

# WATER & THE LAW

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Welcome to the Spring 2016 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

## 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)

or contact one of us directly through the following links:

[Craig Smith](#)  
[David Hartvigsen](#)  
[Jeff Gittins](#)  
[Adam Long](#)  
[Nathan Bracken](#)

To view previous newsletters, visit our website [www.Water.law](http://www.Water.law)

## Upcoming Events

**Water Law & Policy Seminar**  
**Mar. 14, 2016**  
**St. George, UT**  
For more information contact  
Donna Keeler at  
801-292-4662

**Utah Water Users  
Association Annual  
Conference**

## 2016 Legislative Review of Water Related Bills

by David Hartvigsen, Jeffrey Gittins, and Nathan Bracken

The 2016 General Session of the Utah Legislature ended on Thursday March 10. The last day for the Governor to sign or veto bills is March 30, and the effective date for most of the newly enacted bills will be May 10, unless otherwise noted. Here are the highlights of the water related bills that passed and didn't pass during the session:

### Bills That Passed

#### **H.B. 222: Nonuse Application Amendments**

House Bill 222 amends Utah's statute regarding nonuse applications. The bill inserts language into the statute to provide (1) that one or more successive overlapping change applications do not protect a water right that is already subject to forfeiture due to nonuse, and (2) that the approval of one or more nonuse applications does not constitute beneficial use of the water for purposes of calculating the 15-year period during which a forfeiture action must be brought. Follow this link to view the bill  
<http://le.utah.gov/-2016/bills/static/HB0222.html>

#### **H.B. 305: Water Rights and Resources Amendments**

The Legislature passed Rep. Joel Briscoe's (D-Salt Lake) H.B. 305, which is intended to improve the accuracy of water use data. The bill instructs the Drinking Water Board to require a certified water operator of a public water supplier, or professional engineer performing the duties of an operator, to verify the accuracy of water use and supply data submitted to the Division of Drinking Water. It also provides that the Division of Water Rights may collect and validate water use data. The bill further requires the Division of Water Rights to enact rules specifying the type of water use data that will be reported and how that data will be verified. Follow this link to view the bill  
<http://le.utah.gov/-2016/bills/static/HB0305.html>

#### **H.B. 464: Wildfire on Public Lands and Watersheds**

**Mar. 14-16, 2016**  
**St. George, UT**  
For more information click  
[here](#)

**Northern Utah Water  
Conference**  
**Mar. 29, 2016**  
**North Logan, UT**  
For more information call  
435-753-5616 x111

## Water Blog

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

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



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The Utah Legislature passed H.B. 464 to require the Conservation Commission within the Department of Agriculture and Food to work with Utah State University and certain conservation districts to study the environmental and economic impacts of wildfire on public lands in Utah. Among other things, the study will analyze the impacts of wildfire on the state's watersheds and air quality. The Legislature also authorized a one-time, \$200,000 appropriation from the General Fund to carry out the study. Follow this link to view the bill <http://le.utah.gov/~2016/bills/static/HB0464.html>

### **H.C.R. 1: Concurrent Resolution on Waters of the United States**

On March 1, Governor Herbert signed H.C.R. 1, a concurrent resolution expressing his and the Legislature's joint disapproval of the so-called "Waters of the United States" rule. The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers finalized the rule last year to resolve uncertainty the U.S. Supreme Court created in its divided *Rapanos v. United States* decision regarding the extent of Clean Water Act (CWA) jurisdiction. The rule has drawn praise from conservation groups and the ire of farmers, industry, and at least 30 states, including Utah, which have filed challenges in courts across the country to stop the rule. The resolution, which Rep. Mike Noel (R-Kanab) introduced, criticizes the rule as an "unlawful exercise of federal regulatory authority" that will improperly expand the CWA to include dry land and infringe on the ability of states to manage their water resources. It would also express support for Attorney General Sean Reyes's ongoing efforts to vacate the rule. The rule is currently on hold pursuant to a nationwide stay the Sixth Circuit Court of Appeals issued in October while it determines which courts have jurisdiction to hear the various court challenges. Follow this link to view the bill <http://le.utah.gov/~2016/bills/static/HCR001.html>

### **H.J.R. 4 (First Substitute): Water Infrastructure**

House Joint Resolution 4 urges Utah's congressional delegation to support the efforts of Utah water users to secure title transfer of reclamation projects and associated water rights from the federal government to local water user organizations. The project specifically mentioned in the joint resolution are the Strawberry Valley Project, Moon Lake Project, Emery County Project, Sanpete Project, and Provo River Project. Follow this link to view the bill <http://le.utah.gov/~2016/bills/static/HJR004.html>

### **S.B. 23 (Second Substitute): Protected Purchaser Amendments**

Senate Bill 23 modifies the definition of a "protected purchaser" in the Investment Securities chapter of the Utah Uniform Commercial Act. The bill adds additional requirements for a purchaser of a share of stock in a water company to qualify as a protected purchaser. The standard requirements of a protected purchaser are (1) give value, (2) not have notice of an adverse claim, and (3) obtain control of the certificate. A purchaser of a share of stock in a water company will also need to show that he, or his predecessors in interest, (1) paid assessments on the share for at least four of the prior seven years, or (2) used water available under the share for at least four of the prior seven years. Follow this link to view the bill <http://le.utah.gov/~2016/bills/static/SB0023.html>

### **S.B. 28: Water System Conservation Pricing**

This bill, sponsored by Sen. Scott Jenkins (R-Plain City) and recommended by the Natural Resources, Agriculture, and Environment Interim Committee, sailed through the legislature and was passed on February 10th. It now awaits the Governor's signature. It requires retail water providers to establish a tiered rate structure where the price per unit of water increases as the quantity of water delivered increases from tier to tier. Many water retailers already use tiered pricing as a conservation incentive and to obtain assistance from state revolving loan funds. Each retailer retains the flexibility of identifying the size and number of tiers or blocks of water and of setting the increasing rate applicable to each tier. This bill mandates this pricing approach for all "retailer water providers," a term that is already defined by statute as entities which supply culinary water to more than 500 end user connections. The bill also requires that the end users be given, at least annually, notice of: (1) the amount of water used, (2) the billing cycle or period; and (3) the tiered rates. Follow this link to view the bill <http://le.utah.gov/~2016/bills/static/SB0028.html>

### **S.B. 75: Adjudication Amendments**

Senate Bill 75 makes a number of changes to the general adjudication statutes found in Title 73, Chapter 4 of the Utah Code. As with other general adjudication amendments that have passed in the last few years, this bill seeks to take more responsibility from the Division of Water Rights and puts it on the water users to ensure that timely and proper water claims are filed.

A substantial change is with respect to the hydrographic survey maps. Previously, these surveys of water use were completed as an initial step by the Division of Water Rights, and were the primary source of information that the Division then used to complete Water User's Claims for the water users to review and sign. Under the bill, no survey will be done in the preliminary stages of the adjudication; rather, the hydrographic survey maps will be prepared late in the process-at the same time that the proposed determination is prepared-using the data from the submitted claims to prepare the maps.

Other significant provisions of the bill include:

- Changing the term "Water User's Claims" to "Statements of Claim"
- Allowing the Division to accept electronic Statements of Claim
- Providing a mechanism for water users to ask the Division for an extension of time to file their Statements of Claim
- Providing additional notice and a public meeting regarding unclaimed rights of record, which will occur after claim are due but before a proposed determination is published. Owners of the unclaimed rights of record may object to the list of unclaimed rights (i.e., assert that their rights should be included in the general adjudication), but the claimants will have to demonstrate that their failure to file a timely statement of claim was excused by circumstances beyond their control, mistake, or other justification.

Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/SB0075.html>

### **S.B. 80: Infrastructure Funding Amendments**

This bill, sponsored by Senator Stuart Adams (R-Layton), moved well through the process and was substituted twice, and then held until the very last day because it includes a budget appropriation. As substituted, the bill redirects over time a 1/16% sales tax rate from the Transportation Fund back to the water community and places it in the new Water Infrastructure Restricted Account that was created last year. By 2021, all of these sales tax revenues will go to the new water fund. This sales tax rate was originally destined for water project funding but got diverted to major transportation needs, most of which have now been met. Now that the state has identified \$33 billion in costs for essential water infrastructure need between now and 2060, there is a clear need for these sales tax funds back in the Water Infrastructure Account. Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/SB0080.html>

#### **S.B. 251: Water Infrastructure Funding Amendments**

This bill, sponsored by Senator Stuart Adams (R-Layton), came out late in the session on March 1st, was substituted three times, and then one version passed the Senate and another the House. On the last day, the two bodies agreed on a compromise version and passed that version. The bill, among other things, requires new procedures to be established for funding state water projects on the Bear and Colorado Rivers and funds certain studies related to those projects. Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/SB0251.html>

#### **S.C.R. 1: Concurrent Resolution Encouraging Universal Metering of Water Systems**

This resolution, sponsored by Sen. Scott Jenkins (R-Plain City) and recommended by the Natural Resources, Agriculture, and Environment Interim Committee, encourages public water suppliers to implement metering of water on "all retail public and private water systems," including secondary water systems, because water users tend to voluntarily conserve more water when they know how much water they are actually using. It flew through both houses and on to the Governor's desk, who signed the resolution on February 24, 2016. Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/SCR001.html>

#### **Bills That Did Not Pass**

##### **H.B. 82: Property Taxing Authority for Public Water**

The Utah Legislature failed to act on H.B. 82 during the 2016 Legislative session. The bill would have modified the maximum property tax rate that water districts served by the Colorado River Compact to the Upper Basin can charge. Currently, Section 17B-2a-1006 of the Utah Code allows Upper Basin water districts to increase the amount of property taxes they may impose on individuals and businesses up to a maximum of 0.004 per dollar of taxable value of taxable property. H.B. 82 would have continued the current maximum rate through fiscal year 2020, but would have lowered the rate to 0.002 beginning in fiscal year 2021. The fiscal note for the bill estimated that the legislation may have decreased the amount of property taxes Upper Basin districts can impose by about \$33.6 million beginning in fiscal year 2021. The fiscal note also observed that districts could make up the decrease through

user fees. Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/HB0082.html>

#### **H.B. 257: Water Funding Revisions**

House Bill 257, which sought to send some of the State sales tax to the Water Infrastructure Restricted Account, was similar to S.B. 80, which you can read about above in the list of bills that passed.

Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/HB0257.html>

#### **H.B. 283: Public Utility Easement Amendments**

The Legislature failed to act on H.B. 283 during the 2016 Session. The bill would have required public utilities to provide notice to affected property owners within 48 hours after the utility disturbs property subject to a public utility easement. The required notice would have described the name, address, and phone number of the utility company. Telephone corporations and electrical corporations with less than 30,000 customers would not have been subject to this requirement. Follow this link to view the bill

<http://le.utah.gov/~2016/bills/static/HB0283.html>

#### **H.B. 309: Sales and Use Tax Earmark Amendments**

Rep. Daniel McCay (R-Riverton) sponsored this bill seeking to repeal the 1/16th % sales tax that has been dedicated to water funds within the Utah Department of Natural Resources. This bill was assigned to the House Standing Tax & Revenue Committee, but was never considered by that committee or otherwise acted upon.

Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/HB0309.html>

#### **H.B. 326: Special and Local District Transparency Amendments**

Rep. Justin Fawson (R-North Ogden) sponsored this bill seeking to, among other things: (1) change the election process for district trustees; (2) place districts under the jurisdiction of cities and/or counties and grant them authority to audit districts; and (3) changing the process for dissolving districts. This bill was assigned to the House Standing Political Subdivisions Committee, but was never considered by that committee or otherwise acted upon.

Follow this link to view the bill  
<http://le.utah.gov/~2016/bills/static/HB0326.html>

#### **H.B. 432: Governmental Nonprofit Entity Compliance Amendments**

Rep. Kim Coleman (R-West Jordan) sponsored this bill seeking to re-classify private nonprofit organizations that have governmental entities as shareholders or members that together have a "controlling interest" in the organization as "governmental nonprofit corporations." All such re-classified organizations would then become subject to governmental regulatory laws such as the "Open and Public Meetings Act," the "Government Records Access and Management Act" (GRAMA), and other governmental reporting acts. This bill was assigned to the House Standing Tax & Revenue Committee, which voted to substitute the bill, but it was never considered thereafter or otherwise acted upon. Follow this link to view the bill <http://le.utah.gov/~2016/bills/static/HB0432.html>

#### **H.B. 457: Water Quality Revisions**



The Legislature failed to pass H.B. 457 to revise the Utah Water Quality Act to provide that inadvertent releases of water from publically owned culinary water systems do not constitute a "discharge of a pollutant," which the Act prohibits absent compliance with specific requirements. The bill did provide, however, that inadvertent discharges from a publicly owned culinary water system will qualify as a "discharge of a pollutant" if they are caused by misconduct, a primary cause of pollution, and released in violation of numeric water quality standards. Follow this link to view the bill

<http://le.utah.gov/~2016/bills/static/HB0457.html>

**H.B. 218: Utah Revised Nonprofit Corporation Act**

**S.B. 116: Water Law - Nonprofit Corporation Amendments**

House Bill 218 and Senate Bill 116 were identical bills that sought to amend two provisions of the Utah Revised Nonprofit Corporation Act. First, the bills sought to exempt shares of stock in water companies from the general rule in the Act that memberships in nonprofit corporations may not be transferred. This proposed change was primarily in response to the Utah Supreme Court's decision in the Southam v. South Despain Ditch Co. case from 2014. Second, the bills sought to clarify that shareholders in water companies have an undivided interest in the property and water rights of the company and that they are entitled to the use of water and right to change the use of water under the Utah water code.

Follow these links to view the bills

<http://le.utah.gov/~2016/bills/static/HB0218.html>

<http://le.utah.gov/~2016/bills/static/SB0116.html>

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