

WATER & THE LAW

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Spring Issue 2012

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Upcoming Events

**ABA Environmental Law
Annual Conference
March 22-24, 2012
Salt Lake City, UT**

For more information click
[here](#)

**Northern Utah Mini Water
Conference
March 28, 2012
USU Innovations Campus
North Logan, UT**

For more information contact
Bob Fotheringham at:
435-755-1854 or
bob.fotheringham@
cachecounty.org

**Water Rights Sales
and Transfers
April 4, 2012
Salt Lake City, UT**

Lorman Education Services
David Harvigsen &
Matthew Jensen, speakers
For more information click
[here](#)

**Water Environment
Association of Utah
Annual Conference
April 17, 2012
St. George, UT**

Greetings!

Welcome to the 2012 Spring 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
Bryan Bryner
Jeff Gittins

2012 Legislative Update on Water Issues

by Matthew E. Jensen

Post-Session Update from the 2012 Legislature

The 2012 General Session of the Utah Legislature ran from Monday, January 23, 2012 through Thursday, March 8, 2012. Because of an apparent bottleneck in legislative research and drafting, many of the proposed bills got a late start during the session or were never actually released. This legislative preview is divided into four groups: (1) bills addressing significant policy issues; (2) bills proposing technical or minor revisions, refinements, and/or clarifications to the existing laws; (3) bills that did not receive major opposition but did not pass this year because the session ended before they could make it through both the House and Senate, and (4) bills or topics that will likely be referred to interim study for consideration next year.

Bills Addressing Significant Policy Issues

1. [H.B. 127 - Navajo Water Rights Negotiation Account](#), Representative Christine F. Watkins

The State Engineer has worked hard to negotiate a settlement with the Navajo Tribe on its entitlement for Colorado River water out of Utah's allocation. The anticipated settlement involves allocation of funds to, in connection with the federal government, provide water infrastructure to the tribe. This bill begins the process of setting aside funds for that purpose. This bill passed both the House and Senate, is being enrolled, and awaits signature by the Governor.

For more information click [here](#)

**American Water Resources
Association
Utah Section
Annual Conference
May 8, 2012
Salt Lake City, UT**
For more information click [here](#)

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about water law in Utah, visit
our water blog at

utahwaterrights.blogspot.com



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2. H.B. 485 (first substitute) - Change Application Amendments, Representative Ryan D. Wilcox

In response to the Salt Lake City v. Big Ditch Irrigation Co. case discussed below, this bill amends Utah Code section 73-3-3 to require that a change application on a water right owned by the federal government as part of Bureau of Reclamation project must be signed by both the federal government and the local sponsor of that project. This bill passed both the House and Senate, is being enrolled, and awaits signature by the Governor.

3. S.B. 11 - Department of Environmental Quality Boards Adjudicative Proceedings, Senator Margaret Dayton

This bill creates a distinct type of review proceedings for permits decisions made by five divisions within the Department of Environmental Quality (i.e., Water Quality, Drinking Water, Air Quality, Radiation Control, and Solid & Hazardous Waste). S.B. 11 provides that a permit order may be reviewed by an administrative law judge (ALJ) on the record. Specifically, only issues raised in the initial permit review process may be addressed on review. The ALJ submits a proposed order to the relevant board, which then makes the final decision on the review. The Board's decision can then be appealed to the Court of Appeals for a review of the decision on the record. S.B. 11 passed both the House and Senate, is being enrolled, and awaits signature by the Governor.

4. S.B. 21 (first substitute) - Department of Environmental Quality Boards Revisions, Senator Margaret Dayton

This bill, also sponsored by Senator Dayton, revises many attributes and powers of the various boards associated with the Department of Environmental Quality (DEQ). Specifically, the bill assigns executive functions to the division directors rather than the boards and limits the function of the boards to policy making. It also changes the composition of the boards and identifies qualifications of individual members. It requires compliance with attendance and conflict of interest standards. And it transfers some powers and duties previously assigned to the boards to the respective directors of the division in DEQ. This bill is almost 200 pages long and represents a significant shift in how decisions are made within DEQ. This bill was passed by the Senate, amended and passed in the House, and the Senate then concurred with the house amendments. S.B. 21 (first substitute) is being enrolled and awaits the Governor's signature.

5. S.B. 134 - State Water Development Commission Amendments, Senator Margaret Dayton

This bill converts the Water Development Commission into a permanent legislative task force or commission that addresses water needs of the state. The number of members on the Commission from the Legislature is increased, and the non-legislative members of the commission no longer have voting rights. This bill passed both the House and Senate, is being enrolled, and awaits signature by the Governor.

Bills Making Minor Changes or Technical Revisions

1. H.B. 153 - Diversion of Water, Representative Joe Briscoe

This bill amends section 73-3-20 to allow small exchange applications that have lapsed to be reinstated with a later priority date in certain circumstances. This bill essentially tracks the changes that were made last year for small change applications. This bill passed both the House and Senate, is being enrolled, and awaits signature by the Governor.

Uncontroversial Bills That Did Not Pass Because the Session Ended

1. H.B. 368 - Abandonment or Forfeiture of Water Rights, Representative Brad J. Galvez

This bill amends section 73-1-4 to remove an unintended forfeiture exemption for the sometimes-decades-long period between when the State Engineer issues a proposed determination and when a final decree is issued by the court. It also prevents the State Engineer from asserting forfeiture in a proposed determination for periods ending more than fifteen years before the date of the proposed determination and prevents a forfeiture challenge by anyone to a water right included in the proposed determination based on pre-proposed determination nonuse unless the challenge comes in the form of a timely objection to the proposed determination. This bill passed the House with little opposition and was on the Senate Second Reading Calendar when the session ended.

2. H.B. 369 - Adjudication of Water Rights, Representative Joe Briscoe

This bill amends sections 73-4-3, -4, and -11 to provide that notices in general adjudications are to be completed by the Division of Water Rights rather than the court clerk. It also allows for electronic service of Water Users Claims and the Proposed Determinations in certain instances. This bill passed the House with little opposition and was before the Senate Rules Committee when the session ended.

3. H.B. 458 - Wastewater System Amendments, Representative Patrick Painter

This bill was a cleanup bill requested by Walt Baker, Director of the Division of Water Quality. It repeals a couple of sections related to negotiating loan funds for municipal sewage treatment facilities because those sections were no longer necessary. This bill passed the House with little opposition and was before the Senate Rules Committee when the session ended.

4. H.B. 486 - Water and Irrigation Amendments, Representative Neal Hendrickson

This bill (a) amends section 73-2-1 to make rulemaking related to sewage effluent reuse discretionary for the State Engineer, (b) amends section 73-2-22 to update the name of the Emergency Management Administration Council, (c) amends section 73-3-12 to further define how the State Engineer should assess proof

extensions for wholesale electrical cooperatives beyond fifty years, (d) amends section 73-3-16 to remove the requirement that a submission of proof have both a professional engineer stamp and a notary stamp, and (e) amends section 73-5-13 to require only that a diligence claim be prepared by a professional engineer or licensed surveyor rather than require a verification under oath. This bill passed the House with little opposition and was on the Senate Second Reading Calendar when the session ended.

Bills or Topics that Will Likely Be Studied in Interim

H.B. 67 - Storm Water Capture Amendments, Representative Fred Cox. The third substitute of this bill seeks to amend Utah Code section 73-2-25 to prevent enforcement actions by the State Engineer for detention of water for storm water purposes. The bill also sought to amend the rain water harvesting section, Utah Code section 73-3-1.5, to allow capture and use of water from as much as two 100-gallon tanks without registration with the State Engineer, and to allow capture and use of water from a maximum 2500-gallon tank (or multiple tanks totaling no more than 2500 gallons) after registering with the State Engineer. The third substitute of this bill passed the House, but has not yet passed the senate. Late in the process it was discovered that part of the motivation for this bill may have been to allow for development approvals without water rights, so it remained on the Senate Second Reading Calendar when the session ended.

H.B. 174 - Sales and Use Tax Allocation for Water Resources Construction Fund, Representative Patrick Painter. This bill sought to allocate 15% of the otherwise unappropriated growth in revenue from sales and use taxes to fund the Water Resources Construction Fund. This fund would be used to fund water projects, including the Lake Powell Pipeline. This bill was given a favorable recommendation by the House Revenue and Taxation Committee during this session, but did not go to a vote on the floor of the House. It will likely be a topic of discussion during interim.

H.B. 288 - Impact Fee Amendments, Representative Michael Morley. This bill proposed additional application of the impact fees act to private water companies, including secondary water companies. There was some discussion of providing a specific exemption for sales of water shares, as a result, this bill was circled on the Senate Second Reading Calendar when the session ended.

H.B. 412 - Voting Shares Assessments, Representative Patrick Painter. The text for this bill was not made public, but the concept, which will be studied in the interim, is that a company must allow for one vote per share or face limitations in assessing shares with limited voting rights.

S.B. 78 - Water Conservancy District Amendments, Senator John Valentine. This is another in a series of bills over the years that have attempted to removed taxing authority from certain types of districts. This iteration sought to strip taxing authority from three conservancy districts. As a result of concern from the water community, the bill was converted to an interim study bill that will be studied by the Revenue and Taxation Interim Committee.

S.B. 187 - Forfeiture of Water Rights, Senator Ralph Okerlund. For the last four 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. This past summer, as further discussed below, the Utah Supreme Court issued the Jensen v. Jones opinion that concluded that the State Engineer lacks authority to consider nonuse of a water right when ruling on a change application. As a result, the Water Coalition and Executive Taskforce recommended approval of a bill that would give the State Engineer statutory authority to consider nonuse and deny or limit a change application if there is nonuse. The proposal would also institute a framework that gives the applicant additional notice and protections in the event that nonuse is an issue. The bill also proposed to address the Salt Lake City v. Big Ditch Irrigation Co. opinion, further discussed below, that determined that a water user may be able to file a change application on a water right even if he is not the record owner of the right. As a result, the bill also proposed an amendment to allow a change application to be filed only by (1) the record owner of the right, (2) one who has permission from that record owner, or (3) a water company shareholder under Utah Code section 73-3-3.5. The text for this bill was not released until late in the session, and Senator Okerlund elected to refer these proposed changes to interim study rather than pursue the bill.

S.J.R. 3 - Master Study Resolution. The Master Study Resolution provides for study of changes to water rights (S.B. 187), groundwater transfers between basins, assessing shares of stock by a water company in proportion to the voting rights of the shares, and the proper allocation of water costs to the rate structure charged for water customers (S.B. 781S).

The Water Rights Title Committee

Jeff Gittens, an associate attorney at Smith Hartvigsen, has been asked to serve on the Water Rights Title Committee, which is a group of professionals (attorneys, engineers, title agents, and land surveyors) who meet and confer with the Utah Division of Water Rights on water right title issues. The Committee's mission statement provides that: "The Committee's purpose is to explore and advocate for improvements in the water right conveyance and record updating process, which will encourage reliable and current agency ownership records." The Committee will meet three to four times per year to review and recommend improvements to Utah statutes, codes, and rules with respect to water right title issues.

We welcome feedback and questions. Please contact us at info@smithlawonline.com

Or Visit us at www.smithhartvigsen.com

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