

SMITH | HARTVIGSEN <sup>PLLC</sup>  
ATTORNEYS AT LAW

# WATER & THE LAW

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

**Fall Issue 2012**

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## Upcoming Events

Utah Association  
of Special Districts  
Annual Convention  
November 7-9, 2012  
Midway, UT

On Wednesday afternoon, Nov. 7, special training classes are being offered, including training for "records officers" which meets the new 2012 statutory requirements.

For more information click [here](#)

## Greetings!

Welcome to the 2012 Fall Issue 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  
Jeff Gittins

## ***Magna Water Co. v. Strawberry Water Users Association: The Next Chapter in Utah Return Flow Law***

by Matthew E. Jensen

When a water right holder is asked how big his water right is, he will most likely respond by stating the flow or quantity of water that he is allowed to divert under his water right. While this is certainly an important limit to a water right, perhaps more important is the quantity of water that can be consumed under a water right. Most uses of water do not consume the full amount used. For example, the rule of thumb for irrigation is that about half of the water applied to crops is consumed with the other half returning to the natural hydrologic system. Similarly, the rule of thumb for indoor domestic uses is that about 20% of the water delivered is consumed with the remaining 80% returning to the natural hydrologic system. The water that returns to the system is commonly called return flow.

Downstream users' water rights often depend on this return flow making its way back into streams, creeks, rivers, lakes, and aquifers. Conversely, upstream water right holders have every incentive to maximize their use under their water rights, and they have, over the years,

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

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



### 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](mailto:info@smithlawonline.com)

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

**Smith Hartvigsen, PLLC** is located in the Walker Center at: 175 So. Main St., Ste. 300, Salt Lake City, UT 84111

explored ways to capture return flow and reuse it. Utah Courts have been faced over the years with the task of balancing these two interests. The general rule is that a water user may capture and reuse return flow as long as the water remains within its control. In the context of irrigation, this often means that it extends only to the property boundary of the original appropriator. Once it passes out of the control of the appropriator, it is available for appropriation and use of others.

While this general rule is accepted for water within a specific drainage or system, there has been no definitive statement from the courts on whether this rule applies to water imported from another drainage. The pending case of Magna Water Company v. Strawberry Water Users Association addresses this issue. In that case, Magna Water Company and South Farm, LLC, claim that the general rule discussed above applies equally to imported water. The other parties, including the State Engineer, CUWCD, Strawberry Water Users, Strawberry High Line Canal, and the federal government, claim that the party that imported the water should have the ability to recapture return flows after it has comeled with the natural hydrologic system.

This past summer, the Utah Court of Appeals issued an opinion that will allow a decision on this issue. Strawberry Water Users and others claimed that Magna Water Company and South Farm, LLC, did not have enough at stake in this issue to be parties to the case. The Court of Appeals decided that this was an issue of such public importance that Magna Water and South Farm could continue as parties under an alternative standing. The case will now return to the district court for additional discovery and ultimately a decision on whether water importers have special rights to return flow. There are policy considerations that cut both way in this issue, but one thing is clear, the effect of the ultimate decision will have a significant impact on water reuse in the state.

The author represents Magna Water and South Farm in the discussed case. If you would like more information about the law of return flow or how this case will shape that law, you may contact the author at 801-413-1600 or [mjensen@smithlawonline.com](mailto:mjensen@smithlawonline.com).

## ***Stern v. Metropolitan Water District of Salt Lake & Sandy***

**By Jeffrey R. Gittins**

A few months ago, the Utah Supreme Court issued its ruling in *Stern v. Metropolitan Water District of Salt Lake & Sandy*. This case relates to the Point of the Mountain Aqueduct ("Aqueduct") that was constructed by Metropolitan Water District of Salt Lake & Sandy ("Metropolitan Water"), specifically to the portion of the Aqueduct that was constructed in the old easement for the Draper Canal.

The Draper Canal ("Canal") was constructed in the early 1900s by Utah Lake Irrigation Company ("ULIC"). Rights to construct the Canal across private property were obtained from property owners by voluntary transfer (i.e., deed) or by condemnation judgments. Some of the deeds and judgments referenced that the easement would be used for "canal purposes only." Shortly after its construction, the Canal was conveyed to Draper Irrigation Company. For decades, Draper Irrigation used the Canal to convey irrigation water to its shareholders. Over the years, the canal was also used by Salt Lake County and then Draper City for storm water purposes. In the 1990s, Draper Irrigation Company piped much of its water distribution system and ceased using the portion of the Canal at issue in this case. In 2001, Draper Irrigation Company conveyed the Canal to Draper City so that it could be used for storm water purposes as well as a public trail. Soon afterward, Metropolitan Water negotiated with Draper City to construct the Aqueduct in the Canal easement. The Aqueduct was buried, but some cement structures rose above ground. The Aqueduct transports culinary water to Salt Lake City and others in the Salt Lake Valley.

Four landowners whose property borders the Aqueduct brought suit, alleging that the construction of the Aqueduct exceeded the scope of the Canal easement. The landowners also alleged that the Canal easement had been abandoned. The district court ruled in favor of Metropolitan Water, and the landowners appealed to the Utah Supreme Court.

The Court first examined the portion of the Canal that had been acquired by a stipulated judgment of

condemnation. The landowners asserted that the only property interest that ULIC could have obtained through condemnation was an easement interest, and not fee simple ownership. The Court concluded, however, that because it was a stipulated judgment of condemnation, and not a contested judgment, there was no reason why ULIC could not have obtained fee simple ownership of the property. Thus, the Court concluded that Draper City owned the land, and could allow the Aqueduct to be constructed on it.

The Court then examined another portion of the Canal that had been acquired by deed. The landowners asserted that these deeds from their predecessors-in-interest to ULIC conveyed only an easement right and not fee simple ownership. The Court disagreed, and held that the deeds did pass fee simple ownership because the deeds used the phrase "conveys and warrants," which demonstrates intent to pass ownership and not just grant an easement. The Court did hold, however, that the language in the deed limiting use to "canal purposes only" was a covenant that ran with the land.

The Court then had to determine the scope of the "canal purposes only" limitation and determine whether it prohibited an enclosed and buried pipeline to convey culinary water. The Court first determined that "canal purposes" could include conveyance of culinary water. This determination was based largely on the fact that in the early 1900s, canals were used to convey water used for domestic and culinary purposes. The Court then determined that an open canal could be enclosed. This determination was based largely on prior Utah cases that allow ditch and canal owners to improve their methods of conveyance, provided that the improvements are reasonable and do not materially alter the burden on the land. Finally, the Court determined that district court had failed to apply the standard regarding reasonableness and material alteration of the burden. Accordingly, the Court remanded the case to the district court for additional proceedings on the issues of whether Metropolitan Water's improvements related to the Aqueduct were performed reasonably and whether the improvements materially altered the burden on the land.

In a final note, the Court upheld the district court's conclusion that Draper Irrigation had not abandoned the Canal easement. The Court specifically noted that even when Draper Irrigation had ceased using the Canal to

convey irrigation water, the Canal was still being used to convey storm water.

## **Blue Stakes of Utah: Helping Operators of Underground Utilities (That's You Water Companies) Manage Liability**

**By: Graham Gilbert**

The Utah Damage to Underground Utility Facilities Act (Facilities Act) requires excavators to communicate with operators of underground facilities prior to commencing excavation. The Act circularly defines an excavator as a person or entity who conducts excavation. And it broadly defines excavation as an operation that moves material at or below ground. On the other hand, the Act defines an operator as a person who owns or operates an underground facility, including buried water pipelines. Pursuant to the Act, excavators must notify operators in the area of excavation prior to breaking ground. Upon receiving notice of proposed excavation, operators must either mark their underground facilities or notify the excavator that the operator does not own underground facilities in the area. By complying with the Act, operators avoid liability for damage caused by excavators.

The Act permits operators to form an association. The Act suggests that, once an association is formed, membership is mandatory, although it is not clear on this point. The Blue Stakes of Utah Utility Notification Center, Inc. program is a statewide association of operators created pursuant to the Act. Blue Stakes streamlines communication between excavators and operators because excavators can comply with the Act by providing notice to the association, instead of to individual operators. Blue Stakes forwards notices to member-operators in the area of proposed excavation.

Potential liability for operators of underground water pipelines is illustrated by a recent lawsuit filed by an excavator against an irrigation company. The excavator alleges that the irrigation company is liable for damages that resulted after the excavator struck an unmarked underground water pipeline. The excavator notified Blue Stakes prior to commencing excavation, but the irrigation company was not a

member of the association and neither received notice nor marked any of its facilities. The lawsuit is still in its early stages, and it remains unclear whether the irrigation company was required to become a member of Blue Stakes or whether the damaged pipeline belonged to the irrigation company.

What is clear is that water pipeline operators may limit their liability for damage caused by excavators if they join Blue Stakes and properly mark their facilities when notified of proposed excavation. We encourage water companies and other underground pipeline operators who are not already members to contact Blue Stakes to learn more about the program. Blue Stakes' member coordinator, Sherrie Bowman, may be contacted at 801-208-2113.

## **Water Shares for Sale**

### Sanpete County

=Cedar Creek Tunnel Irrigation Co.

183 shares (30% of the total shares of the company)  
(Point of Diversion in San Rafael River basin with Place of Use in Sanpete County. Trans-basin diversion)

### Salt Lake County

=South Jordan Canal Co.

10 shares

### Utah / Salt Lake Counties

=Utah & Salt Lake Canal Co.

108 shares, 12 shares, 4 shares

=Utah Lake Distribution Co.

56 shares, 86 shares

=Welby Jacob Water Users Co.

10 shares

## **Water Rights for Sale**

### Utah County

=51-7221

18 acre-feet used for irrigation. Additional water is also available.

### Carbon County

=91-94

0.15 cfs / 72.4 acre-feet used for mining (Gordon  
Creek water)

=91-330

0.557 cfs / 252.35 acre-feet used for mining (Gordon  
Creek water)

=91-353

0.015 cfs / 3.62 acre-feet used for mining (Gordon  
Creek water)

Grand County

=92-668

595.8 acre-feet used for irrigation (Green River water)

## Water Rights for Lease

Dagget County

=41-3470

8,000 to 11,832 acre feet used for municipal

We welcome feedback and questions. Please contact us at [info@smithlawonline.com](mailto:info@smithlawonline.com)  
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