

Water & The Law

257 East 200 South, Suite 500 | Salt Lake City, UT 84111 | 801.413.1600

Spring 2019 Issue

[2019 Legislative Review on Water
Related Bills](#)

[Utah Stream Access Coalition v.
VR Acquisitions LLC](#)

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:
[Craig Smith](#)
[David Hartvigsen](#)
[Jeff Gittins](#)
[Nathan Bracken](#)
[Devin Bybee](#)

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

Upcoming Conferences

Water Law & Policy Seminar
Mar. 18, 2019
St. George, UT

**Utah Water Users Association
Annual Conference**
Mar. 19-20, 2019
St. George, UT

**Rural Water
Association of Utah
Secondary Irrigation-Metering
for the Future Forum**
Mar. 26, 2019
North Salt Lake, UT
For more information click [here](#)

**Rural Water
Association of Utah
Water Rights Certification**
Apr. 18-19, 2019

Greetings!

Welcome to the Spring 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 Review on Water Related Bills

BILLS PASSED

HB 12 - Instream Flow Water Right Amendments
Rep. Timothy D. Hawkes

House Bill 12 removes 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 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 approved by the Legislature and by voters.

Salt Lake City, 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



Connect with us on
Facebook
at

www.facebook.com/SmithHartvigsen

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 355 - Water General Adjudication Amendments

Rep. Joel Ferry

House Bill 355 amends statutes regarding small applications of water and general adjudications. The bill modifies Utah Code section 73-3-5.6, which allows for the filing of an Affidavit of Beneficial Use to reinstate a lapsed application for a small amount of water. The bill also provides that an Affidavit of Beneficial Use cannot be used to reinstate a water right if the water right lapsed before the State Engineer issued a Notice to File Statement of Water User's Claim and the water right owner did not file a Water User's Claim on the water right. The bill also clarifies that there is a right of appeal to the Utah Supreme Court for any district court order that resolves an objection in a general adjudication. The bill also provides a form summons for the State Engineer to use in giving published notice to potential water claimants in a general adjudication.

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

HCR 10 - Concurrent Resolution to Address Declining Water Levels of the Great Salt Lake

Rep. Timothy D. Hawkes

House Concurrent Resolution 10 points out the importance of the Great Salt Lake and the potential impacts currently facing the lake due to declining water levels. The Resolution provides that there should be an overall policy that supports effective administration of water flow to the Great Salt Lake to maintain or increase lake levels, while balancing economic, social, and environmental needs. The Department of Natural Resources is encouraged to collaboratively engage with a wide range of stakeholders to develop policy recommendations and other solutions, and to present them to the legislature.

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

HCR 18 - Concurrent Resolution Concerning Bear Lake

Rep. Logan Wilde

House Concurrent Resolution 18 recognizes the characteristics, benefits, and challenges to Bear Lake and urges solutions to address challenges to Bear Lake, including water quality, invasive species, lakebed management, and enhancement of irrigation water storage and supply functions. The Resolution also encourages the State's continued cooperation with Idaho to develop joint expectations regarding the lake. The Resolution also encourages the participation of stakeholders to develop recommendations to protect and enhance the lake.

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](#)

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 (5th Sub.) - Secondary Water Requirements

Sen. Jacob L. Anderegg

Senate Bill 52 (5th Substitute) enacts legislation regarding secondary water metering. This bill was amended and substituted several times during the legislative session. The bill requires that secondary water providers must meter all new connections beginning April 1, 2020. Also, by December 31, 2019, each secondary water supplier must develop a plan regarding the process the supplier will follow to implement metering of all connections, including costs, time estimates, and financing. The plans must be filed with the Division of Water Resources. The Department of Natural Resources will work with the Utah Water Task Force to prepare a study of issues related to enacting secondary metering requirements, and will report the results of the study to the legislature by November 2019. The bill also requires secondary water suppliers to report each year to the

Division of Water Rights with water use information, including acre-feet of secondary water supplied, number of connections, acre-feet used through metered connections, and dates of service. The Board of Water Resources will make available \$10 million per year in low-interest loans to help finance secondary metering projects, and will make rules regarding the process and criteria for the loans. To read 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 read the full text of the bill, click [here](#)

SB 214 - Property Tax Relief Modifications

Sen. Lincoln Fillmore

Senate Bill 214 originally proposed to place limitations on the amount of property tax that can be collected by water conservancy districts. The 1st Substitute, which ultimately passed, requires metropolitan water districts and water conservancy districts to provide data to the legislature regarding the percentage and amount of revenue received from property taxes, water rates, and all other sources during 2018.

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

SCR 9 - Concurrent Resolution Regarding Navajo Water Rights Settlement Agreement

Sen. David P. Hinkins

Senate Concurrent Resolution 9 declares support for the negotiated settlement of federal reserved water right claims, particularly the Settlement Agreement of Reserved Water Rights between the State of Utah and the Navajo Nation.

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

BILLS NOT PASSED

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](#)

HB 360 - School Water Testing Requirements

Rep. Stephen G. Handy

House Bill 360 requires the Drinking Water Board to make administrative rules regarding water testing in schools and child care centers. The rules are to (1) establish a reduction of lead in drinking water in schools and child care centers; (2) require schools to create written plans regarding lead concentration in their water supply; (3) establish the lead level requiring mitigation; and (4) determine whether a school is required to undertake mitigation. The bill also establishes the Lead Sampling Fund, with an initial outlay of \$5 million, to pay schools for costs incurred in complying with the requirements.

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

HB 377 - Capitol Hill Water Usage Amendments

Rep. Joel K. Briscoe

House Bill 377 requires the State Capitol Preservation Board to develop a water management plan and conduct an analysis of water use at the Capitol Hill complex. The bill also provides that the Board may implement water conservation measures at the Capitol Hill complex, consult with the Division of Water Resources, and appoint a water conservation specialist.

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

HB 452 - Water Facilities Amendments

Rep. Logan Wilde

House Bill 452 amends Utah Code section 73-1-14 regarding penalties for interfering with water facilities and Utah Code section 73-1-15 regarding penalties for obstructing water facilities. The bill maintains the purpose of the sections to prohibit those without rights from obstructing and interfering with ditches, pipelines, canals, reservoirs, storage tanks, and other water facilities, but expands and provides additional detail regarding these sections.

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

HB 456 - Water Amendments for Institutions of Higher Education

Rep. Stephen G. Handy

House Bill 456 amended Utah Code section 73-1-4 regarding abandonment and forfeiture of water rights. Specifically, this bill provides that institutions of higher education qualify as public water suppliers that are protected from claims of nonuse and forfeiture. To read the full text of the bill, click [here](#)

SB 189 - Temporary Land Use Regulation Amendments

Sen. Ralph Okerlund

Senate Bill 189 provides that a county of the fifth or sixth class can enact an ordinance establishing a temporary land use regulation prohibiting construction, subdivision approval, and other development activities within an area that is the subject of a study of water availability, capacity, or quality that is overseen by the Division of Water Rights.

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

Utah Stream Access Coalition v. VR Acquisitions LLC
2019 UT 7
Utah Supreme Court
February 20, 2019

The case of Utah Stream Access Coalition v. VR Acquisitions LLC centered on whether the 2010 Utah Public Water Access Act is constitutional. This case is another progression in the stream access issue that has been bouncing between the courts and the Utah legislature for more than 10 years.

In the 2008 decision in *Conatser v. Johnson*, the Utah Supreme Court established a broad public easement to utilize the beds of Utah's waterways for recreational purposes. In response to this decision, the Utah legislature adopted the Public Water Access Act in 2010. The Act placed restrictions on the broad easement recognized under *Conatser*. Specifically, the Act restricted recreational access to water on public property and to waterways that are navigable. Another court case, *Utah Stream Access Coalition v. Orange Street Development*, litigated the navigability component of the Act, which resulted in a stretch of the Weber River being declared navigable and therefore open to public access.

In the VR Acquisitions case, USAC took a different approach and challenged the constitutionality of the Act under several different arguments. The VR Acquisitions case focused on a stretch of the Provo River that passes through private property and that has been shut off to public access by the property owner. The district court originally ruled against USAC on the majority of its claims challenging the Act. The district court did, however, ultimately rule that that Act violated the public trust doctrine found in Article XX, Section 1 of the Utah Constitution because the Act substantially impaired the right of Utah fishers to recreate in public waters. This decision was appealed to the Utah Supreme Court.

A significant portion of the Utah Supreme Court's decision focused on the procedural question of whether it was necessary for the parties to litigate the navigability of the stretch of the Provo River at issue before the parties could litigate the constitutional challenges to the Act. A dissenting opinion by Justice Himonas argued that until the parties litigate the navigability issue, it is uncertain whether the landowner or the State is the legal owner of the streambed of the Provo River; and without that determination, the parties should not be allowed to force a decision on the constitutional issues. The majority opinion, however, concluded that USAC was free to be the "master of its claim" and to waive certain claims and pursue other claims. Thus, the Court held that answering the navigability question was not a prerequisite to the Supreme Court reviewing and addressing the constitutional issues.

The Supreme Court then looked at the merits of the case and determined that some key, preliminary determinations had not been made by the district court with respect to the applicability of Article XX, Section 1 of the Utah Constitution. In particular, the Supreme Court noted that the district court had not determined whether the State had actually "acquired" or "accepted" the access easement (as described in the *Conatser* decision) at the time of the framing of the Utah Constitution. The Supreme Court noted that the *Conatser* easement was rooted in common law easement principles, and that the legislature is allowed to modify-and even reverse-common law decisions through legislation. Thus, the Supreme Court reversed the district court's decision and remanded the case to the district court to allow USAC an opportunity to "establish a historical, 19th-century basis for the easement that it seeks to root in Article XX, Section 1 of the Utah Constitution." If USAC is unable to carry this burden, then the district court will most likely rule that the Act was a proper exercise of the legislative power.

The Supreme Court also raised other issues that the district court should consider on remand (assuming USAC is able to successfully navigate the preliminary issue discussed above). First, the Supreme Court noted that although the Conatser easement is certainly an interest in the land, such an interest in land may not qualify as a "land of the State" that is protected under the Utah Constitution. Second, the Supreme Court raised the issue of whether the Act "disposed" of public land or simply managed/regulated the public land. Third, the Supreme Court questioned the district court's interpretation and application of the public trust standards set out in the U.S. Supreme Court case of Illinois Central Railroad Co. v. State of Illinois.

In sum, the Supreme Court's decision means that the Act is no longer considered unconstitutional, as the district court had previously concluded. The case will return to the district court, where the parties will have to litigate the issues raised by the Supreme Court-most importantly the question of whether the Conatser easement is based on modern common law or whether it can be based on accepted law at the time of Utah's statehood in the 19th century.

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

We welcome feedback and questions. Please contact us at info@Water.law
Or Visit us at www.Water.law

This newsletter and the information provided herein are for informational and/or advertising purposes only, and are neither offered nor meant as legal advice or opinion on any issue or matter. Receipt or review of this newsletter does not, nor is it intended to, create an attorney-client relationship with Smith Hartvigsen. A person should not rely or act on any particular matter based on the information included in this newsletter without seeking appropriate legal counsel or other appropriate advice.

Copyright 2019