

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@SHUtah.law

or contact one of us directly through the following links:

[Craig Smith](#)

[David Hartvigsen](#)

[Jeff Gittins](#)

[Adam Long](#)

[Nathan Bracken](#)

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Upcoming Events

**Rural Water Association of
Utah Annual Conference**

Feb. 27-Mar. 3, 2017

St. George, UT

For more information click

Dear Brian,

Welcome to the Winter 2017 Issue of *Water & The Law*. Our feature article reviews the currently available water-related legislation for the 2017 Session which starts Monday. 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

2017 Legislative Preview on Water Related Bills

by David Hartvigsen, Jeffrey Gittins, and Nathan Bracken

The 2017 General Session of the Utah Legislature begins Monday January 23 and runs through Thursday March 9. Here are the highlights of the currently released bills of interest:

Numbered Bills

HB 84 - Water Law - Nonuse Requirements Rep. Tim Hawkes
This bill, which has been recommended by the Executive Water Rights Task Force, clarifies that: (1) an approved nonuse application excuses the requirement of beneficial use from the nonuse application's filing date; (2) the filing or approval of a nonuse application, or a series of nonuse applications, does not constitute beneficial use or protect a water right that is already subject to forfeiture; and (3) a nonuse application does not bar a water right owner from using the water as permitted under the water right or from claiming any available defense against forfeiture. The bill also modifies the procedures for instituting a forfeiture action for nonuse.

HB 118 - Authority of State Engineer Rep. Tim Hawkes
This bill, which has been recommended by the Executive Water Rights Task Force, allows the State Engineer to develop rules regarding the "duty of water" or in other words, a quantification of the maximum amount of water that can be beneficially used, without waste, for a particular purpose. Although the State Engineer and the courts in General Adjudications have used this concept for over 100 years, there is no statutory authority for this concept. This bill gives the State Engineer express authority to do what is already being done with respect to the duty of water.

SB 11 - Water Development Commission Amendments Sen. Margaret Dayton

This bill, which has been recommended by the Natural Resources,

[here](#)

Water Law & Policy Seminar

Mar. 20, 2016

St. George, UT

For more information contact

Donna Keeler at

801-292-4662

Utah Water Users Association Annual Conference

Mar. 21-22, 2016

St. George, UT

For more information click

[here](#)

Water Blog

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Agriculture, and Environment Interim Committee, modifies the membership of the State Water Development Commission. The bill removes the following nonvoting members from the Commission: the state treasurer; two representatives of the Governor's Office, including one representative from the Governor's Office of Management and Budget; the executive director of the Department of Natural Resources; the executive director of the Department of Environmental Quality; the commissioner of agriculture and food; a member of the Board of Water Resources; and a representative with experience with finance and economics. The bill adds one nonvoting member to the Commission: a representative of the governor's cabinet or the Governor's Office.

SB 63 - Nonprofit Corporation Amendments - Water Sen. Margaret Dayton

This bill, which has been recommended by the Executive Water Rights Task Force, modifies the Utah Revised Nonprofit Corporation Act to change the default rule on the transferability of shares in a water company from non-transferrable to transferrable, unless the articles or bylaws of the water company specify otherwise. It states that a shareholder in a water company has "an equitable, beneficial interest in the use of the water supply of the water company, proportionate to the shareholder's shares in the water company, which interest is in the nature of real property." It also now expressly allows a water company to purchase delinquent shares of stock and clarifies the process for distributions to shareholders in a water company.

Bill Requests (Not Yet Numbered)

HB ___ Fee List Amendments Rep. Logan Wilde

Preliminary drafts of this bill, which has been recommended by the Executive Water Rights Task Force, update the name of an "Extension of Time to Resume Use Application" to its current name used elsewhere in the code, i.e., a "Nonuse Application."

HB ___ Assignment Addendums Rep. Logan Wilde

Preliminary drafts of this bill, which has been recommended by the Executive Water Rights Task Force, allow "Water Right Deed Addendums" to be used and recorded with water right "Assignments" and to have those Addendums be forwarded to the State Engineer.

SB ___ Public Water Supplier Amendments (Instream Flows) Sen. Jani Iwamoto

Preliminary drafts of this bill modify Utah's instream flow statute (Section 73-3-30) to allow public water suppliers to change perfected water rights for instream use. The instream flows must be located within the public water supplier's jurisdictional boundaries and the related change application can be up to ten years. The bill would also specify that all approved instream flow change applications will be administered according to the change application's priority date relative to all other rights in the stream system, thereby making the application the most junior right in the system. This represents a change from the current statute, which specifies that change applications for instream flows are distributed according to the application's priority date relative only to other rights the stream section specified in the application, rather than the entire stream system.

HB _____ Public Supplier Water Amendments Rep. Merrill Nelson

HB _____ Great Salt Lake Commission Rep. Merrill Nelson

HB _____ Water Commissioner Expenses Rep. Scott Chew

SB _____ Water Infrastructure Revisions Sen. J. Stuart Adams

SB _____ Water Law - Protected Purchaser Agreements Sen. Margaret Dayton

Possible Legislation Recommended by the Executive Water Task Force

The Executive Water Task Force is recommending changes to the process municipalities follow when notifying canal owners of subdivisions that have been approved within 100 feet of the center line of a canal. Currently, municipalities mostly rely on information they receive from canal owners. The Task Force recommends legislation that would require Cities to also use the State Engineer's canal inventory along with information provided by the surveyor who makes the plat for the subdivision. The Task Force also recommends that surveyors consult with the owners of canals that are located within a proposed subdivision or within 100 feet of the subdivision when preparing subdivision plats. Lastly, the Task Force recommends that the State Engineer include enclosed canals within its canal inventory and recommends extending the deadline to complete the inventory until 2019.

Personnel Changes at Utah Division of Water Rights

The Utah Division of Water Rights has recently made some personnel changes in key positions. These changes include:

John Mann has retired from his position as the Assistant State Engineer for Applications and Records.

Teresa Wilhelmsen, who was previously the Regional Engineer for the Utah Lake/Jordan River Region, has been appointed as the Assistant State Engineer for Applications and Records.

Ross Hansen, who was previously the Regional Engineer for the Weber River/Western Region, has been appointed as the Regional Engineer for the Utah Lake/Jordan River Region.

The Division has not yet selected a new Regional Engineer for the Weber River/Western Region

Washington Townhomes LLC v. Washington County Water Conservancy District

The Utah Supreme Court recently issued its decision in the case of Washington Townhomes LLC v. Washington County Water Conservancy District. The case started as a class action lawsuit by property owners and developers who paid impact fees to Washington

County Water Conservancy District. These plaintiffs asserted that the impact fees violated the Utah Impact Fees Act and constituted a taking under the state and federal constitutions. The District defended its impact fees by asserting that the fees were based on a "level of service" standard imposed by the Utah Division of Drinking Water, and by asserting that its adoption of the level of service standard was a legislative judgment that should survive judicial scrutiny.

The district court agreed with the District, and concluded that the level of service that was adopted by the District and that was based on DDW standards was "legal and reasonable as a matter of law." Accordingly, the court granted partial summary judgment in favor of the District. Additionally, pursuant to a stipulation of the plaintiffs and the District, the court certified that the case could be immediately appealed under Rule 54(b) of the Utah Rules of Civil Procedure. The case was then appealed to the Utah Supreme Court. The Supreme Court did not get to the substantive question of whether the impact fees were properly based on the DDW standards. Rather, the Supreme Court dismissed the appeal on jurisdictional grounds. The Supreme Court determined that although the district court's ruling made an important determination in the case context, the ruling did not qualify for appeal certification under Rule 54(b) because the ruling did not finally dispose of any claim and did not finally adjudicate the interests of a party to the case.

The Supreme Court further considered whether to exercise its discretion to treat the appeal as a petition for interlocutory appeal under Rule 5 of the Utah Rules of Appellate Procedure. The Supreme Court noted the precedent that an interlocutory appeal is appropriate "to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed." Although the Supreme Court noted that the level of service question was an important issue in the case, the Supreme Court declined to accept the appeal because it determined that the district court's ruling was unclear and had unanswered factual and legal questions. For example, the Supreme Court felt that there was an unanswered question as to whether the District was legally required to build infrastructure and facilities in accordance with the DDW level of service standards. Accordingly, the Supreme Court declined to accept the appeal, dismissed the appeal, and sent the case back to the district court for further proceedings.

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

Catskill Mountain Chapter of Trout Unlimited v. EPA

On January 18, 2017, the Second Circuit Court of Appeals issued a 2-1 decision in *Catskill Mountain Chapter of Trout Unlimited v. EPA*, upholding the Environmental Protection Agency's (EPA) so-called "Water Transfers Rule" (40 C.F.R. § 122.3). That rule provides that certain water transfers do not require permits under the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES).

A number of environmental groups challenged the rule along with eight eastern states, the State of Washington, and a number of other entities. They argued that the rule was in impermissible interpretation because the CWA requires NPDES permits when there

is an "addition" of a pollutant to a "water of the United States," which is the legal term the CWA uses to define those waters subject to its jurisdiction. Because water transfers can involve waters with differing levels of quality, the plaintiffs argued that such transfers involved the "addition" of a pollutant and therefore required a permit. EPA argued that transfers from one "water of the United States" to another do not involve the "addition" of a pollutant because the waters are collectively "waters of the United States." The Second Circuit sided with EPA, holding that the CWA does not speak directly on whether water transfers require NPDES permits. Because of this ambiguity, the Second Circuit reasoned that the rule was a reasonable interpretation of the CWA, and therefore entitled to deference under the so-called "Chevron" framework that the U.S. Supreme Court requires for federal regulations. Circuit Judge Denny Chin dissented, arguing that the CWA is unambiguous and that excluding water transfers was incompatible with Congressional intent.

Utah and eleven other western states intervened to support the rule over concerns that requiring NPDES permits would make many water transfers in the West financially or technically infeasible without providing water quality improvements. Western water providers from across the West also intervened in support of the rule, including the Central Utah Water Conservancy District, the Salt Lake and Sandy Metropolitan Water District, the Washington County Water District, and the Kane County Water Conservancy District. No Utah entities challenged the rule.

Whether the plaintiffs will appeal the ruling is unknown, although the decision is consistent with the Eleventh Circuit, which has upheld the rule as a reasonable interpretation of the CWA. The Second Circuit's opinion is available at:

<http://courthousenews.com/wp-content/uploads/2017/01/Catskill-Mountains.pdf>.

We welcome feedback and questions. Please contact us at info@SHUtah.law.com
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