

**MINUTES OF THE  
WATER ISSUES TASK FORCE**

Thursday, September 28, 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  
Rep. David N. Cox  
Sen. Beverly Ann Evans  
Rep. James R. Gowans  
Rep. Michael T. Morley  
Rep. Patrick L. Painter

**Members Absent:**

Sen. Mike Dmitrich  
Sen. Thomas V. Hatch  
Rep. Margaret Dayton  
Rep. Ben C. Ferry  
Rep. Brad King

**Staff Present:**

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](http://www.le.utah.gov).

**1. Task Force Business**

Chair Ure called the meeting to order at 2:10 p.m. Sen. Dmitrich, Sen. Hatch, Rep. Dayton, Rep. Ferry, and Rep. King were excused from the meeting.

**MOTION:** Sen. Arent moved to approve the minutes of the September 14, 2006 meeting. The motion passed unanimously. Sen. Knudson and Rep. Cox were absent for the vote.

Rep. Painter acknowledged the attendance of members of the Thorpe Waddingham family. He distributed and read a letter from the Task Force expressing its sympathy in Mr. Waddingham's passing and acknowledged his many accomplishments.

Mr. Brent Waddingham thanked the Task Force for recognizing the service his father provided to others.

**MOTION:** Rep. Painter moved to adjourn time certain at 4:00 p.m. The motion passed unanimously. Sen. Knudson was absent for the vote.

**2. Instream Flow - Trout Unlimited Draft Proposal**

Mr. Tim Hawkes, TU (Trout Unlimited, Inc.) distributed a copy of his presentation "Private Water Leasing A Win/Win Solution for Agriculture and Sportsmen." He outlined the highlights of TU's proposal which calls for the establishment of a ten-year pilot program to allow a water right holder to lease water on a temporary basis to protect stream flows, thus providing water right holders greater flexibility in using those rights. He distributed and reviewed "In-stream Flow to Protect Trout Habitat."

Ms. Brown distributed and reviewed 2007 General Session draft legislation, "Instream Flow to Protect Trout Habitat." The bill authorizes a private entity to file a change application for a fixed time period not to exceed ten years for an instream flow to protect or restore habitat for native trout, with approval from the director of the Division of Wildlife Resources. Ms. Brown stated that the Task Force needs to address the policy issue of whether just compensation for impairment of water rights should be allowed for instream flow change applications.

Rep. Ure asked what is the definition of a vested right. Ms. Brown stated certificated water right holders have a right of action against someone that is taking their water. They also have the right to challenge a decision of the state engineer if the state engineer approves another water right that affects them.

Rep. Ure questioned if water running off someone's property for the last 100 years is classified as a vested right. Ms. Brown said there is case law that addresses that issue. The original appropriator can recapture and reapply water as long as it is not used to enlarge the right.

Rep. Painter suggested that just compensation should be addressed in the legislation. Ms. Brown explained that with instream flow change applications there is no opportunity to offer just compensation if it impairs a vested right. Instead, the state engineer must deny the change application.

Rep. Ure questioned if water donated to the DWR (Division of Wildlife Resources) for instream flow receives the same review as a private entity. Mr. Hawkes said currently they are subject to the same change application process and more.

Rep. Ure asked if DWR can only do instream flow for water the Legislature has approved. Mr. Hawkes stated if DWR is going to acquire a right, it must have a specific appropriation for it unless it is just given to them. It must pass through the regular approval process as the use or point of diversion is changed.

Rep. Ure asked if at the end of the ten-year cycle, DWR would have to go through the entire process again and take complaints of those that have been impaired. Mr. Jerry Olds, State Engineer, said DWR and the Division of Parks and Recreation, would file changes in perpetuity. Under the proposal, private entities could file change applications for instream flow for ten years with the potential for renewal for another ten years.

Rep. Ure asked what would happen if in the middle of the cycle, a private entity donates the water to DWR because it realizes there has been an impairment and a protest will be filed at the end of the ten-year period. Mr. Olds stated a new change application would have to be made by DWR.

Rep. Painter asked if the instream flow can be renewed for another ten-year lease. Ms. Brown stated it can be renewed. Mr. Hawkes stated currently the proposal is open ended.

Rep. Ure expressed concern for the potential of abuse of the program. He asked if there was the possibility for speculation in water and if it could be manipulated for that purpose. Mr. Hawkes explained that safeguards have been built into the proposal. The requirement for a biological reason for the project and DWR approval provides a mechanism to avoid speculation in water.

Mr. Fred Finlinson, Utah Water Coalition, said the coalition will discuss the bill at its October 10 meeting. He addressed the difference between the impairment of a right with compensation under the current process and no impairment under instream flow and encouraged maintaining the two standards.

Mr. Mark Danenhauer, Utah Rivers Council, said that modest amendments to the Utah water code that are based on free market principles while preserving prior appropriation doctrine will greatly benefit water right holders in the streams. He expressed support for the TU proposal.

Mr. Randy Crozier, Duchesne County Water Conservancy District, requested that the streams in question be referenced on a map prior to adopting the legislation. He expressed his concern with instream flow because it makes it difficult for farmers and ranchers to stay in business. Once the water is leased elsewhere, it is difficult to compete.

Mr. Dallin Jensen, Parsons Behle & Latimer, said the Task Force should address whether or not the instream flow structure will continue to be governed by a public entity or moved into the private arena.

### **3. Proposed Changes to Non Profit Corporation Water Law**

Mr. Warren Peterson, Waddingham & Peterson, distributed a memorandum "Proposed Changes to Water Corporations Code for 2007 General Session." He suggested the following four areas the Legislature could address at its next session: voting and shares, transfer of assets for lapsed water companies, share assessment statute, and Control Shares Acquisition Act Revisions. He provided a background of each issue and suggested language to address the issues raised.

Mr. Peterson stated there are a number of corporations in existence whose charters have lapsed. Mr. Parker indicated it would be best to address this issue with any proposed changes rather than leave it silent.

Mr. Peterson referred to the Control Shares Acquisition Act. He suggested two possible solutions which are to repeal the act or add language stating that the act does not apply to nonprofit corporations.

Mr. Finlinson distributed and discussed "Amendments to the Controlled Shares Acquisition Act." He reviewed the background of the act, which was passed in 1987. He said the legislation has never been tested in Utah's court. He asked for input from the Task Force.

Rep. Painter commented that investment bankers had contacted him to express their concerns that continually changing this particular statute would discourage anyone from wanting to invest in Utah companies. The bill passed in 1987 addresses that issue. He noted that a share of water stock is a property right and a shareholder has a right to call for the water.

Sen. Knudson asked how widespread water speculation is. Rep. Ure responded that it is very widespread. He noted there are people making a great deal of money off it.

### **4. Other Items / Adjourn**

The next meeting of the Task Force was scheduled for October 11 at 8:30 a.m.

Chair Ure adjourned the meeting at 4:00 p.m.