

WATER & THE LAW

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

Summer 2016 Issue

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Jeffrey R. Gittins Appointed as Water Law Committee Chair

Jeffrey R. Gittins has been selected to serve as the Chair of the Water Law Committee for the Energy, Natural Resources & Environmental Law (ENREL) Section of the Utah State Bar. The Water Law Committee provides continuing legal education courses, practice area updates, and other services to Utah attorneys who practice water law and other related areas of law.

Nathan Bracken Becomes a Partner at Smith Hartvigsen

Smith Hartvigsen is pleased to announce that Nathan

Dear Brian,

Welcome to the Summer 2016 Issue of *Water & The Law*. There have been several important decisions and proceedings in the last few months, which makes for a longer newsletter than normal. 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

HEAL Utah v. Kane County Water Conservancy District

In July 2016, the Utah Court of Appeals issued its decision in the case of HEAL Utah v. Kane County Water Conservancy District. The primary issue in the case was whether the State Engineer had properly approved change applications for water use at a proposed nuclear power plant.

In 2009, two change applications were filed by Kane County Water Conservancy District and San Juan County Water Conservancy Districts (collectively, "the Districts") to move significant amounts of water upstream for use at a proposed nuclear power plant near Green River in Emery County. The Districts and Blue Castle Holdings, Inc., the developer of the power plant, had entered into water lease agreements that were contingent upon approvals of the change applications to move the water. After the change applications were published, the Division of Water Rights received nearly 80 protests. The Division held a hearing on the change applications in January 2010. In 2012, the Division issued two separate orders approving the change applications. HEAL Utah, a nonprofit organization that advocates for clean air and clean energy, appealed Division's approvals to the district court. The district court held a trial in the case, and ruled that the change applications met the statutory criteria and were therefore properly approved. HEAL Utah then appealed the district court's decision to the Utah Court of Appeals.

The Court began its opinion with a discussion of the change application process, the Colorado River Compact, and the procedural background of the case. The Court also laid out the standards of review, including that a change application is to be approved if "there is reason to believe" that (1) there is unappropriated water in the source, (2) the proposed use will not impair other water rights or interfere with the more beneficial use of water, (3) the proposed plan is physically and economically feasible and would not be detrimental to the public welfare, and (4) the applicant has the financial ability to complete the project.

Bracken has become a partner in the firm. Nathan has also been named as the Chair of the American Bar Association's 2017 Annual Water Law Conference and to the Board of Advisors for the National Judicial College's Dividing the Waters Program, which educates judges on water issues.

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

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

Upcoming Events

**Rural Water Assoc.
Northern Utah Conference
Aug. 29-Sep. 1, 2016
Layton, UT**

For more information click [here](#)

**American Water
Works Assoc. Intermountain
Section Conference
Sep. 14-16, 2016
St. George, UT**

For more information click [here](#)

**Utah League of Cities
Annual Conference
Sep. 14-17, 2016**

The Court then analyzed each of these factors based on the facts presented in this case.

First, the Court determined that there was reason to believe that there was unappropriated water in the Green River, despite the fact that Utah's allocation of the Colorado River system is "oversubscribed." The Court noted that although there are approved Utah filings--including the Districts' filings--that exceed Utah's 1.4 million acre-feet of allocated water, Utah is currently only using about 1 million acre-feet. The Court also concluded that it was proper for the Division to rely on water released from Flaming Gorge Reservoir in determining the availability of water in the Green River.

Next, the Court determined that there was reason to believe that the proposed changes would not unreasonably affect public welfare or the natural stream environment. HEAL Utah asserted that approval of the change applications would undermine the fish recovery programs on the Green River and would negatively impact the agricultural economy that depends on the Green River. The Court, however, determined that HEAL Utah had "failed to meet its burden of persuasion" on these issues.

Finally, the Court determined that there was reason to believe that the proposed changes were feasible and not speculative. The Court noted that although the power plant project is anticipated to cost between \$15 and \$20 billion dollars, Blue Castle had shown a financial ability to complete the project, including the \$17.5 million already raised and spent on the project thus far. The Court also noted that "considerable evidence" had been presented to the district court that supported a conclusion that the project was feasible based on its location and the economic considerations associated with producing power for a growing Utah population. The Court clarified that the project was not speculative because Blue Castle has proposed a site for the plant, invested money to develop the plant, offered a detailed description for the proposed use of the water, and entered into contracts to develop the project (as distinguished from the Western Water case from 2008, in which an application was found to be speculative because the applicant had no lands, facilities, customers, or contracts to support its plan).

Based on these determinations, the Court affirmed that the change applications had been properly approved.

To read the full opinion, follow this link:

<https://www.utcourts.gov/opinions/appopin/HEAL%20Utah%20v.%20Kane%20Co.%20Water%20Conservancy%20District20160721.pdf>

Brasher v. Christensen

In May 2016, the Utah Court of Appeals recently issued its decision in the case of Brasher v. Christensen. A central issue in the case was whether a Water Use Authorization constituted a contract for the lease of irrigation water shares.

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**Utah Assoc. of Special
Districts Annual Conference**
Nov. 2-4, 2016
Ogden, UT
For more information click [here](#)

**Utah Assoc. of Conservation
Districts Conference**
Nov. 2-3, 2016
St. George, UT
For more information click [here](#)

Water Blog

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

utahwaterrights.blogspot.com



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Christensen owns a farm in Emery County and has shares of stock in Huntington-Cleveland Irrigation Company ("HCIC"). Brasher owns and leases farmland in Emery County, and also owns shares of stock in HCIC. But Brasher needed additional shares in order to irrigate all of his land. In 2012, Brasher leased 215 Class A shares from Christensen. Brasher asked to lease the water on an indefinite basis, but Christensen declined. Both parties signed a Water Use Authorization ("WUA") form provided by HCIC. On the WUA, Brasher checked the box that indicated that the lease would continue "until further notice." HCIC contacted Christensen regarding the WUA, and Christensen instructed HCIC that the lease was for 2012 only. In 2013, Brasher contacted Christensen about leasing shares again. Christensen originally declined, until Brasher indicated an interest in purchasing Christensen's farm. The parties met and negotiated two documents: an Offer to Purchase Real Estate and a new WUA. Christensen took the Offer with her so that she could review it. Brasher took the WUA and filed it with HCIC -- although the district court later determined that Brasher had added terms to the WUA after Christensen had signed it and without Christensen's knowledge. Ultimately, Christensen decided not to accept the Offer to purchase her farm. Christensen also notified HCIC to stop providing water under her shares to Brasher. Brasher sued for damages for crop loss and for losses associated with his cattle operation due to not having water.

After a trial was conducted, the district court dismissed Brasher's complaint. The district court concluded that the WUA was not an enforceable contract and that there was not a meeting of the minds between the parties to form a contract for lease of the water shares. Brasher appealed to the Court of Appeals.

The Court first reviewed whether the WUA was an enforceable contract for the lease of shares. The Court noted that the essential elements of an enforceable contract are (1) offer and acceptance, (2) consideration, and (3) competent parties. The Court determined that these elements were not met because the WUA form did not require offer, acceptance, or consideration. Rather, the WUA was simply a form used to instruct a third party (HCIC) to deliver water to one of a parties for a period of time. The WUA form was "devoid of language establishing a contractual relationship." Indeed, the Court noted that the WUA form expressly conditions its enforceability upon a separate agreement between the parties. Accordingly, the Court upheld the determination that the WUA was not an enforceable lease contract.

The Court then reviewed whether there was a meeting of the minds between Brasher and Christensen that would support an oral contract for lease of the water shares. The Court determined that there was no meeting of the minds because Christensen had told Brasher that she needed to discuss the Offer and WUA with her family and attorney before anything was final and because Christensen had intended that the Offer and WUA were contingent upon each other.

Based on these determinations, the Court of Appeals upheld the dismissal of Brasher's complaint against Christensen.

To read the full opinion, follow this link:

Clearwater Farms LLC v. Giles

In June 2016, the Utah Court of Appeal recently issued a decision in the case of Clearwater Farms LLC v. Giles. The case involves a dispute between two neighboring landowners regarding alleged interference with an irrigation water system.

In 1996, the Gileses purchased a piece of farmland next to the Spanish Fork River. About two years later, Morley purchased a piece of farmland north of and adjacent to the Gileses' property. A year later, the Gileses divided their property into two parcels and constructed a home on each parcel. A ditch crossed the Gileses' property and conveyed irrigation water to the Morley property. Due to increased difficulty conveying water through the ditch, the Gileses allowed Morley to construct an electric pump and pump house on the Gileses' property, which was attached to a 6-inch pipeline that was buried in the location of the old ditch. Morley used this water system until approximately 2003, when he installed a diesel pump and new pump house on his own property. The 6-inch pipeline on the Gileses' property was no longer used, but remained in place.

Clearwater purchased the Morley property in 2010 with the intent of building homes on the property. In 2011, Clearwater sought to remove the 6-inch pipe on the Gileses' property and replace it with a 42-inch pipe, but the Gileses opposed the larger pipe, including calling the sheriff and posting no trespassing signs on the old pump house. In 2012, the parties were able to reach an agreement to allow an easement across the Gileses' property for utilities and water pipelines. But Clearwater filed suit claiming damages for being unable to irrigate during the 2011 season. The district court concluded that Clearwater was not entitled to damages for lost crop revenue because the Gileses had not obstructed Clearwater's water rights. Clearwater appealed this decision to the Court of Appeals.

Clearwater asserted claims under two statutes: Utah Code sections 73-1-15 and 73-1-7. The Court first reviewed Clearwater's claims under section 73-1-15, which provides that "it shall be unlawful for any person to place or maintain in place any obstruction, or change of the water flow by fence or otherwise, along or across or in such canal or watercourse." The Court concluded that the statute's language requires a physical barrier or obstruction to be placed in the ditch or water system that is in contact with the water and actually changes the water's flow. The court therefore determined that the Gileses actions of refusing to cooperate, calling the sheriff, and posting no trespassing signs did not amount to "obstructions" under the statute; rather, they were "more like the mere assertion of a contrary legal position." The court also noted that Clearwater had a relatively speedy way to resolve the issue through a motion for a temporary restraining order, which Clearwater failed to pursue.

The Court next reviewed Clearwater's claims under section 73-1-7, which provides a water user with a right to enlarge another person's existing ditch or canal to carry additional water. Clearwater asserted that this statute evidenced a public policy favoring the ability of a party to increase the size of a ditch or pipeline. The court noted that in 2011, the statute had been substantially amended, which included a clarification that the statute only applied to ditches and canals, but not pipelines. But the pre-2011 statute was at issue, and the Court therefore had to determine if the pre-2011 language of the statute extended to and included pipelines. The Court concluded that it did not, because the plain meaning of the term "ditch" does not encompass an enclosed pipe. The Court also again noted that the Gileses' actions did not impede Clearwater from exercising the rights that Clearwater asserted it had.

Based on these determinations, the Court affirmed the decision of the district court in favor of the Gileses.

To read the full opinion, follow this link:

<https://www.utcourts.gov/opinions/appopin/Clearwater%20Farms%20v.%20Giles20160616.pdf>

Dansie v. Public Service Commission

In May 2016, the Utah Court of Appeals issued its ruling in the case of Jesse H. Dansie Family Trust v. Public Service Commission and Hi-Country Estates Homeowners Association. This case originates from a well lease agreement between the Dansie Trust's predecessor (Jesse Dansie) and Hi-Country's predecessor (Gerald Bagley/Foothills Water Company), in which Mr. Dansie agreed to allow Bagley's water system to be connected to his well for a period of 10 years. In exchange, Mr. Dansie was given a number of free residential hook-ups to the water system and the right to receive up to 12 million gallons of water per year, in perpetuity, at no cost. In 1985, Foothills applied to the Utah Public Service Commission ("PSC") to operate the water system as a public utility. The following year, the PSC held a hearing regarding rates for the water system, in which the PSC reviewed the well lease and found that it was "grossly unreasonable" and that it would be "unjust and unreasonable" to expect the water systems' active customers to bear the burden of the well lease. The PSC required Mr. Dansie and his family to pay pro-rata costs for water delivered to them.

In 1993, Hi-Country took over control of the water system, developed a new well, and disconnected the water system from the Dansie well. Hi-Country also disconnected the water lines to the Dansies due to the Dansies' refusal to pay the pro-rata costs of water delivery, as ordered by the PSC. Thereafter, the PSC decertified Hi-Country as a public utility because Hi-Country was providing water service only to its members.

Following lengthy litigation and several appellate court rulings, it was ultimately held that the well lease was an enforceable contract. In 2011, the Utah Court of Appeals ruled that the Dansies were entitled to their contractual rights to free hook-ups and free water "unless the PSC intervenes and determines otherwise."

Following the 2011 decision, the Hi-Country water system was again brought under PSC jurisdiction, and Hi-Country filed for a new general rate case. The Dansies filed a petition to intervene, which was granted. The PSC held a rate hearing and issued an order in which it concluded--in a manner similar to its ruling in 1986--that the well lease was "void and unenforceable as against the public interest." The Dansies appealed the ruling to the Court of Appeals.

The Court of Appeals reviewed the issue of whether the PSC exceeded its jurisdiction when it concluded that the well lease was void and unenforceable. The Court noted that the PSC has been granted broad and sweeping jurisdiction to supervise and regulate public utilities in the state in order to protect the public interest. The Court also noted that the PSC has statutory authority to determine if a public utility contract is unjust, unreasonable, discriminatory, preferential, or in violation of any law, and that the PSC is at liberty to disregard such contracts altogether in they conflict with a reasonable rate determined by the PSC. The Court therefore concluded that the PSC did not exceed its jurisdiction, and declined to change the PSC's decision that the well lease is "unreasonable, unjust, and not in the public interest." Accordingly, the Court upheld the order of the PSC.

The attorneys at Smith Hartvigsen are pleased to have represented Hi-Country in this case.

To read the full opinion, follow this link:

<https://www.utcourts.gov/opinions/appopin/Dansie%20v.%20Public%20Service%20Commission20160526.pdf>

UPDATE ON WATER RIGHT ADJUDICATIONS

The General Adjudication in the Utah Lake/Jordan River area has been ongoing for several decades. As part of the General Adjudication process, there are often objections to the Division of Water Rights' determinations of water rights. Sometime these objections are filed by a water right owner who disagrees with the Division's quantification or description of the owner's water right. Other time, a water right owner may object to the Division's quantification or description of another person's water right. In either case, these objections have to be resolved through agreement, stipulation, or litigation before the court handling the General Adjudication. As with the General Adjudication itself, there are numerous objections that have been pending for years or decades, but have not yet been resolved. The State has set aside funding to pay for a Special Master to assist the court with processing and resolving these objections. The process of selecting a Special Master has been ongoing for several months. On June 28, 2016, Judge Laura Scott of the Third District Court issued an order appointing attorney Rick L. Knuth to serve as the Special Master.

The Special Master's duties, as provided by the order, include:
1--Actively manage objections, including scheduling, notifying the parties, holding status and settlement conferences, and holding hearings.

- 2--Encourage the parties to settle matters in dispute.
- 3--Designate subcases within the general adjudication case.
- 4--Identify the parties affected by a proposed settlement, provide notice to the affected parties, and hear objections to a proposed settlement.
- 5--Take evidence, oversee discovery, rule on procedural motions, and rule on substantive motions with a report and recommendation to the court.
- 6--Prepare a final report and recommendation for each subcase containing findings of fact and conclusions of law.

Another update on the Utah Lake/Jordan River General Adjudication is that the Division is initiating another "mini-adjudication" in the South Salt Lake area. The West Mill Creek adjudication area is from Main Street on the east to the Jordan River on the west, and from approximately 2700 South on the north to approximately 4100 South on the south. On July 12, the Division held a public meeting with water users in the West Mill Creek area to discuss the adjudication process. Water User's Claims and associated notices were mailed out on August 1.

To see the order appointing the Special Master or read more about the ongoing General Adjudications, follow this link:
<https://www.waterrights.utah.gov/miscinfo/currentIssues.asp#ci3>

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