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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

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www.smithhartvigsen.com

Upcoming Events

Uintah Basin Water Summit
Feb. 19, 2014
Roosevelt, UT

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Welcome to the Winter 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 Preview on Water Related Bills

By Jeffry R. Gittins and David B. Hartvigsen

The 2014 General Session of the Utah Legislature begins today and runs 45 days, through Thursday March 13th. The last day to open a bill without floor approval is Thursday, February 6th. The Governor may sign or veto bills through April 2nd, and the effective date for most of the newly enacted bills will be May 13th. Fortunately, there are not as many water related bills this year as there have been in recent years. However, there is always the possibility that some new ones might surface with little or no advanced notice. You may click on the highlighted bill numbers to access the actual text of the bills. Here are the highlights of the currently released bills of interest:

[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 37](#) Public Waters Access Act, Rep. Dixon Pitcher (R)

This bill seeks to make sweeping changes to the Utah Public Water Access Act. Under the bill, "public access water" would be defined as a stream that in its natural state during ordinary high water is capable of (1) floating cut lumber six feet in length and six inches in diameter; (2) floating a commercial commodity; or (3) being

**Rural Water Association-
Utah Annual Conference
Feb. 24-28, 2014
St. George**

For more information click
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**Water Law and Policy
Seminar**

**Mar. 17, 2014
St. George, UT**

For more information
contact Donna Keeler at:
801-292-4662

**Utah Water User's
Association
Annual Conference
Mar. 17-19, 2014
St. George, UT**

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navigated by a watercraft propelled by oar, paddle, or motor. The bill would completely repeal several code sections of the current Act and replace them with new code sections. These new statutes would provide that public access water at or below the ordinary high water mark would be open to public use for lawful activities that utilize the water, including boating, fishing, swimming, and wading. The bill would limit members of the public from crossing private property to get to the public access water, but would allow the public reasonable portage across private property to avoid obstructions in the waterway. The bill would also allow the property owner to fence across the waterway, so long as the fence complies with law and does not create an unreasonably dangerous condition to those using the waterway, and provided that the property owner allow public users to use a ladder, gate, or other mechanism to portage around or over the fence.

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

This bill, in a nutshell, proposes a modified procedure for change applications filed on water rights held by water companies, often referred to as "shareholder change applications." The present process, implemented in 2002 with the adoption of U.C.A. Section 73-3-3.5, requires that change applications be filed in the name of, or on behalf of, the water company. Therefore, a shareholder must first request the water company's approval of a proposed change application. Any dispute resolution comes at the end of the process with the water company and Section 73-3-3.5(10) provides the shareholder with a "cause of action," which necessitates a lawsuit before the change application is filed if the shareholder is unhappy with the water company's response, or in some cases, a non-response.

This bill amends the process in two significant ways. It allows the shareholder to file the change application with the State Engineer's office, as was the case prior to 2002, after going through the existing request process with the water company. It also allows for a mediation process, on fully disclosed points of dispute, after the change application has been filed, but before the change application can proceed with the State Engineer, if there are any disputed issues between the shareholder and the water company. Subsequent dispute resolution options are also proposed. Upon completion of those dispute resolution efforts, the change application process is resumed by the State Engineer. There are also several other minor amendments related to this process.

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

This bill seeks to define the scope and limits of the public trust doctrine in Utah. The public trust doctrine is a legal doctrine that has been used in a growing number of states to trump the rights existing water users in favor of a public use that is deemed by the courts to be in the best interest of the public. The basis for this doctrine is that under certain common law and/or state laws, the state holds/retains certain rights concerning water use "in trust for the public," which rights can be exercised even after having granted valid water rights to water users. The bill also clarifies that a water

right is a property right that is protected by the Utah Constitution, and cannot be taken for public use without just compensation. This bill is nearly identical to the one that Rep. McIlff ran last year as HB 68.

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

This bill seeks to enact several new statutes to govern canal safety issues. The bill begins by defining a canal as a water conveyance system that conveys a flow of more than 10 cfs of water. The bill would require all canal owners to conduct an assessment of the condition of each canal before January 1, 2015, and at least once every five years thereafter. The canal owner must determine whether each section of the canal is high risk, medium risk, or low risk; determine if any repairs or improvements are necessary to reduce the risk of canal failure; and report the findings to the Utah Division of Water Rights. The Division would then maintain a "canal action list" to include all canals that are high risk and/or require repairs or improvements. If a canal is on the canal action list, the canal owner must prepare a remediation plan, which must be approved by the Division of Water Rights and the Division of Water Resources. The canal owner cannot receive state funding for a project related to the canal unless they have an approved remediation plan.

[Note: Rep. Johnny Anderson (R) has a bill file opened entitled "Canal Safety Amendments" with which he proposes to fund an initial mapping effort, the results of which would be maintained by the State Engineer's office, and which would also provide some basic technical assistance to canal owners with various safety and/or emergency plans.]

Bill Requests

Rep. Ken Ivory (R) has opened three Bill Request files with the following titles: "Water Reuse Amendments;" "Water Jurisdiction Amendments;" and "Joint Resolution on States' Water Rights."

Sen. Carol Moss (D) has opened a Bill Request file entitled "Water Conveyance Facilities."

New Court Ruling on the Las Vegas Pipeline Project

By David B. Hartvigsen

One of the most controversial pipeline projects in recent memory was dealt a major blow last month as Nevada District Court Judge Robert Estes issued a ruling against the project, a coalition supported management plan, and the Nevada State Engineer. We in Utah refer to the project as the "Snake Valley Project" because it affects the aquifer under Snake Valley, which is partially located in Millard County. The project proposed by the Southern Nevada Water Authority ("SNWA") also includes pumping water from four other valleys located solely within Nevada, i.e., Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley, and then piping the water down to the very thirsty Las Vegas area. These five valleys are comparable in size to New England, i.e., parts or all of the states of Vermont, New Hampshire, Massachusetts, Connecticut, and New York. The judge characterized it as "likely the largest interbasin transfer of water in U.S. history."

The applications to appropriate water from these 5 valleys were first filed in 1989 and hearings were held on the applications in 2006. However, because Nevada law requires that the State Engineer rule on applications within one year of the protest deadline, the original approvals were vacated by the courts and the process was restarted. Prior to the second round of hearing in 2011, several federal agencies agreed to withdraw their protests if SNWA agreed to implement a Hydrologic and Biologic Monitoring, Management, and Mitigation Plan ("MMM Plan"). The State Engineer incorporated this MMM Plan into his March 2012 approval of the Project applications.

Several of the protestants appealed the approvals and the appeal was presided over by Senior Judge Estes in 7th District Court of Nevada. Two days of hearings on the appeal were held last June, then the judge went to work reviewing the evidence and the law. He issued a ruling dated December 10, 2013 in which he vacated the March 2012 approvals and sent them back to the State Engineer for re-evaluation and action consistent with his ruling on four key points: "(1) The addition of Millard and Juab [C]ounties, Utah in the [MMM] Plan so far as water basins in Utah are affected by pumping water from Spring Valley Basin, Nevada; (2) A recalculation of water available for appropriation from Spring Valley assuring that the basin will reach equilibrium between discharge and recharge in a reasonable time; (3) Define standards, thresholds, or triggers so that mitigation of unreasonable effects from pumping of water are neither arbitrary nor capricious in Spring Valley, Cave Valley, Dry Lake Valley, and Delamar Valley; and (4) Recalculate the appropriations from Cave Valley, Dry Lake and Delamar Valley to avoid over appropriations or conflicts with down-gradient, existing water rights."

The judge pointed out serious flaws and omissions in the MMM Plan and rejected the State Engineer's calculations under the plan, concluding that the diversion of the amounts approved would exceed the safe yield of the Spring Valley aquifer and that equilibrium would never be reached, despite compliance with the MMM Plan. The Judge also found the MMM Plan to be "subjective, unscientific, arbitrary and capricious," stating that it doesn't even offer a clear definition of what an unreasonable impact might be. He concluded that the "[g]ranting of water to SNWA is premature without knowing the impacts to existing water right holders and not having a clear standard to identify impacts, conflicts or unreasonable environmental effects so that mitigation may proceed in a timely manner."

The full text of the Court's ruling, along with other relevant documents such as SNWA's applications, a history of the Project, the State Engineer's rulings, and prior court rulings, may be found in the last paragraph of the article posted on the following webpage:

<http://chanceofrain.com/2013/12/judge-decrees-awards-of-rural-water-for-las-vegas-arbitrary-and-capricious/>

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