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ATTORNEYS AT LAW

WATER & THE LAW

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

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Upcoming Events

Utah Association of Special Districts Annual Convention
Nov. 2, 2011
Layton, UT

For more information click [here](#)

Utah Association of Conservation Districts
Nov. 2-3, 2011
St. George, UT

For more information click [here](#)

Utah Farm Bureau Federation
Annual Convention
Nov. 17-18, 2011
Layton, UT

For more information click [here](#)

Utah Water Users Association
Utah Water Summit
Nov. 29, 2011
Provo, UT

For more information click [here](#)

Greetings!

Welcome to the 2011 Fall 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
Rick Rathbun
Bryan Bryner
Jeff Gittins

A NEW TOOL TO AVOID WATER RIGHTS LITIGATION

By: David B. Hartvigsen

Three years in the making and available for use as of July 1, 2011, water right deed riders can help solve several big problem areas in water right transactions. The problem is that most people don't know that they exist, how to use them, or most importantly, why to use them. There is not room in this newsletter to go in to all of the details, but a general summary should get you pointed in the right direction. For starters, the forms themselves can be found on the Utah Division of Water Rights website at www.waterrights.utah.gov/wrinfo/forms under ownership applications. They are listed as the "Land Deed Addendum" and the "Water Deed Addendum."

What is a deed rider or a deed addendum? It is simply a document that is attached to a deed. It becomes part of the deed and is recorded with it. Under the new law, when a County Recorder records a document with a water rights deed rider attached, the Recorder sends a copy of the deed rider to the State Engineer's office. The State Engineer's office will review the form and the referenced water rights and, if the grantor/seller's name matches the name of the water right

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

utahwaterrights.blogspot.com



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owner on the State Engineer's database and no further clarification of ownership or the water right is needed, then the State Engineer's office will update ownership of the water right (s) on their records without requiring a Report of Conveyance ("ROC"). If the names do not match or additional clarification is needed, the State Engineer will send a letter to the grantee/buyer (because the deed rider gives the State Engineer's office the buyer's address - which they wouldn't have had otherwise) informing the buyer of what is needed to complete the title update process.

If the deed rider is sufficient to replace the ROC, it will save the buyer a lot of money by avoiding the cost of having an ROC prepared (hundreds or thousands of dollars) and the \$40 ROC filing fee. It can also help avoid the possible loss of the water right because of missed deadlines. If a buyer forgets to file an ROC or does not file one in a timely manner, notices of critical deadlines pertaining to the water rights will be sent to the seller instead of the buyer and sellers are notoriously good at ignoring such notices.

Another key function of the deed riders is to help get both the seller and the buyer on the same page with respect to water rights, e.g., agreeing on how much of which use under which water right is being transferred. It also helps them to focus on the issue of appurtenancy of water rights, which passes title of an appurtenant water right to the buyer when the deed is "silent as to water rights" (i.e., no mention of water rights is made in the deed). This law often leads to unintended consequences for both the seller and the buyer.

The loss of a water right in any of these scenarios can lead to conflict and litigation with the other party, professionals involved in the transaction, and sometimes, even the State Engineer. But such conflicts could have easily been avoided by the appropriate use a deed rider.

IS IT TIME FOR BLUE STAKES?

By: J. Craig Smith

As more and more open canals and ditches are replaced with underground pipelines, water users need to be aware of Utah law governing buried utilities. Unlike open canals, ditches and reservoirs, which have historically comprised the bulk of facilities of a mutual irrigation company, buried pipelines are not open and visible. A different set of laws applies to these underground, and often unseen, facilities.

One such law is found in Chapter 8a of Title 54 of the Utah Code, "Damage to Underground Facilities Act." This Act provides the legal basis for the Blue Stakes program commonly associated with large utilities. While large utilities and municipalities have historically participated in Blue Stakes, many mutual water companies have not. However, Utah law does not exempt mutual water companies from either the Act or participation in Blue Stakes. An "operator" is the term used in the Act for owners of underground facilities. An operator is defined as "a person or entity which owns, operates, or maintains an underground facility." Utah Code Ann. § 54-8a-2(10). This definition includes mutual water companies. The definition of an underground facility includes a buried water pipeline. Utah Code Ann. § 54-8a-2(14). Municipalities, water districts, and mutual water companies, as well as utilities, all come under the Act if they have buried pipelines that run through property they do not own or control.

The Act is designed to minimize inadvertent damage to underground utilities by excavators. It accomplishes this purpose by requiring excavators to notify of their intent to dig, and allow the operators to mark the location of their underground facilities. The excavator, under the Act, must give 48-hour notice during the business week of its intent to excavate. The operator must, within that period of time, mark the location of its underground facilities. Hand tools only may be used within 24 inches of the marking until the underground facilities are actually located.

Blue Stakes of Utah Utility Notification, Inc. is a statewide association created under Utah Code Ann. § 54-8a-9 to facilitate the exchange of information between operators of underground facilities. Membership and participation in Blue Stakes are voluntary, but Utah Code Ann. § 54-8a-9 provides that if an operator (e.g., owner of an underground pipeline) does not belong to or participate in Blue Stakes, the operator is liable for damages incurred by an excavator who has complied with the Act, and the excavator is not liable for damages caused to the underground facility. This is also important to remember when a water entity is planning to excavate as well.

Water entities with buried pipelines should carefully consider participation in Blue Stakes of Utah. There is, of course, a cost to participate in Blue Stakes. Although Blue Stakes of Utah is a non-profit organization, it must generate revenue to operate. It charges a set-up fee along with a notification fee each time it notifies a participant of a plan to excavate.

Currently, there are 531 Blue Stakes members in Utah. Further information on the Blue Stakes program can be obtained by calling (800) 662-7836 or (801) 208-2101. Blue Stakes of Utah also has a website at www.bluestakes.org. If you have comments or questions, the author can be reached at (801) 413-1600 or jcsmith@smithlawonline.com.

ESTABLISHING CAPITAL RESERVE ACCOUNTS FOR PRIVATE WATER COMPANIES

By: Bryan C. Bryner

The Utah Public Service Commission has recently begun requiring private water utilities to establish special capital reserve accounts to build up reserves for future capital infrastructure repairs and replacements. While these requirements only apply to public utilities regulated by the PSC, the concept applies equally well to mutual irrigation companies and other private water companies. This article will briefly describe the purpose and use of capital reserve accounts, and how they can be implemented.

Over the past few years, the PSC has seen a pattern of private water companies filing requests for rate increases in an attempt to fix major infrastructure and service problems. In nearly all cases, these companies did not have financial reserves on hand to address sudden equipment failures, line breaks, or simply retirement of aging infrastructure. The result has been interruption of safe, reliable, and adequate service to the utility customers. Because financing for private water companies is much more difficult to obtain than for governmental and quasi-governmental agencies, the necessary fixes are usually paid for by high-interest loans, subsidies from willing developers, or costly one-time assessments to the customers.

To prevent this situation from reoccurring, when utilities file rate cases the PSC requires that the rates fund not only ongoing expenses, but also a capital reserve account. The capital reserve account is a restricted, interest-bearing account that typically can only be used for capital replacements and improvements. The account is funded by monthly rates, often with an annual target equal to the annual depreciation expense of the company's capital infrastructure. In this way the companies can build up reserves paid for by the customers, thus eliminating the sudden shock of large special assessments when emergencies occur. While the amount of reserves may not always pay for the entire cost of new equipment, they can help reduce the burden on customers as well as facilitate more favorable loan terms.

While the PSC only requires the establishment and funding of a capital reserve account in new rate cases, all private water companies would be well-served to review their rate structures to see if a rate increase is needed in order to adequately fund a capital reserve account. For utilities regulated by the PSC, this would require approval of the PSC. But for mutual irrigation companies and other private water companies, the rate increase would be accomplished as governed by the companies' bylaws. Each company's situation will likely be different, depending on the age of current equipment, amount of current reserves, the targeted balance in the capital reserve account, and how quickly that target should be reached. But taking the effort now to establish a capital reserve account will help water providers to respond to and prevent major problems in the future, ultimately saving the companies and the customers money.

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