

WATER & THE LAW

215 South State Street | Suite 600 | Salt Lake City, UT 84111 | 801.413.1600

Winter Issue 2010

[Upcoming Events](#)

[News](#)

[Water Blog](#)

[2010 Legislative Preview on
Water Issues](#)

[Supplemental Water Rights
and the Proposed Revision to
the Sole Supply Rule](#)

Upcoming Events

**Utah Water Laws and
Regulations CLE**
February 3, 2010
Salt Lake City, UT

For more information click
[here](#)

Uintah Water Summit
February 11, 2010
Roosevelt, UT

For more information contact
dcac3@ubtanet.com or
435-722-4598

**ABA Water Law Annual
Conference**

February 17-19, 2010
San Diego, CA

For more information click
[here](#)

**Rural Water User's--Utah
Annual Conference**

March 1-5, 2010
St. George, UT

For more information click
[here](#)

Greetings!

Welcome to the 2010 winter 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 Preview on Water Issues

by David B. Hartvigsen

The 2010 Session of the Utah Legislature is set to begin on Monday, January 25, 2010 and runs through Thursday, March 11, 2010. Several groups have been working hard on water related issues and draft legislation since the 2009 Session concluded last spring and an unusually large number of bills are now in the works. These bills can be divided into three groups: (1) bills addressing significant or substantive policy issues; (2) bills proposing technical or minor revisions, refinements, and/or clarifications to the existing laws; and (3) bills that have not yet been filed, but which may still surface in the Session.

BILLS ADDRESSING SIGNIFICANT OR SUBSTANTIVE POLICY ISSUES

Canal Safety - The issue of canal safety jumped to the forefront following the tragic loss of life when the canal in Logan failed this past summer. Governor Herbert personally attended a meeting of the Executive Task Force on Water Issues to ask the group to study the issues and bring back specific recommendations for the Governor. A subcommittee was formed and met numerous times on the issue, resulting in six recommendations and proposed legislation under the sponsorship of Rep. Fred Hunsaker. Two other bill files have also been opened on this issue, one by Sen. Gene Davis and the other by Rep. Stephen Sandstrom. The Hunsaker bill (**H.B. 60**) contemplates having owners and operators of canals, pipelines, and other water conveyances do a self assessment to determine whether any sections of their systems are "hazardous" (as that term is defined in the bill) and to develop a management plan to

Water Law & Policy Seminar
March 15, 2010
St. George, UT
For more information contact
Jack Barnett at:
jbarnett@barnettwater.com
or 801-292-4662

**Utah Water User's
Association Conference**
March 15-17, 2010
St. George, UT
For more information click
[here](#)

**Environmental Law Network
Annual Meeting**
March 17, 2010
Salt Lake City, UT
For more information contact
Bryan C. Bryner at:
bbryner@smithlawonline.com
or 801-413-1600

**ABA Environmental Law
Annual Conference**
March 18-21, 2010
Salt Lake City, UT
For more information click
[here](#)

New Partner at Smith Hartvigsen, PLLC.

Matthew E. Jensen becomes
a partner January 1st.

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

utahwaterrights.blogspot.com



address those facilities. The other bills are not currently available. These bills (along with the other bills discussed below), once they are made publicly available, can be found at the following website (click on "Water and Irrigation" in the "by Subject" box):

<http://www.le.state.ut.us/asp/billsintro/index.asp?year=2010GS>

Tax Exemption for Water Rights - The Utah Constitution currently provides an 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 are 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. Rep. Painter has filed **H.J.R. 2** which proposes a constitutional amendment to 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. A companion bill (**H.B. 54**) provides some clarifying definitions as directed in the proposed constitutional amendment. This exemption is needed to treat all of the public water suppliers and irrigators equally.

Rainwater Harvesting - Last year, Sen. Scott Jenkins ran a rainwater harvesting bill that did not make it all the way through the legislative process in time, so he has refiled his bill in this Session with some additional refinements. The bill has been numbered as **S.B. 32**. It allows people to collect rainwater in properly installed below ground tanks of up to 2,500 gallons in size and in above ground containers of up to 55 gallons in size without the need to obtain a water right to collect or use that water.

Water Banking - Rep. Jack Draxler has just filed a bill (**H.B. 84**) that would allow the banking of water rights. He has been working on this bill with Bob Fotheringham in order to prevent unused water rights in Utah on the upper Bear River from being forfeited and then the lost water being given to Idaho water users rather than other Utah water users.

Public Access to Private Stream Beds - This issue was hotly debated in last year's Session and was sent to Interim Study. Several legislators have been working on various approaches to dealing with this issue, which is the result of the Utah Supreme Court's decision in the Conaster case, discussed in earlier editions of this newsletter. Rep. Lorie Fowlke has now filed **H.B. 80** to address public recreational activities on "public waters" over private lands. This bill defines what types of activities are allowed and the conditions and restrictions applicable to those activities, including when the public can leave the water to portage around obstacles, etc. This issue is likely to be a magnet for debate again this year.

BILLS MAKING MINOR CHANGES OR TECHNICAL REVISIONS

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

To view previous newsletters, visit our website www.smithhartvigsen.com

H.B. 33 - Groundwater Recharge and Recovery Act Amendments -

This bill being 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 statute currently only establishes the requirements for beginning this process and this bill adds the necessary provisions for completing the process.

H.B. 34 - Water Storage Projects - This bill, also being sponsored by Rep. Noel, is very similar to H.B. 33 but applies to large storage reservoirs (with a capacity of 1,000 acre-feet or more). This bill 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.

H.B. 69 - Repealer of State Engineer's Duty to Plug Certain

Artesian Wells - This bill was requested by the State Engineer and is being 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.

H.J.R. 1 - Constitutional Amendment to Allow Limited Leasing of Municipal Water Right -

Rep. Kay McIff is proposing 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.

S.B. 20 - Local District Amendment - Sen. Dennis Stowell is proposing to allow local districts to create and implement groundwater management plans as an alternative to groundwater management plans created and implemented by the State Engineer. This gives more local control and self governance where groundwater supplies are in need of management but they still require the approval of the State Engineer to ensure that the requirements of U.C.A. 73-5-15 are being met.

BILLS THAT MAY SURFACE DURING THE SESSION

Change Applications - The State Engineer requested that the scope of his review of historical beneficial use in acting upon change applications be more clearly defined by statute. There are conflicting views 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 developed some proposed language for a bill allowing the State Engineer to approve that portion of the water right which is supported by historic beneficial use and to leave status of the balance of the water right unchanged so that the owner can take

appropriate action to correct any problems. The issue of the level and burden of proof of use or non-use was hotly debated and is not clearly resolved yet. Another side issue that arose focused on who can file a change application. However, the biggest challenge that has arisen to this bill is that the League of Cities and Towns wants to have this and other aspects of the administration of water rights reformed to provide more objectivity and timeliness in the process. Rep. Patrick Painter has opened a bill file on this matter but needs more consensus before he believes it will be a viable bill. Compromise language is being considered by the League.

Shareholder Change Applications - Rep. Painter has also opened a bill file to clarify shareholder rights in the change application process in connections with water rights held by water companies. The Task Force and the Utah Water Coalition have worked on this bill extensively and general agreement has been reached on most points. This bill is intended to clarify the procedures set forth in U.C.A. 73-3-3.5.

Preference for Domestic Water Use - Last year, a bill was passed that repealed a statutory preference for domestic water use that had been on the books since the 1880's. The bill delayed the effective date of the repeal until May of 2010, in order to provide more opportunity to review the issues. The Task Force and the Water Coalition have worked hard on this issue and both groups endorse a bill that would cancel the repeal and would clarify when and how such a preference would be implemented. Rep. Kerry Gibson is the anticipated sponsor of this bill.

Well Driller's Licenses - The Task Force was approached by representatives of the well drilling industry seeking to have pump installers licensed and regulated the same as well drillers, primarily in order to prevent health risks when non-professionals install pumps into wells without properly sanitizing the pumps, pipes and well. The version of this bill approved by the Task Force regulates pump installers generally but allows an exemption for do-it-yourself well owners.

General Adjudication Amendments - The Task Force addressed and approved a proposed bill that would clarify certain notice requirements in the general adjudication process. This bill, if filed, would be a technical amendment bill rather than a substantive policy change. Rep. Painter has opened a bill file for this proposed bill.

Supplemental Water Rights and the Proposed Revision to the Sole Supply Rule

by Matthew E. Jensen

A foundational principle of Utah Water Law is that beneficial use is the basis, measure, and limit of a water right. The concept of duty is implicit in this principle in that there can be only a certain amount of beneficial water use for any particular use. For example, in the Tooele Valley, the irrigation duty is 4 acre-feet of water per acre of land. In other words, the application of water

for irrigation in Tooele Valley in excess of 4 acre-feet per acre would be wasteful, and irrigation of one acre can support only 4 acre-feet of water right.

Often, however, multiple water rights combine to supply a particular beneficial use. When this occurs, the rights are said to be supplemental to each other. In 2006, the State Engineer implemented the supplemental group system to facilitate clarification of supplemental water rights. In essence, the State Engineer gave a unique supplemental group number to each particular beneficial use and linked that number to any water right that may provide water for that use. Typically, the amount of water actually contributed from each water right to the supplemental group was shown as unevaluated. To promote evaluation, the State Engineer began requiring Sole Supply Statements or Group Contribution Forms for most Change Applications. These forms required an applicant to determine how much beneficial use each water right contributes to particular supplemental group and to get signatures from all water rights holders in favor of that allocation. But the process of evaluating supplemental groups is often complicated and expensive, and water rights 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.

The State Engineer's first attempt at formalizing this practice through an Administrative Rule was met with stiff resistance. When Kent Jones became the State Engineer early last year, he commissioned a significant revision of the proposed rule to address the many comments. The revised rule was published in the Utah State Bulletin on November 1, 2009, and the State Engineer held a series of meetings along with the public hearing on the rule. There were again a number of comments to the rule, but the tenor of those comments was generally more positive than before. The Rule could become effective as early as the end of this month.

The revised rule offered solutions for holdouts, allowed for flexibility in administration of the rule where efficiency would be served, and applies to a narrower range of Change Applications. Under the proposed rule, a water right holder must submit a Declaration of Individual Beneficial Use Amounts (the new name for the Sole Supply Statement) in support of only certain Change Applications. For example, if you are only adding a point of diversion to a supplemental group without removing any water right from that group, no Declaration would be required. Thus, a public water supplier such as a city, district, or private water company would essentially be exempt from the Declaration requirement except for the addition of a new water right to their system. Additionally, if a water right holder in the group refuses to agree to the Declaration, a Change Applicant can request that the State Engineer allocate the sole supply through an administrative proceeding. Ultimately, the new rule, while still imposing a significant new requirement on some Change Applications, more fairly allocates that burden and allows means to move a Change Application forward in spite of opposition.

We welcome feedback and questions. Please contact us at info@smithlawonline.com
Or Visit us at www.smithhartvigsen.com

This newsletter and the information provided herein are for informational and/or advertising 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

