

# WATER & THE LAW

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## Fall 2015 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@SHUtah.law](mailto:info@SHUtah.law)

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## Upcoming Events

Utah Assoc. of Special Districts Annual Conference  
Nov. 4-6, 2015  
Provo, UT  
For more information click [here](#)

Welcome to the Fall 2015 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

## UPDATE ON GENERAL ADJUDICATIONS

by David B. Hartvigsen

There have been a few developments that water users in Utah should be aware of with respect to ongoing and future court proceedings called General Determinations of Water Rights or General Adjudications in river basins and sub-basins around the state. According to a General Adjudication status report on a Division of Water Rights ("DWR") website (<http://waterrights.utah.gov/adjstatus/default.asp>), there are currently 13 ongoing General Adjudications; most have been pending for decades, with the one on the Utah Lake/Jordan River drainage basin having been pending since 1936. These General Adjudications evaluate each water right within the basin being adjudicated and result in a decree on each water right which either disallows the water right (for such reasons as non-use) or validates the right with a new set of characteristics/limitations based on a Water Users Claim, a Hydrographic Survey, a Proposed Determination ("PD") from DWR, and any court hearing on objections to the findings in the PD. These newly validated water rights in the adjudication process become "decreed" rights. It is therefore absolutely essential that water users understand and participate in this General Adjudication process or they could potentially lose valuable water rights.

Of the 13 pending General Adjudications, I'm aware of recent activity in: Area 05 near Moab in the Southeastern Colorado River basin; Area 29 in the Bear River basin; and several areas in the Utah Lake/Jordan River basin, including Area 51 near Birdseye and Hobble Creek, Area 53 near Goshen, and Area 57 in the Harmony Park area and the Emigration Creek area. There is likely activity in a few other General Adjudications as well. Finally, there are also two different procedural matters that are being addressed in the Utah Lake/Jordan River General Adjudication and the State Engineer is proposing legislation to streamline all General Adjudications. These procedural and legislative matters should be of interest to all water users, even those in areas outside of the Utah Lake/Jordan River basin.

Utah Assoc. of Conservation  
Districts  
Nov. 5-6, 2015  
St. George, UT  
For more information click  
[here](#)

## Water Blog

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### Legislative Proposal for the 2016 Session

The State Engineer has spearheaded an effort to find ways to both modernize and streamline the General Adjudication process. The results of that effort was recently presented to the Executive Water Rights Task Force. The main feature of the proposal is to get water users involved earlier in the process and to take more responsibility with asserting their water rights in the court proceeding. More specifically, once a water user receives notice that a General Adjudication is under way, the water user will be solely responsible for initiating preparation of a water user claim. DWR staff will assist upon request but will no longer prepare the forms on their own initiative and send them out to water users. Next, if a person or entity with a known water right fails to file a claim within the time specified in the notices, DWR staff will prepare and publish a List of Unclaimed Rights of Record." This list will give water users one more chance to get their claims of record in the General Adjudication, but the penalty for filing at this stage is that the water user will be filing an objection to a determination that their water right has been abandoned and will need to submit sufficient evidence to overcome that determination. A final key point is that DWR staff will only do the Hydrographic Survey work on claims that have been filed, not on all water uses as has been the prior practice. Please watch for this legislation as it moves forward and get involved if you are either supportive or opposed to this proposal.

### Appointment of a Special Master in the Utah Lake/Jordan River General Adjudication

DWR has also been asking the court in the Utah Lake/Jordan River General Adjudication to appoint a Special Master to assist with resolving objections and other specific issues in this long-pending case. The Special Master will be paid by specific appropriations by the Legislature to help speed up resolution of these adjudications. The concept is a good concept. The question is who should be appointed as this Special Master. An ideal candidate would be someone who is familiar with Utah water law, the Utah General Adjudication process, and general civil litigation procedure, but who also does not have any ties or conflicts of interests with water users in the area being adjudicated. We are not sure the ideal person exists and are watching to see who responds to open position notice being sent out by the court. Water users and other interested parties will be given a chance to weigh in on the decision of who to appoint once a pool of individuals is identified. Please watch for information and notices regarding this process as well.

### Return Flow Credits for Imported Water

Finally, last year a settlement was reached and a stipulation was entered in the Utah Lake/Jordan River General Adjudication concerning a procedure for public input and protest on new applications for, and changes to existing formulas for, credits given to importers of water into this basin where the return flows migrate to Utah Lake. These credits are then typically used to allow for water stored in Deer Creek Reservoir, and potentially Jordanelle Reservoir, to be diverted directly to Salt Lake Valley for culinary

use instead of flowing down the Provo River and into Utah Lake. The first such proposal to be considered under this new process is currently being processed by DWR. It was filed by the Provo River Water Users Association on Water Right No. 55-262. The new process appears to be working well, but this is a very complicated issue that could affect many water users on the Jordan River, so water users that may be affected will want to be watchful for notices regarding such Return Flow Credit proposals.

## **CLEAN WATER ACT RULE GOES INTO EFFECT IN UTAH**

By Nathan S. Bracken

On October 9, the Sixth Circuit Court of Appeals issued a nationwide stay preventing the implementation of the so-called "Waters of the U.S." or "Clean Water Rule." The Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("the Corps") finalized the rule in June to clarify the scope of Clean Water Act (CWA) jurisdiction following the U.S. Supreme Court's divided plurality decision in *Rapanos v. U.S.* That decision created a significant amount of uncertainty about the scope of CWA jurisdiction because it did not include a clear majority and set forth three competing tests for determining such jurisdiction. The rule has proven controversial and has prompted 31 states and numerous agricultural, business, industry, and other groups to file a flurry of challenges to the rule in various courts across the country.

In staying the rule, the Sixth Circuit addressed a challenge that Utah and 17 other states - Ohio, Michigan, Tennessee, Oklahoma, Texas, Louisiana, Mississippi, Georgia, West Virginia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, and Wisconsin - filed to stop the rule. The challenge argued that the new rule is too expansive, improperly infringes upon state authority, and is inconsistent with U.S. Supreme Court rulings. The states also argue that EPA and the Corps did not follow proper procedures in creating the rule in violation of the Administrative Procedures Act.

The Sixth Circuit agreed with many of these points, finding that the states "have demonstrated a substantial possibility of success on the merits of their claims." Among other things, the Sixth Circuit found that "it is far from clear" that some of the rule's new provisions are "harmonious" with instructions in *Rapanos* regarding the types of tributaries and adjacent waters that can be jurisdictional. The court also found that the rulemaking process is "facially suspect" because the final rule contains provisions that were absent from the draft rule EPA and the Corps proposed for public comment. While the court found that there is "no compelling showing" that the states would suffer immediate harm if it did not stay the rule, it also found: "[T]he sheer breadth of the ripple effects caused by the Rule's definitional changes counsels strongly in favor of maintaining the status quo for the time being."

One particularly interesting aspect of the decision is whether the CWA requires challenges to the rule to be brought before the circuit courts of appeal or federal district courts. Thus, one of the preliminary issues the Sixth Circuit will determine while the stay is pending is whether it has subject matter jurisdiction over the

challenge. Oral arguments on this point are currently scheduled for December 8.

At the same time, however, there are at least nine challenges to the rule pending in seven district courts across the country. One of those courts, the U.S. District Court for the District of North Dakota, also issued an earlier preliminary injunction in August that found the rule to be "exceptionally expansive" and enjoined its enforcement in 13 states - North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico.

EPA and the Corps have filed a motion to stay further proceedings in the District Court for North Dakota until the Sixth Circuit determines whether it has jurisdiction. Of further note, the Judicial Panel on Multi-district Litigation, which determines whether to consolidate similar court actions, has denied a request from EPA and the Corps to consolidate the various actions pending at the district court level. The court found that the issues in dispute are questions of law and that consolidation would provide minimal benefits to the parties because there are no questions of fact.

Regardless of what the district and circuit courts may hold, it is likely that the rule will be tied up in litigation for years to come. The Supreme Court will also likely have the final say on the validity of the rule, which raises the possibility of another muddled decision similar to *Rapanos*.

(For a detailed analysis of the Clean Water Act Rule, refer to the following link: <http://smithhartvigsen.com/resources.html> and go to the bottom of the page for the Summer 2015 Issue of Water & the Law)

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