

# Water & The Law

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## Summer 2019 Issue

[Metropolitan Water District v. Sorf](#)

[Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.](#)

[Motion to Appoint Special Master in Virgin River General Adjudication](#)

[Water Banking in Utah: Voluntary, Temporary, and Local](#)

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

To view previous newsletters, visit our website [www.Water.law](http://www.Water.law)

## Upcoming Conferences

**Rural Water Association of Utah  
Midyear Conference**  
Aug. 26-29, 2019  
Layton, UT

For more information click [here](#)

**Utah League of Cities & Towns  
Annual Conference**  
Sep. 11-13, 2019  
Salt Lake City, UT  
For more information click

## Greetings!

Welcome to the Summer 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

## Metropolitan Water District v. Sorf

by Jeffry Gittins

The Utah Supreme Court recently issued its decision in the case of Metropolitan Water District of Salt Lake and Sandy v. Sorf. The primary issue in the case was enforcement of easement rights associated with a water pipeline.

Metropolitan Water District owns and operates the Salt Lake Aqueduct, a large pipeline that transports water from Deer Creek Reservoir to the Salt Lake City area. The District owns some of the land along the course of the Aqueduct and has easements along other parts of the course of the Aqueduct. Zdenek Sorf is the owner of a parcel of land that the Aqueduct crosses, and in 1946, the then-owner of his land deeded a 125-foot wide easement for the Aqueduct. The District passed regulations controlling use of the Aqueduct easements by the landowners, including a prohibition on the construction of structures or the planting of trees within the easement areas.

Mr. Sorf made improvements to his property within the boundaries of the District's easement. These improvements included a hot tub, a gazebo, garden boxes, a water feature, and a shed. The District filed a lawsuit seeking to enjoin Mr. Sorf from making any more improvements within the easement area and to allow the District to remove the existing improvements. Mr. Sorf asserted that the case was not yet "ripe" because the District had no current plans to repair, replace, or reconstruct the Aqueduct across Mr. Sorf's property, and that his improvements were not interfering with the District's current operation of the Aqueduct. The district court agreed and dismissed the District's claims. The District appealed the case to the Utah Supreme Court.

The Court began its decision by noting that a dispute is ripe "when a conflict over the application of a legal provision has sharpened into an actual or imminent clash of legal rights and obligations of the parties thereto." The Court concluded that the easement dispute between the District and Mr. Sorf met this standard because the District had valid, deeded easement interests "to construct, reconstruct, operate and maintain" the Aqueduct. The Court noted that the district court had incorrectly focused on whether Mr. Sorf's improvements were interfering with the Aqueduct, and that the focus should have been on whether Mr. Sorf's improvements were interfering with the easement. Thus, the Court concluded that there was a "live dispute" that was ripe for judicial resolution.

[here](#)

**Rural Water  
Association of Utah  
Conservation Training**  
Sep. 26-27, 2019  
Salt Lake, UT

For more information click [here](#)

**Utah Water Users Association  
of Utah  
Water Summit**  
Oct. 29, 2019  
Provo, UT

For more information click [here](#)

**American Water  
Resources Association National  
Conference**  
Nov. 3-6, 2019  
Salt Lake City, UT

For more information click  
[here](#)

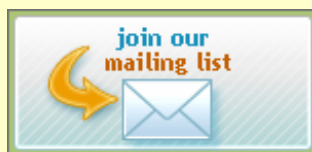
**Utah Association of  
Special Districts  
Annual Conference**  
Nov. 6-8  
Layton, UT

For more information click  
[here](#)

## Water Blog

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

[utahwaterrights.blogspot.com](http://utahwaterrights.blogspot.com)



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In the end, the Court reversed the district court's dismissal and sent the case back to the district court because "the parties are both entitled to a determination of whether [Mr. Sorf's improvements] are permissible, and if not, a determination of the proper remedy." To read the full text of the opinion, click [here](#).

## Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co.

by Jeffrey Gittins

The Utah Supreme Court recently issued its decision in the case of Rocky Ford Irrigation Company v. Kents Lake Reservoir Company. The case focuses on the issues of water efficiency savings, impairment of others' water rights, and obligations to measure water diversions.

Rocky Ford and Kents Lake are two irrigation companies on the Beaver River system. Both irrigation have various direct flow water rights and storage water rights with varying priority dates. In 1931, the Fifth District Court issued the Beaver River Decree, which divided the Beaver River system into an upper portion and a lower portion. Upper water users were allowed to divert water prior to lower water users, despite a later priority date, in part because the lower water users benefitted from return flows from the upper water users' flood irrigation. The Decree also required that all points of diversion be equipped with measuring devices.

In the 1930s and 1940s, Kents Lake filed applications with the State Engineer to construct Three Miles Reservoir in the upper portion of the Beaver River system. Rocky Ford protested the applications, but the State Engineer ultimately approved the applications. In 1953, Rocky Ford and Kents Lake entered into an agreement in which Rocky Ford agreed not to protest future change applications associated with Three Mile Reservoir, and Kents Lake agreed not to oppose Rocky Ford's expansion of its reservoir located in the lower portion of the Beaver River system. Kents Lake later filed a change application, and Rocky Ford did not protest it. Kents Lake later certificated this change application with the State Engineer.

Beginning in the 1970s, Beaver River water users began converting from flood irrigation to sprinkler irrigation. Rocky Ford alleged that it was being harmed due to the reduced return flows from upper water users and due to Kents Lake storing the "saved" water from the efficiency gains in its reservoir. In 2010, Rocky Ford filed a lawsuit against Kents Lake alleging water right interference, conversion of water rights, and negligence. Rocky Ford asserted that its water rights had been impaired by the actions of Kents Lake, including the storage change application and the failure to measure water diversions. Following a trial, the district court ruled in favor of Kents Lake. Rocky Ford then appealed the case to the Utah Supreme Court.

The Court first reviewed Rocky Ford's claims of impairment. The Court determined that even though Kents Lake had filed change applications in the 1950s, the water rights retained their (much earlier) original priority dates. And the Court rejected the "hybrid priority approach" that the priority date of the change applications is relevant to impairment, but the original priority is relevant to distribution. The Court then determined that parties cannot "claim impairment in perpetuity" and that "an impairment claim must be raised during the protest period before the State Engineer." Interestingly, the Court also implied that impairment protests can and should be raised at the proof stage, despite the fact that there is no public notice or protest period when proofs are filed or certificates are issued. Based on these determinations, the Court concluded that Rocky Ford had "failed to participate in any administrative proceedings" and therefore cannot claim impairment now.

The Court next examined whether Kents Lake is allowed to store the water it saves through increased irrigation efficiency. The Court determined that the lower water users "have no claim on runoff

before it reenters the stream" and therefore "have no claim against upper water users requiring them to create a return flow." Based on these determinations, the Court concluded that "Rocky Ford has no claim to Kents Lake's efficiency gains."

The Court next examined Kents Lake's obligations to measure its water diversions. Kents Lake asserted--and the district court had agreed--that even though Kents Lake did not measure all of its diversions, it was compliant because it did all measuring required by the State Engineer. But the Court noted that both Utah law (Utah Code section 73-5-4) and the Beaver River Decree require Kents Lake to measure all of its diversions. Thus, the Court reversed the district court on this point.

The Court finished its opinion by determining that the district court had properly concluded that the 1953 Agreement between Rocky Ford and Kents Lake should not be rescinded, and determining that the district court had erred in granting an award of attorney fees to Kents Lake.

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

## **Motion to Appoint Special Master in Virgin River General Adjudication**

by Jeffrey Gittins

The Utah Division of Water Rights has filed a Motion with the Fifth District Court to appoint Rick L. Knuth as the Special Master for the General Adjudication of Water Rights in the Virgin River area. The following information is taken from the Division's notice regarding the Motion.

A motion to appoint R.L. Knuth as Special Master pursuant to Utah Rule of Civil Procedure 53 has been filed in the case entitled IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND, WITHIN THE DRAINAGE AREA OF THE VIRGIN RIVER IN WASHINGTON, IRON, AND KANE COUNTIES IN UTAH. This action is pending in the Fifth Judicial District in and for Washington County, State of Utah, Civil No. 800507596. The Division of Water Rights, also known as the Office of the State Engineer, has filed a motion to appoint R.L. Knuth as Special Master pursuant to Utah Rule of Civil Procedure 53. Parties may obtain a copy of the motion and associated documents at <https://waterrights.utah.gov/adjdinfo/default.asp>, or on file with the Fifth District Court. A party may object to the appointment of any person as a master on the same grounds as a party may challenge for cause any prospective trial juror in the trial of a civil action. Utah Rule of Civil Procedure 53(f). Such objections are due within 30 days of the final date of publication of this notice. Replies to opposing memoranda are due within 30 days of the final date for filing opposing memoranda. The Court has set a hearing on the motion on November 18, 2019 at 2:00 p.m. located at 206 West Tabernacle, St. George, Utah. For more information, please contact the Utah Division of Water Rights at (801) 538-7240 or the Attorney General's Office at (801) 538-7227.

For more information and related documents, click [here](#).

## **Water Banking in Utah: Voluntary, Temporary, and Local**

by Nathan Bracken

Utah's growing population presents a number of opportunities and challenges. Perhaps one of the greatest challenges is the question of how one the driest states in the country will supply water to a population that could nearly double by 2060.

To address this challenge, Governor Gary Herbert convened a multi-stakeholder group of experts in 2013 to develop a set of recommended strategies that could inform the development of a 50-

year water plan. In 2017, Governor Herbert's team issued a recommended strategy that calls for Utahns to work together to provide clean and affordable water to sustain communities and businesses, while also supporting robust agriculture, ample recreation, and a resilient and healthy natural environment. To this end, the strategy identified a number of potential recommendations Utah could use to satisfy its growing water demands. Water banking was one of these tools, which the strategy identified as one possible way of supporting agriculture, improving water quality, facilitating water markets and temporary transfers, and providing water for environmental needs.

Water banking is a flexible concept and exists in many forms in other western states, such as Idaho, Washington, and Kansas. Informal banking already exists in Utah to some extent, often in the form of lease pools and other such programs offered by certain water companies. In its most simplistic form, a water bank facilitates the transfer of water from one use to another. Banks do this by providing a transparent and accessible forum in which willing right holders can advertise the availability of their water rights for lease so that interested parties can secure the temporary use of the rights quickly. A key benefit of water banking is that it allows a water right to be used for multiple uses without changing the underlying ownership of the right. Water banks also allow a right holder to use their right for its original purpose after a lease has expired without the need for further change applications. If deployed correctly, water banks could provide an alternative to so-called "buy-and-dry" water transfers in which water rights are permanently transferred away from agriculture to supply urban demands. In addition, water banks could serve as a market tool that facilitates low cost, voluntary, and temporary transactions that provide both income to water right owners and greater access to water for a variety of uses, including urban and environmental uses, through spot market transactions.

For instance, a farmer who does not want to farm for a given season could deposit a water right in a bank and receive passive income for the right until such time as the right is needed. Conversely, a farmer with a junior priority right that is usually curtailed in late summer but wants to do a third or fourth cutting of hay in a particular year could lease water from a water bank for the months the water is needed rather than incurring the expense of permanently acquiring an additional, more senior water right. Within the context of urban needs, a public water supplier experiencing a drought or other temporary stressor could lease the water needed to address the passing shortage instead of permanently acquiring water rights that it will not need in most years.

Recognizing the potential benefits of water banking, the Utah Legislature unanimously passed SJR 1 in March 2019, requesting recommendations for the 2020 legislative session on how the state could develop a voluntary water banking program to carry out the goals of the Governor's recommended water strategy. Sponsored by Senator Jani Iwamoto and Representative Stewart Barlow, the resolution stated that any water banking recommendations should recognize that the majority of water rights in Utah are agricultural in nature and incentivize the participation of agricultural producers. Recognizing the potential costs of this request, the Legislature also appropriated \$400,000 to support the continued study of water banking.

Notwithstanding the recent passage of SJR 1, a large and diverse multi-stakeholder group of over 60 water professionals had already been working for nearly two years to study water banking. In addition to Smith Hartvigsen and a number of other water attorneys, other group participants include representatives from the State Engineer's office, the Division of Water Resources, the Utah Farm Bureau, the Utah Department of Agriculture, the Central Utah Water Conservancy District, and many others. As a result of its studies, the group has

identified the following consensus guidelines that it believes will be needed for any water banking program to be effective in Utah:

- \* Voluntary: no one should be required or forced to participate in a water bank.
- \* Local: water banks should be created and organized at the local level, with appropriate state oversight to ensure that banks are operated properly and do not injure right holders.
- \* Temporary: water rights should only be placed into banks on a temporary basis and right holders who deposit water rights must maintain ownership of their rights.
- \* Prior Appropriation: the priority rights of banked water rights should remain unchanged and banked rights should not be subject to abandonment and forfeiture.
- \* Low Transaction Costs: water banks should not be expensive or burdensome.
- \* Efficient Transactions: water banks should be easy to understand and execute.
- \* Access: water banks should promote equal access to banked water.
- \* Non-Exclusive and Complimentary: water banks should not impede but support other water marketing or sharing efforts.
- \* Not a Panacea: notwithstanding its potential benefits, water banking will not be able to address all of Utah's water needs nor will it be suitable in every part of Utah. Instead, water banking will hopefully be one of many tools and approaches that will be used to satisfy Utah's growing water demands and to carry out the goals of Governor Herbert's recommended water strategy.

With these goals in mind, the group has developed draft legislation for which it is currently seeking comments. Key aspects of the legislation include:

- \* Consistent with the Governor's Strategy, the legislation is intended to lessen the need for "buy-and-dry" transfers and court actions by authorizing voluntary, temporary, and local water markets in which right holders can voluntarily lease or "bank" water rights for others to use for a variety of uses in exchange for compensation.
- \* The legislation would not affect current water markets and other water sharing efforts. It would, however, create a 10-year pilot program that would establish a statutory framework that would give local water right holders the option of creating and operating their own water banks in their regions, subject to public notice and comment as well as oversight from the Board of Water Resources and coordination with the State Engineer.
- \* No banks would be operated or managed at the state level and the decision to create a water bank or to participate in one would be entirely voluntary.
- \* The legislation authorizes right holders to create two types of banks: (1) "statutory banks," which would operate as open marketplaces where water rights could be leased and used within a defined service area; and (2) "contract banks" based on option contracts or other voluntary leasing arrangements involving a public water supplier. Notably, many public water suppliers in Utah are already using "contract banks" and the legislation seeks to provide more clarity and transparency for this practice.
- \* Right holders seeking to deposit a water right into a bank would go through the same change application process that applies to all water rights. This means the State Engineer would review all applications that seek to place a water right into a bank to ensure that they do not impair other rights. It also means that the existing limitations on out-of-basin transfers would also apply.
- \* After the State Engineer approves a right for use within a bank, the right could then be used within the bank's service area for other uses for a specified period of time without the need for another change application, subject to any limitations imposed by the State Engineer.
- \* Water right holders would retain ownership of their water rights at all times and the rights would revert to their prior "heretofore" use when withdrawn from the bank without the need for a change application. Water rights deposited within a bank would also not be subject to abandonment and forfeiture for the period of time the

State Engineer authorizes them to be used within a bank.

\* As a pilot program, every bank would submit an annual report to the Board of Water Resources. At the end of the pilot program, the Board would report on the effectiveness of the water banking program to the Legislature, which would then determine whether to continue the program, modify it, or allow it to terminate.

\* To test the concept of water banking, the group will implement specific pilot projects and is in the process of applying for a federal WaterSMART grant to leverage the Legislature's \$400,000 water banking appropriation.

The draft legislation is available at: [utahwaterbanks.org](http://utahwaterbanks.org).

We welcome feedback and questions. Please contact us at [info@Water.law](mailto:info@Water.law)  
Or Visit us at [www.Water.law](http://www.Water.law)

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