Autumn Issue 2009

Upcoming Events

Utah League of Cities and Towns Annual Conference
September 9-11, 2009
Salt Lake City, UT
For more information click here

Groundwater Protection Council 2009 Annual Forum Water/Energy Sustainability Symposium
September 13-17, 2009
Salt Lake City
For more information click here

AWWA Annual Conference
September 16-18, 2009
West Yellowstone, MT
For more information click here

17th Annual Water Law CLE
October 15-16, 2009
Salt Lake City, UT
For more information click here

Greetings!

Welcome to the 2009 autumn edition of *Water and the Law* we hope you will find this newsletter to be helpful and informative. As always, we welcome your feedback. If you have questions or comments, please reply to this e-mail or call us at 801-413-1600.

Craig Smith
David Hartvigsen
Matt Jensen
Bryan Bryner
Jeff Gittins

A Preference for Domestic Water Use in Utah: A Relic of the Past?

by J. Craig Smith & Scott M. Ellsworth

Since 1880, sixteen years prior to statehood, Utah law has given preference, in times of scarcity, to "domestic use"--historically defined as indoor household use--over all other uses of water. Utah's 2009 Legislature caught many a bit off guard when H.B. 241 repealed Utah Code Ann §73-3-21, the statute that gives priority to domestic use of water. It was only at the last minute that the effective date of the repeal was delayed until May 12, 2010, to provide an opportunity for closer scrutiny. While few could recall when it had last been formally invoked, the move to repeal the preference for domestic use was led by Utah's agricultural community and its principal lobby, the Utah Farm Bureau. Not surprisingly, at least one large mining interest also supported the repeal.

Proponents of the repeal successfully characterized the preference as both vague as well as contrary to the Prior Appropriation Doctrine. Those who opposed the repeal, of course, urged caution in changing a law which had existed for 131 years without any major complaint or problem. They noted that, as Utah's population continued to grow, the State's limited supply of water must, of necessity, eventually be subject to the application of the preference during times of scarcity so as to ensure that public water suppliers could continue uninterrupted culinary water service.

One point both sides did agree upon was that the language of the law was outdated and did not address modern multiple uses of water by public water suppliers typically bundled under the heading

Case Updates

On July 13, 2009, the Honorable Judge Claudia Laycock of the Fourth District Court for Utah County entered a decision in the case of Hamblin v. Clayton that determined the ability of the State Engineer to assess nonuse in the context of a Change Application. The decision concluded that, under the law as it existed prior to 1996, a water right is forfeited by operation of law upon nonuse of the water for five years. Accordingly, the State Engineer could deny a Change Application on that water right because the owner was not a "person entitled to the use of water." A copy of the Hamblin v. Clayton decision is available on our website, or by clicking here.

On August 12, 2009, the Tenth Circuit Court of Appeals issued an opinion in the case of Strawberry Water Users Association v. United States. That decision affirmed the ruling of the district court, which determined that (1) Strawberry Water Users could not file a Change Application on Strawberry Project Water without the consent of the Federal Government and (2) Strawberry Water Users and the Federal Government must negotiate in good faith a power generation contract on the rights used by Strawberry Water Users. The Tenth Circuit refused, however, to further elaborate on what the result of such negotiation should be. A copy of the opinion is available at the Tenth

"municipal use." The hierarchy of beneficial water use is not unique to Utah; prior appropriation statutes from nearly all Western states generally include some form of preference that can preempt a prior or senior use of water.

In Utah, water rights for culinary use, which necessarily includes domestic use, are often junior to agricultural water rights drawn from the same source or aquifer. The preference, however, has been a useful tool for public water suppliers even despite its rare formal application. For example, one municipal public water supplier has used an emergency back-up well in late summer months when its primary water sources were not available. Because this well diminished flows from a nearby spring, the public water supplier negotiated a voluntary damage payment to the senior water right holder for crop loss.

If the preference is resurrected in the 2010 legislative session it will almost assuredly include a provision for payment of just compensation to the senior water right holder.

The reasons for the repeal are likely a reaction by the agricultural community to urbanization caused by Utah's rapid population growth which has both shifted water from agriculture to municipal use and dramatically increased water right values. The spark was likely legislation in 2008 that was viewed by the agricultural community as largely favorable to public water suppliers and urban areas. A key provision of the 2008 legislation was to allow public water suppliers to hold water rights for the "reasonable future requirements of the public" without forfeiture for nonuse. But if the history of water development in the West teaches us anything, it is that water will always continue to flow, both literally and economically, to the demands of domestic and other urban uses.

For the full article click here

Liability and the Mutual Irrigation Company

by J. Craig Smith & David B. Hartvigsen

[Editor's note: *This article appeared ten years ago in the October 1999 issue of the Utah Water Users Association Newsletter and was just reprinted in the August 2009 issue of that same newsletter following the recent canal break and tragedy in Logan. We are including it in this issue of our own newsletter, knowing that many of you have probably seen it in the UWUA Newsletter, in order to make sure that this important information is available to all of our newsletter subscribers. The article is being reprinted without any changes because the concepts and recommendations are still timely.]*

The recent, well-publicized break of Davis and Weber Counties Canal Company's canal has pushed liability concerns to the forefront of Utah's water community. With canal and irrigation companies operating dams, ditches, and canals in increasingly more urbanized settings, it is actually surprising that it has taken this long for the liability alarm to sound.

While liability, like death and taxes, will always be with us, there

Circuit's website or by clicking here.

After four years of negotiation, Utah and Nevada developed a draft Agreement for Management of the Snake Valley Groundwater System. Although much of the water in the basin originates on the Nevada side and most of the current water use is on the Utah side of the basin, the Agreement proposes that the total water use be split with each state getting 50% of the consumptive use. There are also many other provisions related to management of the aquifer in the future. A copy of the draft agreement is available at the Utah Division of Water Rights, or by clicking here. A copy of the press release is available by clicking here.

To view more information about water law in Utah, visit our water blog at

utahwaterrights.blogspot.com

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are steps that mutual irrigation companies can take to, in the lingo of lawyers, "limit their exposure." This article will list briefly some of those steps:

1. Create an inspection, maintenance and repair program.

Many, if not all, mutual water companies are operated on a shoestring budget with pressure to keep assessments as low as possible. If maintenance is deferred, obviously both the chance of an accident occurring and the responsibility for the accident are magnified. Long range planning is essential! Most mutual irrigation companies would have never been created in the first place without the foresight of those who made substantial sacrifices and investments in the future.

2. Bump up assessments now.

A modest assessment increase now, in accordance with the company's governing rules, will add up over time and will help make necessary and crucial maintenance & repair projects realistically feasible. This maintenance or contingency fund will also provide a cushion for coping with unexpected emergencies.

3. Utilize available funding mechanisms to reduce liability.

Funds from the Board of Water Resources and other such sources may be available to upgrade facilities, at low or interest free rates. Take advantage of those resources.

4. Insure, if possible.

Insurance will provide at least some measure of protection and defense against liability claims. Insurance, like the contingency fund discussed above, requires only a small increase in assessment, but could save the company in the face of a large claim.

5. Consider creation of a separate corporation to hold water rights.

The most valuable asset of a mutual irrigation company is generally its water rights. To help insulate those valuable water rights from liability claimants, formation of a separate corporation to hold only the water rights should be considered. This will help to protect the water rights, which are essentially irreplaceable, from the high liability associated with assets such as the diversion and conveyance facilities. No strategy is completely "bullet proof." However, this is one mechanism that has not been widely used in the past that should be seriously considered now.

6. Don't own anything you don't maintain.

If particular laterals, ditches, or other facilities are considered the responsibility of a particular shareholder or group of shareholders, convey those facilities to those with the maintenance responsibilities, or alternatively, have them execute indemnification agreements to protect those without such maintenance responsibilities. If you have facilities you don't use, consider disposing of them.

website
www.smithhartvigsen.com

7. Make urbanization pay its share.

If facilities need to be re-routed or reconfigured because of development, use this as an opportunity to improve the facilities and make them safer while fairly allocating to such development its rightful share of the costs.

8. Encourage employees, shareholders and others to keep an eye on company facilities.

Many water facilities are in remote locations. However, if small problems are spotted and reported, many big problems can be avoided. The shareholders of a mutual irrigation company are a great asset that can be used to help spot such problems and they should be encouraged to pay close attention to company facilities.

9. Prevent, Document and Report Vandalism.

Many liability problems are caused by vandals. The use of locks, fences, gates, etc., discourages vandalism. If vandalism does occur, document it, photograph it, and report it to the proper authorities before repairing it, unless it is creating an emergency. Interference with water works is a specific crime in Utah. This will help develop a partial defense to liability claims by others arising out of the vandalism.

10. Create a 24-hour Rapid Response System for Emergencies.

Most problems, if caught and corrected early, are small. Unfortunately, the response time on the more serious problems, is often very short. In order to minimize the damage, and resulting liability, a rapid response system should be developed and implemented. It should be functional around the clock, because emergencies rarely happen when its convenient and easily solved.

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