

# WATER & THE LAW

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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)

or contact one of us directly through the following links:

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## Upcoming Events

**Uintah Basin Water Summit**  
Roosevelt, UT  
February 8, 2011  
For more information click [here](#)

**Rural Water User's  
Association Utah  
Annual Conference**

## Greetings!

Welcome to the Winter 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

## 2013 Legislative Preview on Water Issues

*by Matthew E. Jensen*

The 2013 General Session of the Utah Legislature runs from Monday, January 28, 2013 through Thursday, March 14, 2013. The following legislative preview divides proposed or anticipated bills 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

### **H.B. 36 - Storm Water Capture Amendments,**

Representative Jim Nielson. This bill seeks to amend 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.

Feb. 25-Mar. 1, 2013  
St. George, UT  
For more information click  
[here](#)

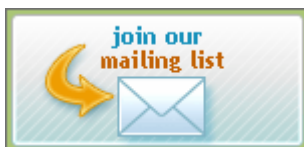
Water Law & Policy Seminar  
March 17, 2013  
St. George, UT  
For more information  
contact Donna Keeler at:  
801-292-4662

Utah Water User's  
Association  
Annual Conference  
March 18-20, 2013  
St. George, UT  
For more information click  
[here](#)

ABA Environmental  
Law Conference  
March 21-23, 2012  
Salt Lake City, UT  
For more information click  
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about water law in Utah, visit  
our water blog at

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



**H.B. 68 - Public Trust Obligations and Constitutional Protections**, Representative Kay L. McIff. This bill would enact Utah Code section 65A-15-101 and -102, and amend section 73-1-1. The bill seeks to define the scope of the public trust doctrine and establish that it may not be used to reduce beneficial use of water. The bill further confirms that an approved appropriation of water is a property right that cannot be taken or damaged by the government without just compensation.

**H.B. 73 - Water Easement Amendments**, Representative John G. Mathis. This bill Utah Code section 57-13a-104, which would establish a procedure for a holder of a prescriptive easement for water conveyance to abandon all or a portion of its easement. 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.

**S.B. 109 - Change Application Procedure**, 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. In 2011, 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 act as a "gatekeeper" and consider the amount of water that is available to be changed based on use or nonuse (i.e., authority to deny a change application or limit the amount of water approved 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 proposes to address 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 bill also proposes 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. There is significant discussion about changes to this bill to allow an applicant to have the district courts assess nonuse rather than the State Engineer.

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

**H.B. 29 - Adjudication of Water Rights**, Representative Joe Briscoe. This bill would amend Utah Code sections 73-4-1, -3,

-4, -5, -9, -11, -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.

**S.B. 30 - Water and Irrigation Amendments**, Senator Margaret Dayton. This bill proposes 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 only that a diligence claim be prepared by a professional engineer or licensed surveyor rather than require a verification under oath.

**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.

### **Bill Requests and Other Bills That May Surface During the Session**

**Bill Request - Modifications to Water Company Share Assessment Act**, Senator Aaron Osmond. This bill is expected to limit a water company to assessing shares in proportion to voting rights of those shares.

**Other Bill Request Topics** - Division of Water Rights Amendments (Representative Webb), Fixed Time Water Rights Application Requirements Amendments (Senator Dayton), Instream Flow Amendments (Representative Noel).

**Other Topics that May Surface** - A bill may be proposed to apply the impact fees act more fully to private water companies, including secondary water companies. There may also be competing bills that address the issues discussed in H.B. 68 and S.B. 109 above.

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