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WATER & THE LAW

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Spring Issue 2010

[Upcoming Events](#)

[Water Blog](#)

[2010 Legislative Summary on
Water Issues](#)

[Brown v. Division of Water
Rights](#)

Upcoming Events

**Water Environment
Association of Utah
Conference**

April 13-16, 2010

St. George, UT

For more information click
[here](#)

**American Water Resources
Association--Utah
Conference**

May 11, 2010

Salt Lake City, UT

For more information click
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our water blog at

utahwaterrights.blogspot.com

Greetings!

Welcome to the 2010 Spring 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

2010 Legislative Summary on Water Issues

by David B. Hartvigsen

The 2010 General Session of the Utah Legislature wrapped up March 11, 2010 and the Governor had until March 31, 2010 to sign, ignore, or veto the bills that were passed. Most of the bills that were passed will become law on May 11, 2010. The Legislature passed 481 pieces of legislation in a session that was thought would focus primarily on budget issues. About 20 bills passed that I would characterize as water-related bills. The bills can be divided into two groups: (1) bills addressing significant or substantive policy issues; and (2) bills proposing technical or minor revisions, refinements, and/or clarifications to the existing laws. I will also briefly comment on the water bills that did not pass. Internet links to the bills that passed are included at the end of the discussion on each bill.

Bills Addressing Significant or Substantive Policy Issues

Canal Safety- Four bill files were opened on the canal safety issue. **HB 60**, sponsored by Rep. Fred Hunsaker and based on the efforts of a subcommittee formed by the Executive Water Task Force, was ultimately adopted with some amendments. **HB 298**, which was sponsored by Rep. Ben Ferry and provided for notifications to canal owners if contact addresses are provided, also passed this session. **SB 185**, sponsored by Sen. Gene Davis, was debated but not passed, and a bill by Rep. Stephen Sandstrom was never released for debate. Under **HB 60**, owners and operators of canals, pipelines, and other water conveyances may do a self assessment to determine whether any sections of their systems are "hazardous" (as that term is defined in the bill) and may develop a



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management plan to address those facilities. The only enforcement provision is that State funding will not be available if the assessments and plans are not done. In a year with no funds available for addressing this problem, this bill was about as much as could have been expected to be approved. **HB 60** and **HB 298** were both signed by the Governor.

<http://le.utah.gov/~2010/bills/hbillenr/hb0060.pdf>
<http://le.utah.gov/~2010/bills/hbillenr/hb0298.pdf>

Tax Exemption for Water Rights- Two bills sponsored by Rep. Patrick Painter which authorize a Constitutional Amendment needed to treat all of the Public Water Suppliers and irrigators equally passed unanimously. **HB 54** has been signed by the Governor. **HJR 2**, which places the amendment on the ballot in November's election, does not need the Governor's signature but is on the Lt. Governor's desk for addition to the ballot. The Utah Constitution currently provides a property tax exemption for water rights and facilities that are used for irrigation purposes. A tax exemption also exists for governmental entities, which exempts water rights and facilities owned by those governmental entities and used for municipal, domestic, irrigation, and any other purpose. These constitutional exemptions leave a gap which has recently been interpreted by a few County Assessors as requiring the taxation of public water systems owned by non-profit entities that provide domestic and outdoor water. The constitutional amendment would close this gap and exempt all water and most facilities used by non-profit entities in a public water system, regardless of the use to which the water is placed.

<http://le.utah.gov/~2010/bills/hbillenr/hb0054.pdf>
<http://le.utah.gov/~2010/bills/hbillenr/hjr002.pdf>

Rainwater Harvesting- Sen. Scott Jenkins' rainwater harvesting bill, **SB 32**, made it through the process this year (after running out of time last year) . It allows people to collect rainwater in properly installed below-ground tanks of up to 2,500 gallons in size or in two above-ground containers of up to 100 gallons each without the need to obtain a water right to collect or use that water. It has been signed by the Governor.

<http://le.utah.gov/~2010/bills/sbillenr/sb0032.pdf>

Public Access to Private Stream Beds- This issue was hotly debated in both last year's session and this year's session. Several legislators worked on various approaches to dealing with this issue, which is the result of the Utah Supreme Court's decision in the Conatser case discussed in earlier editions of this newsletter. **HB 141**, sponsored by Rep. Kay McIff, was ultimately the victor in the debate over public recreational activities on "public waters" over private lands. This bill declared that Section 73-1-1 does not create an easement for public recreation on private lands. Public access to public waters for recreational purposes is now governed the new Public Waters Access Act contained in the sections beginning at Section 73-29-101. Use the link below to review the detailed provisions in this new Act. The Governor ultimately signed this bill.

The debate is not be over yet, however, and **SB 281**, sponsored by

Sen. Dennis Stowell, has created a twelve person task force to study this issue and make recommendations by the end of this November, so watch for more proposed legislation in the coming sessions. The Governor also signed this bill.

<http://le.utah.gov/~2010/bills/hbillenr/hb0141.pdf>
<http://le.utah.gov/~2010/bills/sbillenr/sb0281.pdf>

Water Right Forms to be Attached to Conveyances- Often referred to as "Deed Riders," the Legislature unanimously approved forms addressing water rights to be attached to deeds and to be sent by County Recorders to the State Engineer. The statutory text authorizing the forms is in **HB 314** and the forms themselves are contained in **HJR 26**, both sponsored by Rep. Ben Ferry. These forms should serve several functions: (1) they require the grantor to think about and state what he or she intends with respect to water rights; (2) they require the grantee to acknowledge that he or she has seen the form as completed by the Grantor; (3) they provide a means of getting grantee information from the Recorder's Office to the State Engineer's office in a timely manner; (4) they allow the State Engineer's office to give timely notice to grantees of upcoming deadlines, even before the grantee submits a Report of Conveyance; and (5) they provide general guidance and educational information to grantees on what needs to be done once he or she acquires a water right. **HB 314** has been signed by the Governor. The effective date is July 1, 2011, but the forms are already establishing the standard of care to be used in conveyances.

<http://le.utah.gov/~2010/bills/hbillenr/hb0314.pdf>
<http://le.utah.gov/~2010/bills/hbillenr/hjr026.pdf>

Priority of Water Rights in Times of Scarcity - HB 231, sponsored by Rep. Kerry Gibson, was a follow-up bill from the last session where Section 73-3-21 as repealed effective this coming May 11th. The delayed effective date was designed to give the water community a chance to decide whether priorities should be adjusted in times of scarcity, and if so, how. This bill retained the preference for certain critical domestic and fire fighting uses and provided a much more clearly defined process and narrowed application. It replaces Section 73-3-21 with a new Section 73-3-21.1. The Governor has signed this bill.

<http://le.utah.gov/~2010/bills/hbillenr/hb0231.pdf>

Bills Making Minor Changes or Technical Revisions

HB 33 - Groundwater Recharge and Recovery Act Amendments- This bill, sponsored by Rep. Michael Noel, fleshes out the procedures for filing "proof" and obtaining a recharge certificate on approved aquifer recharge and recovery permits. The prior statute only addressed the requirements for beginning this process and this bill added the necessary provisions for completing the process. It has been signed by the Governor.

<http://le.utah.gov/~2010/bills/hbillenr/hb0033.pdf>

HB 34 - Water Storage Projects-This bill, also sponsored by Rep. Noel, is very similar to **HB 33** but applies to large storage reservoirs (with a capacity of 1,000 acre-feet or more). It establishes the procedures for filing "proof" and obtaining a certificate of beneficial use of water once the reservoir and delivery facilities have been completed, but does not require the owner to actually take the water out of storage in order to do the proof and get the certificate because the whole purpose of these large storage reservoirs is to hold the water for future needs when other water supplies are in short supply. It has been signed by the Governor.

<http://le.utah.gov/~2010/bills/hbillenr/hb0034.pdf>

HB 69 - Repealer of State Engineer's Duty to Plug Certain Artesian Wells-This bill was requested by the State Engineer and was sponsored by Rep. James Gowans. It repeals an archaic statute, U.C.A. 73-2-21, which required the State Engineer to plug certain artesian wells which are no longer in use. The obligation for plugging such wells should be on the owner of the well, not the State Engineer. This bill has been signed by the Governor.

<http://le.utah.gov/~2010/bills/hbillenr/hb0069.pdf>

HB 98 - Repealer of Bond Requirements for State Engineer-This bill was requested by the State Engineer and was sponsored by Rep. Ryan Wilcox, repeals another archaic provision of the Code, this time a requirement that the State Engineer post a 5,000 bond before taking office. This bill has been signed by the Governor.

<http://le.utah.gov/~2010/bills/hbillenr/hb0098.pdf>

HB 189 - Closed Meeting Amendments - This bill, sponsored by Rep. Patrick Painter, made an important clarification to the laws governing closed meetings of governmental entities, such as water districts and municipalities. The existing law limits the topics that can be discussed in closed meetings. One approved topic is the purchase or sale of "real property." Under existing case law, water rights are considered to be "real property" rights. However, shares in water companies have been treated by the courts to be "personal property" rights, which technically prohibited their purchase or sale to be discussed in closed meetings, even though they represent an interest in water rights and discussions concerning their purchase or sale should be entitled to the same protections as are afforded other purchase and sale discussions. This bill has been signed by the Governor.

<http://le.utah.gov/~2010/bills/sbillenr/sb0020.pdf>

SB 103 - Adverse Possession of Water Conveyance Corridors-Sen. Stephen Urquhart sponsored this bill to prohibit people from acquiring portions of water conveyance rights-of-way or corridors held by cities, counties, or metropolitan water districts via adverse possession. The measure passed quickly and easily and has been signed by the Governor.

<http://le.utah.gov/~2010/bills/sbillenr/sb0103.pdf>

Bills That Did Not Pass This Session

Public Access to Private Stream Beds - HB 80(Rep. Lorie Fowlke), **HB290**(Rep. Curtis Webb), **HJR 29**(Rep. Keith Grover), and **SB 267** (Sen. Curtis Bramble) well all bills that addressed the issue of recreational access to private stream beds under the Conatser case. This issue is on the interim study list and work is already under way to revisit this matter.

Water Banking-Rep. Jack Draxler allowed **HB 84** to stall out this session so that the matter of banking of water rights could be addressed during the interim. While most people in the water community believe that Utah should adopt some form of water banking, a consensus on the appropriate approach has not yet been reached.

Change Applications - HB 141, sponsored by Rep. Kerry Gibson, was requested by the State Engineer to better define the scope of his review of historical beneficial use in acting upon change applications be more clearly defined by statute. Conflicting views exist as to whether the State Engineer can reject a change application in whole or in part where it does not appear that there has been full beneficial use of the underlying water right during the last 15 years. The Task Force and the Utah Water Coalition have worked on this issue for two years now and have not reached a consensus yet. However, the biggest challenge to this bill came from the League of Cities and Towns and the Property Rights Coalition, which want to have this and other aspects of the administration of water rights reformed to provide more objectivity and timeliness in the process. Although not on the interim study list, this issue will be debated during the interim and possibly beyond.

Constitutional Amendment to Allow Limited Leasing of Municipal Water Right-Rep. Kay McIff proposed **HJR 1**- seeking a constitutional amendment that would allow cities to enter into lease agreements for up to seven years if the city does not currently need the water. The Constitution presently prohibits cities from leasing or selling any of its water rights. The future of this effort is unknown at present.

Shareholder Change Application Requests - SB 99, sponsored by Sen. John Valentine, sought to clarify shareholder rights in the change application process in connections with water rights held by water companies. Although it emphasized that a water company could deny a request if harms to the company could not be mitigated, water companies and the Farm Bureau opposed this bill that had been approved by the Task Force and the Utah Water Coalition. It has been specifically listed as in interim study item on the **Master Study Resolution SJR 15** passed by both the Senate and the House. All of the topics set for interim study are available at this link:

<http://le.utah.gov/~2010/bills/sbillenr/sjr015.pdf>

Brown v. Division of Water Rights

by Jeffrey R. Gittins

The Utah Supreme Court recently issued its opinion in *Brown v. Division of Water Rights*. The case began in 2006 when the Browns' neighbor applied to the Division for a stream alteration permit so that he could build a bridge across Little Cottonwood Creek. The Browns protested the permit, asserting that the bridge would diminish the Creek's ability to handle high water flow and would adversely impact the natural stream environment. Despite the Browns' protest, the Division issued the permit. The Browns filed a request for reconsideration, which the Division denied.

The Browns then filed a petition for administrative review with the district court. In their petition, the Browns alleged that the bridge would increase the risk of flooding, which could lead to erosion of the stream bank and subsidence of the soil that could cause damage to structures on the Browns' property. The neighbor filed a motion to dismiss the Browns' petition, arguing that the Browns lacked standing because they failed to allege a distinct and palpable injury in their petition. In other words, the neighbor alleged that the Browns were barred from bringing the petition because they had not shown that the proposed bridge was likely to cause them harm. The district court agreed, and dismissed the Browns' petition.

The Browns appealed to the Utah Court of Appeals, who affirmed the district court's decision. The Court of Appeals held that the Browns' alleged injury was "not imminent" and was "too speculative."

The Browns then appealed to the Utah Supreme Court, who reversed the Court of Appeals and district court. The Supreme Court held that the Browns were not required to show that their alleged injury was imminent; rather, the Browns were only required to show a "reasonable probability of future injury." The Supreme Court concluded that the Browns had set forth sufficient facts in their petition to show a reasonable probability of future injury if the bridge was constructed. Because the Browns had standing to pursue their claims, the case was sent back to the district court for further proceedings.

To read the full opinion, click [here](#).

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