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WATER & THE LAW

The Walker Center | 175 South Main Street | Suite 300 | Salt Lake City, UT 84111 | 801.413.1600

Summer Issue 2010

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**Rural Water Users--
Northern Utah Conference**
September 13-17, 2010
Layton, UT
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**Utah League of Cities and
Towns Annual
Conference**
September 15-17, 2010
Salt Lake City, UT
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utahwaterrights.blogspot.com

Greetings!

Welcome to the 2010 Summer 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

The State Engineer's New Supplemental Water Rights Rule

by Matthew E. Jensen

It looks like the third time was the charm for the State Engineer's Supplemental Water Rights Rule-Rule R655-16, "Administrative Procedures for Declaring Beneficial Use Limitations for Supplemental Water Rights," is now the law. This article describes some of the provisions of that new law. For a more expansive explanation of the water rights principles underlying the new rule, please refer to an earlier newsletter article available at the following link: [Smith Hartvigsen's Water & The Law, Winter 2010 Edition](#) (scroll down below the 2010 Legislative Preview). In a nutshell, since the state water rights database was modified in 2006 to assign a unique number to each supplemental water right group (i.e., a group of water rights used together for a specific beneficial use), the Utah Division of Water Rights has been seeking the right mechanism to better define the actual water contributed by each water right within a group.

Originally, the State Engineer began requiring Sole Supply Statements or Group Contribution Forms for virtually every Change Application. These forms required an applicant to determine how much beneficial use each water right contributes to a particular supplemental group and to get signatures from all water right holders approving that allocation. But the process of evaluating supplemental groups is often complicated and expensive, and water right holders are often hesitant to sign the form regardless of how logical or fair the allocation is. Accordingly, the process resulted in an unexpected expense and delay for a number of change applicants. Perhaps in response to the objections of many change applicants to completing the Sole Supply Statements, the State



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Engineer published a proposed administrative rule in the summer of 2008. In response to the many comments submitted in opposition to the rule as originally proposed, the State Engineer published a revised rule in the Utah State Bulletin on November 1, 2009. Although there were again a number of comments to the rule, the tenor of those comments was generally more positive than before.

The version of Rule R655-16 that is now in effect was published in the Utah State Bulletin on March 1, 2010 with a few additional changes from the November 2009 version. As a result of those changes, it is significantly less onerous than the original policy of the State Engineer. First, the rule does not require a Declaration of Beneficial Use Amounts (the new name for the Statement of Sole Supply or Statement of Group Contribution forms) for every change application, but only for change applications that fall within a narrowly defined set of circumstances where a change application is seeking to separate a water right from its historical supplemental group. Second, there are significant exemptions for many types of change applications. For example, public water suppliers, such as municipalities and districts, need not file a Declaration for Supplemental Groups created for water use within their service areas. Furthermore, the State Engineer may waive the Declaration requirement for Temporary Change Applications and may remove water rights from a group if it would be unduly burdensome (e.g., for large water rights that cover an expansive area and are therefore part of many supplemental groups). Third, the rule now requires only that the beneficial use amount for the water right being changed be declared as opposed to every water right in the group. And finally, in instances where the other water right holders refuse to sign a Declaration, the rule provides for an administrative process to establish the beneficial use amounts and allow the change application to proceed. The new rule R655-16 contains many nuances and should be studied thoroughly before a change application is filed. The full text of the rule is available on the State's website or through the following link: [Utah Administrative Code Rule R655-16.](#)

Case Law Update: Bingham v. Roosevelt City

by Jeffry R. Gittins

The Utah Supreme Court recently issued a significant decision regarding water rights in Bingham v. Roosevelt City. The case centered around five Roosevelt City wells, known as the Hayden Well Field, through which the City pumped water out of an unconfined, shallow aquifer underlying the Hayden area. The water level in the area dropped significantly due to the City's pumping. For example, the static water level at one well dropped from 14.3 feet to 94.6 feet.

A group of landowners near the Hayden Well Field were affected by the decreased water table levels. The landowners found that when they applied water to their fields, the water was quickly drawn down deep into the soil past the root zone of their crops. Thus, the landowners found it more costly and, in some instances, practically impossible to raise crops and livestock. The landowners filed suit against the City, asserting three claims: interference with water rights, takings, and negligence.

The Supreme Court held that because the landowners had not lawfully appropriated the water in the water table, the landowners' interest in maintaining the historic level of the water table underlying their property was not a protectable interest under the Utah Constitution or the United States Constitution. Therefore, the Court rejected the landowners' takings claim.

The Court also held that the landowners' water right interference claim failed because they still received their full quantity and quality of water at their approved point of diversion. Although the Court acknowledged that the City's pumping from the Hayden Well Field affected the soil saturation and the water table, the Court concluded that the City was not interfering with the landowners' ability to receive and divert water under their water rights. In essence, the Court limited water interference claims to situations where a plaintiff does not receive his or her full water right at the point of diversion.

Finally, the Court held that the district court erred when it granted summary judgment in favor of the City on the landowners' negligence claim. The Court held that the negligence claim was not barred by the statute of limitations because the City's pumping-- which caused the alleged damage--was a continuing tort. Most significantly, the Court held that the City did owe a duty to the landowners to exercise reasonable care in obtaining its water. In other words, a water right does not give its owner the absolute right to divert that water without regard to neighboring owners that would be unreasonably affected by the diversion. The Court recognized that the landowners would be able to prevail on their negligence claim if the facts support the landowners' assertion that there were reasonable alternative means for the City to obtain its water without adversely affecting the landowners. The case has been remanded to the district court for additional proceedings on the negligence claim.

Rainwater Harvesting Registration

This year, the Utah Legislature passed Senate Bill 32, which permits the capture and storage of precipitation. The bill has now been codified as section 73-3-1.5 of the Utah Code. One of the requirements of the new law is that a person who wants to harvest rainwater must first register with the Utah Division of Water Rights. The Division now has an online registration form, which asks for the applicant's name, phone number, address, email address, and size of storage containers. Once the information is submitted, the person will receive a rainwater harvesting registration certificate.

To access the online registration go to:

<http://waterrights.utah.gov/forms/rainwater.asp>

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