

# WATER & THE LAW

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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)

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## Upcoming Events

**American Water Resources  
Association-Utah  
Special Conference  
May 12-14, 2014**

Welcome to the Summer 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

## 2014 Legislative Summary on Water Related Bills

By David B. Hartvigsen

The 2014 General Session of the Utah Legislature began on January 27th and ended at midnight on March 13th. The last day for the Governor to sign or veto bills was April 2nd, and the effective date for most of the newly enacted bills will be May 13th, unless otherwise noted below. You may click on the underlined bill numbers to access the actual text of the bills. Here is a summary of the water related bills that passed. Often, it is equally important to review those bills that did not pass and discuss the topics that will likely be addressed during "Interim". Those items are also included following the bills that passed, along with a schedule for this year's Interim.

### HB 29 County Recorder Index Amendments, Curt Webb (R)

This bill adds the following duty for County Recorders, i.e., "Each recorder shall: ... (l) keep an indexwater right numbers that are included on an instrument recorded on or after May 13, 2014, showing the date and time of recording, the book and the page or the entry number, and the kind of instrument." This standardizes a practice common in several counties. The recorders are in support of this bill. It should be noted that this bill will, however, only result in the creation of an index for newly filed deeds expressly listing water right number starting on May 13, 2014, and moving forward in those counties that don't already have such an index. Title research for previously filed deeds and for deeds not listing water right numbers will still require searching multiple databases and indices, the same as before.

### HB 370 Canal Safety Amendments, Re. Johnny Anderson (R)

This bill requires the State Engineer to inventory, and maintain a list of, all open, human-made water conveyance systems in the state that carry 5 or more cfs of water. The deadline for this effort is July 1, 2017. The inventory shall include the alignment of the system, owner contact information, the maximum flow capacity of

**Snowbird, UT**

For more information click [here](#)

**American Water Resources Association-Utah**

**Annual Conference**

**May 20, 2014**

**Salt Lake City, UT**

For more information click [here](#)

**Rural Water Association-Northern Utah Conference**

**August 25-28, 2014**

**Layton, UT**

For more information click [here](#)

**Utah League of Cities & Towns Annual Conference**

**September 10-12, 2014**

**St. George, UT**

For more information click [here](#)

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

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



the system, whether the system is used for flood or storm management, and whether a canal safety/management plan required by U.C.A. 73-10-33 has been adopted. The bill requires system owners to notify the State Engineer if any of the inventory information concerning their system changes. It also allows the State Engineer to contract with a local conservation district to provide technical support for a canal owner who is in the process of adopting a safety plan.

**SB 17 Water and Irrigation Amendments, Sen Margaret Dayton (R)**

This bill is a "clean-up bill" that makes several small changes to the Utah Water Code which have been recommended by the Executive Water Task Force. First, the bill would expand the State Engineer's enforcement powers by allowing the State Engineer to pursue an enforcement action against a person who violates the law requiring a stream alteration permit for work done in a natural streambed. Second, the bill would require assignments of unperfected water rights to be recorded with the proper county recorder instead of just being filed with the Division of Water Rights. Third, the bill seeks to clarify the criminal penalties for well drillers operating without a current license. Fourth, the bill proposes changes to the statute governing stream alteration permits, including giving the State Engineer authority to issue orders for repair and restoration of streambeds altered without a permit. Finally, the bill proposes technical changes to the statute governing the State Engineer's duties to divide and distribute water.

**SB 274 Water Jurisdiction Amendments, Sen. Margaret Dayton (R)**

This bill addresses federal versus state jurisdictional issues by: (1) removing the requirement that a livestock watering right be acquired jointly by a public land agency and a beneficial user; (2) stating that a public land agency may not condition the issuance, renewal, amendment, or extension of any permit, approval, license, allotment, easement, right-of-way, or other land use occupancy agreement on the transfer of the water right, or a party acquiring a water right on behalf of the public land agency; (3) stating that, among other reasons, a livestock watering right may be considered valid if it is held by a beneficial user who has the right to use the grazing permit and graze livestock on the allotment; and (4) providing that if a reduction in livestock grazing results in a partial forfeiture of water, the state engineer shall hold the appropriated water right in trust until the water can be appropriated for livestock watering.

**SJR 4 Joint Resolution on Water Rights on Grazing Lands, Sen. Kevin Van Tassell (R)**

This resolution declares: (1) that Utah has a sovereign right to put the state's livestock water rights located on public lands to beneficial use through development and maintenance of the resource; (2) that Utah recognizes the right of the livestock owner to access the state's water to put it to beneficial use, including crossing public land, grazing the livestock as necessary while livestock drink, and ultimately developing and maintaining watering facilities on the necessary appurtenant public lands to put the state's water to beneficial use; and that (3) Utah supports the

Water Rights Protection Act in Congress (HR 3189), which seeks to protect state sovereignty and the water rights of Utah livestock producers. This resolution became effective upon the Governor's signature on March 11, 2014, and is being sent to the appropriate federal, state, and local officials as a statement of Utah's official position on these points.

#### **Bills that Did Not Pass (... this year, at least)**

HB 37 Public Waters Access Act, Rep. Dixon Pitcher (R)

HB 49 Water Rights - Change Application Amendments, Rep. Kay McIff (R)

HB 233 Public Trust Obligations and Water Rights Protections, Rep. Kay McIff (R)

HB 298 Water Conveyance Facility Amendments, Rep. Carol Moss (D)

HB 371 Water Reuse Amendments, Rep. Ken Ivory (R)

SB 114 Canal Safety Act, Sen. Gene Davis (D)

SB 211 Water Rights Amendments, Sen. Margaret Dayton (R)

#### **Interim Study Issues**

SJR 20 Master Study Resolution, Sen. Ralph Okerlund (R)

Topic 158. Municipal Water Rights - to study whether municipalities should be required to disclose their water rights assets.

Topic 169. Water Reuse - to study issues related to reuse water and waste water (H.B. 371). Water Reuse - to study issues related to reuse water and waste water (HB 371).

Topic 235. Standards for Allocating Utah's Water Supply - to study the standards for allocating Utah's water supply, including:

1. standards for the allocation of water for domestic use and whether the standards should be revised to accurately reflect actual domestic beneficial use;
2. standards for the allocation of irrigation water based on flood irrigation and whether standards should be revised based on pipeline based sprinkler irrigations systems;
3. whether the reduction or elimination of natural vegetative water consumption should result in a recognition of the reduced water use and:
  - a. a corresponding reduction in the water requirement associated with developing the land; and
  - b. recognition of a landowner's right to put to alternative use the water previously consumed by the eliminated natural vegetation;
4. whether current allocation standards comply with existing Utah statutory and case law; and

5. ways that these revisions can identify over-allocation, resulting in the availability of additional water resources and reduced costs that can fuel the growth of Utah's economy.

**2014 Schedule for the Natural Resources,  
Agriculture, and Environment Interim Committee**

Wed. May 21st, 9:00 a.m.  
Wed. June 18th, 9:00 a.m.  
Wed. July 16th, 9:00 a.m.  
Wed. Sept. 17th, 9:00 a.m.  
Wed. Oct. 15th, 9:00 a.m.  
Wed. Nov. 19th, 9:00 a.m.

**Central Utah Water Conservancy District v. Jensen**

By Jeffrey R. Gittins

In 2011, the Utah Supreme Court issued its opinion in the Jensen v. Jones, in which the Court held that the State Engineer could not consider alleged forfeiture in determining whether or not to grant a change application. The Court did not, however, determine whether the water right owned by Jensen had actually been forfeited.

A few months after the Court's decision, Central Utah Water Conservancy District ("CUWCD") initiated a separate lawsuit in district court against Jensen seeking to have Jensen's water right declared forfeited. On March 12, 2014, the district court issued a ruling in which the court concluded that the Jensen water right was forfeited for nonuse.

The district court first addressed Jensen's argument that CUWCD should be estopped from bringing the forfeiture action because a lawsuit alleging forfeiture should have been brought before Jensen spent significant time and money pursuing the change application. Although the court acknowledged these costs, the court concluded that the legal standard of "manifest injustice" had not been met and that Jensen had not materially altered their course of conduct based on the CUWCD's alleged inaction. The court also noted that the doctrine of beneficial use was established to protect the public and Utah's limited resource of water, and therefore it was in the public interest to allow CUWCD to pursue its forfeiture claim.

The court next addressed the primary issue of whether the Jensen water right had been forfeited. The court focused primarily on Jensen's inability to produce any documents, records, or evidence that she or her predecessors had beneficially used the water right for at least 25 years, as well as prior acknowledgments that no beneficial use had occurred. Although Jensen urged the court to balance the requirement of beneficial use of water against the public policy of protecting property rights, the court declined to do so, concluding that Utah Code section 73-1-4 did not require or allow any such balancing. The court also rejected Jensen's arguments that forfeiture should not apply due to alleged

unavailability of water in the source and due to the pending change application.

It is currently unknown if Jensen will appeal this decision. If the ruling stands, it will surely result in an end to the still-pending case regarding the State Engineer's denial of the change application. It is also unknown to what extent, if any, this ruling may have on future legislative considerations of legislation relating to the State Engineer's authority to review beneficial use and nonuse in the context of a change application.

## **Wyoming Law Review Article Authored by J. Craig Smith**

The current issue of the Wyoming Law Review leads off with the article "This Land Is Your Land ... But What About My Water? Applying an Exaction Analysis to Water Dedication Requirements for Facilities on Federal Land," by J. Craig Smith. The article discusses how snowpack accumulating in mountain ranges each winter is the principal source of water in the western United States. Most mountain ranges are now reserved as national forests. However, private and public facilities that collect, store, transport, and distribute water have been constructed on easements granted under various federal laws in force during the nineteenth and the first three quarters of the twentieth century. Without these facilities, water right holders cannot divert and transport their water to its intended beneficial use.

During recent decades, conflicts between the federal government, in charge of managing the forests and other federal land, and water right holders arose, particularly when water right holders have sought to maintain, rebuild, or expand these on forest water facilities. Thus far, when faced with adjudicating these disputes, courts have not considered the constitutionally protected property aspect of state appropriated water rights related to the water these facilities convey. Courts have sanctioned governmental edicts exacting part or all of these water rights by requiring bypass flows, conservation pools, and even prohibiting maintenance of water facilities under a deferential "reasonable regulation" standard of review.

In adjudicating these disputes, Smith urges courts to recognize that water right holders have a constitutionally protected property right in the water. Furthermore, courts should utilize the test developed by the United States Supreme Court in two seminal opinions on the constitutionality of similar exactions by local governments as part of land use approvals. The Nollan/Dolan, nexus/rough proportionality test is constitutionally appropriate to determine if an exaction of water imposed by the federal government as a condition of continued use of water facilities on federal land rises to the level of a compensable taking.

The entire article can be found at the [Wyoming Law Review](#)

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