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MESSAGE FROM THE DIRECTORS CORNER

By Carly Burton

Editorial

This newsletter supplements the January 20, 2012 Newsletter at the request of many of our readers to submit a rebuttal statement to the newsletter article by Jared G Parkinson titled “Concern Over Legislative Changes – Opinion to Utah Water Users Newsletter”. This pending legislation is an extremely important topic that is currently before the Utah State Legislature. First, it has always been the policy of the Utah Water Users Association to provide newsletter articles to its readers without formulating a position either in favor or against a particular article. However, in this case, the Association and many of its members do not support the position of Mr. Parkinson. The Association must re-emphasize to the members that the Association and the Utah Department of Natural Resources, especially the State Engineers Office and the Division of Water Resources have always experienced a relationship which has been extremely important as well as mutually beneficial to the parties. This important relationship has existed for decades and the Association will continue to promote this relationship into the future for the benefit of Association membership, as well as all water users in the state. In the spirit of providing a more balanced viewpoint on this important issue we have included two rebuttal articles from Kent Jones, State Engineer and Steven E. Clyde, attorney with the law firm of Clyde Snow. This newsletter as well as detailed information on the proposed legislation before the legislature can be found on the state’s website at www.le.utah.gov or use the Association’s websites at www.utahwaterusers.com or www.utahwaterusers.org.

Rebuttal Article by Kent Jones, State Engineer

The purpose of Senate Bill (SB) 187, sponsored by Senator Ralph Okerlund at the request of the Executive Water Issues Task Force, is to clarify a simple but important water right principle: **In Utah, water right ownership is absolute, access to water is not.**

Water right ownership is a black or white issue. Either you own the right or you don't. Ownership IS being entitled to the use of water. You acquire ownership by deed. You transfer it the same way. There is no in between. You don't have a water right just because you've been using water. You can't just claim a right without some clear tie to a right to use. Adverse possession is specifically forbidden in Utah statute. What does that have to do with SB187? The change statute currently says "any person entitled to the use of water may file

a change application". Change applications are the vehicle through which existing water rights are changed to become a new right (define a new use or divert water from a different source). It only makes sense that the owner of the water right, should be in the drivers seat making decisions about how the water right they own will change. Unfortunately recent Utah Supreme Court decisions have cast doubt on that thinking and now seem to favor recognition of contractual and use interests as parties who can file a change. Kind of like renting out your house, and finding out the renter has sold it and purchased a house for you on the other side of town. Ownership exists for a reason, notwithstanding the fact water right ownership may be more difficult to understand. Lets fix the understanding, not abandon the principle. SB187 address that issue directly by clarifying only an owner or one designated by the owner may file a water right change.

There are two parts to a water right; ownership, and actual use. Unlike personal or real property which can be physically touched and held, a water right is a right to use the shared, finite, renewable, public resource; our rivers, lakes, springs and the groundwater beneath our feet for some beneficial purpose. Exercise of the right is necessarily constrained to maintain equity for all who share in its use. The bedrock of our water right system, prior appropriation is of itself a huge constraint. Those with earlier priority are entitled to receive their whole supply before any subsequent water user has any right. There are other constraints and conditions under which each water right receives its water. There is also an obligation on the part of each water user to continue their use so its impact is always apparent in the shared water resource system or make others aware by filing a nonuse application. There is no guarantee of water for actual use, just a hierarchal right to share use of whatever supply exists. In spite of the information specified on the water right paper, there are realities involved as one considers impact of the actual use.

Water right change applications serve two purposes: 1) to document and update the water right record to reflect changes in the right and 2) control and regulate the exchange that occurs when moving from an existing right so no one gets injured in the change that occurs. The state engineer is appointed in statute to be the gate keeper to make that work. That is why change applications must be approved and not just filed with the state engineer. Laws change, and Utah's water right laws have changed over time sometimes in subtle and other times in more dramatic ways. Importantly, each law change though unintended has its effect. What started as a simple concept of looking at each water right change and considering how it could be effectuated without injuring others with a minimum of red tape has now evolved into a process with some specific requirements and criteria. Unfortunately what has become lost in the decorations of the now existing statute is the simple concept the approval process began with which was never very well described in words. Recently the Utah Supreme Court brought focus to that issue when it concluded the state engineer could not deny a change application on the basis of nonuse. That has opened the question of whether there remains room in the change application approval criteria for the state engineer to operate a gate on the basis of equivalency in water use as one passes through it. SB187 is the beginning of an effort to restore in statute through explicit language the gate keeping function the state engineer has always employed. It isn't perfect, but it starts the process. It describes in statute one of the most critical measures in change application evaluation, that of actual beneficial use. I urge you to look at the issue, not just from the standpoint of how one would maximize their own personal benefit in the change application process, but how we might all continue to work together to make the most of our limited shared water resource and not injure one another. That is the gate keeping function I feel compelled to defend and I hope you will join with me to legislatively achieve that result.

**REBUTTAL TO JARED PARKINSON'S
OPINION ARTICLE REGARDING PROPOSED AMENDMENTS TO 73-3-3 AND 73-3-8
BY: STEVEN E. CLYDE**

The Executive Water Task Force, (Task Force) unanimously endorsed a bill to expressly restore the authority of the State Engineer to consider the extent of historical beneficial use in evaluating a change

application, and to eliminate the confusion created by a series of Utah Supreme Court decisions regarding who had the right to file a change application. Contrary to Mr. Parkinson's assertions in the Op-Ed article published in the January 20, 2012 edition of the Utah Water Users Association newsletter, the Task Force is a group comprised of wide-spread water interests, including an equal balance among irrigators, municipalities and public water supply entities. Because Legislative General Counsel has yet to provide the text of the bill to the public, Please note that the legislation text on the proposed amendments to Utah Code Ann. 73-3-3 and 73-3-8 as endorsed by the Task Force can be found on the legislative website or on the Utah Water Users Association Websites addressed in CarlyBurton's editorial. I urge you to read it carefully and draw your own conclusions. I suspect you will conclude that the Parkinson Op-Ed article inaccurately describes the bill's intent and incorrectly concludes that if passed, the bill will have disastrous effects on water rights and water law.

The bill was proposed in response to two recent decisions of the Utah Supreme Court. The first was *Jensen v. Jones*, 2011UT 31, June 17, 2011, where the Court held that the State Engineer was limited to the prescribed statutory criteria of Utah Code Ann. §73-3-3, and 73-3-8 in deciding whether to approve or reject a change application. The extent of historic beneficial use is simply not one of the specifically enumerated criteria, nor was the concept subsumed in the existing enumerated criteria. Therefore, the State Engineer's review of historic use exceeded his limited administrative authority.

Historically, the State Engineer has served as a gate-keeper in reviewing change applications. The extent of historical beneficial use was reviewed to avoid the enlargement of the water right to and protect other water users against interference from the proposed change of use. Indeed, many smaller cities, water companies and individuals who lack professional staffs or the economic resources to have lawyers and engineers at their constant disposal have come to rely on the State Engineer to make this basic review as part of the change application process; especially where the change application involves ancient diligence claims or long-dormant, early priority water rights an applicant hopes to revive through the change application process. The Supreme Court in the *Jensen* decision took away that safety net. The bill seeks to restore it. The bill does not create some new and unusual power in the State Engineer; it simply gives express authority to what the State Engineer has been doing for decades in protecting the greater interests of the water users of the State.

The second decision is *Salt Lake City Corporation v. Big Ditch Irrigation Company*, 2011 UT 33, June 28, 2011, where the Court further retreated from earlier and seemingly clear precedent regarding who has the necessary authority to file a change application. It held that an irrigation company with a mere contractual right to receive irrigation quality water from the Salt Lake City, as opposed to a water right, had the right to file a change application to change aspects of water rights owned by Salt Lake City.

Unlike shareholders in mutual irrigation companies, whose property rights are well articulated in the case law, and whose right to file change applications is protected by Utah Code Ann. §73-3-3.5 (and preserved in the proposed bill), *Big Ditch Irrigation Company* had a contract to use water. It owns no interest in the water rights used to provide it water, and thus no property interest that normally would have been required to file a change application. In holding that a party with a contractual right to use water could file a change application, the court opened the door to essentially anyone with some contractual interest allowing for the use of water to file a change application. For example the holder of a Weber Basin District replacement contract arguably can now file a change application to modify the Bureau project water rights. The potential disaster of allowing the many hundreds of Weber Basin's contract holders to file change applications, each seeking some unique modification to the operations of the Bureau project to accommodate their unique desires is plainly apparent. Consequently, the proposed amendment seeks to clearly delineate who can file change applications and limits that class to those who have a recognized property interest in the water rights (including shareholders) and those who have the written permission of the owner of the water right.

Here is what the proposed bill actually does. It includes two critical definitions. The first defines who may file a change application, and limits the privilege of modifying a water right to those persons: (i) who hold an approved but unperfected application to appropriate; (ii) the owner of record of a perfected water right; (iii) someone authorized in writing by the holder of an approved but unperfected application to appropriate or owner of record; and, (iv) a shareholder in a water company in accordance with 73-3-3.5. Contrary to Mr. Parkinson's assertions, no attempt has been made to restrict the rights of shareholders in mutual water companies.

Second the bill defines the quantity of water available for change as that quantity of water that has been placed to beneficial use under a water right within the time provided in Section 73-1-4 (the seven-year forfeiture time period). It authorizes the State Engineer, in order to prevent the impairment of other water rights, to review the beneficial use of water and to limit the approval to that quantity of water available for change. In making that review, the State Engineer is required to presume the water right has been used to its full extent. This presumption can only be rebutted by a very high evidentiary showing of clear and convincing evidence that a lesser quantity of water has been used without a defense to that non-use. If an issue of less than full use is raised either by the State Engineer or a protestant to the application, the State Engineer is required to hold a hearing. If sufficient evidence of non-use of all or some portion of a water right is presented, the State Engineer may reject the application, or limit the approval to that quantity of water determined by the State Engineer to be available for change. When an application is approved for the quantity of water that is less than applied for, the unapproved portion of the water right remains intact and valid on its face and may be used in accordance with the existing water right. The decision is not adjudication of forfeiture or the abandonment of the water right; as both of those issues are beyond the State Engineer's statutory authority. Any such decision of the State Engineer is of course subject to de novo judicial review.

At any time prior to the issuance of a decision, the applicant may withdraw the change application and go back to the status quo. Alternatively, he may request the State Engineer to stay the proceedings for a period not to exceed two years, during which time the applicant may take efforts to resolve the non-use issue. Once that is accomplished, the applicant can resume proceedings before the State Engineer and complete the change application process. If the applicant does not resume the proceedings within two years, the change application will be deemed withdrawn with no decision having been made that might affect the water right.

The proposed bill is a careful, well-vetted and reasoned response to these decisions of the Supreme Court, which decisions will have ramifications far beyond the confines of the limited facts of those cases. Those who oppose this bill are primarily those who have no long-term interest in the sustainability of a water system, and people who speculate in water rights. They resist scrutiny by the State Engineer or anyone else into their activities, as that might slow down or inhibit sales and speculative profits.

Without this bill, it will become necessary for water users big and small, public and private, to be far more vigilant in monitoring change applications. It will force water users to file lawsuits challenging the validity of water rights on grounds of forfeiture, because the State Engineer's ability to evaluate historic beneficial use is clearly eroded by the Jensen decision. Further litigation will ensue to determine exactly what kind of contract rights the Supreme Court believes have a sufficient interest to file change applications seeking to modify water rights they do not own or control. The potential list of contractual interests that exist is long and each such potential interest will require a case by case test. Accordingly, it is the lack of this bill, rather than its adoption, that will increase litigation and transactional costs, with the resulting delays in reaching decisions on change applications that will allow development and conversion of water to new uses to occur.

Water is the most precious of our natural resources. For that reason, the water resources have since statehood been owned by the State itself. The appropriator acquires only a right of use in the water owned by the State. That right of use is a property right that is protected by priority and the non-interference doctrine, in exchange for which the appropriator is expected to apply the water to beneficial use. The water right is subject to the statutory penalty of forfeiture for not complying with the beneficial use requirement. Beneficial use is the measure and limit of the water right. If the State Engineer is prohibited from reviewing this most fundamental aspect of the water right in evaluating a change application, then the job of policing water rights will fall to those water users who often can least afford to protect their own interests. That is why the State Engineer has traditionally performed this gate-keeper function. It is also why the water speculators have through the Jensen and Big Ditch cases tried so hard to remove the State Engineer and as well as the owner of the water right from having a voice in this process.

This bill is not a battle between the free and unfettered exercise of a private property right and government regulation. Water rights have never been totally free from State regulation and control because the water itself is owned by the public. Every appropriated water right can only be approved if it is not detrimental

to the greater public interest. State regulation of this essential public resource has existed since the adoption of the permit system in 1903. The administrative process we have in place has served the needs of the State and its water users well for over one hundred years. The law is not perfect, and periodic changes are made to respond to changing societal values. But the fundamental tenant of beneficial use remains and the State Engineer must be able to make that review to protect the greater public interest. Limiting the filing of change applications to those who actually own the property right in the water rights simply makes sense. That of course includes shareholders in mutual irrigation companies and the proposed bill clearly and unequivocally preserves their rights. It requires all others to obtain the permission of the owners of the water right to avoid disrupting operations of complex water systems and water rights. If you are going to call your Legislator, tell them to support the bill.