

WATER & THE LAW

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Summer Issue 2008

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Upcoming Events

July 18, 2008

LORMAN: WATER SALES
AND TRANSFER SEMINAR

David B. Hartvigsen and
Matthew E. Jensen, among
others will be presenting.

For more information click

[here](#)

August 27-29, 2008

RURAL WATER NORTHERN
CONFERENCE

For more information click

[here](#)

October 16, 2008

UTAH STATE BAR CLE:
WATER LAW LITIGATION

For more information click

[here](#)

SMITH | HARTVIGSEN News

Matthew E. Jensen chosen
as the Chair Elect for the
Utah Chapter of the
American Water Resources
Association.

Greetings!

Welcome to the 2008 summer edition of Water and the Law we hope you will find this newsletter to be helpful and informative. Despite an above average snowfall throughout Utah, and the filling of reservoirs to levels not seen in recent years; the scarcity of water continues to drive legislative, administrative and judicial activity. The pace of water related activity in the legislature is undiminished. An executive water task force has been impaneled to review various aspects of Utah water law and recommend legislation for the 2009 session, now only six months away.

This issue of Water and the Law will recap legislative activity in addition to H.B. 51 which we reported on in the Spring Issue, and some important court decisions as well. As always, your comments and questions are welcomed. Also, if you find this newsletter helpful we hope you will pass it along to your colleagues in the water community.

Yours truly,

J. Craig Smith

Legislative Updates

by Bryan C. Bryner

In the 2008 General Session, the Utah Legislature passed several bills relating to water in addition to the much publicized H.B. 51 which was covered in the Spring 2008 edition of *Water and the Law*. These bills are summarized below.

HB 203

HB 203 amends 73-3-14 relating to judicial review of State Engineer decisions.

Under the amendment, a party seeking judicial review (the petitioner) of a decision of the State Engineer is required to name the State Engineer as a respondent. If the petitioner is a protestant, he must also name as a respondent the party that requested the adjudicative proceeding. The petitioner must also serve on each person who filed a timely protest a written notice of the petition for judicial review and the opportunity to intervene under Utah Rules of Civil Procedure. The written notice must be served within 120 days after filing of the petition for judicial



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review. This change ends the requirement to name every protestant as a party.

HB 208

HB 208 creates a special "livestock watering right" allowing the use and consumption of water for or by livestock on public land in conjunction with an issued grazing permit. Only a person with a grazing permit may acquire a livestock watering right, which becomes appurtenant to the public land allotted for grazing. This new bill is codified as U.C.A. § 73-3-31.

SB 228

This bill clarifies and expands the State Engineer's authority to enforce and regulate well drilling. Specifically, it authorizes the State Engineer to commence an enforcement action against a person that fails to file a well driller report or drills a well without a license. It also authorizes the state engineer to make rules to establish enforcement procedures for failure to meet construction standards; set a fine amount; and establish well driller report requirements.

HB 143

This bill authorizes the state engineer to enter into an agreement with another state regarding an interstate surface water source; as well as implement an agreement with another state to regulate, distribute, and administer an interstate surface water source. Codified as U.C.A. § 73-2-29.

HB 117

HB 117 authorizes a fishing group to temporarily change a water right for instream flow to protect or restore native trout habitat. The bill changes the instream flow provisions of U.C.A. § 73-3-3(11) and (12) and replaces it with the new 73-3-30. The period of use for instream flow is no more than 10 years, after which the water right will automatically revert to its previous place and purpose of use when the application expires unless the applicant refiles the application.

HB 42

This bill amends U.C.A. § 73-3-12 to allow the State Engineer to approve an extension of time beyond 50 years for a wholesale electrical cooperative to put its water right to beneficial use if the water will be needed to meet the reasonable future electricity requirements of the public.

Case Law Update

by Matthew E. Jensen

***Western Water, LLC v. Olds*, 2008 UT 18, 184 P.3d 578.**

In *Western Water, LLC v. Olds*, the Utah Supreme Court affirmed the district court's award of summary judgment to the State Engineer on the basis that Western Water had not exhausted its administrative remedies. Western Water had filed an application to appropriate an enormous quantity of water from the Jordan River and its tributaries. When the State Engineer denied the application, Western Water requested reconsideration and in its request suggested substantial changes that could be made to its

application. The State Engineer did not act on the request and it was deemed denied after twenty days. When Western Water filed its appeal to the district court, it requested review only of the revised plan submitted with its request for reconsideration. The Court concluded that the revised plan was so different from the original plan that it constituted a new application to appropriate. Because Western Water had failed to strictly comply with the requirements for filing a new application, and because the State Engineer had not specifically considered the revised plan, Western Water did not satisfy its obligation to exhaust its administrative remedies before filing an appeal in district court. Although the Court did not consider other issues before it, the Court did call the constitutionality of Utah Code section 73-3-15 into question. The Court suggested that the two-year deadline (three with an appeal) may result in due process violations or violation of the principle of separation of powers. Accordingly, the Court invited the Legislature to revisit this time limit.

In re General Determination, Penta Creeks, LLC v. Olds, 2008 UT 25, 182 P.3d 362.

This case is a small portion of the General Adjudication of the Green River Drainage Area, and it involves procedural questions about the effectiveness of objections to a Proposed Determination. Penta Creeks' predecessor had originally filed an objection to the Proposed Determination in 1973, with the objection being signed by its attorney. In 2003, the State Engineer sent the First Addendum to the Proposed Determination to Penta Creeks at an obsolete address. Upon receiving notice of the Addendum in 2005, Penta Creeks filed its objection. The State Engineer moved to dismiss both the objections. The district court dismissed the first objection on the basis that it was not properly verified, merely being signed by the attorney. The court dismissed the second objection as untimely. The Supreme Court agreed that an attorney signature did not suffice as "verification" under the adjudication statute but held that the court must consider whether "due cause" for the defect existed. The Supreme Court further held that the State Engineer failed to provide adequate notice of the Addendum. The State Engineer is required to give notice according to the address list on file with the district court where the adjudication is being heard. The Supreme Court then remanded the case to the district court to determine whether there was "due cause" for the second objection's being late.

We welcome feedback and questions. Please contact us at info@smithlawonline.com
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