

# 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

### Uintah Basin Water Summit Vernal, UT

February 1, 2011

For more information  
contact Heather Hoyt at:  
or 435-781-5482

[hhoyt@co.uintah.ut.us](mailto:hhoyt@co.uintah.ut.us)

### Rural Water User's Association Annual Conference

Feb. 28-Mar. 4, 2011

St. George, UT

For more information click  
[here](#)

### Utah Water User's Association Annual Conference

March 14-16, 2011

St. George, UT

For more information click  
[here](#)

### Water Law & Policy Seminar March 14, 2011

St. George, UT

For more information contact  
Jack Barnett at:

[jbarnett@barnettwater.com](mailto:jbarnett@barnettwater.com)

or 801-292-4662

## Greetings!

Welcome to the 2011 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

## 2011 Legislative Preview on Water Issues

*by David B. Hartvigsen*

The 2011 Session of the Utah Legislature is set to begin on Monday, January 24, 2010 and runs through Thursday, March 10, 2011. This session appears to be shaping up as a somewhat less controversial and prolific session with respect to water related bills ... but one never knows what kind of legislation may surface for the first time during a session ... so that characterization may be much different at the end of the session. Following the same format we used last year, the proposed water legislation 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 been discussed but not released for public review and which may or may not surface during the session.

## Bills Addressing Significant or Substantive Policy Issues

**S. B. 25 - Lost Water Share Certificates** - Certificates representing shares of stock in water companies often become lost, destroyed, stolen, or can't be located for any number of reasons. This most typically happens when property and interests in water shares are passed from one generation to another upon the death of the parent or grandparent. Most water companies use share certificates as the sole documentary evidence of ownership of the shares. Therefore, when certificates are lost, a serious problem develops concerning who

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[utahwaterrights.blogspot.com](http://utahwaterrights.blogspot.com)



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

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is the rightful owner of the shares. About the only solution available in the past to water companies was to require the person claiming ownership to provide a bond that could be used to reimburse the company for potential liability under future claims by others purporting to be the true owners and alleging that the company has given their shares to someone else. The problem has become worse over time because the value of water stock, and therefore the cost of such bonds, has skyrocketed and bond companies are no longer willing to issue bonds that protect more than a few years into the future.

This bill, sponsored by Sen. Ralph Okerlund, addresses this problem by setting up a new "safe harbor" for water companies and shareholders to use. It provides for published notice to the public and for direct notice to those known to have a possible interest in the shares covered by a lost certificate, such as those who have paid assessments on those shares within the last five years. In general, if no objections are filed with the company within a 60-day period, the company may issue a replacement certificate and both the company and the holder of the new certificate are protected against future claims of ownership of those shares. If an objection is received, the company can either evaluate the claims and take action as it deems appropriate or tell the parties to go have a court settle the dispute. There are more specific requirements and procedures that must be followed, but this is the basic concept. The bill is supported by Water Coalition, the Water Task Force, and the Interim Natural Resources Committee. A full copy of the bill is available at the following website:

<http://le.utah.gov/~2011/bills/sbillint/sb0025.pdf>

### **Bills Making Minor Changes or Technical Revisions**

**S.B. 10 - Local District Amendments** - This bill, sponsored by Sen. Dennis Stowell, makes some corrections to a bill passed last year by Sen. Stowell to allow a local district to acquire water rights in connection with an approved Groundwater Management Plan. This bill provides that the owners of the groundwater rights rather than the owners of the land are the ones that vote on creating this type of local district and are the ones that are assessed by such a district. This bill received unanimous approval from the Interim Natural Resources Committee.

**S.B. 20 - Management of Water Rights Amendments** - This bill, also being sponsored by Sen. Stowell, is related to S.B. 10 and allows a local district created to assist in the development and implementation of a Groundwater Management Plan in a critical management area to hold surface water rights as well as

groundwater rights for groundwater basin recharge purposes. It also provides that the artificial recharging of a groundwater basin in a critical management area is a beneficial use of water. This bill also received unanimous approval from the Interim Natural Resources Committee.

**S.B. 26 - Water Law Modifications** - This bill was requested by the State Engineer and is being sponsored by Sen. Margaret Dayton. It makes the recording of Certificates of Beneficial Use of Water with county recorders optional instead of mandatory. Due to changes in water law over the past few decades, the primary reason for recording the Certificates no longer exists. This bill received unanimous approval from the Interim Natural Resources Committee.

**S.B. 102 - Temporary Water Shortage Emergency - Military Facilities** - This bill, sponsored by Sen. Okurlund, amends the water priorities statute rewritten last year by adding military facilities to the list of water users entitled to a special priority for drinking water, sanitation water, and fire suppression water in times of temporary water shortage emergencies. This bill was not presented to the interim committees or task forces for consideration or action.

**S.B. 105 - Legal Notice Publication Requirements** - This bill, sponsored by Sen. John Valentine, eliminates an exception to the new legal notice law. The new law (enacted in 2009 and amended in 2010) exempted the requirement to publish legal notices in newspaper in First and Second Class counties (i.e., the more populated counties) and provided that they only needed to be published on the new legal notices website. This exception was to take effect on January 1, 2012. If the exception is removed, all legal notices will need to be published as historically required AND on the new legal notices website. This bill is included here because the new law applies to water right notices published by the Utah Division of Water Rights. This bill was not presented to the interim committees or task forces for consideration or action.

**H.B. 39 - Water Rights Amendments** - This bill was requested by the State Engineer and is being sponsored by Rep. Jack Draxler. It makes corrections in subsections 3 and 4 of Section 73-3-18. An incorrect reference to "forfeited" applications is deleted from subsection 3 and an incorrect cross-reference in subsection 4 is changed from Section 73-3-17 to Section 73-3-12. This bill received unanimous approval from the Interim Natural Resources Committee.

### **Bills That May Surface During the Session**

**Change Applications** - For the last three years, the State Engineer has 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 Water Task Force and the Water Coalition did not address the issue during the last interim period, but discussions are proceeding in other arenas and it is unknown when a bill on this issue will surface again.

**Shareholder Change Applications** - Another continuing issue involves shareholder rights in the change application process concerning water rights held by water companies. The Task Force and the Utah Water Coalition both considered this issue during the interim, but no consensus was reached and the Task Force voted to not support any legislation on the issue for this session. However, one or more bills on this topic may still be pursued during this session.

**Other Bill Request Topics** - Rep. McIff has opened a bill file entitled "Recreational Use of Public Waters on Private Property Amendments" presumably to do some fine tuning on this hotly debated issue from the last two sessions. Other more generic bill request titles include "Water Development Amendments," "Water Rights Forfeiture Amendments," and "Water Rights Revisions." This bill files could be filled with bills on any number of water related topics ... or they may just sit dormant during the entire session. Therefore, if you are interested in legislation on water issues, you should remain watchful, even if it does not appear to be the most significant session on water issues at the outset.

## **Two New Rule Changes**

### **"Municipal Use" Rights**

On December 3, 2010, the State Engineer adopted a new policy concern eligibility for "municipal use" water rights. The new policy states:

*It has been the policy of the Division to approve municipal use only for public entities or entities which are contractually obligated with public entities for public water supply service. Applications in the name of other parties with the concurrence of a public entity to whom the water right is to be conveyed have been approved with the condition the application must be conveyed to the public entity and perfected in their name.*

*Current practice is to approve change applications for public entities to municipal use from other uses with a condition which limits the approval to a specific acre foot diversion and depletion quantity related to the historic use and a requirement the public water supplier maintain records of actual diversion and use sufficient to demonstrate depletions associated with use under the application do not exceed the specified depletion limitation.*

*Effective immediately, the entities which qualify for municipal use on application approval are to be expanded from public entities to "Public Water Suppliers" as defined in 73-1-4(1)(b) UCA. Please note this expands the universe of qualifying entities to include private water companies regulated by the PSC and community water systems (normally non-profit corporations) serving at least 100 connections or 200 year round residents which are controlled by the residents they serve. This change in policy will allow these entities to submit applications to cover the universe of uses under the umbrella of municipal use expected in a metropolitan setting without the overhead of change applications for each particular use type, the flexibility of accounting for their uses in terms of diversion and depletion, and submit proof on that basis for uses in their service area. With this new found flexibility these entities must also accept the responsibility to maintain records of diversion and use to demonstrate their compliance with the limitations of their applications and are expected to submit data to the water use program consistent with other public entities which are now reporting.*

This is a policy change we and others requested on behalf of the larger private water companies supplying water to the public, the same as governmental entities. The private companies, however, had to go through all sorts of hassles with the State Engineer's Office in order to do change applications and proofs. They would have to guess in advance, e.g., at the beginning of a change application, how many lots would be served, the size of the lots, the size of the homes and hard top surfaces, the size of the irrigation surfaces, the number of cats and dogs and other pets or livestock, etc. Then, at the proof stage, they have to survey or measure all of the same. Then, if they guessed wrong in the beginning, they would have to start over with an amendatory change. Then, technically, they have to monitor usage, and if it varies from the approval or certificate (such as a store's commercial use being converted to industrial use), they would have to file another change application so that they are not subject to an enforcement action for using a water right in violation of its approved uses.

With the passage of HB51 a few years ago, a definition was put in place that better identifies systems that actually serve the public as compared to developer-run systems. The "Public Water Supplier" definition added to Section 73-1-4 by HB51 includes: (1) government owned systems; (2) systems regulated by the PSC; and (3) "community water systems" (a Drinking Water Act definition) serving at least 100 year-round connection or 200 year-round residents AND whose voting customers own a share of the system, have the right to receive water based on their shares, and pay based on the amount of water received; and (4) a provision to include one other larger semi-public water users association.

It will be a real operational benefit to many privately owned systems that act and function like government owned systems. It will similarly reduce the workload on the Division of Water Rights in dealing with the issues mentioned above.

### **Historic Property Effect Evaluations**

Under Utah Code section 9-8-404, a state agency is not supposed to approve any undertaking without taking into account the undertaking's possible effects on historic property and providing the state historic preservation officer with a written evaluation any effect the undertaking may have on the historic property. In order to implement this provision, the Utah Division of Water Rights now requires applicants to fill out a Historic Property Effect Evaluation ("HPEE"). An HPEE must be submitted with all applications to appropriate, change applications, exchange applications, well rush letters, well replacements, non-production well authorizations, geothermal well applications, dam applications, and stream gage installations.

The HPEE form can be found online at

[www.waterrights.utah.gov/forms/historicProperty.pdf](http://www.waterrights.utah.gov/forms/historicProperty.pdf) .

Applicants are asked to (1) describe the physical effects to the land will occur to the land surface under the proposed project; (2) describe any historic properties that could be affected by the proposed project; (3) describe any historic property survey that has been conducted at or near the site of the proposed project; and (4) state whether there is a federal or state connection to the proposed project that would require a historic property evaluation. The HPEE form is to be completed by the applicant, but is to be signed by a representative of the Division of Water Rights.

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