



## Summer Issue 2009

[Upcoming Events](#)

[New Filing Fee Schedule](#)

[New Water Blog](#)

[Fun Features](#)

[New Procedures for Small Residential Water Rights](#)

[Supreme Court Ruling on Adverse Use of Water](#)

## Upcoming Events

**Rural Water Northern Conference**  
August 24-28, 2009  
Layton, UT

For more information click  
[here](#)

**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](#)

## New Filing Fee Schedule

Effective July 1, 2009, the Utah Division of Water Rights will have a new fee schedule. The filing fee for most applications will double,

## Greetings!

Welcome to the 2009 summer edition of *Water and the Law* we hope you will find this newsletter to be helpful and informative. This issue includes a few links to movie clips put together by Rep. Patrick Painter on YouTube for a splash of humor. 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

## New Law Eases Procedures to Protect and Preserve Small Residential Water Rights

by *Bryan C. Bryner*

Last month, the Utah legislature enacted H.B. 389 to remedy the harsh consequences of a water right applicant's failure to timely file a proof of appropriation or permanent change of a small amount of water for residential use. A small amount of water is defined as the amount of water needed for one residence, the irrigation of  $\frac{1}{4}$  acre, and the livestock watering for 10 cattle (or the equivalent). Previously, an applicant who failed to file a proof within the time required by statute would lose the approved water right through lapsing of the application. Such a lapsed application would only be reinstated if it could be shown that the State Engineer's notice of proof due was defective, such as by being sent to a wrong address.

The loss of the water right caused significant problems for homeowners who could not connect to a public water supply and thus had to rely on a groundwater source of culinary water. Often, the residence's prior owner or the developer had obtained approval from the State Engineer to appropriate or change a small amount of water to serve the new residence, but failed to timely file a proof of appropriation due to the sale of the home, unfamiliarity with the proofing requirements or deadline, or the expenses and difficulties in hiring an engineer to do the proofing. Thus, the homeowners, and subsequent purchasers of the home, would divert and use needed culinary water without an approved water right, in violation of Utah's water laws. While this problem could at times be addressed by applying for a new appropriation or purchasing and changing an existing water right, closure of certain groundwater aquifers and basins and restrictions on water in the basins would leave the homeowners with no recourse. H.B. 389 amended Utah

including applications to appropriate, change applications, and requests for extension of time to submit proof. Perhaps the biggest change is that the Division will now charge a filing fee for protests. Currently, protestants may file their protests for free. However, beginning July 1, it will cost \$15 to file a protest with the Division.

A full comparison of the current fees and the fees effective July 1 is available at [www.waterrights.utah.gov/fees-fy2010.pdf](http://www.waterrights.utah.gov/fees-fy2010.pdf)

### Signing of Legislative Bills



On May 4, 2009 Governor Huntsman signed the bills that were passed during the legislative session. To see other pictures of the bill signing go to [www.governor.utah.gov/photos/](http://www.governor.utah.gov/photos/)

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

<http://utahwaterrights.blogspot.com/>

### Fun Features

We came across some entertaining clips about Utah water law that were put together by Rep. Patrick Painter and decided to share them in the newsletter.

[Clip # 1](#)

[Clip # 2](#)

Code section 73-3-5.6 to make two significant changes to prevent and address this situation.

First, an applicant can now file a notarized statement or "affidavit" as for the proof of beneficial use on these small residential water rights, instead of having to hire a licensed engineer to prepare and file the required proof documents. The affidavit must simply specify the amount of irrigated land, livestock watered, and declare the residence to be constructed and occupied.

Second, if an application for appropriation or permanent change of a small amount of water has lapsed for failure to file the proof before the proof deadline, the application may still be reinstated by the applicant or his/her successor-in-interest. Reinstatement will be granted if a residence was constructed and occupied within the time limit for completing the water diversion under the original approval, the water was beneficially used, and an affidavit is filed. Upon meeting these conditions, the State Engineer will issue a certificate of appropriation.

These new procedures are now available to the public and should benefit homeowners statewide. Please feel free to contact us if you have any questions about your eligibility to take advantage of these new procedures.

### Case Law Update

#### ***Otter Creek Reservoir Company v. New Escalante Irrigation Company 2009 UT 16***

by Jeffrey R. Gittins

On March 3, 2009, the Utah Supreme Court issued its opinion in the case of *Otter Creek Reservoir Company v. New Escalante Irrigation Company*. The case involves adverse use of water.

Prior to 1939, water rights in Utah could be obtained by seven years of adverse use. In 1939, the Utah legislature passed a statute which abolished adverse use of water. However, an important question remained: Could a water right be obtained by adverse use if the seven years of adverse use began before 1939 but were not complete before 1939? This case presented the opportunity for the Utah Supreme Court to finally address the question.

The case began when Otter Creek brought suit against New Escalante, claiming that New Escalante was diverting and using water to which Otter Creek was entitled. New Escalante counterclaimed that it had a diligence right or, in the alternative, that it had obtained right to use the water through adverse use. The district court held that New Escalante had lost its diligence right because it failed to participate in the general adjudication that resulted in the Cox Decree, which was issued in 1936. However, the district court held that New Escalante began adversely using the water the day after the Cox Decree was issued. The court then determined that because New Escalante began its adverse use prior to 1939, its adverse use could ripen into a water right based on adverse use.

Otter Creek filed an interlocutory appeal on the limited issue of whether the district court correctly determined that if adverse use



### Contact Us

If you have any questions or if you would like to see something discussed in the future, please let us know by sending an e-mail to [info@smithlawonline.com](mailto:info@smithlawonline.com)

To view previous newsletters, visit our website [www.smithhartvigsen.com](http://www.smithhartvigsen.com)

began prior to 1939, the adverse user could complete the seven years of adverse use after 1939. The Supreme Court began its analysis by discussing past dicta contained in prior opinions. The Court noted that the issue had never been squarely before the Court, resulting in dicta that appeared to support both positions. Ultimately, the Court rejected its previous dicta and construed the 1939 statute based on its plain language. The Court noted that the statute provides that "no right to the use of water . . . can be acquired by adverse use or adverse possession." The Court also noted that adverse use rights can only be acquired after the seven years of adverse use are completed. Until that time, the adverse user only has an expectation or hope of acquiring the right by adverse use. Thus, the Court determined that the seven years of adverse use must be completed before 1939. The district court's decision was reversed and the case was remanded for further proceedings.

We welcome feedback and questions. Please contact us at [info@smithlawonline.com](mailto:info@smithlawonline.com)  
Or Visit us at [www.smithhartvigsen.com](http://www.smithhartvigsen.com)

This newsletter and the information provided herein are for informational purposes only, and are neither offered nor meant as legal advice or opinion on any issue or matter. Receipt or review of this newsletter does not, nor is it intended to, create an attorney-client relationship with Smith Hartvigsen. A person should not rely or act on any particular matter based on the information included in this newsletter without seeking appropriate legal counsel or other appropriate advice.

Copyright 2009

Email Marketing by

