MINUTES OF THE
STATE WATER DEVELOPMENT COMMISSION
Thursday, October 19, 2000 - 1:00 p.m. - Room 303 State Capitol

Members Present:
Sen. Leonard M. Blackham Senate Chair
Rep. Evan L. Olsen, House Chair
Sen. Mike Dmitrich
Sen. Joseph L. Hull
Rep. James R. Gowans
Rep. Wayne A. Harper
Rep. Dennis H. Iverson
Rep. Bradley T. Johnson
Mr. Tom Christensen
Ms. Kathleen Clarke
Ms. Chris Finlinson (representing Don Christiansen)
Mr. Ivan Flint
Mr. Chris Fullmer
Mr. Irvin Haws
Mr. Dallin Jensen
Mr. Darrell H. Mensel
Mr. Cary Peterson
Mr. Dale Pierson
Mr. Ron Thompson
Mr. Thorpe Waddingham

Members Excused:
Mr. Larry Andher
Mr. Paul Riley

Members Absent:
Sen. Peter C. Knudson
Rep. Brad King
Ms. Natalie Gochnour
Ms. Dianne Nielson

Staff Present:
Ms. Constance C. Steffen, Research Analyst
Ms. Jeanenne B. Larson, Associate General Counsel
Ms. Joy L. Miller, Legislative Secretary

Note: A list of others present and a copy of materials distributed in the meeting are on file in the Office of Legislative Research and General Counsel.

1. Committee Business - Sen. Blackham called the meeting to order at 1:10 p.m. He introduced Mr. Chris Fullmer as a new member of the commission.

MOTION: Mr. Thompson moved to approve the minutes of July 13, 2000. The motion passed unanimously. Sen. Hull was absent for the vote.

2. Partial Forfeiture of a Water Right - Mr. Warren Peterson, Waddingham & Peterson, explained that water itself is owned by the state of Utah. A water user obtains only the right to make beneficial use of the water. The concept of beneficial use is integral to the water right itself. If a water user ceases to make beneficial use of the water right for a period of five years or more, the water right ceases and reverts to the public. There are only three exceptions to that provision. Partial forfeiture raises the question of if a water user uses only part of the water right, does the partial use protect all of the water right. Mr. Peterson discussed some litigation that has resulted

from partial forfeiture issues. He stated that in considering the issue with the Utah Farm Bureau, they wanted to pursue a legislative remedy.

Mr. Kim Christy, Utah Farm Bureau, distributed a copy of his slide presentation. He indicated there are many factors to consider in introducing legislation. The present five-year forfeiture statute does not recognize the characteristics and patterns of agriculture water use. Agriculture is the sector least financially able to bring or defend partial forfeiture litigation. The nonuse statutory scheme could be improved by revising the reasons for granting applications for extension of time to use water. If partial forfeiture is to be part of the water rights regime in Utah, the impact on agriculture water users will be severe unless there is time to adapt. He suggested a legislative, interim study approach to partial forfeiture over establishment of the principle by litigation. Legislation would provide a better opportunity to tailor the impacts of partial forfeiture to the economies of farm operations and the Utah economy in general.

Mr. Peterson reviewed revised draft legislation, "Forfeiture of Water Rights." The legislation would allow a water right user to make beneficial use of water or file a nonuse application. He indicated the bill expands the reasons for qualifying for an extension of time to use the water and provides that the holding of a water right by a public agency for the reasonable future use of the public is a beneficial use. He noted the bill creates a defense to a claim of abandonment or forfeiture. Instruction is given to the state engineer that during the interim period, partial forfeiture cannot be applied when considering change applications. When approving a change application resulting in the change of use of the water right, the state engineer can make such adjustments as are appropriate to prevent enlargement of the right.

Mr. Bob Morgan, state engineer, commented that in an adjudication he is required to report partial forfeiture to the courts.

Mr. Mike Quealy, Attorney General's Office, stated he had some legal concerns regarding the issue. He indicated the Supreme Court has ruled that the state engineer does not have the authority to adjudicate water rights.

MOTION: Mr. Flint moved to continue study of the issue next year in an effort to develop recommendations to resolve the problems. The motion passed unanimously.

Mr. Fred Finlinson, representing local governments that supply water, distributed their proposed draft of public exception to forfeiture. Mr. Finlinson asserted it is critical to have certainty to assist all sides of the transfer process in the conversion from agriculture water to municipal and industrial (M&I) water. The proposal states that public agencies have a responsibility to provide water to the public and are now the providers of water for the vast majority of the state's citizens. Public agencies have to acquire water from the public who own

the water rights. Any loss of water or water rights by a water company pursuant to the forfeiture process due to nonuse of water by shareholders other than public agencies shall be allocated by the water company to the water stock owned by those shareholders whose nonuse was responsible for the loss. No part of the loss may be allocated to water stock held by public agencies or to the water stock of other shareholders who were not responsible for the forfeiture. Mr. Finlinson distributed a summary of western states water law. He noted that of the 11 states interviewed, all but Colorado have some type of forfeiture law.

Mr. Finlinson stated it is the intent of the public exception to forfeiture policy to encourage public agencies to acquire additional water rights and water stock when available in the market place. It is also intended to encourage public agencies to water bank for future public needs. The practice of water banking will allow public agencies to acquire through the market place water rights and water stock as they become available and then to hold these rights and water stock for future use. The public exception to forfeiture does not change or modify the responsibility of a public agency to pay any assessment due on any water stock.

MOTION: Mr. Thompson moved to study the issue next year. The motion passed unanimously.

3. Mutual Water Corporations and Change Applications - Mr. Mike Quealy, Attorney General's Office, gave a brief history of the subject. He said that prior to the mid-1970s, the state engineer's office took the position that a stockholder in an irrigation company could not file a change application based on stock in the company without the permission of the company. That position changed primarily in response to some legal arguments. The state engineer and the attorney general's office took another look at the issue and decided they would allow consideration of change applications based on stock, assuming that all the other criteria were met and there was no impairment of other water rights and particularly any rights of the company. That policy was followed until the early 1990s when the East Jordan Irrigation Company lawsuit raised the issue before the Supreme Court. In that particular case, Payson City had bought approximately 38 shares of water in East Jordan and wanted to convert its existing well water for municipal purposes and take it out above Utah Lake. The state engineer granted the change and East Jordan raised the issue directly that a stockholder could not file the change without the consent of the company. The Supreme Court ruled that the shares of stock in an irrigation company could not be the subject of a change application without the consent of the company. Since 1993, the state engineer has not accepted applications for changes unless there is either the company's signature on the application or a letter from the company evidencing the company's consent.

Mr. Quealy stated many of the companies have provisions in their articles of incorporation that prohibit transferring of water outside of the company's service area or for other purposes

without the consent of the company. He stated any legislation countermanding a situation where the articles of a particular company prohibited that, would raise constitutional issues. He questioned what action is in the best public policy.

Ms. Denise Dragoo, attorney, stated she represented East Jordan in the litigation. She explained that the purpose of mutual water companies is to provide water for their shareholders. The board should be looking to the interests of the whole rather than one particular shareholder. The East Jordan case upheld the ability and the power of the board to do that. She noted the shareholder can still petition the court to receive a ruling in the event the board unreasonably withholds consent. Ms. Dragoo stated the East Jordan case only applies when changing water out of the system. She pointed out that the case was a dispute between a shareholder and the board. The state engineer became involved because he initially approved the change application. She said the state engineer should refrain from becoming involved in disputes between the shareholder and the board.

Mr. Shawn Draney, Snow, Christensen and Martineau, urged the committee to carefully study the issue prior to proposing any changes. He said it would be a mistake to ignore the importance of collective administration of water rights or to suggest that it is a city versus noncity issue. He stated that Mr. Morgan has a difficult job. Is not a wise idea to make him the arbitor of corporate disputes. He suggested the commission study the issue and receive input from a broad spectrum of interests.

Mr. Darin Peterson, Nephi City Councilman, noted that by limiting the availability and the sale of water shares strictly within the company, an irrigation company limits the valuation of that real property. He indicated that Nephi City needs water. When it comes time to look for water and a shareholder cannot sell it to the municipality, the city's only option is to condemn which devalues the property. Mr. Peterson questioned how a mutual irrigation company can actually be the owner of the water if it is the irrigators who are putting it to beneficial use upon the land.

MOTION: Rep. Olsen moved to adjourn the meeting at 3:55 p.m. The motion passed unanimously.