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# WATER & THE LAW

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

## Fall 2014 Issue

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## 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)

or contact one of us directly through the following links:

[Craig Smith](#)  
[David Hartvigsen](#)  
[Jeff Gittins](#)  
[Megan Garrett](#)  
[Adam Long](#)

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

Welcome to the Fall 2014 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

## New Forest Service Hydrology Rules Will Impact Water Users

By J. Craig Smith

The Forest Service is in the process of amending its management of groundwater resources on National Forest System ("Forest") lands. This is important to Utah water users as approximately 80% of all water resources originate on Forest lands. Specifically, the proposed changes will provide change policies on groundwater management agency activities, approvals, and authorizations; establish procedures for reviewing new proposals for groundwater withdrawals on Forest lands; require the evaluation of potential impacts from groundwater withdrawals on Forest resources; and provide for measurement and reporting for larger groundwater withdrawals. The proposed amendments will supplement existing special uses and minerals and geology directives to address issues of groundwater resources management.

This proposed groundwater directive represents a drastic change in the Forest Service's national policy on water management. Utah leaders are among those in Western states who fear a Forest Service proposal will, if adopted, usurp states' historic dominion over water rights and is akin to a water grab by the Forest Service.

The Western Governors' Association has voiced concern over the proposed directive, indicating it believes any formalized policy shift would have "significant implications for our states and our groundwater resources." In its letter to Tom Vilsack, U.S. Secretary of Agriculture (the department that oversees the Forest Service), the association asked that a number of its concerns and questions be addressed, and questioned the legal basis for the directive. The proposal also raised the ire of the 40 members of the Congressional Western Caucus, the American Farm Bureau and the Western States Water Council.

Kent Jones, Utah's state engineer, said he's concerned the proposal, if enacted, would interfere with existing water right approvals. States have historically enjoyed almost exclusive authority over



Groundwater Management both on and off Forest lands: Congress recognized states as the authority over groundwater in the Desert Land Act of 1877, and in 1935 the U.S. Supreme Court reaffirmed that exclusive authority in California Oregon Power Co. v. Beaver Portland Cement, 295 US 142 (1935). However, the proposed directive could be construed to assert Forest Service ownership of state groundwater by use of the phrase "NFS groundwater resources" throughout the document. The document also identifies states merely as "potentially affected parties" and only recognizes states as "having responsibilities" for water resources within their boundaries.

Western Governors are concerned that the Forest Service gives itself authority to place stipulations on proposed actions on Forest lands, based on the water withdrawn under a state water right. These portions of the proposed directive assume that the Forest Service has some type of authority over the management of groundwater, which it does not.

The letter from the Western Governors' concludes: "This proposed directive was developed without any state consultation of which Western Governors' Association is aware. True consultation with the states will help the Service identify and avoid conflicts regarding proposed directives and rules. We invite the USFS to work through Western Governors' Association, the Western States Water Council, and individual states to facilitate dialogue on ways to improve this (and any future) proposed directive."

Hopefully, comments submitted by these and other western water groups will be given real consideration and result in substantive changes to the Directive if and when it is adopted. Until then water users should stay tuned.

## **Southam v. South Despain Ditch Co.**

By Jeffry R. Gittins

The Utah Supreme Court recently issued its ruling in the case of Southam v. South Despain Ditch Company. This case could have significant impact on how water companies are allowed to regulate and limit share transfers.

This case originates with a share transfer between Jordan School District and Southam's predecessor-in-interest. South Despain's bylaws include restrictions on share transfers, including requirements that (1) South Despain's board of directors must approve all share transfers; (2) a person cannot acquire shares unless they can connect to South Despain's system; and (3) the shares must be sold for a fixed amount of \$1,100 per share. The school district had 23 shares that it no longer needed, and despite being reminded by South Despain of the share transfer restrictions, the school district held a sealed-bid auction for the 23 shares. Two water brokers won the auction with a bid of \$1,945 per share. When the purchasers went to South Despain after the sale, South Despain refused to issue the new certificates to them or to recognize them as shareholders in the company.

This lawsuit ensued. During the course of the litigation, Mr. Southam acquired the water brokers' interest in the shares. The district court ruled in favor of South Despain, and Mr. Southam appealed the decision to the Utah Supreme Court.

In reaching its decision, the Supreme Court relied primarily on a statute contained in the Utah Revised Nonprofit Corporation Act, which provides that "[u]nless otherwise provided by the bylaws, a member of a nonprofit corporation may not transfer (a) a membership; or (b) any right arising from a membership." Because this statute provides that shares in a nonprofit corporation are not generally transferrable unless the bylaws allow share transfers, the Court concluded that restrictions on transfers are not prohibited. Based on this conclusion, the Court summarily dismissed Mr. Southam's arguments that prohibitions on share transfers contradict state policies of beneficial use of water and violate the common law presumption against rules restricting the alienation of real property. Ultimately, the Supreme Court upheld the district court and held that South Despain's restrictions on share transfers are enforceable.

The Court's decision raises issues of concern. For example, the Court's decision seems to signal that water companies can place any restrictions on share transfers, regardless of whether they are legitimate and rational or arbitrary and capricious. Additionally, as pointed out by Mr. Southam, restrictions on share transfers can conflict with principles of free alienation of property and beneficial use of water. Finally, restrictions on share transfers could hamper efforts to put Utah's limited resource of water to its highest and best use. It will be interesting to see if this decision triggers any legislative action during the next session of the Utah Legislature.

You can read the full opinion by clicking [here](#).

## **Public Meeting Concerning the Groundwater Appropriation Policies in Goshen Valley**

The Utah Division of Water Rights has set a public meeting to discuss the appropriation policies and a proposed study in Goshen Valley, Utah County. The following information is from the public meeting notice:

**What:** Public Meeting

**Who:** Water Users in Goshen Valley, Utah County

**When:** December 2, 2014, 4:00 pm

**Where:** Goshen Elementary School, 60 North Center, Goshen, UT 84633

**Purpose:** The purpose of the meeting is to discuss groundwater appropriation policies in Goshen Valley located in southwestern Utah County (part of Water Right Area 53) and to present a proposal for a hydrogeologic study of the area. Personnel from the Division of Water Rights will be available to take all questions and comments provided by the general public and interested parties.

If you are unable to attend the meeting, but would like to provide input, please send your written comments to: Division of Water Rights, 1594 West North Temple, Suite 220, P.O. Box 146300, Salt Lake City, UT 84114-6300

Agenda:

1. Introduction - Kent Jones, State Engineer
2. Groundwater appropriation policies - Teresa Wilhelmsen, Utah Lake/Jordan River Regional Engineer
3. Proposed hydrologic study - Stephan Kirby and Lucy Jordan, Utah Geological Survey
4. Public questions/comments

For more information on the meeting, [click here](#).

**Public Meeting Concerning the Proposed Determination in Moab Area**

The Utah Division of Water Rights has set a public meeting to discuss the proposed determination of water rights within the Taylor Flat Subdivision, Moab Division of Southeastern Colorado River Drainage Area (Area No. 05, Book 3). The following information is from the public meeting notice:

**What:** Public Meeting

**Who:** Water Users within the Taylor Flat Area

**When:** November 18, 2014, 3:30 pm to 4:30 pm

**Where:** Moab City Center, 217 East Center Street, Moab, UT 84532, (435)259-5121

**Purpose:** In accordance with Chapter 73-4, Utah Code Annotated, and the Seventh Judicial District Court (Civil No. 4477), the State Engineer has conducted and distributed a general determination of the rights to the use of all water, both surface and underground, within the drainage area of the Taylor Flat Subdivision, Moab Division of the Southeastern Colorado River Drainage Area in Grand County.

Per statute, the Division of Water Rights will hold a Public Meeting in order to inform water users and distribute copies of the proposed determination to claimants. Representatives from the Division of Water Rights will be available during this time to discuss the adjudication process, review water rights within the proposed determination and answer questions.

If individuals cannot attend, but have questions regarding the adjudication process or water rights within the Taylor Flat Area; please contact Blake Bingham at (801) 538-7345.

Agenda:

1. Introduction - Blake Bingham, P.E., Adjudication Program Manager
2. Adjudication process presentation
3. Public comments and questions

For more information on the meeting, [click here](#).

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