

WATER & THE LAW

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Spring 2013 Issue

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Upcoming Events

Water Law & Policy Seminar
March 17, 2013
St. George, UT
For more information contact Donna Keeler at:

Greetings!

Welcome to the Spring 2013 Issue of *Water & 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.

Smith Hartvigsen, PLLC

News Flash on the Demise of Senate Bill 109

By David B. Hartvigsen

The 2013 General Session of the Utah Legislature ended just a few hours ago. One of the most significant bills this session was SB 109 - Change Application Procedure, sponsored by Sen. Ralph Okerlund and Rep. Lowry Snow. In fact, Rep. McCay stated on the House Floor yesterday that this was probably the most important policy decision before the legislature this year. But despite extensive work and debate over the last several years, the final move yesterday was to send it back for more study between now and next session.

You may recall that 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 (that is, his "gatekeeper" role "to keep out bad water rights") be clearly defined by statute. In 2011, the Utah Supreme Court issued the Jensen v. Jones opinion that concluded that the State Engineer currently lacks statutory authority to consider nonuse of a water right when ruling on a change application. As a result, the Water Coalition and Executive Water Taskforce helped prepare a proposed bill in the 2012 session (SB187) that would give the State Engineer statutory authority to act as a gatekeeper and consider the amount of water that is "available to be changed based on use or nonuse." A second Supreme Court decision, in the case of Salt Lake City v. Big Ditch Irrigation Co. raised another issue with the change application process involving who can file a change application. SB187 also addressed this issue. SB187 did not make it through the full legislative process in 2012 and was reincarnated as SB109 in the 2013 session. Another change application bill was introduced in the 2013 session as HB123 by Rep. Kay McIlff. It addressed, among other things, the issue of shareholder rights regarding change applications on water rights held by water companies.

During the course of this year's session, four new versions of SB109 were prepared. The first substitute version added a "swing out provision" for municipalities whereby the municipalities had the

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Association
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March 18-20, 2013
St. George, UT**

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**ABA Environmental
Law Conference
March 21-23, 2012
Salt Lake City, UT**

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**Utah Water Law &
Regulation Seminar
March 22, 2013
Salt Lake City, UT**

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option of having the courts or the Property Rights Ombudsman perform the gatekeeper role of determining whether or not there had been any nonuse. It also gave cities a special process to give them finality of this issue of nonuse so that they could move forward knowing exactly how much water was being dedicated for a specific development project. Substitute #2 refined some of the new concepts added in Substitute #1 and then specified that the special swing out provisions for the municipalities terminated in 2016 at the end of a three-year test period. Substitute #3 merged the shareholder rights provisions from HB123 into SB109. Adoption of Substitute #2 was delayed as Substitute #3 was being developed and before it could be officially adopted, an effort was made to insert an extensive procedure for processing shareholder change applications. This effort resulted in Substitute #4 being adopted yesterday morning in place of Substitute #1.

There are three particularly interesting things about the evolution of SB109, starting with last year's SB187 and ending with Substitute #4. The first is that the gatekeeper authority the State Engineer was seeking was significantly limited. He could look at nonuse only when a change application was protested and then, only if all of the parties agreed to allow him to address the nonuse issue. Otherwise, the issue would be addressed by swinging out to the courts or the Ombudsman and then the parties would proceed with the State Engineer for the rest of the change application process. If the change application was not protested, the State Engineer would not be able to act as a gatekeeper and would have to proceed with the change application without looking at nonuse.

The second interesting thing is that initially members of the House of Representatives felt like they were cut out of the policy making process because they were essentially told that the bill had been through extensive development, negotiations, and review by the water community and therefore the bill (SB109 and Substitutes #1 and #2) shouldn't be changed by the House. Ironically, the same water community felt like they had been cut out of the policy making process by the House because they were not going to get to see Substitute #3, and did not get to see Substitute #4, before being presented on the floor of the House for adoption.

The third item is that through this process, a very detailed and complex proposal evolved ... without review by, and input from, the general members of the water community. The process, though cumbersome, appeared to be generally fair. However, substantial opposition was generated because interested people were not given the chance to be involved in the process.

It appears that these three factors, in some combination or another, doomed Substitute #4 in the waning hours of the session. Substitute #4 was adopted and passed the House late yesterday morning and was sent over to the Senate for the Senate to "concur" with the changes made by the House. It was immediately "circled," or placed on hold, by the Senate. Later in the afternoon, it was uncircled and then the Senate, without debate, refused to accept the House changes. That is, the Senate refused to accept Substitute #4 over Substitute #1 which the Senate had previously approved. When there is a stalemate such as this, a "conference committee" with three Senators and three Representatives is

appointed to try to work out a mutually agreeable compromise. With the few hours remaining in the session, it appears that this conference committee process was not actively pursued and the bill was left to die as the session ended at midnight. One final interesting point is that there does not seem to be anything in the list of issues to be addressed by the legislature during the interim on water rights, change applications, or shareholder rights. So, we may be left with the current status of no State Engineer authority to review non-use for a while.

2013 Legislative Update on Water Issues

By Matthew E. Jensen

The 2013 General Session of the Utah Legislature ran from Monday, January 28, 2013 through Thursday, March 14, 2013. The following bills and resolutions passed both the House of Representatives and the Senate, and in most cases are awaiting signature by the Governor.

H.B. 29 - Adjudication of Water Rights, Representative Joe Briscoe. This bill amends Utah Code sections 73-4-1, -3, -4, -5, -9, -11, and -22. It allows the State Engineer to divide a general adjudication into divisions and subdivisions and conduct the adjudication for each division or subdivision separately. The bill also provides that notices in general adjudications are to be completed by the Division of Water Rights rather than the court clerk, and allows for electronic service of Water Users Claims and the Proposed Determinations in certain instances.

H.B. 36 - Storm Water Capture Amendments, Representative Jim Nielson. This bill amends Utah Code sections 73-2-25 and 73-3-1.5. The bill would prevent enforcement actions by the State Engineer for detention of water for storm water purposes so long as the detention does not interfere with any water right and does not put the detained water to beneficial use. The bill also proposes changes to the rain water harvesting section 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 bill would also clarify that the ability to harvest rainwater consistent with section 1.5 does not constitute a water right and cannot be assigned, consolidated, or be the subject of a change application.

H.B. 72 - Safe Drinking Water Disclosure Act, R. Barrus. This bill requires certain disclosures related to fluoridation of water supplies. It also requires that fluoridation be temporarily discontinued under certain circumstances and requires Utah Division of Drinking Water oversight of fluoridation record keeping.

H.B. 73 - Water Easement Amendments, Representative John G. Mathis. This bill amends Utah Code section 57-13a-104 and would establish a procedure for a holder of a prescriptive easement for water conveyance to abandon all or a portion of its easement. The bill contains notice provisions to ensure that others who may have an interest in the canal easement or in keeping the canal corridor active can take appropriate action. The abandonment would be

subject to others who may have established a right, but if no others exist, then the owner of the underlying property may reclaim the property.

H.B. 166 - Water Rights Amendments, Representative Ken Ivory.

This bill allows a beneficial user of water for livestock on public lands to access and improve public land that has been designated for grazing to use, develop, and maintain beneficial use of water appurtenant to that designated area. Additionally, if the federal government files a diligence claim, the state engineer is obligated to notify the Natural Resources, Agriculture, and Environment Interim Committee of the claim. Finally, the bill requires the Department of Natural Resources to, before November 30, 2013, study the state's jurisdiction over water right conflicts between state or its subdivisions or citizens and the federal government.

H.B. 215 - Water Quality Amendments, R. Wilcox. This bill removes the maximum permit fee allowance for sewage sludge management.

H.B. 326 - Division of Water Rights Amendments, Representative R. Curt Webb. This bill requires the state engineer to consider a recorded water rights deed addendum as a report of water right conveyance. The bill further provides that if a county recorder updates ownership based on a recorded document, the state engineer shall rely on that document to update title to a water right appurtenant to that land. Finally, the bill also requires that, absent clear language in a company's articles or bylaws, the right to use of water evidenced by shares of stock may only transfer under chapter 8 of the Utah Uniform Commercial Code and not as an appurtenance to land.

H.B. 358 - Instream Flow Amendments, Representative Mike Noel.

This bill gives more flexibility for fishing groups wanting to file for an instream flow water right. Specifically, a change application for instream flow may occur if there is a Candidate Conservation Agreement with Assurances or if there is the fishing group as entered into a contract to indemnify the water right holder against any liability under the Endangered Species Act.

H.B. 360 - Water and Irrigation Revisions, Representative Ryan D. Wilcox.

This is a cleanup bill that closes an unintended loophole from a H.B. 51 in 2008. Although H.B. 51 (2008) did provide additional protections against forfeiture, it was not intended to resurrect water rights subject to forfeiture. It arguably allowed a person to do so, however, simply by filing a nonuse application. H.B. 360 clarifies that a nonuse application only prevents the years where the nonuse application is active from being considered in a forfeiture action and does not prevent forfeiture based on nonuse that predated the nonuse application.

H.J.R. 14 - Joint Resolution on Water Rights, Representative Ken Ivory.

This joint resolution expresses concern with actions by the U.S. Forest Service that seek to take control of water rights originating and used on federal public lands and calls on state, county, and local governments "to protect, preserve, and defend their jurisdiction . . . over the water resources of [Utah]."

S.B. 30 - Water and Irrigation Amendments, Senator Margaret Dayton. This bill makes the following amendments: (a) 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, to prevent 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 to prevent 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. (b) Amends section 73-2-1 to make rulemaking related to sewage effluent reuse discretionary for the State Engineer. (c) Amends section 73-2-22 to update the name of the Emergency Management Administration Council. (d) Amends section 73-3-12 to further define how the State Engineer should assess proof extensions for wholesale electrical cooperatives beyond fifty years. (e) Amends section 73-3-16 to remove the requirement that a submission of proof have both a professional engineer stamp and a notary stamp. (f) And amends section 73-5-13 to require that a diligence claim be prepared by a professional engineer or licensed surveyor rather than require a verification under oath.

S.B. 101 - Division of Water Rights Revisions, Senator Margaret Dayton. This bill makes technical revisions to sections 73-3-10, 73-3-18, 73-3-20, and 73-5-13. The most significant changes are that fixed time applications no longer have a proof due deadline, diligence claimants may file an amended diligence claim, and general adjudications can cut off unfiled diligence claims.

S.B. 115 - Water Development Commission Amendments, Senator Margaret Dayton. This bill provides for staggered, four-year terms for appointed nonvoting members of the Commission.

S.B. 276 - Water Conservancy District Capital Assets, Senator John Valentine. This bill enacts Utah Code section 17B-2a-1010, which requires conservancy districts to "adopt a policy for the assessment, maintenance, and replacement of . . . qualified capital assets" and inventory which of its assets are "qualified capital asset [s]."

S.C.R. 8 - Concurrent Resolution for the Provo Reservoir Canal Title Transfer, Senator Margaret Dayton. This resolution calls for transfer of title to the Provo Reservoir Canal from the United States to the Provo River Water Users Association in conformance with the Provo River Project Transfer Act (P.L. 108-382).

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