

**MINUTES OF THE
WATER ISSUES TASK FORCE**

Wednesday, October 11, 2006 – 8:30 a.m. – Room W125 House Building

Members Present:

Rep. David Ure, House Chair
Sen. Patrice Arent
Sen. Thomas V. Hatch
Rep. David N. Cox
Rep. Margaret Dayton
Sen. Beverly Ann Evans
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. Peter C. Knudson, Senate Chair

Staff Present:

Mr. J 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 8:40 a.m. Sen. Dmitrich was excused from the meeting.

MOTION: Rep. Painter moved to approve the minutes of the September 28, 2006 meeting. The motion passed unanimously. Sen. Arent, Sen. Evans, Rep. Cox, Rep. Ferry, and Rep. Morley were absent for the vote.

2. Draft Legislation, "Use of State Engineer Fees"

Mr. Jerry Olds, State Engineer, reviewed "Division of Water Rights Building Block Requests." He said the legislation proposes that the state engineer be allowed to use the filing fee to process reports of water right conveyance. The fee would cover the cost of technical staff.

MOTION: Sen. Hatch moved to adopt Draft legislation, "Use of State Engineer Fees" as a task force bill with the recommendation that the fee be increased. A request to increase the fee should be made to the Natural Resources Appropriations Subcommittee.

Rep. King asked that the state engineer provide information to the subcommittee on the actual amount of time that is involved in processing and approving a water right conveyance application.

Mr. Fred Finlinson, Coalition (Utah Water Coalition), stated the water community is in favor of a fee increase. However, he asked that the fee cover the cost of the service and not be treated as a General Fund revenue source.

The Task Force voted on the motion which passed unanimously. Sen. Evans and Rep. Cox were absent for the vote.

Sponsorship of the bill was assigned to Rep. Dayton.

3. Draft Legislation, "Instream Flow to Protect Trout Habitat"

Mr. Tim Hawkes, Trout Unlimited Inc., stated that the generic term of instream flow refers to water left in the stream as opposed to water diverted out of the stream for a specific purpose. He distributed and discussed "Instream Flow to Protect Trout Habitat - Policy Question Key" which addresses the policy issues within the legislation.

Rep. Ure declared a conflict of interest. He questioned how the bill would affect irrigation companies. He expressed concern that opening up a large amount of acre feet to a private entity as an investment for environmental preservation, could increase the price of water for municipalities, special service districts, and agriculture. Mr. Hawkes stated he did not foresee that happening because the legislation is a very narrow tool at best.

Mr. Hawkes distributed and reviewed "Instream Flow to Protect Trout Habitat-Overlapping Safeguards."

Sen. Hatch questioned whether or not the amount of water applied for should be limited.

Mr. Craig Smith, Smith Hartvigsen, said that water speculation in Utah is rampant, mostly through buying shares of irrigation companies. He noted that the bill is a good compromise with many safeguards.

Mr. Finlinson distributed a memorandum outlining the Coalition's recommendations concerning each agenda item. He reviewed the suggested changes to the proposed legislation.

Rep. Ferry asked if a protest can be made only after the application has been awarded. Mr. Hawkes said the intent was to allow a person to protest once after it has been awarded.

Mr. Finlinson said the Coalition was concerned that it would be a specific standard that would be treated differently than any other change application.

Mr. Parker explained current enforcement provisions which he felt do not provide an avenue for redress.

Mr. Olds stated a water user could submit a request to the state engineer to look at the enforcement aspect of an instream flow water right. The state engineer could decide if the person is in compliance with the water right and whether or not there is an enforcement action that should be taken. If they are in compliance, the remedy would be through civil procedures.

Mr. Finlinson asked if the existing change application process provides sufficient protection on these instream flow rights.

Mr. Olds said the process is very public and open. He supported deleting the language in question.

MOTION: Rep. Ferry moved to delete lines 387-390. The motion passed unanimously. Rep. Morley was absent for the vote.

MOTION: Rep. Ferry moved to amend line 369 as follows: after "change application" insert "on a perfected water right". The motion passed unanimously. Rep. Morley was absent for the vote.

Rep. Ure asked if instream flow rights are temporary or permanent. Mr. Finlinson stated the proposal to approve a ten-year lease would be a permanent change application for the ten-year period of the lease. If it was only going to be used for one year or less, a temporary change application would be given for a period not to exceed one year.

Rep. Painter asked what would happen to the civil contracts if the legislation sunsets in ten years. Mr. Finlinson said they would be approved and expire at the end of the lease period. If no action is taken during the sunset provision, they would be eligible for renewal.

Ms. Brown pointed out that the only type of change that can be made under this bill is for a fixed period of time for ten years or less.

Rep. King asked if it would clarify the issue to have a separate name so that it is not confused with the permanent change order. Ms. Brown stated she would develop a term for that purpose that could be added to the definition section.

MOTION: Sen. Arent moved to change "renewal" to "refile" throughout the bill where appropriate. The motion passed unanimously. Rep. Morley was absent for the vote.

Sen. Hatch questioned changing "shall" to "may" on line 377 to allow discretion to the director. He asked Ms. Brown to develop possible alternative language.

MOTION: Rep. Ferry moved to amend line 415 as follows: after "state engineer" insert "and the lessor if applicable". The motion passed unanimously.

Mr. Finlinson stated that the bill contains two sections dealing with measuring devices. He reviewed the Coalition's proposed changes to the bill which provide only one section dealing with measuring devices.

Ms. Brown was asked to rewrite the language in the subsections concerning measuring devices.

Mr. Finlinson discussed the issue of enforcement. He noted that the Coalition recommends the deletion of lines 455 and 456 which address civil enforcement of the instream flow right.

Mr. Olds stated that the enforcement statute enacted two years ago adequately addresses the issue.

MOTION: Rep. Ferry moved to delete lines 455 and 456. The motion passed unanimously. Rep. Cox and Rep. Gowans were absent for the vote.

MOTION: Rep. King moved the following amendments: on line 469 delete "along the ditch" and on line 417 delete "into the ditch". The motion passed unanimously. Rep. Dayton and Rep. Gowans were absent for the vote.

Mr. Finlinson suggested that more discussion take place on expanding the use of instream flows to private entities.

Rep. Ure requested that members of the Task Force study the changes that have been made to the bill so that action can be taken in a future meeting.

4. Draft Legislation, "Instream Flow to Protect Water Quality"

Ms. Brown reviewed the substantive changes to the proposed legislation. A municipality or special district may file a permanent or temporary change application for the purpose of providing water for an instream flow within a stream channel to preserve water quantity or quality or to comply with state or federal water quality standards.

Mr. Finlinson pointed out that instream flow use is a nonconsumptive use. The amount of water that should be available for conversion into an instream flow should only be the consumptive amount of the underlying water right so that the return flow portion of the original underlying water right does not get converted. He reviewed the Coalition's suggested changes to the legislation as outlined in the memorandum.

MOTION: Sen. Hatch moved to amend the bill as follows: on line 355, after "Subsection 10-1-104(5)," delete "or" and on line 356 after "or (1)," insert "or an interlocal entity as defined by Title 11, Chapter

13". The motion passed unanimously. Sen. Evans, Rep. Dayton, and Rep. Gowans were absent for the vote.

MOTION: Rep. Ferry moved to amend the bill as follows: on line 357, after "change application" insert "on a perfected water right". The motion passed unanimously. Sen. Evans, Rep. Dayton, and Rep. Gowans were absent for the vote.

Mr. Jerry Kinghorn, Parsons Kinghorn Harris, discussed water quality certification. He stated that the language regarding this issue needs to be tuned up. He noted the reference to "federal" on line 361 and indicated it should be deleted throughout the bill.

Mr. Walt Baker, Division of Water Quality, pointed out that the state cannot have standards that are stricter than the federal standards. Sometimes federal standards are silent and the state must adopt its own water quality standards.

MOTION: Rep. King moved to delete on line 361, and where applicable throughout the bill, the reference to "federal". The motion passed unanimously. Rep. Dayton, Rep. Ferry, and Rep. Gowans were absent for the vote.

MOTION: Sen. Evans moved to request that Ms. Brown work with Mr. Finlinson and Mr. Kinghorn to develop the appropriate language for lines 362 - 370. The motion passed unanimously. Rep. Dayton, Rep. Ferry, and Rep. Gowans were absent for the vote.

Mr. Olds indicated that he was tasked by the Coalition to develop language that would ensure instream flow water rights are made part of the priority system.

Sen. Evans suggested that Ms. Brown work with the Coalition to draft the appropriate language to replace lines 373-376.

Mr. Finlinson suggested that the following change be made to the bill: on line 382, after "engineer" delete the remainder of the paragraph.

Rep. Ferry asked Mr. Olds if he felt the language Mr. Finlinson proposed to delete was necessary.

Mr. Olds responded that deleting the language still provides the ability to obtain the necessary information.

Ms. Brown pointed out that Subsection (4) does not just apply to POTWs (publicly owned treatment works). It also applies to the Division of Wildlife Resources and the Division of Parks and Recreation and is existing language. If it is changed in the proposed bill, it will affect all instream flow applicants not just POTWs.

Mr. Finlinson discussed the language regarding measuring devices. Ms. Brown indicated she would make the same changes to this bill as in the "Instream Flow to Protect Trout Habitat" legislation.

Rep. Ferry expressed concern with POTWs owning an instream water flow right. He distributed and reviewed a list of proposed amendments. The amendments provide a mitigating opportunity for an entity to meet the demands of water quality while putting in place standards to resolve its pollution issues. Rep. Ferry stated that resolutions need to be long term.

MOTION: Rep. Ferry moved to incorporate his proposed amendments into a separate version of the bill.

Mr. Finlinson stated the proposed amendments disregard some of the recommendations of the Division of Water Quality and the Water Quality Board. He asked for time to study the recommendations.

Mr. Kinghorn stated he would also like time to evaluate the amendments and review them with those performing the science testing on total maximum daily loads. He noted that dilution is a factor in addressing the issue.

Rep. Ure suggested that staff provide two different versions of the bill - one with the Coalition's suggested changes and the other with Rep. Ferry's amendments.

Mr. Baker said it will be up to the POTWs to secure a water right and show evidence that the water is in a stream. He noted if there is a limitation, it will push the POTWs to take water out of the stream and reuse it because they will not be able to meet the water quality limits. He said he is not sure it is a good idea to dewater the stream. He said they will review the proposed amendments.

Mr. Mike Luers, Snyderville Basin Water Reclamation District, said the phosphorus levels they discharge are 40 times below what is in the stream. He said if they are required to lower levels any further, it will be cheaper for them to take the water out of the stream and use it for reuse.

The Task Force voted on the motion which passed unanimously. Rep. Dayton and Rep. Gowans were absent for the vote.

5. Draft Legislation Concerning Water Companies

Mr. Parker distributed and reviewed draft legislation, "Nonprofit Corporation Amendments." The bill addresses voting requirements for nonprofit corporations and authorizes distributions from one nonprofit corporation to another upon dissolution. The bill also prevents the automatic transfer of title in water rights upon dissolution of a nonprofit corporation. Nonprofit corporations would also be exempted from the effects of Title 61, Chapter 6, Control Shares Acquisition Act.

Mr. Warren Peterson, Waddingham and Peterson, stated that the bill captures the intent of the water community. He suggested that the reference to "bylaws" on line 38 be changed to "articles of incorporation".

MOTION: Rep. Painter moved to amend the bill as follows: on line 38, delete "bylaws" and insert "articles of incorporation". The motion passed unanimously. Sen. Evans, Rep. Dayton, and Rep. Gowans were absent for the vote.

Mr. Peterson stated two issues have not been addressed in the legislation. He questioned whether it should have retrospective application.

Mr. Parker said he did not think a retrospective provision is needed. It may be beneficial to have language clarifying the time period.

Mr. Peterson questioned whether the provision should be coordinated with the judicial dissolution provision. He requested that Mr. Parker look at the issue and report back to the Task Force. Mr. Peterson said there is a policy question of whether nonprofit corporations should be exempted from the Controlled Shares Acquisition Act. He said the Coalition feels the issue needs to be studied. Many feel it is a protection and should not be taken out until something better can be found to replace it.

Mr. Finlinson suggested addressing the policy by solving the issues regarding controlled shares

acquisition and if there are other abuses, they should be resolved when there is more time to consider it.

Rep. Painter expressed concern with leaving open the possibility for any abuse. If someone buys a stock they should be able to vote it. He agreed with the way the bill was drafted.

Mr. Peterson raised the issue of whether or not water stock is an interest in real property or a security that should be regulated. The Utah Supreme Court said it is a species of an interest in real property. The issue continues to be raised in various irrigation companies of whether it is a security.

Rep. Painter requested that staff research that issue.

Mr. Finlinson said in the municipal code there is an old provision which requires a backdoor referendum on the purchase, lease, or condemnation of a water right. He distributed a copy of Section 10-7-4. He suggested the deletion of "purchase or lease" from the language. He said the change would probably require a separate bill.

Rep. Ure suggested the issue be put on the agenda below Mr. Peterson's suggestion to study the security issue.

Rep. Ferry said he did not like condemnation for water for any purpose. He asked what the need is to remove the language.

Mr. Peterson said if there is an arms length purchase or lease transaction, it should not be undone. The language is a limitation that can be imposed by popular vote on the use of eminent domain power. Under the Internal Revenue Code, the fact that it is coming through condemnation is useful because it allows a longer exchange period.

Rep. Ure asked that the discussion be held for a future meeting.

6. Other Items / Adjourn

Future meetings of the Task Force were scheduled for October 25 at 1:00 p.m., to discuss water conservation, and November 2 at 9:00 a.m.

Chair Ure adjourned the meeting at 12:10 p.m.