

# Water & The Law

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## Legislative Preview 2019 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](mailto:info@water.law)

or contact one of us directly through the following links:

[Craig Smith](#)  
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## Upcoming Conferences

**Rural Water Association of Utah Annual Conference**  
Feb. 25-Mar. 1, 2019  
St. George, UT  
For more information click [here](#)

**Water Law & Policy Seminar**  
Mar. 18, 2019  
St. George, UT  
For more information contact Donna Keeler at 801-292-4664

**Utah Water Users Association Annual Conference**  
Mar. 19-20, 2019  
St. George, UT  
For more information click [here](#)

## Water Blog

## Greetings!

Welcome to the Legislative Preview 2019 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

## 2019 Legislative Preview on Water Related Bills

### House Bills

#### **HB 12 - Instream Flow Water Right Amendments**

Rep. Timothy D. Hawkes

House Bill 12 would remove the current "sunset provision" the Legislature enacted when it created Section 73-3-30(3), which authorized fishing groups to file fixed time change applications to provide instream flows for the Bonneville cutthroat, the Colorado River cutthroat, and the Yellowstone cutthroat. The program is currently set to expire on December 31, 2019.

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

#### **HB 31 - Water Supply and Surplus Water Amendments**

Rep. Kim F. Coleman

House Bill 31 addresses the how municipalities are to provide water service within and beyond its municipal boundaries. The municipality must define, by ordinance, the municipality's designated water service area, which may be an area that extends beyond the municipality's boundaries. The municipality must adopt, by ordinance, reasonable water rates for retail customers within the area, and must provide water service to its retail customers within the designated water service area in a manner consistent with the principles of equal protection. A municipality can establish different rates for different classifications of retail customers, if the rates and classifications have a reasonable basis. If a municipality provides water to a retail customer outside of the municipality's boundary, the municipality must create and maintain a map showing the areas outside of the municipality's designated water service area where the municipality provides water service to a retail customer. The municipality must provide the map to the State Engineer and, if the municipality has more than 500 retail customers, post the map on the municipality's website. If more than 10% of a large municipality's retail customers are outside the municipal boundaries, the municipality must establish an advisory board to make recommendations regarding water rights, water projects, and water service standards. If the municipality supplies water outside of its designated water service area, it must do so only by contract that includes terms for termination, and the municipality must notify the Division of Drinking Water of the names and contact information for each person in these contracts. The bill would take effect in January 2021, provided that the constitutional amendments under HJR 1 are

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approved by the Legislature and by voters.

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

### **HB 125 - Quantity Impairment Modifications**

Rep. Carl R. Albrecht

House Bill 125 makes one modification to Utah Code section 73-3-8 regarding quantity impairment determinations in change application proceedings. Currently, the statute provides that there is a rebuttable presumption of quantity impairment if, for a period of seven consecutive years, a water right has not been diverted from its approved point of diversion and beneficially used at its approved place of use. The bill would change the "and" to "or."

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

### **HB 143 - Water Conservation Plan Amendment**

Rep. Suzanne Harrison

House Bill 143 proposes to make several amendments to Utah Code section 73-10-32 regarding water conservation plans. The proposal would require that water conservation plans prepared by water districts and retail water providers must include an evaluation of the specific measures that would have to be enacted to reduce water use to 175 gallons per capita per day or less, and how much it would cost to do so. The plans would also have to an analysis of how much it would cost in operation costs, maintenance costs, treatments costs, delivery costs, etc. to not reduce water use to 175 gallons per capita per day.

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

### **HJR 1 - Proposal to Amend Utah Constitution - Municipal Water Resources**

Rep. Keven J. Stratton

House Joint Resolution 1 proposes an amendment to Article XI, Section 6 of the Utah Constitution. The proposal would maintain the prohibition that a municipality cannot lease, sell, alienate, or dispose of any of its water rights or water supply sources. A municipality would be allowed to designate, by ordinance, the geographic limits of its designated water service area, which could be an area that extends beyond its municipal boundaries. A municipality will be allowed to supply water to retail customers outside of its municipal boundaries but within its designated water service area, as well as outside of its designated water service area through surplus water agreements. Municipalities are also allowed to exchange water rights or water supply sources for other water rights or water supply sources. If HJR 1 is passed by the Legislature, the proposed amendment will be submitted to Utah voters at the next general election.

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

### **HJR 5 - Joint Resolution Approving Notes to Water Rights Addenda**

Rep. Derrin R. Owens

House Joint Resolution 5 proposes edits to the water rights deed addenda. The proposed edits add clarification that a properly recorded water rights addendum can be processed as though it were a Report of Conveyance. If, however, the water rights addendum cannot be processed as a Report of Conveyance (e.g., if signatures are missing from the addendum, if the addendum is incorrectly filled out, or if the grantor listed on the addendum is not the recognized water right owner on the Division of Water Rights' database), then the water right owner will need to file a Report of Conveyance in order to update title with the Division.

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

### **Senate Bills**

### **SB 17 - Extraterritorial Jurisdiction Amendments**

Sen. Ralph Okerlund

Senate Bill 17 amends Utah Code section 10-8-15 regarding a municipality's extraterritorial jurisdiction over waterworks and water sources. The bill maintains a municipality's right to construct waterworks inside and outside of the municipality's boundaries, and also maintains a municipality's jurisdiction over its waterworks as well as streams and other water sources for a distance of 15 miles about the water source and 300 feet on each side of a stream. First class cities (which are cities with a population exceeding 100,000 residents) continue to have jurisdiction over the entire watershed, but the jurisdiction is limited to the county in which the city is located, unless there is an agreement between the first class city and the municipalities and counties that have jurisdiction over the area. The bill also requires additional notice and hearing requirements if municipalities seek to adopt ordinances under their extraterritorial jurisdiction power. Such ordinances cannot conflict with existing federal or state statutes and rules.

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

### **SB 52 - Secondary Water Metering Requirements**

Sen. Jacob L. Anderegg

This bill enacts deadlines for metering secondary water use, which is defined as pressurized non-culinary and non-agricultural water use for the irrigation of landscaping and gardens. It would require secondary water suppliers to have all new service beginning after July 1, 2019 to be metered. All existing connections will need to be metered by 2030. It would also require secondary water suppliers to report water use and other information to the Division of Water Rights before March 31 of each year and to provide monthly readings and educational material to its customers, among other things. To help offset the costs associated with installing meters, the bill would direct the Board of Water Resources to make \$10M available each year (as funded by the Legislature) in the form of loans and grants for up to 50% of the total cost (grants are limited to 16.5% of the total cost). Finally, a water user would not be able to use culinary water if secondary water is available to irrigate landscaping and gardens even though the culinary water rates may be lower.

To see the full text of the bill, click [here](#).

### **SB 66 - Dam Safety Amendments**

Sen. Scott D. Sandall

Senate Bill 66 makes minor wording changes to Utah Code sections 73-5a-101 and 73-5a-501 regarding the State Engineer's regulation of dam safety. The purpose of the bill is to clarify to that the State Engineer's responsibility is to ensure that dams are safe so they do not fail and cause damage, but that it is not the State Engineer's responsibility to govern use and safety of the impounded reservoirs for boating, fishing, and other recreational use.

To see the full text of the bill, click [here](#).

### **SJR 1 - Joint Resolution Supporting the Study of Water Banking in Utah**

Sen. Jani Iwamoto

Senate Joint Resolution 1 expresses support for a multi-stakeholder group that has been working for over a year to develop a water banking program for Utah in accordance with related recommendations from the Governor's 2017 Recommended Water Strategy. The resolution requests draft water banking legislation for the Legislature to consider during the 2020 general session that would: (1) recognize that the majority of water rights in Utah are agricultural in nature; (2) incentivize agricultural water users to participate in water banking; (3) protect against abandonment and

forfeiture for water rights placed within a water bank; (4) minimize the potential for water right impairment; and (5) ensure that water placed within a water bank may be leased or otherwise used for any lawful purpose.

To see the full text of the bill, click [here](#).

## **SALT LAKE CITY CORPORATION v. HAIK**

By Jeffrey R. Gittins

The Utah Court of Appeals recently issued its decision in the case of *Salt Lake City Corporation v. Haik*. This case is a continuation of a long-standing water dispute between Salt Lake City and Mark Haik.

Mark Haik and Pearl Raty are two of six owners of a portion of a water right from Little Cottonwood Creek that was decreed in the 1910 Morse Decree. In 1934, the then-owners of the water right entered into an agreement with Salt Lake City under which the City was granted use of most of the water right during the non-irrigation season. In 1950, a portion of the water right (represented by Water Right No. 57-7800) was moved from the Creek to a well through a change application that was certificated. In 2000, the then-owner of WR 57-7800 filed a change application to return the water back to the Creek. After this change application was approved, WR 57-7800 was conveyed to the six owners, who each filed a change application to move the water to be used for cabins at Albion Basin in Little Cottonwood Canyon. Two of the change applications were approved, but Haik's and Raty's change applications remained unapproved.

This lawsuit was initiated by the City as a judicial review of the two approved change applications, but the City also brought claims challenging the nature and validity of Haik's and Raty's water rights. Haty brought counterclaims against the City, asserting that the City was obligated to serve water to her property in Little Cottonwood Canyon. During the proceedings, the City acquired the rights associated with the two approved change applications, thereby leaving only the claims and counterclaims involving Haik and Raty. Ultimately, the district court concluded that Haik's and Raty's water rights had been forfeited due to nonuse and that the City did not have obligations to serve water to Ray's parcel. Accordingly, the district court issued a judgment in favor of the City. Haik and Raty appealed to the Utah Court of Appeals and argued that the district court had made several errors.

First, Haik and Raty asserted that the City lacked standing to bring its claims. The Court disagreed and determined that the City met the "traditional test" for standing because both parties had rights to draw water from the same source (Little Cottonwood Creek), and therefore was impacted by Haik and Raty's rights to divert and use water from the Creek.

Second, Haik and Raty asserted that the district court lacked subject matter jurisdiction because the City had not exhausted its administrative remedies. Haik and Raty argued that the City could not bring an action against them until the Division of Water Rights issued decision on their pending change applications. The Court noted that the City was not appealing a decision of the Division relative to the change applications; rather, the City was bringing a claim asserting forfeiture of the underlying water right -- which is a determination that can only be made by a court, and not by the Division. Thus, the Court determined that the district court had subject matter jurisdiction over the case.

Third, Haik and Raty argued that the district court had incorrectly determined that their water rights had been forfeited due to nonuse of more than seven years. Haik and Raty had presented evidence that

their water had been diverted and used by successors to the original water right, but the Court held that this evidence was insufficient and did not meet the statutory requirements for beneficial use because Haik and Raty did not have agreements in place for other people to use the water. The City, on the other hand, had presented clear evidence that Haik and Ray had not made any beneficial use of the water since 2003. The Court also determined that the district court had applied the correct legal analysis for total forfeiture and that the City's forfeiture claims were not barred by the applicable statute of limitations. Thus, the Court affirmed the total forfeiture of Haik's and Raty's water rights.

Fourth, Raty asserted that the district court had incorrectly determined that the City did not have an obligation to serve water to Raty's parcel in Little Cottonwood Canyon. Raty asserted that the City had obligations to serve water to her property based on Article XI, Section 6 of the Utah Constitution, which provides that municipalities must preserve, maintain, and operate its water resources to serve its inhabitants. But the Court determined that Raty was not an inhabitant of the City because here property is located outside of the City's municipal boundaries. Raty also asserted that the City had denied her due process. But the Court determined that Raty did not have a protectable property interest, but rather had nothing more than a unilateral expectation of water service. Raty also asserted an equal protection claim under Article I, Section 24 of the Utah Constitution. The Court, however, determined that the City's decision to not serve her property was a proper exercise of its permissive right to serve water to people outside of its boundaries. Finally, Raty asserted that the City should be regulated by the Utah Public Service Commission. The Court disagreed, and noted that the Utah Constitution prohibits the Commission from regulating municipalities.

Based on these determinations, the Utah Court of Appeals affirmed the district court's decision on all points. The result is that Haik's and Raty's water rights are forfeited in their entirety, and the City is not obligated to provide water service to Raty's parcel in the Albion Basin.

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

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