

SMITH HARTVIGSEN PLLC

Water & The Law

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Summer 2017 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@water.law

or contact one of us directly through the following links:

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To view previous newsletters, visit our website www.Water.law

Upcoming Events

Utah Water Law
CLE International

Dear Brian,

Welcome to the Summer 2017 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.

We're growing, so we've moved our office location to 257 East 200 South, Suite 500, Salt Lake City, UT 84111. Please make a note of this new address

Smith Hartvigsen, PLLC

Utah Water Strategy Report

In 2013, Governor Gary Herbert tasked the State Water Strategy Advisory Team to provide recommendations for a 50-year water strategy for the State of Utah. The Advisory traveled around the state and held town hall meetings, and also invited written comments, to get public input on planning for future water needs. The Advisory Team has recently published its Recommended State Water Strategy, which is a 200-page report to Governor Herbert containing various recommendations and ideas regarding how Utah should manage its water resources into the future. Some of the topics covered include:

- Water conservation and efficiency
- Development of water supplies
- Water for agricultural lands and food production
- Preservation of natural water systems
- Water quality
- Maintenance and replacement of existing water infrastructure
- Impacts of climate change on water supplies
- Utah water law and policy
- Role of policymakers
- Science, technology, and innovation

To read the full report, [click here](#).

Haik v. Salt Lake City Corporation

Oct. 11, 2017
Salt Lake City, UT
For more information click [here](#)

Utah Association of Special Districts Annual Conference
Nov. 1-3, 2017
Layton, 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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The Utah Supreme Court issued its opinion in the case of Haik v. Salt Lake City Corporation. The case started nearly 20 years ago when Mark Haik filed a lawsuit in federal court against Salt Lake City. Mr. Haik asserted that Salt Lake City was required to supply water to his undeveloped property in the Albion Basin Subdivision. Mr. Haik's complaint against Salt Lake City included claims for unlawful taking and violation of equal protection. The federal court ruled against Mr. Haik, and concluded that Salt Lake City had no duty to provide water to Mr. Haik's property.

In 2012, Mr. Haik filed a second lawsuit in federal court against Salt Lake City, again asking the court to order Salt Lake City to provide water to his property. This lawsuit alleged different legal claims (including claims of civil conspiracy and fraud on the court), but was based on the same underlying facts as the first lawsuit. The federal court again ruled against Mr. Haik and determined that he had no claim against the City.

In 2014, Salt Lake City filed a lawsuit in state district court seeking an administrative review of State Engineer orders approving change applications related to the Albion Basin area. As part of the lawsuit, Salt Lake City also brought claims to adjudicate and quiet title to water rights in Little Cottonwood Creek, including water claimed by Mr. Haik. In response, Mr. Haik brought counterclaims against Salt Lake City that were nearly identical to the claims brought in his 2012 federal lawsuit. The district court dismissed Mr. Haik's counterclaims on the grounds that they were barred by res judicata, which is a legal principle that prohibits a party from bringing the same claims multiple times. The district court's decision was appealed to the Utah Supreme Court.

The Utah Supreme Court reviewed the principles of res judicata to determine if the district court had correctly dismissed Mr. Haik's counterclaims against Salt Lake City. The Supreme Court noted that this was not the second time, but the third time, that Mr. Haik had brought his claims against Salt Lake City. The Supreme Court noted that although some of Mr. Haik's counterclaims differed slightly from the claims he asserted in federal court, they were claims that could have been--and should have been--asserted in his federal court actions, and were therefore barred under res judicata. Mr. Haik asserted that his claims were not barred because he was bringing them as counterclaims in the state court action, rather than as direct claims as he did in his federal court actions, and that his counterclaims were necessary to mount a proper defense. The Supreme Court did not find his distinction to be persuasive (although the Supreme Court did note that a future decision may be necessary to determine if Mr. Haik will be prohibited from raising certain defenses in the state court action due to his prior federal court actions).

In the end, the Supreme Court affirmed the district court's dismissal of Mr. Haik's counterclaims. The Supreme Court summarized its decision as follows: "What has been will be again, and what has been done will be done again; there is nothing new under the sun.' Ecclesiastes 1:9. Certainly not Mr. Haik's lawsuit."

To read the full opinion, [click here](#).

Burr v. Koosharem Irrigation Company

Last month, the Utah Court of Appeals issued its opinion in the case of Burr v. Koosharem Irrigation Company. The case began in 2014 when Greg Torgerson, a shareholder in Koosharem Irrigation Company, filed a lawsuit against the Company. Shortly thereafter, two additional shareholders, Chad Torgerson and Bret Kouns, joined in the lawsuit. The three plaintiffs filed an Amended Complaint, which included a shareholder derivative claim against the Company and two of the Company's directors. The plaintiffs alleged that these two directors had breached their fiduciary duties to the Company, had engaged in self-dealing, and had failed to act in good faith and with loyalty. The plaintiffs also sought to have the two directors removed from the board due to "rigged elections."

Under the Utah Revised Nonprofit Corporation Act, a court action to remove a director must be commenced "by voting members holding at least 10% of the votes entitled to be cast in the election of the director's successor." The three plaintiffs owned a combined 11.9% of the outstanding shares in the Company. In 2015, however, plaintiff Bret Kouns passed away. The two remaining plaintiffs only owned a combined 5.3% of the outstanding shares.

Following an investigation by a court-appointed committee that determined that a derivative claim was not in the best interests of the Company, the court dismissed plaintiffs' derivative claims. The Company then sought to have the director removal claim dismissed as well, citing to the fact that the two remaining plaintiffs did not own the requisite number of shares.

Burr, another shareholder in the Company, then sought to join the lawsuit by filing a motion to intervene. If Burr was allowed to intervene in the lawsuit, the plaintiffs would collectively have sufficient shares to be above the required 10% threshold. The district court, however, denied Burr's motion to intervene, concluding that Burr had failed to adequately explain why he had waited nearly two years to try to join in the lawsuit. Burr appealed the decision to the Court of Appeals.

The Court began its opinion by noting the standard for a party seeking to intervene, which is that the party must demonstrate "(1) that its motion to intervene was timely, (2) that it has an interest relating to the property or transaction which is the subject of the action, (3) that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, and (4) that its interest is not adequately represented by existing parties." The Court determined that Burr had met these requirements. Although Burr's motion to intervene was not filed for almost two years after the case was initiated, his participation in the case did not become necessary until Kouns passed away. Thus, the motion to intervene was timely. Furthermore, Burr had an interest in the subject matter of the case because he was a shareholder in the Company, and without Burr's participation in the case, the director removal claim would be dismissed and the interests of Burr (and the other two plaintiffs) would be affected. Finally, the Court determined that Burr's interests were adequately represented until Kouns' death -- but after Kouns' death, Burr's interests were not

adequately represented by the remaining two plaintiffs who did not own sufficient shares to allow the case to continue.

For these reasons, the Court of Appeals held that Burr should have been allowed to intervene in the case. The Court of Appeals therefore reversed the decision of the district court and sent the case back to the district court to continue.

To read the full opinion, [click here](#).

Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District

In March, the Ninth Circuit Court of Appeals issued its decision in the case of Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District. The case started when the Tribe filed a court action seeking a declaration that it has a federally reserved water right to groundwater underlying the Tribe's reservation. The federal government intervened in the case and also asserted that the Tribe had a reserved right to groundwater. The case was divided into three phases, with the first phase being to determine if the Tribe has a reserved right to groundwater. In the first phase, the federal district court ruled in the Tribe's favor, and the ruling was appealed to the Ninth Circuit.

The Ninth Circuit acknowledged that under the Winters Doctrine, federal reserved water rights are directly applicable to Indian reservations, but recognized that prior applications of the Winters Doctrine had been only for surface water and that no court had squarely addressed the question of whether the doctrine extended to groundwater. The Court looked at the primary purposes of the reservation and extended the Winters Doctrine to include groundwater. The Court noted that some reservations lack perennial streams and therefore depend on pumping groundwater for present and future survival sustainability. In July, the Coachella Valley Water District and the Desert Water Agency filed petitions with the U.S. Supreme Court, asking it to review the case. The states of Nevada, Arizona, Alaska, Idaho, Nebraska, North Dakota, South Dakota, Texas, Wisconsin, and Wyoming have also filed an amicus brief asking the court to review the decision.

To read the full opinion, [click here](#).

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