

WATER & THE LAW

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Winter Issue 2012

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Upcoming Events

**Uintah Basin Water Summit
Roosevelt, UT
February 8, 2011**
For more information
contact Duchesne County
Chamber of Commerce at:
435-722-4598
or 435-722-4997

**ABA Water Law Conference
Feb. 22-24, 2012
St. George, UT**
For more information click
[here](#)

**Rural Water User's
Association Annual
Conference
Feb. 27-Mar. 2, 2012
St. George, UT**
For more information click
[here](#)

**Utah Water User's
Association Annual
Conference
March 12-14, 2012
St. George, UT**
For more information click
[here](#)

Water Law & Policy Seminar

Greetings!

Welcome to the 2012 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
Rick Rathbun
Bryan Bryner
Jeff Gittins

2012 Legislative Preview on Water Issues

by Matthew E. Jensen

The 2012 General Session of the Utah Legislature runs from Monday, January 23, 2012 through Thursday, March 8, 2012. As a result of some major water-related decisions this past summer from the Utah Supreme Court, there will likely be some significant water bills considered during the session. Because of an apparent bottleneck in legislative research and drafting, many of the proposed bills have not yet been formally processed and do not have a bill number assigned. As the bill numbers become available, check back at www.smithhartvigsen.com for updates. The following legislative preview is divided into three groups: (1) bills addressing significant 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 Policy Issues

S.B. 11 - Department of Environmental Quality Boards Adjudicative Proceedings - This bill, sponsored by Senator Margaret Dayton, 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.

**March 12, 2012
St. George, UT**

For more information contact
Jack Barnett at:
jbarnett@barnettwater.com
or 801-292-4662

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

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

utahwaterrights.blogspot.com



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if you would like to see
something discussed in the
future, please let us know
by sending an e-mail to
info@smithlawonline.com

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www.smithhartvigsen.com

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The Natural Resources, Agriculture, and Environment Interim
Committee recommended passage of this bill.

S.B. 21 - Department of Environmental Quality Boards Revisions -
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. 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 currently 187 pages long and
represents a significant shift in how decisions are made within DEQ.
The Natural Resources, Agriculture, and Environment Interim
Committee recommended passage of this bill.

H.B. 67 - Stormwater Capture Amendments - This bill, sponsored by
Rep. Fred C. Cox, amends Utah Code section 73-3-1.5, the
rainwater harvesting section, to allow for beneficial use of up to
2,500 cubic feet per parcel (18,701 gallons or 0.057 acre-feet) of
water without a water right if the primary purpose of capturing the
water is stormwater management or pollution control. A person
must first submit a simple form to the State Engineer before
beneficially using any captured precipitation. This bill was
somewhat of a surprise to the water community and was not
discussed by either the Water Coalition or the Executive Water
Taskforce.

Bills Making Minor Changes or Technical Revisions

Water and Irrigation Amendments - This bill, which has not yet
been made public, will be sponsored by Rep. N. Hendrickson, and is
believed to effect a number of largely technical changes proposed
by the State Engineer including the following: (1) an amendment of
section 73-1-4 that removes a virtual 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; (2) an amendment of section 73-2-1 that makes
rulemaking related to sewage effluent reuse discretionary for the
State Engineer; (3) an amendment of section 73-2-22 that updates
the name of the Emergency Management Administration Council;
(4) an amendment of section 73-3-12 to further define how the
State Engineer should assess proof extensions for wholesale
electrical cooperatives beyond fifty years; (5) an amendment of
section 73-3-16 that removes the requirement that a submission of
proof have both a professional engineer stamp and a notary stamp;
(6) an amendment of section 73-3-20 that allows small exchange
applications that have lapsed to be reinstated with a later priority
date; and (7) an amendment to sections 73-4-3, -4, and -11 that
provides that notices in general adjudications be completed by the
Division of Water Rights rather than the court clerk.

Bills That May Surface During the Session

Change Applications I - 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, 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 have recommended approval of a bill that will give the State Engineer statutory authority to consider nonuse and deny or limit a change application if there is nonuse, using a framework that gives the applicant additional notice and protections.

Change Applications II - During 2011, the Utah Supreme Court issued the Salt Lake City v. Big Ditch Irrigation Co. opinion 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 Water Coalition and Executive Taskforce have recommended approval of a bill that will 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. This proposed amendment will likely be considered as a consolidated bill with the amendment discussed above as Change Application I.

Change Applications III - As an additional response to the Salt Lake City v. Big Ditch Irrigation Co. case, there has been a proposal to amend 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.

State Water Development Commission Amendments - This bill, which has not yet been made public, will be sponsored by Senator Margaret Dayton, and is believed to seek conversion of the commission into a permanent legislative task force or commission that addresses water needs of the state.

Other Bill Request Topics - Navajo Water Rights Compensation Account (C. Watkins), Safe Drinking Water Disclosure Act (R. Barrus), Special District Amendments (J. Stevenson)

Are You Ready for the Canal Safety Plan Deadline?

In response to the tragic loss of life when a landslide breached the Logan & Northern Canal in Logan on July 11, 2009, the Utah State Legislature passed two canal safety bills - 2010 House Bill 298, Land Use Authority Notification of Canal Development, and 2010 House Bill 60, Water Conveyance Facilities Safety Act (Act). The Utah Association of Conservation Districts (UACD) has helped the Logan & Northern Irrigation Company (LNIC) and the Logan, Hyde Park and Smithfield Canal Company (which is allowing LNIC to use part of its canal to get water around the breach) complete a joint Safety Plan on their canal systems. Though a confidential and protected document under the Act, it follows the template plan that is now available to all irrigation companies through UACD and the Utah Division of Water Resources (DWRe).

The purpose of House Bill 298 was to ensure that residential construction projects within close proximity to a canal do not

proceed until the canal owner has been given an opportunity to review the project. Thus the canal owner can protect the integrity of the canal system and assist homeowners and developers to safeguard adjacent water structures. Canal owners had until July 1, 2010 to provide a general description of their canal, including contact information, to each county or municipality in which the canal operates. If you haven't provided this information yet, the sooner the better, because a homeowner or developer could argue that damages or losses could have been avoided if this information had been timely provided.

The purpose of House Bill 60 was to encourage canal owners to identify the risks associated with their canal systems and to develop solutions to reduce or eliminate those risks. This information is to be documented in a Water Conveyance Facility Safety Management Plan ("Safety Plan") by no later than May 1, 2013. As a means of promoting compliance with the Act, DWRe may only provide financial assistance to canal companies that have met this deadline, with some limited exceptions. If your canal company has not yet started on the inspections needed for the Safety Plan, you should be including funding in this year's budget and assessments to get that work done because this summer is the last summer before the deadline to do the inspections and field work. It is very difficult to assess site conditions and certain of the risk factors when the canal is under a blanket of snow.

In January 2011, UACD partnered with various state, federal, and private organizations, including the Strawberry-Highline Canal Company, DWRe, and the U.S. Bureau of Reclamation, to produce a Safety Plan template. Canal companies can use this template as they develop their own Safety Plan. The template, as well as the full text of House Bills 60 and 298, are available online at: <http://www.water.utah.gov/WaterConveyance/default.html>.

The main canal risk factors that must be addressed in the Safety Plan are slope instability and storm water. Subsection 4 of House Bill 60 places the responsibility on the municipalities to identify storm water inlets into canals and estimate the maximum flow that could occur at each inlet. As canal companies have sought to obtain this information from local governments, it has become apparent that many cities do not have accurate data nor up-to-date maps of their storm water drainage systems. On canals with multiple storm water inlets, canal operators have faced the task of balancing water levels so that there was adequate capacity for storm water each time a large rainfall occurred. However, city governments and canal companies have begun to work more closely together for comprehensive storm water management.

A water company may be exempt from the requirement of adopting a Safety Plan depending on the type of water conveyance facility owned by the company. Natural channels and pipelines are not considered water conveyance facilities according to House Bill 60. In addition, since the bill was meant to address the risks to population and infrastructure, canals that don't have any potential risk locations may also be exempt. A potential risk location is defined as a segment of a water conveyance facility that, if it were to fail, would create a high probability of causing loss of human life or extensive damage to infrastructure. To determine if their canals

have potential risk locations, canal companies must consider the following parameters: location, elevation, soil conditions, structural instability, water volume or pressure, or other conditions. Each parameter must be evaluated in relation to existing and future urban development.

As water companies continue to implement House Bill 60, there will be additional issues and concerns that come forth. A recent request was made to DWRe to consider different canal systems within a single company as separate entities. The canal company determined that one canal system had no potential risk locations and was therefore exempt from adopting a Safety Plan, even though other canal systems owned by the company, once they have been fully evaluated, may still require the adoption of a Safety Plan. DWRe will evaluate these types of requests on an individual basis.

This article was a joint effort by Gordon Younkens (435-753-6029 x31) and Kerry Van Dyke (435-637-0041 x103) of UACD, Eric Millis (801-538-7230) and others at DWRe, and David Hartvigsen of Smith Hartvigsen, PLLC (801-413-1600). If you have questions, please feel free to contact any of these authors.

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