are reliant upon Utah Lake have been a good option for additional development. He noted many change applications have been filed that affect irrigation companies in the Salt Lake valley. As a result, shares of stock in those irrigation companies are having change applications filed on them to move the water back to the groundwater system in Utah valley.

Mr. Olds explained that many communities in Utah valley have water rights that are based upon historical irrigation water rights in Salt Lake valley. Transferring water from these companies creates many problems for the companies. He questioned whether municipalities would be better off requiring that the companies separate off a portion of that water right and deed it to the city rather than maintain shares of stock in the company and be subject to conditions associated to shareholder requirements. He said adjustments should be made that would insure that the shareholders that are left would be protected.

Rep. Gowans asked what happens to beneficial use since it is treated differently for municipalities than for irrigation companies. Mr. Olds said they would quantify the water right as part of the change application process. They define how much irrigation water can be moved to municipal use. That use is required to be metered and reported to the state engineer.

Rep. Cox asked how well owners above Utah Lake are affected by the change. Mr. Olds stated there are

several areas around Utah Lake that have flowing artesian wells. Those wells were drilled in the early part of the 19th century. As change applications are allowed from the surface water back into the groundwater system, there will be a reduction in the number of flowing wells within those basins. The Utah Supreme Court has ruled that under Utah water law an artesian head is not an element of a water right that is protected. Water users have an obligation to maintain reasonable means of diversion. He has met with municipalities in Utah Valley regarding this problem.

Rep. Ferry asked if artesian wells are certificated rights. Mr. Olds said many of them are water rights initiated prior to formalization of water law and are referred to as diligence rights. Some of them may have been filed on and certificated to appropriate the water. They are considered to be a perfected water right. Rep. Ferry asked if they run the risk of forfeiture because the artesian effect, rather than pumping, has been the methodology historically used. Mr. Olds indicated it could put them at risk.

Sen. Hatch stated that municipalities cannot sell a water right. He asked if that was applicable to the shares of water stock in a company held by the municipality. Mr. Olds responded that conservancy and special districts do not have that requirement. Many municipalities have created special districts that basically retain the title to these water rights. A constitutional amendment would be necessary to change this requirement.

Mr. Warren Peterson, Waddingham & Peterson, distributed a copy of his presentation "Mutual Water Companies: Driving a 19th Century Vehicle Into the 21st." He stated private water companies have not been adequately maintained to meet the circumstances facing them. At least 80 percent of Utah's water use is managed at some stage through private water companies. Water use transition has and will continue to be marked by delay, litigation, and uncertainty. Mr. Peterson outlined the common circumstances among water companies. He stated that shifting these water resources from one economic sector to another, such as to the M&I sectors, are frequently occurring either through market transactions or eminent domain. He outlined the process that should be followed to address this issue.

Rep. Ure asked if the Supreme Court or the Legislature should address these issues. Mr. Peterson indicated the issues can be addressed by either body.

Rep. Painter disclosed that he had a conflict of interest since he is an irrigation shareholder. He felt that shares in a water company should be defined as a real property right with the accompanying protections.

Mr. Peterson stated he would rather see the marketplace handle the transition of water. He cautioned that the Legislature should not become heavily involved in the management of these companies. They are a local concern and should be free to address local interests. Mr. Peterson said rules regarding directors who are not managing on behalf of shareholders need to be defined.

Rep. Ure and Rep. Morley encouraged Rep. Painter and Mr. Peterson to continue to work with others in the water community and the water coalition to develop a basis for a philosophical foundation from which to begin drafting legislation.

3. Instream Flow Water Rights

Mr. Jerry Kinghorn, Parsons Kinghorn, asked that he be allowed to give his presentation on this issue at

the August 31 meeting. He said he is very interested in reaching a consensus among the water groups about what is appropriate for instream flows for privately owned treatment works.

Mr. Fred Finlinson, Utah Water Coalition, commented that at its next meeting, the coalition will develop its responses to instream flow water rights and will submit them to the Task Force when completed.

Mr. Mark Danenhauer, Council (Utah Rivers Council), said ownership of instream flow rights should be expanded to include other state agencies, political subdivisions of the state, and nonprofit organizations. Acquisition should be expanded to include temporary and permanent change applications and purchases and leases.

Rep. Ferry asked where instream flow should be allowed. Mr. Danenhauer stated instream flow should be allowed at whatever point the right is held on the river. It could be held prior to reaching a municipality's water works.

Rep. Ferry asked what impact that would have on development. Mr. Danenhauer stated the Council is not trying to restrict development. It is trying to allow water right holders to maximize their water right.

Sen. Hatch asked why there is a need to allow additional entities ownership or acquisition. Mr. Danenhauer responded that it will greatly benefit the state overall. It will prevent nonprofits from being required to go through state agencies.

Rep. Ure asked if there is ever an inefficient way to use water in agriculture. Mr. Danenhauer said there are ways that fields are irrigated that could be improved upon.

Re. Ure commented that if water is kept in streams, it would dry up wetland areas in the Kamas valley because sprinklers do not allow enough runoff. Rep. Ure asked how water rights and instream flow water rights would be regulated. Mr. Danenhauer said it is a very complicated issue.

Sen. Arent asked if the Council agreed or disagreed with the position of Trout Unlimited. Mr. Danenhauer stated the Council is in full support of Trout Unlimited's proposal.

Mr. Tim Hawkes, Trout Unlimited, distributed a summary of resources to assist the Task Force in evaluating the questions presented at the last meeting. He reviewed Trout Unlimited's proposal for nonprofit corporations to lease instream flow rights from willing producers. A ten-year pilot program is proposed that would provide the opportunity to determine whether the program works. He noted that under the program, the leased water would not be subject to forfeiture. He reviewed the instream flow program adopted by Montana and stated it could be a useful tool in developing the program for Utah.

Sen. Hatch asked if part of the lease agreements in Montana include some type of public access component. Mr. Hawkes stated that it is negotiable. Trout Unlimited has found that these programs only work on the smaller tributaries and toward the headwaters and connecting pieces of rivers.

Rep. Ferry asked what the incentive is for someone to convert their water. Mr. Hawkes stated there is no monetary benefit. There are different reasons people might want to convert the water.

Rep. Ferry asked if the purpose of an instream flow is for preventing a species from being listed as endangered, how long does it take to mitigate the situation. Mr. Hawkes said it is a long-term prospect. He said Montana initially did a ten-year limit on the transfer. It was determined that since some situations required an extensive upfront investment, it was necessary to extend the lease term.

Rep. King asked if once water is converted to instream flow, do all beneficial use discussions stop. Mr. Hawkes responded that there are cases where someone may not be using the water and it is not being put for another use recognized as providing a benefit. There must be a beneficial use component and the potential for forfeiting a water right. Mr. Hawkes explained that under the program the quantified water right would be registered as a change application with the state engineer.

Mr. Olds noted that the problem is knowing how to differentiate the water. It becomes very difficult to administer.

Sen. Hatch asked if instream flows could potentially disrupt the whole river system. Mr. Olds responded that it would change the timing of the stream flow and how it has historically operated.

Sen. Arent requested Mr. Olds to contact his counterpart in Montana to determine how the system works.

Rep. Ure asked staff to prepare a summary of the information obtained regarding the Montana system and distribute it to the Task Force.

Rep. Ferry asked how the applicant would be warned that there could potentially be a loss of the flow due to the expiration of the lease. Mr. Olds said this is a concern of the agriculture community. He stated the law should be clarified so that it does not become an issue. Legislation should state that an individual who leases the water for instream flows would not forfeit their right at the end of the lease.

Rep. Ure expressed concern with the ramifications to all issues instream flows will have on existing water law. He asked staff to research whether Montana had instream flow provisions for publicly owned treatment works. He asked that Mr. Hawkes research whether Trout Unlimited had common issues with other entities such as the Sierra Club that could be addressed.

Rep. King indicated that there will be effects downstream. He stated the Task Force would have to address how to reissue water rights on leased water. Mr. Olds replied that the state engineer can grant applications to appropriate water for fixed periods of time. That could be a tool to address the issue.

Mr. Peterson distributed a memorandum regarding instream flows. Studies by the Utah Water Resources Laboratory and other researchers have found the Sevier River system to be the most efficient system in the world in terms of the ratio of the amount of water utilized for beneficial use when compared to the total rainfall on the watershed. He stated that increases in use of water at any given location through so-called efficiency would cause loss of return flow.

Mr. Todd Bingham, Utah Farm Bureau, said they support instream flow as long as other water rights are not affected, there is no loss of water to other states, the assessments are retained on respective rights, and instream flows are not acquired through eminent domain. The Utah Farm Bureau considers water rights to be private property rights rather than securities.

Rep. Cox asked what recourse downstream users would have if they can prove they are losing water as a result of actions taken higher in the system.

Rep. King asked if there is any supporting evidence of sprinkling systems depleting water elsewhere.

Rep. Ure indicated those questions would be addressed at the next meeting.

Mr. Finlinson stated there is a chance that recommendations from the Utah Water Coalition could be developed later in the year for the Task Force to consider.

Rep. Ure questioned whether federal instream flow rights should be integrated into the state water rights system. He indicated he would also like to hear from representatives of the Corps of Engineers or Bureau of Reclamation in a future meeting.

4. Other Business / Adjourn

Rep. Ure suggested the task force members review Mr. Peterson's memorandum and the document distributed by Mr. Steven Clyde at a previous meeting.

The Task Force scheduled the following meeting dates: August 31, September 14, and September 28.

MOTION: Sen. Knudson moved to adjourn. The motion passed unanimously.

Chair Ure adjourned the meeting at 11:55 a.m.